The Advocate
Official Publication
of the Idaho State Bar
Volume 55, No. 2
February 2012

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Although our firm name has recently changed, we continue our dedication to providing our clients with the highest quality legal services. We value the trust and confidence our clients have placed in us since 1988 and remain committed to serving their needs. We will continue to practice law in the broad range of practice areas in which we have specialized for several years. We look forward to continuing the successful representation of our many current and future clients.

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The Advocate

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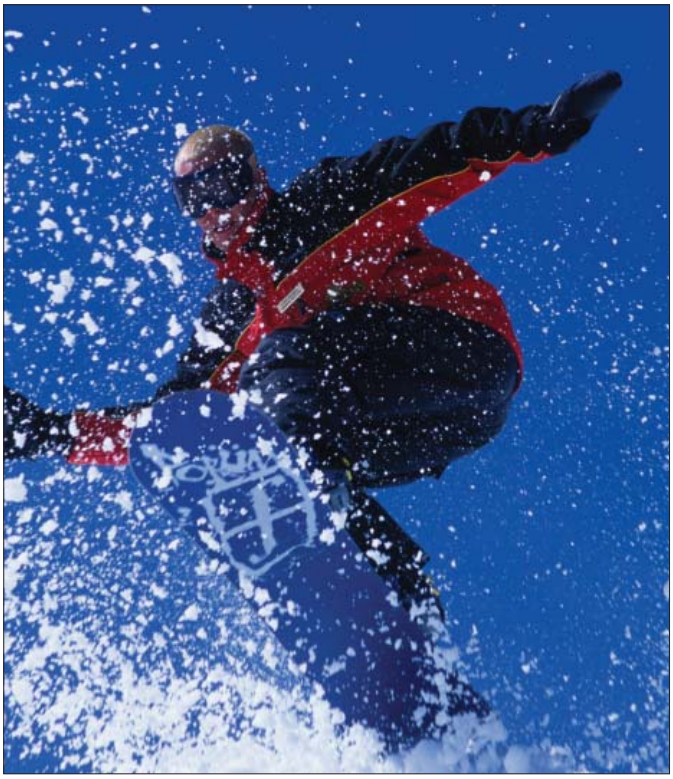
Featured Articles

Columns

News and Notices



On the Cover

Sun Valley SnowSports Snowboard Instructor carves a turn on Baldy. Photo courtesy of the Sun Valley Resort.

Editors

Special thanks to the February editorial team: Gene A. Petty, Jennifer M. Schindele, Tenielle Fordyce-Ruff, Denise Penton.

Letters to the Editor

The Advocate welcomes letters to the editor or article submissions on topics important to the Bar. Send your ideas to Managing Editor Dan Black at dblack@isb.idaho.gov.

"Dad Couldn't Remember How To Get Home"

An estimated 4.5 million Americans have Alzheimer's disease. The number of Americans with Alzheimer's disease will continue to grow — by 2050 the number of individuals with Alzheimer's could range from 11.3 million to 16 million.

A person with Alzheimer's disease will live an average of eight years and as many as 20 years or more from the onset of symptoms.

The average nursing home cost in Idaho is $84,000 per year.

The legal and financial challenges posed by Alzheimer's disease can only be answered on an individual basis by an attorney whose practice is concentrated on elder law, Medicaid planning, 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.

Take The First Step…

Call us and we'll be glad to consult with you about your client's situation, and determine whether we can help.

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IDAHO STATE BAR

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Boise, Idaho 83701

Upcoming CLEs

February

February 10
CLE Idaho: Movie and Lunch
Sponsored by the Idaho Law Foundation
Blackfoot – Bingham County Courthouse
Moscow – University Inn Best Western
11:15 a.m. (Local time)
2.0 CLE credits (RAC)

February 16-19
30th Annual Bankruptcy Seminar
Sponsored by the Commercial Law and Bankruptcy Section
Sun Valley Resort ~ Sun Valley
13.0 CLE credits of which 1.0 is Ethics

February 24
Real Property Section Annual Seminar
Sponsored by Real Property Section
Boise Centre ~ Boise

March

March 1 - 3
Family Law of Community Property States Symposium
Sponsored by the Family Law Section
The Coeur d'Alene ~ Coeur d'Alene
6.0 CLE Credits

March 9
Workers Compensation Section Annual Seminar
Sponsored by the Workers Compensation Section
Sun Valley Resort ~ Sun Valley
6.0 CLE Credits of which 1.0 is ethics

March 16
Day with the Idaho Supreme Court Video Replay
8:30 am
Red Lion Hotel – Pocatello, ID
5.0 CLE credits of which 1.0 is ethics

*RAC—These programs are approved for Reciprocal Admission Credit pursuant to Idaho Bar Commissions Rule 204A(e)

**Dates and times are subject to change. The ISB website contains current information on CLEs. If you don't have access to the Internet please call (208) 334-4500 for current information.

Attend a CLE that keeps you on the cutting edge

Live Seminars
Throughout the year, live seminars on a variety of legal topics are sponsored by the Idaho State Bar Practice Sections and by the Continuing Legal Education program of the Idaho Law Foundation. The seminars range from one hour to multi-day events. Upcoming seminar information and registration forms are posted on the ISB website at: isb.idaho.gov. To register for an upcoming CLE contact Dayna Ferrero at (208) 334-4500 or dferrero@isb.idaho.gov.

Online On-demand Seminars
Pre-recorded seminars are available on demand through our online CLE program. You can view these seminars at your convenience. To check out the catalog or sign up for a program go to http://www.legalspan.com/isb/catalog.asp.

Webcast Seminars
Many of our one-to three-hour seminars are also available to view as a live webcast. Pre-registration is required. These seminars can be viewed from your computer and the option to email in your questions during the program is available. Watch the ISB website and other announcements for upcoming webcast seminars. To learn more contact Beth Conner Harasimowicz at (208) 334-4500 or bconner@isb.idaho.gov.

Recorded Program Rentals
Pre-recorded seminars are also available for rent in DVD, VCR and audio CD formats. To visit a listing of the programs available for rent, go to isb.idaho.gov, or contact Beth Conner Harasimowicz at (208) 334-4500 or bconner@isb.idaho.gov.

IDAHO STATE BAR

President's Message

Why Not Welcome Discussion About Politics and Religion?

Reed W. Larsen
President, Idaho State Bar Board of Commissioners

In February of 1982, I applied to the J. Reuben Clark Law School at Brigham Young University. I had my undergraduate degree from BYU and really thought I would like to go to law school there, but the answer was a rather swift and resounding NO. It was one of the best rejections I have ever had. I was ultimately accepted to the University of Idaho, which opened doors that benefit me to this day. One of the benefits was diversity. If I had stayed at BYU, I would not have been exposed to various views on politics, religion and life. If I had not sought out conversations with others on the topics of politics and religion, I would have still been left in my own little cocoon.


Reed W. Larsen

For some reason, someone determined long ago that it is not polite to talk religion or politics in public. I never understood why. Fortunately, some of my fellow first year law students and I didn't get the memo. We started a weekly lunch meeting to talk about current events, politics, and any other relevant and interesting topics. It was a great experience. The group was small, but diverse. I'm still thankful Georgia Yuan and Dee Brookings expanded my understanding of difficult issues simply by sharing their views and opinions. They expressed ideas that made me think, a rare gift in our current political environment. Too often people hold their views passionately, but do not listen with that same intensity.

So is it polite to talk politics in public? What about religion? Perhaps we have stopped talking about religion and politics in public because we don't know how. My premise is that we as lawyers should be leading the discussion of both religion and politics in public and we should be the teachers of how to do it. We have training on the topic. We know that the First Amendment to the U.S. Constitution protects both religion (as well as protecting us from religion), speech, and the right to assemble. Why then are we not comfortable talking about the two most important things in our existence, freedom (politics) and our purpose (religion)?

> *Even though we as lawyers are trained to appreciate different perspectives, it can take considerable effort to do so continually.*

The potential problem with discussing religion and politics is that it creates conflict. Conflict can lead to bitterness, hard feelings and it can even divide good friends. We avoid conflict at all costs. Except lawyers. We live in conflict. I am sure every lawyer has had a client ask, "How can you fight in the court room and then be friendly to the other lawyer after the case is over?" That is our teaching moment. We can respond that freedoms of speech, religion and assembly are more important than the conflict at hand. They are certainly more important than hurt feelings.

This leads me back to the current events group at the University of Idaho. In the fall of 1982 conservative and liberal politics were really starting down the road of division. You had to be "all-in" on every topic. You are either with us or against us. I have never found life to be that simple. Thanks to Georgia and Dee, I gained new perspectives on women's rights and women's issues. As a bar commissioner, these issues have come up and I am grateful to have understood various perspectives on the issue.

Sometime around 1993 I learned one of my college roommates from BYU suffered and died from AIDS. He was a wonderful and kind man, raised on an apple farm in eastern Washington. He had been a great roommate, always happy and fun to be around. Learning of my former roommate's illness and death helped me reexamine my own views and biases. He was a real person, not just some abstract statistic. It still breaks my heart to think he died of such a horrible disease that was politicized and demonized. Even though we as lawyers are trained to appreciate different perspectives, it can take considerable effort to do so continually. The rewards for doing so are incalculable. How else can we really put ourselves in the shoes of others? How else do we learn compassion, humility, and respect? How else can we be of service to the community and our profession?

So speak up. Let your voice be heard; but let your ears be open. Then, perhaps our points of view can be refined by the combined experience of those we encounter.

About the Author

Reed W. Larsen *is a founding partner at Cooper & Larsen in Pocatello. His practice includes auto accident cases, repetitive trauma injuries in the workplace, Federal Employer Liability Act (FELA) litigation, railroad crossing cases, personal injury insurance defense, agricultural litigation and Indian law.*

He is a 1985 graduate from the University of Idaho College of Law. He has served as a Commissioner for the Sixth and Seventh Judicial Districts since 2009 and is currently serving a year term as President of the Idaho State Bar Board of Commissioners. Reed is married to Linda M. Larsen and together they have three children.

RICHARD D. HIMBERGER (Public Reprimand/Withheld Suspension/Probation)

On January 5, 2012, the Idaho Supreme Court issued a Disciplinary Order issuing a Public Reprimand to Boise attorney, Richard D. Himberger. The Disciplinary Order also included a withheld three-month suspension and placed Mr. Himberger on disciplinary probation for 15 months.

The Idaho Supreme Court found that Mr. Himberger violated I.R.P.C. 1.15(a) [A lawyer shall hold property of clients or third persons separate from the lawyer's own property], 8.1(b) [Failure to respond to Bar Counsel in connection with a disciplinary matter], and I.B.C.R. 505 [Failure to cooperate with or respond to a request from Bar Counsel].

The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho disciplinary proceeding in which Mr. Himberger admitted that he had violated I.R.P.C. 1.15(a), 8.1 and I.B.C.R. 505. The stipulation also included dismissal of the allegations that Mr. Himberger violated I.R.P.C. 1.15(b), (c) and (d).

Mr. Himberger's misconduct related to his failure to keep complete records of his trust account funds and to preserve those records for a period of five years after termination of representation. Mr. Himberger explained that some computer records relating to the trust account were lost or destroyed by a former employee. Mr. Himberger acknowledged he was not able to conclusively determine or allocate funds held in his trust account from January 2010 until very recently when he hired a CPA to identify the ownership of funds presently held in the trust account and to recommend internal accounting controls. As a result of these circumstances, Mr. Himberger acknowledged a lack of records demonstrating that his trust account funds were held totally separate from his own property. However, none of Mr. Himberger's clients made any complaints to the Idaho State Bar regarding his handling of their trust account funds and his clients did not request any accountings of their funds held in his trust account.

In addition, Mr. Himberger failed to respond in full to Bar Counsel's disciplinary investigation of these trust account issues.

The Disciplinary Order also provides that the three-month suspension will be withheld and Mr. Himberger will serve a 15-month period of probation, subject to conditions of probation specified in the Order. Those conditions include, (1) that Mr. Himberger will serve the withheld suspension if he admits or is found to have violated any Idaho Rules of Professional Conduct for a which a public sanction is imposed for any formal charge case filed during the period of probation or for any conduct occurring during the period of probation, except any complaints by current creditors of his law firm for alleged non-payment of legitimately disputed debts under I.R.P.C. 8.4(d); (2) that Mr. Himberger remain under his physician's care and comply with any treatment regimen prescribed by his treating physician; and (3) in all cases where Mr. Himberger receives client funds that are held in a trust account, Mr. Himberger shall provide Bar Counsel's Office with a monthly written report or summary that includes the date the funds were received, confirmation that Mr. Himberger has a fee agreement relating to the funds on file, copies of client ledgers reflecting any deposits and distributions to each individual client, copies of monthly bank statements reflecting records of deposits to and withdrawals from the trust account, a copy of any accounting sent to clients or third persons with funds in Mr. Himberger's trust account and certification that he is complying with I.R.P.C. 1.15.

The public reprimand, withheld suspension and probation do not limit Mr. Himberger'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.

JOHN T. BUJAK (Interim Suspension)

On January 9, 2012, the Idaho Supreme Court issued an Order Granting Stipulation for Interim Suspension of License to Practice Law of Boise attorney John T. Bujak.

The parties filed a Stipulation for Interim Suspension of License to Practice Law on December 28, 2011. The Idaho Supreme Court's Order immediately suspended Mr. Bujak's license to practice law, pursuant I.B.C.R. 510(a)(1), until all disciplinary matters referred to in the Stipulation are concluded. All such disciplinary matters will be held in abeyance until pending criminal charges are concluded at the state district court level. The Order also provides that the time Mr. Bujak spends on interim suspension shall be credited toward any eventual disciplinary sanction he may receive.

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

BLAKE G. HALL (Public Reprimand)

The Professional Conduct Board of the Idaho State Bar has issued a Public Reprimand to Idaho Falls lawyer, Blake G. Hall, based on professional misconduct.

The Professional Conduct Board Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding, in which Mr. Hall admitted that he violated Idaho Rule of Professional Conduct 8.4(b) [Commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects].

The Complaint related to Mr. Hall's conviction for misdemeanor stalking in 2009. The circumstances of that conviction were that for a period following the breakup of a relationship with a former girlfriend, Respondent engaged in a course of conduct which led to him being charged with stalking. Mr. Hall entered an Alford plea to the charge and was sentenced to 180 days in jail, of which 165 were suspended. Mr. Hall was also ordered to pay a fine and court costs, was placed on supervised probation for one year, and was ordered to have no contact with the victim. Mr. Hall complied with all terms of his sentence and thereafter the Court granted his motion for a withheld judgment and the case was dismissed.

The public reprimand does not limit Mr. Hall'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.

NOTICE TO TOM HALE OF CLIENT ASSISTANCE FUND CLAIM

Pursuant to Idaho Bar Commission Rule 614(a), the Idaho State Bar hereby gives notice to Tom Hale that a Client Assistance Fund claim has been filed against him by former client, Heather Peterson, in the amount of $500. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

NEWS BRIEFS

Fourth District Bar Association kicks up the 6.1 Challenge

Based on Idaho Rule of Professional Conduct 6.1 and the responsibility of lawyers to provide pro bono service, the Fourth District Bar Association's 6.1 Challenge represents a friendly competition to recognize and encourage pro bono and public service from law offices within the district. To participate, simply keep track of qualifying pro bono hours between May 1, 2011 and April 6, 2012. Later in the spring, submit the log for you and your firm's qualifying pro bono hours and public service activities. Winners in various categories will be announced during the 2012 Law Day festivities.

Molly Huskey appointed as Third District Judge

Governor C. L. "Butch" Otter appointed Molly Huskey of Middleton to the Third Judicial District vacancy created by the retirement of Judge Gregory W. Culet. Huskey is a Moscow native with a law degree from the University of Idaho.

Hon. Molly Huskey

She has been State Appellate Public Defender since 2002, when she was appointed by then-Governor Dirk Kempthorne. Huskey was reappointed to that position by Gov. Otter in 2008 and again in 2011.

"Molly has proven her judicial temperament and her legal preparation. She has proven her management skills and her understanding of Idaho's culture and issues, and she has prepared herself admirably for this new challenge," Otter said. "I'm proud to be able to appoint her to the District Court, and look forward to her capable administration of justice for the people of the Third Judicial District."

As State Appellate Public Defender, Huskey oversaw a 22-member staff assigned to represent indigent defendants in non-capital felony conviction appeals and other post-conviction proceedings.

The office also represents indigent defendants who have been sentenced to death as they appear in state court for post-conviction proceedings.

Huskey was among four candidates nominated to the Governor by the Idaho Judicial Council to succeed Culet, whose court is based in Caldwell. Before joining the Office of the Appellate Public Defender, Huskey was a deputy prosecutor and a deputy public defender in eastern Idaho's Bonneville County.

"To be selected is an honor and a responsibility," she said. "I will work to ensure the confidence of my colleagues and the governor is not misplaced. I will do my best to administer justice fairly with due regard for the parties and the issues they seek to resolve."

David Gardner appointed to Chapter 7 panel of trustees

The United States Trustee has appointed David Gardner to the panel of Chapter 7 trustees for the District of Idaho. Starting in February, Mr. Gardner is being assigned Chapter 7 cases filed in the Coeur d'Alene Division of the United States Bankruptcy Court, District of Idaho. Mr. Gardner's meetings of creditors under 11 U.S.C. § 341 will be conducted on the mornings of the regularly scheduled Chapter 7 meetings of creditors in Coeur d'Alene. Chapter 7 Trustee Ford Elsaesser's meetings of creditors will be conducted on the same days following Mr. Gardner's meetings. Mr. Gardner may be contacted at 250 Northwest Blvd., Ste. 206, Coeur d'Alene, ID 83814, or at (208) 667-2103.

Ninth Circuit appoints new appellate lawyer representative

The United States District & Bankruptcy Court, District of Idaho is pleased to announce the appointment of Syrena Case Hargrove as the newest Appellate Lawyer Representative to the Ninth Circuit Judicial Conference.

She was recently appointed by Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals, to replace Larry Westberg, who has served since 2008.

The Appellate Lawyer Representative assists in creating and developing topics to present to the Ninth Circuit during the year and at judicial conferences, including rule changes to perfect appellate procedure and improve the administration of justice. Appellate lawyer representatives work directly with members of the Ninth Circuit and court staff and participate regularly at meetings during the year and at the judicial conferences.

Ms. Hargrove is the Appellate and Civil Chief for the United States Attorney's Office for the District of Idaho. She graduated from Swarthmore College in 1992 and Harvard Law School in 1997, coming to Idaho to clerk for Judge Stephen S. Trott, U.S. Court of Appeals for the Ninth Circuit. She spent nearly 10 years working for federal judges in Idaho, including Judge Trott, the late Judge Thomas G. Nelson of the Ninth Circuit, and Chief District Judge B. Lynn Winmill. She previously worked in private practice in Washington, D.C. and as an Assistant City Attorney in Boise.

In making the announcement, Chief Judge B. Lynn Winmill stated, "Syrena is a terrific lawyer and a wonderful individual. We are pleased to see someone so capable take over for Larry, who has represented our District so well over the last four years."

Syrena Case Hargrove

CLIENT ASSISTANCE FUND

Client Assistance Fund aided 17 clients in 2011

In 2011, the Client Assistance Fund paid $121,475 in claims. That amount represents reimbursement to 17 different clients against 5 lawyers after a finding by the Client Assistance Fund Committee that the lawyers engaged in dishonest conduct via theft, embezzlement or misappropriation of clients' money or property. The Client Assistance Fund balance is currently $511,260. Pursuant to Idaho Bar Commission Rule 606, the maximum amount payable on any one claim is $20,000. Several claims paid in 2011 were for the maximum amount.

IDAHO STATE BAR **EXECUTIVE DIRECTOR'S REPORT**

2011 – The Idaho State Bar Year in Review

Diane K. Minnich
Executive Director, Idaho State Bar

As we begin 2012, I want to highlight the Bar's activities in 2011.

Admissions

In 2011, the Idaho Supreme Court approved the bar's recommendation to implement the Uniform Bar Exam (UBE). The UBE allows applicants to transfer a bar exam score to other states that have adopted the UBE. The first administration of the UBE will be February 2012.

Reciprocal applicants from 29 states are currently eligible to apply for admission in Idaho. Since reciprocal admission was established 10 years ago, 706 attorneys have been admitted reciprocally.

Bar Exam/Reciprocal Admission		
Year	2010	2011
Bar exam applicants	180	183
Bar Exam Pass Rate	78%	79%
Reciprocal admittees	91	73

Licensing/Membership

ISB Membership		
12/10	12/11	% Change
5,510	5,622	2.1%

As of December 2011, of the 5,622 lawyers licensed by the Idaho State Bar, 4,491 were active members, 190 judges, 29 house counsel members, 908 affiliate members, and 4 emeritus attorneys. The 2.1% increase is the lowest percentage growth since 2000.

Bar Counsel

Discipline			
	2010	2011	Change
Phone Inquires	1,392	1,466	5.4%
Grievances	453	447	-1%
Complaints opened	91	96	5.5%
Ethics questions answered	1,657	1,546	-6.7%

Twelve formal charge cases were opened in 2011, 12 cases were closed. Of the 12 closed cases: One was disbarred, one resigned in lieu of discipline, six were suspended, one received a public censure, one received a public reprimand, and in two cases the lawyer was transferred to disability inactive.

This spring Casemaker will release a new, more comprehensive product, CasemakerElite.


Diane K. Minnich

Fee arbitration

The number of fee arbitration cases filed in 2011 was less than 2010; 54 cases were opened in 2010, 41 were opened in 2011.

Client Assistance Fund

Year	Claims Paid	Total Paid
2010	7	$19,079
2011	17	$121,475

In 2011, 27 CAF claims were opened and 26 cases were closed, 12 cases were pending at the end of the year.

Lawyer Referral Service

	2010	2011	Change
Calls	2,856	2,024	-29%
Referrals	1,942	1,421	-27%

The referral service has an online option for individuals seeking a referral to an attorney. This has reduced the number of calls while providing the service 24/7. About 46% of those individuals receiving a referral contacted the attorney. The LRS Committee is considering changes in the LRS that are designed to improve the quality of the referrals to attorneys.

Annual Meeting

The 2011 Annual Meeting was held in Sun Valley. Attendance was slightly less than the 2010 meeting in Idaho Falls, however, the attendance was an increase over the last several meetings held in Sun Valley.

Annual Meeting			
	2010 Idaho Falls	2011 Sun Valley	Change
Total Attendees	398	378	-5%
Attorneys & Judges	255	237	-7%

Casemaker

This spring Casemaker will release a new, more comprehensive product, CasemakerElite. The Elite legal research library will offer a more comprehensive, easily searchable, continually updated database of case law, statutes and regulations. The service will be available to all ISB active members and judges (and to affiliate members for a fee). To access Casemaker, go to the ISB website, www.idaho.gov/isb. If you need your password or have any comments or recommendations for improving the Casemaker services, please let us know.

Sections

The Sections of the Bar continue to actively assist their members with education, public service activities and opportunities to meet and work with attorneys that practice in similar areas. One section, Law Practice Management, was disbanded in 2011 so there are now 19 sections. Section membership increased slightly in 2011 from 2,796 to 2,893.

Communications: website/ Advocate/ E-bulletin

We continue to improve the ISB web-

site by providing more quality information, easier navigation, and regular updates. The E-Bulletin keeps members, informed about programs, events, rule changes, and other opportunities for Bar members. *The Advocate* was published 10 times in 2011. *The Advocate* is posted online a few days after it is mailed to the membership and subscribers.

Legal services

Idaho continues to be the only state in which legal services does not receive state funding. In 2011, representatives from the Bar, Idaho Supreme Court, Idaho Legal Aid Services, and the Idaho Association of Counties met several times to develop a mutually acceptable legislative strategy. The group drafted legislation to be submitted to the 2012 legislative session. We hope that in next year's report we will be one of the 50 states that receive state funding.

Group health benefits

The Idaho Lawyer Benefit Plan (ILBP) offers medical, dental and vision benefits to Idaho lawyers, their employees, and dependents. The Plan has been active since August of 2008. As a self-funded plan, contributions are made by members to a trust to finance the cost of member benefits. Money that remains after administrative and claims expenses are paid, is reinvested into the trust. The trust is directed by a board of trustees who are elected representatives of the firms that participate in the program.

For further information about the Idaho Lawyer Benefit Plan please contact Todd Points via phone: (800) 367-2577 or via email: tpoints@alpsnet.com.

Hundreds of volunteers, both lawyers and non lawyers, volunteer each year to assist the Bar's programs and activities. The Idaho legal community is committed to improving the profession and serving the public. Special thanks for the time, energy and expertise so many of you devote to serving the bar.

The Foul Blow:

Prosecutorial Misconduct in Idaho

In *Berger v. United States*, 295 U.S. 78, 88 (1935), the United States Supreme Court, in speaking about prosecutorial misconduct, said "(The prosecutor) may prosecute with earnestness and vigor — indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones."

By Thomas J. McCabe
Westberg McCabe & Collins, Chtd.

A review of the criminal law decisions issued in the last few years by the Idaho appellate courts shows that the courts have been called upon to ward off the "foul blow" in a number of cases. It is troubling that the volume of cases where misconduct has been found, whether it results in reversal or not, appears to have increased in that same time. What is more troubling, however, is the fact that a disproportionate number of these cases have arisen from the same prosecutor's office.

In reviewing the appellate opinions that have found prosecutorial misconduct, it is not hard to determine that the office most likely to get called out for misconduct is the Kootenai County Prosecutor's Office. However, it is not always possible, from the opinions themselves, to determine who the offending prosecutor is.

The most recent published opinion involving misconduct by the Kootenai County Prosecutor's Office is State v. Ellington, 151 Idaho 53, 253 P.3d 727 (2011). Ellington is a road rage case that was charged as second degree murder. The defense was that the death in the case was an unavoidable accident. The unnamed prosecutor engaged in the following behavior that was found by the Idaho Supreme Court to be misconduct: (1) soliciting testimony that highlighted the defendant's post-arrest silence, (2) repeatedly phrasing questions around the idea that the defendant "ran over" the decedent, (3) soliciting "expert" testimony from a police officer that this was not an "accident," (4) soliciting testimony from a separate witness that working on the case gave him nightmares, and (5) presenting testimony from a pathologist that was ostensibly to prove the mechanics of the victim's death but which actually devolved into a detailed review of the gruesome details of the decedent's injuries.

While the Idaho Supreme Court found that each of the foregoing actions constituted prosecutorial misconduct, the Court chose not to reverse on that basis. Instead, the Court reversed because an ISP officer called by the unnamed prosecutor testified under oath contrary to sworn testimony he had previously given in another case. The Court

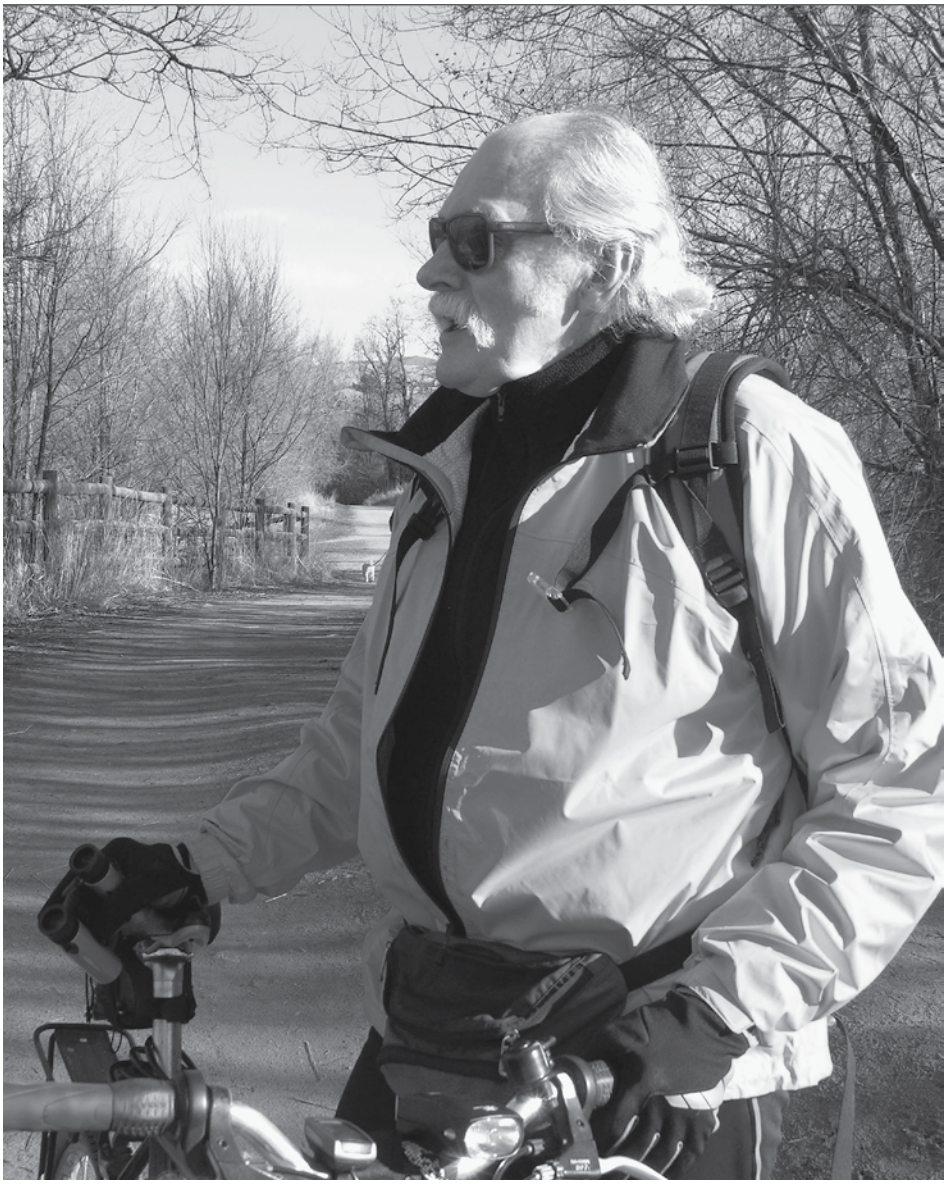

Photo by Dan Black

Longtime criminal defense attorney Tom McCabe is pictured taking a break from bird watching in the Hulls Gulch Reserve just north of Boise.

went so far as to call the ISP officer a perjurer, but was uncertain as to whether the prosecutor himself participated in the falsehood. As the Ellington Court put it, "We have no way to know whether or not the prosecutor had any knowledge of the falsity of Cpl. Rice's testimony given his past testimony and training materials, but we recognize the serious constitutional implications of the possibility." Not exactly a rousing vote of confidence in the prosecutor's ethical well-being.

Ironically, one of the cases cited in Ellington is yet another case involving prosecutorial misconduct by the Kootenai County Prosecutor's Office. State v. Phillips, 144 Idaho 82, 87, 156 P.3d 583, 588 (Ct. App. 2007) is cited for the proposition that appeals to emotion, passion or prejudice of the jury, through the use of inflammatory tactics, are impermissible. Despite the fact that the Court of Appeals in Phillips held such actions to be prosecutorial misconduct, this did not deter a Kootenai County deputy prosecutor from appealing to the emotions of the jury in Ellington.

This case represents yet another in a long line or pattern of repetitious misconduct from this prosecutorial office.

Phillips involved an allegation of aggravated assault as a result of a pickaxe going through a windshield. There were several witnesses to the event who gave differing stories to the police and then to the jury. The first trial ended in a hung jury. At the second trial, all of the witnesses were called by the prosecution, and the defense rested without putting on any evidence. Nevertheless, despite the fact that the defense had presented no witnesses, the prosecutor argued to the jury, "You might find yourself a little irritated that someone will bring up that kind of defense against a victim of a crime." While there was a simultaneous objection, the judge failed to rein in the prosecutor, and he continued in the same vein, inviting the jury to be "irritated and upset" no less than six times, despite the fact that he was the one who had called the witnesses. The Court of Appeals found this to be prosecutorial misconduct because it was inflammatory and an appeal to emotion, passion and prejudice. The court stated that the objection should have been sustained, the jury should have been instructed to disregard, and the prosecutor should have been admonished. Because the error in allowing this argument was not harmless, the case was reversed and remanded for retrial.

Judge Schwartzman's concurrence in Phillips is especially telling. As Judge Schwartzman explained, he did not conclude that the error in the Phillips case mandated reversal in and of itself. Rather, because of prior instances of misconduct from this same office, he voted to reverse. He included a laundry list of prior appellate decisions involving the same office, where harmless error analysis saved the conviction. "This case represents yet another in a long line or pattern of repetitious misconduct from this prosecutorial office." It was because of the repetitious conduct that he voted to reverse and remand.

Judge Schwartzman cited five published opinions and two unpublished opinions in his concurrence. In the first published opinion, State v. Vandenacre, 131 Idaho 507, 960 P.2d 190 (Ct.App.1998), the prosecutor asked the defendant, with the jury present, if he had ever been convicted of a felony. Because of the inherent prejudice in asking such a question, Rule 609 of the Idaho Rules of Evidence provides that such a question cannot be asked without first getting an admissibility determination from the court, outside the presence of the jury. The Court of Appeals ruled that the question was "ill-advised" and "improper" but not so prejudicial as to require reversal.

In the second case cited by Judge Schwartzman, State v. Brown, 131 Idaho 61, 951 P.2d 1288 (Ct. App.1998), the Court of Appeals found that the prosecutor concealed an item of evidence for over 8 months, improperly argued to the jury that defendant constituted a risk of "possible future criminality" (as opposed to actual guilt for the present crime), and snidely commented that defense counsel "should have been an actor." Nevertheless, the court determined that because the misconduct was either not objected to or was harmless, the conviction would stand.

The third published case cited by Judge Schwartzman is State v. Lovelass, 133 Idaho 160, 983 P.2d 233 (Ct.App.1999). In that case the Court of Appeals referred to the prosecu-

tor's argument to the jury as "less than artful," because he appeared to argue his personal belief with regard to both the guilt of the defendant and the credibility of the witnesses. However, because there was no simultaneous objection, the court refused to find fundamental error. In addition, while arguing to the jury, the prosecutor "did misstate the evidence to a degree." Again, the court refused to reverse because the deviations were not "significant enough" to "have a meaningful impact."

The next case cited by Judge Schwartzman is State v. Cortez, 135 Idaho 561, 21 P.3d 498 (Ct. App.2001). A review of Cortez will provide a familiar litany of misconduct by a prosecutor from Kootenai County. Because there was a co-defendant who was being tried separately, the prosecutor argued that the defense in the Cortez case was trying to place the blame on the co-defendant and that the co-defendant would do the same, thereby avoiding responsibility altogether. As the Court of Appeals put it, "we agree with Cortez that the above quoted portions of the prosecutor's closing arguments improperly presented the jury with the hypothetical possibility that neither Cortez nor the child's mother would be held responsible for the child's injuries, thus amounting to a 'justice formula.' But as in other cases, the court said that the comments "were not so egregious and inflammatory that an objection and curative instruction could not have remedied their prejudicial effect." So because the defense attorney failed to object, the Kootenai County Prosecutor's Office got away with another one.

The final published opinion cited by Judge Schwartzman is State v. Kuhn, 139 Idaho 710, 85 P.3d 1109 (Ct.App.2003), a case in which the prosecutor "crossed the line of propriety" and called the defendant "a liar and a thief" and expressly accused him of committing perjury, an independent felony. Again the misconduct did not draw an objection, so it had to be reviewed for fundamental error. Again the Court of Appeals found the comments "were not so inflammatory" that the jurors were influenced to determine Kuhn's guilt on factors outside the evidence, and the judgment was affirmed.

While this drumbeat of misconduct was enough to cause Judge Schwartzman to "call out" the Kootenai County Prosecutor's Office (without specifically naming the office or the individual offenders), it was not the last word in 2007. Five months after Judge Schwartzman's concurrence in Phillips showed that he would not tolerate any further misconduct from that office, the actions of a Kootenai County prosecutor were again before the court. In State v. Beebe, 145 Idaho 570, 181 P.3d 496 (Ct. App. 2007), the court was faced with yet another allegation of prosecutorial misconduct, only this time the defense attorney had objected to the improper closing arguments of the prosecutor. The Court of Appeals found that the prosecutor had misstated the facts during his rebuttal, argued the jury should convict to protect society from future crimes by this person, and "grotesquely mischaracterized" the defense's arguments in the case. The court reversed and remanded.

Although the last three reported cases involving prosecutorial misconduct by the Kootenai County Prosecutor's Office have resulted in reversals (Ellington, Beebe and Phillips), the office has gotten away with many more instances, as shown by the cases cited by Judge Schwartzman. This is clearly an example of a mentality that values winning over justice, that seeks to persecute rather than prosecute. It is important that the courts of Idaho continue to do more than engage in the "ritualistic verbal spanking" referred to in Justice Blackmun's dissent in Darden v. Wainwright, 477 U.S. 168, 206 (1986). In Darden, the majority of the U.S. Supreme Court refused to reverse a conviction despite what Justice Blackmun called a "text-book illustration of a violation of the Code Of Professional Responsibility."

Two years ago, in State v. Severson, 147 Idaho 694, 215 P.3d 414 (2009), Justice Warren Jones dissented from the Idaho Supreme Court's finding that the prosecutorial misconduct in that case constituted harmless error. While the case did not involve Kootenai County, Justice Jones' analysis is relevant to the

The prosecutor's office has been granted leeway by the appellate courts for too long with respect to allegations of misconduct."

— Justice Warren Jones

The Foul Blow: Part II

Idaho Prosecuting Attorneys Association Board of Directors Responds

By IPAA Board of Directors Dustin Smith, Louis Marshall, Clayne Tyler, Greg Bower, Grant Loebs, Delton Walker, Sid Brown

Idaho prosecutors seek justice

The Commentary to Rule 3.8 of Idaho's Rules of Professional Conduct charges prosecutors to be ministers of justice, not just advocates. The United States Supreme Court instructs us to "prosecute with earnestness and vigor" and to "strike hard blows [but not] foul ones."[1]

Over the last decade the Idaho Supreme Court and Court of Appeals have helped clarify the lines distinguishing between hard and foul blows. Each opinion cited by Mr. McCabe generated an immediate introspective reaction from the membership and Board of the Idaho Prosecuting Attorneys Association (IPAA).[2] Our organization dedicated hours exploring the root causes of the errors, including talking with judges and justices. We then expended resources developing and presenting trainings focused on minimizing future occurrences and strengthening our commitment to ethical prosecution.

Our findings suggest, after closer scrutiny of Mr. McCabe's eight examples in fourteen years, that there is no pattern. In fact the relatively small number of occurrences suggests the cases he cites are anomalies. Perhaps it is the very infrequency of prosecutorial error findings that lends to the sensation. Nonetheless, we will share some of information we collected.

Prosecutor caseloads

In 2011, 238 Idaho prosecutors handled 12,875 adult felonies, 13,713 juvenile cases, and a large portion of the 311,264 misdemeanor and infraction cases filed statewide.[3] Since 1998 (the year of the first appellate opinion cited in Mr. McCabe's article), Idaho prosecutors handled over 164,000 felonies, 190,000 juvenile cases and a portion of over 1.8 million

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present discussion. He included a list of five cases from the Supreme Court since 1999, and seven cases from the Court of Appeals since 2004, where prosecutorial misconduct was found to be present, but in which it was held to be harmless. As Justice Jones put it, "The prosecutor's office has been granted leeway by the appellate courts for too long with respect to allegations of misconduct." In light of Judge Schwartzman's concurrence in Phillips, that statement seems to be especially pertinent with regard to the Kootenai County Prosecutor's Office.

As stated in the Commentary to Idaho Rule of Professional Conduct 3.8(d), "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." And as the Idaho Supreme Court put it in State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007), "While our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he is nevertheless expected and required to be fair." It is hoped that the prosecutors of the Kootenai County Prosecutor's Office will embrace this concept and will no longer resort to the "foul blow."

About the Author

Thomas J. McCabe *is "Of Counsel" to his old firm, Westberg, McCabe & Collins, Chtd. in Boise. He is the founding president of the Idaho Association of Criminal Defense Lawyers. He has been a member of the Idaho Rules of Evidence Committee, the Misdemeanor Rules Committee, and the Idaho Criminal Jury Instruction Committee. He and his wife, Susan Chaloupka, live in Boise.*

An avid cyclist and bird watcher throughout the year, Tom regularly keeps track of dozens of bird species along his routes. He explained that after his bout with non-Hodgkin's lymphoma in 2006, he decided that there was more to life than practicing law. When not outdoors, Tom presents seminars on criminal law, does legal consultations with other attorneys, and weighs in on issues of interest to him.

Continued from page 20

misdemeanors and about 3.2 million infractions.[4] Although the time required to handle each case varies widely, the caseload of most Idaho prosecutors is considerable.

Mr. McCabe's examples

Mr. McCabe writes specifically about eight criminal appellate cases where the court identified prosecutorial misconduct.[5] Of the eight, five of the convictions were upheld and three were overturned, two of the three reversals were based upon prosecutorial misconduct. During the same time period Idaho prosecutors handled over a half a million cases, 164,000 of those felonies. Ideally, there should be no cases of prosecutorial, judicial or defense error, but these numbers are very low.

Mr. McCabe points to one prosecutor's office in particular and questions why such a high number of the appellate cases originated in that office. Again, context is important. Four of the cases are over 10 years old. Three of the cases predate 2008, and only one occurred in the last 5 years. The IPAA was unable to determine whether the genesis of these cases was a statistical anomaly, purely random or because that office tried a statistically higher number of cases. What we can determine is almost all of the cases predate the current elected prosecutor who has been in the forefront of IPAA training on legal ethics and prosecutorial error.

IPAA training

Even though the actual number of error cases is quite low, the IPAA took this issue very seriously and made this its highest priority. Twice each year, for the last six years, every IPAA training conference has included a prosecutorial error or ethics component. In 2011, our training was supplemented by the National District Attorneys Association, which provides training on these issues nationwide.

Every prosecutor, and for that matter every reader of this magazine, is aware of the emotional toll involved for victims, defendants and the attorneys in a case remanded for a new trial. The resource drain for our offices, the court and jurors is likewise substantial.

As mentioned earlier, the IPAA tasked itself with placing each prosecutorial error opinion under a microscope. We first noted the very volume of cases we handle is significant. Of course we are drawn to this daily work in the trenches because we want to make a difference in our communities. That is why we love our jobs. But we know that even in offices which provide intensive training, most prosecutors learn as they go. That is because we can't "teach" experience. And no training can prepare a trial attorney for every situation that will arise. The time to debrief between cases is limited. While civil practitioners may be in court once or twice a month, Idaho criminal attorneys are often in court every day and trial every month. Many times we respond to arguments we've just heard for the first time. Inexperience and the nature of our practice inevitably generate errors. The IPAA concluded that many of the mistakes made were the result of inexperience.

While a noble and challenging career, it is no secret there are better paying positions for attorneys, especially those with significant trial experience. Our daily court appearances provide invaluable experience, but when a deputy (or elected) prosecutor leaves, often the position is filled by a less experienced (perhaps newly-minted) attorney.

Another reason prosecutors err is the difficulty separating hard blows from foul ones. We all work side-by-side with law enforcement officers who commit their lives to protecting their communities. We want to represent that commitment well. Add to this the desire for a just result for the grieving family of a father, brother, sister or mother who was just killed by a drunk driver; the family of a child or parent who was brutally murdered; or the 4, 5 and 6 year olds who were forced into acts no child should ever experience. Sometimes our practice is raw.

We have the responsibility for making sure the defendant gets a fair trial, but we are also cognizant that we are helping to protect the victim and the community in the state where most of us grew up. When prosecutors take cases to trial, we know if we can convey the truth to the jury, the jury will do justice. And that is why we are duty bound to strike hard blows instead of foul ones.

Mr. McCabe writes about eight cases, spanning fourteen years, where individual prosecutors have erred. The Bar can rest assured the IPAA is aware of and has addressed each occurrence. After studying the courts' teachings, we titrated what we discovered and provided training, specifically focused on these areas.

Conclusion

It is worth noting, and Mr. McCabe does, in at least four of the eight cases the defense attorney did not see the prosecutor's action worthy of objection. We are all human, and will all err. Judges make mistakes, defense attorneys make mistakes and prosecutors make mistakes. Since acquittals are rarely appealed, it is mainly convictions that are reviewed. And by its nature an appeal must include allegations of mistakes. Many times the allegations are the court made a mistake – judicial error. Mistakes by defense attorneys are usually captioned "ineffective assistance."[6] Mistakes by prosecutors, though, are not called "errors." They are somehow elevated to a kind of intentional act – labeled "misconduct." And when serious enough, like the other errors, a defendant gets another trial.

Prosecutors must walk a tightrope – nearly every conviction will be second guessed. The nanosecond decision to make a comment in a closing will be parsed, diagrammed, briefed and reread for the next 2 years. Rest assured that we strive to minimize these mistakes.

— The IPAA Board of Directors

Endnotes

[1] *Berger v. United States*, 295 U.S. 78, 85, 55 S. Ct. 629, 633 L. Ed. 1314 (1935).

[2] All of Idaho's 44 prosecuting attorneys and 194 deputy prosecutors are members of the IPAA. The Idaho U.S. Attorney's office, several city attorneys and the Attorney General's office belong as well. The IPAA provides professional and ethics training to office assistants, paralegals, new and seasoned deputy prosecutors, newly elected prosecutors, and support for DUI enforcement.

[3] Idaho State Judiciary 2011 Annual Report.

[4] Idaho State Judiciary 2009 Annual Report, 10 year caseload statistics.

[5] Mr. McCabe also quotes from the dissent in *State v. Severenson,* 147 Idaho 694, 215 P.3d 414 (2009) alluding to a listing of 5 Supreme Court and 7 Court of Appeals opinions since 2004 where prosecutorial misconduct was found to be harmless.

[6] An Idaho Westlaw search reveals 180 documents include the term "prosecutorial misconduct," while well over 400 contain the term "ineffective assistance of counsel."

Comment by Kootenai County Prosecuting Attorney

I was asked by the Advocate Editorial Advisory Board to comment on Mr. McCabe's opinion piece. I have reviewed the opinion article of the Idaho Prosecuting Attorney's Association (IPAA), and I agree with its contents. Rather than focus on cases discussed by Mr. McCabe that were tried before I took office as the Kootenai County Prosecuting Attorney in January 2009, I will focus on the most important aspect of this story, what my office has been doing since then. I have made it clear to the attorneys in my office that I expect them to strike fair blows while prosecuting their cases "with earnestness and vigor." My office has made sure that our attorneys have the tools, training and support necessary to perform their duties competently and ethically.

I have participated with the IPAA in providing continuing legal education on the issue of misconduct to prosecutors from around the state. Kootenai County Prosecuting Attorneys have attended the IPAA conferences and other conferences with sections focusing on prosecutorial ethics in order to better avoid errors that can lead to findings of misconduct. I have emphasized to the attorneys in my office that thorough preparation, and when possible, presenting questions to the judge before proceeding in trial, they can prevent many allegations of prosecutorial error.

I am very proud of the people who work in my office, and am excited about the future. We have a great mix of attorneys, investigators, victim/witness advocates and support staff who are committed to pursuing excellence. We have made consistent improvement in the operation of the office and the prosecution of criminal cases. Achieving those goals is an ongoing challenge, as it is in most prosecutors' offices that suffer the loss of experienced attorneys for a variety of reasons.[1]

I ask that members of the Bar and the public judge our efforts by our performance since January 2009, using the thoughtful analysis our profession demands. I will continue my efforts to lead the Kootenai County Prosecutor's Office in a way that results in effective and professional advocacy.

— Barry W. McHugh

Endnotes

[1] Five of the 14 deputy prosecuting attorneys employed in the Criminal Division in January 2009 remain today.

Post Script to "The Foul Blow"

When I was asked to create a seminar about prosecutorial misconduct for the Idaho Association of Criminal Defense Lawyers, I had no idea of what I would find. While I practiced criminal defense for 25 years, I had never focused on that particular aspect of trial practice. In addition, even though I have been privileged to participate in an annual review of criminal law decisions for the magistrates and district judges for at least 10 years, I had never played "connect the dots" in the area of prosecutorial misconduct. It was only when I began preparing my seminar materials that I began to see some patterns emerge. The most disturbing pattern was the plethora of prosecutorial misconduct cases coming out of just one office, the Kootenai County Prosecutor's Office.

Once my seminar materials had been completed, I became concerned that I would be presenting my findings to a limited audience: criminal defense attorneys. That was when I decided that I would try to reach a wider audience by writing an article for *The Advocate* to try to focus attention on a problem that even I, an experienced criminal defense attorney, had been only marginally aware of.

My initial draft was probably too inflammatory (I referred to the unnamed offending prosecutors as "Lord Voldemort," the evil wizard in Harry Potter who must not be named). But eventually I toned down the rhetoric so that attorneys in Idaho would see what the appellate courts of this state have been seeing, prosecution that turns to persecution, especially in one county.

When I submitted my final version to *The Advocate*, I was pleased by the initial response, but then things started to get strange. I found out that my article had been submitted to Bar Counsel, Brad Andrews, for some kind of *imprimatur*. Later I found out that not only had the Kootenai County Prosecutor been granted a prepublication review of the article, so had the Idaho Prosecuting Attorneys Association, an entity that is nowhere mentioned or maligned in the article. Not only that, they had each been allowed the opportunity to respond to the article before anyone else in the state bar had a chance to read it.

Of the two responses, the IPAA's and Kootenai County Prosecutor Barry McHugh's, I find McHugh's very appropriate. It is more in the nature of a letter to the editor following publication of an article. It doesn't take offense, it just explains why the criticism is focused on the past actions of the office. I applaud him for any actions he has taken, or will take, to prevent future misconduct.

On the other hand, the IPAA's response, which like the offending prosecutors is anonymous (Lord Voldemort, anyone?), is more troubling. In the article I chose to focus on cases decided by the Idaho appellate courts and the specific actions highlighted in those cases. The IPAA, on the other hand, presents an article almost equal in length to mine to say what a great job is done by prosecutors. I never said that all prosecutors are evil, nor did I say that misconduct occurs in every case. Rather the appellate cases cited in my article show what can happen in a trial situation, not what happens in the thousands of cases "handled" on an annual basis. The IPAA would surely agree that a very small percentage of cases are actually tried anymore, and fewer still are appealed. But percentages and the number of cases handled successfully are meaningless if you are the defendant who is the victim of prosecutorial misconduct.

Furthermore, the IPAA response falls prey to the very thing discouraged by our appellate courts: appeals to passion. Use of such phrases as "grieving family," "brutally murdered" and "acts no child should ever experience" appeal to the passions of the reader, not to his or her logical thought processes. I do not question that bad things happen in this world and that someone must be held accountable for them. Nevertheless, I ask that those in charge of seeking accountability do so based on hard evidence and proof beyond a reasonable doubt, not on appeals to a juror's (or a reader's) sense of outrage. As Shakespeare wrote in *Hamlet*, Act III, Scene 2, "The lady doth protest too much, methinks."

— Tom McCabe

Perfecting Your Appeal – Key Initial Considerations For Pursuing an Appeal in Idaho

Matthew Gunn
Brian C. Wonderlich
Holland & Hart LLP

It is critical to determine early in a case when the clock will begin to run on your appeal.

Pursuing an appeal can be time consuming and expensive. One of the last things an attorney wants is to expend the significant time and effort necessary to brief and argue an appeal only to find it has been dismissed on procedural or other non-substantive grounds. Thankfully, such a disappointing end to your case can be avoided by giving early and careful consideration to the controlling appellate rules.

The following article is intended to provide a non-exhaustive outline of some of the most important steps for initiating an appeal of a civil case before the Idaho Supreme Court or the Ninth Circuit Court of Appeals. Although these rules may encompass the more mundane part of appellate practice, there are countless examples of how failing to meet these requirements can make the difference between a great victory and great deal of wasted effort.


Matthew Gunn


Brian C. Wonderlich

While each case will have its own unique circumstances that must be considered, the following is intended to provide a useful starting point for your next appeal.

Appeals to the Idaho Supreme Court

The Idaho Appellate Rules[1] lay out a number of initial requirements that must be met to ensure full consideration of your appeal. The following section outlines a few key steps that can help ensure your appeal to the Idaho Supreme Court will be decided on the merits.

Use I.A.R. 17 as a road map to plan your appeal

I.A.R. 17 sets out the mandatory contents of the notice of appeal. It also serves as a useful checklist for setting up the appeal and emphasizes key issues that should be considered at the outset of the appeal, if not earlier in your case.

Know when the notice of appeal is due

The timely filing of a notice of appeal is jurisdictional[2] and the failure to do so will result in dismissal no matter how strong the merits.[3] Thus, it is critical to determine early in a case when the clock will begin to run on your appeal.

I.A.R. 14(a) states that an appeal "from the district court may be made only by physically filing a notice of appeal with the clerk of the district court within 42 days from the date . . . on any judgment or order . . . appealable as a matter of right."[4] I.A.R. 11(a) identifies the judgments and orders that are appealable in a civil action.

The best way to avoid missing the deadline to file an appeal is to consult Rule 11(a) at any point in which a decisive judgment or order is made by the trial court. Identify the subsection of Rule 11(a) that applies and be cognizant that if a judgment or order identified in Rule 11(a) is entered by the district court, the clock will begin to tick on your appeal.

Failure to take this relatively simple step can result in dismissal of your appeal for lack of jurisdiction. For example, in one recent case the Idaho Supreme Court dismissed an appeal where the appellants filed their appeal forty-two (42) days after judgment was entered, presumably pursuant to Rule 11(a)(1), rather than properly filing the appeal within forty-two (42) days of the district court's order confirming an arbitrator's award as required by Rule 11(a)(8).[5]

File a cross-appeal when seeking affirmative relief

Simply because an appeal has been filed does not mean all issues presented to the district court are on the table. If the respondent seeks affirmative relief from the appellate court, a notice of cross-appeal must be filed or those issues presented by the respondent will be dismissed for lack of jurisdiction.[6] The notice of cross-appeal must be physically filed with the clerk of the district court "within the 42 day time limit prescribed in Rule 14, . . . or within twenty-one (21) days after the . . . filing of the original notice of appeal."[7]

Where Rule 11(a)(1) applies, ensure a "final judgment" has been entered

I.A.R. 17 requires that the appellant designate the judgment or order appealed from[8] and provide a jurisdictional statement as to the basis of the right to appeal to the Idaho Supreme Court.[9] The most common basis for a civil appeal is Rule 11(a)(1), which allows for the appeal of a "[f]inal judgment as defined in Rule 54(a) of the Idaho Rules of Civil Procedure."[10] Where Rule 11(a)(1) forms the jurisdictional basis of an appeal, it is critical for the appellant to ensure a final judgment has been entered because the Supreme Court has been adamant that it lacks jurisdiction where the judgment or order appealed from does not meet the definition of a final judgment.[11]

Civil Rule 54(a) states that a judgment is final when "judgment has been entered on all claims for relief, except costs and fees, asserted by or against all parties in the action."[12] I.R.C.P. 54(a) also defines a judgment as "a separate document entitled Judgment or Decree" that states "the relief to which a party is entitled."[13] It is important to note that Civil Rule 54 specifically states that any document that contains any of the following is not a judgment: a recital of pleadings, the report of a master, the record of prior proceedings, courts legal reasoning, findings of fact, or conclusions of law.[14] Thus, for example, a typical order granting summary judgment does not constitute a final judgment and relying on a summary judgment order alone will re-

sult in dismissal of your appeal for lack of jurisdiction.[15]

Of course, the final judgment requirement can be satisfied by requesting the district court enter a final judgment as described in I.R.C.P. 54. In fact, even if a notice of appeal was filed prior to entry of a final judgment, this deficiency may be remedied during the pendency of the appeal and it is unnecessary to refile the notice of appeal.[16]

Meaningfully consider the issues on appeal and contents of the record

Appellate Rule 17 requires that the notice of appeal include a preliminary statement of the issues on appeal[17] and request any transcripts, documents, and exhibits the appellant desires to be part of the record.[18] These requirements are best considered together because the issues presented play a leading role in defining what records and transcripts are necessary to designate a complete appellate record. While the Appellate Rules permit both the issues on appeal and the record and transcript to be subsequently augmented,[19] there are a number of good reasons to give each meaningful consideration at the outset of the appeal.

First, it is "the appellant's responsibility to provide an adequate record to substantiate his or her claims on appeal. . . ."[20] An incomplete record can result in the dismissal of an issue on appeal without substantive consideration if a key document or transcript is missing.[21]

Second, not all of the clerk's record or transcripts are automatically included in the appellate record. Under I.A.R. 25 the "parties are responsible for designating the proceedings necessary for inclusion in the reporter's transcript."[22] In fact, for civil cases, no standard transcript is identified by the Appellate Rules.[23] Instead, the parties are "encouraged and expected" to include only those portions of the transcript that are necessary for the appeal.[24] This express provision in the Idaho Appellate Rules emphasizes the need to consider at the outset what transcripts are necessary for resolving your appeal.

Similarly, under I.A.R. 28, only certain portions of the clerk's record are automatically included in the appellate record.[25] Any additional documents must be requested in the notice of appeal or notice of cross appeal.[26]

Third, a complete but not excessively voluminous appellate record is user friendly and easily referenced. It takes little imagination to realize the value of the judges and law clerks being able to easily locate those documents that are central to your theory of the case.

This express provision in the Idaho Appellate Rules emphasizes the need to consider at the outset what transcripts are necessary for resolving your appeal.

Finally, consider whether a stay pending appeal is necessary

Under Appellate Rule 13(a), execution of all judgments or orders in a civil action is automatically stayed for only fourteen (14) days. After that, execution of the judgment will only be stayed upon an order of the district court[27] or Supreme Court.[28]

Appeals to the Ninth Circuit Court of Appeals

Approximately one thousand cases, civil and criminal, are filed annually in the United States District Court for the District of Idaho.[29] Many of those cases will to lead to an appeal to the Ninth Circuit Court of Appeals. Appellate procedure before the Ninth Circuit is governed by both the Federal Rules of Appellate Procedure and the Ninth Circuit Rules.[30]

The following discussion contains a non-exhaustive outline of key rules that should be considered at the outset to help ensure substantive and timely consideration of your appeal to the Ninth Circuit.

Appealing a final decision of the district court

A party may appeal all final decisions of the United States district courts as a matter of right.[31] The federal appeals process begins with the filing of a notice of appeal.[32] The notice of appeal and filing fee are filed with the federal district court, not the Ninth Circuit.[33] The notice must specify the party or parties taking the appeal, the judgment or order being appealed, and the court to which the appeal is being taken.[34] The appealing party must provide the district court with sufficient copies of the notice such that the clerk of the district court may serve the notice on all parties.[35]

In a civil case, the notice of appeal must be filed no later than thirty (30) days after entry of the judgment or order being appealed.[36] Generally, the filing deadline for the notice of appeal is tolled until the entry of a final order disposing of any post-trial motions.[37] Except in a few enumerated cases, every judgment and amended judgment must be set out in a separate document.[38] The thirty (30)-day time frame to file the notice of appeal begins to run after the judgment or order forming the basis of the appeal has been entered in the civil docket and the earlier of two events occurs: (1) a separate document setting forth the judgment or order is entered in the civil docket, or (2) 150 days have elapsed since the entry of the order being appealed.[39] If the judgment or order being appealed is one of the few cases not requiring entry of a separate judgment or order, the thirty (30)-day time frame to file the notice of appeal begins with the entry of the judgment or order.[40]

Interlocutory appeals

Interlocutory appeals of non-final orders are presumptively impermissible, but a few enumerated interlocutory orders are appealable as a matter of right, including district court orders granting, continuing, modifying, refusing, or dissolving injunctions and orders appointing receivers or refusing to wind up receiverships.[41]

Interlocutory review of an otherwise non-appealable, non-final order may be granted discretionarily under 28 U.S.C. § 1292(b). A party may seek interlocutory review of a non-final order by obtaining the permission of both the district court and the Ninth Circuit.[42] The non-final order must involve a controlling question of law involving substantial difference of opinion, the appeal of which will materially advance the ultimate resolution of the case.[43] Confusion could arise from the wording of § 1292(b), which states that the district court judge must make the requisite findings "in writing in such order," referring to the order from which interlocutory review is sought. However, the Ninth Circuit does not require that counsel be clairvoyant and request interlocutory appeal certification from the district court contemporaneously with the substantive motion, thereby enabling the district court to rule on both the motion and interlocutory certification request in a single order; the Ninth Circuit will entertain interlocutory appeals in instances where interlocu-

tory certification is requested subsequent to the district court's ruling on the motion.[44]

Preservation of the status quo

It is often important to the appellant to maintain the status quo during the appellate process so as not to suffer irreparable harm to its interests. Any party may seek a stay or injunction pending the outcome of an appeal.[45] Such a stay or injunction must be sought from the district court, and may only be sought from the Ninth Circuit upon a showing that seeking such relief from the district court would be impracticable.[46] An appealing party may be required by the district court to post a bond or provide other security to ensure the payment of appellate costs.[47]

The appellate record

The appellate record consists of three parts: (1) the original filings and exhibits filed with the district court; (2) the transcript of any relevant proceedings; and (3) a certified copy of the docket entries.[48] It is the duty of the appellant to order a transcript from the reporter of all relevant proceedings, or to file a certificate stating that no transcript will be ordered, no later than fourteen (14) days after the filing of the notice of appeal or resolution of the last timely post-trial motion.[49] It is also the duty of the appellant to do "whatever else is necessary to enable the clerk [of the district court] to assemble and forward the record."[50] Once the record is assembled, the clerk of the district court numbers it and forwards it to the Ninth Circuit.[51]

Unique to the Ninth Circuit, and forming the backbone of any successful appeal to the Circuit, are the excerpts of record.[52] The Federal Rules require that all appellate briefs have an appendix containing the judgment or order being appealed, and all docket entries and portions of the transcript relevant to the brief.[53] The Ninth Circuit, in lieu of an appendix, requires all non-*pro se* parties to file separate excerpts of record that include "those parts of the record necessary to permit an informed analysis of their positions."[54]

Careful preparation of the excerpts of record is integral to a successful appeal to the Ninth Circuit.[55] A bloated excerpt of record does little to direct the three judges on an appellate panel to the portions of the record supporting a claim, while an overly narrow record undermines the evidentiary support necessary to prevail. Appellate counsel should carefully consider what evidence is being cited to support the appeal, and should then provide excerpts fully supporting these points and no more. It is important that the judges on the appellate panel have the crucial portions of the record readily available, and can quickly and easily access the portions of the record containing the support for a given position.

Conclusion

Early and careful consideration of key appellate rules will help ensure your appeal is given meaningful consideration by an appellate court. We hope that this article proves useful when you commence your next appeal to the Idaho Supreme Court or Ninth Circuit Court of Appeals.

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Endnotes

[1] *Available at*: http://www.isc.idaho.gov/rules/iaridx.htm.
[2] *In re Universe Life Ins. Co.*, 144 Idaho 751, 755, 171 P.3d 242, 246 (2007).
[3] *Harrison v. Certain Underwriters at Lloyd's, London*, 149 Idaho 201, 205, 233 P.3d 132, 136 (2010).
[4] I.A.R. 14(a) (emphasis added).
[5] *See Harrison*, 149 Idaho at 204-05; 233 P.3d at 135-36.
[6] I.A.R. 21; *Carr v. Carr*, 116 Idaho 754, 757, 779 P.2d 429, 432 (Ct. App. 1989).
[7] I.A.R. 15(b).
[8] I.A.R. 17(e)(1).
[9] I.A.R. 17(g).
[10] I.A.R. 11(a)(1).
[11] *See, e.g.*, *T.J.T., Inc. v. Mori*, 148 Idaho 825, 230 P.3d 435 (2010) (dismissing appeal for lack of jurisdiction because the district court had not entered a final judgment).
[12] I.R.C.P 54(a). A judgment is also final if it "has been certified as final pursuant to [I.R.C.P. 54] (b)(1)." *Id.*
[13] I.R.C.P. 54(a). Despite the language of this rule, "[w]hether an instrument is an appealable order or judgment must be determined by its content and substance, and not by its title." *Camp v. East Fork Ditch C., Ltd.*, 137 Idaho 850, 867, 55 P.3d 304, 321 (2002). Thus, whether the judgment is titled a judgment or decree is not decisive.
[14] I.R.CP. 54(a).
[15] *See T.J.T, Inc.*, 148 Idaho 825, 230 P.3d 435; *see also Spokane Structures, Inc. v. Equitable Investment, LLC*, 148 Idaho 616, 226 P.3d 1263 (2010).
[16] I.A.R. 17(e)(2); *Spokane Structures, Inc.*, 148 Idaho at 621, 226 P.3d at 1269.
[17] I.A.R. 17(f).
[18] I.A.R. 17(h)-(j).
[19] *See* I.A.R. 30(a), 32(c).
[20] *See State v. Kilby*, 130 Idaho 747, 749, 947 P.2d 420, 422 (Ct. App. 1997) .
[21] *Id.* ("Without a transcript . . . we are unable to conduct a meaningful appellate review of Kilby's . . . challenge. Thus, Kilby has failed to establish a record sufficient to support his claim, and we will not address this issue.").
[22] I.A.R. 25(a).
[23] *Compare* I.A.R. 25(a) *with* I.A.R. 25(c) ("Standard Transcript – Criminal Appeals").
[24] *Id.*
[25] I.A.R. 28(b).
[26] I.A.R. 28(c) contains a non-exclusive list of documents that are not automatically included in the appellate record but that may be added to the record, including jury instructions, depositions, briefs, and affidavits.
[27] I.A.R. 13(b)(14)-(15)
[28] I.A.R. 13(g).
[29] Represents annual filings from 2009-2011. Federal Court Management Statistics, available at: http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx.
[30] A combined version of the F.R.A.P. and Ninth Circuit Rules is available at: http://www.ca9.uscourts.gov/datastore/uploads/rules/Rules_TOC.htm.
[31] 28 U.S.C. § 1291.
[32] F.R.A.P. 3(a)(1).
[33] F.R.A.P. 3(a)(1).
[34] F.R.A.P. 3(c)(1).
[35] F.R.A.P. 3(d)(1).
[36] F.R.A.P. 4(a)(1)(A).
[37] F.R.A.P. 4(a)(4).
[38] *See* F.R.C.P. 58(a) (a separate document is not required for orders disposing of motions for judgment under Rule 50(b), motions to amend or make additional findings under Rule 52(b), motion for attorney's fees under Rule 54, motions for a new trial or to alter or amend a judgment under Rule 59, or motions for relief under Rule 60).
[39] F.R.A.P. 4(A)(7)(ii); *Solis v. County of Los Angeles*, 514 F.3d 946, 951 (9th Cir. 2008) ("When judgment is not set forth on a separate document as required by Rule 58(a)(1), it is considered 'entered' when 150 days have run from notation in the civil docket.").
[40] F.R.A.P. 4(A)(7)(i).
[41] *See* 28 U.S.C. § 1292(a) (listing non-final orders from which an interlocutory appeal is permissible).
[42] 28 U.S.C. § 1292(b).
[43] *Id.*
[44] *See, e.g., Reese v. B.P. Exploration (Alaska) Inc.*, 643 F.3d 681, 686-87 (9th Cir. 2011) (district court granted defendant's motion for interlocutory appeal after granting in part and denying in part defendant's motion to dismiss).
[45] F.R.A.P. 8(a).
[46] *Id.*
[47] F.R.A.P. 7.
[48] F.R.A.P. 10(a).
[49] F.R.A.P. 10(b)(1).
[50] F.R.A.P. 11(a).
[51] F.R.A.P. 11(b)(2).
[52] Ninth Cir. R. 30-1.1.
[53] F.R.A.P. 30(a)(1).
[54] Ninth Cir. R. 30-1.1.
[55] *See Delia v. City of Rialto*, 621 F.3d 1069, 1083 (9th Cir. 2010) (district court's grant of summary judgment in favor of appellee affirmed by Ninth Circuit where the "record [was] devoid of any evidence" supporting essential element of appellant's argument).

The Curious Case of Idaho Code Section 12-117

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Land-use entitlements are a prominent example. These are often proceedings at the frontier of law and politics and controversial decisions are regularly challenged through petitions for judicial review.

The landscape of petitions for judicial review of agency and local government actions has shifted recently on a number of fronts. For example, the scope of a court's review of local government land-use decisions narrowed considerably in 2008 with *Burns Holdings* and its accompanying cases.[1] Until H.B. 605 was enacted in 2010,[2] land-use practitioners had significant reason to question whether petitions for judicial review would be available for a number of different local government land-use approvals.

Recently, the Idaho Supreme Court and the Idaho Legislature have been engaged in yet another back-and-forth affecting petitions for judicial review of agency and local government actions. This time, the question deals with Idaho Code Section 12-117 and the ability to seek awards of attorney fees under that statute.


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Participants in petitions for judicial review have regularly relied on Section 12-117; however, recent Idaho Supreme Court decisions have determined that Section 12-117 is no longer available in that context. Meanwhile, efforts at the Idaho Legislature reveal an apparent disconnect between legislative intent and the Idaho Supreme Court's interpretation of the actual language of enacted legislation. This article describes the dilemma participants face as a result of this disconnect and urges a "fix" in the next legislative term that will restore this important check on abuse of the judicial process.

Background

Idaho Code Section 12-117 allows for awards of attorney fees against a nonprevailing party in an action involving "a state agency or political subdivision" if the court "finds that the nonprevailing party acted without a reasonable basis in fact or law."[3] It also allows for an award of fees if the nonprevailing party acts without a reasonable basis with respect to any portion of the case.[4] Courts have relied on these checks on actions "without a reasonable basis in fact or law" to punish misuse of the courts (or, in the case of local governments, their authority over land-use approvals) in cases involving a "political subdivision" of the state.[5]

The types of cases where Section 12-117 has been regularly employed are varied. Land-use entitlements are a prominent example. These are often proceedings at the frontier of law and politics and controversial decisions are regularly challenged through petitions for judicial review. Unfortunately, high stakes may mean neighbors or applicants may be willing to challenge a decision without a firm basis, or local governments, under pressure, may issue decisions that overlook significant evidence or ignore ordinance requirements, knowing that the likely outcome is simply a remand back to the local elected officials to "get it right" in a new decision.

Very similar pressures arise in petitions for judicial review of decisions by administrative agencies more generally (as opposed to local municipal bodies). A prominent recent example was the *Laughy* case, in which individuals living and operating businesses along the Highway 12 corridor challenged permits issued to ConocoPhillips Company by the Idaho Transportation Department.[6] In *Laughy*, both ConocoPhillips and the neighbors applied for fees under Section 12-117. Yet, for reasons explained more fully below, the Supreme Court ruled that, despite a history of use in just this context, Section 12-117 was no longer available in petitions for judicial review of agency actions.

Rammell and the 2010 legislative response

The litigants in *Laughy* likely expected to be able to rely on Section 12-117 because of its regular presence in petitions for judicial review for many years. All of that changed when the Idaho Supreme Court heard *Rammell v. Idaho State Department of Agriculture*, 147 Idaho 415, 210 P.3d 523 (2009).

In *Rammell*, the Supreme Court changed its prior position regarding the authority of "administrative agencies" to award attorneys' fees in an "administrative proceeding," holding that Section 12-117 only allowed a "court"—not an agency—to award fees. The Court also relied on the label contained in the then-effective language of the statute ("any administrative or civil judicial proceeding") to conclude that fees could not be granted directly by an administrative entity:

> Because the prior version of [Section] 12-117(1) authorized courts to award fees in "any administrative or civil judicial proceeding," it was evident that the courts of this state were to have some power to award attorney fees in judicial actions relating to administrative proceedings. Since the Legislature provided no mechanism for courts to award fees in administrative proceedings, it must have only meant to allow fee awards in appeals from administrative decisions.[7]

The Idaho legislature reacted swiftly to *Rammell* by amending Section 12-117 with retroactive effect. House Bill 421 was intended to "restore the law as it [had] existed since 1989...,"[8] because it would "permit awards of costs and attorney fees to prevailing parties not only in court cases, but also in administrative cases."[9] The clear intent of H.B. 421 as expressed in the Statement of Purpose was to restore the *status quo ante*—not to further limit Section 12-117's use in these settings.

Smith v. Washington County

Not long thereafter, the Idaho Supreme Court interpreted the new language of Section 12-117. The result was not what H.B. 421's drafters anticipated.

In *Smith v. Washington County Idaho*, 150 Idaho 388, 247 P.3d 615 (2010), an applicant convinced the lower court to overturn a county's decision not to grant a building permit. The subject of the appeal

was whether attorney fees should have been awarded to the applicant where "the Board had delayed [the applicant's] application for too long and had denied the permit arbitrarily."[10]

The Idaho Supreme Court denied the award of attorney fees because, in the Court's view, Section 12-117 (as amended by H.B. 421) no longer allows for an award of attorney fees by a court hearing a petition for judicial review of an agency decision. The Court reached this conclusion based upon two rulings. The Court looked, first, to the amended language of Section 12-117(1), which now states:

> Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.[11]

The Court focused on new language indicating fees may be awarded by "the state agency or political subdivision or the court, as the case may be," which the Court interpreted to mean "that only the relevant adjudicative body—the agency in an administrative proceeding or the court in a judicial proceeding—may award the attorney fees."[12] In other words, a reviewing court no longer has the ability to award fees—only the body that hears the original application may do so.

The second prong of the Court's analysis was based upon its often-repeated refrain that petitions for judicial review are not "civil judicial proceedings" because they are not initiated with a "complaint filed in court."[13] The Court concluded that petitions for judicial review no longer fall within the purview of Section 12-117 because, "[b]y separating 'administrative proceedings' from 'civil judicial proceedings,' the Legislature signaled that the courts should no longer be able to award fees in administrative judicial proceedings such as this one."[14]

Legislative help did not arrive in the 2011 session

The *Smith* decision prompted additional legislative action—this time during the 2011 Idaho legislature. As unmistakably expressed in its Statement of Purpose, House Bill 209[15] was a reaction to *Smith*:

> Until the summer of 2009, Idaho Code Section 12-117 was interpreted by the Idaho Supreme Court to allow an award of attorney fees and costs to the prevailing party in administrative cases if the non-prevailing party acted without a reasonable basis in fact or law. Following an Idaho Supreme Court ruling in the summer of 2009, which reinterpreted the statute to bar such awards, HB 421 was passed by the 2010 Legislature and signed into law with the objective of allowing such awards at all stages of an administrative proceeding, including on appeal to the courts. Nonetheless, on October 6, 2010, the Idaho Supreme Court ruled that the 2010 amendments did not accomplish this objective. (See Smith v. Washington County, 149 Idaho 787, 241 P.3d 960 (2010)). This bill adds additional language to Idaho Code Section 12-117 to correct this situation....

Unfortunately, however, rather than focusing solely on the fix needed to address the attorney fees issue, House Bill 209 also attempted to cover other ground. For example, it included a provision *requiring* an award of attorney fees in cases involving government entities as adverse parties. It is unclear whether this additional language caused a problem for the legislation; what is known is that House Bill 209 stalled in the Senate Judiciary Committee. A "fix" restoring the ability to seek attorney fees in petitions for judicial review has still not occurred.

In the meantime, the Idaho Supreme Court has repeatedly relied on *Smith* to reject requests for attorney fees under Section 12-117,[16] despite calls by litigants, including local governments, for the Court to reconsider its conclusion in *Smith* in light of the legislative history of H.B. 421. To date, the Court has refused to do so, holding that the plain language of H.B. 421 requires the result reached by the Court.[17]

Rather than focusing solely on the fix needed to address the attorney fees issue, House Bill 209 also attempted to cover other ground. For example, it included a provision requiring an award of attorney fees in cases involving government entities as adverse parties.

A "fix" in 2012?

Another attempt at resolving this situation is expected in the 2012 legislative session. Resolution of what is, on its face, a simple issue is imperative not only for all applicants, but also for agencies and local governments who would like the more straightforward path to attorneys' fees that Section 12-117 can provide.

A relatively simple amendment of the form noted below would, in this author's opinion, resolve the issue. Blacklined language from the existing statute (in relevant part) is suggested below.

The primary change needed removes the modifiers of the word "proceeding" that created the distinction confronted by the Supreme Court in *Smith*:

> 12-117. Attorney's fees, witness fees and expenses awarded in certain instances.
> (1) Unless otherwise provided by statute, in any ~~administrative proceeding or civil judicial~~ proceeding involving as adverse parties a state agency or political subdivision and a person, the state agency or political subdivision or the court hearing the proceeding, ~~as the case may be~~, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

A similar change (deleting the modifiers of the word "proceeding") would also be needed in sub-section 2:

> (2) If a party to ~~an administrative proceeding or to~~ a ~~civil judicial~~ proceeding prevails on a portion of the case, and the state agency or political subdivision or the court hearing the proceeding, ~~as the case may be,~~ including on appeal, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

These modifications alone may be enough to remedy the issue confronted by the Supreme Court in *Smith*; however, for good measure, the legislature may consider making the word, "proceeding" a defined term, as follows:

(4) For the purposes of this section:
(a) "Person" shall mean any individual, partnership, corporation, association or any other private organization;
(b) "Political subdivision" shall mean a city, a county or any taxing district.
(c) "Proceeding" shall include: any administrative proceeding, administrative judicial proceeding, civil judicial proceeding, or petition for judicial review; or any appeal from any administrative proceeding, administrative judicial proceeding, civil judicial proceeding, or petition for judicial review.
~~(c)~~(d) "State agency" shall mean any agency as defined in section 67-5201, Idaho Code.

With this relatively simple fix, this author believes that applicants, agencies, and local governments can regain an important deterrent against expensive and unwarranted legal challenges.

With this relatively simple fix, this author believes that applicants, agencies, and local governments can regain an important deterrent against expensive and unwarranted legal challenges.

Conclusion

Section 12-117 is an important deterrent against abuse of the process provided for challenging agency decisions, generally, and local government land-use decisions, in particular. It is hoped that legislative efforts to address the interpretation of Section 12-117 after *Smith* will be successful in the 2012 Idaho legislative session.

About the Author

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Endnotes

[1] *Burns Holdings, LLC v. Madison County Bd. of County Com'rs*, 147 Idaho 660, 214 P.3d 646 (2008). *See also Giltner Dairy, LLC v. Jerome County*, 145 Idaho 630, 181 P.3d 1238 (2008); *Highlands Development Corp. v. City of Boise*, 145 Idaho 958, 188 P.3d 900 (2008); *Taylor v. Canyon County Board of Comm'rs*, 147 Idaho 424, 210 P.3d 532 (2009).

[2] H.B. 605, Sixtieth Legislature, 2d. Regular Session (Idaho 2010). H.B. 605 clarified the situation by stating the Legislature's intent that all "applications for zoning changes, subdivisions, variances, special use permits and such other similar applications required or authorized pursuant to [LLUPA]" would be eligible for judicial review—not simply those "permits" specifically identified as such by LLUPA.

[3] I.C. § 12-117(1).

[4] I.C. § 12-117(2).

[5] *See, e.g., Fischer v. City of Ketchum*, 141 Idaho 349, 356, 109 P.3d 1091, 1098 (2005); *Canal/Norcrest/Columbus Action Committee v. City of Boise*, 136 Idaho 666, 39 P.3d 606 (2001).

[6] *Laughy v. Idaho Dept. of Transp.*, 149 Idaho 867, 243 P.3d 1055 (2010).

[7] *Smith v. Washington County, Idaho*, 150 Idaho 388, 391, 247 P.3d 615, 618 (2010).

[8] *Id.*

[9] H.B. 421, Sixtieth Legislature, 2d. Regular Session (Idaho 2010).

[10] *Smith*, 150 Idaho at 390, 247 P.3d at 617.

[11] I.C. § 12-117(1).

[12] *Smith*, 150 Idaho at 391, 247 P.3d at 618

[13] *Id.* citing *Sanchez v. State*, 143 Idaho 239, 243, 141 P.3d 1108, 1112 (2006); *Neighbors for Responsible Growth v. Kootenai Cnty.*, 147 Idaho 173, 176 n. 1, 207 P.3d 149, 152 n. 1 (2009). This same reasoning was used in *Laughy* to deny a claim for attorney fees under Idaho Code Section 12-121, which allows for such awards "[i]n any civil action." *Laughy*, 149 Idaho at 877.

[14] *Id.* Even worse for the applicant in *Smith* is the fact that the case was originally styled as a petition for a writ of mandate, then converted by the Court to a petition for judicial review. The Court notes that "Smith... never challenged the district court's decision to treat his initial motion for mandamus relief as a petition for judicial review." Whether Smith should (or could) have known that such a challenge would be necessary is a difficult question in light of prior decisions permitting awards of attorney fees in petitions for judicial review.

[15] H.B. 209, Sixty-First Legislature, 1st Regular Session (Idaho 2011).

[16] *See, e.g., Krempasky v. Nez Perce County Planning and Zoning*, 150 Idaho 231, 245 P.3d 983 (2010); *St. Luke's Magic Valley Regional Medical Center, Ltd. V. Board of County Comm'rs of Gooding County*, 150 Idaho 484, 248 P.3d 735 (2011); *Vickers v. Lowe*, 150 Idaho 439, 247 P.3d 666 (2011); *In re City of Shelley*, 151 Idaho 289, 255 P.3d 1175 (2011); *Locker v. How Soel, Inc.*, 151 Idaho 696, 263 P.3d 750 (2011).

[17] *See Sopatyk v. Lemhi County*, No. 37186, 2011 WL 5375190, at *7-9 (2011). The Court also decided not to overturn *Smith* because, in the Court's opinion, "there is no obvious principle of justice at stake here" because, "[h]aving allowed parties to bring petitions for judicial review in the first place, the Legislature could reasonably have intended to withhold fee awards in such cases. No fundamental principle of law requires attorney's fees in judicial review of administrative decisions, nor is there any basic injustice in requiring parties to pay their own attorneys." *Id.* at *9. Another case also deserves brief mention. In *Jasso v. Camas County*, No. 37258, 2011 WL 5299710 (2011), an applicant obtained an award of attorney fees from the district court based upon the court's review of a denial of a preliminary plat. Although the award was given prior to the enactment of H.B. 421, H.B. 421 was enacted with *retroactive* effect. The Court relied upon this retroactive effect in order to overturn the award.

Building Better Lawyers: Proposals to Meet Our Professional Obligation of Constant Improvement

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Every day spent practicing law presents an opportunity to learn something new. Paradoxically, this opportunity is even more demanding when our practice begins to feel repetitive or routine. Tedium might be one of the most fruitful areas for legal innovation.

This article highlights three ideas from different sources that have the potential to dramatically improve the way lawyers learn and the practice in Idaho. The first relates to the value of coaching to invigorate professional practice. The second exhorts attorneys to seek second opinions. The third suggests more interactive CLE's that provide attorneys an opportunity to improve their craft through observed hypothetical situations.

In short, as professional experience waxes, skill development has a tendency to stagnate or in the worst cases, even to wane.

Get a coach

A recent article in the *New Yorker*, "Personal Best"[1] pointed out that the greatest strides made occur primarily in the first few years out of school. A surgeon observed this truth in his own development within the medical field, but the example is equally relevant within the legal profession. In short, as professional experience waxes, skill development has a tendency to stagnate or in the worst cases, even to wane. As Dr. Gawande observed, our careers naturally plateau—the challenge for professionals is whether these plateaus represent stopping points or launching pads for continued development?


Brian P. Kane

A first- or second-year attorney is likely to hyper-research an issue, examining it from multiple angles and delivering cautious, well-reasoned advice. But then there is typically a plateau, the direct result of a complacency of competence. At some point, we think we know enough. A more senior attorney is likely to deliver advice from the hip, never having cracked a book, though veterans of the field would do well to ask themselves, "Would I have been comfortable with this answer as a first- or second-year attorney?" A coach, typically another attorney or a law professor, can help us ask ourselves these questions and remind us that we can still learn and grow in our practice.

A coaching scenario for a deposition might unfold in the following manner. A short meeting takes place before the deposition with your "coach," who is likely an attorney or a law professor. Within that meeting, you discuss your expectations for the deposition, what information you are seeking of the deponent, obstacles likely to come up, the demeanor and style of the opposing attorney, and other details. Your coach may provide some insight as to how to approach certain aspects, or agree to observe your work and provide feedback afterwards. You take the deposition; your coach watches and takes notes but does not participate or even have an interest in anything other than your performance as an attorney.

After the deposition, you and your coach sit down and debrief. The coach may have observed verbal or non-verbal habits that are worth discussing. He or she may have also observed your demeanor toward the witness or the opposing counsel and reflect on potential improvements or consequences. Your coach could identify rough spots in your questioning and rework your style or refine your technique. Discussing your work with a coach would give you the opportunity to assess your own performance. This process can be replicated for various professional tasks—oral argument, legal writing, client meetings, or negotiations. Having an objective set of eyes and ears can result in measurable improvements in practice.

There are inherent hurdles to the concept of professional coaching. For example, time, resources, the attorney client privilege—these issues can be overcome, though they must be addressed beforehand. Perhaps the most difficult obstacle would be allowing another to provide a frank assessment of our work. To have a successful coaching experience, an attorney must make himself vulnerable.

It is this accepting, and even embracing, of vulnerability that separates coaching from a typical mentoring. One of the problems with mentoring, particularly within a firm, is that often you may not want to share uncertainties or shortcomings with peers or supervisors. Coaching removes this hindrance because the coach's sole objective is to produce improvement in his trainee; there is no opportunity to exploit vulnerability or attach value to any shortcoming.

Likewise, coaching is different from performance evaluation. An honest appraisal, and recognition of room for improvement, of your own performance can be risky in the context of a performance review. To be successful, a coaching program must be removed from the umbrella of performance reviews or evaluations. In the performance review context, shortcomings can disparage or discredit. But in the coaching context, shortcomings can be used to build more effective lawyers. In sum, a coaching effort should be separated from a personal evaluation

Get a second opinion

Given the myriad legal questions that present themselves in any field of law, fellow attorneys are a tremendous resource—so much so that "Second Opinion Lawyers" would be of great benefit to our profession. Often law firms have established internal networks to encourage these types of exchanges, but for less experienced attorneys this process can be intimidating—especially when trying to establish themselves. Similarly, attorneys in small or solo practice settings may not have an established network within which to seek a second opinion. But one of the most valuable assets that an attorney can

possess is the availability of professional peers to bounce unfamiliar situations off of.

Most often difficulties for lawyers arise when they deviate from the well-traveled path and blaze a new trail, without the benefit of a second opinion. The complacency of competence may again cause us to shed the caution of our early years of practice, or perhaps we wish to attempt to test or extend the boundaries of the law. Of course, reckless disregard for propriety or even ethics in this attempt is going too far. But without the benefit of a second set of eyes and ears, we may become so engrossed in advocacy that we fail to see that we have crossed the line. Unlike coaching, which seeks to identify points for potential improvement after the task is complete, a second opinion seeks to keep us on the correct side of the line before the task is begun, or at least before it has reached a point of irrevocability.

For example, an attorney recently filed a motion so ill-advised that not only was the motion denied, the attorney was charged with contempt. We must wonder whether, had that lawyer had the opportunity to discuss his planned approach with a peer, a second opinion could perhaps have saved him from a considerable amount of heartache.

A pool of "Second Opinion Lawyers" willing to assist other attorneys might provide to sole (or shy) practitioners a rich resource already available in many law firms. Second opinion lawyers would necessarily have to take care to insure compliance with the Idaho Rules of Professional Conduct, particularly with regard to conflicts of interest and confidentiality—but assuming these obstacles could be overcome, such a pool could be a significant advancement for our profession.

Get more interactive CLEs

You know the drill: trudge in to the classroom at 8:00 am, sign in on the sheet, grab a drink and a muffin, and dutifully listen to a CLE lecture, all the while trying with various degrees of success to resist the urge to catch up on your e-mail, draft your shopping list, or advance in Angry Birds. Another hour down, 29 to go. In this way we learn, improve our craft, keep up with the dynamics of the law… right?

It is time to embrace an active learning model for CLE's. Instead of a CLE lecture on oral argument, each attendee would get up and make an oral argument; instead of a lecture on brief writing, each attendee would submit a brief prior to the CLE, and a critique would be the basis for the class. These approaches would require additional time, organization and resources, but if the goal of CLE's is to improve and advance the profession, these investments would be worthwhile. The development of a curriculum of this nature would inject a little enthusiasm as well.

For example, in reviewing attendee evaluation forms of the National Attorney's General Training and Research Institute, the highest rated courses are consistently those which require attorneys to directly participate in learning. This does not mean that lectures have disappeared from the curriculum—for certain topics a lecture is indispensable, but lectures are mixed with interactive components to create a robust and often rigorous CLE experience.

These courses also have technological and practical challenges. It is difficult to take an interactive course via video. Similarly, class size is an issue, because the most significant learning comes from the student completing an exercise and then receiving feedback. Designing and delivering interactive CLE courses requires much time, work, and logistical consideration, but the payoff is worth the investment. By invigorating CLE's by adding interactive components, we can inspire vitality and growth in long-standing lawyers' practice, and provide opportunities for new lawyers to learn practical skills in a clinical, rather than a high-risk, setting.

Conclusion

Practicing with competent, fully engaged adversaries creates advantages for both parties. Recognizing this, we should strive to continually improve our profession, particularly when we notice ourselves just going through the motions. Understanding that these proposals, if implemented, might be viewed as big changes to our profession, it may be worthwhile to try limited experiments to determine if the opportunity is viable. We might also find that these are not solutions, but rather a starting point. Wherever they lead, I hope these proposals provide incentives for lawyers to contemplate and discuss our responsibility to be professional lifelong learners.

The highest rated courses are consistently those which require attorneys to directly participate in learning.

About the Author

Brian P. Kane *is the Assistant Chief Deputy Attorney General for Idaho's longest serving Attorney General, Lawrence Wasden. The views within this article are Brian's own and should not be considered those of Attorney General Wasden or the Idaho Office of Attorney General. Brian also serves as an Advisory Board member of the National Attorneys General Training and Research Institute. Within that capacity, Brian develops curricula and conducts training in the areas of civility, professionalism, ethics, administrative representation, professional development, management, and technology law among others.*

Endnotes

[1] Atwul Gawande, Personal Best, *Top athletes and singers have coaches. Should you? The New Yorker*, October 3, 2011 (available online at: http://www.newyorker.com/reporting/2011/10/03/111003fa_fact_gawande).

The Role of Legal Counsel in Social Media Strategy

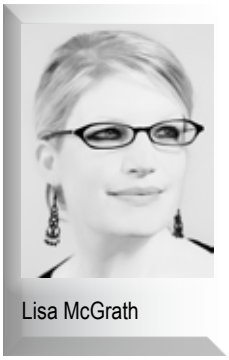
Lisa McGrath
lisa mcgrath llc

After over two years since the FTC issued the Revised Guides, companies have been largely noncompliant. Eighty percent of social media users monitored in company programs do not follow through on marketing disclosures and the FTC has taken note.

As companies rush to deploy social media technologies, legal departments have been left without a seat at the strategy table. A 2011 study of 144 enterprise-class social media programs was conducted. Of the 14 companies identified as advanced in social business, none had legal as part of their corporate social media team.[1] Marketing and corporate communications departments house over 75 percent of the formalized customer-facing social media efforts, and many times, in-house or other counsel do not understand social media well enough to inject legal programmatic review or training.[2] Only within the last few years have companies recognized the critical role of legal in corporate social media strategy and addressed ways to bridge the lawyer-social media manager divide.[3] This social media law update will shine a light on some of the most pressing legal issues corporate clients are facing in modern social media markets.

Social media marketing

In October 2009, the Federal Trade Commission ("FTC") revised the Guides Concerning the Use of Endorsements and Testimonials in Advertising ("Revised Guides") to include promotions on blogs and online social networks such as Facebook and Twitter.[4] Specifically, the Revised Guides require disclosure of material connections (cash and in-kind payments) between advertisers and endorsers of an advertised product if the connection is not reasonably expected by the audience.[5] Advertisers are subject to liability for failing to disclose material connections between themselves and their endorsers, and both advertisers and endorsers may be liable for false or unsubstantiated statements made through endorsements.[6]


Lisa McGrath

Clear and prominent disclosure

After over two years since the FTC issued the Revised Guides, companies have been largely noncompliant. Eighty percent of social media users monitored in company programs do not follow through on marketing disclosures and the FTC has taken note.[7] In 2010, the FTC found that Reverb Communications, Inc. ("Reverb Communications"), a public relations and marketing company hired by video game developers, engaged in deceptive advertising by having employees pose as ordinary consumers posting game reviews at the online iTunes store and failing to disclose that the reviews came from paid employees working on behalf of the developers.[8] In addition to requiring Reverb Communications to take reasonable steps to remove any previously posted endorsement that misrepresented the authors as independent reviewers or endorsers, the FTC also prohibited the company from making any representation about a product or service unless they disclose "clearly and prominently" a material connection when one exists.[9]

Advertiser monitoring

More recently, the FTC fined Legacy Learning Systems, Inc. ("Legacy") $250,000 for using misleading online consumer and independent reviews.[10] Specifically, Legacy advertised using an online affiliate program through which it recruited "review ad" affiliates to promote its courses through endorsements in articles, blog posts, and other online materials. Without clearly disclosing that the affiliates were paid for every sale they generated, the FTC found that Legacy disseminated deceptive advertisements by representing that online endorsement written by affiliates reflected the views of ordinary consumers or independent reviewers.[11] Most importantly, despite the fact that Legacy required its affiliates to sign a contract requiring them to comply with the Revised Guides, the FTC concluded that the contract without monitoring was insufficient because Legacy failed to implement a reasonable monitoring program to ensure that the affiliates clearly and prominently disclosed their relationship to Legacy.[12]

In addition to the $250,000 fine, for the next 20 years, Legacy is required to monitor and submit monthly reports to the FTC about their top 50 revenue-gathering affiliate marketers and make sure that they are following disclosure guidelines.[13]

Safe harbor

Had Legacy implemented a reasonable monitoring program, it may have avoided liability through a safe harbor provision in the Revised Guides. Specifically, the Revised Guides state that "[t]he Commission . . . in the exercise of its prosecutorial discretion, would consider the advertiser's efforts to advise these endorsers of their responsibilities to monitor their online behavior in determining what action, if any, would be warranted."[14] This issue was central to the FTC's investigation of AnnTaylor Stores Corporation ("Ann Taylor").[15]

In that case, Ann Taylor's LOFT division provided gifts to bloggers in exchange for them posting blog content about the LOFT's Summer 2010 collection.[16] The FTC initiated the investigation when the bloggers failed to disclose that they received gifts for blogging about the event. Ultimately, the FTC determined not to recommend enforcement action, among other reasons, because LOFT posted a sign at the preview that told bloggers that they should disclose the gifts if they posted comments about the preview, and more importantly, LOFT adopted a written policy in February 2010 stating that LOFT will not issue any gift to any blogger without first telling the blogger that the blogger must disclose the gift in his or her blog.[17] In a letter to Ann Taylor's

attorney, the FTC stated that it "expects that LOFT will both honor that written policy and take reasonable steps to monitor bloggers' compliance with the obligation to disclose gifts they receive from LOFT."[18]

Brand protection

Fines aside, noncompliance with the Revised Guides can irreparably damage corporate brands. If one googles "Reverb Communications" and "Legacy Learning Systems," the majority of the search results are splashed with FTC investigation and deceptive advertising headlines. Before leveraging Facebook, Twitter, and blogs to execute a paid promotion, companies, public relations firms, and advertising and marketing agencies should have legal disclosure provisions in their social media policies and monitoring programs in place for all relevant employees and emerging media platforms.

Social media account ownership

When CNN fired controversial radio host Nick Sanchez, did Sanchez or CNN own his Twitter account with over 140,000 followers?[19] The cases below attempt to answer that question.

Social media account ownership agreements

In the 2011 case, Ardis Health, LLC v. Nankivell, an employee ("Nankivell") responsible for producing videos, websites, blogs, and social media pages was terminated.[20] Upon termination, Nankivell refused to provide her employer with passwords for its social media accounts and Websites. Prior to termination, Nankivell signed an agreement with her employer transferring ownership in her work product to the employer and requiring the return of all confidential information to the employer upon the employer's request. The employer sued, seeking injunctive relief. Relying on the written agreement, the court held that it was uncontested that the employer owns the rights to the social media accounts and Website access information and that the employer's inability to access and update their sites constitutes irreparable harm.[21] The court ordered Nankivell to provide the access information pending the resolution of the suit.[22]

Misappropriation of trade secrets and conversion

In another case, PhoneDog v. Kravitz, PhoneDog gave former employee Noah Kravitz ("Kravitz") the Twitter account "@PhoneDog_Noah" (the "Account") to transmit written and video content to followers, with the Account eventually generating over 17,000 followers.[23] Kravitz later ended his employment with PhoneDog. PhoneDog requested that Kravitz relinquish use of his Twitter Account and in response, Kravitz changed the Account handle to "@noahkravtiz," and continued to use the Account. PhoneDog alleged that it had suffered at least $340,000 in damages as a result.[24] In a preliminary ruling, the court declined to dismiss the lawsuit, finding that PhoneDog's allegations that Kravitz misappropriated PhoneDog's trade secrets and converted its property by retaining control over the Account were sufficient to state a claim.[25]

It is important for employers to obtain employee agreements regarding social media account ownership, and to retain social media account and website access information.

Unauthorized use

Most recently, in Maremont v. Susan Fredman Design Group, Ltd., Maremont sued her former employer for unauthorized access of her social media accounts.[26] Maremont created a Facebook account and blog for her employer and subsequently suffered an accident. While Maremont was in the hospital, her employer accessed and posted from Maremont's accounts. Maremont sued her employer for, among other things, violations of the Lanham and Stored Communications Act.[27] The court recently denied her employer's motion for summary judgment on the basis of lack of evidence of damages, and the case is moving forward.[28]

It is important for employers to obtain employee agreements regarding social media account ownership, and to retain social media account and Website access information. The only company I have seen address this issue correctly in its social media policy is Dell as set forth below:

> **Social Media Account Ownership**
> This section isn't a Social Media Principle, but it's still important enough to be in this policy. If you participate in Social Media activities as part of your job at Dell, that account may be considered Dell property. If that account is Dell property, you don't get to take it with you if you leave the company – meaning you will not try to change the account name or create a similar sounding account or have any ownership of the contacts and connections you have gained through the account. That doesn't apply to personal accounts that you may access at work, but would certainly apply to all Dell branded accounts created as part of your job.[29]

National Labor Relations Board

The National Labor Relations Board ("NLRB") has been aggressive in investigating and prosecuting unfair labor practices related to employees' use of online social networks. The NLRB reviewed over 129 cases involving social media in 2011.[30] In August 2011, the NLRB issued a report of the most significant social media cases in 2011 in order to provide guidance to employers and practitioners on how the National Labor Relations Act ("NLRA") applies to employees' rights on online social networking platforms.[31] Most frequently before the NLRB were cases alleging that an employer's social media policy was overbroad and restricted employee use of social media, or that an employer unlawfully discharged or disciplined one or more employees over contents of social media posts.

Social media cases

Section 7 of the NLRA, which applies to both unionized and non-unionized employees, protects employees' rights "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection."[32] In American Medical Response of Connecticut, the NLRB filed a complaint that alleged, among other things, that an employer maintained numerous overbroad policies that prohibit employees from "making disparaging, discriminatory, or defamatory comments when discussing the company, or the employee's superiors, co-workers, and/or competitors."[33] The complaint also alleged that the employer asked an employee to prepare a written incident report and denied the employee's request for union representation.[34] After this incident, the employee, along with other employees, criticized her supervisor on Facebook and the employer terminated her.

The Division of Advice (the "Division") issued a memorandum, finding that the employee engaged in protected activity "by discussing supervisory actions with coworkers in her Facebook post," and that the employer's social media policy was overbroad and unlawful because it prohibited employees from making disparaging comments "while discussing the employee's superiors, co-workers, and/or competitors" without making it clear that it did not apply to Section 7.[35] On February 8, 2011, the employer reached a settlement agreement with the NLRB, agreeing to "revise its overly-broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours, and working conditions with co-workers and others while not at work, and that they would not discipline or discharge an employee for engaging in such discussions."[36]

In Lee Enterprises, Inc. d/b/a/ Arizona Daily Star, the managing editor of a newspaper told his reporter-employee to "stop airing his grievances or commenting about the employer in any public forum," instructed him not to tweet about anything work-related, and told him to "refrain from using derogatory comments that may damage the goodwill of the company."[37] Despite this, the reporter posted unprofessional tweets to a work-related Twitter account and the employer discharged him. Although the Division found that the managing editor's collection of statements to the employee could be interpreted to prohibit activities protected by Section 7, it stopped short of finding the statements overbroad, orally promulgated rules. The statements did not constitute overbroad policies, according to the Division, because they were "made solely to the [employee] in the context of discipline, in response to specific inappropriate conduct," and they were not communicated to other employees or characterized as new rules.[38]

The Division also found that the employer did not violate Section 8(a)(1) of NLRA by terminating the reporter for his unprofessional tweets.[39] Section 8(a)(1) provides that it is an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 … ."[40] Some of the tweets that the reporter posted included: 1) "You stay homicidal, Tucson, See Star New for the bloody deets"; 2) "What?!?!? No overnight homicide? WTF? You're slacking Tucson"; and 3) "I'd root for daily death if it always happened in close proximity to Gus Balon's."[41] The discharge did not violate Section 8(a)(1), the Division found, because his tweets did not involve protected concerted activity. Specifically, the posts did not relate to the terms and condition of employment or seek to involve other employees in issues related to employment.[42]

Conclusion

In 2010 alone, the U.S. Equal Employment Opportunity Commission saw more than 99,000 charges of discrimination filed as a result of social-media-background checks.[43] In 2011, the FTC proposed significant revisions to the Children's Online Privacy Protection Rule to account for the evolution of social media technology.[44] As new laws continue to be made in response to online activity in 2012 and beyond, the role of legal in corporate social media strategy is critical to legal compliance for you and your clients.

Specifically, the posts did not relate to the terms and condition of employment or seek to involve other employees in issues related to employment.

About the Author

Lisa McGrath *runs lisa mcgrath llc, an exclusive flat fee law firm that focuses on solving legal problems related to new media, technology, e-commerce, and the Internet. McGrath is a graduate of American University, Washington College of Law in Washington, DC. She is a former commercial litigator in private practice, United States Senate Counsel, and previous law clerk for the Chief Justice of the Idaho Supreme Court. She is also co-founder and program director of Social Media Club Boise and organizer of two Idaho Startup Weekends. McGrath can be reached at mcg@iammcg.com.*

Endnotes

[1] Altimeter Group, Social Readiness: How Advanced Companies Prepare (2011), available at http://www.web-strategist.com/blog/2011/08/31/report-social-media-crises-on-rise-be-prepared-by-climbing-the-social-business-hierarchy-of-needs/ (last visited December 19, 2011).
[2] Id.
[3] SXSW, Bridging the Lawyer-Social Media Manager Divide (2011), available at http://panelpicker.sxsw.com/ideas/view/11198 (last visited December 19, 2011).
[4] See 16 C.F.R. § 255.0 (2009).
[5] 16 C.F.R. § 255.5 (2009)
[6] 16 C.F.R. § 255.1 (2009).
[7] Advertising Age, CMP.LY: Keeping Your Social-Media Marketing Legal (2011), available at http://adage.com/article/digital/cmp-ly-a-start-up-social-media-marketing-legal/231100/?utm_source=pulsenews&utm_medium=referral&utm_campaign=Feed:+AdvertisingAge/LatestNews+(Advertising+Age+-+Latest+News) (last visited December 19, 2011).
[8] See In the Matter of Reverb Communications, Inc., FTC Docket No. C-4310 (December 19, 2011), available at http://www.ftc.gov/os/caselist/0923199/100826reverbagree.pdf.
[9] Id.
[10] See In the Matter of Legacy Learning Systems, Inc., FTC Docket No. C-4323 (December 19, 2011), available at http://www.ftc.gov/os/caselist/1023055/110315llsagree.pdf.
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[13] Id.
[14] See 16 C.F.R. § 255.0 (2009).
[15] Federal Trade Commission, Letter to Kenneth A. Plevan, Esq. (2010), available at http://www.ftc.gov/os/closings/100420anntaylorclosingletter.pdf (last visited December 19, 2011).
[16] Id.
[17] Id.
[18] Id.
[19] RWW, CNN's Social Media Pioneer Gets Fired: What Happens to Rick Sanchez on Twitter? (2010), available at http://www.readwriteweb.com/archives/cnns_social_media_pioneer_gets_fired_what_happens.php (last visited December 19, 2011).
[20] Ardis Health, LLC v. Nankivell, 2011 WL 4965172 (S.D.N.Y. 2011).
[21] Id.
[22] Id.
[23] PhoneDog v. Kravitz, WL 5415612 (N.D. Ca.2011).
[24] Id.
[25] Id.
[26] Maremont v. Susan Fredman Design Group, Ltd., et al., 10 C 7811 (N.D. Ill. 2011).
[27] Id.
[28] Id.
[29] Dell, Global Social Media Policy (2011), available at http://content.dell.com/us/en/corp/d/corp-comm/social-media-policy.aspx (last visited December 19, 2011).
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[31] NLRB, Report of the Acting General Counsel Concerning Social Media Cases (2011), available at http://www.huntonlaborblog.com/uploads/file/NLRB_Provides_Guidance_For_Social_Media.pdf (last visited December 19, 2011).
[32] 29 U.S.C. § 157 (2011).
[33] Advice Memorandum, American Medical Response of Connecticut, Case No. 34-CA-12576 (October 5, 2010).
[34] Id.
[35] Id.
[36] NLRB News Release: Settlement Reached in Case Involving Discharge for Facebook Comments (February 8, 2011).
[37] Lee Enterprises, Inc. d/b/a/ Arizona Daily Star, Case No. 28-CA-23267 (April 21, 2011).
[38] Id.
[39] Id.
[40] 29 U.S.C. § 158 (2011).
[41] Lee Enterprises, Inc. d/b/a/ Arizona Daily Star, Case No. 28-CA-23267 (April 21, 2011).
[42] Id.
[43] Human Resource Executive Online, Social-Media Privacy Concerns Go Global (2011), available at http://www.hreonline.com/HRE/story.jsp?storyId=533342580 (last visited December 19, 2011).
[44] FTC Press Release: FTC Seeks Comment on Proposed Revisions to Children's Online Privacy Protection Rule (2011), available at http://ftc.gov/opa/2011/09/coppa.shtm (last visited December 19, 2011).

OFFICIAL NOTICE
SUPREME COURT OF IDAHO

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

2nd AMENDED - Regular Spring Terms for 2012

Boise. . . . . .January 5
Boise. . . . . January 11, 13, 17, 18, and 20
Boise. . . . . February 8, 10, **14***, 15, and 17

***Oral Argument will be held at**
Boise State University, Special Events Center

Coeur d'Alene. . . . . April 2, 3, 4, 5, and 6
~~**Moscow . . . . . April 5**~~
~~**Lewiston . . . . . April 6**~~
Coeur d'Alene . . . . . May 2 and 3
Lewiston . . . . . May 4
Boise . . . . . May 9 and 11
Twin Falls (Boise) . . . . . .June 4, 6, 8, 11, and 13

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2012 Spring 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

1st AMENDED Regular Spring Terms for 2012

Boise. . . . . .January 10, 12, 19, and 24
~~**Boise. . . . . February 9, 16, 22, and 23**~~
Boise. . . . . March 13 ~~**and 15**~~
Moscow . . . . . March 20 and 21 ~~**22**~~
Boise. . . . . .April 10, 17, 19, 24, and 26
Boise . . . . . .May 8, 10, 17, and 22
Boise. . . . . June 5, 7, 12, and 14

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2012 Spring 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 Supreme Court
Oral Argument for February 2012

Wednesday, February 8, 2012 – BOISE
8:50 a.m. A & B Irrigation District v. IDWR .....#38403/38421/38422-2011
10:00 a.m. The Watkins Co. v. Michael Storms .....#37685-2010
11:10 a.m. Hurtado v. Land O'Lakes, Inc. .....#38406-2011

Friday, February 10, 2012 – BOISE
8:50 a.m. State v. Koivu .....#38106-2010
10:00 a.m. Ball v. City of Blackfoot .....#38530-2011
11:10 a.m. Friends of Minidoka v. Jerome County .....#38113-2010

Tuesday, February 14, 2012 – Boise State University in Special Events Center
9:15 a.m. Thomas O'Shea v. High Mark Development, LLC .....#37869-2010
10:40 a.m. Hestead v. Western Surety Co. .....#38467-2011
1:40 p.m. Shore v. Bokides .....#38454-2011

Wednesday, February 15, 2012 – BOISE
8:50 a.m. Arambarri v. Armstrong .....#38351-2010
10:00 a.m. Brooke A. Stark v. Assisted Living Concepts .....#38715-2011 (Industrial Commission)
11:10 a.m. Bennett v. Patrick .....#38138-2010

Friday, February 17, 2012 – BOISE
8:50 a.m. IDHW v. Jane Doe (Petition for Review) *EXPEDITED* .....#39360-2011
10:00 a.m. Arregui v. Gallegos-Main .....#38496-2011
11:10 a.m. Morrison v. Northwest Nazarene University .....#37850-2010

Idaho Court of Appeals
Oral Argument for March 2012

Tuesday, March 13, 2012 – BOISE
9:00 a.m. State v. Watkins .....#37906-2010
10:30 a.m. Hansen v. Dept. of Transportation .....#38435-2011
1:30 p.m. Mecham v. Dept. of Transportation .....#38502-2011

Tuesday, March 20, 2012 – MOSCOW
9:00 a.m. Beckvold v. Barnes .....#38231-2010
10:30 a.m. Arthur v. Dept. of Health & Welfare .....#38399-2011
1:30 p.m. Peck v. Dept. of Transportation .....#38542-2011

Wednesday, March 21, 2012 – MOSCOW
9:00 a.m. State v. Giovanelli .....#38134-2010
10:30 a.m. State v. Kramer .....#38786-2011

Please Note:
There are no oral arguments scheduled for February 2012

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

CIVIL APPEALS

Attorney fees and costs

1. Whether the district court erred in determining the Pooles were not the prevailing party.

Poole v. Davis
S.Ct. No. 38877
Supreme Court

2. Whether the court erred in failing to find, pursuant to I.C. § 12-117, that SE/Z was the overall prevailing party entitled to an award of fees and costs against the Division of Public Works after SE/Z recovered $225,000 in a settlement with DPW shortly after the court barred DPW's cross-claims and all of SE/Z's claims remained viable.

Hobson Fabricating Co. v. Department of Administration
S.Ct. No. 38202
Supreme Court

Evidence

1. Did the court fail to properly apply the clear and convincing standard in finding the Sniders were entitled to imposition of a constructive trust?

Snider v. Arnold
S.Ct. No. 38572
Supreme Court

New trial

1. Did the district court abuse its discretion when it ordered a new trial?

Berry v. McFarland
S.Ct. No. 37951
Supreme Court

2. Was it error to deny plaintiff's motion for new trial, additur or judgment notwithstanding the verdict?

Harper v. Drzayich
S.Ct. No. 38521
Court of Appeals

3. Did the court err in denying the County's first motion for new trial by determining that the plaintiff's ex parte contact and personal relationship with the trial court's deputy clerk did not prevent the county from having a fair trial?

Athay v. Rich County, Utah
S.Ct. No. 38683
Supreme Court

Post-conviction relief

1. Did the district court err when it summarily dismissed Hoffman's claims of ineffective assistance of counsel?

Hoffman v. State
S.Ct. No. 37938
Court of Appeals

2. Did the district court err when it found Parvin could not raise his ineffective assistance of counsel claim as to his Rule 35 motion in post-conviction because it could have been raised on direct appeal?

Parvin v. State
S.Ct. No. 38295
Court of Appeals

3. Whether the district court erred in denying Dunlap's claim of ineffective assistance of counsel for failure to adequately investigate and present mitigating evidence, and failure to rebut the prosecution's case in aggravation.

Dunlap v. State
S.Ct. No. 32773/37270
Supreme Court

Standing

1. Whether the court erred in granting GEICO's motion to dismiss under Rule 12(b)(6) when it held that Brooksby lacked standing to bring a declaratory judgment action against GEICO.

Brooksby v. GEICO General Ins. Co.
S.Ct. No. 38761
Supreme Court

Summary judgment

1. Whether the court erred in granting Jones' motion for summary judgment, by holding that Grazer had failed to timely execute on or renew the judgment.

Grazer v. Jones
S.Ct. No. 38852
Supreme Court

2. Whether the district court erred in its application of I.C. § 68-110.

Beus v. DBL Company, Inc.
S.Ct. No. 38520
Supreme Court

3. Whether the district court erred in ruling the action for professional malpractice was barred by the applicable statute of limitation.

Reynolds v. Trout Jones Gledhill Fuhrman
S.Ct. No. 38933
Supreme Court

Tax cases

1. May Pacificorp deduct obsolescence from the cost approach to value without offering evidence of the cause of the obsolescence and that the asserted obsolescence actually affects the property?

Pacificorp v. Idaho Tax Commission
S.Ct. No. 38307
Supreme Court

Termination of parental rights

1. Whether the court erred in its conclusion that John Doe abandoned his minor child.

Jane Doe v. John (2011-19) Doe
S.Ct. No. 39393
Supreme Court

Water law cases

1. Whether the Director erred in failing to apply the constitutionally protected presumptions and burdens of proof when he used a "minimum full supply" rather than the decreed quantity in determining material injury to the Coalition's senior surface water rights.

A&B Irrigation v. Idaho Ground Water Approp.
S.Ct. No. 38191/38192/38193
Supreme Court

CRIMINAL APPEALS

Due process

1. Did the district court err when it denied Rivera's motion for mistrial?

State v. Rivera
S.Ct. No. 38390
Court of Appeals

Evidence

1. Was reversible error committed when testimony came in which had been prohibited by the court's ruling pursuant to I.R.E. 404(b) regarding inadmissible evidence?

State v. Moskios
S.Ct. No. 38241
Court of Appeals

2. Did the district court err in allowing an officer to present testimony regarding Johnstone's social security number and date of birth?

State v. Johnstone
S.Ct. No. 37439
Court of Appeals

Jurisdiction

1. Whether the district court erred when it concluded that a magistrate court in a juvenile proceeding has ongoing jurisdiction to amend or alter the amounts to a final judgment.

State v. Sparhawk
S.Ct. No. 38841
Supreme Court

Search and seizure – suppression of evidence

1. Did the district court err when it concluded the initial search was not reasonable under the Fourth Amendment as a valid probation search?

State v. Robinson
S.Ct. No. 38816/38839
Court of Appeals

Substantive law

1. Did the trial court commit reversible error when it declined to exclude evidence as a discovery sanction?

State v. Kramer
S.Ct. No. 38786
Court of Appeals

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

My Inbox: Follow-Up Advice to Readers

Tenielle Fordyce-Ruff
Smith, Fordyce-Ruff, & Penny PLLC

I love receiving a new issue of *The Advocate* because after every issue a few readers will take the time to drop me an email about my latest article. I have my favorites. For instance, one reader (who was not my mom) wrote: "You have now written my favorite *Advocate* article ever!" High praise indeed.

I am not writing, however, to convince you that there are people who actually read my column. I'm writing because several readers sent me questions and comments and, though I try to respond to all of them, I thought the rest of you might have had some of the same questions, but not enough time to ask. So, in the interest of sharing, here are a few of my favorite follow-up discussions regarding essays from the last year.

Beginning sentences with conjunctions

Tenielle Fordyce-Ruff

One of my big pet peeves is when someone insists on grammar rules that simply aren't rules. So, in the May 2011 issue, I addressed grammar myths, including beginning sentences with "and" or "but." One reader wrote to inquire whether he could correctly begin a sentence with "so." My response: "Thank you so much for writing me. I love to hear from the readers. Yes, you may feel confident that it is not an error to begin a sentence with 'so.' I caution you, however, that some readers find the tone of this very casual, so always consider your audience."

Although my May essay addressed using "and" or "but" to begin a sentence, it is perfectly acceptable to use conjunctions to begin sentences. To heed the advice of *The Redbook*: "forget the idea that a conjunction should never start a sentence. Any writer can benefit from unlearning such baseless nonsense."

Beginning sentences with "hopefully"

Every year I ask my in-laws for a new Chicago Manual of Style for Christmas, and I inevitably get a sweater. After another year without a writing guide under the tree I wrote: "*Hopefully, that present is the newest edition of the Chicago Manual of Style!*" This appeared in my February essay on joining independent clauses. One reader wrote to tell me that AP style does not allow for the use of "hopefully" to begin a sentence and to see what my take on that issue was. My reply:

I agree that language sticklers dislike beginning sentences with "hopefully." Technically, the adverb "hopefully" can modify a whole sentence, and so it is correct in some instances. Sentence adverbs have been common in English usage for about 500 years. Also, "hopefully" has meant "it is to be hoped" in standard English usage for some time now (around 400 years), although some language sticklers insist is means only "in a hopeful fashion."

I dislike beginning a sentence with "hopefully" when it could create ambiguity. When, however, the context makes the writer's meaning clear to the reader and when it is used in less formal settings (and I do hope to use a less formal style in my essays!), I personally have no objection to its use. Moreover, I agree with Bryan Garner that the argument that it is never correct to begin a sentence with "hopefully" is dead. I think, though, that my agreement is made with more enthusiasm than his reluctant admission.

So, by all means you can continue to avoid ever beginning a sentence with it, and I suggest not doing so in formal writing (like to a court).

HOPEFULLY, this has helped!

Dashes and colons: more advice

I frequently get questions relating to how to use "scary" punctuation marks (those that readers see, but don't really know how to use), so I decided to provide some guidance. In the March/April issue I addressed creating emphasis in your writing by using punctuation.

> *Heed the advice of The Redbook: "forget the idea that a conjunction should never start a sentence. Any writer can benefit from unlearning such baseless nonsense.*

One reader wrote to ask if I could address how to correctly form a dash (rather than a hyphen) and when to capitalize the word following a colon. I promised him that I would address the issue in a future essay, so here goes:

En dashes, em dashes, and hyphens (Oh my!)

There are three typed marks that can create confusion here: a hyphen (-), an en dash (–), and an em dash (—). Many writers have seen the different marks, but don't understand the difference between them or don't know how to form en and em dashes using their word processing program.

The traditional dash, or em dash, (—) is the longest of the three marks. Depend-

ing on your word processing program, you can find em dashes in the special character menu, or you can sometimes form one by typing two hyphens together without a space between them and the program will automatically convert this to an em dash. Em dashes are used to set off lists and create emphasis in your writing. Don't place spaces around an em dash—you join it to the words before and after.

An en dash (–) is found in the special character menu and is slightly longer than the hyphen. It is used to connect numbers (and occasionally words) and means "to."

I will be on vacation from December 23, 2011–January 2, 2012.

The en dash used to be found only in typeset documents, so many writers continue to substitute the hyphen key.

A hyphen (-) is the shortest of the three marks. It is used to join certain compound words, such as modifiers: family-car doctrine, price-fixing contract.

Capitalization following colons

The "rule" here is somewhat up for debate. If what follows the colon is an independent clause (a complete, correct sentence), then you may choose to capitalize the first word. There are good arguments for both capitalization and non-capitalization. If you leave the first word lower case, the colon does a better job of relating the two independent clauses.

The witness started to get irritable: she was tired and wanted to go home.

Capitalization creates slightly more emphasis on the second independent clause.

The witness started to get irritable: She was tired and wanted to go home.

Whichever you choose, be consistent throughout the document. And if a phrase follows the colon, never capitalize the first word.

The defendant's trial was originally scheduled for October 25, 2011: ninety-three days after his arraignment.

Serial commas

Invariably, the punctuation mark that garners the most comments is the comma. Many readers have let me know how much they struggle with commas and have thanked me for the helpful tips.

Now, I made it known early on that I use serial commas (and I mentally insert them into lists when I'm speaking, so you could say I'm pretty committed to the idea of serial commas). One reader was not such a big fan of serial commas and asked me whether my recommendation to use serial commas as a bright line rule was appropriate.

I agree and acknowledge that, technically, it can be proper to create a list without placing a comma between the last two items. Indeed, many people believe that the conjunction used in the list takes the place of the last comma. In many instances, this is true. But when it is not correct, you can create unnecessary consternation:

I would like to thank my parents, Mother Teresa and the Pope.

In this example, not using a comma between the last two items in a list creates ambiguity. Did Mother Teresa and the Pope conceive me, or did I mean to thank four people: Mom, Dad, Mother Teresa, and the Pope? Without a serial comma the reader cannot know for sure.

Now you understand how leaving off a serial comma can create ambiguity, but you might still be wondering why I am so committed to using them in every list instead of just those that could create confusion. My answer: Better safe than sorry. Serial commas never create confusion, but omitting them (while technically proper in some cases) can. My default habit of using serial commas saves me from an additional step in the editing process to ensure that I haven't created confusion with my comma usage (or non-usage in this case).

Conclusion

I hope that this shared mail-box of answers has addressed some lingering questions you may have had about grammar and usage but were afraid to ask. In the future please don't hesitate to let me know your thoughts and questions.

About the Author

Tenielle Fordyce-Ruff *is a partner at Rainey Law Office. Her practice focuses on civil appeals. She was a visiting professor at University of Oregon School of Law teaching Legal Research and Writing, Advanced Legal Research, and Intensive Legal Writing and, prior to that, clerked for Justice Roger Burdick of the Idaho Supreme Court. While clerking for Justice Burdick, she authored Idaho Legal Research, a book designed to help law students, new attorneys, and paralegals navigate the intricacies of researching Idaho law. You can reach her at tfr@raineylawoffice.com.*

Sources

- Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* at 250, 252-53 (3d ed. 2009).
- Deborah E. Bouchoux, *Aspen Handbook for Legal Writers: A Practical Reference* at 43, 47-48 (2005).
- Bryan A. Garner, *The Redbook: A Manual on Legal Style* at 16, 34-36, 143 (2d ed. 2006).
- Bryan A. Garner, *Garner's Dictionary of Legal Usage* at 414 (3d ed. 2011).
- Terri LeClercq, *Guide to Legal Writing Style* at 75, 78 (3d ed. 2004).

IN MEMORIAM

Hon. Earl L. McGeoghegan
1944 - 2011

Judge Earl L. McGeoghegan, 67, of Lewiston, died Thursday, Dec. 22, 2011, at St. Joseph Regional Medical Center in Lewiston.

Judge McGeoghegan was a longtime attorney for the Lewiston Orchards Irrigation District. He had been a judge for the Nez Perce Tribe since 1992, and was assistant attorney for the city of Lewiston from 1988 to 1992.

In addition to the Nez Perce Tribal Court, Judge McGeoghegan also served the following tribes: Coeur d'Alene Tribal Court, Colville Confederated Tribal Court, Spokane Tribal Court, Salish-Kootenai Tribal Court and Quinault Tribal Court.

A retired U.S. Marine with 22 years of active duty, Judge McGeoghegan will be laid to rest at the Arlington National Cementary.

A memorial service was held on at the Pi-Nee-Waus Community Center in Lapwai.

Patrick J. Inglis
1960 - 2011

Patrick James Inglis, 51, Boise, Idaho passed away unexpectedly on Dec. 23, 2011. Pat was born on Sept. 7, 1960 in Boise, Idaho to Richard and Sandra Inglis.

A true sports enthusiast, he played football all through his school years for the Optimist, West Junior High and Borah High School Football teams. Though he loved football, Pat's real passion was for the game of golf. Thursday nights were the highlight of his week; he never missed league night! A long time member of Crane Creek Country Club, he was well known on the golf course, participating in (and often winning!) many local golf tournaments. He especially enjoyed teaming up with his father, brother in-law, Pat Ryan and friends.

A senior partner with Sasser and Inglis at the time of his passing, Pat attended the University of Washington, receiving a BA in Accounting & Business Finance. To pursue his law degree, Pat attended the University of Idaho and earned his Juris Doctorate. He was admitted to the Idaho State Bar in 1986. He began his legal career as an intern law clerk to the Honorable J. Blaine Anderson, and later served as law clerk to the Honorable Charles Donaldson, Chief Justice of the Idaho Supreme Court. He joined the law firm now known as Sasser & Inglis in 1987. Pat was a member of the Idaho State Bar, American Bar Association, Defense Research Institute, Idaho Association of Defense Counsel, Boise Insurance Adjusters Association, and American Inn of Court No. 130. He was past Chairman of the Board of Boise Neighborhood Housing Services, Inc.

Patrick J. Inglis

Pat met the love of his life Beverly in 1989 and they were married in 1992. Pat very much loved his wife and three boys, Gabe, A.J. and Jackson Inglis. He was so proud of them all! He also held a special interest in Autism awareness and research because of his family's personal journey with Jackson. With Pat's legendary soft spot for animals, lucky were the animals that shared their home and any strays that happened by.

Pat is preceded in death by his mother, Sandra Inglis and Grandparents Mary and James Dunn and Jerry "Dadaw" Inglis.

To share memories with the family please visit Pat's memorial webpage at www.cloverdalefuneralhome.com.

OF INTEREST

Gardner and Breen adds partner

Gardner and Breen Law Offices is now Gardner Breen & Veltman Law Offices practicing in Boise, Idaho.

Susan R. Veltman

The firm is proud to announce that both Lora Rainey Breen and Susan R. Veltman recently received the Martindale Hubble AV rating. Ms. Breen was recently promoted to Lieutenant Colonel in the JAG Corps, Idaho Army National Guard. Ms. Veltman is now serving as a member of the Idaho Industrial Commission's Advisory Committee. Alan R. Gardner was recently elected to the College of Workers' Compensation Lawyers, a national honorary society for those practicing in the workers' compensation field.

OF INTEREST

Firm undergoes name change and adds associate

Farley Oberrecht West Harwood & Burke, P.A. announces its new name.

The firm now in its 24th year handles litigation, business, insurance, healthcare, construction, labor and employment matters.

Slade D. Sokol recently joined the Boise law firm of Farley Oberrecht West Harwood & Burke, P.A. as an associate attorney. Slade received his undergraduate degree in Political Science from Boise State University in 2003 before going to law school at the Michigan State University College of Law, where he graduated in the top 10% of his class in 2011. Mr. Sokol is licensed to practice law in all Idaho courts, including the United States District Court for the District of Idaho.

Slade D. Sokol

Farley Oberrecht West Harwood & Burke, P.A. is located at, 702 W. Idaho Street, Ste. 700 or PO Box 1271, Boise, ID 83701, telephone (208) 395-8500 or on the web at www.farleyoberrecht.com.

Final Licensing Deadline

The final licensing deadline is March 1, 2012. Remember to include the late fee payment – Active/House Counsel: $50 or Affiliate/Emeritus: $25. On March 2, 2012, the names of all attorneys who have not paid their licensing fees will be submitted to the Idaho Supreme Court for license cancellation. If you have questions please call the Membership Department (208) 334-4500 or astrause@isb.idaho.gov.

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Law Foundation receives $66,000 in donations in 2011

In 2011 the Idaho Law Foundation received over 600 contributions, raising nearly $66,000. These donations include gifts to the ILF General Fund as well as donations directed to Idaho Volunteer Lawyers Program, Law Related Education, and the Endowment Fund.

The Idaho Law Foundation's staff and Board of Directors would like to thank those who contributed for their generosity. If you would like to make a donation or have any questions about the Idaho Law Foundation's fund development opportunities, please contact, Carey Shoufler, Development Director, at (208) 334-4500 or cshoufler@isb.idaho.gov.

Mock Trial Judges needed for 2012 Mock Trial Competition

The Law Related Education Mock Trial Program needs judges for the 2012 competition. Competition staff is currently recruiting judges and attorneys to judge for regional and state competitions. Competition dates and times are as follows:

- Saturday, March 3, 2012: Regional Competition at the Canyon County Courthouse in Caldwell from 8:00 a.m. - 5:00 p.m.
- Saturday, March 10, 2012: Regional Competition at the Kootenai County Courthouse in Coeur d'Alene from 8:00 a.m. - 5:00 p.m.
- Saturday, March 10, 2012: Regional Competition at the Bannock County Courthouse in Pocatello from 8:00 a.m. - 5:00 p.m.
- Wednesday, March 21: First Night of the State Quarterfinal Competition at the Ada County Courthouse in Boise from 4:30 - 10:30 p.m.
- Thursday, March 22: Second Night of the State Quarterfinal Competition at the Ada County Courthouse in Boise from 4:30 - 10:30 p.m.

This year, mock trial teams will have the opportunity to try a civil case in which a celebrity sues a local long term care facility for the death of the celebrity's spouse, tragically killed in a particularly vicious bingo match, after being hit over the head with a bingo cage.

Please consider volunteering your time to help make this year's mock trial competition successful for Idaho students. Contact Carey Shoufler at (208) 334-4500 or cshoufler@isb.idaho.gov if you are interested in volunteering.

DONATE NOW

Idaho Law Foundation now accepting donations online

Since January, the Idaho Law Foundation has been able to accept donations online. The secure site, run by the Access Idaho, can accept donations for ILF general support as well as donations directed to Idaho Volunteer Lawyers Program and the Law Related Education Program. To make a donation online, visit www.idaholawfoundation.org and click the "Donate Now" button on the front page. For questions about donating to the Idaho Law Foundation, contact Carey Shoufler at (208) 334-4500 or cshoufler@isb.idaho.gov.

MCLE Extension Deadline

If you did not complete your MCLE credits by the end of 2011, you can request an MCLE extension until March 1, 2012. The extension fee is $50 and may be included with your licensing payment. For additional credits, visit our website at www.isb.idaho.gov for information on upcoming live courses, rental programs and online courses. Contact the MCLE Department at (208) 334-4500 or jhunt@isb.idaho.gov if you have any questions.

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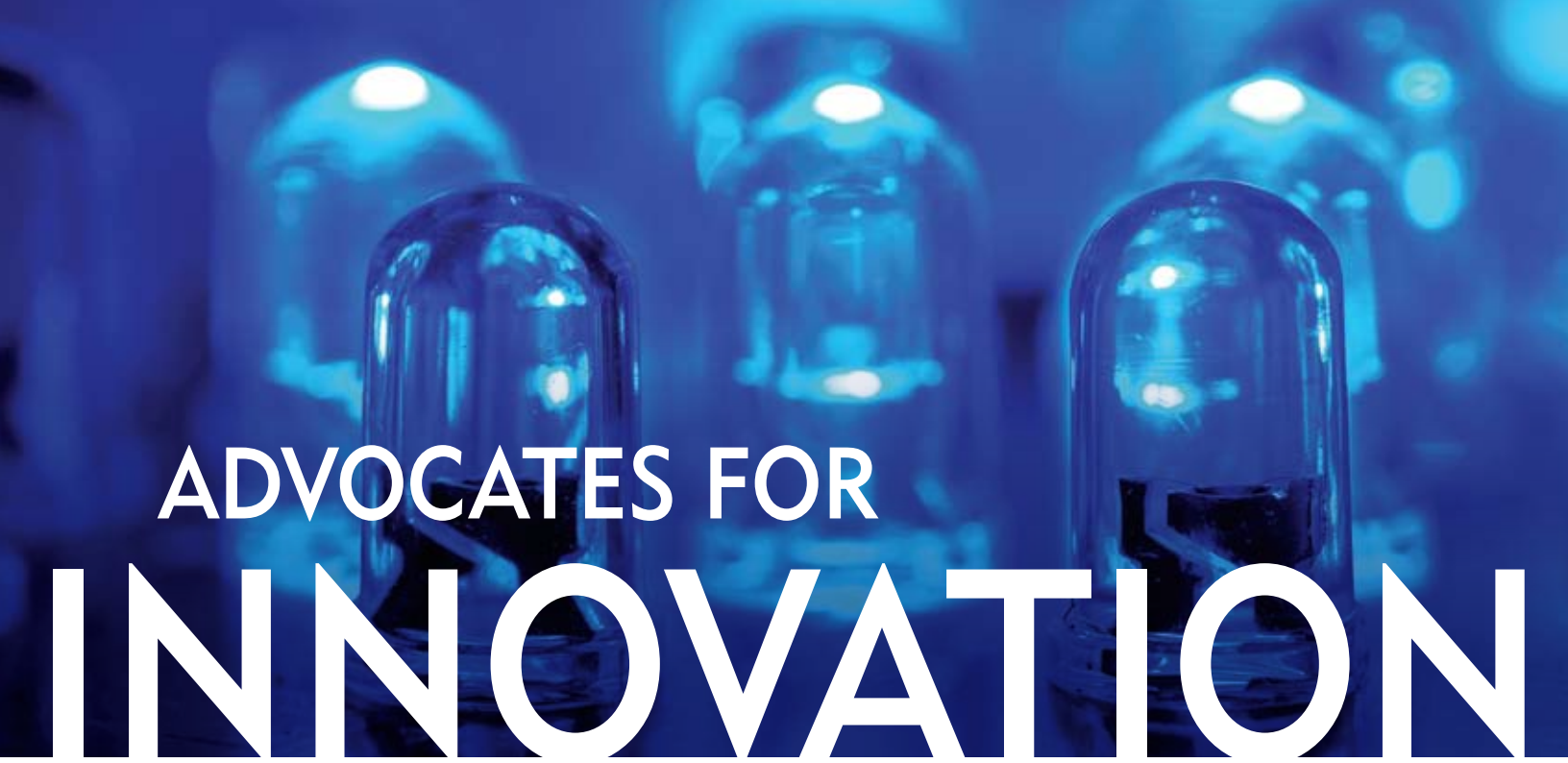

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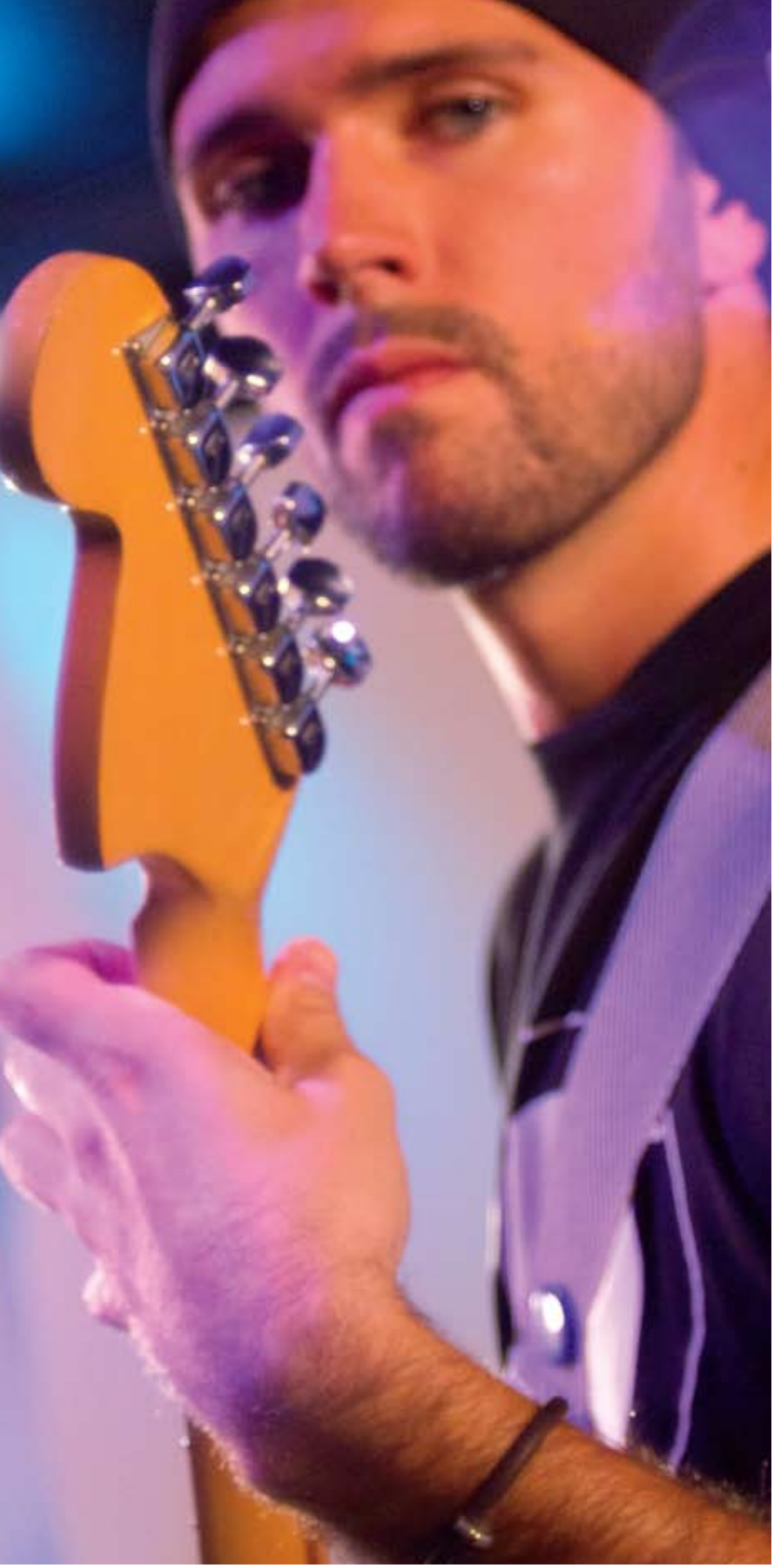

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