The Advocate

Official Publication
of the Idaho State Bar
Volume 53, No. 2
February 2010

Beware arbitration in China

Could rulings liberate Apple's iPhone?

Attorney websites fall under Idaho Rules of Professional Conduct

New web domain names challenge cyber territory

Make your law practice profitable

The trouble with 'shall'

This issue of *The Advocate* is sponsored by the **Intellectual Property Law Section**

The Advocate

The Official Publication of the Idaho State Bar
53 (2), February 2010

Feature Articles

Columns

News and Notices

On the Cover

Driving toward Boise from Bogus Basin on a January day, Boise attorney Lisa Shultz took this photograph which captures a sea of clouds with the Boise foothills as a coastline. Shultz is an avid photographer and her work is profiled at http://bouncelightphotography.zenfolio.com.

Section Sponsor

This issue of *The Advocate* is sponsored by the Intellectual Property Law Section.

Editors

Special thanks to the February *The Advocate* editorial team: John Zarian, Brent Wilson, Sara Marie Berry and Sam Laugheed.

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.

IDAHO LAW REVIEW SYMPOSIUM 2010
ENERGY INDEPENDENCE:
CHALLENGES FACING THE WEST IN ADOPTING ALTERNATIVE AND RENEWABLE ENERGY RESOURCES

APRIL 9, 2010
BOISE CITY HALL | CITY COUNCIL CHAMBERS
150 N. CAPITOL BOULEVARD | BOISE, IDAHO

The Idaho Law Review Symposium 2010 will bring together an interdisciplinary panel of legal, scientific, and business experts to discuss issues related to the sustainable development of alternative and renewable energy sources in the West. Topics will include: (1) the impacts that energy regulation and environmental laws have on the development of alternative energy sources, (2) the challenges faced in the transmission and transportation of renewable energy, and (3) how new energy sources can be used to create sustainable communities.

For more information about this event, including registration information, CLE credits, and sponsorship opportunities please visit: *www.lawreview.uidaho.edu/advisory.html*

The Advocate
Official Publication of the Idaho State Bar

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Attend 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.

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.

On-line On-demand Seminars
Pre-recorded seminars are available on-demand through our on-line 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.

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.

Idaho Law Foundation 2010 CLE Schedule

MARCH

March 12
Handling Your First or Next Employment Law Case
Law Center, Boise
2.0 CLE Credits
(RAC) Webcast statewide

APRIL

April 28
Idaho Practical Skills
Boise Centre, Boise
Credits TBD (5-6 credits anticipated)

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

SAVE THE DATE

July 14-16
Idaho State Bar Annual Conference
Idaho Falls, Idaho

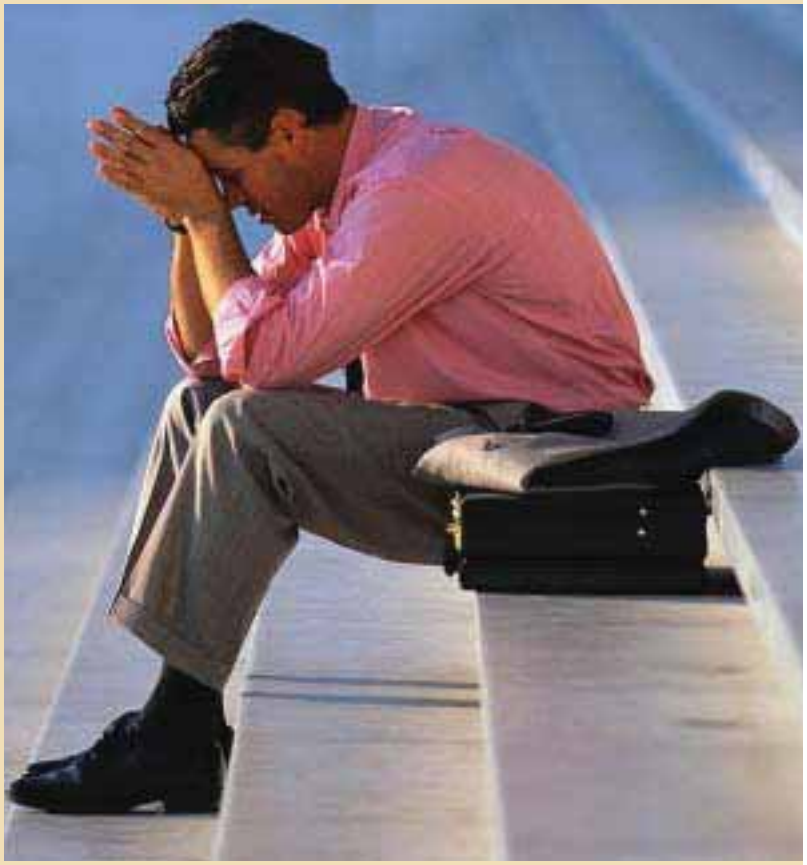
October 1
Idaho Practical Skills
Boise Centre, Boise
Credits TBD (5-6 credits anticipated)

Feeling Stressed Out?

A lawyer's life involves deadlines, frustrations, and demands. For many, living under stress has become a way of life. Occasional stress can help you perform under pressure and motivate you to do your best. But when you're constantly operating in emergency mode, your mind and body pay the price.

At a certain point, stress stops being helpful and starts causing major damage to your health, your mood, your productivity, your relationships, and your quality of life. Living under constant pressure can lead to depression and alcohol or substance abuse.

The Idaho Lawyer Assistance Program offers confidential 24-hour help to lawyers who are experiencing problems associated with alcohol and/or substance abuse and other mental health issues related to stress.



Contact Southworth Associates at

(866) 460-9014

or one of the Volunteers from the Idaho Lawyer Assistance Program for a confidential peer consultation:

Hon. Thomas Joseph Ryan
Caldwell, (208) 454-7371

David Samuelson
Boise, (208) 344-7676

Thomas Lopez
Boise, (208) 342-4300

Hon. Daniel Meehl
Twin Falls, (208) 733-8310

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Boise, (208) 841-5634

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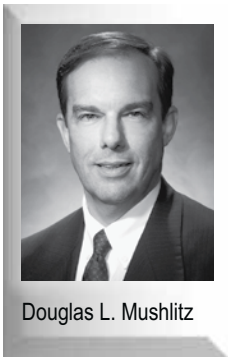
IDAHO STATE BAR

President's Message

Light Years from Then: Thoughts on the Past, Present and Future of the Business of Law

The firm where I practice, Clark & Feeney, has existed in one form or another for over one hundred years in the town of Lewiston, Idaho. A hundred years ago, a client walking into this office would probably be personally acquainted with the lawyer who would represent him, as well as the associate doing legal research. He would probably base his decision about representation and compensation upon those personal relationships, and to some degree, trust in the justice and reasonableness of the legal system. An attorney could build his business on skills in the courtroom, a personal reputation and some face time in the bar with his neighbors.



Douglas L. Mushlitz

A century later, as in so many areas of life, the business of practicing law either is, or soon will be light years away from our traditional picture. For many of you reading this article, that is old news. For others, the new year, and the beginning of a new decade, may present a worthy opportunity to evaluate the business of legal practice. Regardless, the economy in this immediate present may nudge us all to consider some factors that affect our practice, from a business perspective.

My reputation may be tied more to Facebook, than to face time.

The advent of social and business networking sites such as LinkedIn, Facebook and Twitter present an opportunity for us to create face time, online, where many prospective clients prefer to first meet us. That prospective client may want to know what other site users are tweeting about our firm. Or, she may use a search engine, such as Google or Yahoo, to locate my firm's website, before calling my office for an appointment. She will probably check out what practice areas we offer, and try to get a feel for our personalities from our website. I cannot afford to ignore my online presence and reputation. Have you Googled yourself lately?

My office may transition from pushing paper to pushing PDF's.

We are at times conflicted by technology and the role it plays in our lives. I have attended presentations where speakers have posed the philosophical – and practical question of whether technology has actually made our lives any easier, or any more efficient. Given the pervasiveness and multitude of technologies that we use daily, the question of how to make them work for us, rather than finding ourselves slavishly working for them, is a personal and business challenge that bedevils most of us.

Have you evaluated the technologies you use lately? Have you considered organizing your files using paperless software or whether videoconferencing can save costs? Does dictation, voice recognition software or a third alternative make the most sense? Will complying with electronic discovery requests or electronic filing requirements require some skill-building? Have you talked with other lawyers who are technologically savvy, and considered what electronic mediums work for you – rather than the other way around? These are timely questions.

The client may be wavering between downloading a form and hiring me.

In this economy, competition is stiff. In order to save on fees, the client that came to my firm yesterday, may go to legalzoom.com or cybersettle.com, for a less expensive alternative. The competition does not just come from form banks or the office down the street, either. It may be in the next state – or the next country. Idaho has reciprocal admission agreements with more than half of the States. Consideration is now being given of a proposal to adopt a uniform bar examination. The General Agreement in Trade for Services Treaty poses avenues for multi-jurisdictional practices: this would make it much easier for lawyers to practice across national boundaries. This may be a valuable time to consider ones' advertising, professional identity and mission statement. What unique qualities or services does your practice offer? Are those same qualities or services the ones most required by your prospective clients at this time?

The "associate" doing legal research for the brief that is due next week may be working in India.

Some qualities are not unique to attorneys in the United States, and one of those is the ability to do online legal research, and to convey those results in English. There are one million lawyers in India who speak English, are trained in the common law, and are willing to work for a fraction of the cost posed by their U. S. counterparts. Globalization and outsourcing are not just controversial questions for car companies. Have you considered outsourcing's possible effect upon the quality, efficiency, overhead and costs to the client in your firm?

Some things never change.

Coming full circle on this business planning stroll, I believe there are some truths that are timeless. When that prospective client walks into your office, she needs to see a face that, based upon her experience with you, represents compassion, competence and professionalism. That isn't the product of either Facebook, or Legalzoom. When she looks at her bill and then spends her money on your services, she will want a reason to believe that your time was spent wisely. Only you can create efficiency and quality from the arrays of technology, support systems and staffing available. At the end of this decade, when you look back on the changes in your practice, hopefully the adversity and opportunities pre-

sented will have brought about changes for the better in our technology, offices and business practices.

About the Author

Douglas L. Mushlitz *is a partner in the Lewiston Law Firm of Clark & Feeney. In 1982 he received a Bachelor's Degree in Accounting & Business Administration from Idaho State University. He attended the University of Idaho College of Law, where he received his Juris Doctor Degree in 1985. He was admitted to practice before the state and federal Courts in Idaho in 1985; and was subsequently admitted to practice before the U. S. Ninth Circuit Court of Appeals in 1990, and the U. S. Supreme Court in 1995.*

Doug and his wife, Anne, reside in Lewiston. Anne is Health Manager for ATK. He has two daughters, Morgan and Allison. Doug is a member of the Board of Directors of Potlatch No. 1 Federal Credit Union, is a member of the Board of Directors for the Lewiston Roundup Association, and is a founding member of the Board of Directors for the Gina Quesenberry Breast Cancer Foundation, Inc. His personal interests include travel, golf, sports, and outdoor activities.

Doug is a former President of the Second Judicial District Bar Association, and is a member of the Idaho Trial Lawyers Association. In January, he became President of the Idaho State Bar Board of Commissioners.

DISCIPLINE

A. ELIZABETH BURR-JONES
(Public Reprimand)

The Professional Conduct Board of the Idaho State Bar has issued a Public Reprimand to Burley lawyer, A. Elizabeth Burr-Jones, based on professional misconduct.

The Professional Conduct Board Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding, in which Ms. Burr-Jones admitted that her conduct violated Idaho Rules of Professional Conduct 1.3 ["Diligence"] and 1.4 ["Communication"] with respect to one client matter and Idaho Rules of Professional Conduct 1.4 ["Communication"] and 1.16(d) ["Upon termination of representation, a lawyer shall refund any advance payment of fee that has not been earned or incurred"] with respect to another client matter.

This public reprimand relates to Ms. Burr-Jones' representation of two different clients. The first matter related to a settlement of a personal injury case. In April 2006, the case settled and the check was issued, endorsed, and deposited in Ms. Burr-Jones' trust account. Ms. Burr-Jones was to negotiate and pay her client's medical bills related to the accident. Despite her client's efforts to contact her, Ms. Burr-Jones did not communicate with her client about the status of the case or provide a settlement statement or check until August 2007, after her client had already paid the overdue medical bills. Ms. Burr-Jones did not pay any medical expenses on her client's behalf from April 2006 to August 2007. She did not act with reasonable diligence and promptness after the case settled, and did not communicate with her client about the status of those medical expenses or the status of his settlement proceeds, Ms. Burr-Jones did pay her client the full amount of the settlement proceeds due in August 2007.

In the second matter, Ms. Burr-Jones' client paid a retainer for a child custody case in December 2007. Shortly after that, the client called Ms. Burr-Jones' office and advised he had decided not to pursue the matter, terminated representation and requested a refund. Thereafter, the client called Ms. Burr-Jones' office a number of times but did not speak with Ms. Burr-Jones or receive a return phone call. In an August 2008 letter, the client requested a full refund or an accounting, but did not receive a response. After filing a grievance in November 2008, Ms. Burr-Jones refunded the full amount of the retainer to her client.

The public reprimand does not limit Ms. Burr-Jones' 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.

S. CRISS JAMES
(Suspension/Withheld Suspension/Probation)

On December 29, 2009, the Idaho Supreme Court issued a Disciplinary Order suspending S. Criss James from the practice of law for eleven months, with all but 60 days withheld, and placing him on Bar Counsel probation following reinstatement.

The Idaho Supreme Court's Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. James admitted that he violated I.B.C.R. 505(b) [Criminal conduct], I.R.P.C. 8.4(b) [Commission of a criminal act] and I.R.P.C. 1.7(a)(2) [Conflict of interest: current clients]. The Complaint related to two matters when Mr. James was the Caribou County Prosecutor. One matter related to Respondent's guilty plea to one misdemeanor count of bribery-unlawful use of public position for personal gain, in violation of Idaho Code §18-1359 and the other matter related to his prosecution of a criminal defendant for probation violation and attempted escape charges.

With respect to Mr. James' misdemeanor conviction, between March 2006 and July 2007, Mr. James accepted a number of checks from defendants, made payable to charitable or public entities, in infraction cases in conjunction with plea agreements to have those infraction charges dismissed. During that timeframe, Mr. James deposited approximately $3,800 into a separate personal bank account and the Caribou County Sheriff's Search and Rescue Fund. Mr. James deposited approximately $2,612 into a separate personal account dedicated solely for the Caribou County Fair 5K race. Mr. James used approximately $1,600 to purchase prizes for the Caribou County Fair 5K race. Mr. James did not use any of the funds deposited in his personal account for any personal use unrelated to the Caribou County Fair 5K race. During trial on the charges of misuse of public money by an officer, Mr. James accepted a plea offer to the one misdemeanor count noted above and was sentenced on June 5, 2008. The judge imposed a $1,000 fine, 90 days jail, with all 90 days suspended, two years of unsupervised probation, and 150 hours of community service.

With respect to the admitted violation of I.R.P.C. 1.7(a)(2), a conflict of interest, in April 2006, Mr. James prosecuted charges against a defendant for a probation violation and attempted escape from the Caribou County Jail. The defendant and Mr. James eventually agreed to a plea bargain whereby the defendant pled guilty to three felony counts in exchange for dismissal of the remaining six felony counts. During 2006, Mr. James engaged in a sexual relationship with the defendant's mother. The relationship lasted approximately two months. The exact timeframe of the relationship was disputed, but it occurred either before or during the defendant's prosecution, resulting in the conflict.

The Disciplinary Order provides that Mr. James' 60 day suspension will run from November 1, 2009 through December 30, 2009. Following his reinstatement, Mr. James will serve probation for one year, upon terms and conditions that include compliance with all the terms and conditions of his criminal probation. If Mr. James violates any of the conditions of probation, then the entire nine month withheld suspension shall automatically and immediately be imposed.

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 CLINTON E. JACOB OF SERVICE OF SUMMONS AND COMPLAINT

Pursuant to *Idaho Bar Commission Rule* 523(c), the Idaho State Bar hereby gives notice to Clinton E. Jacob that the Idaho State Bar has filed a Summons and Complaint against him. The Idaho State Bar attempted to serve the Summons and Compliant upon Mr. Jacob by certified mail, return receipt requested at his addresses as filed with the Idaho State Bar and the certified mail was returned to the Idaho State Bar as "Not Deliverable as Addressed, Unable to Forward." Please be advised that service of these documents upon Mr. Jacob shall be deemed complete fourteen (14) days after the publication of this issue of *The Advocate.* Mr. Jacob, please contact Julia A. Crossland, Deputy Bar Counsel, at the Idaho State Bar, P.O. Box 895, Boise, ID 83701, (208) 334-4500, to obtain copies of the Summons and Complaint referred to in this notice.

REINSTATEMENT

MICHAEL R. ROBINSON
(Reinstatement to Active Status)

On October 19, 2009, the Idaho Supreme Court issued an Order of Reinstatement to Active Status for Michael R. Robinson. Mr. Robinson is therefore currently an active member of the Idaho State Bar.

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

2009 – The Idaho State Bar Year in Review

Diane K. Minnich

The Idaho State Bar continues to maintain its programs and services. This month we feature the highlights of the Bar's efforts in 2009.

Admissions

Reciprocal Admission – Idaho now accepts reciprocal applicants from 27 states. Since the inception of reciprocal admission in late 2001, 542 attorneys have been admitted reciprocally.

Diane K. Minnich

Bar Exam/Reciprocal Admission		
Year	*2008*	*2009*
Bar exam applicants	202	193
Pass Rate	72%	81%
Reciprocal admittees	63	94

The Idaho Bar Commission Rules governing Admissions were revised in 2009. The proposed rules were approved by the membership during the 2009 resolution process and will be submitted to the Idaho Supreme Court for its consideration in early 2010.

Licensing/Membership

ISB Membership		
12/08	*12/09*	*% Change*
5, 181	5, 367	+ 3.6%

As of December 2009, of the 5,367 lawyers licensed by the Idaho State Bar, 4,259 were active members, 186 judges, 26 house counsel members, 892 affiliate members, and 4 emeritus attorneys.

Bar Counsel

Thirteen formal charge cases were opened in 2009, 13 cases were closed. Of the 13 closed cases, one attorney was disbarred, two resigned in lieu of discipline, two were suspended, one received a withheld suspension and public censure, five received public reprimands, one was placed on disability inactive status, and one case was dismissed.

Discipline			
	2008	*2009*	*Change*
Phone inquiry	1,388	1,555	+ 12%
Grievances	432	463	+ 7%
Complaints opened	105	119	+ 13%
Ethics questions answered	1,709	1,775	+ 4%

Fee Arbitration

The number of fee arbitration cases filed increased in 2009; 53 cases were opened in 2009, 36 were opened in 2008.

Client Assistance Fund

2009 - 19 CAF claims were opened and 18 cases were closed, 11 cases were pending at the end of the year.

Client Assistance Fund Claims		
Year	*Claims Paid*	*Total paid*
2008	7	$45,060
2009	11	$53,439

Lawyer Referral Service

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 33% of those individuals receiving a referral contacted the attorney. The LRS continues to work closely with IVLP and other agencies to provide referrals for callers to attorneys and other appropriate services.

Lawyer Referral Service			
	2008	*2009*	*Change*
Calls	4,771	3,710	-22%
Referrals	3,128	2,530	-19%

Annual Meeting

The 2009 Annual Meeting was held in July in Boise. The Conference offered a variety of programs, with attendance considerably higher than 2008. The Commissioners and staff continue to consider changes in the annual meeting to increase its appeal. Your suggestions are welcome.

Annual Meeting			
	2008 Sun Valley	*2009 Boise*	*Change*
Total Attendees	369	472	+ 28%
Attorneys and Judges	199	283	+ 42%

Casemaker

The Casemaker legal research library continues to offer a comprehensive, easily searchable, continually updated database of case law, statutes and regulations. The service is available to all ISB active members and judges. To access Casemaker, go to the ISB website, www.idaho.gov/isb. Each eligible attorney has a password; your username is your Bar number. If you need your password or have any comments or recommendations for improving the Casemaker services, please contact Terri Muse or me.

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. There are now 20 sections of the Bar. Section membership increased 10% in 2009 from 2,509 to 2,765.

Communications: Website/ Advocate/Ebulletin

In 2009, the newly designed ISB website was launched. More information and easier navigation and access are features of the new website. The E-Bulletin continues to be provided weekly, keeping you informed of programs, events, rule changes, and other opportunities for Bar members. *The Advocate* was published 9 times in 2009. *The Advocate* is now posted online about a month after it is mailed to the membership and subscribers.

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 and continues to expand. Indications from initial participants suggest that the rates are competitive, and the benefit options are excellent.

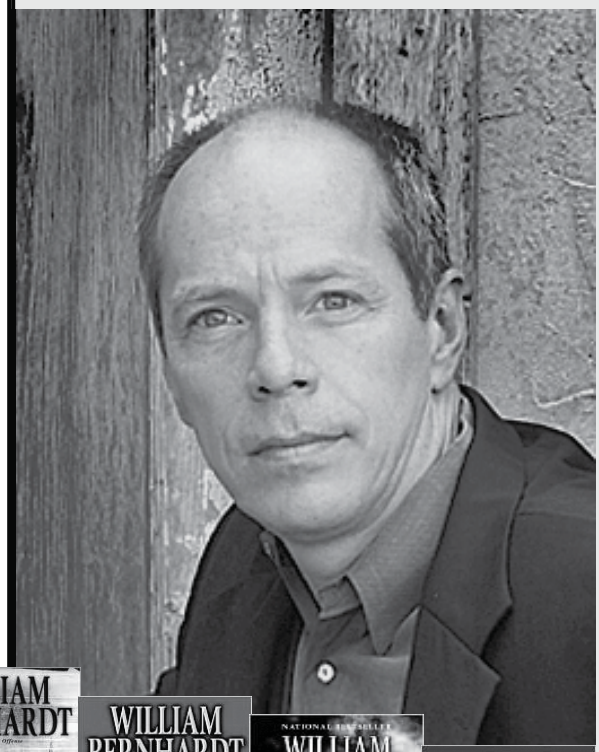
The ILBP was formed as a partnership between ALPS Corporation and the Idaho State Bar to meet the long-term healthcare needs of Idaho lawyers and their employees. As a self-funded plan, premiums that would have gone to an insurance carrier are now paid to a trust as member contributions to finance the 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. Participating members, through the board of trustees, are encouraged to provide feedback and ideas about how best to grow or alter the benefit options available to the legal community.

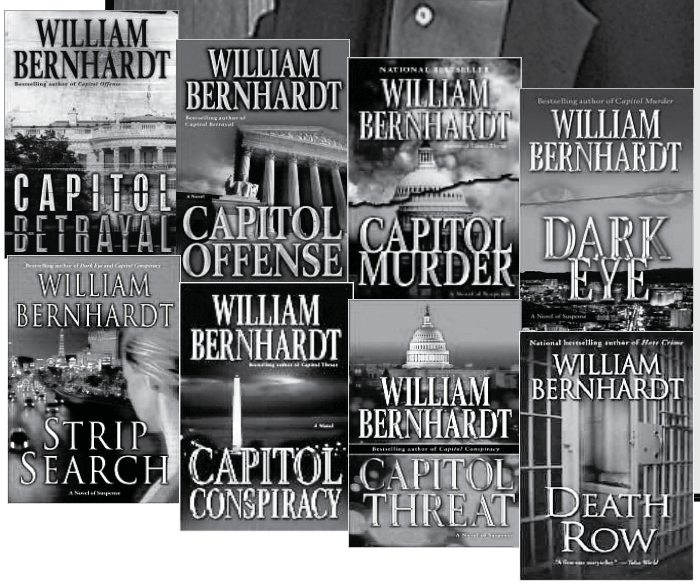
For further information about the Idaho Lawyer Benefit Plan please contact Todd Points via phone: (800) 367-2577 or via email: tpoints@alpsnet.com.

The work of the Bar is accomplished with the help of hundreds of volunteers each year. 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.

New York Times bestselling author is Keynote speaker at Idaho State Bar Annual Conference

July 14 – 16 in Idaho Falls





William Bernhardt is an American thriller/mystery/suspense fiction author best known for his "Ben Kincaid" series of books.

Bernhardt has sold more than 10 million books in several different countries throughout the world. He has twice won the Oklahoma Book Award for Best Fiction, in 1995 and 1999, and in 1998 he received the Southern Writers Guild's Gold Medal Award. In 2000, he was honored with the H. Louise Cobb Distinguished Author Award, which is given "in recognition of an outstanding body of work that has profoundly influenced the way in which we understand ourselves and American society at large." That same year, he was presented with a Career Achievement Award at the 2000 Booklovers Convention in Houston. He has also been inducted into the Oklahoma Writers Hall of Fame, the youngest author ever so honored.

In addition to his work as a writer, Bernhardt is also a popular teacher and publisher. In 1999, he founded HAWK Publishing Group. HAWK has published books by acclaimed authors such as Pulitzer Prize-winning novelist N. Scott Momaday, Grammy Award-winning singer-songwriter Janis Ian, and PBS newsman Jim Lehrer. He also sponsors the HAWK Writing Workshop each summer to nurture and mentor aspiring writers.

A former trial attorney, Bernhardt has received several awards for his public service. He lives in Tulsa, Oklahoma with his wife, Marcia. They have five children, Kate, Alex, Alice, Harry, and Ralph.

TIM MURPHY

ZM ZARIAN•MIDGLEY

Zarian Midgley & Johnson, PLLC, a Boise-based firm specializing in intellectual property matters and complex litigation, is pleased to welcome **Tim Murphy,** a registered patent attorney, as an associate. Tim's practice focuses on intellectual property litigation.

Tim is a former DRAM R&D product engineer and semiconductor manufacturing engineer. He has experience in legal matters involving semiconductors, optoelectronics, advanced materials, computer networking, and nuclear and hydroelectric power production. Tim holds a Master of Science in Electrical Engineering from the University of Michigan and a Bachelor of Science in Electrical Engineering from Boise State University. He received his law degree from the University of Michigan.

Tim can be reached at murphy@zarianmidgley.com or 208-562-4900

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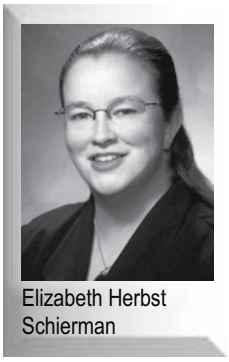
Welcome from the Intellectual Property Law Section

Elizabeth Herbst Schierman
Dykas, Shaver & Nipper, LLP

Intellectual property law reacts to the ever-expanding realm of business and personal interaction. The Intellectual Property Law Section continues to explore these new developments through its bi-monthly Section meetings and the articles within this issue. This past year, our free-to-members, lunch-time CLEs have touched on the most recent, groundbreaking opinions in patent law. We were also pleased to welcome, in conjunction with the International Law Section, patent practitioners visiting from Beijing and Shanghai to discuss intellectual property enforcement in their China.

In this issue of *The Advocate*, our members examine some of the concerns facing attorneys and clients at the frontiers of modern global communication and business practices. Robert Shaver writes on the increasingly-popular social media tools and the legal ethics rules that govern attorneys' use of such websites. Scott Swanson discusses the Copyright Office's current considerations to revise the Digital Millennium Copyright Act to provide exemptions that will expressly allow iPhone owners to "jailbreak" their phones so as to have access to a greater variety of apps. Jonathan Zimmerman recommends that attorneys and clients think twice before seeking to participate in the China International Economics and Trade Arbitration Commission (CIETAC) and plan accordingly when negotiating arbitration clauses with Chinese parties. Finally, I discuss ICANN's New gTLD Program that is set to expand the size of cyberspace from the limits of .com, .net, and .org to the infinite possibilities of .anything, urging trademark holders to be ready to take advantage of new rights protection mechanisms to prevent Internet-based trademark infringement and cybersquatting.


Elizabeth Herbst Schierman

In 2010, our Section is looking forward to offering more CLEs to its members and to the general Bar, as well. We strive to keep close ties with the University of Idaho, having recently allowed law students to join at no cost. Membership is available to all members of the Idaho State Bar and also to judicial law clerks, law students, and patent agents. If you are interested in joining the Intellectual Property Law Section, I invite you to stop by a Section meeting or contact a Section officer.

About the Author

Elizabeth Herbst Schierman *is the Chair of the Intellectual Property Law Section and a registered patent attorney. Her practice includes patent application preparation and prosecution, copyright and trademark registration procurement, and intellectual property litigation, including matters concerning domain name disputes. Ms. Schierman holds degrees from the University of Idaho in both law and chemical engineering.*

INTELLECTUAL PROPERTY LAW SECTION

Chairperson
Elizabeth Herbst Schierman
Dykas, Shaver & Nipper, LLP
PO Box 877
Boise, ID 83701-0877
Telephone: (208) 345-1122
Fax: (208) 345-8370
Email: schierman@dykaslaw.com

Southern Vice Chairperson
Dana Michael Herberholz
Zarian Midgley & Johnson, PLLC
960 Broadway Avenue, Ste. 250
Boise, ID 83706
Telephone: (208) 562-4900
Fax: (208) 562-4901
Email: herberholz@zarianmidgley.com

Treasurer
Rexford Alan Johnson
Zarian Midgley & Johnson, PLLC
960 Broadway Avenue, Ste. 250
Boise, ID 83706
Telephone: (208) 562-4900
Fax: (208) 562-4901
Email: johnson@zarianmidgley.com

Northern Vice Chairperson
Stephen J. Nemec
James, Vernon & Weeks, PA
1626 Lincoln Way
Coeur d'Alene, ID 83814
Telephone: (208) 667-0683
Fax: (208) 664-1684
Email: snemec@jvwlaw.net

Eastern Vice Chairperson
Melanie Alexandrine Madsen Thatcher
Elite Creators, LLC
43 Ponderosa Ave
Rexburg, ID 83440
Telephone: (208) 359-8171
Fax: (208) 359-8171
Email: skylaw@ida.net

Secretary
Timothy E. Murphy
Marger Johnson & McCollom, PC
1208 E. Wright Street
Boise, ID 83706
Telephone: (208) 473-0451
Fax: (503) 274-4622
Email: tim.murphy@techlaw.com

Legal Ethics Rules Apply to Attorneys' Social Media and Websites

Robert L. Shaver
Dykas, Shaver & Nipper, LLP

Social media networks of various sorts are used by an increasing number of people, including lawyers, judges, and clients. Lawyers often use social media as a form of networking, and also to present their firms or services to prospective customers. Social media for the purposes of this article includes webpages, blogs, podcasts, LinkedIn, Facebook, Twitter, Myspace, and similar technologies. This article will present some information on how or why to use these services, and will focus on ethical implications of their use. The reader is referred to Stephen Nipper's column in the January Advocate for information about using these sites.

Use of the social media technologies noted above may involve several ethical rules for attorneys, including those relating to endorsements and testimonials, misleading statements, extrajudicial communications, use of statements made in social media as evidence, pretexting to obtain access to social media statements of witnesses and parties, and regulation as advertising.


Robert L. Shaver

Websites

Law firm websites are the least interactive of internet communications, and are more akin to a phone book advertisement than to more interactive forms of social media or networking. Potential clients often look at websites when choosing an attorney. A website may include material that is advertising and also commonly includes an invitation for a potential client to contact the law firm. The prudent law firm will view a website as subject to all of the same advertising regulations as any printed equivalent.

When presented with proposed regulation regarding computer-accessed attorney advertising, the Florida Supreme Court, in opinion N. SC08-1181, November 19, 2009, held that attorney websites are subject to all the substantive advertising regulations applicable to other advertising media, except the requirement

RULE 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or
(c) compares the lawyer's services with other lawyer's services, unless the comparison can be factually substantiated.

RULE 7.2: ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.
(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
  (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
  (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and
  (3) pay for a law practice in accordance with Rule 1.17.
(d) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

RULE 7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by inperson, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
  (1) is a lawyer; or
  (2) has a family, close personal, or prior professional relationship with the lawyer.
(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by inperson, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
  (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
  (2) the solicitation involves coercion, duress or harassment.
(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses inperson or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

RULE 7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
  (1) the lawyer has been certified as a specialist by an organization that has been approved by the Idaho State Bar; and
  (2) the name of the certifying organization is clearly identified in the communication.

to file before dissemination. In Idaho, a record of the website advertising content must be saved for two years, but Rule 7.2(b) specifically states that prior approval is not required. In general, the Idaho rules that pertain to attorney or law firm websites are contained in IRPC 7.1, IRPC 7.2, and IRPC 7.4.

To comply with these rules, an attorney or law firm website "must present no false or misleading communication".[1] Statements include those that are a misrepresentation of fact or law, or that omit a fact necessary to make the statement considered as a whole not materially misleading. Further, a website may not include statements that may create unjustified expectations,[2] may not compare services with other lawyers unless that comparison can be factually substantiated,[3] or make claims to an unauthorized specialization.[4] Additionally, the management of the website would include keeping a record of the content for two years.[5]

Additionally, if a communication from an attorney based on a website inquiry falls into the category of "soliciting professional employment from a prospective client known to be in need of legal services in a particular matter," then such communications should require the words "Advertising Material" …at the beginning and ending of any recorded or electronic communication.[6] In the case of a client submitting an inquiry based on viewing a website, it is likely that the communication is not a solicitation since it is client initiated and is not specific to any particular matter. Such an inquiry is equivalent to an attorney answering a telephone inquiry from a client, and subject to the same rules.

Blogs

Blogs are "web logs" and may have content very similar to a website such as attorney biographies, mission statement, areas of practice, contact information and other information about a law firm in a manner similar to a static web page. In this form a blog is similar to a webpage or even a telephone book advertisement, and is subject to the same rules of advertising as noted above for websites.

Another type of legal blog is one in which an individual attorney presents information relevant to his field of practice. Such a blog may serve to network with attorneys with similar interests. The author's partner Stephen Nipper's Invent Blog (http://inventblog.com/) is an excellent example of such a blog. An interested reader may request to have notices of new blog posts sent to her as they are posted via a subscription service called RSS, and subscribers may post comments or questions about any blog post. Such a question from an interested reader has the possibility of being a direct communication with a client, and if so, is governed by the rules of I.R.P.C. 7.3, as discussed above.

When presented with proposed regulation regarding computer-accessed attorney advertising, the Florida Supreme Court, in opinion N. SC08-1181, November 19, 2009, held that attorney websites are subject to all the substantive advertising regulations applicable to other advertising media...

Another type of blog is one written by an attorney that has a non-legal focus. Blogs that the author writes include one about the history of technology (http://patentpending.blogs.com/), a blog about outdoor technology and patents (www.backpackingtechnology.com), and a blog about bicycling technology and patents (www.bicyclepatents.com). The Federal Trade Commission has issued a recent guideline that has an impact on such blogs. This guideline requires an author of a blog evaluating or recommending a product to disclose if he has received a free sample of a product that he is recommending. According to the guideline:

> the post of a blogger who receives cash or in-kind payment to review a product is considered an endorsement. Thus, bloggers who make an endorsement must disclose the material connections they share with the seller of the product or service. …And a paid endorsement – like any other advertisement – is deceptive if it makes false or misleading claims.[7]

This guideline clarifies that bloggers are under the same rules that already apply to broadcast stations, newspapers, and magazines.

LinkedIn

LinkedIn (www.linkedin.com) is an example of a social media technology that is more interactive than websites or blogs. LinkedIn is considered to have more of a business focus than other social media services. The purpose of LinkedIn is to maintain contact information for a registered user of people that person knows and trusts in business. A user is informed of contacts connected to people in his network. If a person changes email address, employer, or cell phone number, other LinkedIn users to whom he is connected are informed of such changes. A personal or company profile may be entered in LinkedIn, and testimonials are permitted.

For attorneys in some states such testimonials may be problematic, but Idaho has no prohibition against testimonials as long as rules about creating a false impression, misleading statements, or a false expectation are not violated. No authority in Idaho has equated a reciprocal recommendation as an example of offering value in exchange for a recommendation, which is prohibited by IRPC 7.2, but such recommendations should be done carefully and truthfully for this reason. An attorney must assume that the rules of attorney advertising apply to a LinkedIn profile, and that the profile is equivalent to a personal website. An unanswered question is whether putting your law firm name on your LinkedIn profile makes it an extension of your law firm website so that all rules of advertising, making misleading statements, noting a specialization, and creating a false expectation apply to a LinkedIn profile.

Facebook

Facebook (www.facebook.com) is a highly interactive social media technology, which has increased greatly in popularity in recent months. In Facebook a user enters personal information in a profile. The user may be a law firm, or an individual lawyer. The profile may include personal pictures, relationship status, spouse and children's names, and links to favorite internet sites or blogs. A user may make his profile information public, or restrict access to only those

he designates are "friends." A user may enter a comment or a picture and it will be sent to all of the people who have designated her as a "friend." She will also receive such comments entered by her "friends." If one has a lot of "friends," one may receive a lot of such comments. The Facebook page of a law firm may attract friends, who sign up as "fans" of the business.

Some obvious precautions when using Facebook relate more to the fact that all of a person's comments are sent to all of a user's Facebook friends, and may sometimes be publicly viewed. If your boss or co-workers are designated as a "friend" in Facebook, you do not want to make negative comments about your workplace, express excitement about a job interview, or describe your fun outing on the day you called in sick, all of which have happened using Facebook. One attorney made the mistake of asking for a continuance to attend the funeral of her father, while posting on Facebook about a week of drinking and partying.[8] A San Diego attorney posted on his blog updates about a trial in which he was involved, and was suspended for 45 days and lost his job.[9]

One would think it obvious that if you are a judge, you would not want to discuss your views on judicial reform or the administration of the court system that employs you, especially if your Facebook privacy settings are set so that your boss or co-workers may see them. Just such a monologue resulted in one judge being reassigned.[10] It also would not be proper for attorneys and judges to "friend" each other if a case is pending, or even if cases might arise with both the judge and lawyer involved, nor for a judge to research the website of a party to litigation, even though the website is not presented as evidence. Another judge was reprimanded for "friending" a lawyer in a pending case, posting and reading messages about the litigation, and then accessing the website of the opposing party.[11]

Unethical acts may include instructing your staff to request to be "friended" for purposes of accessing the Facebook homepage of a party or witness in litigation in order to obtain evidence. This would violate IRPC 8.4 (c), which prohibits a lawyer from "engaging in conduct involving dishonesty, fraud, deceit or misrepresentation." This question was analyzed as a result of an inquiry as to the ethics of this tactic by the Philadelphia Bar Association Professional Guidance Committee.[12]

Further, a website may not include statements that may create unjustified expectations, may not compare services with other lawyers unless that comparison can be factually substantiated, or make claims to an unauthorized specialization. Additionally, the management of the website would include keeping a record of the content for two years.

Twitter

Twitter (www.twitter.com) is a technology that allows a person to connect with as many people as he wants, and to send them (and receive from them) a short note of less than 140 characters. These short notes are called "tweets." Each note is sent to all of a person's followers, which might be hundreds or thousands of people. Facebook has a similar feature, but Twitter users tend to have more followers. Tweets may be narrations of the meal you are eating, comments about traffic, insightful sayings, or anything the tweeter chooses to send out. More famous people or those with interesting or useful tweets gather more followers, and with Twitter one may follow the daily lives of celebrities and exciting attorneys, if you know any exciting attorneys.

A Twitter user may also enter an RSS search to send certain classes of tweets to the user, such as people who tweet about any "attorney" near Boise, Idaho. This will return information about the tweeter who may be a total stranger to the attorney. One possible way to handle that situation in order to avoid a solicitation issue is to follow up the tweet by an email so that it is not be a real-time contact. An attorney may also send a tweet to the tweeter with a link to the attorney's website, and follow up if the tweeter contacts the website.

A tweet responding to an inquiry about representation is similar to responding to an inquiry like "is there an attorney present?" If a tweet were sent out to unknown individuals saying "I would like to represent you," it would at least be an advertisement and would require a statement such as "this is an advertisement." Are tweets such as this currently sent out in Idaho or Boise? Yes they are.

MySpace

MySpace (www.myspace.com) has strong similarities to Facebook, and provides a profile page which a person can use to communicate with friends and meet new friends. Use of MySpace poses similar issues as Facebook.

Chat Rooms and Forums

An attorney may find himself participating in chatrooms or forums on many different subjects, such as fly fishing, cycling, running, photography or other topics. This type of communication is considered by many jurisdictions to be real time communication and thus may be impermissible communication. The Florida State Bar Standing Committee on Advertising held that an attorney's participation in a chat room in order to solicit professional employment is prohibited by Rule 4-7.4(a),[13] citing similar opinions in Illinois,[14] Michigan,[15] Philadelphia,[16] Utah,[17] Virginia,[18] and West Virginia.[19]

Conclusion

When the author was in law school in 1994, he reviewed a book on environmental regulations around the world and wrote a book review. Much to his surprise, that review was posted on the internet in association with the book title, is still on the internet and still turns up in a search sixteen years later. This illustrates the point that anything posted to the internet must be assumed to be searchable forever.

Most, if not all, ethical problems that arise when attorneys use social media sites may be prevented if the user as-

sumes that anything posted to the internet may be publicly visible for all time, may be considered to be attorney advertising or client contact, and is subject to the same rules of professional ethics as are equivalent written publications. The privacy settings on social media accounts should be studied carefully and tuned to the user's purposes, and a user should either avoid say anything the user may regret if publicly known, or always keep in mind who can view the posted message.

About the Author

Robert L. Shaver *is a partner in the law firm of Dykas, Shaver, and Nipper LLP, where he has worked on patent, trademark, and internet law issues since 1995. Before law school he was a scientist at the Hanford Nuclear Site in Washington state. Mr. Shaver is a frequent speaker on patent, trademark, and internet law issues. He is a recipient of the Cliff Dochterman Award for Rotarians in Scouting.*

Unethical acts may include instructing your staff to request to be "friended" for purposes of accessing the Facebook homepage of a party or witness in litigation in order to obtain evidence. This would violate IRPC 8.4 (c), which prohibits a lawyer from "engaging in conduct involving dishonesty, fraud, deceit or misrepresentation."

Endnotes

[1] I.R.P.C. 7.1.
[2] I.R.P.C. 7.1.
[3] I.R.P.C. 7.1 (c).
[4] I.R.P.C. 7.4.
[5] I.R.C.P. 7.2 (b).
[6] I.R.C.P. 7.3.
[7] *At* http://www.ftc.gov/opa/2009/10/endortest.shtm; *see also* 16 C.F.R. § 255.0 to 255.5.
[8] ABA Journal (online), Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches, July 31, 2009.
[9] California Bar Journal, cited on Legal Profession Blog (http://lawprofessors.typepad.com/legal_profession/), August 3, 2009.
[10] Staten Island Real-Time News (http://www.silive.com/), October 15, 2009.
[11] ABA Journal (online), Judge Reprimanded for Friending lawyer and Googling Litigant, June 1, 2009
[12] Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02, March 2009.
[13] Florida Bar Standing Committee on Advertising, Opinion A-00-1, August 15 2000.
[14] Illinois State Bar Advisory Opinion 96-10, July, 2009.
[15] Michigan State Bar Ethics Opinion RI-276, July 11, 1996.
[16] Philadelphia Professional Guidance Committee Opinion 98-6, March 1998.
[17] Utah State Bar Ethics Advisory Opinion Committee, Opinion 97-10, October 24, 1997.
[18] Virginia Ethics Committee Opinion A-0110, April 14, 1998.
[19] West Virginia Lawyer Disciplinary Board Opinion 98-03, Oct 26, 1998.

The Digital Millennium Copyright Act and the iPhone: An Unnecessary Proceeding

Scott D. Swanson
Dykas, Shaver & Nipper, LLP

Copyright law also protects computer programs, such as the operating code that runs an iPhone, but only to the extent that the code incorporates authorship in the programmer's expression of the ideas, such as the precise language the programmer uses to tell the operating system of the iPhone to perform a task, as opposed to the ideas themselves.

Introduction

The United States Copyright Office is currently reviewing suggested exemptions to section 1201 of the Digital Millennium Copyright Act (the "DMCA"), 17 U.S.C. § 1201, *et. seq*.,. Section 1201 prohibits conduct aimed at circumventing technological measures that control or limit access to a work protected by the Copyright Act. The Electronic Frontier Foundation (the "EFF"), a nonprofit organization that defends consumer rights related to technology, and Apple, Inc. ("Apple") have presented arguments against and in support of, respectively, a proposed exemption to the DMCA for "jailbreaking" Apple's iPhone. Jailbreaking consists of overriding Apple's technological measures that allow only Apple approved applications to run on the iPhone. This article sets forth reasons why these arguments are inapplicable because the iPhone's anti-circumvention technology is not governed by the DMCA if precedent from the Sixth Circuit Court of Appeals in the case of *Lexmark v. Static Control* is applied to the analysis. Other federal circuit Courts of Appeal will be wise to adopt and follow the analysis developed by the Sixth Circuit.


Scott D. Swanson

Background of the iPhone

Apple's iPhone[1] is an extremely popular device. The device is used by people, including many attorneys, throughout the United States and the world. The hardware, or physical components of the iPhone, is designed to perform an unprecedented range of functions from making basic phone calls to extensive GPS (Global Position System) functionality to acting almost like a personal computer.

The iPhone, however, is not sold with a full range of software necessary to provide all of the potential functions enabled by the hardware. Apple sells the programs, more commonly known as apps, through its App Store,[2] which, expectedly, is extraordinarily profitable for Apple as iPhone users expand their use of the iPhone. The App Store sells, or in some instances provides for free, a wide variety of apps written by third parties as well as Apple itself. Apple does not, however, offer a complete range of apps through the App Store necessary to allow consumers to fully enable the built-in functionality of their iPhones. For example, Apple has not provided software allowing the iPhone 3G to tether the iPhone to an independent computer and use the iPhone as a modem to access the internet. Another example is that the camera of the iPhone 3G is capable of shooting video, but Apple, until December of 2009, had not provided software to enable video capability for the 3G. Instead, Apple approves which apps may be sold through the App Store and, while Apple claims not to arbitrarily accept or deny any proposed apps, rejects some proposed apps altogether from sale through the App Store.[3]

Apple's post-purchase control of the iPhone has led to tension between Apple and several different groups. These groups include third party programmers whose apps have not been approved by the App Store, third party programmers who do not want to sell through Apple and the App Store, and iPhone owners seeking to expand functionality of their iPhone through apps or uses not approved by Apple. Several groups, uninterested in abiding by Apple's control over their iPhones, have developed methods of "jailbreaking" their iPhones. Jailbreaking an iPhone involves measures that override Apple's technological controls designed to limit an iPhone to run only Apple allowed apps. Jailbreaking subsequently allows the iPhone to run third party apps not sponsored by Apple. Currently, a sizeable number of people disagree with Apple's control over the iPhone to the extent of "jail breaking" their iPhones.

Background of the Copyright Act and the DMCA

Copyright law, title 17 of the United States Code, endows an author of a copyrightable work with a bundle of exclusive rights.[4] Copyright law protects the non useful expression of an idea as opposed to the idea itself. [5] This concept is commonly referred to as the idea-expression dichotomy. Courts and commentators frequently use the idea-expression dichotomy to distinguish between the patent system and the copyright system.[6] Patent law protects novel, useful, and nonobvious ideas whereas Copyright law protects non utilitarian expressions of ideas such as drawings, movies, and photographs. For example, a copyright in a picture of a landscape protects the individual expression associated with the specific photograph as opposed to the idea of photographing the landscape. Copyright law also protects computer programs, such as the operating code that runs an iPhone, but only to the extent that the code incorporates authorship in the programmer's expression of the ideas, such as the precise language the programmer uses to tell the operating system of the iPhone to perform a task, as opposed to the ideas themselves.[7]

The advent of digital technology significantly increased the ease and speed

of infringing a copyright. Suddenly the ease of producing illegal copies of song recordings, motion picture recordings, and photographs became significantly less expensive and much faster with digital technology. Entire works could be copied with the mere push of a button. In response to changes in technology, producers of copy-written works on digital media developed technological measures to prevent illegal copying of their works. Subsequently, members of the public skilled in the technological arts began to undertake efforts to circumvent the technological protections. These people are often called "hackers". In response to a mounting concern regarding the actions of hackers and in accord with several World Intellectual Property Organization treaties, the United States Congress passed The DMCA in 1998. The DMCA, amongst other results, makes it illegal to circumvent technological measures that control access to digital work protected by copyright.[8]

Technology that protects copy written works includes digital copies of motion pictures, CDs, digitally purchased music, video games, and a wide variety of other digital systems. These protections include features such as encrypting music CDs or motion picture media so that music players can only play legal copies distributed by the copyright owner, installing authentication codes on video games so that the authentication codes are required for a copy of the game to be played on a gaming system, and a large number of other protective measures. When the DMCA was first proposed many people opposed it on grounds ranging from it being unconstitutional to unnecessary. Many commentators worried about a potential expansion of intellectual property protection, via copyright law, to material that previous was only protectable by patent laws if protectable at all.

As a result, Congress included a process in the DMCA by which the Register of Copyrights establishes, through the Librarian of Congress, exceptions to the DMCA's prohibition on measures that circumvent the technological controls that limit access to digital work protected by copyright law. Every three years the Register of Copyright commences a process by which members of the public submit proposed categories for exemption, or for continued exemption, from the DMCA's prohibition and supporting arguments.[9] The proposals and arguments are then published for public comment and eventually the parties are allowed to argue over the proposals. Finally, the Register of Copyrights makes her recommendation of exempt uses and submits the recommendations to the Librarian of Congress for enactment.[10] The latest review of the proposed exemptions, which both EFF and Apple have commented on, was scheduled to occur in 2009.[11]

Under the Sixth Circuit's decision in Lexmark v. Static Control, the iPhone's anti-circumvention technology is not covered by the language of the DMCA.

Lexmark v. Static Control: The Sixth Circuit Court of Appeals Reaches a Sensible Solution

In 2009 EFF submitted a proposed exempted class, comprised of jailbreaking the iPhone, and an argument for the proposed exempted class. Subsequently, Apple presented its argument against a proposed exemption to the DMCA for the purpose of jailbreaking Apple's iPhone. [12] While the arguments are an interesting read, they appear misguided. EFF focuses on fairness to third party programmers wishing to sell apps through the App Store while Apple argues that is has a right to benefit from its investment in the development of the iPhone and its App Store. These arguments are not pertinent if the remaining federal circuits adopt precedent established by the Sixth Circuit Court of Appeals construing section 1201 of the DMCA.

Under the Sixth Circuit's decision in *Lexmark v. Static Control*,[13][14] the iPhone's anti-circumvention technology is not covered by the language of the DMCA. In *Lexmark*, the Sixth Circuit held that section 1201 of the DMCA did not apply to efforts to circumvent a program containing an authentication sequence called a "Toner Loading Program." This program controlled access to a printer's copy-written operating system. The authentication program was located in a microchip attached to the company's toner cartridge and allowed Lexmark's cartridge to work in Lexmark's printer. The authentication program allowed the operating system to operate only when the authentication program correctly authenticated the system. Conversely, the Lexmark printer would not function without the authentication program located on a cartridge inserted into the Lexmark printer.

The Sixth Circuit specifically looked to the meaning of the terminology of section 1201 of the DMCA that makes it illegal to circumvent technology that "effectively controls access to a work," in determining the scope of section 1201. The Sixth Circuit held that the term "controlling access to a work" refers to the technological measures that control access to the actual subject matter of the copyright, in *Lexmark* the code of the operating system itself, as opposed to the use of the code by the printer. Thus the court determined that the purchase of the printer was the event "controlling the access" to the software of the operating system of the printer, and the owner of the printer may access and printout the software code regardless of the authentication program. In other words, the authentication program was required to make the printer function, but was not a key to displaying the actual software code itself.[15]

Apple's bootloader program appears to function in the same manner as the authorization code of the printer system in *Lexmark* and should not be subject to DMCA protection under the Sixth Circuit's decision in *Lexmark*. In Apple's iPhone system, when a user powers the iPhone on, a bootloader program performs a "few initial tests of the hardware," then loads the operating system into the iPhone's main memory for operation.[16] Certain forms of jailbreaking the iPhone, specifically the PwnageTool jailbreaking method,[17] install a modified version of the bootloader, which fools the iPhone into loading the modified bootloader. [18] The modified bootloader in turn "does not perform authentication checks on application programs loaded onto the iPhone, thereby jailbreaking the device."[19] As the Sixth Circuit held in

Lexmark, the purpose of the anti-circumvention software in the iPhone is not directed toward preventing someone from copying the software code found in the iPhone. Instead, the anti-circumvention software is directed toward preventing a user from using apps not sanctioned or provided by Apple. This is not the covered by the intent of the DMCA, as illustrated by the Sixth Circuit's Lexmark decision. Accordingly, the anti-circumvention software found in the iPhone is not protected by the DMCA.

An exemption for Apple's anti-circumvention software under the DMCA is unwarranted and unnecessary as established by the Sixth Circuit in the *Lexmark* case. Jailbreaking should be moderated by Apple through contractual means, which Apple already does, for example by voiding the warranty if an iPhone has been jailbroken, or through producing superior products for the open market. The Sixth Circuit's decision in Lexmark also may have further implications in allowing competition among post initial sale suppliers of accessories or components of a wide range of technologies from cell phones to automobiles by preventing the application of the DMCA to these technologies.

Apple's bootloader program appears to function in the same manner as the authorization code of the printer system in Lexmark and should not be subject to DMCA protection under the Sixth Circuit's decision in Lexmark.

About the Author

Scott D. Swanson, *is an associate with the intellectual property law firm of Dykas, Shaver, and Nipper, LLP where he practices predominantly in the fields of intellectual property litigation and prosecution. Scott received his Bachelor of Science degree in Biological Chemistry from the University of Idaho in 2003 and his law degree from the Ave Maria School of Law in 2007. Scott is a registered patent attorney admitted in Idaho and Utah.*

Endnotes

[1] Apple offers at least three versions of the iPhone: the 2G, 3G, and 3Gs.

[2] The App Store is an electronic store, as opposed to a brick and mortar store, iPhone users access either through their iPhones or via Apple's iTunes to purchase software (called application) to run on the iPhone and enhance the iPhone's capability.

[3] For example, Apple rejected Google's voice app from the App Store. This prompted the Federal Communications Commission (FCC) to investigate. *See, e.g.,* http://www.taranfx.com/blog/fcc-apple-att-questioned-for-google-voice-app-rejection.

[4] The exclusive rights of an owner of a copyright include the right to reproduce the copyrighted work, to prepare derivative works based on the copyrighted work, to distribute copies of the work, to perform the work publicly (in certain categories of works), to publicly display the work (in certain categories of works), and to publicly broadcast the work via a digital audio transmission. 17 U.S.C. § 106.

[5] *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

[6] *Id.*

[7] *See e.g.*, *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004).

[8] 17 U.S.C. 1201 (year).

[9] *Id.*

[10] The factors the Librarian of Congress considers in making her review are as follows: (i) the availability for use of copyrighted works; (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Librarian considers appropriate. 17 U.S.C. 1201(a)(1)(C)(i–v).

[11] The Librarian of Congress was scheduled to complete her review in 2009. On October 27, 2009, the Librarian of Congress issued an interim ruling until the Register of Copyrights is able to complete her recommendation. See http://www.copyright.gov/fedreg/2009/74fr55138.pdf. As of the writing of this article, the Register of Copyrights had not made her recommendations.

[12] See http://www.copyright.gov/1201/2008/comments/lohmann-fred.pdf (EFF's proposed exemption class and argument thereto) and http://www.copyright.gov/1201/2008/responses/apple-inc-31.pdf (Apple, Inc.'s argument against EFF's proposed class)

[13] *Lexmark*, 387 F.3d 522.

[14] Surprisingly neither Apple nor EFF cites to Lexmark in their argument.

[15] Compare *Lexmark*, 387 F.3d 522, with *Davidson & Associates v. Jung*, 422 F.3d 630 (8th Cir. 2005) (holding that circumvention measures protecting code of a video game constitute violation of section 1201 of the DMCA). Similarly to anti-circumvention laws protecting software protecting the code of a DVD as the technology protects the copyright of the DVD itself, the code of a video game protects the copyright in the video game (the actual display of the video game) as opposed to protecting a useful object such as a printer or a cellular phone by controlling access to the printer or cellular phone.

[16] Apple, Inc.'s, responsive comment to proposed exemption to prohibition on circumvention of Copyright Protection Systems for Access Control Technologies, http://www.copyright.gov/1201/2008/responses/apple-inc-31.pdf, p. 7–8.

[17] While there are several apparent methods to jailbreak the iPhone, only the Pwnage tool is discussed in this article other methods of jailbreaking appear to constitute direct copyright infringement by modifying Apple's operating system and may be directly stopped by Apple in fixing "holes" in Apple's software. See, e.g., http://linuxoniphone.blogspot.com/2008/08/similarities-and-differences-between.html. The Pwnage tool is not easily fixed by Apple as each time Apple alters its bootloader, third parties quickly modify the bootloader.

[18] *Apple's Responsive Comment* at 12.

[19] *Id.* Apple asserts in its response that the version 2.0 software updated in July of 2008 made the OS verify the authenticity of Apps and therefore it has been modified to enable the OS to read unauthenticated apps. Apple's response at 8. However, the discussion of jailbreaking of iphones from http://linuxoniphone.blogspot.com/2008/08/similarities-and-differences-between on August 3, 2008 indicates that pwnage incorporates its own lines of code and does not provide a modified version of Apple's OS, which would be very large as indicated in the comparisons to the apparently now defunct ZiPhone method of jailbreaking the iPhone.

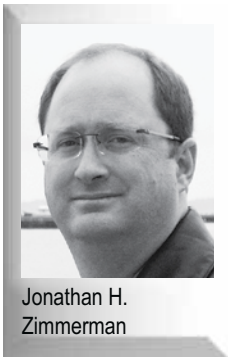
2010 License Fees Deadline

If you still haven't paid your fees, you must add a late fee payment – Active/House Counsel - $50.00 or Affiliate/Emeritus - $25.00 to your payment when you send it to the Bar. It must be physically received in our office by March 1, 2010. On March 2, 2010, the names of all attorneys who have not paid their 2010 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 astrauser@isb.idaho.gov.

When Dealing With Chinese Entities, Avoid the CIETAC Arbitration Process

Jonathan H. Zimmerman
Solo Practitioner

The past 12 years certain colleagues would ask me what I thought about participating in the China International Economic and Trade Arbitration Commission (CIETAC). My answer would be the same today as it would when I first encountered the repercussions of this arbitration procedure. I understand the underlying principle much better than when I experienced my first CIETAC tribunal. Needless to say, I still think that they should be avoided at all cost. However, having a better understanding of why a Chinese company chooses this method of arbitration will prepare you to negotiate an arbitration clause in an agreement that is more acceptable to your client and the Chinese party.


Jonathan H. Zimmerman

When drafting an agreement with a Chinese entity, you cannot always choose the venue and choice of law in the United States. A majority of US businesses find reliance upon the Chinese court system to be less than palatable, even though it has shown significant improvement over the years. On the other hand, one must consider how a Chinese company senses having to conduct litigation in the United States; which is a very frightening prospect for them. Thus, when drafting agreements between Chinese and U.S. companies a lawyer must choose an alternative dispute process to resolve future conflicts that may arise.

Usually, when you are drafting an agreement with a Chinese entity, you have two choices with regards to arbitration; utilizing the CIETAC, or an internationally recognized method of arbitration like the International Court of Arbitration (ICA) of the International Chamber of Commerce (ICC) (which has locations in Hong Kong and Singapore). Based upon my experience, an attorney would want to choose the ICA through the ICC because it is an arbitration process that can accommodate both Chinese and Western companies if a dispute arises.

The reason that CIETAC proceeding take so long is on purpose; because they want the both sides to settle their differences in "friendly manner," i.e. without lawsuits or any other adversarial type of proceeding. Many Chinese think U.S. businesses as a whole are too quick to litigate, and do not take the time or effort to negotiate a settlement.

CIETAC has been in existence since 1956, and boast that it has 274 foreign arbitrators (not Chinese Nationals) of its 969 listed arbitrators. Even with the foreign arbitrators, this method of arbitration is disagreeable prospect with foreign or North American companies; especially if you have experienced it.

If you have a CIETAC arbitration clause in your agreement, you then must go through a series of bureaucratic procedures (such as choosing the arbitrators) just to progress to the actual tribunal. The CIETAC proceeding is comprised of three arbitrators, one representing each party, and an impartial third arbitrator. Two of the arbitrators have to rule in a party's favor to prevail; or you must convince the neutral arbitrator to rule in your client's favor. And that is the trick; getting the neutral arbitrator to make a ruling. Then when the person does make a ruling, usually it is not in favor of the U.S. business.

One of the biggest complaints about CIETAC is that it is excruciatingly slow. I have been practicing law since 1993, and I have been doing business in China since 1998. I have heard of CIETAC cases that are still active since 1993; I not been able to confirm this information. However, I personally know of cases before the CIETAC tribunal that are still active and ongoing since 2001. CIETAC tribunals have a tendency to become bogged-down in procedural and mundane points of law, from the point of view from most attorneys that practice in China. In fact, many Chinese companies are becoming disillusioned with CIETAC for the same frustrated reasons as Western companies. Each set of rules in the process is designed to be slow and laboriously bureaucratic. It is designed specifically for this purpose because of the cultural aspects of how Chinese conduct business.

The reason that CIETAC proceeding take so long is on purpose; because they want the both sides to settle their differences in "friendly manner," i.e. without lawsuits or any other adversarial type of proceeding. Many Chinese think U.S. businesses as a whole are too quick to litigate, and do not take the time or effort to negotiate a settlement.

Even if a company eventually arrives at the tribunal stage, and it eventually deals with the issues of the dispute; it is more likely to be a beginning rather than an end. Furthermore, there have been many accusations of corruption in CEITAC tribunals. But in my experience it is more of a cultural bias. The apparent third impartial arbitrator is never going to rule against a local business or factory; it's simply not in that person's best interest to do so, especially if it is a large state owned enterprise that employs thousands of people. If the Chinese party is culpable beyond question, the third impartial arbitrator is more likely to keep delaying the decision, in the hope that the parties eventually settle, than to rule against his/her compatriots.

Chinese contracts related to foreign investments and/or state-owned companies in general, usually provide some language in the agreement, whether in an arbitration or mediation clause, that

states, "*any disputes arising between the parties should be settled by friendly negotiation*." The aforementioned phrase has a powerful connotation to the cultural mind-set of Chinese businessmen and companies.

It is also part of the practice called "guanxi" (pronounced, *gwan-shee*) of which there is no exact translation. Simply put, it is a methodology or a set of loose rules, for which there can be a dozen caveats and exceptions, in which the Chinese deal with one another, whether for business or day-to-day situations (to give more examples of "guanxi" would go far beyond the scope of this article).

To a Western or U.S. business "guanxi" will appear to be a strategy of delay, frustration, and obstruction, but that is but one facet of this truly nebulous methodology. To any attorney that gives advice to clients doing business in China, you want to negate the element of guanxi as much as possible.

The more preferred arbitration; especially for U.S. based businesses doing business in China is through the ICA of the ICC in Hong Kong. There are other arbitration organizations that can be utilized, but this is the most familiar to both sides, and probably the most palatable for your Chinese counterpart to actually agree to participate. It is fairly similar to arbitration in the United States or Great Britain, and generally it is fast, economical, and private method of handling a disputed agreement.

At the initial onset of negotiation, a Chinese party will not want arbitrate in any other forum other than a CIETAC tribunal. What will make it more attractive to a Chinese company; will be having the proceedings located in Hong Kong and choosing the language of the arbitration to be *both* in Chinese and English. It will depend upon how well your negotiation is proceeding to determine the applicable law. Sometimes the parties will agree to have a neutral country as the choice of law, such as Great Britain. Many times the Chinese parties will insist that the choice of law be that of China, especially if they are state-owned. This is not a Western company's first choice, but it is preferable to CEITAC arbitration. If the choice of law in your agreement is that of China, then the Chinese will likely agree to have the arbitration in Hong Kong. Of course, these are general statements based upon my experience not a prediction or insinuation of any possible future outcome.

Consider the circumstances as to why a Chinese company would want to opt for CIETAC arbitration as apposed to some other form of adjudication. The reason would be that CIETAC arbitration is something much more familiar and understandable than arbitration or litigation in the United States. Arbitrating in Hong Kong may not be the first choice of a Chinese company, but it is certainly more favorable and convenient than the United States. An attorney should be able to assist their client in avoiding a CIETAC tribunal by identifying and communicating the argument of convenience, the utilization of both Chinese and English, and a favorable choice of law. Negotiating and drafting and agreement without a CIETAC arbitration will result in saving your client a considerable amount of time and money, if a future dispute arises.

The more preferred arbitration; especially for U.S. based businesses doing business in China is through the ICA of the ICC in Hong Kong. There are other arbitration organizations that can be utilized, but this is the most familiar to both sides, and probably the most palatable for your Chinese counterpart to actually agree to participate.

About the Author

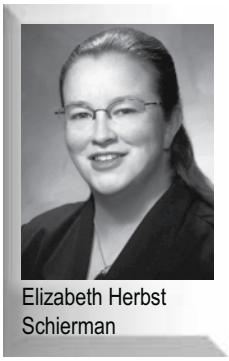
Jonathan Zimmerman *has been a practicing attorney for over 16 years, and is licensed to practice law in both Idaho and Texas. Mr. Zimmerman has work for one the largest Chinese state owned electronics manufacturer as their international corporate counsel. Presently, he is in private practice; and advices both clients doing business in China and the United States.*

.Com and .Net, Make Room for .Trademark: What Trademark Holders Should Know About the New gTLD Program

Elizabeth Herbst Schierman
Dykas, Shaver & Nipper, LLP

...the World Wide Web stands to welcome potentially hundreds or thousands of new generic top-level domains (gTLDs) in 2010...

If you are a business owner, you have probably invested a great deal of time and money into building the goodwill of your business and into associating that goodwill with a business name, logo, or other trademark. You want your customers to know that when they see your trademark on a flyer, commercial, letter, or email, they are receiving a message from *your* business. Imagine the nightmare of learning that someone else has registered a domain name using *your* trademark and has been using the website at that domain to sell competing goods or services to customers who think they are buying from your business. It is equally terrifying to learn that someone else has registered your trademark in a domain to lure your potential customers to a website that publicizes disparaging remarks about your business. You can only imagine the number of potential customers who have entered your trademark as a search term in Google or as a website address only to land at that other website, not yours. Lost sales and damage to your reputation may increase through the drawn-out and expensive process of trying to dispossess that other person or business of the domain name that was wrongly registered. That process is made all the more difficult when the cybersquatter[11] is not within the personal jurisdiction of the United States.


Elizabeth Herbst Schierman

Visit www.Cabelas.com, www.Cabelas.net, and www.Cabelas.org, and you will find yourself at the same website, not three separate websites. Each domain name points to one website, owned and operated by Cabela's Inc., with the Cabela's® trademark prominently displayed in the upper left-hand corner. Obviously, Cabela's has no interest in operating a separate website at each of the separate website addresses, and yet it separately registered each of these domain names. Undoubtedly, Cabela's registered these domain names to prevent someone else from registering them, a preventative measure to combat cybersquatting and trademark infringement.

This tactic of registering multiple websites at [trademark].com, .net, and .org, among others, is commonly used by businesses that own valuable trademarks rights, and it has been used successfully in a world where the number of available top-level domain (TLD) names has been rather limited. However, as the World Wide Web stands to welcome potentially hundreds or thousands of new generic top-level domains (gTLDs) in 2010, trademark holders will likely find that registering www.TheirTrademark.com, .net, and .org will no longer be sufficient when www.TheirTrademark.anything and .everything are possible.

History of TLDs, Their Control, and the New gTLD Program

As of the writing of this article, the Internet's addressing system has been limited to a rather small number of TLDs. TLDs are the two or more letters that follow the last dot in a website address and come in two types: gTLDs, such as .com and .net, and country-code top-level domains (ccTLDs), such as .uk and .cn.[2] At this time, while there are over 250 ccTLDs, there are only 21 gTLDs.[3]

The Internet Corporation for Assigned Names and Numbers (ICANN) has been responsible for managing the Internet's addressing system for more than ten years. It coordinates the allocation and assignment of, among other things, domain names, and it has overseen the growth of the number of gTLDs from the eight that pre-date ICANN's formation (.com, .edu, .gov, .int, .mil, .net, .org, and .arpa), through two rounds of gTLD expansions, to the twenty-one gTLDs that existed at the end of 2009.[4]

For years, ICANN has been developing a new policy that will allow significantly more gTLDs to be introduced.[5] The final step in the adoption and implementation of the New gTLD Program will be the completion of an Applicant Guidebook to provide detailed information about the rules, requirements, and process for acquiring new gTLDs.[6] Version 3 of the Guidebook was released in October 2009.[7] The final Guidebook is expected to be released at the end of 2009, with applications for new gTLDs to be accepted in 2010.[8]

The New gTLD Program is meant to allow for a greater degree of innovation and choice for those who register domain names and utilize the Internet.[9] It will allow for new gTLDs to be created, gTLDs that are not limited to only a few characters or to only ASCII characters.[10] For the first time, Internationalized Domain Names (IDNs), domain names including local language characters or letter equivalents, will available as TLDs.[11] Accordingly, trademark holders could possibly acquire new gTLDs consisting of their trademarks.

Acquiring a new gTLD will not be simple and will certainly be much more complicated than registering a second-level domain name using an established gTLD. A second-level domain name is the portion of a website address (*i.e.*, domain name) that precedes the top-level domain, *e.g.*, the "Cabelas" in www.Cabelas.com. Acquiring a new second-level domain name with an established gTLD like .com or .net, is usually as simple as filing out a short form and paying a relatively-small annual or semi-annual fee to a registrar such as GoDaddy.com. The registrar takes the information from the would-be domain name registrant, checks to confirm that the domain name is available, and then registers the new domain name with

the registry operator associated with the appropriate gTLD (*e.g.*, if seeking to register a domain name in the .com gTLD, the registrar would register the new domain name with VeriSign, Inc., the Registry Operator for the .com gTLD[12]). The registry operator would then add the new domain name to the registry database. In this process, there is little that is required by the would-be registrant of the second-level domain name, and the process is completed almost immediately upon the registry operator's receipt of a registration request.

Acquiring a new gTLD, on the other hand, will require the prospective owner to complete a complex application to prove the applicant is ready, willing, and capable of operating a registry business as the registry operator for the new gTLD; payment of fees in the neighborhood of $185,000; and signing a contract with ICANN governing the operation of the gTLD, provided the applicant has successfully survived the application process, including an objection period. The application process is expected to take several months from beginning to end.

Surely, there are trademark holders who have the resources and willingness to secure their trademarks as new gTLDs, either to be able to utilize www.____.[trademark] as their own or to simply prevent a third party or competitor from acquiring that gTLD.[13] However, given the complexity and expense of the application process and the ongoing, contractual commitments accompanying the acquisition of a new gTLD, many trademark holders will find it unfeasible to acquire new gTLDs for their trademarks. These trademark holders need to be aware of the rights protection mechanisms that the New gTLD Program is expected to provide as means for preventing or combating cybersquatting and trademark infringement.

The rights protection mechanisms (RPMs[14]) that the New gTLD Program is expected to provide are aimed at furthering certain principles of the program, including that "[s]trings [*i.e.*, the sequence of characters that make up a gTLD] must not be confusingly similar to an existing top-level domain . . ." and that "strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law."[15] To carry out these principles, the New gTLD Program is expected to provide (1) that ICANN will engage in string review, looking for string similarity, during an Initial Evaluation of all new gTLD applications; (2) for formal objections of pending gTLD applications, resolved by a dispute resolution process; and (3) for a Trademark Post-Delegation Dispute Resolution Policy (PDDRP) to which the registry operators of new gTLDs will be subject. These three mechanisms are tools to prevent a registry operator from acquiring a new gTLD that infringes upon the trademark rights (or other rights) of another or otherwise operating a gTLD in a manner that systemically infringes or cybersquats upon another's trademark rights.[16] Trademark holders would be well advised to be cognizant of these mechanisms and to position themselves to utilize them to prevent or combat trademark infringers and cybersquatters.

To have standing to file a legal rights objection, the objector must be a rightsholder, and the objector must provide documentation of the source and existence of the legal rights at issue.

Initial Evaluation of New gTLD Application by ICANN

The first RPM that will come into play as part of the New gTLD Program is the string review during the Initial Evaluation stage of the application consideration process. After applications for new gTLDs are received and the application period closes, an Initial Evaluation stage begins during which ICANN will, among other things, evaluate whether each of the applied-for gTLD strings is so similar to other already-established gTLDs or applied-for gTLDs that it would cause confusion.[17] String confusion will be found where an applied-for gTLD string "so nearly resembles another visually that it is likely to deceive or cause confusion."[18] It would have to be probable, not merely possible, "that confusion will arise in the mind of the average, reasonable Internet user."[19]

Because this string review is initiated and conducted by ICANN at the start of the application review process, without prompting, and at no extra cost to either the applicant or a third-party, it essentially provides the quickest mechanism by which trademark holders are potentially protected, the end result being that the application for the new gTLD is not approved and the gTLD is not put into operation. However, because the comparison is limited to only established and concurrently-applied-for gTLD strings, for a trademark holder to be "saved" by this mechanism, the trademark holder would need to have already acquired or have concurrently applied for a gTLD consisting of its trademark. Further, as the string review is limited to visual comparison, the string review mechanism will likely do little to protect a trademark holder against a third party applying for a confusingly-similar *sounding* gTLD (*e.g.*, .Costco compared with .KostKo). Nonetheless, the string review mechanism does mean that trademark holders that do take the time and incur the expense to acquire gTLDs for their trademarks will have this one quick and free shot at stopping third parties from acquiring gTLDs that are confusingly similar in appearance to the trademark holder's marks.

Formal Objection and Dispute Resolution Process

After the Initial Evaluation stage in the application review process, ICANN will post, on its website, a list of complete applications for gTLDs being considered. This list, once posted, will be publicly available and its posting will initiate an Objection Filing / Dispute Resolution period. During this period formal objections may be filed, but are limited to only four grounds: (1) string confusion, (2) legal rights, (3) morality and public order, and (4) community objections.[20] Of these, trademark holders will be most interested in the first and second grounds.

In filing a formal objection on the grounds of string confusion, the objector alleges that the applied-for gTLD string is confusingly similar to either an existing TLD or to a concurrently-applied-for gTLD (*i.e.*, an applied-for gTLD being

considered in the same round of applications as the objected-to gTLD).[21] To have standing to bring such a formal objection, the objector must be an existing TLD registry operator or concurrent gTLD applicant.[22] Unlike the string review during the Initial Evaluation, however, the consideration of whether there is string confusion sufficient to prevent the grant of the new gTLD will take into consideration more than just visual similarity. Accordingly, this mechanism will be available to those trademark holders who have acquired or who are seeking to acquire a gTLD of their trademark and who want to prevent a third party from registering a confusingly-similar gTLD string where the similarity is due to more than obvious visual similarity.

A formal objection on the grounds of a legal rights objection amounts to a contention that the applied-for gTLD string would infringe the objector's existing legal rights.[23] To have standing to file a legal rights objection, the objector must be a rightsholder, and the objector must provide documentation of the source and existence of the legal rights at issue.[24] Notably, these objections can be based on either a registered or unregistered trademark.[25]

> During evaluation of a legal rights objection, the appropriate dispute resolution service provider panel will determine whether . . .
>
> the potential use of the applied-for gTLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector's registered or unregistered trademark or service mark . . . , or unjustifiably impairs the distinctive character or reputation of the objector's mark, or otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and the object's mark . . . [26]

This determination will take into consideration, among other things, the similarity of the applied-for gTLD to the objector's trademark; whether the objector's acquisition and use of its trademark has been bona fide; whether the applied-for gTLD is recognized in the relevant sector of the public as the objector's mark, the applicant's mark, or a third-party's mark; the applicant's intent in applying for the gTLD; whether and to what extent the applicant has used or plans to use the gTLD in connection with a bona fide purpose; and whether the applicant's intended use of the applied-for gTLD would create a likelihood of confusion with the objector's mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.

Thus, trademark holders will need to be on their toes to take advantage of the formal objection and dispute resolution mechanism.

With either the string confusion or legal rights objections, the formal objection and dispute resolution process should be a useful tool for trademark holders due to its many benefits. First, the process is designed to be rather quick, just a matter of weeks.[27] Second, all filings, including the response from the gTLD applicant, are to be in English and the response is to provide the applicant's contact information.[28] This can be quite helpful when dealing with a potential cybersquatter or trademark infringer in a foreign jurisdiction. Third, because it takes place before the gTLD is awarded, it should allow trademark holders to prevent cybersquatting and trademark infringement before any damage is done. Fourth, though the cost for the associated dispute resolution process will likely be in the range of several thousand dollars (likely between $3,000 and $56,000 for most objections[29]), the cost is still significantly-lower than applying for and operating a new gTLD. However, the window during which formal objections can be filed will probably be rather narrow, perhaps as little as two weeks between the posting of the Initial Evaluation results and the close of the objection filing period. Thus, trademark holders will need to be on their toes to take advantage of the formal objection and dispute resolution mechanism.

Trademark Post-Delegation Dispute Resolution Policy (PDDRP)

The PDDRP mechanism is to be used to protect trademark rights against an entity that has already successfully gone through the new gTLD application process and been awarded the gTLD. At the conclusion of that process, the operator of the new gTLD will be required to enter into a contract with ICANN, with one of the terms being that the registry operator is required "to comply with and implement decisions made according to the Trademark Post-Delegation Dispute Resolution Policy."[30] As part of the PDDRP, trademark holders will be able to take action against a gTLD registry operator that has operated in bad faith, "with the intent to profit from the systemic registration of infringing domain names (or systemic cybersquatting) or who have otherwise set out to use the gTLD for an improper purpose."[31] The PDDRP will not apply to a gTLD registry operator who just happens to have infringing domain names registered in its gTLD.

The PDDRP mechanism may be used to combat trademark infringement or cybersquatting at either the top level or the second level. Infringement at the top level would be an infringement due to the gTLD (the top-level domain) itself (*e.g.*, www.domain.infringingstring), while infringement at the second level would be an infringement due to a domain registered within the gTLD, but not the gTLD itself (*e.g.*, www.infringingstring.gtld). With a top-level infringement, the alleged infringer is the registry operator; with a second-level infringement, the alleged infringer is a domain registrant, not the registry operator. As such, the PDDRP mechanism treats the two situations differently.

To succeed with a PDDRP complaint regarding a top-level infringement, the trademark holder (*i.e.*, the complainant) will likely need to prove by clear and convincing evidence . . .

> that the registry operator's affirmative conduct in its operation or use of its gTLD, that is identical or confusingly similar to the complainant's mark, causes or materially contributes to the gTLD: (a) taking unfair advantage of the distinctive character or the reputation of the complainant's mark, or (b) unjustifiably impairing the distinctive character or the reputation of the complainant's mark, or (c) creating an impermissible likelihood of confusion with the complainant's mark.[32]

Given the high burden of proof and the requirement that the registry operator be operating in bad faith, trademark holders will probably find it difficult to win on such PDDRP complaints. However, for trademark holders who missed the narrow window of opportunity to assert a formal legal rights objection during the application stage, the PDDRP mechanism could be their best option.

For success with a PDDRP complaint regarding a second-level infringement, the trademark holder will likely be required to prove by clear and convincing evidence

> (a) that there is a substantial ongoing pattern or practice of specific bad faith intent by the registry operator to profit from the sale of trademark infringing domain names; and (b) of the registry operator's bad faith intent to profit from the systematic registration of domain names within the gTLD, that are identical or confusingly similar to the complainant's mark, which: (i) takes unfair advantage of the distinctive character or the reputation of the complainant's mark, or (ii) unjustifiably impairs the distinctive character or the reputation of the complainant's mark, or (iii) creates an impermissible likelihood of confusion with the complainant's mark.[33]

As with the first-level infringement situation, the burden of proof to succeed with a second-level infringement PDDRP complaint is high. However, because the complaint will necessarily be based on the registry operator's actions during operation of the gTLD, it is not a complaint that could practically be brought during the application stage through a formal objection. Thus, the second-level PDDRP complaint is likely a trademark holder's best and only mechanism (under the New gTLD Program) to combat a systematic cybersquatting or trademark infringing registry operator.

With either the top level or second level PDDRP situation, a complaint may be brought by any trademark holder, whether the trademark is registered or unregistered,[34] and the process is meant to be relatively quick, on the order of weeks. Even so, success for the trademark holder will not result in a transfer of the infringing domain name.[35] Instead, remedies available range from monetary sanctions equaling the complainant's financial harm to suspension of the registry operator's ability to accept new domain name registrations until violations are cured.[36] In any regard, this mechanism provides a good tool for trademark holders to combat ongoing cybersquatting or infringement by registry operators.

Most trademark holders will likely find that the best and most practical option for guarding their trademarks in the face of the New gTLD Program will be to monitor the application process and be ready to file any necessary formal string confusion or legal rights objections within the narrow objections period...

Conclusion

The three RPMs described above are the most likely to be available to help trademark holders prevent or stop another from confusing customers with the new gTLD registrations. Even so, the surest way for a trademark holder like Wal-Mart, Cabelas, or Coca-Cola to prevent a third party from acquiring new gTLDs consisting of strings confusingly-similar to its trademark is to be the first to register .walmart, .cabelas, or .cola, as the case may be. This will obviously prevent someone else from sending mass emails to potential customers from www.coupons.walmart or www.hunting.cabelas or www.coca.cola and operating websites at those domains. However, registering the gTLD before a third party can do so will be a complicated and highly expensive process, which will likely be impractical for most trademark holders.

Most trademark holders will likely find that the best and most practical option for guarding their trademarks in the face of the New gTLD Program will be to monitor the application process and be ready to file any necessary formal string confusion or legal rights objections within the narrow objections period, which opens once ICANN posts the list of applied-for gTLDs.[37] Once that window has closed, however, the PDDRP is available for clear cases of cybersquatting or trademark infringement due to bad faith actions of the new gTLD registry operator.

In any regard, the explosion of new TLD options is almost assuredly going to occur in 2010, and trademark holders should no longer rely solely upon registering www.[trademark].com, .net, and .org to prevent cybersquatting and trademark infringement. Cyberspace is changing and trademark holders' tactics must change too.

About the Author

Elizabeth Herbst Schierman *is a registered patent attorney focusing on helping businesses and individuals secure and enforce their intellectual property rights. Her practice includes patent application preparation and prosecution, copyright and trademark registration procurement, and intellectual property litigation, including domain name disputes. Ms. Schierman holds degrees in chemical engineering and law from the University of Idaho and is the current Chair of the ISB Intellectual Property Law Section.*

Endnotes

[1] Cybersquatting, generally speaking, is the registration and use of a domain name with the bad faith intent to profit from the goodwill of another's trademark. One example would be the registration and use of Wallmart.com (with two l's) for a merchandise retail website, selling gods to those who are confused and think the site is associated with Wal-Mart Stores, Inc. (Wal-Mart has been smart enough to register wallmart.com itself.)

[2] Country-code top-level domains are limited to two letters. *See* Root Zone Database, Internet Assigned Numbers Authority, http://www.iana.org/domains/root/db/# (last visited Dec. 16, 2009).

[3] ICANN, Draft Applicant Guidebook, Version 3, Preamble (Oct. 2, 2009), *available at* http://www.icann.com/en/topics/new-gtlds/draft-rfp-clean-04oct09-en.pdf.

[4] ICANN, New gTLDs – Frequently Asked Questions (last revised Oct. 24, 2008), http://www.icann.org/en/topics/new-gtlds/strategy-faq.htm.

[5] Letter from Rod Beckstrom, CEO and President of ICANN, to All Prospective Applicants for New gTLDs 1, *available at* http://www.icann.com/en/topics/new-gtlds/draft-rfp-clean-04oct09-en.pdf (last visited Dec. 6, 2009).

[6] *Id.*

[7] *Id.*; Draft Applicant Guidebook, note 2.

[8] ICANN, In Focus, Applicant Guidebook, http://

www.icann.com/en/topics/new-gtlds/dag-en.htm (last visited Dec. 16, 2009).

[9] New gTLDs – Frequently Asked Questions, note 3.

[10] *Id.* ASCII characters, generally speaking, are those characters that would be found on the computer keyboard used in Enlgish-speaking countries. They include the characters of the English alphabet, punctuation, and other common symbols (e.g. [${/ \}). They do *not* include frequently-used symbols in non-English languages, such as those of the Cyrillic alphabet, Chinese characters, and Japanese kanji and hiragana.

[11] *Id.*

[12] *See* ICANN, .com Registry Agreement (Mar. 1, 2006), *available at* http://www.icann.org/en/tlds/agreements/com/.

[13] Likewise, there will probably be trademark holders who will invest in acquiring new gTLDs of the generic names of their products or services, thereby preventing a competitor from doing so. The thought of .cola or .soda comes to mind. Were the Coca-Cola Company to acquire these gTLDs, it could secure www.coca.cola and www.dietcoke.soda while likely preventing www.pepsi.cola from coming into existence.

[14] As of the writing of this article, the rights protection mechanisms (RPMs) of the New gTLD Program have not yet been finalized, so only the mechanisms seeming to have the best chance of approval and finalization will be discussed. As used in this article, RPMs refer to any mechanism, policy, or procedure within the New gTLD Program that is designed to protect the rights of trademark holders. The final New gTLD Program may define RPMs more narrowly.

[15] ICANN, Generic Names Supporting Organization, Final Report – Introduction of New Generic Top-Level Domains (Aug. 8, 2007), *available at* http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm.

[16] There has also been a great deal of discussion about two other rights protection mechanisms: a Uniform Rapid Suspension (URS) proceeding to provide an expedited procedure for addressing clear cases of trademark infringement and a Trademark Clearinghouse to facilitate "Trademark Watch" and "Sunrise Period" services. These two mechanisms would be tools particularly aimed at preventing third parties from registering cybersquatting or infringing second-level domains in gTLD registries. These mechanisms would be in addition to the already-available Uniform Domain-Name Dispute-Resolution Policy (UDRP). At this time, it appears that the New gTLD Program will encourage, but may not require, that gTLD registry operators utilize the URS proceeding and Trademark Clearinghouse mechanisms if and when such mechanisms are put into place.

In any regard, the explosion of new TLD options is almost assuredly going to occur in 2010, and trademark holders should no longer rely solely upon registering www.[trademark].com, .net, and .org to prevent cybersquatting and trademark infringement.

[17] Draft Applicant Guidebook, note 2 at 2-2.

[18] *Id.* at 2-5.

[19] *Id.* Further, "[m]ere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion." *Id.*

[20] *Id.* at 3-1–3-2.

[21] *Id.* at 3-1. Importantly, formal objections grounded on string confusion must be filed with the International Centre for Dispute Resolution, the institution that has been authorized to act as the dispute resolution service provider for this category of objections. *Id.* at 3-4.

[22] *Id.* at 3-2.

[23] *Id.* at 3-1. Formal legal rights objections must be filed with the Arbitration and Mediation Center of the World Intellectual Property Organization. *Id.* at 3-4.

[24] *Id.* at 3-3.

[25] *Id.*

[26] *Id.* at 3-14.

[27] *See id.* at 3-9 (noting that responses to formal objections are to be filed within thirty calendar days of receipt of a notice from the dispute resolution service provider that ICANN has published a list of formal objections).

[28] *Id.* at 3-8–3-9.

[29] *Id.* at 1-32.

[30] *Id.* at 5-10.

[31] ICANN, Proposed Trademark Post-Delegation Dispute Resolution Procedure (Trademark PDDRP) (Oct. 4, 2009), *available at* http://www.icann.org/en/topics/new-gtlds/draft-trademark-pddrp-04oct09-en.pdf.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* (explaining that because only the registry operator, and not the registrant or registrar of the infringing domain name, is a party to the dispute resolution proceeding, transfer of the domain name should not be available because transfer of the domain would affect non-parties).

[36] *Id.*

[37] Though this option is available to holders of registered as well as unregistered trademarks, trademark holders of *registered* marks will likely find it easier to succeed on a formal objection, and so holders of unregistered marks would be well advised to formally register their trademarks.

OFFICIAL NOTICE
SUPREME COURT OF IDAHO

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

AMENDED - Regular Spring Terms for 2010

Boise. . . . . .January 13, 15, 19, 20 and 22
Boise. . . . . .February 10, 12, 16, 17 and 19
Wallace. . . . . April 5
Coeur d'Alene. . . . . .April 6 and 7
Moscow. . . . . April 8
Lewiston. . . . . April 9
Boise (Eastern Idaho) . . . . . May 3, 5, 7, 10 and 12
Boise (Twin Falls) . . . . . .June 2, 4, 7, 9 and 11

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2010 Spring Terms of the Idaho Supreme Court, 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
Karen L. Lansing
Judges
Sergio A. Gutierrez
David W. Gratton
John M. Melanson

AMENDED - Regular Spring Terms for 2010

Boise. . . . . .January 14, 21, 26 and 28
Boise. . . . . .February ~~11~~, 18 and 23
Boise. . . . . March 11, 16, 18 and 19
Boise. . . . . April 8, 13, 15 and 20
Boise . . . . . May 11, 13, 18 and 20
Boise. . . . . .June 10, 15, 17 and 22

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of setting of the year 2010 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 Dates

Wednesday, February 10, 2010 – BOISE
8:50 a.m. Ogden v. Griffith. . . . . #35964
10:00 a.m. State v. John Doe (Petition for Review). . .#36606
11:10 a.m. Black Diamond Alliance v. Kimball. . . . .#35189

Friday, February 12, 2010 – BOISE
8:50 a.m. Bunn v. Heritage Safe Company. . . . . #36024
10:00 a.m. Thompson v. Clear Springs Foods. . . . . .#36159
11:10 a.m. Brown v. City of Pocatello. . . . . .#35992

Tuesday, February 16, 2010 – BOISE
8:50 a.m. State v. Pina (Petition for Rehearing). . . . .#34192
10:00 a.m. Wesco Autobody v. Ernest. . . . . #35732
11:10 a.m. John Doe v. John Doe II. . . . . .#36309

Wednesday, February 17, 2010 – BOISE
8:50 a.m. State v. Munoz (Petition for Review). . . . .#36542
10:00 a.m. Borley v. Smith. . . . . .#35751
11:10 a.m. State v. Frederick (Petition for Review). . .#36493

Friday, February 19, 2010 – BOISE
8:50 a.m. State v. Pierce. . . . . .#35063
10:00 a.m. Flying Elk Investment v. Cornwall. . . . . #35853
11:10 a.m. City of Idaho Falls v. Fuhriman. . . . . #36721

Idaho Court of Appeals
Oral Argument Dates

Thursday, February 18, 2010 – BOISE
9:00 a.m. State v. Moore. . . . . .#35486/36033
10:30 a.m. Nicolai v. State. . . . . .#35444
1:30 p.m. Medical Recovery Services v. Carnes. . . . . #36500

Tuesday, February 23, 2010 – BOISE
9:00 a.m. State v. Hartshorn. . . . #33914/33915/33916/33917
10:30 a.m. State v. Miller. . . . . .#35845
1:30 p.m. State v. Naranjo. . . . . #35966

IDAHO LAW FOUNDATION

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The Idaho Law Foundation has received a generous donation from **Alfred Barrus,** in honor of: **The University of Idaho College of Law Class of 1974.**

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Update 1/02/10)

CIVIL APPEALS

DIVORCE, CUSTODY, AND SUPPORT

1. Whether the court erred in applying the child support guidelines on voluntary underemployment.

Decoria v. Lundquist
S.Ct. No. 36583
Court of Appeals

HABEAS CORPUS

1. Did the court err by dismissing Knight's petition for writ of habeas corpus in which he challenged the computation of consecutive sentences?

Knight v. Packer
S.Ct. No. 36780
Court of Appeals

LIENS

1. Did the court err in holding that filing a motion for leave to amend a complaint constitutes the commencement of proceedings to enforce a mechanic's lien within the meaning of I.C. § 45-510?

Terra-West, Inc. v. Idaho Mutual Trust, LLC
S.Ct. No. 36523
Supreme Court

POST-CONVICTION RELIEF

1. Did the court err by summarily dismissing Jonas' claim her plea was involuntary prior to giving her twenty days notice of its intent to dismiss?

Jonas v. State
S.Ct. No. 35748
Court of Appeals

2. Did the district court err by summarily dismissing Reese's petition for post-conviction relief?

Reese v. State
S.Ct. No. 35933
Court of Appeals

3. Did the court err in finding Kaykay failed to prove his ineffective assistance of counsel claims and in denying Kaykay's petition for post-conviction relief?

Kaykay v. State
S.Ct. No. 35906
Court of Appeals

4. Did the district court err in determining that the *Brady* claim should be summarily dismissed on the basis that the withheld evidence regarding the home computer was not material?

Glass v. State
S.Ct. No. 36203
Court of Appeals

PROCEDURE

1. Whether the Janoush Investigation was conducted in violation of I.C. § 54-4107 (2005 version), IBOL's procedures, as well as the Board's adopted disciplinary procedures and policies, and thus counts 1-7 of the Board's complaint should be dismissed.

Williams v. Idaho Board of Real Estate Appraisers
S.Ct. No. 36642
Supreme Court

SUBSTANTIVE LAW

1. Whether the district court was correct in concluding Vickers failed to preserve any error in the findings of fact by not filing exceptions to the recommended order with the agency head pursuant to I.C. § 67-5244.

Vickers v. Lowe
S.Ct. No. 36619
Supreme Court

TERMINATION OF PARENTAL RIGHTS

1. Whether the magistrate court erred in terminating the parents' rights under the best interest of the child analysis.

Idaho Department of Health & Welfare v. John Doe
S.Ct. No. 36863
Supreme Court

2. Whether appellant's parental rights were incorrectly terminated when (1) there is a presumption in Idaho law that the natural parents retain custody, (2) Appellant substantially completed her case plan with Health and Welfare, and (3) the record fails to show that Appellant will be incarcerated for the majority of her children's minority.

Idaho Department of Health & Welfare v. Jane Doe
S.Ct. No. 36690
Supreme Court

3. Whether the court erred by terminating the appellant's parental rights due to neglect because of her inability to discharge her parental obligations without clear and convincing evidence that the strict requirements for such termination had been satisfied.

Idaho Department of Health & Welfare v. Jane Doe
S.Ct. No. 36813
Supreme Court

4. Was there clear and convincing evidence that Doe was unable to parent even with the assistance of disability provider?

Idaho Department of Health & Welfare v. John Doe
S.Ct. Nos. 36664/36665
Supreme Court

5. Whether the magistrate erred in finding termination is in the minor child's best interest without substantial competent evidence to meet the standard of clear and convincing evidence.

Idaho Department of Health & Welfare v. John Doe
S.Ct. No. 36983
Supreme Court

BAIL BONDS

1. Did the magistrate abuse its discretion in denying Two Jinn's motion to exonerate bond by determining that justice did not require exoneration of the bond?

State v. Two Jinn, Inc.
S.Ct. No. 36629
Court of Appeals

DUE PROCESS

1. Whether Dursunov's constitutional right to due process was violated by having an unqualified interpreter used within the psychosexual examination.

State v. Dursunov
S.Ct. No. 35927
Court of Appeals

EVIDENCE

1. Was there substantial competent evidence admitted at trial from which the jury found beyond a reasonable doubt that Anderson was guilty of felony eluding a police officer?

State v. Anderson
S.Ct. No. 34680
Court of Appeals

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Update 1/02/10)

2. Did the court abuse its discretion in allowing the state to present evidence that Overholser was arrested on two outstanding warrants because the prejudicial effect of the evidence was outweighed by any probative value?

State v. Overholser
S.Ct. No. 35696
Court of Appeals

3. Did the interjection of I.R.E. 404(b) evidence without notice constitute fundamental error that can be raised for the first time on appeal?

State v. Coleman
S.Ct. No. 36077
Court of Appeals

4. Did the court abuse its discretion by admitting the testimony of the detective regarding the GPS tracking of Danney's truck?

State v. Danney
S.Ct. No. 36394
Court of Appeals

5. Whether the court abused its discretion by excluding as hearsay the testimony of Dotty Sampson.

State v. Sampson
S.Ct. No. 36074
Court of Appeals

6. Did the court err when it ruled that the officer's visual estimation of speed was sufficient to convict?

State v. Estes
S.Ct. No. 36471
Court of Appeals

CRIMINAL APPEALS

PLEAS

1. Did the trial court abuse its discretion when it denied Manwill's motion to withdraw his guilty plea?

State v. Manwill
S.Ct. No. 36071
Court of Appeals

2. Whether the state breached the plea agreement at the hearing on relinquishing jurisdiction and, if so, whether Longest is entitled to withdraw his plea.

State v. Longest
S.Ct. No. 36083
Supreme Court

PROBATION REVOCATION

1. Did the district court err by denying Gamino's motion to dismiss his probation violation where probation had expired by the time the state filed its petition to revoke probation?

State v. Gamino
S.Ct. No. 35796
Court of Appeals

SEARCH AND SEIZURE – SUPPRESSION OF EVIDENCE

1. Did the court err in finding valid consent for the initial search of the common areas of the residence and in denying Hansen's motion to suppress?

State v. Hansen
S.Ct. Nos. 35519/35521
Court of Appeals

2. Did the court err in denying Bauman's motion to suppress and in finding the DUI arrest was the product of a legal and justified stop?

State v. Baumann
S.Ct. No. 35947
Court of Appeals

3. Did the court err in denying Jones' motion to suppress evidence of statements made to an officer before his arrest and in finding Jones was not in custody?

State v. Jones
S.Ct. No. 36001
Court of Appeals

4. Did the district court err in denying Grigg's motion to suppress and in finding he had not been illegally detained?

State v. Griggs
S.Ct. No. 36351
Court of Appeals

SENTENCE REVIEW

1. Did the court abuse its discretion by imposing excessive sentences upon Kellis?

State v. Kellis
S.Ct. No. 35978
Court of Appeals

2. Did the court err when it denied Hanson's request for a mental health evaluation prior to sentencing?

State v. Hanson
S.Ct. No. 35403
Court of Appeals

SUBSTANTIVE LAW

1. Did the court err in denying Stewart's motion to dismiss the felony stalking charge in which Stewart argued the charge violated principles of double jeopardy?

State v. Stewart
S.Ct. No. 36116
Supreme Court

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

Four Key Habits for Running a Profitable Law Practice

Rochelle Lierz DeLong
Consilio Business Managers

While many attorneys excel in the law, many sidestep cash management. Weak cash management diverts attention to simple survival rather than the future of the business.

Attorneys who run thriving businesses master two practices. Firstly, they infuse very specific habits into their businesses. Secondly, they recognize the natural cycles of business and plan their habits in rhythm with them. This past October I presented business management tips at the Idaho Practical Skills seminar in Boise. In this article, I present habits from that seminar that successful owners have mastered and also discuss how those habits fit into the natural order of business.

Uncover your purpose. Team success is rooted in clarity of purpose. It is up to the leader to distill the purpose and make it known to the team. If a purpose is not made clear to each attorney on the team, they will design their own vision and march on. A mission that states "To provide companies in Idaho with business legal services" may very well end up with a team of attorneys focusing on several services and markets, thus splitting the firm's resources in many directions.


Rochelle Lierz DeLong

An firm's purpose is comprised of several elements —your vision for the future, your current mission, and your company culture and values. A well-designed purpose is memorized by staff, so it should be intuitive and short. Historically, a "tagline" has helped many companies define their purpose.

The book *Good to Great* by Jim Collins provides a practical map to developing a firm's purpose. One of its key points is the Hedgehog Concept, named after the parable of the fox and hedgehog. The fox uses his creativity and quick feet to find his next meal, but he rarely outfoxes the hedgehog. The Hedgehog concept is the intersection of what you are most passionate about, what you do best in the world, and what keeps your company solvent. It is a "simple, crystalline concept"—otherwise known as a purpose statement. The Hedgehog arises each day hungry (passion), sets out to forage with laser focus (solvency), and uses his defenses—his quills and his flexible spine—when the fox approaches (best skill). The hedgehog knows his purpose.

The companies profiled in *Small Giants* by Bo Burlingame repeatedly show how strength of purpose can lead to greatness. They all nailed purpose on the head. Their purpose was to be world-class companies in their niche and remain relatively small. They didn't wander into tangential areas and they refused buy-out offers. These companies identified their purpose again and again, made sure their team knew the purpose well, and waltzed into the business hall of fame.

How will you know if your purpose needs refinement? You have high turnover, your team spends time on tangents, and typically profits are low to non-existent. When staff knows why they are present and you have clear buy-in, they have a loyalty that you cannot imagine. The human spirit is bent on seeking purpose—and your staff is full of that spirit. Your job as a leader is to stoke the embers and connect them with the fire. Giving regular pep talks, encouraging those who exemplify the purpose, and providing direction that makes reference to the purpose are just some of the ways successful business leaders lead with purpose.

In summary, make it a habit to spend time on company's purpose. While this is best done every day in every interaction, a periodic review is worthwhile. The cycle to consider for this work is an annual refocus, and in young companies a mid-year review as well. In that case, your total investment is 8-16 hours per year.

Focus on cash weekly. While many attorneys excel in the law, many sidestep cash management. Weak cash management diverts attention to simple survival rather than the future of the business. By mastering cash management, you will exponentially increase your ability to respond to opportunities, thus focusing on your firm's purpose.

Strong cash management encompasses three parts of your financial system: what you have in the bank (current assets), what you owe others (accounts payable or A/P) and how much each client owes you (accounts receivable). Each part of the system has two layers—management and data entry/reporting. Management is responsible to make decisions about what is in the bank and when cash is spent. It is also responsible to collect on overdue client receipts and halt work when the situation requires it. It is up to you, as the leader, to oil all of the gears of the system to be sure that the machine works without a hitch.

Traditional cash flow reports give an annual or monthly view. These reports were designed for companies with full financial teams. As an alternative, for younger or smaller firms, a micro cash flow report provides the detailed information they need to manage it easily. We often implement a 7-day view that includes weekly bank reconciliations, as well as accounts receivable and accounts payable updates. Over time, as the system matures, we extend this view, but rarely is the weekly cash management activity omitted entirely.

Deadlines and schedules come into play and keep all the parts working together. Larger firms that have a different person managing each part can be challenging to coordinate, but it is possible and it is critical, so do not give up when the curve is steep. In a smaller firm, all the parts of the system might be handled by one or two people so coordination is easier. In any case, we recommend that you choose a cash management day. This is the day that the people that enter the transactions finalize their reporting and the people that manage the process are available to make decisions and adjustments.

In summary, employ the habit of spending time on cash management at least every 30 days. The cycle of cash management depends on the maturity of your financial systems and the strength of your cash. If you have young systems and weak cash, a 7-day cycle is your best bet. If you have decent systems and healthy cash, you may be able to run a 14-day or 30-day cycle. Your total investment is 2-4 hours per month.

Know your Cost of Goods Sold. Many attorneys tend to fidget when I use financial terms, so I'll write this subject presuming that it needs a detailed explanation.

Cost of Goods Sold (COGS) is the direct cost of the product or service. It does not include overhead expenses that indirectly support production such as Rent or Office Supplies. In a service business, like a law firm, COGS is primarily made up of time, which is represented as Payroll Expense on your financial reports.

Needless to say, exact time tracking is essential whether staff is paid by the hour or receives a monthly salary. If you do not know where your staff spends time or which products they support, you cannot accurately measure the cost. You are left to guess which products are money-makers and which sell at a loss.

In summary, make it a habit to spend time understanding your product costs. It is best to do it on a monthly cycle. Your total investment is 1-2 hours per month spent reviewing, analyzing, and adjusting (presuming the reports are solid). If your financial system is lacking, you will need to invest additional time or money to systemize your information and reporting.

Embrace Technology Changes. If you haven't yet accepted the constant of change and learned skills to embrace change, there really couldn't be a better time. With recent additions to our workforce, employers everywhere are being challenged to adapt quickly to new technology.

If you do not know where your staff spends time or which products they support, you cannot accurately measure the cost. You are left to guess which products are money-makers and which sell at a loss.

These energetic staff members push anyone not raised with technology way past their comfort level. They question and resist traditional business technology like voice mail, fax machines and email. Instead, they use communication tools like text messaging, social networks, and online collaboration tools. Naturally, the younger generations push limits. Their mastery of technology requires leaders to revisit what works best in the workplace.

For anyone over 30, there are at least a few blinders related to technology, and in some cases it is immobilizing. If the roadblock is a lack of understanding or a genuine technology fear, hire a personal technology tutor. The right person can also help integrate the right tools for your personal, as well as business requirements. If the roadblock is not enough time, which is most people, decide which technology duties can be delegated. Again, a personal technologist can help point out how the firm is using technology and which pieces you need to have, which you don't, and which you can assign to a staffer.

With these questions answered, lead and manage the delegation of those duties. This is not abdication, but delegation. Unfortunately for some, leading the technology process is no longer an "off to the side" supporting activity of business. It is as integrated as money management, and moves through the width and the depth of companies.

In summary, make it a habit to understand technology and its use in business today. Personally integrate a new change at least quarterly, and plan to put together a technology map annually. Your total investment is 8 hours per quarter spent learning, integrating and testing a new technology and 16 hours per year on your annual technology plan. If you need a thinking partner, plan on 2-4 hours to connect with one and ensure their style suits your own.

About the Author

Rochelle Lierz DeLong, *a Boise native, founded Consilio Business Managers, a business that supports other businesses in finance, technology and operations. In 2001, she founded Perfect Order, a business that helps individuals organize their personal lives. The companies work together to help business owners maintain order and clarity in their lives and businesses. In 1989, she received a BS in Business with emphasis in Technology, Sociology, and Family Business from Oregon State University.*

We Shall Not Use Shall: Don't Make Trouble for Your Contracts

Mark T. Peters, Sr.
Solo Practitioner

"In business and the professions, one is always writing for a reader. And most readers are busy people who don't like to waste time reading three pages that easily could have been condensed to less than one.

"In writing, more is not better. Yet some writers seem stuck in term-paper mode. In high school, piles of prose, often copied verbatim from the *World Book* or *Britannica* and topped with an attractive cover might have been the surest way to an A. In the business world, however, wordiness in a memo, letter or report is a turnoff. Although today's executives may be beguiled by a lively cover, they have little time to read what's inside."[1]


Mark T. Peters, Sr.

Think about when you see the word shall being used. Typically, it is not contained in letters, memos or emails. Nor do most people use it when talking. I believe that 98% of the time (a pure guess on my part) that you will see it used is in contracts, statutes, deeds and documents that purport to be "legal,", e.g. employee handbooks, memoranda of understanding, etc. If you perform a search on the word shall in the Statutes section in Casemaker, you will find that there are 16,410 separate provisions that use the word shall.

Shall is not a bad word. When writing persuasively, it can add emphasis, as in the last line of the Gettysburg Address: **"**and that government of the people, by the people, for the people, shall not perish from the earth." However, in most legal writing, shall is used so often and in so many different situations that it tends to be more confusing than useful. Part of the reason for this is the fact that shall has a number of different meanings.

However, in most legal writing, shall is used so often and in so many different situations that it tends to be more confusing than useful. Part of the reason for this is the fact that shall has a number of different meanings.

Merriam-Webster provides 4 broad definitions for shall: 1) a) will have to, b) will be able to; 2) a) used to express a command or exhortation, b) used in laws, regulations or directives to express what is mandatory; 3) a) used to express what is inevitable or what seems to be fated or decreed or likely to happen in the future, b) to express simple futurity; and 4) used to express determination.[2]

My experience is that in most legal writing, shall is primarily used in 4 different ways. First, there is the idea of obligation:

Tenant **shall** make the monthly lease payments on or before the fifth (5th) day of the month during the lease term.

Second, shall is used to indicate that a party has a power or right to do something:

Landlord **shall** be allowed to inspect the premises upon giving no less than twenty-four hours notification to Tenant.

Third, shall is used to indicate that a party does not have the power or right to do something:

Tenant **shall** not have the right to make improvements to the leasehold without first obtaining Landlord's consent, which **shall** not be unreasonably withheld.

Fourth, shall is used to state what will happen if a contingency occurs:

In the event the premises are subject to condemnation by an applicable governmental authority, the payment of the proceeds of the condemnation **shall** be allocated in accordance with this section.

If we are to keep our writing concise, we need to reduce the number of words used. Shall forces us to use too many words. In all of the examples shall is used as a helping verb. Because of its general meaning of obligation, lawyers have to use other words to either flesh out or reduce the overall effect of shall. If we substitute words that more accurately state what we are trying to say, fewer words are used and the overall meaning becomes clearer.

Take the first sample sentence and change shall to another word of obligation, "must": Tenant **must** pay the rent on or before the 5th day of the month.

Another way we can reduce the number of words used is to show a power or right by use of a word that gives permission, "may": Landlord **may** inspect the premises upon giving at least 24-hours notice to Tenant.

Can we do this in the situation where a power does not exist? The simple way it to use the phrase "may not": Tenant **may not** improve the leasehold without Landlord's consent, which **may not** be unreasonably withheld.

A perfect word to use in a future contingency situation is "will": If the premises are condemned by an applicable governmental authority, the proceeds of the condemnation **will** be allocated in accordance with this section.

I give you two caveats. First, it is tempting to soft-sell your client's obligations and make the other party's obligations mandatory: "Lessee must pay the rent when due. While the rent is paid promptly, Landlord will give Lessee quiet possession of the premises." However, since contracts are construed strictly against the drafter, I think that it is better practice to be consistent in your use of words throughout the document. If your client has an obligation, then use must. Remember, your client will appreciate your letting him or her know exactly what their obligations under the contract are.

The second warning is don't fall into the trap of using will instead of shall. This is an easy trap to fall into. I know;

I've done it myself. However, you will develop the same issues with will that you do with shall, it just sounds a little more modern.

So review your writing. Do you use the word shall? If so, try using my suggestions for its replacement. I believe that if you do, you will find that your document will read more smoothly.

[1]Working with Words in Business and Legal Writing; Agress, Lynn, Ph.D., Perseus Publishing, Cambridge, Massachusetts; 2002.

[2]Webster's Third New International Dictionary – Unabridged; Gove, Phillip, Ph.D., Editor; Merriam-Webster, Inc.; Springfield, Massachusetts; 2002.

About the Author

Mark Peters *graduated from the University of Michigan with a B.A. in Political Science and Economics and the University of Michigan Law School. He has been a member of the State Bar of Michigan for about 30 years and a member of the Idaho Bar since September, 2009. Most of his career has been spent as in-house counsel for a number of corporations drafting a variety of agreements and documents. You may contact him at mtpeters47@cableone.net.*

MCLE Extensions

March 1, 2010 is the deadline for the MCLE extension to complete your MCLE requirements. Visit our website at www.isb.idaho.gov for information on upcoming live courses, recorded programs available for rent and online courses. Contact the Membership Department at (208) 334-4500 or jhunt@isb.idaho.gov if you have any questions on MCLE compliance.

Fifth District judge retiring from full-time work

Fifth District Judge Barry Wood retired from his full-time duties recently, but will continue working part-time as a senior judge as needed.


Honorable Barry Wood

Wood started as a Lincoln County magistrate judge in 1987. In 1995 he became a district judge covering Gooding, Jerome and Lincoln Counties.

He tells The Times-News that unprecedented population growth in the state combined with drug problems have led to heavy workloads for judges and courtroom staffs.

Wood has been a proponent of rehabilitation and drug, mental health and other specialty courts.

Otter names Simpson as new First District Judge for Idaho

Gov. C.L. "Butch" Otter named Kootenai County Magistrate Benjamin Simpson to replace First District Judge Charles Hosack.


Honorable Benjamin Simpson

Hosack is retiring at the end of the year.

Simpson was an associate, then a partner in a Wallace-based law firm for 15 years before becoming a magistrate judge in January 2000. He now lives in Coeur d'Alene with his wife, Jonelle.

The 60-year-old magistrate is originally from Colorado but got his law degree from Gonzaga University in Spokane, Wash.

Kyte named president for Adventist Risk Management

Robert E. Kyte, General Counsel for Healthwise, Incorporated, was recently named president for Adventist Risk Management, Inc., (ARM), and its affiliated companies, Gencon Insurance Company of Vermont and Gencon Insurance Company International, Ltd. ARM, located in Silver Spring, Maryland, provides risk and insurance services to the Seventh-day Adventist Church worldwide and is owned and operated by the church.


Robert E. Kyte

As General Counsel for Healthwise, Incorporated, Kyte is responsible for all legal applications, transactional work, governance, risk management, including insurance management and regulatory compliance for the corporation. He provides legal oversight to the strategic plans to move into additional international markets, including working with outside counsel in various countries.

Kyte was also an attorney with Skinner Fawcett Law office in Boise, Idaho from 1990 to 2005 where he provided counsel on issues relating to corporate, business and commercial transactions. He assumed his new role with ARM on Jan. 1, 2010.

Zarian Midgley elects Brook B. Bond as a member

Brook B. Bond has been named a member of Zarian, Midgley and Johnson, PLLC (Zarian Midgley), Idaho's largest law firm specializing in intellectual property matters (especially patent law), intellectual property litigation, and complex business litigation. Bond joined the firm in October 2007, just one week after the original three members founded the firm. Bond is the first lawyer to be named as a new member since Zarian Midgley was founded.

"We are delighted to have Brook join us as a member," said John Zarian, managing attorney for Zarian Midgley. "Brook has been a tremendous asset to the firm from the very beginning and has demonstrated a strong commitment to providing clients with excellent legal work and outstanding service."


Brook B. Bond

Bond's legal practice focuses on intellectual property litigation, complex insurance coverage litigation, and complex commercial litigation. He has handled many massively complex cases involving multiple parties, millions of documents and complex legal and scientific issues.

"I joined Zarian Midgley because I saw it as a firm that could grow, prosper, serve clients well, and meet an important need in the legal community," said Bond. "During the past two years, I have seen Zarian Midgley do just that – with energy, vitality and professionalism encompassed in a friendly and congenial atmosphere."

Bond earned his Juris Doctor from the University of San Diego in 1989 and holds a Bachelor of Science degree in Genetics from the University of California – Davis. He is licensed to practice law in the states of Idaho and California, where he practiced law for twelve years before moving back to Idaho.

Jeremy C. Chou named as a new partner

Givens Pursley LLP is pleased to announce that it has named Jeremy C. Chou as a new partner of the firm. Jeremy earned his B.A. from Baylor University in 1992 and his J.D. from Washington College of Law, American University in 1996. Jeremy's legal practice focuses primarily in the area of government affairs and administrative law.

Jeremy began his law career in Idaho in 1996. In 1999, he relocated to open the first Washington D.C. Office of the Governor for the State of Idaho. Jeremy then joined the D.C. law firm of Wright Robinson Osthimer and Tatum. In 2003, he returned to Idaho to work in the Office of the Attorney General, Civil Litigation Division. He joined Givens Pursley as an associate in 2007.


Jeremy C. Chou

Mosher joins Creason, Moore, Dokken & Geidl

Cynthia L. Mosher is a Clarkston, Washington, native who joined the firm of Creason, Moore, Dokken & Geidl, PLLC, of Lewiston in August 2009. She received her B. S. degree in Criminal Justice with highest honors, with a minor in political science, from Lewis-Clark State College in 2005. Ms. Mosher then received her J. D. degree, summa cum laude, from the Penn State University – Dickinson School of Law in 2008.

After her graduation from law school, Ms. Mosher received a one-year clerkship appointment at the Idaho Supreme Court for Justice Jim Jones. Ms. Mosher is currently licensed to practice in all courts

OF INTEREST

in the state of Idaho. She is a member of the Idaho State Bar, American Bar Association, and the Ray McNichols American Inns of Court.

Ms. Mosher is actively engaged in the general practice on behalf of clients of the firm.

Cynthia L. Mosher

Evans Keane announces new associate

The law firm of Evans Keane, LLP is pleased to announce that Gary W. Tanner became an associate of the firm in December 2009. Mr. Tanner received a Masters of Laws (L.L.M.), with honors, in commercial real estate from John Marshall Law School in Chicago in 2001, his Juris Doctorate from the University of Idaho College of Law in 2000, and a Bachelor of Science in 1996 from Boise State University, where he graduated cum laude. Mr. Tanner's areas of practice include: real estate transactions, including real estate development, land use planning and zoning; contract law; and corporate law, including business transactions, entity selection and corporate governance.

Mr. Tanner came to the firm with extensive legal experience in real estate and business law. In addition to his years in private practice, Gary spent two years as in-house counsel where he was involved in the acquisition, sale and development of more than $600 million of commercial real estate and the management and leasing of hundreds of thousands of square feet of commercial office and retail space located in Idaho and throughout the continental United States. Mr. Tanner is licensed to practice law in all courts in the State of Idaho.

Gary W. Tanner

Patent attorney Tim Murray joins Zarian Midgley

Zarian Midgley and Johnson PLLC continues to build Idaho's largest law firm specializing in intellectual property matters (especially patent law), intellectual property litigation, and complex business litigation. Tim Murphy, formerly of Marger Johnson and McCollom in Portland, Oregon, becomes the eighth registered patent attorney to join Zarian Midgley. The firm now includes 13 attorneys, overall.

Murphy joins Zarian Midgley as an associate. His practice emphasizes intellectual property litigation, including patent, trademark, unfair competition and licensing disputes, as well as complex business disputes. Murphy has experience in litigation and patent prosecution involving semiconductors, optoelectronics, advanced materials, networking, and nuclear and hydroelectric power production.

Tim Murphy

Murphy is a former DRAM R&D product engineer and semiconductor manufacturing engineer, and he previously served in the U.S. Navy. He is licensed to practice in the states of Idaho, Oregon and California, and before the U.S. Patent and Trademark Office. In 2008, he received his Juris Doctor from the University of Michigan. He also holds a Master of Science in Electrical Engineering from the University of Michigan, and a Bachelor of Science in Electrical Engineering from Boise State University.

Givens Pursley welcomes new associate Emily McClure

Givens Pursley LLP is pleased to announce the addition of new associate Emily McClure. Emily joins Givens Pursley following a clerkship with the Honorable Stephen S. Trott of the Ninth Circuit Court of Appeals. During her clerkship Emily also assisted the Honorable B. Lynn Winmill of the United States District Court for the District of Idaho.

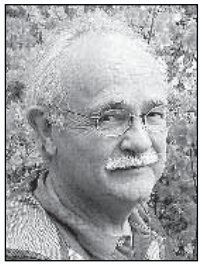
Emily McClure

Emily earned her B.A. with Honors in Political Science from Willamette University in 2002 and her J.D. from Boston College Law School in 2008.

IN MEMORIAM

Hon. Robert W. Mullen 1939 - 2009

Honorable Robert Wyley Mullen was born to John and Ferne Mullen on December 30, 1939, in Denver. Bob was raised in Colorado and Montana, and became an avid skier, outdoorsman, hunter, and rockhound. He attended Mesa College in Grand Junction before transferring to the University of Utah where he earned his B.S. in mining engineering from the School of Mines in 1962 and his J.D. from the School of Law in 1964.



Honorable Robert W. Mullen

During breaks from courses, Bob lived with his family in Moab, Utah, where he met Holly, his wife of 45 years. Bob and Holly moved to the Silver Valley in northern Idaho where Bob worked as counsel for Hecla Mining Company from 1967-79 and then as General Counsel for Day Mines, Inc., until 1981.

They raised their children, Kate and George, in Wallace, Idaho, until 1983, when Bob was appointed an Administrative Judge with the Board of Land Appeals in the U.S. Department of the Interior and the family moved to Washington, D.C.

Bob retired to Spokane in 2005 to pursue his outdoor passions as well as his artistic and creative talents of pottery and woodworking.

Bob suffered an aneurism while on vacation at Flathead Lake, where he had been enjoying fishing and playing with his grandchildren. He died shortly after, on August 22, 2009, in Kalispell.

He will be missed by his loving wife, Holly; mother, Ferne; daughter Kate, her husband Shayne and their kids Hannah and Max; son, George, his wife Rachel and their kids Kiley and Keegan; his two sisters Pat and Mary and their families; and by many loving friends and colleagues.

The Mass celebrating Bob's life was held on September 12, at St. Mary's Catholic Church in Spokane Valley.

Updates to Idaho State Bar Attorney Directory
12/2/09 – 01/1/10

The attorneys listed have had a change in their membership information (name, firm, address, phone, fax, email, website or status) during the time period indicated. For complete information, please visit our website at www.isb.idaho.gov.

Ann Elizabeth Allen
Associated Industries
Spokane, WA

Keller Wayne Allen
Law Firm of Keller W. Allen, PC
Spokane, WA

Adam David Andersen
Battelle Energy Alliance
Idaho Falls

Roger Doyle Armstrong
Armstrong & Kidwell
Elko, NV

Robert Richard Audley
Audley - Audley
Salem, OR

Nathan Andrew Austin
Twin Falls County Public Defender's Office
Twin Falls

Bryan William Aydelotte
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Nicholas Mark Baran
Nicholas Baran, Attorney at Law
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Lawrence Richard Beck
Beck Law Offices
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Idaho Falls

Paul M. Beeks
Paul M. Beeks, PLLC
Sun Lakes, AZ

James Michael Bendell
Bendell Law, PLLC
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Pocatello

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Caldwell

Schuyler Leroy Bradley
West Richland, WA

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Rupert

Christopher Erik Brown
Hillborough County Sheriff's Office
Tampa, FL

Gerald Raymond Bublitz
Bublitz Law, PC
Boise

Christopher Alden Bugbee
Bugbee Law Office, PS
Spokane, WA

Paul Phillip Burghardt
Richards Brandt Miller Nelson
Salt Lake City, UT

Paul Gary Butikofer
Butikofer Law Office, PLLC
Rigby

George David Carey
Boise

Charles Henry Carpenter
Carpenter Law Firm
Missoula, MT

Dennis M. Charney
Charney & Associates
Eagle

Ronald Dean Christian
Ron Christian, Attorney at Law, PLLC
Boise

Michael Anthony Clapin
Kootenai County Public Defender's Office
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Eric Robert Clark
Clark & Associates, Attorneys
Eagle

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Bannock County Magistrate Court
Pocatello

Mckinzie Nicole Elizabeth Cole
Twin Falls County Prosecutor's Office
Twin Falls

James Edward Monroe Craig
Immigration & Customs Enforcement
Orlando, FL

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Salt Lake City, UT

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Bannock County Public Defender's Office
Pocatello

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Arlington, VA

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Boise

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Ogden, UT

Suzanne Mary Fegelein
Elsaesser Jarzabek Anderson Marks & Elliott, Chtd.
Sandpoint

Joel Alva Flake Jr.
Eagle

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Holden, Kidwell, Hahn & Crapo, PLLC
Idaho Falls

Lyle James Fuller
Smith Hartvigsen, PLLC
Salt Lake City, UT

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Gardner Law Office, PA
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Gauthier Law Offices, kPS
Kent, WA

P. Denise Giles
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Jon Steven Gorski
Bencor, LLC
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Ada County Prosecutor's Office
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G. W. Haight
Law Service, PA
Coeur d'Alene

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Boise

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Lukins & Annis, PS
Coeur d'Alene

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Law Office of Jim C. Harris
Boise

Sarah Elizabeth Harris
U.S. Navy
Washington, DC

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Boise

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Melbourne, FL

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Heather Henderson
Salt Lake City, UT

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Hiatt Law Offices
Lehi, UT

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Westover, WV

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URS Corporation
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Idiart Law Group, LLC
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The Jacobson Law Firm, PLLC
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Jacques Law Office, PC
Boise

David Anthony Johnson
David A. Johnson, PA / Wright,Johnson,Tolson & Waymert PLLC
Idaho Falls

Updates to Idaho State Bar Attorney Directory
12/2/09 – 01/1/10

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Rockne K. Lammers, Attorney at Law
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Skiff Robert Larson
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Lubing Law Office
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Worley

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Roy, Nielson, Barini - Garcia and Platts
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McGrath Law Office
Swan Valley

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Boise

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Cache County School District
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Michael John Mehall
Boise

Ronald Mark Morris
True Oil & Affiliated Companies
Casper, WY

Thomas Charles Morris
Belnap Law, PLLC
Boise

Airon Ann Mothershed
U.S. Air Force
FBO AE,

Tamara Whalen Murock
Law Office of Tamara W. Murock, PLLC
Spokane, WA

Norma F. Myers
Spokane, WA

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Pocatello

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Richard Lloyd Nelson
Jackson, WY

Thomas Howard Nelson
Welches, OR

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Boise

Charina A. Newell
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Robert Carroll Nicholson
Kalispell, MT

Amy Nichole Borgman Nixon
Kootenai County
Prosecutor's Office
Coeur d'Alene

Updates to Idaho State Bar Attorney Directory
12/2/09 – 01/1/10

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Hailey

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Law Office of Larry D. Purviance
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Ronald P. Rainey, PA
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Law Office of Andrew T. Schoppe, PLLC
Boise

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Schwam Law Firm
Moscow

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Kootenai County Public Defender's Office
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Seedall Law Office, PC
Idaho Falls

Martha Sheehy
Sheehy Law Firm
Billings, MT

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Mann Bracken, LLP
Portland, OR

Peter John Smith IV
Lukins & Annis, PS
Coeur d'Alene

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Thomas M. Smith, Inc., PS
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Berg and Mclaughlin Chtd.
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Roberta Lynn Stewart
SunCor Idaho, Inc.
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Trapper Stewart
Kingston Companies
Idaho Falls

Dwain Hilliard Stufflebeam
First American Title Company
Blackfoot

Julie Ann Sturgill
Twin Falls County
Twin Falls

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Canyon City, OR

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Ammon

Karen Shepherd Turner
Florida Office of Attorney General
Tallahassee, FL

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Salt Lake City, UT

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Hewlett Packard Company
Boise

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Eagle Financial Advisors, LLC
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Christine Marie Weaver
Law Office of Christine M. Weaver, PS
Spokane Valley, WA

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Spokane, WA

Krista L. White
Bishop, White & Marshall, PS
Seattle, WA

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Alexanderson, Davis, Rainey & Whitney
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TDW Law Cotract Services, Inc.
Idaho Falls

Hon. Eric J. Wildman
Fifth District Judge
Twin Falls

Brad Lyle Williams
Brad L. Williams, PS
Spokane, WA

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Weldon S. Wood
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Jeffrey D. Block, PE Civil, Structural, Building Inspection, Architectural, Human Factors and CM Coeur d'Alene Idaho. Licensed ID, WA, CA. Correspondent-National Academy of Forensic Engineers, Board Certified-National Academy of Building Inspection Engineers. Contact by telephone at (208) 765-5592 or email at jdblock@imbris.net.

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Historic McCarty Building at 9th & Idaho, office spaces for sale or lease. Single offices to half-floors available, $18.00 per square foot full service. For more information contact L. D. Knapp & Assoc. (208) 385-9325.

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CLASS A-FULL SERVICE EXECUTIVE SUITES DOWNTOWN BOISE

Key Business Center is now offering BEAUTIFUL NEW offices on the 11th floor of Key Financial Plaza! Full Service including receptionist and VOIP phone system, internet, mail service, conference rooms, coffee service, printer/fax/copy services, administrative services and concierge services. Parking is included! On site health club and showers also available. References from current tenant attorneys available upon request. Month-to-month lease. Join us in the heart of Boise! karen@keybusinesscenter.com; www.keybusinesscenter.com, (208) 947-5895.

BOISE OFFICE SUITE FOR LEASE

1,522 sq. ft. – consisting of 1 large private office or conference room, 2 small private offices, a copy/file room, and a large open reception/secretarial area. Common areas include bathrooms and kitchen. Located on the Boise bench, one block southeast of the intersection of Latah and Cassia, at 812 La Cassia Drive. Free parking. Five minutes from downtown. Lease rate is $8 per sq. ft. per year, full service except janitorial. Call (208) 336-8858.

RECREATIONAL RENTAL

La Quinta, California – Luxury two-story townhouse. Spacious and elegantly decorated. 3 bedroom, 3.5 bath. Near Old Town, La Quinta Resort, multiple golf courses, biking and hiking. Directly on semi-private pool. Sleeps up to eight. HD TVs, bikes, cable and wireless internet with small extra fee. From $175//night low season to $400/night high season. Reduced rates for weekly/monthly rental. (541) 579-5090, (541) 345-3333. See photos/info at www.vrbo.com/282631.

POSITIONS

CITY ATTORNEY POSITION

The City of Sandpoint is seeking candidates for a full time City Attorney position to start in April 2010. Starting salary $32.80 to $34.68/hr DOE/DOQ. The work is primarily civil, but some experience with prosecution would be helpful. Candidates must be licensed as an attorney in the state of Idaho (or qualified to be licensed with reciprocity). Open until filled. Contact City Clerk's office (208) 263-3317 or clerksoffice@ci.sandpoint.id.us. www.cityofsandpoint.com.

EXPAND YOUR PRACTICE

EXPAND YOUR PRACTICE!

Veterans need representation learn how at the Seattle Seminar. April 22-24, 2010 from NOVA www.vetadvocates.com (877) 483-8238

2009
Idaho Law Foundation & Idaho State Bar
CLE Speakers

The Continuing Legal Education program of the ILF and ISB wants to acknowledge the many individuals who contributed their time and expertise in 2009. Without the commitment of these individuals these programs would not be possible!

A

Adelson, Robert
Adler, Ken
Akers, Steve
Alexander, J. Robert
Anderson, Robert
Andrews, Brad

B

Bail, Honorable Deborah Ann
Bard, Damien
Bauer, Charles
Beal-Gwartney, Tori
Beard, Winston
Belzer, Frederick
Bieter, Honorable Christopher
Birch, Erika
Bishop, Nancy
Blair, Mary Beth
Bolinder, Erik
Bowen, Daniel
Boyle, Honorable Larry M.
Bozorg-Omid, Renee
Brandt, Elizabeth
Brassey, Andrew
Brumley, Jennifer
Burdick, Honorable Roger
Burgoyne, Grant
Burke, Cameron
Burnett, Donald
Burri, Laura
Bush, Honorable Ronald E.

C

Calhoun, Robert
Cameron, Alan
Carnaroli, Honorable Rick
Carr, D.C.
Carter, Sean
Chen, Kevin
Christensen, Matthew
Cooper, Gary
Copsey, Honorable Cheri C.
Coulter, Ron
Craighill, Carol
Crawford, J. Nick
Crawford, Jerad
Crossland, Julia
Culet, Honorable Gregory

D

Dale, Honorable Candy
Davis, Bart
Davis, James
Davis, Layne
DeLong, Rochelle
Derden, Catherine
Derek, Jonathan
Dodson, Robin
Donick, Elizabeth
Drescher, Cassandra
Dryden, William

D

Duke, Keely
Dullea, Catherine

E

Eismann, Honorable Daniel T.
Elsaesser, Ford
Engle, Robert
Epis, Honorable David C.

F

Fegelein, Suzanne
Felbeck, Rachel
Fields, Richard
Fisher, Heidi
Fisher, Vaughn
Flammia, Sue
Fletcher, Lois
Foley, Howard
Frazer, Brad
Fry, Lauren

G

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Goff, Honorable Dennis
Goldman, Lew
Goodman, Linda
Goss, Geoff
Gourley, Kim
Gray, Monte
Greenwood, Honorable Richard D.

H

Hall, Richard
Hall, Stephen
Harris, Donald
Harris, Shannon
Harty, Jack
Haxlett, Natasha
Haynsworth, Harry
Heikkila, Kara
Hendrickson, Martin
Herndon, Steve
Hickok, Suzanne
High, Thomas
Hobson, Mary
Hoidal, Ernest
Hoopes, D. Fredrick
Hopkins, R. Sam
Horton, Honorable Joel
Howard, Kenneth
Howell, John

J

Janis, John
Jensen, David
Jensen, Tiffany
Johnson, David
Johnson, Michael

K

Kenyon, Stephen
Khoury, Andrea
Kirscher, Honorable Ralph B.
Klein, Erika
Knox, Brian
Krafft, Kevin
Kunkel, Anne

L

Ladle, Jeremy
Lam, Horace
Langford, Brian
Larson, Stephen
Lee, Royce
Leroy, David
Liesche, Ramona
Limbaugh, Thomas
Lin, Geoffrey
Lipetzky, Joe
Lucas, Anne

M

MacGregor-Irby, Honorable Cathleen
Magel, John
Maynard, R.D.
Maynes, Robert
McGrath, Lisa
McKay, Scott
McKee, D. Duff
Meadows, David
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Melillo, Cynthia
Merkley, Douglas
Miller, John
Mills, Carol
Moore, Richard
Mott, Tobi
Myers, Honorable Terry L.

N

Nipper, Stephen
Nye, Marcus

O

Olson, Wendy Jo
Oths, Honorable Michael J.
Owens, Richard

P

Palmer, Jacque
Pappas, Honorable Jim D.
Patton, Mary Kay
Perison, Mark
Peterson, Charles
Petrie, Gair
Pike, Edward
Points, Michelle
Poplack, Rick
Prince, Jason

Q

Querna, Donald

R

Ramsden, Michael
Reardon, Honorable Michael
Reynard, Janine
Reynoldson, Lauren
Roberts, James
Robnett, Ausey
Rock, Ronnie
Ruchti, James
Russell, Gena

S

Saunders, Judith
Schroeder, John
Scruton, Rick
Shuster, Bonnie
Smith, Honorable N. Randy
Smith, Honorable Tyler
Solchany, JoAnne
Spinner, James
Stark, Paul
Stegner, Honorable John
Stokes, Steven
Sturgell, Jay

T

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Thiry, Krista
Thomsen, Curt
Thomson, Jeffrey
Thurman, Honorable William T.
Trott, Honorable Stephen
Twitchell, John

V

Varin, Will

W

Wardwell, William
Watson, Honorable Barry E.
Weiss, J. Mark
Williams, Honorable Mikel
Williams, Mark
Williamson, Honorable Darla
Wilper, Honorable Ronald
Wullenwaber, Dean

Y

Yukins, Christopher

Z

Zarian, John

2009
Idaho Law Foundation & Idaho State Bar
CLE Speakers

Thanks to the following law offices, firms and businesses for supporting the ILF and ISB CLE programs.

A

ABA Center on Children and the Law
Ada County Magistrate Court
Ada Orthopedics
Adler Law and Mediation Service
Ahrens & DeAngeli, PLLC
Amendola & Doty, PLLC
Anderson, Julian & Hull, LLP
Angstman, Johnson & Associates, PLLC

B

Bannock County Magistrate Court
Bauer & French
Beard St. Clair Gaffney, PA
Belzer Law Office
Benoit, Alexander, Harwood, High & Valdez, LLP
Bessemer Trust
Bevis, Thiry & Schindele, PA
Boise Physical Medicine and Rehabilitation
Boise State University, College of Business and Economics
Bowen & Bailey, LLP
Brassey, Wetherell & Crawford, LLP

C

Camacho Mendoza Coulter Law Group PLLC
Child & Fisher
Clements, Brown & McNichols, PA
Colliers International
Consilio Business Managers
Cooper & Larsen
Cornerstone Psychological
Cosho Humphrey, LLP
Coventry Work Comp Services

D

Davis & Walker
DC Law, PLLC

D

Department of Justice, U.S. Trustee Program
Dykas, Shaver & Nipper, LLP

E

E.W. Pike & Associates, PA
Elam & Burke, PA
Elmore County Magistrate Court
Elsaesser Jarzabek Anderson Marks Elliott & McHugh, Chtd.

F

Flammia & Solomon, PC
Fletcher & West, LLP
Foley Freeman, PLLC
Fourth District Court

G

Gem County Magistrate Court
Givens Pursley LLP
Goss Gustavel Goss, PLLC
Greener, Burke & Shoemaker, PA
Grow Rasmussen LLP

H

Hall, Farley, Oberrecht & Blanton, PA
Harty Capital
Hawley Troxell Ennis & Hawley, LLP
Hepworth, Janis & Brody, Chtd.
Holden, Kidwell, Hahn & Crapo, PLLC
Holland & Hart, LLP
Hopkins Roden Crockett Hansen & Hoopes, PLLC

I

Idaho Business Law Group, PLLC
Idaho Credit Union League
Idaho Department of Commerce
Idaho Department of Juvenile Corrections
Idaho Human Rights Commission
Idaho Industrial Commission

I

Idaho State Bar
Idaho State University
Idaho Supreme Court
Idaho Volunteer Lawyers Program

J

JVT Investigations

K

Kootenai County Magistrate Court

L

Lawpsided Seminars
Leroy Law Offices
Liesche & Reagan, PA
Lovells, LLP
Ludwig Shoufler Miller Johnson, LLP

M

Mauk & Burgoyne
Merris, Naugle & Herndon, PLLC
Meyers Law Office, PLLC
Miller, Purnell & Harr, PLLC
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
Mountain States Counseling

N

Nevin, Benjamin, McKay & Bartlett, LLP

O

Owens & Crandall, PLLC

P

Paine Hamblen LLP
Petersen, Moss & Hall
Powell & Reed, PC

R

Racine, Olson, Nye, Budge & Bailey, Chtd.
Ramsden & Lyons, LLP
Randall Danskin
Ringert Law, Chtd.
Ruchti Law Offices, PLLC

S

Schroeder & Lezamiz Law Offices, LLP
Second District Court
Service, Spinner & Gray
Spink Butler, LLP
Stindberg & Scholnick, LLC
Stoel Rives, LLP
Syngenta Seeds, Inc.

T

The George Washington University Law School
Third District Court
Thomsen Stephens Law Offices, PLLC
Trout Jones Gledhill Fuhrman, PA

U

U.S. Attorney's Office, District of Idaho
U.S. Bankruptcy Court
U.S. Court of Appeals
U.S. District Court of Idaho
University of Idaho College of Law
University of Washington

W

Washington Trust
William Mitchell College of Law
Wullenwaber Law Firm

Z

Zarian Midgley & Johnson, PLLC

IDAHO LAW FOUNDATION

Helping the profession serve the public

JUDGE CARNAROLI TAKES QUESTIONS FROM THE SKEPTICAL ATTORNEY

Happy New Year! The Idaho Pro Bono Commission encourages you to come on board and adopt a pro bono policy for yourself or your office. As the Commission has traveled the state talking to you about adopting pro bono policies, the reactions of the members of the Idaho State Bar have been understandably mixed. We have received enthusiastic acceptance and offers of assistance, and we've been met by healthy skepticism and concern. Those in the latter group have posed a number of good questions. Therefore, as a service to you, the members of the Idaho State Bar, the Commission offers one its own, Sixth District Magistrate Judge, Rick Carnaroli, to answer some of your questions.

The judge on the stand, under oath. Your witness, Mr. Skeptical Idaho Attorney:

Question: Isn't this pro bono policy thing just for the big Boise firms?

Answer: No. The Pro Bono Commission is reaching out to all sectors of the Idaho State Bar seeking participation from private firms big and small, government agencies and corporate legal departments. A written pro bono policy certainly seems to fit well with large firms because of their inherent organizational structure. However, we received policies from two and three person firms in both northern and southern Idaho. Corporate law departments are considering our model policies. Meanwhile, the Idaho Attorney Generals' Office, county prosecuting attorneys' offices, public defenders' offices and other government agencies either have or are considering pro bono policies.

Question: Isn't it a bit ridiculous for a solo practitioner to adopt a pro bono policy?

Answer: That depends on your point of view I guess. A policy is defined, among other definitions as, "a governing principle, plan or course of action". Most solo practitioners have policies for operation of their offices covering for example amounts required for a retainer, hourly rates or flat fee charges, types of cases accepted etc. even if they don't write them down. These policies help the practitioner manage the business side of the practice. Since pro bono work also impacts a solo practice, it makes sense for the attorney to develop a "governing principle, plan or course of action" for that work as well. But, if you are the kind of Idaho solo practitioner that prefers limited planning, a pro bono policy is not required. But it is something you might want to think about.

Mr. Skeptical, Esq.

Honorable Rick Carnaroli

Question: I've taken pro bono cases for years. I never needed a policy. It's been my (our) unwritten policy to take on pro bono work. Why bother?

Answer: First of all, we appreciate all of the pro bono work you have done over the years and we thank you. Unfortunately, Idaho is no different than any other state in the respect that a small percentage of our members are shouldering the pro bono service load for the majority. The Commission would like to encourage a state-wide commitment of as many members of the Bar as possible to pro bono service this year and right now. Dean Donald Burnett of the University of Idaho College of Law sometimes describes their pro bono program as a means of "creating a culture of young lawyers committed to pro bono service." Personally, I view pro bono service as a team approach. Remember when we took the oath? Most all of us took it in large groups. Pro bono service to meet the needs of the poor in Idaho requires a group effort. So if you are already doing the service, you can help encourage the culture of pro bono by adopting a policy that reflects your present commitment.

Question: Do we have to do our pro bono service through IVLP?

Answer: No. Many Idaho lawyers prefer to do their own intake with pro bono work. While there are advantages to having IVLP assist with case screening and the extension of legal malpractice coverage to you for those cases referred to you by IVLP, the Pro Bono Commission is not requiring a commitment to pro bono work through IVLP. To the extent that you advise IVLP of your good work, IVLP can let the news media and others know how much time and effort the members of the Idaho State Bar together commit to pro bono service to the poor of Idaho.

Question: I'm not doing pro bono for recognition, awards or plaques, so can I keep my commitment to myself and not make it a "public" commitment?

Answer: Certainly. Adopt the policy and do your part. That is all we are really asking of you. But if you are willing to go "just a little public," you can encourage others in your community to follow your lead. That's up to you.

Question: Do we have to commit to doing a certain number of hours or cases?

Answer: Absolutely not. Give until it feels good. If you can devote a certain amount of hours, or fit one or more cases into your busy schedule, the amount of time and number of cases you take on is entirely up to you. Your pro bono policy need not state any commitment to any specific number of hours or cases.

Question: If we adopt a policy, do we have to share it with the Commission, the Bar, or the public?

Answer: No. We would like to know if you or your office has adopted a policy to gauge the response to the efforts of the Pro Bono Commission. We'd love to see your policy and perhaps use it to improve upon the model policies, but you do not have to share the text of your policy with the Commission, the Bar, or the public if you do not want to.

Question: What happens if we don't follow our policy after we adopt it?

Answer: No penalty. We will not be inquiring into the compliance, or lack of compliance with your policy. As in many aspects of your life and your practice, you will be left to police yourself.

Question: What is in it for me, my firm or office to have a policy?

Answer: If you are willing to be recognized and thanked, we have lots of ways to do that. Otherwise, we can't promise you much of anything other than the hope that the work is its own reward. The knowledge that you are fulfilling your promise, honoring your professional oath, and that you are helping someone in need is big. Hopefully that combined with the knowledge that your commitment might inspire others to make the same commitment is big enough.

Question: Any other reason to adopt a pro bono policy?

Answer: Adopt a policy as a reminder to you to take a case every now and then. The days, the months, the years all seem to fly by too fast. A promise to take a case next week, next month, or even next year might not be a promise you keep to yourself without a small reminder to do so. Don't we all use reminders in one form or another to help us remember to get certain things done? Together, we made joint and individual commitments, among other things, to "never reject, from any consideration personal to (ourselves), the cause of the defenseless or oppressed…." Why not respond to the call for a policy, a commitment on paper to yourself and your office, as a reminder to each of us, to simply fulfill our oath and do the right thing for someone who needs legal help and cannot afford it? Idaho law has long required that "every person, before receiving license to practice law, shall take the oath prescribed by law." I.C. 3-102. Fulfill your promise and join us with a renewed commitment.

Question: Easy for you to say. You're a judge. You cannot practice law and join us.

Answer: True. But, frankly I would if I could. As a member of the Commission along with many others in the judiciary who are serving on local pro bono subcommittees, we are putting our time into trying to assess the local needs in our districts and filling those needs with pro bono lawyers. Many in the judiciary devote time to mediation as well. We are trying to do our part too.

UPCOMING CLES

February

February 18-20
28th Annual Bankruptcy Seminar
Sponsored by the Commercial Law and Bankruptcy Section
Shore Lodge McCall, Idaho
12.75 CLE Credits of which 1.0 is Ethics
Room Reservations call (800) 657-6464

February 24
How to Lay the Proper Foundation for Admission of Evidence
8:30 - 9:30 a.m. Law Center, Boise- Live: Statewide-Webcast
Sponsored by the Young Lawyers Section
1.0 CLE Credits (RAC)

February 26
Current Issues in Lending, Bankruptcies and Other Issues in Tough Economic Times
8:30 a.m. - 4:00 p.m. Boise Centre, Boise
Sponsored by the Real Property Section
6.0 CLE Credits of which 1.0 is Ethics (RAC)

March

March 5
Workers Compensation Section Annual Seminar
Sponsored by the Workers Compensation Section
Sun Valley Resort, Sun Valley Idaho
6 CLE credits of which 1.0 is Ethics (RAC)
Room Reservations call 1-800-786-8559

March

March 12
Handling Your First or Next Employment Law Case
Law Center, Boise Boise- Live: Statewide-Webcast
2.0 CLE Credits (RAC)

March 24
Ethics and Appellate Practice
8:30 a.m. - 9:30 a.m. Law Center, Boise- Live: Statewide-Webcast
Sponsored by the Young Lawyers Section
1.0 CLE Credits of which .5 is Ethics (RAC)

April

April 28
Idaho Practical Skills
Sponsored by the Idaho Law Foundation
Boise Centre, Boise
Credits TBD (5-6 credits anticipated)

April 24
Building a Case from Discovery to Trial and Beyond: Depositions
8:30 - 9:30 a.m. Law Center, Boise- Live: Statewide-Webcast
Sponsored by the Young Lawyers Section
1.0 CLE Credits RAC

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

Save the Date

July 2010

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1	2	3
4	5	6	7	8	9	10
11	12	13	ISB Annual Conference July 14 - 16 in Idaho Falls			17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

ISB
IDAHO STATE BAR

Idaho State Bar Annual Conference
July 14 - 16, 2010 in Idaho Falls

- ☼ Legal seminars
- ☼ Awards and social events
- ☼ Connect with colleagues
- ☼ Close to Yellowstone and Grand Teton National Parks
- ☼ Great location for a family getaway
- ☼ Close to world-class fishing

Superior Legal Writing: Winning *with* Words

A Legal Writing CLE Seminar by

William Bernhardt

Idaho State Bar Annual Conference
July 14 – 16 in Idaho Falls
Sponsored by the Idaho Law Foundation

William Bernhardt, New York Times bestselling author of more than twenty novels and a former trial lawyer, tells lawyers what they really need to know to succeed on the printed page, based upon personal experience and extensive interviews with judges and practitioners. Bernhardt takes participants through a practical and systematic consideration of the writing process, peppered with practical assignments based upon real world legal scenarios.

Bernhardt focuses on helping lawyers develop skills and strategies for communicating in a rapidly changing legal environment, with a special emphasis on the abilities needed to frame your case, present it persuasively—and win. Bernhardt covers common writing errors, the pitfalls of legalese, the importance of strategic issue-framing, capturing a reader's imagination (the best way to persuade), drafting briefs, memos, and client letters, building a bulletproof argument, giving your pleadings and briefs focus and direction, setting a winning tone from the first sentence, the critical importance of tight editing for clarity and impact, and creating a compelling story that best represents your client.


We'll get you there first.
EXPERIENCE
It is only fitting that as America's best winter athletes compete against the world in Vancouver, Canada this February, that we are reminded how important experience is for achieving results.
Combining integrity, innovation and technology with more than 75 years of experience we can produce results, superior in quality and value.
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