The Advocate

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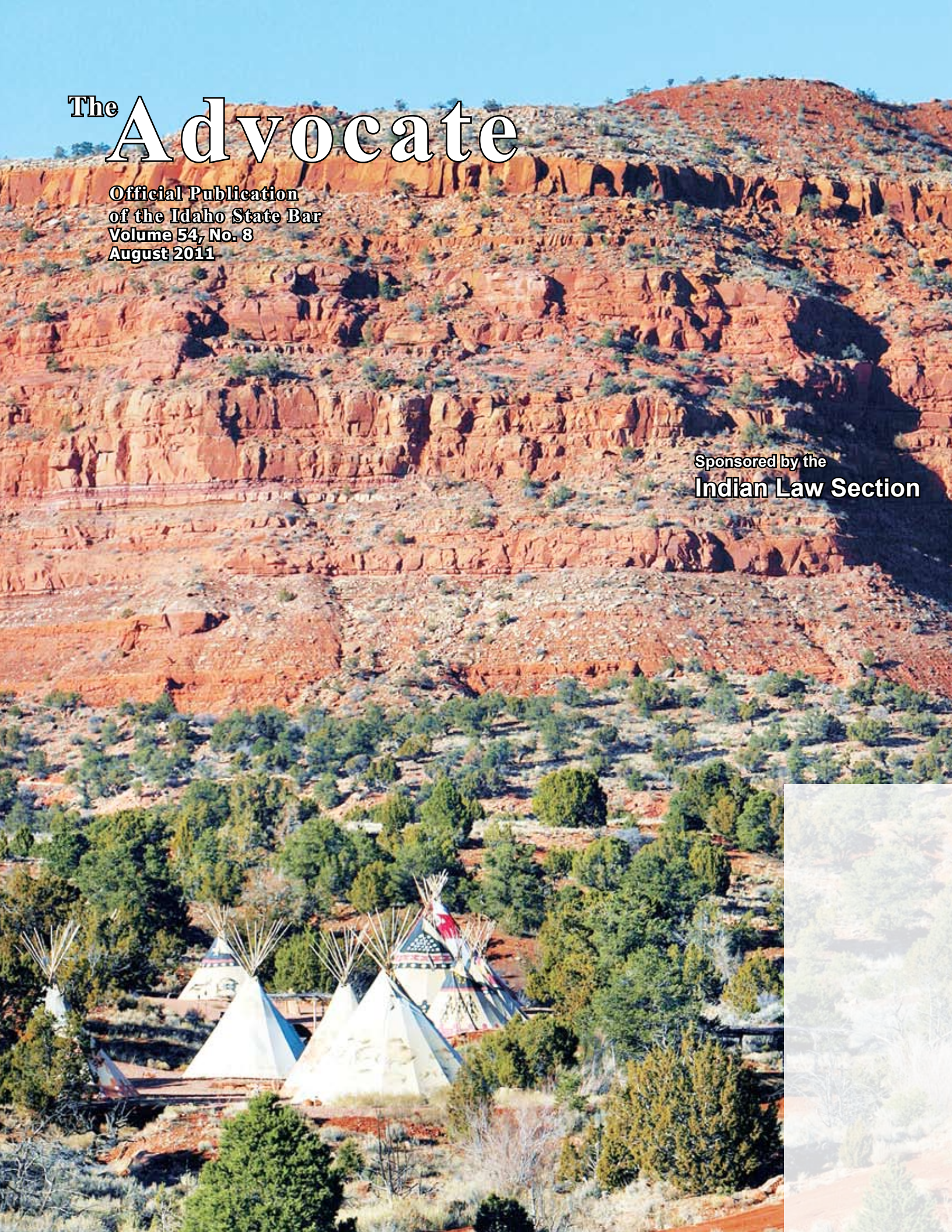
Indian Law Section



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For five years, The Elder Law Firm employed a health care professional to help its senior clients and their families coordinate care issues. In 2010, Pete Sisson formed The Care Management Team to more comprehensively address all the health care issues faced by seniors with chronic illness – issues that need ongoing advocacy and intervention. The Care Management Team is composed entirely of licensed professionals (nurses and social workers) who have in-depth experience in geriatric and long-term care issues and understand the health care system, its complexities, resources and services.

Pete Sisson is a National Board Certified Elder Law Attorney (www.nelf.org) and a VA Accredited Attorney. Since 1993, The Elder Law Firm has helped thousands of Idaho seniors and their families avoid the financial ruin that is caused by long-term care costs.

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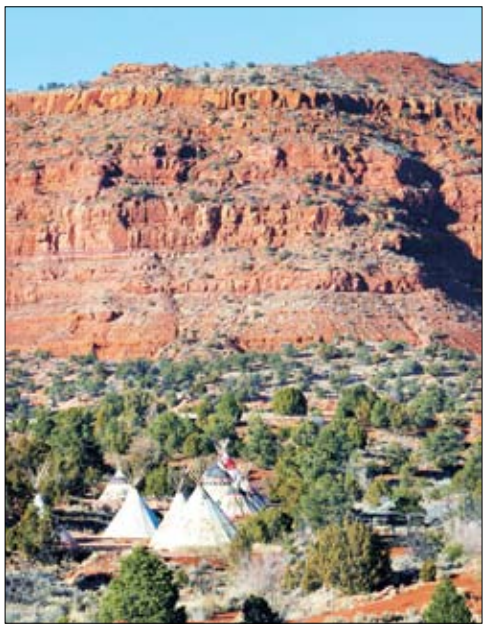
Feature Articles

Columns

News and Notices



On the Cover

The cover photograph was taken between Zion's National Park in southern Utah and the Grand Canyon in Arizona by Boise attorney Monte Stiles. Stiles is an avid outdoor photographer. His work is featured at www.montestiles.com.

Section Sponsor

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

Cover art sought

Bar members are encouraged to send their digital photos to Managing Editor Dan Black at dblack@isb.idaho.gov.

Editors

Special thanks to the August editorial team: Hon. Kathryn A. Sticklen, Brian Kane and Scott Randolph.

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.

The Advocate

Official Publication of the Idaho State Bar

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Upcoming CLEs

August

August 8
CLE Idaho: Lunch and Replay – Employment Law and Practitioner Ethics
Sponsored by the Idaho Law Foundation
11:15 a.m. – 1:30 p.m. (local time)
Coeur d'Alene – Iron Horse Bar and Grill
Boise – Law Center
2.0 CLE credits of which 1.0 is ethics (RAC approved)

August 15
CLE Idaho: Lunch and Replay – Adoption Law and Criminal Law Ethics
Sponsored by the Idaho Law Foundation
11:15 a.m. – 1:30 p.m. (MDT)
Idaho Falls – Law Firm of Hopkins Roden Crockett Hansen & Hoopes
Boise – Law Center
2.0 CLE credits of which 1.0 is ethics (RAC approved)

August 17
Business without Borders: International Law for the Idaho Attorney
Sponsored by the International Law Section
1:30 – 5:00 p.m. (MDT)
Law Center
3.0 CLE credits

August (cont'd)

August 22
CLE Idaho: Lunch and Replay – Wrongful Death Case and Law Practice Ethics
Sponsored by the Idaho Law Foundation
11:15 a.m. – 1:30 p.m. (MDT)
Burley – Burley City Hall
Boise – Law Center
2.0 CLE credits of which 1.25 is ethics (RAC approved)

September

September 9-10
Annual Advanced Estate Planning Seminar
Sponsored by the Taxation, Probate and Trust Law Section
Sun Valley Resort, Sun Valley, ID
9.5 CLE credits of which 1.0 is ethics

September 26
Ethical Considerations in Starting and Sustaining a Solo and Small Group Practice
Sponsored by Idaho Law Foundation
12:30 – 1:15 p.m. (MDT)
Telephonic Conferencing
.75 CLE credits of which .75 is ethics

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

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

Attend a CLE that keeps you on the cutting edge

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

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

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

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

IDAHO STATE BAR

President's Message

Have I Done Any Good in the World Today

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

One of my favorite songs from Church: *Have I Done Any Good?* teaches a message worth constant consideration.

As a Husband, Father, Son, Bar Commissioner, Lawyer, and Friend, I ask myself the question often, "Have I done any good in the world today?" Sometimes the answer is obvious that I have or have not. But sometimes the answer is more subtle. I could not have accomplished anything in my personal or professional life with out help or mentoring from others. I could never take credit.

With this in mind, I start my year as President of this great organization of Lawyers. Many, if not most of you are better qualified to do this job, but I volunteered because I thought I could help. I hope I can. The first two years have gone by at rapid speed and I know this year will be packed with work and events and the time will escape me.


Reed W. Larsen

I represent the Sixth and Seventh Districts of the State Bar, living and practicing in Pocatello. I have lived in Pocatello for 26 years, most of my adult life. However, I am always from Burley. My kids don't understand why I am always claiming Burley as my home town, when I have lived in Pocatello so long, but that is just part of who I am.

During the next year, as I present these articles, it is my intent to have a common theme. That theme is centered on doing good for others by mentoring. I would like to see the bar develop a spirit of mentoring. Some states are adopting formal programs on mentoring. Utah has made mentoring a mandatory part of its bar program. They have a very good program and it is being used as a model for many states, including many of our Western neighbors. At some point the bar may consider such a program for Idaho, but I hope we can develop a spirit of mentoring with out being compelled to engage in a formal program.

Each month I will share some mentoring thoughts, ideas, stories or experiences that hopefully will be helpful. Mentoring is teaching, helping, listening, and doing. Ask yourself the question who has done those things for you so you can be where you are? What are you doing to give back?

One of my most powerful influences has been my brother, Brent. I know I would not be a lawyer, if not for his mentoring. Now, Brent's mentoring was not what would be considered politically correct in today's world. As a little league football player I wasn't afraid of any one on the opposing team. I was afraid that if I didn't do my best I would answer to Brent. He is four years older, much bigger, at the time and a better athlete so I had to perform or face his consequences. It worked. While I was never a great athlete, I was always able to make the team and contribute. I never did have to face Brent after a game or after a practice and say I couldn't get up from a hard hit or tackle. His mentoring was such that I feared his consequences more than anything that could be handed out on the football field or on a basketball court. I knew with Brent there were consequences. Consequences, sometimes unpleasant, teach us lessons that last a life time.

As a young boy I had a tendency to be lazy. That may be a polite way to put it. Brent was the opposite. He was always a hard worker and demanded that of me. We lived on a farm and there was no end to work and no end to early mornings and long days. One summer day, in an effort to take time off and sleep in, I hid in the closet, covered myself with a blanket and pillow and went back to sleep, successfully hiding from everyone. Of course, being AWOL caused quite a lot of concern. My mother and father were at work and no one could find me. It was a great success, until Brent opened the small closet door. The light hit my eyes and I moved from my hiding place. Brent was not pleased and I had no place left to run or hide. It was a teaching moment. A mentoring moment. Not necessarily a pleasant moment. But I remember the lesson learned. I now don't mind getting up early and working long days. It has become a habit without an older brother to teach me hard work and diligence, I hate to think of where I would have ended up.

Have I Done Any Good?

Have I done any good in the world today?
Have I helped anyone in need?
Have I cheered up the sad and made someone feel glad?
If not, I have failed indeed.
Has anyone's burden been lighter today
Because I was willing to share?
Have the sick and the weary been helped on their way?
When they needed my help was I there?

Then wake up and do something more
Than dream of your mansion above.
Doing good is a pleasure, a joy beyond measure,
A blessing of duty and love.

There are chances for work all around just now,
Opportunities right in our way.
Do not let them pass by, saying, "Sometime I'll try,"
But go and do something today.
'Tis noble of man to work and to give;
Love's labor has merit alone.
Only he who does something helps others to live.
To God each good work will be known.

Text and music:
Will L. Thompson, 1847–1909

Learning the lesson of work was one of the greatest gifts a person could have given me. I am sure my mother and father contributed to my work ethic, but the credit for making me a hard worker, goes to Brent. I also learned that there are very few things that can't be accomplished through hard work.

When I was older, about thirteen and Brent was seventeen, we had a barn that was used all winter to bed cows. The build up of straw and manure was epic. The levels could be measured on the walls to be about four feet deep. Because of the configuration of the barn the only way to clean the barn was with a pitchfork. On some pleasant spring days Brent and I worked for hours on end, in very unpleasant conditions shoveling out crap. I think it took us two or three weekends to get the job done. Many times I wanted to quit. I complained a lot. Quitting was not an option. Brent encouraged (made) me stick to it and eventually we got the job done. It was just an awful job to have to do, but today when I have a bad case, like a divorce where no one gets along or personal injury case where the parties might be a little to invested in the fight for the cause with a lack of civility or humor, I think if it weren't for Brent I would still be shoveling fertilizer. If we just keep working something good eventually happens. It is never in the first shovel full, but only after the last.

If we just keep working something good eventually happens. It is never in the first shovel full, but only after the last.

So the question is "Have I done any good in the World today? Have I helped any one in need? We are all in need and we can all help. Here is hoping this year opens our eyes as to where and how.

About the Author

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

He is a 1985 graduate from the University of Idaho College of Law. He has served as a Commissioner for the Sixth and Seventh Judicial Districts since 2009 and is currently serving a year term as President of the Idaho State Bar Board of Commissioners.

Reed is married to Linda M. Larsen and together they have three children.

SHAWN C. NUNLEY (Suspension/Probation)

On June 15, 2011, the Idaho Supreme Court issued a Disciplinary Order suspending Coeur d'Alene attorney, Shawn C. Nunley, from the practice of law for a period of three years, with two years of that suspension withheld and placing him on probation following any reinstatement. The suspension period started effective August 13, 2010, the date Mr. Nunley voluntarily disqualified himself from the practice of law.

The Idaho Supreme Court found that Mr. Nunley violated I.R.P.C. 8.4(b) [Commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects] and I.B.C.R. 505(b) [Conviction of a serious crime].

The Idaho Supreme Court's Disciplinary Order followed a stipulated resolution of an Idaho State Bar disciplinary proceeding in which Mr. Nunley admitted that he had violated the Idaho Rules of Professional Conduct set forth in the preceding paragraph.

The Complaint filed in this proceeding related to Mr. Nunley's illegal purchase of a controlled substance, Oxycodone, from a confidential informant in Kootenai County, Idaho, in December 2008, and his plea of guilty to a felony charge of possession of a controlled substance in August 2010. Mr. Nunley's voluntary and court-ordered treatment for substance abuse, his remorse and acknowledgement of the misconduct, and his lack of any prior disciplinary record were considered as mitigating factors.

The Disciplinary Order provides that one year of the suspension will be served and two years of the suspension will be withheld. Mr. Nunley will serve a four-year period of probation following any reinstatement, subject to conditions of probation specified in the Order. Those conditions include that Mr. Nunley will serve all of the withheld suspension if he admits or is found to have violated any of the Idaho Rules of Professional Conduct for which a public sanction is imposed for any conduct during his period of probation. During his probation, Mr. Nunley must also comply with all terms and conditions of his criminal probation and enroll in a program of random urinalysis with submission of all results to Bar Counsel.

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

THOMAS F. HALE (Transfer to Disability Inactive Status)

On June 7, 2011, the Idaho Supreme Court issued an Order transferring Pocatello attorney, Thomas F. Hale to disability inactive status for medical reasons pursuant to I.B.C.R. 515(b).

The Idaho Supreme Court's Order followed a recommendation by Bar Counsel. On November 2, 2010, Mr. Hale filed a Motion for Disability Status, I.B.C.R. 515 with the Professional Conduct Board of the Idaho State Bar requesting placement on disability status under the rules regulating all attorneys.

Mr. Hale filed that Motion for Disability Status in a reciprocal disciplinary proceeding seeking disbarment, based upon a federal disciplinary proceeding. In that federal proceeding, on August 30, 2010, the United States District Court for the District of Idaho entered a Final Order of Disciplinary Proceeding that disbarred Mr. Hale from the practice of law before the United States District and the United States Bankruptcy Courts for the District of Idaho. Mr. Hale appealed that Final Order to the Ninth Circuit Court of Appeals. On March 11, 2011, that appeal was dismissed and the federal disbarment became final.

A hearing scheduled in the reciprocal disciplinary case on November 3, 2010 was vacated under I.B.C.R. 515(b) when the Motion for Disability Status was filed. On November 12, 2010, Bar Counsel filed a petition to immediately transfer Mr. Hale to disability inactive status pending determination of incapacity, or in the alternative to place him on interim suspension. Following an investigation of the disability, the Order transferring Mr. Hale to disability inactive status was entered.

In addition to the reciprocal disciplinary proceeding, another disciplinary proceeding was pending against Mr. Hale. That case had been stayed pending a trial in parallel criminal charges.

By the terms of the Idaho Supreme Court's Order, the two pending disciplinary proceedings will be deferred and Mr. Hale shall be retained on disability inactive status until the Idaho Supreme Court subsequently considers a petition for transfer to active status.

Mr. Hale may not actively practice law except by future order of the Idaho Supreme Court.

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

NOTICE TO TOM HALE OF CLIENT ASSISTANCE FUND CLAIM

Pursuant to Idaho Bar Commission Rule 614(a), the Idaho State Bar hereby gives notice to Tom Hale that a Client Assistance Fund claim has been filed against him by former client, Heather Palacios, in the amount of $800. Please be advised that service of this claim is deemed complete fourteen (14) days after the publication of this issue of *The Advocate*.

Hon. Linda Copple Trout recognized

The U of I College of Law faculty started a new tradition, awarding its inaugural Sheldon A. Vincenti Award for Exemplary Service to the Hon. Linda Copple Trout.

This award, named for the beloved former dean and professor emeritus who passed away in 2010, recognizes individuals who have rendered exceptional service to the College of Law, generally in a capacity other than as an employee.

Hon. Linda Copple Trout

Justice Trout, who retired from the Idaho Supreme Court in 2008, was Idaho's first woman to serve on the Court and the only woman to serve as Chief Justice.

She began her judicial career in Lewiston, where she had also practiced law, eventually becoming the Acting Trial Court Administrator for Idaho's Second Judicial District, and then being elected as District Judge. She was appointed to the Supreme Court in 1992 and was elected by Idaho voters to two additional terms. She has served as an adjunct instructor in family law at the University of Idaho and as chair of the College of Law Advisory Council.

She currently serves as the legal profession member of the College's Self-Study Committee for continuing accreditation by the American Bar Association and continuing membership in the Association of American Law Schools.

Justice Roger S. Burdick to Serve as Chief Justice of Idaho Supreme Court

Justice Roger S. Burdick has been unanimously elected by his colleagues to serve as Chief Justice of the Idaho Supreme Court. Justice Burdick begins his four year term as Chief Justice on August 1, 2011. He succeeds Justice Daniel T. Eismann, who will continue to serve on the state's highest court. The new Chief Justice will be formally sworn in at a ceremony in August.

"It is a great honor to serve as Chief Justice of the Idaho Supreme Court and I thank my colleagues for their unanimous vote of confidence," Justice Burdick said. "I know that any success I have had as a judge has been as a direct result of the talented, capable people I have been privileged to work with over a long period of time. I include in that number elected and appointed clerks and court personnel, lawyers who have always been willing to work with me to attempt to solve problems for people and, of course, the law clerks over the years that have been critical to the work judges are able to perform."

Chief Justice Roger S. Burdick

Justice Burdick said Justice Eismann, who has advocated a four-year rotation in the Chief Justice position, has done an outstanding job as Chief Justice and that Justice Burdick plans to continue his initiatives to expand drug, mental health and other problem solving courts in Idaho and to pursue advances in technology that help modernize court operations.

The new Chief Justice also pledged that he will continue to emphasize the importance of timely justice for all Idahoans, recruiting and retaining highly competent judges, and working with Governor Otter, the Idaho legislature, and county officials to ensure that there are an adequate number of judges and appropriate facilities to carry out the Constitutional duties of the Judicial Branch. Justice Burdick said during his tenure he plans to visit all 44 Idaho counties to hear directly about court issues from the public, elected officials, and court personnel.

Justice Burdick has served for 30 years in various capacities within the Idaho Judiciary, including service as a Magistrate Judge in Jerome County, a District Judge in Twin Falls County, the Administrative Judge for the Fifth Judicial District and the judge overseeing the Snake River Basin Adjudication. In August 2003, he was appointed to the Idaho Supreme Court by Gov. Dirk Kempthorne and was retained by popular vote in 2004 and 2010. In 2007, he became Vice Chief Justice of the Idaho Supreme Court.

Justice Burdick received his undergraduate degree in Finance from the University of Colorado in 1970 and graduated from the University of Idaho School of Law in 1974.

Otter appoints Norton to replace Boise judge

Governor C. L. "Butch" Otter named veteran Ada County Deputy Prosecutor Lynn Graham Norton to fill the Fourth District Court vacancy being left by the retirement of Boise-based Judge Darla Williamson.

Norton grew up in Alabama and received her bachelor's and law degrees from the University of Alabama. She also has served 21 years as an attorney in the United States Air Force and Air Force Reserve, rising to the rank of colonel. Norton served with the 366th Fighter Wing at Mountain Home Air Force Base from 2008 to 2010.

Lynn Graham Norton

She was among four candidates submitted for the Governor's consideration by the Idaho Judicial Council. Norton and her husband, Einar, have four children.

"Lynn is respected and admired by her colleagues for her skills, for her work ethic, and for the important service she's provided both in the military and in the prosecutor's office," Governor Otter said. "She has handled both civil and criminal cases with equal success and professionalism, and I particularly appreciate the job she's done representing the prosecutor's office in the Ada County Drug Court for several years. Our newest judge has my confidence and my appreciation for her willingness to serve."

"There is nothing more important to the fabric of American society than the rule of law and the fair administration of justice," Norton said. "The importance and integrity of the American system of justice is that the people have a fair, public, honest system where their disagreements protect the public, and those accused of crimes have the opportunity to have their cause heard by the court."

Eric White earns prestigious history award

Idaho State Bar Member Services Assistant Eric White was selected by the Idaho Legal History Society as one of its 2011 recipients of the Byron S. Johnson award. The ILHS established this award in 2007 to recognize those individuals who have made significant efforts to meet

the mission of the ILHS. The awards were announced by ILHS President Scott W. Reed.

Byron S. Johnson award winners have all donated time, talent and treasure to collect, preserve and disseminate information about Idaho's colorful legal history.

Eric "worked tirelessly in reviewing and preparing indices of transcripts for the Oral History Subcommittee's efforts to produce public access and video history of attorneys, judges and others associated with legal history at the Idaho History Center in Boise," said Mr. Reed.

Eric White

Additionally, he spent many Saturdays volunteering for the Oral History Subcommittee. Known by many attorneys for his work managing Idaho State Bar CLE materials and setting up for CLE programs, Eric received the Byron S. Johnson Award at the at the Idaho State Bar Annual Meeting in Sun Valley.

Washington State University study suggests traditional blood spatter analysis may lead to false results

Crime scene analysts have long used blood spatter evidence in order to determine location and position of a victim.

The Idaho Supreme Court has held that blood spatter analysis is "clearly a well-recognized discipline, based upon the laws of physics" and has upheld the admissibility of expert testimony regarding such evidence." *State of Idaho v. Rodgers*, 119 Idaho 1047, 1051, 812 P.2d 1208, 1212 (1991). In his dissent, however, Justice Bistline strongly questioned the reliability of blood spatter analysis and contended that "this is a new science in need of further research before it may be properly relied upon in a court of law." *Id*. at 1055, 812 P.2d at 1216.

A recent study of the physics of fluid spatter conducted by WSU physicists appears to suggest that Justice Bistline's concerns in *Rodgers* about the reliability of blood spatter analysis and methodology were likely justified. A review of the WSU study indicates that the analytical methods which are used by crime scene analysts may not accurately account for the forces of gravity and air resistance, and may therefore under certain circumstances result in an incorrect prediction as to the precise location and position of the body which is the source of the blood droplets, such as whether the body was in a standing or a sitting position.

This study, although intended to be used for physics education, has relevance to attorneys involved in cases requiring the accurate analysis of blood spatter evidence. The article, entitled *Locating the Source of Projectile Fluid Droplets*, has been accepted for publication in the *American Journal of Physics* and is currently available for review at the following link: http://arxiv.org/PS_cache/arxiv/pdf/1102/1102.5134v2.pdf

- Ken Nagy, Attorney at Law

Bonner County Courthouse to close its doors - temporarily

The remodeling of the Bonner County Courthouse has exposed serious health hazards to both our employees and members of the public. The Board of Commissioners for Bonner County has declared an emergency and ordered the courthouse closed until abatement procedures are fully implemented making the building once again safe for occupancy.

While the building itself is being closed, all court functions will continue to take place as normal but in different locations throughout the city of Sandpoint. Our mailing address of 215 South First Avenue in Sandpoint, Idaho 83864 will still be valid as will all of our email addresses, phone and fax numbers. None of these items will change.

Beginning on July 14th all court hearings will be held on the first floor of the County Administrative Office Building located at 1500 Highway 2 in Sandpoint. Court hearings will still be held Mon-Fri between the hours of 8 a.m. and 5 p.m. Since that building will now be housing court operations, all people entering it will be subjected to screening by staff using a magnetometer.

Also, effective on July 11th, the payment of fines, the filing of court documents and obtaining copies from court records will be done in a different location. We shall be sharing a building that currently houses the Loan Star Mortgage Company at 201 E Superior Street (aka Highway 95) which is located just behind the current Courthouse. The office hours of this office will remain 9-5 Monday through Friday. All folks entering this building will also be subjected to magnetometer screenings.

We do expect to return to our normal location by November 1st. In the meantime, we hope this information will make using the services of the Courts in Bonner County easier for you as we all deal with the abatement of asbestos in a hundred year old building. Should you have any questions concerning this information, please feel free to contact me at 208-265-1437 or by email directed to mscott@co.bonner.id.us

Law Foundation Releases 2011 Annual Report

The Idaho Law Foundation recently released its 2010-2011 annual report. This report contains information about ILF programs, including Idaho Volunteer Lawyers Program, Law Related Education, Continuing Legal Education, and Interest on Lawyers' Trust Accounts. It also includes a financial statement for the period ending December 31, 2010.

Some of the Law Foundation's accomplishments for 2010-2011 include:

- **Idaho Volunteers Lawyers Program** provided direct legal services in 728 cases to over 1,700 family members and individuals.
- **Law Related Education** partnered over 100 teachers and attorneys to teach over 2,500 students about the Constitution and Bill of Rights on Constitution Day.
- **The IOLTA Grant Program** granted $205,000 to community programs in all parts of Idaho.
- **Continuing Legal Education** seminar attendance increased by nearly 14% over the previous year.

A copy of the annual report has been mailed to individuals and organizations that made donations to ILF between July 1, 2010 and June 30, 2011. Additionally, a copy of the report has been placed on the Idaho Law Foundation website.

If you have any questions or would like to make a donation to or volunteer your time with any of the Foundation's programs, contact Carey Shoufler, ILF Development Director, at (208) 334-4500 or cshoufler@isb.idaho.gov.

Stephen C. Smith, former Chairman of the Washington State Bar Association Disciplinary Board, is now accepting referrals for attorney disciplinary investigations and proceedings in Washington, Idaho, Hawaii, and Guam.

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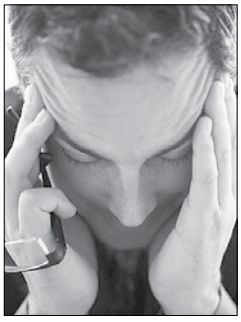

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IDAHO STATE BAR **EXECUTIVE DIRECTOR'S REPORT**

2011 Resolution Process

Diane K. Minnich
Executive Director, Idaho State Bar

Do you, your section, committee or district bar association have an issue, proposed rule revision or legislative matter that you think should be voted upon by the Idaho State Bar membership? If so, the fall resolution process, or "Roadshow" is the opportunity to propose issues for consideration by members of the bar.


Diane K. Minnich

Unlike most state bars, the Idaho State Bar cannot take positions on legislative matters, or propose changes to rules of court, or substantive rules governing the Bar itself at its Annual Meeting, or by act of its Bar Commissioners, without first submitting such matters to the membership through the resolution process.

This year, proposed resolution may include revisions to I.B.C.R. Section III Right to Practice After Admission and proposed revisions to the Idaho Rules of Professional Conduct to conform with recent changes in the Model Rules of Professional Conduct.

Idaho Bar Commission Rule 906 (page 279 of the 2011-2012 Directory) governs the resolution process. Resolutions for the 2011 resolution process must be submitted to the bar office by September 25, 2011. If you have questions about the process or how to submit a resolution, please contact me at dminnich@isb.idaho.gov. or (208) 334-4500.

Thank you

At the Annual Meeting in Sun Valley, the presidential gavel was passed from Deborah Ferguson to Reed Larsen. My thanks to the two Commissioners that shared the presidency for the past year; James Meservy from Jerome served the first half of the year and Deborah Ferguson from Boise the second half of the year. Deborah and Jim have dealt with some difficult issues during their tenure; they have done so thoughtfully, with tact, skill, and resolve.

Jim Meservy is one of the most gracious and kind attorneys that I have had the pleasure of working with. During his tenure he had several difficult personal incidents; he handled them with optimism and strength while not wavering in his service to the bar and its members. I enjoyed getting to know both he and his wife Cheri. We will miss them at bar gatherings.

Deborah Ferguson brought a new perspective to the Commission. She is the first assistant US attorney to serve on the Bar Commission. She is bright, capable, and fun. She is committed to improving the legal profession in Idaho. The newly created Leadership Academy (IALL) became a reality due to Deborah's determination and leadership. Deborah's husband Rick joined us on many bar outings; it was pleasure to get to know him also.


James C. Meservy


Deborah A. Ferguson

Serving as a Bar Commissioner takes a substantial amount of time and energy. Past Commissioners estimate they spent 300-400 hours per year fulfilling their responsibilities as a Commissioner. Idaho attorneys' willingness to contribute the time, along with their energy and expertise, is essential to the success of the Bar and its activities. Jim and Deborah are two of the many attorneys who have chosen to give back to the profession through their service as a Commissioner. Thank you to both of them for their commitment to the bar and the legal profession.

2011-12 ISB Commissioners

President: Reed W. Larsen, Pocatello
Commissioners:
Molly O'Leary, Boise
Paul W. Daugharty, Coeur d'Alene
William H. Wellman, Nampa
Robert T. Wetherell, Boise

2011 District Bar Association Resolution Meetings

District	Date/Time	City
First	Nov. 9, Noon	Coeur d'Alene
Second	Nov. 9, 6 p.m.	Lewiston
Third	Nov. 14, 6 p.m.	Nampa
Fourth	Nov. 15, Noon	Boise
Fifth	Nov. 15, 6 p.m.	Twin Falls
Sixth	Nov. 16, Noon	Pocatello
Seventh	Nov. 17, Noon	Idaho Falls

Message from the Indian Law Section

Brian P. McClatchey
Coeur d'Alene Casino Resort Hotel

The Indian Law Section is grateful for the chance to present a few articles in an effort to help members of the Bar increase their knowledge of a field of practice which is often misunderstood. One of the most complex corners of the field is zoning and environmental regulation on reservations. This topic is difficult for even the most seasoned practitioners to approach, and Charissa Eichman's article sheds some light. Jason Brown provides compelling insights about how members of tribes may see the Constitutional guarantee of trial by a jury of one's peers. Professor Angelique Eaglewoman updates the Bar about the exciting progress made by the University of Idaho College of Law's Indian Law Program, and my article comments on recent legislation concerning policing on reservations. The Section hopes that the members of the Bar, upon finishing the articles we've prepared, can honestly say that they have a greater understanding of an often misunderstood area of the law. We always welcome and appreciate comments and feedback about our efforts and the subject in general.

Brian P. McClatchey

About the Author

Brian P. McClatchey *is the In-House Attorney at the Coeur d'Alene Casino & Resort. A graduate of the University of Washington and the University of Michigan Law School, Brian's practice encompasses real property, employment, environmental and construction law matters.*

Tribal Sovereignty, Jurisdiction, Zoning, and Environmental Regulations

Charissa A. Eichman
National Wildlife Federation

Indian tribes are sovereign governments. When the Europeans arrived in what has now become the United States and encountered the people who inhabited it, they began entering into treaties and agreements with the Tribes. Later, the U.S. government continued in this practice. Tribes have maintained their sovereignty by reserving rights of jurisdiction and government over traditional lands, Tribal lands, and reservation lands.

There are 565 federally recognized Tribal governments in 36 states, including Alaskan Tribal Towns.[1] These Tribes manage more than 95 million acres of land. Federal Indian law in the U.S. has developed over time, and the extent of the Tribes' jurisdiction over non-members and non-Indians is controversial and often litigated. Given the number of Tribes and the amount of land over which these Tribes exercise jurisdiction, zoning and environmental regulation is often disputed by individuals, states, counties and in some cases the federal government.

Zoning and environmental regulations

Environmental departments within various Tribal governments are working to implement programs to promote tribal use and protection of lands. The general rule is that a Tribe has the authority to conduct, regulate, and zone the activities it chooses unless expressly limited by an Act of Congress (for example, gaming is heavily controlled by federal statute and regulations). Litigation often results when a Tribe's zoning regulations has an impact on non-members who live within a tribe's reservation or when non-member activity has an impact on Tribal lands. Three cases addressing environmental and zoning regulations define established limits on a Tribe's sovereign rights concerning its lands and its jurisdiction over non-members are *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*,[2] *City of Albuquerque v. Browner,*[3] and *New Mexico v. Mescalero Apache Tribe.*[4]


Charissa A. Eichman

When answering questions related to a Tribe's jurisdiction over non-member activity, the courts attempt to balance government interests.

Brendale: determining the tribal interest

The *Brendale* case was a plurality decision which concerned the treaty between the U.S. and the Yakama Nation. The treaty provided that the Nation would have "exclusive use and benefit" of the reservation. Approximately 80 percent is owned by the Nation and held in trust by the U.S., and the remaining 20 percent is owned in fee by individual Indian and non-Indian owners. The reservation is divided into open (less regulated) and closed (heavily regulated as to access and use) sections. The Nation created zoning ordinances to control the use of all the land within the reservation boundaries. Brendale owned land in the closed area and wished to develop in violation of the Nation's ordinance (but not state requirements) and Wilkinson wished to do the same on property he owned in the open area. The Supreme Court ultimately held that with regard to the Wilkinson property, the Nation had no jurisdiction because of its lesser governmental interest in the open areas, but as to the Brendale property, the Nation's ordinance controlled because the Nation's governmental interest in the closed areas of the reservation was of much greater significance.[5]

Browner: tribe can establish more stringent standards

The *Browner* case arose in the 10th Circuit. There, the City of Albuquerque challenged an Environmental Protection Agency (EPA) decision to approve the Pueblo of Isleta's water quality standards (which the City would be bound to maintain as well because they were upstream). The standards are allowed under amendments to the Clean Water Act (CWA), which allows the EPA to grant Treatment as State (TAS) status to Tribes under some circumstances. This status includes authority to set water quality standards. The District Court denied a motion for a restraining order and motion to dismiss while upholding the Pueblo's and EPA's authority to set standards that would be binding on non-members (in this case, the City of Albuquerque). It also held that under the CWA, the Pueblo could set standards that are more stringent than federal standards based on inherent Tribal sovereignty and CWA statutory authority. The 10th Circuit upheld the lower court decision and the Supreme Court decided not to hear the case.[6]

Mescalero Apache: wildlife as a tribal resource

In the *Mescalero Apache* case, the Tribe's rules and regulations for hunting differed from New Mexico's: the Tribe did not require a state hunting tag in order to hunt on the reservation. The reservation in that case is more than 460,000 acres in area, and all but 193.85 of those acres are owned by the Tribe. Unsurprisingly, then, the Tribe sought to regulate hunting and fishing on the reservation for Indians and non-Indians alike. The State began arresting non-Indian hunters for game killed on the reservation in accordance with Tribal but not State regulations. New Mexico conceded that the Tribe had exclusive jurisdiction over members and could regulate non-members, however, it claimed concurrent jurisdiction over the regulation of the non-member activities. The Supreme Court held (1) Tribes retain general authority over regulation of tribal resources, and (2) the Tribe had exclusive jurisdiction over members and non-members hunting on reservation land based on the result of the balancing of federal, state, and tribal interests in this case.[7]

Courts: a balanced approach to sovereignty

When answering questions related to a Tribe's jurisdiction over non-member activity, the courts attempt to balance government interests. To do so they examine

the policies, the significance of the Tribe's interest, and the probable effects of recognizing the Tribe's sovereign authority and interest. Tribes, as sovereign entities distinct from the federal or state governments, often run into obstacles when exercising their authority to regulate activities within their jurisdiction, especially over non-members. However, such challenges are not insurmountable, and it is in the interest of the Tribes to continue exercising the authority they possess if they wish to maintain it.

Challenges inherent to zoning as an exercise of sovereignty

Tribes face numerous challenges in their development, implementation, and enforcement of zoning regulations. These can generally be grouped as follows: (1) effects of "checkerboarding" and fractionation of lands, (2) non-member activities that impact tribal lands, and (3) public perception.

Checkerboarding

"Checkerboarding" of reservations is a term that describes the ownership of land within a reservation which alternates, parcel by parcel, between Tribal trust land, individual Indian trust land, individual Indian fee land, and non-Indian fee land. Fractionation refers to the division of a single allotment among several interest holders (some interests are as small as 1/400,000).[8] This can lead to tensions like those that sparked the *Brendale* case when a tribal government wants to assert jurisdiction over a non-member.

Non-member activities

Off-reservation and non-member activities can have significant impacts within a reservation as well. For example, the *Browner* case demonstrated that upstream water users can have an impact on the quality of water as it heads downstream. In order to regulate the upstream users, a Tribe has to set its standards, and then often work with those upstream users to get cooperation. When that is not possible, the courts get involved which can be expensive, time consuming, and does not always result in a predictable or desired outcome.

Public perception can have a significant impact on a Tribe's decision of what regulations to implement and the best way to establish them.

Educating the public on tribal issues

Public perception can have a significant impact on a Tribe's decision of what regulations to implement and the best way to establish them. Lawsuits are generally time-consuming and expensive, even if they are dismissed in the early stages. There are often misunderstandings and confusion as to the place of Tribes in the governmental structure as well as concerns over the fundamental fairness of a tribe's actions in the exercise of its sovereign authority. When a Tribal action or decision is not explained well, the surrounding communities and local governments are more likely to file suit or in some other way attempt to obstruct the enforcement of decisions.

Conclusion

It is important to fully consider the ramifications that zoning regulations may have (just as the federal and state governments must fully consider the impacts for their actions). Whenever a Tribal zoning issue or environmental issue is confronted, it is essential to balance the Tribal interests, recognize whether the regulation applies to non-members, and take the time to fully educate the public as to the need for the regulation. Although this won't eliminate conflict from the process, those interested will benefit from being fully informed as to the needs of the Tribe, the process employed, and its application by the Tribal government. Tribes face unique challenges because there is a lack of understanding in the general public regarding their political status in the federal system. These challenges are not impossible to meet, and as outlined above, Tribes are balancing and exercising their authority and jurisdiction.

About the Author

Charissa A. Eichman *works for the National Wildlife Federation with the Tribal Lands and Public Lands Programs. She earned her J.D., at the University of Idaho College of Law; and an L.L.M. at the University of Tulsa Law School.*

Endnotes

[1] US Department of Interior: Indian Affairs. 2011. http://www.bia.gov. This number does not include tribes which are recognized only by a state.
[2] *Brandale v Confederated Tribes and bands of Yakima Indian Nation*, 492 US 408 (1989).
[3] *City of Albuquerque v. Browner*, 97 F3d 415 (10th Cir. 1996) *cert. denied* 522 US 965 (1997).
[4] *New Mexico v. Mescalero Apache Tribe,* 462 US 324 (1983).
[5] *Brandale v Confederated Tribes and bands of Yakima Indian Nation*, 492 US 408 (1989).
[6] *City of Albuquerque v. Browner*, 97 F3d 415 (10th Cir. 1996) *cert. denied* 522 US 965 (1997).
[7] *New Mexico v. Mescalero Apache Tribe,* 462 US 324 (1983).
[8] Harvard Project on American Indian Economic Development, *The State of the Native Nations* 101-102 (Oxford University Press 2008).

A Jury of Their Peers: Can a Native American Defendant Be Tried by a Jury of His Peers in the United States?

Jason Brown

The phrase "a jury of one's peers" is a part of the American lexicon, yet surprisingly it does not appear in the U.S. Constitution. The Sixth Amendment simply guarantees the right to "a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." Some of the most significant decisions of the U.S. Supreme Court controlling jury composition have been based not on the Sixth Amendment but on the Fourteenth Amendment's guarantee of "equal protection of the laws." Due to the way jury pools are assembled, Native Americans often are not protected by the Fourteenth Amendment because it is highly unlikely that they will be tried by a jury of their peers.

Due to the way jury pools are assembled, Native Americans often are not protected by the Fourteenth Amendment because it is highly unlikely that they will be tried by a jury of their peers.

The U.S. Supreme Court has held that the constitutional right to be tried by a jury of one's peers provides "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[1] In 1909 Justice Stewart wrote, "Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise." [2]

Jason Brown

Selection methods

The U.S. Supreme Court has held that the Sixth Amendment guarantee of an impartial jury is violated if a group alleged to be excluded from jury service (1) is a distinctive group, (2) the representation of the group on juries is not comparable to the number of such persons in the community, and (3) there is systematic exclusion of the group. These guidelines to establish a prima facie case of purposeful discrimination in selection of a petit jury come from *Batson v. Kentucky*.[3] In *Batson* the court held that the Equal Protection Clause forbade the prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group would be unable to impartially consider the State's case against a black defendant.[4]

State jury selection methods may not be purposely discriminatory, but the effect can be the same because the ways states select jurors for jury pools generally excludes Native Americans. Jury selection systems in the 50 states use four common methods: (1) driver's license records, (2) voter registration lists, (3) state identification cards and (4) taxpayer lists. These characteristics often prevent Native Americans from filling important seats on state juries.

There are several reasons why these selection methods exclude Native Americans. Many tribes do not require their residents to have drivers licenses and many Native Americans simply choose not to drive. This makes drivers license records an ineffective tool for jury pool assembly for this segment of the population. Native Americans have one of the lowest voter turnout rates among any demographic,[5] thus voter records are of little use as well. Most tribes issue their members tribal identification cards and many states accept these cards for identification. This renders lists of state identification card holders useless for drawing Native Americans in to jury pools. Finally, Native Americans are required to pay federal taxes but many do not have to pay state taxes. Reservation land held in trust is not subject to state property taxes. Therefore, state tax rolls are not much help in selecting Native Americans for juries.

The effect of state governments' use of these methods of compiling a jury pool list is that Native Americans are not protected by the Fourteenth Amendments equal protection clause, because they would not be tried by a jury of their peers. No other segment of the U.S. population has this same unique combination of problems.

What does a jury of one's peers mean?

In order for a jury to be a jury of one's peers, it must include a fair cross section of the community. In *Duren v. Missouri*[6] a Missouri statute granting women who requested it an automatic exemption from jury service resulted in an unconstitutional underrepresentation of women on jury venires and violated the defendant's constitutional right to a jury drawn from a fair cross section of the community.

The same type of claim (untested, so far) could be brought by Native Americans tried in an area where a reservation is a significant part of the community. One of the characteristics of a legitimate jury is that it is a representative jury.

> "The best way to ensure that jury pools represent a fair cross section of the community is to have the list of jury eligible people represent a fair cross section and then randomly bring in people from that list to serve on juries. If the lists contain a fair cross section of the community the likelihood of having representative trial jurors increases. The fair cross section requirement does not require the representation of every imaginable social segment. Instead, the group must be "large" and "distinctive." The defining test for groups is not a precise one, but for a group to qualify it must be identifiable and its underrepresentation must affect the jury's ability to act as a check on governmental oppression and to preserve public confidence in the criminal justice system."[7]

Unfortunately, racism in jury selection is still with us today. Recently, in regard to a Santa Clara, California, rape trial, an appellate court held that in a criminal case involving both a Vietnamese victim and defendant, the prosecutor improperly dismissed a Vietnamese person in the jury pool solely because he was Vietnamese.

The court reversed the conviction of Khoa Khac Long because of the impropriety by the prosecutor.[8] When challenged, the prosecutor claimed that she had excluded the prospective juror because he did not participate when the judge asked questions of the entire panel. She added that she did not feel comfortable with his body language. The prospective juror had already volunteered the fact that his father was a retired attorney and the trial transcript indicated that he was of the opinion that a sexual assault victim might not immediately report a crime because she was afraid.[9] The appellate court held that the exclusion of the prospective Vietnamese juror was based on race. The court also found that the information presented by the prosecutor regarding her exclusion of this juror was insufficient and that some of it was false. The court held that the record was devoid of any description of what in his conduct was disturbing or unseemly.[10]

The court system has gone through changes since the *Batson v. Kentucky*[11] decision in 1986 but the *Long* case demonstrates that racism is still out there. This makes the search for solutions a difficult, complicated and ongoing quest.

Cultural Implications

There are various cultural implications on both sides which make the question of Native American jury service in the United States even more complicated. Because Native Americans are excluded from jury service, the argument could be made that not all U.S. citizens are subject to the same justice system. Due to the federal nature of Indian land and the lack of authority of most states on the reservation, law enforcement on and around the reservation can be a labyrinth with no way out. U.S. Supreme Court cases regarding the nature of tribal land and members are varied and contradictory, and offer little help in deciding questions of jurisdiction or authority. If a solution were found and Native Americans were to serve on juries they may find themselves serving in a system they do not understand and are unfamiliar with.

A further complication is the interrelatedness of Tribal community members, as noted in a recent interview by Angelique EagleWoman (Wambdi A. WasteWin), Associate Professor of Law, James E. Rogers Fellow in American Indian Law, University of Idaho College of Law (2010):

> For Native culture the extended family is much broader than other people's ideas of family. Therefore, a seventh degree relative would still be viewed as a close relative. How would the notion of extended family impact the ability of Native people to be on juries? How does it impact the desire to not be on a jury for an extended relative or to be on the jury for an extended relative? Would the same questions be asked of a Native person on a jury to determine relationship as would be asked of a non-Native to determine the kinship relationship? There are also Tribes that continue to have functioning clan systems so that even without bloodline relationships, the clans have relationships (a member of a certain clan is automatically an uncle to everyone in another clan, etc.). Also, is there an automatic assumption of bias against a Native on a jury for a Native? There is no such bias for a white person on a jury for a white person."

Professor EagleWoman poses interesting questions. Will prosecutors assume that Native American jurors will vote to acquit any Native American defendant? Will they find reasons other than race to exclude Native Americans? There is no such assumption for a white person on a jury for a white defendant. Why does the assumption not exist on both sides? Most prosecutors and judges are white and they are familiar with white people and their customs. Fear or mistrust of the unknown is another constant, hence the mistrust of Native American jurors by prosecutors.

Solutions

A seemingly simple solution would be to include tribal enrollment lists in the juror selection process. This solution is not as simple as it appears. First, tribes may be unwilling to allow access to their enrollment records. If a Native American was accused of a crime in a state without a reservation, the effectiveness of this solution would be nil. Additionally, there are tribes that have very low enrollment, but have many unenrolled Native Americans living on the reservation. Using tribal enrollment in this type of area would not be a viable solution. Federal census, income tax, and social security records might yield a relatively comprehensive list, but because of federal limitations on the use of this information, these sources cannot be used to compile jury pools.

The question remains then, what is to be done? A state or a tribe must take the first step. If one state were to begin talks with tribes on the subject of juries, a new channel of communication may be opened and the tribes themselves, knowing the best way to contact their members, may provide a method better than any previously presented. No journey can be completed until the first step is taken. The answer to the question, "Can a Native American be tried by a jury of his peers in the United States?" seems to be no or at least, not yet.

Because Native Americans are excluded from jury service, the argument could be made that not all U.S. citizens are subject to the same justice system.

About the Author

Jason Brown *graduated from the University of Idaho College of Law in May 2011 with an Emphasis in Native American Law. This article is an excerpt from a 35 page article on the same topic. Mr. Brown can be contacted at brow6412@vandals.uidaho.edu.*

Endnotes

[1] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).
[2] Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970).
[3] Batson v. Kentucky, 476 U.S. 79 (1986).
[4] Id.
[5] 2008 Current Population Survey Voting and Registration Supplement, United States Election Project
[6] Duren v. Missouri, 439 U.S. 357, 364 (1979)
[7] Randolph N. Jonakait, The American Jury System, Yale University Press (2003).
[8] People v. Khoa Khac Long, 189 Cal. App. 4th 826 (Cal. Ct. App. 2010).
[9] Id.
[10] Id.
[11] Batson v. Kentucky, 476 U.S. 79 (1986).

The Native Law Program at the University of Idaho: A Third Year of Success

Angelique EagleWoman
University of Idaho
College of Law

At the University of Idaho College of Law, the Native Law program has completed another successful year. In the second year of offering an academic specialization, the Native American Law (NAL) Emphasis, nine law graduates completed and received the designation on their transcripts in the 2010-2011 year. This was a substantial increase from the debut of the Emphasis in 2009-2010 with the first two law graduates trailblazing the way.


Angelique EagleWomen

The University of Idaho College of Law's Native American Law Emphasis is based on an intense course of study on Native American law topics that is completed during the course of a student's J.D. program. After completing the first year of law school, interested students may apply for the Native American Law Emphasis. In the second and third years of law school, the Native American Law Emphasis requirements may be met. Upon successful completion of the Emphasis, the law school transcript will denote the Native American Law Emphasis attainment. The NAL Emphasis requires a minimum of 6 credits completed in the Native American Law curriculum, 6 credits completed in law school courses or graduate courses in a related topic area to Native American Law, (a total of 12 credits through coursework), a substantial research paper in the area of Native American Law meeting the standards of the Upper Division Writing Requirement; and completion of an internship, externship, pro bono hours, clinical experience or other experience involving the application of Native American Law for a total of twenty (20) hours. All aspects of the Emphasis require the pre-approval for each component by the Native American Law Emphasis Advisor, Professor Angelique EagleWoman. To earn the Emphasis, students must complete the requirements for four components: A, B, C, and D.

One of the requirements for the NAL Emphasis specialization is to provide a written research paper of substantial quality on a topic within the field of Native American Law. The nine recent graduates completed topnotch papers on topics ranging from: the impact of P.L. 280 on Idaho reservations, the selection of Native Americans on state and federal juries, recommendations for addressing the epidemic of violence against Native women, to issues involving tribal wolf management, horse stewardship and slaughtering as tribal initiatives, and tribal instream flow rights for fish habitat protection. Another requirement of the NAL Emphasis is to complete an experiential component involving work on a Native American legal issue. Again, these law graduates represented the College of Law well working with tribal courts, tribal attorneys, federal agencies, and private law offices on a variety of issues in the field.

During the 2010-2011 academic year, the U of I Law's Native American Law Student Association (NALSA) chapter sent a team to the National NALSA Moot Court Competition held at Columbia Law School in New York. This was the second time that a team from Idaho competed at the national level in this competition. The team composed of 2L students, Matthew Janz and Jamal Lyksett, did well in preliminary rounds, but did not secure a position in the top sixteen advancing to the finals. The Idaho State Bar Indian Law Section contributed to the cost and expenses of the moot court team to allow representation from the Idaho chapter NALSA. This experience was truly enriching for the team and they brought back a determination to prepare those who may seek to compete next year.

NATIVE LAW PROGRAM
UNIVERSITY OF IDAHO
COLLEGE OF LAW

Professor EagleWoman was appointed Chair of the Subcommittee on the Development of Federal Indian Law (DFIL) of the Federal Bar Association's Indian Law Section in October of 2010. The national subcommittee recommends actions for the furtherance of the field, such as the filing of amicus briefs in U.S. Supreme Court cases which substantially impact federal Indian law and seeking the inclusion of Indian law as a bar exam topic in states with a substantial tribal government presence.

Professor Angelique EagleWoman who has guided and directed the Native Law Program has continued to provide education on Native law topics through speaking engagements and lectures around the state and across the country. One of the highlights was in the fall of 2010 when she was the keynote speaker at the Second Annual Nez Perce Economic Summit on the topic of: "Tribal Economics: Past Influences and Contemporary Perspectives." In the fall of 2011, Professor EagleWoman will be working on a co-authored treatise style book in the field of Native American Law. During the fall semester, the Honorable Cynthia Jordan, U of I Law Alumna, will teach the Native American Law overview course. In the spring of

2012, Professor EagleWoman will again be offering the seminar: "Tribal Nation Economics & Law." This seminar rotates every spring with the "Native American Natural Resources Law" seminar.

Additionally, the Native Law program hosts an annual law conference at the end of March on important contemporary issues in the field. The conference provides CLE credit for legal practitioners in attendance. The annual conferences have been coordinated by Professor EagleWoman for the previous three years: March 2009 – "Soothing Waters: Tribal Protection and Stewardship;" March 2010 – "Living in Balance: Tribal Nation Economics and Law;" and March 2011 – "Reconnecting Economies: Indigenous Networks and Commerce."

In conclusion, the Native Law Program at the University of Idaho has had a third year of success in educating and preparing law students for the real-world challenges and issues they will face working in communities where three governments operate side-by-side: tribal, state, and federal. The Native American Law program and Emphasis is only one of a handful throughout the nation offering this type of expertise to future law practitioners. Recent noteworthy law graduates of the program include Jessica Rammelsberg (2010), who was hired as a Public Defender for the Yakama Nation; Moira Ingle (2010) who serves as an Assistant Attorney General in the Alaska Dept. of Natural Resources; and Sally Butts (2011), who has accepted a federal position in Washington, D.C. with the Bureau of Land Management. As University of Idaho College of Law graduates continue to seek specialization in Native American Law, their field of influence in providing expertise will continue to grow in the region and nationally.

The Native Law program hosts an annual law conference at the end of March on important contemporary issues in the field.

About the Author

Angelique EagleWoman *is the chief architect of University of Idaho College of Law's academic emphasis in Native Law. It is modeled after the program at the University of Tulsa, Oklahoma, where she received her master's degree in law. EagleWoman also studied political science at Stanford University and holds a juris doctor at University of North Dakota. She is the James E. Rogers Fellow in American Indian Law at University of Idaho and currently serves as immediate past chair and secretary of the Association of American Law Schools (AALS) Section on Indian Nations & Indigenous Peoples. EagleWoman joined the Idaho College of Law faculty in 2008 and also serves on the University's American Indian Studies (AIST) faculty.*

The Tribal Law and Order Act of 2010: Toward Safe Tribal Communities

Brian P. McClatchey[1]
Coeur d'Alene Casino Resort Hotel

President Obama recently signed into law H.R. 725, the Tribal Law and Order Act of 2010 ("TLOA").[2] Outside tribal communities, some may question the need for yet more federal legislation regarding Indian reservations. In light of the failure of H. 111 in the Idaho House of Representatives this year and the continuing confusion regarding cross-deputization agreements in north Idaho, members of the Bar should understand why policing on reservations continues to be such an important issue. This article will provide context for the TLOA through an explanation of its background. Then it will summarize jurisdictional gaps, and highlight the possibilities of a solution, and conclude with an incentive for the State of Idaho to address this issue as well.

Tribes are and have been sovereign government powers separate from the states and the federal government, possessing the ability to govern themselves, their territories, and their people.

Background


Brian P. McClatchey

Since before the beginning of the Republic (and the states which constitute it) and continuing today, despite the best efforts of elements within the federal and state governments, tribes are and have been sovereign government powers separate from the states and the federal government, possessing the ability to govern themselves, their territories, and their people. Beginning in the 1830s and continuing today, the Supreme Court has held that state laws generally do not apply on Indian reservations.[3] While courts no longer agree with Chief Justice Marshall's categorical phrasing of the rule, namely that because "the Cherokee [N]ation . . . is a distinct community, occupying its own territory, with boundaries accurately described . . . the laws of Georgia can have no force," it is still true that state laws do not constrain a tribe's activities within reservations: tribal sovereignty remains alive and well today.[4]

Throughout the 19th century, federal assertions of criminal jurisdiction over on-reservation crimes increased and intensified. Congress extended federal criminal laws to Indian lands via the General Crimes Act (also known as the Indian Country Crimes Act),[5] and later assimilated into the body of federal criminal law certain state criminal laws via what later became known as the Assimilative Crimes Act.[6]

During this period, the tribes' actions to punish in their own ways violations of their own laws simply weren't sufficient for many in the dominant non-Indian culture. In a case which became a cause célèbre,[7] Congress was urged to enact legislation to impose federal criminal law on "lawless Indians" when a tribe responded to the murder of one Indian by another with an order that the murderer's family make reparations of various goods to the murdered man's family. In Ex parte Kan-Gi-Shun-Ca (Crow Dog),[8] the U.S. Supreme Court held that the murder of one Indian by another on Indian lands was outside the prosecutorial authority of the federal government.[9] None should have been surprised by this result, given the decisions of the Marshall Court a half century earlier. Nevertheless, in response to public outrage (real or manufactured – there remains academic debate on that point today), Congress in 1885 enacted the Major Crimes Act[10], under which the titular handful of major crimes (later expanded in number) were made federal offenses and jurisdiction granted to the federal government to prosecute Indian violators.

Enlargement of the federal role in on-reservation law enforcement as a way to combat this portion of "the Indian problem" wasn't the only method used; increases in state power were also employed. During the 1950s and early 1960s, Congress pursued a policy of terminating the government-to-government relationship between the tribes and the federal government. Part of this reversal of the historic relationship was the passage of Public Law 280.[11] Initially, P.L. 280 gave general civil and criminal jurisdiction over on-reservation activities to the states listed.[12] Until 1968, other states could seek the ability to assert civil and criminal jurisdiction over Indian lands as well.[13] Idaho assumed P.L. 280 jurisdiction in very limited form, as stated in the Idaho Code:

> The state of Idaho, in accordance with . . . (Public Law 280) hereby assumes and accepts jurisdiction for the civil and criminal enforcement of state laws and regulations concerning the following matters and purposes arising in Indian country located within this state . . . and obligates and binds this state to the assumption thereof:
>
> A. Compulsory school attendance
>
> B. Juvenile delinquency and youth rehabilitation
>
> C. Dependent, neglected and abused children
>
> D. Insanities and mental illness
>
> E. Public assistance
>
> F. Domestic relations
>
> G. Operation and management of motor vehicles upon highways and roads maintained by the county or state, or political subdivisions thereof.[14]

After Idaho's assumption of the civil and criminal jurisdiction for the specific areas named above, Congress amended P.L. 280 to require tribal agreement for further state jurisdiction and later removed entirely the ability of additional states to acquire P.L. 280 jurisdiction.[15]

The Idaho Supreme Court has held that "state officials have no power on tribal lands absent a grant of authority from Congress."[16] This grant of authority is narrowly construed by Idaho courts to avoid infringement on tribal sovereignty.[17] "Although criminal matters within the ex-

terior boundaries of an Indian reservation are generally within the exclusive jurisdiction of the tribal courts, Congress has the power to define the nature of federal, state, and tribal criminal jurisdiction within Indian country."[18] As we've seen above, Congress has often done just that.

Not only has there been an historical increase in federal involvement in on-reservation law enforcement with tight restrictions on the state's role, but tribal courts' power has been severely limited as well. With the passage of the Indian Civil Rights Act (ICRA) in 1968,[19] Congress placed limits upon the ability of tribal courts to prosecute crimes. Under ICRA, tribes could impose sentences no more severe than 1 year in jail and a $5,000 fine. This meant, for practical purposes, that tribal courts were effectively stripped of their authority to prosecute felonies. The states, as we've seen, had no power to enforce serious crimes, and the tribes had their authority to do so nullified by Congress and the courts. The Supreme Court later further restricted tribes' power in Duro v. Reina,[20] which held that tribes didn't even have the authority to prosecute Indians who are not members of the prosecuting tribe.[21] Again: this historic trend has been the effective nullification of tribal criminal prosecutorial power, a steady increase in the federal role, and the nearly complete exclusion of the state governments.

Jurisdictional gaps

With the federalization of criminal law on Indian reservations, one might think that reservations would be at least as safe as the surrounding areas. In fact, while the historical trend has been a steady increase in federal presence on Indian reservations, the follow-through hasn't always kept pace. For example, from 2005-2010, the federal government refused to prosecute roughly 50% of the violent crimes alleged to have occurred on tribal lands and roughly 75% of the sex crimes alleged to have been committed against women and children on Indian reservations.[22] This, despite the facts: 35% of American Indian and Alaskan Native women will be raped in their lifetimes.[23] Thirty-nine percent of American Indian and Alaskan Native women will be victims of domestic violence in their lifetimes.[24]

United States Attorneys in districts containing Indian reservations have often cited lack of resources for this failure to prosecute, as well as the paucity of personnel and the vast distances often involved with many reservations. It surely costs more to prosecute crimes on Indian reservations which are often far removed from the urban centers where U.S. Attorneys have their offices and their Assistant U.S. Attorneys. At the same time, the resource scarcity problem cited by the U.S. Department of Justice is even more acute for tribal prosecutors and police departments "on the ground." So many tribes struggle to fund even the basic needs, such as providing law-trained prosecutors and judges, hiring and training police officers, buying police cars and equipment, providing jail space, and the like, much less to provide the attorney guaranteed to indigent defendants in the non-Indian world. Not only do tribes have little power to prosecute even the more serious misdemeanors (and none at all to prosecute felonies), but they have few resources in which to prosecute even those crimes over which the tribal justice systems do have authority.

The implication is not hard to see: if the state has no jurisdiction, the tribe can't prosecute, and the federal government won't, for many residents, Indian and non-Indian alike, reservations can be extremely dangerous places.

This piecemeal system simply isn't working. Reservations have long been places where criminals can act with impunity. Criminals learn that they can get away with drug trafficking, domestic violence, rape, assault, burglary, theft, and any number of other crimes which are serious, but which are beyond the reach of tribal courts and often not worthy of the scarce resources of the U.S. Attorneys. The implication is not hard to see: if the state has no jurisdiction, the tribe can't prosecute, and the federal government won't, for many residents, Indian and non-Indian alike, reservations can be extremely dangerous places.[25]

The beginning of the solution?

While the ultimate solution to this problem - authorize tribal justice systems to prosecute any offenders within the reservation boundaries and fully fund tribal justice systems so that tribal laws can be enforced consistent with Constitutional safeguards - Congress has instead chosen, again and again, to increase the federalization of tribal law enforcement in an effort to combat the disturbingly high rates of domestic violence and sex crimes on Indian lands. Its latest attempted solution was to enact the Tribal Law and Order Act of 2010. While, with history in view, there may be reason to be skeptical about the Act's efficacy, there are also reasons for optimism.

First, the Act raises the allowable penalty in tribal court prosecutions from 1 year to 3 years per count and 9 years per case.[26] To avail themselves of this extra sentencing power, tribes must ensure that criminal defendants have the right to an attorney and that indigent defendants have the provided counsel which has existed outside reservations since Gideon.[27] This is a positive step, because it increases both tribal courts' authority and the defendants' Constitutional protections.

Second, the Act allows US Attorneys to create Special Assistant U.S. Attorneys (a position for which tribal prosecutors are eligible) for reservations, mandates that U.S. Attorneys cooperate with tribal courts in cases where the tribal court has concurrent jurisdiction and the U.S. Attorney declines prosecution, and requires U.S. Attorneys whose districts include Indian lands to appoint at least one AUSA to serve as a tribal liaison.[28] This will ensure that there's a documented focus and reporting chain for crimes on Indian reservations, and ensures that if the U.S. Attorney declines prosecution, cases which are appropriate for tribal court prosecution will not languish for lack of evidence.

Third, the Act allows for tribal police to be federally deputized and to assist federal agencies, such as DEA and Border Patrol, on raids.[29] It establishes standards for training for tribal police officers, and provides for funding for that training.[30] It also raises the maximum age for tribal police officers from 37 to 47, to ensure that experienced officers can stay on the job.[31] This is progress as well. It may also provide additional motivation for recalcitrant states or counties to fully and meaningful-

ly engage in good-faith cross-deputization agreement negotiations; the alternative to a cross-deputization agreement may be federally-deputized tribal police officers.

Generally, the Act provides crucial funding to strengthen tribal courts, tribal social service programs, and youth services, in an effort to deter future criminal activity and build strong communities so that crime isn't a viable option.[32] It also allows for information sharing and data collection efforts to increase coordination between tribal, federal, and state law enforcement agencies, and allow tribal law enforcement agencies, for the first time, lets tribes use the National Criminal Information Center, a service which has been available to state law enforcement agencies for years.[33] The Act creates a pilot program under which tribal criminal offenders can be housed in federal prisons, and seeks needs assessments for tribal and BIA jails in the future.[34]

Under the Act, the U.S. Attorney General to "take back" jurisdiction given to states under P.L. 280[35], so that federal jurisdiction is at a level concurrent with the state.[36] Federal law no longer requires the state's concurrence for this "retrocession" of jurisdiction to enable the federal government to prosecute crimes for which the state has jurisdiction but no inclination or resources.

Conclusion

The Tribal Law and Order Act of 2010 is certainly not perfect. But in contrast with earlier federal efforts at addressing on-reservation law enforcement, its attempt to address this complex problem with the combined efforts of increased federal participation, a more muscular tribal role, and what looks like a serious effort at capacity-building for future tribal law enforcement efforts may produce a better result than previous efforts which used a single approach. As the State of Idaho continues to grapple with these issues, the TLOA could provide an outline for the continuing consideration of the issues contained in H. 111, H. 33, and H. 500 (2010). Importantly, for a state that prefers to keep its distance from federal intervention, the TLOA signals the federal government's willingness to employ more aggressive measures, should the state continue its failure to take appropriate actions regarding tribal policing, and suggests that the way forward is in partnership, rather than in tension, with the tribes. Anyone with a vested interest in safe reservation communities should hope that the TLOA will be an effective sign to criminals that reservations are no longer safe havens for them.

About the Author

Brian P. McClatchey *is the In-House Attorney at the Coeur d'Alene Casino & Resort. A graduate of the University of Washington and the University of Michigan Law School, Brian's practice encompasses real property, employment, environmental and construction law matters.*

Endnotes

[1] In-House Attorney, Coeur d'Alene Casino & Resort, Worley, Idaho. Opinions expressed in this article are solely those of the author and do not represent the opinions of the Coeur d'Alene Casino or the Coeur d'Alene Tribe.

[2] Abbreviated in this article as "the Act" or TLOA; the text of the Act is *available at:* http://thomas.loc.gov/cgi-bin/query/F?c111:6:./temp/~c111cdvcuE:e11128 (last visited June 6, 2011).

[3] *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[4] See, e.g., Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

[5] 18 U.S.C. § 1152 (1817).

[6] 18 U.S.C.§ 3 (1825).

[7] *Ex Parte Crow Dog*, 109 U.S. 556 (1883). There has been academic speculation about whether the case was purposely set up as a means to incite Congress to impose greater federal criminal jurisdiction over Indian lands. For further reading on the issue of criminal jurisdiction on Indian reservations generally, see Robert Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through A Jurisdictional Maze*, 18 Ariz.L.Rev. 503 (1976).

[8] 109 U.S. 556 (1883).

[9] Id.

[10] 18 U.S.C. § 1153 (1885).

[11] 18 U.S.C. 1162 (1953). *See generally* Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A.L.Rev. 535 (1975).

[12] The six original P.L. 280 states were Alaska, California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. Public Law 280 also allowed for states to "retrocede" jurisdiction. *See* 25 U.S.C. § 1323.

[13] Repealed in 1968.

[14] I.C.§ 67-5101.Certainly, by its nature as an enumerated list of discrete areas, this is not a general grant of criminal or civil jurisdiction over Indian reservations.

[15] *See* 18 U.S.C. § 1162(d).

[16] *State v. Barros*, 131 Idaho 379, 381 (1998).

[17] *State v. Major*, 111 Idaho 410, 416 (1986).

[18] *State v. Ambro*, 142 Idaho 77, 79 (Ct. App. 2005).

[19] 25 U.S.C. § 1302(7).

[20] 495 U.S. 676 (1990).

[21] This has since been removed by an Act of Congress (the "Duro Fix"), codified at 25 U.S.C. § 1301(2).

[22] "The Tribal Law and Order Act of 2010: A Step Forward for Native Women" *available at:* http://www.whitehouse.gov/blog/2010/07/29/tribal-law-and-order-act-2010-a-step-forward-native-women (last visited June 6, 2011).

[23] TLOA, Section 202(a)(5)(B) and (C).

[24] *Id.*

[25] On reservations which encompass parts of two or more counties, the problems get more complicated. The Coeur d'Alene Reservation, for example, contains parts of southern Kootenai and northern Benewah Counties. While the Coeur d'Alene Tribe has a cross-deputization agreement with Kootenai County which allows tribal police officers to cite offenders with violations of state law which must be answered to in state court, it has no such agreement with Benewah County. It doesn't take advanced reasoning to know in which part of the reservation the non-Indian drug dealers, pedophiles, and domestic violence perpetrators reside.

[26] TLOA section 234.

[27] *Gideon v. Wainwright*, 372 U.S. 335 (1963). TLOA section 234.

[28] TLOA section 213.

[29] *Id.*

[30] TLOA section 231.

[31] *Id.*

[32] TLOA section 241.

[33] TLOA section 233.

[34] TLOA section 234.

[35] *See supra* note 12.

[36] TLOA section 221.

OFFICIAL NOTICE
SUPREME COURT OF IDAHO

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

2nd AMENDED - Regular Fall Terms for 2011

Idaho Falls . . . . . August 23 and 24
Pocatello. . . . . August 25 and 26
Boise. . . . . .August 31
Boise. . . . . September 23 and 30
Coeur d'Alene and Moscow ~~**Lewiston**~~ . . . . . September 26, 27, and 28
Twin Falls . . . . . November 2, 3, and 4
Boise . . . . . November 7, 9, and 30
Boise . . . . . December 2, 5, 7, and 9

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2011 Fall Terms of the Supreme Court of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

OFFICIAL NOTICE
COURT OF APPEALS OF IDAHO

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

1st Amended - Regular Fall Terms for 2011

Boise. . . . . August 9, 11, 18 and 23
~~**Idaho Falls . . . . . September 8**~~
~~**Twin Falls . . . . . September 9**~~
Boise. . . . . .September 8, **9**, 12 and 13, ~~**27**~~
Boise. . . . . October 6, 11, 18, and 20
Boise. . . . . November 8, 10, 15, and 17

By Order of the Court
Stephen W. Kenyon, Clerk

NOTE: The above is the official notice of the 2011 Fall Terms of the Court of Appeals of the State of Idaho, and should be preserved. A formal notice of the setting of oral argument in each case will be sent to counsel prior to each term.

Idaho Supreme Court
Oral Argument for August 2011

Tuesday, August 23, 2011 – IDAHO FALLS
8:50 a.m. Asbury Park, LLC v. Greenbriar Estate.....#37556-2010
10:00 a.m. Pines Grazing Assoc. v. Flying Joseph Ranch.....#37236-2009
11:10 a.m. Harris, Inc. v. Foxhollow Construction & Trucking.....#36601-2009

Wednesday, August 24, 2011 – IDAHO FALLS
8:50 a.m. Fife v. The Home Depot (Industrial Commission).....#37894-2010
10:00 a.m. Steel Farms, Inc. v. Croft & Reed, Inc. .....#37776-2010
11:10 a.m. Hopkins Northwest Fund v. Landscapes Unlimited.....#37170-2009

Thursday, August 25, 2011 – POCATELLO
8:50 a.m. Olson v. McKenna .....#36052/36663-2009
10:00 a.m. Peterson v. Private Wilderness.....#37437-2010
11:10 a.m. Kepler-Fleenor v. Fremont County.....#38012-2010

Friday, August 26, 2011 – POCATELLO
8:50 a.m. Tarbet v. J. R. Simplot Co. (Industrial Commission).....#38096-2010
10:00 a.m. Idaho Development v. Teton View Golf Estates.....#37771-2010
11:10 a.m. Minor Miracle Productions v. Starkey.....#36996-2009

Wednesday, August 31, 2011 – BOISE
8:50 a.m. State v. Carson.....#33229-2006
10:00 a.m. State v. Miller (Petition for Review).....#38031-2010
11:10 a.m. Sopatyk v. Lemhi County.....#37186-2009

Idaho Court of Appeals
Oral Argument for August 2011

Tuesday, August 9, 2011 – BOISE
9:00 a.m. Cadman v. Idaho Central Sex Registry.....#37029-2009
10:30 a.m. State v. Maidwell.....#37044-2009
1:30 p.m. State v. Scates.....#37677/37678-2010

Thursday, August 11, 2011 – BOISE
10:30 a.m. Brebner v. Dept. of Transportation.....#37405-2010
1:30 p.m. Ely v. Dept. of Transportation.....#37406-2010

Thursday, August 18, 2011 – BOISE
9:00 a.m. State v. Suriner.....#37433-2010
10:30 a.m. State v. Healy.....#37509-2010
1:30 p.m. Bell v. Dept. of Transportation.....#37865-2010

Tuesday, August 23, 2011 – BOISE
9:00 a.m. State v. Colton.....#37949-2010
10:30 a.m. State v. Liechty.....#38083-2010

Idaho Supreme Court and Court of Appeals
NEW CASES ON APPEAL PENDING DECISION
(Updated 7/1/11)

CIVIL APPEALS

Attorney Fees and Costs

1.Whether the court erred in determining the prevailing party for purposes of awarding costs and fees.

Grant v. Griggs
S.Ct. No. 38341
Supreme Court

2. Whether the district court erred in finding Oakes was not the prevailing party in this matter.

Oakes v. Boise Heart Clinic Physicians
S.Ct. No. 38146
Supreme Court

Evidence

1. Did the trial court err by allowing Hartford to testify that the period of restoration ended when Lakeland could have resumed some of its operations?

Lakeland True Value Hardware v. Hartford Fire Insurance Co.
S.Ct. No. 37987
Supreme Court

License Suspension

1. Is there substantial and competent evidence to support the Hearing Officer's finding that the fifteen minute observation requirement before BAC testing was satisfied?

Wilkinson v. Department of Transportation
S.Ct. No. 38335
Court of Appeals

Substantive Law

1. What is the meaning of "good faith" as used in I.C. § 45-803 and was D.L. Evans Bank acting in good faith in this transaction such that it is not subject to the I.C. § 45-804 lien?

Benz v. D.L. Evans Bank
S.Ct. No. 37814
Supreme Court

2. Did the district court err, as a matter of law, by renewing the judgment more than five years after the judgment was entered?

Bach v. Dawson
S.Ct. No. 38380
Court of Appeals

Summary Judgment

1. Whether the right-of-way is a public highway under Idaho law because it was not created in conformance with the road creation statutes in effect at the time.

Paddison Scenic Properties Family Trust v. Idaho County
S.Ct. No. 38154
Supreme Court

2. Whether the trial court erred in granting summary judgment since material issues of fact exist regarding Petrovich's negligence.

Fragnella v. Petrovich
S.Ct. No. 37783
Supreme Court

3. Did the court err in granting summary judgment in favor of the Huskinsons and in finding the fence was built prior to division of the property and that a boundary by agreement was not created?

Huskinson v. Nelson
S.Ct. No. 38066
Supreme Court

4. Did the court err in granting summary judgment in favor of Windermere Real Estate and in finding that Stevenson had no claim for unjust enrichment against Windermere?

Stevenson v. Windermere Real Estate
S.Ct. No. 38121
Supreme Court

5. Whether the district court erred, as a matter of law, by granting summary judgment in favor of the state based on the doctrine of *res judicata*.

Silver Eagle Mining Co. v. State
S.Ct. No. 38059
Supreme Court

CRIMINAL APPEALS

Evidence

1. Was there sufficient evidence to support the finding that the victim was a peace officer?

State v. Herrera
S.Ct. Nos. 34103/34818/37619
Court of Appeals

2. Did the court abuse its discretion in deeming admissible the Nevada documentation regarding Toyne's alleged prior DUI convictions?

State v. Toyne
S.Ct. No. 35402
Court of Appeals

Pleas

1. Did the court err in denying Woodley's motion to withdraw his guilty plea?

State v. Woodley
S.Ct. No. 38348
Court of Appeals

2. Did the district court abuse its discretion in denying White's motion to withdraw his guilty plea?

State v. White
S.Ct. No. 38030
Court of Appeals

Probation Revocation

1. Did the court abuse its discretion when it revoked probation and executed Roberts' original sentence?

State v. Roberts
S.Ct. No. 37413
Court of Appeals

Restitution

1. Did the district court err in affirming the order requiring Cottrell to pay over $24,000 in restitution to the Idaho State Insurance Fund for knee surgery for the arresting officer, who had a pre-existing knee condition and was injured in Cottrell's arrest?

State v. Cottrell
S.Ct. No. 38129
Court of Appeals

2. Did the district court err when it found Eatinger liable for restitution?

State v. Eatinger
S.Ct. No. 38289
Court of Appeals

Search and Seizure – Suppression of Evidence

1. Did the district court err in denying Linenberger's motion to suppress and in finding he voluntarily consented to a search?

State v. Linenberger
S.Ct. No. 36962
Court of Appeals

2. Did the district court err in denying Acosta's motion to suppress and in finding the officer had probable cause to arrest him?

State v. Acosta
S.Ct. No. 38172
Court of Appeals

3. Whether the results of evidentiary testing for concentration of alcohol should have been suppressed for failure to comply with the requirements of I.C. §§ 18-8002 and 18-8002A.

State v. Decker
S.Ct. No. 38104
Court of Appeals

4. Did the district court err in denying Wilske's motion to suppress statements contained in violation of his Fifth Amendment rights?

State v. Wilske
S.Ct. No. 38298
Court of Appeals

Substantive Law

1. Did the court err when it determined that attempt to obtain a controlled substance by fraud is a misdemeanor?

State v. Summers
S.Ct. No. 38108
Court of Appeals

2. Did the district court err in affirming the magistrate court's order of dismissal on the grounds that the statute required the state to file its motion to require adult registration prior to the juvenile's twenty-first birthday?

State v. Giovanelli
S.Ct. No. 38134
Court of Appeals

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

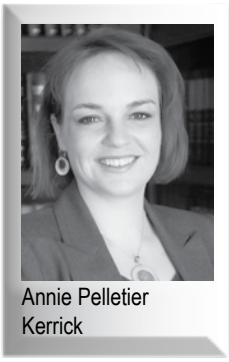
Protections Available to Victims of Domestic Violence: No Contact Orders, Civil Protection Orders, and Other Options

Annie Pelletier Kerrick
Idaho Coalition Against Sexual & Domestic Violence

It is essential for civil attorneys representing a victim of domestic violence to consult with their clients to determine if an order of protection will enhance safety or increase risk

Usually, when we think of ways to protect victims of domestic violence, we think of an order of protection. However, victims of domestic violence are often the best judges of their safety and there are safety related reasons why a victim may not want an order of protection in place. An order of protection may put an abuser on notice of where a victim is residing. Furthermore, in cases where there is escalated violence, orders of protection are less effective and there may actually be an increase in violence as the abused party seeks independence.[2]

It is essential for civil attorneys representing a victim of domestic violence to consult with their clients to determine if an order of protection will enhance safety or increase risk. Whether or not a victim of domestic violence wants an order of protection in place, it is extremely important for that victim to know what options are available and how those options affect safety. Additionally, if there is an order of protection in place in a case, attorneys should ensure that their clients know exactly what type of behavior is covered and how to enforce the order.


Annie Pelletier Kerrick

This article provides a general overview of the types of orders of protection that are available as well as some of benefits and barriers to pursuing the various protections. Ultimately, if a victim of domestic violence feels it is beneficial seek an order of protection, a civil protection order, combined with safety planning and support from a local domestic violence agency, may be the best type of order to pursue. Civil protection orders issued, independent of other civil or criminal actions, have broader coverage in who can be included for protection and allow for greater flexibility in creating remedies and enhancing safety.

History of protections for victims of domestic violence

Domestic and dating violence affects people of all classes, genders, races, and status. Domestic violence is certainly not a new phenomenon, but it has received increasing attention since the late 1960's when the battered women's movement evolved from the women's rights movement. Until then, domestic violence was generally viewed as a man's right to control his wife. Traditionally, upon marriage a woman ceased to exist as an independent entity and a husband could be held liable for his wife's actions. A husband was allowed to control his wife's behavior, even through the use of physical violence.[3] At the same time, laws to protect women against such violence (while allowing a certain amount of violence) have also been recognized by different legal systems for centuries.[4]

In the United States, with the emergence of the feminist movement, which connected domestic violence with a matter of public health and criminal law, the state governments "began to recognize tort actions between spouses, abolish[] marital rape exemptions… and crafted counseling diversion programs."[5] Then, in 1994 the federal government passed the Violence Against Women Act of 1994 "which federalized some interstate domestic violence crimes and established federal grants and policy preferences for states to address legal and community responses to domestic violence."[6] Today, every state has some form of civil protection order that protects certain people from acts of violence.[7] In addition to civil protection orders, there are several other type of protections that may be available to victims of domestic violence within Idaho.

Civil protection orders

Civil protection orders are probably the most widely recognized and commonly used legal protection for a victim of domestic violence. Civil protection orders are the most comprehensive type of orders available and are filed by the victim, giving the victim sole control of the process. In most cases, victims feel "that civil protection orders protect[] them against repeated incidents of physical and psychological abuse and [are] valuable in helping them regain a sense of well-being."[8] Finally, civil protection orders provide victims with an alternative to the criminal justice system and to shelters that require that they leave their homes, pets, and belongings. Because of these advantages, attorneys representing victims of domestic violence may want to recommend that their clients see a civil protection order, in lieu of, or in addition to, other types of orders of protection.

Idaho courts may issue civil protection orders pursuant to the Domestic Violence Crime Prevention Act,[9] or in "any criminal or civil action, as a temporary or final order."[10] Protection orders issued in another jurisdiction will be recognized as such if they are issued under a provision similar to that of section 39-6306 of the Idaho Domestic Violence Crime Prevention Act.[11]

Protection orders issued pursuant to the Idaho Domestic Violence Crime Prevention Act

The Idaho Domestic Violence Crime Prevention Act was enacted in 1988 and provides victims of domestic violence with a method of enhancing their protection and creating stability in their lives through an action for a civil protection order. Unlike orders under the criminal justice system, "the civil protection order system provides victims flexibility in meeting their specific needs and more control over the process and outcome."[12] Civil protection orders may enhance protection through limiting contact that an abuser may have with a victim. Additionally, civil protection orders may increase

stability by giving a victim a sense of control over his or her life, an increased sense of safety, and provide comprehensive remedies for relief from abuse. For victims of domestic violence, the value of the ability to control what happens in their lives cannot be underestimated. Because domestic violence is about controlling a person through an imbalance of power in a relationship, often victims of domestic violence have not had the option to make important choices about their lives. The ability of a victim of domestic violence to file for a civil protection order may be the first of many decisions it takes to escape an abusive relationship.[13]

Idaho Code section 39-6304 creates the action for protection from domestic violence. Domestic violence is defined as the "physical injury, sexual abuse or forced imprisonment or threat thereof of a family or household member, or of a minor child by a person with whom the minor child has had or is having a dating relationship, or of an adult by a person with whom the adult has had or is having a dating relationship."[14] Unlike the criminal definition of domestic violence found in Idaho Code section 18-918, domestic violence for the purpose of getting a civil protection order includes violence that takes place within a dating relationship or former dating relationship even if the parties never lived together.

Civil protection orders created pursuant to the Idaho Domestic Violence Crime Prevention Act have many benefits that may not be available under the other types of orders of protection that are available. The benefits of obtaining an order of protection under the Idaho Domestic Violence Crime Prevention Act may include the following:

- An *ex parte* temporary protection order may be issued immediately upon petition if the petitioner shows that irreparable injury could result from domestic violence if the order is not issued.[15] Therefore, victims do not have to wait for a full hearing to be protected from abusive behavior of the respondent. The respondent will have the opportunity to be heard in court within fourteen days of issuance of an *ex parte* order, and the petitioner's safety is increased in the intervening time.[16]

- The relief available is very broad, including: temporary custody of minor children; restraint from committing acts of domestic violence or contacting the petitioner; restraint from harassing, annoying, disturbing the peace of, telephoning, contacting, or otherwise communicating (either directly or indirectly, in person or through any other person) the protected person; exclusion from a shared dwelling; order to participate in treatment or counseling services; and other relief "as the court deems necessary."[17]

- Even though civil protection orders are issued through the civil court system, they carry criminal consequences for a violation.[18] Therefore, instead of having to return to court to file a motion for contempt of a court order, a petitioner may seek immediate relief for a violation of the order through local law enforcement. Furthermore, by enforcing an order through law enforcement instead of having to file a motion for contempt with the court, enforcement is much more cost and time effective.

- An action for protection may be filed independent of another civil or criminal proceeding; the petition and affidavit required are free to file and a petitioner may prepare the documents him or herself.[19] However, it is highly recommended that a victim consult an attorney, at least for the fourteen day hearing, so that all potential remedies can be discussed and the relief requested adequately meets the victim's unique needs.

- The petitioner knows the exact date at which the order expires, and can make safety plans before the date of expiration.[20] Orders may be renewed if necessary.[21]

- Most orders issued will prohibit the possession of a firearm by the respondent through the application of title 18 of the United States Code section 922(g)(8). This is very important because there is a high correlation between the possession of firearms and level of future risk, especially lethality, in relationships where domestic violence is present.[22] Civil attorneys should be cognizant of this prohibition and make a specific request that all firearms in possession of the abuser be turned over to law enforcement during the fourteen day hearing. Even though language regarding firearm restrictions is included in the standard protection order form, unfortunately this aspect of the law is rarely enforced.

Domestic violence civil protection orders are the most beneficial type of order for protection for a victim of domestic violence.

Domestic violence civil protection orders are the most beneficial type of order for protection for a victim of domestic violence because of the wide range of remedies available assist the victim in creating safety for his and herself and his or her children.

In addition to civil protection orders issued independently of another case, the Idaho Domestic Violence Crime Protection Act allows for civil protection orders to be issued in conjunction with an ongoing criminal or civil matter. This type of order is less desirable than an independent civil protection order because it may be tied to the outcome of a case. Furthermore, these orders are less likely to conform to laws regulating the possession of firearms in domestic violence cases, continuing an on-going safety risk for the victim.

Protection order issued as a part of a criminal or civil action

A protection order may also be issued "[i]n any criminal or civil action, as a temporary or final order (other than a child support or child support order), and where the order was issued in a response to a criminal complaint, petition or motion filed by or on behalf of a person seeking protection, and issued after giving notice and an opportunity to respond to the person being restrained."[23]

Accordingly, a protection order may be essentially written into a divorce decree. While in some cases this may be a reasonable option, this type of order may present some barriers. First, the protection order is not independent of the criminal or civil case with which it has been issued, and a victim may believe he or she is protected when the order is no longer in effect. For example, in a criminal case, if the case is dismissed, the order may no longer be valid. Second, enforcement of the protection order by law enforcement may be more difficult because it doesn't look like a standard civil protection order.

Third, there is not any form of immediate protection when orders are issued this way. In contrast to a civil protection order issued independently from an ongo-

ing civil or criminal case matter, protection orders may only be issued under this section when the person to be restrained has had notice and an opportunity to respond.[24] Finally, orders issued under this provision are much less likely to conform to the requirements found in title 18, United States Code section 922(g)(8), prohibiting possession of firearms by a person restrained under an order of protection. There are specific requirements that an order must include for it to fall under the purview of section 922(g)(8); all of which are contained in the standard Protection Order form produced by the Idaho Supreme Court. These same requirements would need to be included in a protection order issued in conjunction with civil or criminal action, including a finding that the respondent "represents a credible threat to the physical safety" of the petitioner.[25] Therefore, in most cases, a victim of domestic violence will receive a greater benefit from a civil protection order issued independent of an ongoing civil or criminal action.

Criminal no contact orders

Until the enactment of statues around the country allowing victims of domestic violence to petition for civil protection orders, no contact orders were the primary mechanisms for protection. In Idaho, a no contact order may be issued by the court or imposed by Idaho Criminal Rule 46.2 when a person is charged or convicted of offenses, including domestic assault or battery, "or for any other offense for which the court finds a no contact order is appropriate."[26] No contact orders, among other things, state that a defendant must stay a certain distance from the victims and that the "order will expire at 11:59 p.m. on a specific date, or upon dismissal of the case…"[27] A person who is protected by a no contact order may request the court to modify or terminate the order.[28] This may happen, for example, when the order does not stop the threatening or harassing contact of an abuser and the victim feels it would be safer if it appeared he or she was helping the abuser. Victims of domestic violence may have to do things that seem illogical to simply survive the situation they are living.

Under the Crime Victims Rights Act, Article I, section 22 of the Constitution of the State of Idaho, a crime victim has the right to "information about the sentence, incarceration and release of the defendant" upon request.[29] However, because a no contact order may expire upon dismissal of a case, a victim of domestic violence may believe that he or she is protected by the no contact order when it is actually no longer valid. No contact orders are also immediately enforceable through report of the violation to law enforcement.[30] Whenever there is more than one type of domestic violence protection in place the most restrictive provisions will control.[31]

Victims of domestic violence may have to do things that seem illogical to simply survive the situation they are living.

One of the greatest benefits of a civil protection order over a no contact order is the broader jurisdiction allowed under the Idaho Domestic Violence Crime Prevention Act. For example, civil protection orders often include protections for children in addition to the direct victim of violence, where criminal courts are more reluctant to include children on no contact orders if they were not present during the violence or the direct victims of violence. Therefore, to best represent your client and address his or her needs for safety fully, it may be a good idea to petition for a civil protection order even if a criminal no contact order is in place.

Injunctive relief or temporary restraining orders

Sometimes, attorneys do not pursue civil protection orders for their clients because a temporary restraining order has been issued in a divorce case. If domestic violence is involved, attorneys should always discuss the option of filing for a civil protection order, even if a temporary restraining order is in place because of the ease of enforcement and broader remedies available.

Civil courts also have the ability to issue temporary restraining orders if it is clear "that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the party's attorney can be heard in opposition…"[32] Many local courts in Idaho will automatically issue a temporary restraining order when a divorce or custody case is filed; however, sometimes a court will only issue a temporary restraining order if one of the parties makes a request. The specific terms of these orders differ from county to county. However, they almost always specifically order each party not to harass or harm the other party. A party who violates the temporary restraining order may be held in contempt of court and receive a fine or jail sentence but enforcement of the order would require the protected party to file a motion with the court. Additionally, because these orders generally do not make a finding that there is a threat of physical violence, the restrained party would not be subject to federal firearm restrictions. Therefore, even if a victim of domestic violence has been issued a temporary restraining order under an existing civil case, it is a good idea for the victim to consider also petitioning the court for a civil protection order independent of a the case.

Conclusion

The choice of what type of protection to pursue, if any, is ultimately up to the victim. As an attorney you can assist your client by providing information on the types of orders available and the differences between those orders. If a victim does decide that an order of protection is in his or her best interest, encourage a civil protection order independent of another action, even if a criminal no contact order or temporary restraining order is currently in effect. Finally, when working with a victim of domestic violence, encourage him or her to work with a local domestic violence program to create a safety plan that can complement whatever decision is made regarding an order for protection.

For more information on domestic violence and how it may affect your clients please contact your local domestic violence program or Annie Pelletier, Attorney, Idaho Coalition Against Sexual & Domestic Violence.

About the Author

Annie Pelletier Kerrick *is an attorney at the Idaho Coalition Against Sexual & Domestic Violence in Boise, where she has worked since her graduation from Gonzaga University School of Law in 2007. Annie manages the Idaho Legal Assistance for Victims Grant Program funded through the U.S. Department of Justice Office on Violence Against Wom-*

en, and focuses her work on addressing the civil legal needs of teenage and young adult victims of dating abuse and sexual assault.

Endnotes

[1] The author would like to thank Michael Witry, J.D., and Whitney Welsh, J.D. for their insight and feedback on this article.

[2] *See* Nat'l Inst. of Just., U.S. Dep't of Just., Research Preview: Civil Protection orders: Victim's Views on Effectiveness, 1 (1998), available at http://www.ncjrs.gov/pdffiles/fs000191.pdf ("A protection order alone, however, was not as likely to be effective against abusers with a history of violence offenses; women in these cases were more likely to report a greater number of problems with violations of the protection order.") (last visited June 24, 2011).

[3] Jeffery R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse,* 11 J.L. & Fam. Stud. 35, 38 (2009) (England's common-law "rule of thumb," "permitted men to beat their wives with a rod or stick 'no larger than a man's thumb' or small enough to 'pass through a wedding band.'"); *see Developments in the Law – Legal Responses to Domestic Violence,* 106 Harv. L. Rev. 1498, 1530-43 (1993); *and see* Mass. Body of Liberties § 80 (1641) ("Every married woman shall be free from bodily correction or stripes by her husband, unless it be in his own defense upon her assault.").

[4] James Martin Truss, Comment, *The Subjection of Women ... Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence,* 26 St. Mary's L.J. 1149, 1157 (1995).

[5] Baker, *supra* note 1, at 38.

[6] Truss, *supra* note 3; Pub. L. No. 103-322, 108 Stat. 1796, 1902 (1994).

[7] Comm'n on Domestic Violence, Am. Bar Ass'n, Domestic Violence Civil Protection Orders (CPOs) By State (2008), http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/DV_CPO_Chart_8_2008.authcheckdam.pdf (last visited June 24, 2011).

[8] Nat'L Inst. of Just., *supra* note 2, at 1.

[9] Domestic Violence Crime Prevention Act, Idaho Code Ann. §§ 39-6302 – 6317 (Supp. 2010); Idaho Code Ann. § 39-6303(8)(a) (Supp. 2010).

[10] Idaho Code Ann. § 39-6303(8)(c).

[11] *Id.* at § 39-6303(8)(b).

[12] Maureen Sheeran & Emilie Meyer, Civil Protection Orders: A Guide for Improving Practice 3 (Family Violence Dep't, Nat'l Council of Juvenile & Family Ct. Judges, 2010)

[13] *Id.* at 4.

[14] Idaho Code Ann. § 39-6303(1) (Supp. 2010).

[15] Idaho Code Ann. § 39-6308(1).

[16] *But see,* Nat'l Inst. of Just., U.S. Dep't of Just., Research Preview: Civil Protection orders: Victim's Views on Effectiveness, 1 (1998), *available at* http://www.ncjrs.gov/pdffiles/fs000191.pdf ("[R]esearch has shown that the effectiveness of civil protection order for victims of family violence depends on how specific and comprehensive the orders are and how well they are enforced.") (last visited June 24, 2011).

[17] Idaho Code Ann. § 39-6306(1)(a)-(i) (Supp. 2010).

[18] Idaho Code Ann. § 39-6312.

[19] Working with a civil attorney is always recommended because an attorney will be able to ensure that the petitioner submits a petition and draft order that includes all necessary information and specific relief sought, and to draft a petition and a proposed order that provides "comprehensive protection from violence and secure the relief that [a] client needs to move forward." Maureen Sheeran & Emilie Meyer, Civil Protection Orders: A Guide for Improving Practice lxvii-lxviii (Family Violence Dep't, Nat'l Council of Juvenile & Family Ct. Judges, 2010). Furthermore, a civil attorney is often essential at the hearing following the issuance of a temporary protection order. At that hearing, both parties are entitled to counsel and to provide evidence on whether or not the relief granted in the petition shall be granted. Idaho Code Ann. § 39-6306(1) (Supp. 2010). A respondent may be ordered to pay the fees associated with the issuance of a civil protection order, including service fees and reasonable attorney's fees. *Id.* at § 39-6306(1)(f).

[20] Encourage clients who are victims of domestic violence to contact a local domestic violence program for assistance in creating a fluid safety plan. To find the domestic violence program serving your area contact the Idaho Coalition Against Sexual & Domestic Violence.

[21] *Id.* at § 39-6306(5).

[22] Jacquelyn Campbell et al., Intimate Partner Violence Risk Assessment Validation Study, Final Report 11 (2005), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/209731.pdf (last visited June 24, 2011)

[23] Idaho Code Ann. § 39-6303(8)(c).

[24] *Id.*

[25] 18 U.S.C. § 922(g)(8)(c).

[26] Idaho Code Ann. § 18-920(1).

[27] Idaho Crim. R. 46.2.

[28] *Id.* at 46.2(b).

[29] Idaho Const. art. I, § 22 (3).

[30] Idaho Code Ann. § 18-920(2)-(5).

[31] Idaho Crim. R. 46.2.

[32] Idaho r. Civ. Pro. 65(b).

Title VII Retaliation against Third Parties under *Thompson v. North American Stainless, LP*

Mark DeMeester
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In analyzing whether Thompson was "aggrieved" under Title VII, the Court rejected the concept that only employees personally engaging in protected activity could be aggrieved.

Introduction

Management at Alva Chemical discovers that one of its employees, Candace, has filed an age discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). In the next months, as part of an ongoing effort to reduce labor costs, and needing cash flow for expensive attorneys, Alva terminates three other employees, including Candace's close friend Becca. Do any or all of these employees have plausible retaliation claims under Title VII of the Civil Rights Act of 1964?[1] Does Candace's filing provide legal protection for co-employees?

The U.S. Supreme Court recently set out guiding principles to analyze this hypothetical in *Thompson v. North American Stainless LP*.[2] *Thompson* follows an earlier Supreme Court case analyzing retaliation, *Burlington Northern and Santa Fe Railway Co. v. White*.[3] *Burlington* clarified the nature of activity that could be viewed as retaliatory. *Thompson*, on the other hand, clarifies who can bring an action for retaliation.


Mark DeMeester

Ultimately, most employment law practitioners would likely agree that these Supreme Court decisions have interpreted statutory language in a fairly broad manner. These decisions extend the potential reach of retaliation claims beyond obvious employer actions such as terminations or demotions, and beyond obvious claimants such as the employee who actually files the charge with the government or opposes unlawful employment practices. In short, the scope of potential retaliation claims has become larger over time than some had anticipated.[4] This article will examine the background of the *Thompson* case, the reasoning of the decision, and its practical effect.

The back and forth of *Thompson*

Eric Thompson's cause of action was based on the anti-retaliation provision of Title VII, which provides:

> It shall be an unlawful employment practice or an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[5]

Thompson was fired three weeks after North American Stainless ("NAS") learned that his fiancé had filed an EEOC charge against NAS.[6] Thompson then also filed an EEOC charge, and a subsequent lawsuit, alleging that NAS fired him to retaliate because his fiancé filed a charge.[7] In his complaint, Thompson did not allege that he had affirmatively acted to oppose the alleged discrimination against his fiancé; rather, he asserted that the relationship, not any action he had taken, was the basis for the NAS discrimination, his termination.[8]

Before Thompson's case reached the Supreme Court, lower court rulings bounced back and forth. The Eastern District Court of Kentucky granted summary judgment against Thompson, holding that he did not personally engage in protected activity as required by the wording of the anti-retaliation provision.[9] This summary judgment was reversed by a Sixth Circuit panel, which held that a literal reading of the anti-retaliation provision would defeat the plain purpose of Title VII, that of ensuring a non-discriminatory workplace and access to a remedial mechanism.[10] The Sixth Circuit, en banc, vacated the panel decision and affirmed the District Court summary judgment. The Sixth Circuit concluded that Thompson had standing but that he had not established a prima facie case of discrimination, again looking to the language of the anti-retaliation provision.[11]

The Supreme Court interprets Title VII anti-retaliation language

The Supreme Court reversed the Sixth Circuit. The Court mainly focused on two issues: (1) whether the anti-retaliation provision of Title VII was violated by the alleged employer action; and (2) whether, under Title VII, Thompson individually was "aggrieved," as required[12] under Title VII. The Court's analytic approach varied from preceding judicial analyses, and ultimately the Court concluded Thompson could proceed with his lawsuit.

In analyzing whether NAS violated the anti-retaliation provision of Title VII, rather than looking at the provision's specific wording, the Supreme Court applied a test developed in *Burlington.* Therein, the Court defined retaliatory actions as those that "well might dissuade[] a reasonable worker from making or supporting a charge of discrimination."[13] Applying this test, the Court concluded "We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."[14] Accordingly, for the purpose of summary judgment, the anti-retaliation provision was considered violated.

In analyzing whether Thompson was "aggrieved" under Title VII, the Court rejected the concept that only employees personally engaging in protected activity could be aggrieved. The Court reasoned that aggrieved parties, under Title VII, are those who fall within a "zone of interest," someone with an interest "arguably sought to be protected by the statutes . . . while excluding plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated to the statutory prohibitions in Title VII."[15] The Court found that Thompson fell within the zone of interest, meeting the Title VII definition of aggrieved, because:

> Thompson was an employee of NAS, and the purpose of Title VII is to protect employees from their employer's unlawful act. Moreover, accepting the facts as alleged, Thompson is not an accidental victim of the retaliation. To the contrary, injuring him was the employer's intended means of harming [his fiancé].[16]

In ruling that Thompson's case could proceed, the Court opened the door to some degree for claims of retaliation by third-party employees, bystanders so to speak, those not directly involved with the original protected activity. In describing the relationships and employer activity that could support plausible claims, the Court provided limited guidance:

> We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize. As we explained in *Burlington*, "the significance of any given act of retaliation will often depend upon the particular circumstances."[17]

The Court's analysis and outcome suggests that a third-party employee's inaction or unexpressed opinion—whether supportive or oppositional—of the original protected activity will be irrelevant, since it is the employer's motive and actions that ultimately count. Further, even third-party behavior reflecting support for the employer's original, allegedly discriminatory action may be irrelevant, at least for summary judgment purposes.[18] The focus of the *Burlington* and zone of interest tests look to other facts: the timing of events, the personal relationships that exist and are known, the plaintiff's interests in relation to Title VII, and the tendency of the employer's actions to deter or punish protected activity.

Practical implications of *Thompson*

What is the importance and practical impact of *Thompson*? In short, it opens a door for a new type of retaliation claim. This claim can be brought by a sliver of the workplace, those who are closely connected to an employee engaged in a protected activity and who subsequently suffer an adverse employment action.[19] Whether such claim survives summary judgment will depend on a few critical factors: the timing and strength of the adverse employment action, management's foundation for its adverse action, the nature of the personal relationship, and management's knowledge of the relationship. If the claim does survive, it ultimately will be the third-party employee's burden at trial to prove a retaliatory motive.

How would *Thompson* apply to the Alva Chemical hypothetical above? Given the severity of the adverse action, the timing of events, and the nature of the relationship, Candace's and Becca's individual claims of retaliation might survive summary judgment if those managers making the decision to terminate Becca were aware of the close friendship. In evaluating potential retaliation claims by the other two Alva Chemical employees who were terminated, the key issue is whether a reasonable employee would be dissuaded from bringing an EEOC charge or engaging in other protected activity if doing so would cause a few other employees, perhaps only acquaintances, to be fired.[20] Under *Thompson*, these potential third-party retaliation claims appear weaker.[21]

Conclusion

The door to third-party retaliation claims has been opened, requiring management to consider such potential challenges when planning adverse employment actions. While the bulk of these claims may eventually be based on familial or romantic relationships, the Court's language in *Thompson* suggests that under some circumstances other relationships may also suffice. Given the pervasive nature of employment litigation in the U.S., further judicial analysis will most certainly provide additional insight into how far such claims will extend.[22]

The door to third-party retaliation claims has been opened, requiring management to consider such potential challenges when planning adverse employment actions.

About the Author

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Endnotes

[1] 42 U.S.C. §2000e *et. seq.*
[2] 562 U.S. ___, 131 S. Ct. 863, 178 L. Ed. 2d 694 (2011)
[3] 548 U.S. 53 (2006).
[4] The EEOC reports that the largest number of federal employment charges filed by employees in 2010 alleged retaliation. *Equal Employment Opportunity Commission, Enforcement and Litigation Statistics*, available at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm.
[5] 42 U.S.C. §2000e-3(a).
[6] 131 S. Ct. at 696.
[7] *Id.*
[8] *Thompson v. North American Stainless LP*, 567 F.3d 804, 808 (6th Cir. 2009), *rev'd*, 562 U.S. ___ (2011) (quoting complaint). In fact, Thompson had taken some action in connection with his fiancé's discrimination charge: he assisted her in drafting and filing the charge and participated in an EEOC interview concerning the matter. *Id*. at 823 (Moore, J., dissenting).
[9] *Thompson v. North American Stainless, LP*, 435 F.Supp. 2d 633 (E.D. Kentucky 2006), *aff'd,* 567 F.3d 804 (6th Cir. 2009), *rev'd*, 562 U.S. ___ (2011).
[10] *Thompson v. North American Stainless*, *LP*, 520 F.3d 644, 647 (6th Cir. 2008), *reh. en banc granted, opinion vacated* (July 28, 2008).
[11] 567 F.3d 804. As well as the Kentucky District Court and Sixth Circuit, other courts had focused on the language of 42 U.S.C. §2000e-3(a) and held that it barred third-party retaliation claims if the third party had not participated in the original protected activity or otherwise opposed the alleged discrimination. *See* cases cited at 567 F.3d at 810-11.
[12] 42 U.S.C. §2000e-5(f)(1).
[13] 131 S. Ct. at 699 (*quoting Burlington*, 548 U.S. at 68).
[14] *Id*.
[15] *Id*. at 701.
[16] *Id*. at 701-02.
[17] *Id*. at 699-700 (quoting *Burlington*, 548 U.S. at 69, *citation omitted*).
[18] For example, Thompson initially could have advised NAS that he was apathetic about or opposed to his fiancé's claim of discrimination, and yet presumably still have asserted a claim for retaliation if NAS thereafter terminated him, given the Court's focus on the termination's propensity to deter. Looking beyond summary judgment, any third-party actions reflecting support for or opposition to the original protected activity will be used at trial as evidence of employer motive. Obviously, the third-party who opposes loudly will be best positioned through all stages of litigation to establish retaliation.
[19] Presumably, the Court's rationale is not limited to retaliation allegedly triggered by an EEOC charge, but rather, also covers circumstances in which other Title VII protected activity allegedly results in third-party retaliation.
[20] The *Burlington* "might be dissuaded" test as applied in *Thompson* does not definitely establish whether the totality of the employer reaction, rather than only the impact on the specific third-party employee alleging retaliation, should be considered in terms of dissuasion.
[21] The result may depend on how benevolent a reasonable employee is assumed to be. The "might be" wording of the *Burlington* test arguably entails a broader range of potential deterring activity than a "would be" standard.
[22] Shortly after *Thompson* was decided, one district court held that third-party retaliation claims may be brought against a different employer than the employer involved in the original alleged discrimination. *See McGhee v. Healthcare Servs. Grp. Inc.,* No. 5:10cv279/RS-EMT (N.D. Fla., March 2, 2011). Another court noted that a sibling relationship was sufficient to meet the "aggrieved" requirement of *Thompson*. *EEOC v. Williamette Tree Wholesale Inc*., 111 FEP Cases 1392 (D. Oregon 2011).

E-Editing: Time Saving Tips

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

I learned to proof and edit the hard way: read, and read, and read, and then re-read. I spent hours combing over my high school compositions, hoping to find every last error. I don't remember if I was ever successful, but I do remember many late nights!

Then, in college I purchased a computer. It ran slowly and took up most of my desk, but I loved that I could correct errors on the screen instead of retyping a page. Its word processing program supposedly edited my essays for me, but I simply didn't trust it.

Truth is, I still don't trust computer programs to ensure that I have error free documents. I do, however, trust them enough to use them to my advantage. I have, over time, created a series of steps I use to help me proof and edit my work. Use this simple editing checklist with your word processing program to save time and move one step closer to error-free documents.

Citation format

I don't know a single attorney who loves to check every citation in a document to ensure each is in the correct format. Still, we all realize that having correct citations helps give our writing and arguments credibility, so we spend time looking through our work to find any citation format errors.

Tenielle Fordyce-Ruff

To help save time, use the "find" function on your word processor to quickly find all of the citations in your document. Chances are, you have a good idea of the c3"P.3d," or "F.2d." You can also search for "id." and "Id." to find short citations.

The same principle works for statutes and regulations. You can search for "I.C." or "U.S.C.A." to quickly locate these types of citations.

Once you have a citation highlighted on your screen, you can quickly check your citation manual to ensure that the format is fine, and then easily move to the next citation without having to skim all of the material in between them.

Spelling errors

We all think faster than we type, and this leads to spelling errors in our drafts. Two of the most common spelling errors in legal documents are transposing letters in abbreviations or names, or missing a critical letter in a word. As a result, I find myself editing documents in which I refer to the same party as both "ABC" and "BAC" or I discuss the *statues* that govern.

When I'm using an abbreviation throughout my document, I make the "find and replace" function one of my first editing stops. If I'm using "ABC," I ask my computer to replace "BAC," "BCA," CBA," "CAB," and "ACB" with "ABC." I find this helpful because my Word program corrects all the abbreviation mistakes, but I frequently miss these transposition errors when I proofread.

Additionally, as I draft I make note of any names—either of a party or a case—I struggle to type correctly. I then use "find and replace" to quickly fix any errors. (As an added bonus, this saves me time in the drafting stage because I don't worry about correcting these typos as I'm putting my thoughts down.)

I also know to search for commonly mistyped words. You know—the ones that are particularly hard to spot when you know what you mean to say: "trail" instead of "trial," "statue" instead of "statute," and my most feared "pubic" instead of "public." I keep a list of my common typos and always run a quick find and replace for each as I proof and edit my documents.

To help save time, use the "find" function on your word processor to quickly find all of the citations in your document.

In the same vein, run a quick spell-check on your document. It won't pick up every error—and it won't find the words in the previous paragraph—but it will help you find the one-time errors you've made. Every time you see a red squiggly line under a word you can easily replace it and save yourself at least one read-through for proofing.

Using these three quick tricks helps cut down my proofing time, and assures me I won't ever discuss "pubic policy" in a brief!

Ambiguous pronouns

I know simply reading the words "ambiguous pronouns" makes some people cringe. But some readers expect you to know how to use pronouns correctly, so it's worth a few minutes of your time to make sure all your pronouns match their antecedents.

Quick grammar lesson: an antecedent is a noun, and the pronoun replaces it. (In

the last sentence, for example, "antecedent" is the antecedent and "it" is the pronoun.) Pronouns must match their antecedents in gender and number.

Many writers particularly struggle when using a pronoun to refer to a group of people, a business or appellate court. The correct pronoun for a single entity like Idaho Power or the Ninth Circuit is "it." So, search for "they," "their," and "them" and check the antecedent.

"This" can also create ambiguity problems. It can refer to the previous noun, sentence, paragraph, or idea. For instance, "This comports with the Court's reasoning." Does this refer to the argument you made in the previous paragraph or a line of cases you discussed earlier in the section? To make sure your reader understands the antecedent for "this" you need to add a noun. "This *argument* comports with the Court's reasoning" ensures that your reader knows what you mean. Use your computer to find every "this" in your document and then check to see if you should add a noun for clarity.

Use your computer to find every "this" in your document and then check to see if you should add a noun for clarity.

Wordy phrases

As much as I try to eliminate wordy phrases from my drafts, they still sneak into my writing. So, I keep a list of my "favorites" handy and search my document for those phrases. For instance, I love to type "The fact that" as I'm getting my thoughts onto paper. I don't, however, want that wordy phrase to show up in my final version! Because my computer can locate my cluttered phrases, I can use my energy to fix them rather than searching for them.

(For tips on removing wordy phrases, see my essay "Cutting the Clutter: Three Steps to More Concise Legal Writing" in the January 2011 edition of *The Advocate*.)

Conclusion

While these tips won't make your editing pain free, they will help you avoid at least one round of reading. That, hopefully, is enough to prevent a few late nights!

About the Author

Tenielle Fordyce-Ruff *is a member of Smith, Fordyce-Ruff & Penny, PLLC. She clerked for Justice Roger Burdick of the Idaho Supreme Court and taught Legal Research and Writing, Advanced Legal Research, and Intensive Legal Writing at the University of Oregon School of Law. She is also the author of Idaho Legal Research, a book designed to help law students, new attorneys, and paralegals navigate the intricacies of researching Idaho law. You can reach her at tfordyce-ruff@sfrplaw.com.*

Advocates in Action

Stephen A. Stokes
Meyers Law Office, PLLC

Photo by United States Division - Center, Office of the Staff Judge Advocate

Major General Bernard S. Champoux and senior officers of the Iraqi Army and Federal Police at the Legal Advisor Conference.

In the last column, I wrote about recreational activities we use to entertain ourselves during down time. Although we eventually went back to work, we were able to participate in some interesting conferences involving the interplay between Iraqi law and customs and US military law.

On 21 May 2011 the United States Division-Center JAG office hosted the Iraqi Army and Federal Police Legal Advisor Conference. The purpose of the conference was to compare and contrast the Iraqi and US military legal systems and the legal advisor's role in advising soldiers and commanders within those different systems. The conference also built relationships between US and Iraqi legal advisors and allowed legal advisors from the Iraqi Army (IA) and Federal Police (FP) to discuss common frustrations and issues. One of the key takeaways is that there is a serious misallocation of Iraqi legal advisor personnel. For example, since the primary mission of the IA and FP is security and stability, a young military or police legal advisor may be out on the streets of Baghdad leading foot patrols rather than providing fundamental legal advice. There is also a serious mismanagement of personnel assignments; that is, non lawyers are tasked to be "legal advisors," while Iraqi-trained lawyers are placed in military line units. The US Army judge advocates present presented the core legal disciplines to the IA and FP legal advisors to illustrate how the US Army uses military attorneys. Overall, the conference was an excellent way to meet our Iraqi legal counterparts and exchange ideas and culture.

Stephen A. Stokes

As the terrain management attorney for the 116th CBCT, I attended a conference on Iraqi real property law. Be aware that the next few paragraphs may only appeal to real property nerds, so read on at your own peril.

One of the US Government's statutory obligations is to make "land lease" payments to the Iraqis as compensation for using privately-held land to establish military installations. Of course, settling land lease claims is complicated by the nature of Iraqi real property law. The concept of real property ownership dates back to 2700 BCE in the city states of Ur and Uruk, Real property laws were expanded under the rule of Hammurabi (1792-1750 BCE) and are specifically referred to in the Hammurabic Code. Iraq may well be the origin of the concept of land as private property.

During the Ottoman Empire's occupation of Iraq, three types of land interests existed: privately held land, Ameriya lands (land owned by the state but used by the citizenry) and endowed lands. The people of a community were considered the owners of that community and were given a single deed for the real property on which the entire community was situated. Under the British Mandate (1917-1958), several declarations were issued formalizing these principles. However, the British governors took large tracts of land and redistributed them to individuals loyal to the British Mandate. After the July Revolution, the Agrarian Reform Law of 1958 empowered the Iraqi government to repossess real property distributed by the British and redistribute that land to small farmers. When Saddam Hussein came to power in 1979, he began the Al-Anfal Campaign, the fundamental purpose of which was the "Arabization" of Iraq. The result of this campaign was to dispossess Kurdish and Assyrian landowners and redistribute real property to Arabs.

Current Iraqi real property law recognizes four estates: the freehold estate, the Right of Alezma, the Right of Tasaruf, and the Right of Mustaha. The Right of Alezma is a leasehold estate where the government owns the fee but grants an interest in the property to a grantee, who can sell, lease and mortgage that interest. The Right of Tasaruf is also a leasehold estate, but a grantee holds a leasehold estate in perpetuity only so long as the grantee complies with use covenants and agrees to pay a percentage of the land's profits to the government. The Right of Mustaha is a development leasehold for a specific time period, for which the lessee pays a negotiated rent on the condition that the land be developed.

These interests are important to a Judge Advocate in Iraq because a land lease claim may be presented when the claimant does not possess a fee simple estate. Instead, the claimant may possess one of the lesser interests described above, and it is up to the US Government to determine whether a valid interest is possessed and what the fair market value of that interest might be. A further complication is the historical pattern of repossession and redistribution by the different occupying powers. For example, both a Kurd and an Arab might submit a claim

Photo by United States Division - Center, Office of the Staff Judge Advocate

Attendees of the Iraqi Army and Federal Police Legal Advisor Conference.

to the same land in northern Iraq – the Kurdish family may have owned that land for centuries until it was taken away under Saddam's rule and given to the Arab. Who is the rightful owner of the land? Another complicating factor is that many deeds and land-use agreements are not recorded by any central government agency. However, it is the US Government's statutory responsibility to make heads and tails of this confusion and pay valid claims as they are presented. Further information on Iraqi real property law can be found in Dan E. Stigall's article A Closer Look at Iraqi Property and Tort Law, 68 La. L. Rev. 765 (2008).

Of course, the other breaking news since the last column was the death of Osama bin Laden. Although his death fills us all with a sense of relief, it has little bearing on our mission. We still have a mission to perform here in Iraq – that is, the closing of bases and continuing Iraqi stability – which we must successfully and honorably complete.

This is likely the last column I submit from the field. The 116th Cavalry Brigade is expected to redeploy toward the end of August or beginning of September 2011. The emphasis of the Brigade legal office is starting to shift from legal issues unique to a theater of war, and towards a more traditional legal assistance mission. After redeployment, Soldiers may encounter significant legal problems ranging from employers failing to rehire or find adequate positions for returning Soldiers, to default judgments that were entered in the Soldier's absence, to festering family law problems. It is our goal to implement preventative assistance to head off some of these problems. However, I would like to request continued support from the Idaho Bar to assist Soldiers where possible. Please contact LTC M. Lynn Dunlap to find out how you can help and to obtain specialized training. I would also like to take this opportunity to personally thank LTC Dunlap, LTC David Dahle and MAJ Laura Rainey for their efforts as the rear detachment JAG team. Their work with families left at home during this period of separation was critical to the success of the deployed 116th CBCT.

We still have a mission to perform here in Iraq – that is, the closing of bases and continuing Iraqi stability – which we must successfully and honorably complete.

About the Author

Stephen A. Stokes r*eceived his J.D. from the University of Idaho in 2005. He is an associate with Meyers Law Office, PLLC in Pocatello, Idaho, where he practices in the areas of family law, commercial planning, general litigation, and personal injury. He is a member of the Idaho Association of Criminal Defense Lawyers and the Idaho Trial Lawyers Association. He served as chair of the Sixth District Bar Association Family Law Section. He is also a Judge Advocate in the Idaho Army National Guard and is currently deployed to Iraq. He can be reached by email at stephen.stokes@iraq.centcom.mil.*

2011 Distinguished Lawyers

Judge Larry M. Boyle

Since receiving his law degree from the University of Idaho nearly 40 years ago, Judge Boyle has served the legal profession and the state and federal judiciaries with distinction.

In addition to serving as President of the Seventh Judicial District Bar Association while in private practice, Judge Boyle has served as a district judge, Justice of the Idaho Supreme Court, and as a federal judge. His work on state, Ninth Circuit, and federal court committees and task force assignments has significantly contributed to the administration of justice in Idaho and on a national level. As Chair of the Magistrate Judges Executive Committee he represented that group of federal judges on the Ninth Circuit Judicial Council. Notably, in 1998 Judge Boyle was initially appointed, and twice re-appointed, by United States Supreme Court Chief Justice William H. Rehnquist to an unprecedented three terms on a policy making United States Judicial Conference Committee.

He has served on the advisory boards of both the University of Idaho and Brigham Young University schools of law, and as a guest lecturer at those and several other law schools including George Mason University and Notre Dame University.

Judge Boyle has been a frequent contributor to various legal journals and publications, including several articles for the Idaho State Bar's *The Advocate* magazine, and over the years for the *Idaho Law Review*, the Brigham Young University law school *Clark Memorandum*, and the American Bar Association's *Litigation* magazine.

Hon. Larry M. Boyle

In addition to teaching federal prosecutors at the U. S. Justice Department National Advocacy Center, he has been requested by the Justice Department, and invited by the host countries, to teach the rule of law and American jurisprudence to judges in Azerbaijan, a former Soviet Union province. Earlier this year, again at the request of the Justice Department, he taught the rule of law, human and civil rights, and other topics of American jurisprudence to judges and prosecutors in The Islamic Republic of Pakistan. He has also taught appellate and trial advocacy to law students in Kiev and Simferopol, Ukraine.

In a rare assignment, Judge Boyle presided over federal court proceedings in the Klong Prem Central Prison in Bangkok, Thailand involving United States citizens imprisoned in that country.

These teaching experiences in the emerging nations of Ukraine and Azerbaijan, and completing his assignment in spite of the violence and danger present in Pakistan at the time he was there, illustrate a career distinguished by a willingness to go the extra mile in serving and a desire to make a meaningful contribution to the rule of law and the legal profession. In addition to his work in the judiciary and the law, Judge Boyle has lived a life of service and leadership, including serving on school boards, his church, and coaching three 15-year-old Babe Ruth All-Star teams to state championships, one of which qualified for the Babe Ruth World Series in New York.

Judge Boyle is the first to acknowledge that he had great mentors and examples in the law to lead the way, the first being his father-in-law, Rexburg attorney Ray Rigby. The remarkable opportunity to clerk for Idaho Supreme Court Justice Robert E. Bakes followed. Judge Boyle then had the good fortune to begin his private law practice with John Hansen and Tim Hopkins.

He summarized his thoughts about a career in the law:

"It has been my privilege for nearly 40 years to have worked with, learn from, and associate with, highly ethical, competent, fine lawyers, and exceptional judges and justices on the three courts on which I have served. In that process, over a period of many years, I have learned something of value from each of these good women and men. That has been a highlight of my professional career."

He and his wife, Beverly, live in Boise.

L. Lamont Jones

Lamont Jones, of Jones Chtd. in Pocatello, has practiced law for 54 years in a manner that has consistently drawn praise from his peers. Since graduating from the University of Idaho College of Law in 1958, he has seen tremendous change in society and the profession. But some things, such as collegiality, have been a constant.

"To me," he said, "lawyers are my best friends. I always put friendship first and adversarial roles second."

The Malad native said he learned law practice management from his uncle, Ralph Jones, who taught him to take a personal approach to resolving conflict for clients. "If you know the opposing counsel, call and see if there's a way to settle. Ask, 'what's your evidence?' and candidly disclose your facts. You may have the case resolved by the time you hang up."

"To be mad at opposing counsel never made sense to me," he said. "If the respective clients won't communicate, how can a case be resolved without trial if the attorneys won't talk to each other?"

This congeniality earned respect and prominence. He served as Bar Commissioner from 1967-70, Bar President from 1969-70, and received the ISB Professionalism Award in 1992. Lamont was also the first chancellor, from Idaho, for the Jackrabbit Bar Association. He is a Life Fellow in the American Bar Foundation; a captain in the U.S. Navy Reserve and he served as chairman of the Board of Commissioners of the Idaho Housing Agency for 10 of the 12 years he was a commissioner. He primarily practices commercial law in Pocatello.

As a law school student, going to school under the G.I. Bill of Rights for his active service in the U.S. Navy, Lamont served as a police judge of the City of Moscow and the justice of the peace for Latah County. His compensation was $3 for each civil action before him and $3 for each misdemeanor case in which the defendant was found guilty. This was a fair result to the defendant in misdemeanor cases but it tested the integrity of the judge in ruling on each case. While serving as president of the Idaho Bar, the legislature replaced the justice of peace system with our current magistrate courts.

L. Lamont Jones

During the 1980s, Lamont represented the local country club with financial difficulties as well as one of the banks looking to foreclose on their mortgages. Lamont attempted to resolve matters informally respecting the Club, its members and four

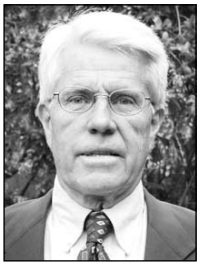
banks. "We got it done," Lamont said, "but because of all my conflicts of interest, there was no way to collect a fee. The banks were paid. The new Club has flourished and my golf course remains intact."

Before time pressures brought on by discovery and technology, professional life was simpler, he said, but not always better. When Lamont started, there were fewer judges, no law clerks and smaller case loads facing the courts. Judges could take most of the summer off, which "was wonderful" for older attorneys, he said. Younger attorneys needed as much work as they could get. "Growing up in the depression," he said, "you never had enough money. I started at a grocery store in sixth grade and never stopped working. Most of my career, I have worked seven days a week. I don't recommend this schedule to anyone but I would recommend playing golf three afternoons each week during golf season as I still do."

John Evan Robertson

A high point of his nearly 40-year career, John Evan Robertson said, has been the opportunity "to build a practice that fits my interests. That means no divorce work, criminal law or bankruptcies," he said laughing. Seriously, he said, he finds transactional law most satisfying. He's been fortunate to work in a community small enough to have personal contacts, he said, which makes things all the more enjoyable.

Evan does mostly transactional law in the Twin Falls and Sun Valley areas, including municipal law, water law and various aspects of real estate law. How did things come together to shape Evan's unique practice? From his hometown in Twin Falls, Evan went to the University of Hawaii, earning a degree in Asian History and Philosophy. Not surprisingly, he returned to find that there weren't any jobs in his field.



John Evan Robertson

He took a position directing the city's fledgling urban renewal agency, one of the first in Idaho. In the process he was introduced to land use planning, municipal finance and real estate transactions. He also met Bob Alexander, Judge Tom Nelson and John Rosholt. "They were instrumental in my going to law school," he said, because they encouraged him to apply.

After graduating from the University of Idaho College of Law, he tried his hand at several practice areas, but focused on transactional law. Part of his journey included taking the Sun Valley Water and Sewer District as his first client, which he still serves. He was later asked to draft the City of Sun Valley's original comprehensive plan, zoning ordinance and subdivision ordinance planning regulations, "which was pretty thrilling for a young lawyer," he said.

He got to know many people in Sun Valley, and was hired as the Sun Valley City Attorney just as the ski area began major expansions and residential development, entering a new era of condominiums, townhouses and various forms of fractional ownership.

Aside from his practice at Robertson & Slette PLLC, Evan was for many years a part owner in a large trout farm near Hagerman, and is currently involved in commercial real estate development projects in Twin Falls, Eastern Oregon and the Treasure Valley.

He likes hunting, fishing, skiing and golf, although he confesses he's not a very good golfer. "I like the sunny side of things," Evan said, adding that he's enjoyed taking some cheerful ribbing from attorney friends who have learned of his award.

"It's an extreme privilege to get this award," he said, "or even to be considered for it, given the stature of previous recipients."

He had some advice to new attorneys: "To build a small private practice, you have to go out and meet people. Make connections. I think in Idaho most legal practices remain quite personal. In my opinion you have to base your practice on personal connections with the majority of your clients."

Richard Wayne Sweney

For his longtime commitment to advancing the practice area of banking, bankruptcy and commercial law, Richard Wayne Sweney of Coeur d' Alene was selected as one of Idaho's Distinguished Lawyers. He is a principal with Lukins & Annis, P.S.

Richard Wayne Sweney co-founded the Idaho State Bar Section on Bankruptcy and Commercial Law and subsequently chaired that Section, which later presented him its Professionalism Award in 1999. He is an active member of the American Bar Association's Committees on Banking Law and Commercial litigation and has served on the Local Rules Committee for the U.S. Bankruptcy Court for the District of Idaho. Wayne was a member of the Idaho State Bar Committee on Uniform Commercial Code Article IX Revision. He has also published articles regarding bankruptcy and commercial law and has presented at seminars on those subjects.

Wayne said he developed a passion for commercial law through a series of circumstances that included a career change from science to law. He received his Bachelor of Science Degree in Physics from Drexel University in 1968, and attended graduate school for mathematics at the University of Maryland while working as a physicist at the U.S. Naval Ship Research and Development Center.

"Job prospects (in science) were narrow at the higher levels," he said, and in 1970 he embarked on a different career track. He earned his J.D. from the University of Maryland in 1974, hoping to practice environmental law. As a scientist, he had worked at the Navy's experimental facility on Lake Pend Oreille and he later located to North Idaho. Like most starting attorneys, he practiced in various areas of law. He became a bankruptcy trustee through a mentor, Coeur d'Alene attorney Scott Reed, and was introduced through that opportunity to the analysis of loan documents and credit transactions. That experience led directly to his commercial and banking law practice.

"My job satisfaction comes from feedback from clients," he said, "And from producing a quality work product. I enjoy a comfortable relationship with my clients."

Richard Wayne Sweney

Wayne obtained the original federal charter and subsequent Idaho state charter for Mountain West Bank, headquartered in Coeur d'Alene, in 1993, and has served as its general counsel since then.

Looking back, Wayne said working in science and practicing law share certain qualities. Both require "problem-solving, skepticism, critical thinking, hard work, and analysis."

He and his wife, Fay, have lived in Coeur d'Alene since 1974. They have a son, Robert, who is a senior mechanical engineer for an international research company in Redwood City, California. Wayne serves on the Board of Trustees of the Museum of North Idaho.

John Lawrence Radin
1951 – 2011

John Lawrence Radin, 59, of Menan, Idaho, died April 28, 2011, at his home.

He was raised in Los Angeles, and graduated Harvard Military School in Los Angeles, continuing his education at the University of California at Berkeley earning a bachelor's degree in Geography. He then attended and graduated from Hastings School of Law in San Francisco.

John Lawrence Radin

John practiced law in Rigby and Idaho Falls for more than 30 years. He was active in the quarter horse industry, raising and racing quarter horses throughout the Intermountain West and California.

He is survived by his children, Cierra Dawn Radin and Ethan James Radin of Ririe; sister, Ginger (John) Radin-Schneider of Woodland, Calif.; and brother, Michael Dan (Jacqueline) Radin of Davis, Calif. He was preceded in death by his parents.

John W. "Jack" Barrett
1931 - 2011

John W. "Jack" Barrett, 79, a founding partner in the law firm Moffatt, Thomas, Barrett, Rock & Fields, Chtd, died on June 28, 2011, at home surrounded by his loving family after a short fight with cancer. He was active in professional organizations and honored with many awards for his professionalism.

John W. "Jack" Barrett

Jack was born in Ellendale, North Dakota and was raised by his mother, Edith Barrett, who was a school teacher, principal and librarian in Ellendale, Horace and Minot, North Dakota.

Jack often commented on his childhood in North Dakota recalling difficult winters, economic hard times and childhood jobs on farms, at grain mills or in construction. The family moved from Horace to Minot where Jack graduated high school and attended Minot State Teacher's college prior to the draft board contacting him during the Korean Conflict. Jack enlisted in the United States Air Force and following basic training as a radio transmitter mechanic, was stationed overseas at Chitosi, Hokkaido, Japan.

After his service overseas, Jack was stationed at Dow A.F.B. in Bangor, Maine. While there, Jack met his future wife, Marilyn Light, who was working as a part-time waitress at a diner Jack frequented near the air base.

He was honorably discharged from the Air Force and moved to Moscow, Idaho where he attended the University of Idaho obtaining a Bachelor of Science degree in business.

After earning his undergraduate degree, Jack returned to Maine and married Marilyn in 1956. The couple moved to Moscow, Idaho, where Jack attended College of Law, graduating in 1959. Jack and Marilyn were married for 52 years and had four children, Kim (Cedric) Minter, Charles (DeAnna) Barrett, Laura (Clay) Shockley, Jonna (Jason) Brewer and ten grandchildren.

Jack loved the law was always willing to answer legal issues raised by fellow lawyers or offer words of encouragement to young lawyers. He shared many stories with family and friends of loading boxes of files into the trunk of his car and trying cases all across Idaho, often being on the road for a month at a time.

In addition to an active trial practice, Jack enjoyed appellate practice and at one point held the dubious distinction of having the most appearances before the Idaho Supreme Court than any other Idaho licensed attorney. During the 1996 Idaho legislative session Jack was instrumental in the passage of the Farm Worker's Bill which brought farm workers under Idaho's worker's compensation statutory provisions.

Jack was a distinguished lawyer who received numerous awards and recognitions among which include: Member of American Academy of Appellate Lawyers; Fourth District Bar Association President; A founding member of the Idaho Association of Defense Counsel; Member of the Idaho Industrial Commission Advisory Committee; Former member of the Idaho Judicial Council; Recipient of the Idaho State Bar Professionalism Award; Recipient of the Idaho State Bar 50 years in practice award; and President Elect, American Inn of Court #130, 2010-2011.

Jack was also heavily involved in the foundation of Kids' Chance of Idaho, Inc. a non-profit organization assisting children of injured or deceased Idaho workers with financial assistance for college education. In addition to his exceptional legal career, Jack enjoyed raising quarter horses and participating with his children in organizations such as AQHA, EHCAPA, 4-H and attending numerous horse shows across the western United States.

Jack and his daughters traveled to several world AQHA shows in Tulsa, Oklahoma. Jack was known for making the drive from Boise to Tulsa and back, in record time, stopping only for gas, food, water for the horses and to find a pay phone to call-in to his legal assistant of 34 years, Janet Yerrington, in order to discuss his cases and developments while out of his office.

No matter how busy at the office, Jack never missed any of his children's activities, a tradition carried over to attending his grandchildren's sporting events, academic awards presentations, band concerts, talent shows and dance recitals. To those that knew him, Jack was a remarkable man with an incredible work ethic.

To himself, Jack was humble and often remarked that he was "just a farm boy from North Dakota."

Carl Burke
1925 - 2011

Carl Burke died June 29, 2011 in the company of his family at St. Luke's Regional Medical Center, the same hospital in which he was born 86 years previously.

Carl Burke

Carl was the first child of Carl Alfred Burke and Mary Prosser Burke. He grew up and graduated from Boise High School in 1942.

After completing part of his first year at Stanford University, he was drafted into the U.S. Army at the age of 19. Carl served in the Infantry in 1944 and 1945 in WW II with the 44th Division, 114th Infantry Regiment, where he fought in northern France, Germany and Austria. He was honorably discharged in November 1945 after receiving the Combat Infantry Badge, the Presidential Unit Citation, the Purple Heart, and the European Theater Badge with three bronze stars.

Following the war, he returned to Stanford University where he received his bachelor's degree in 1947 and his law de-

gree in 1950. In 1949, he married Carolyn Spicer from Newport Beach, California, with whom he had three children.

In 1977, he married Gisela Lubben, a native of Bremerhaven, Germany, with whom he recently celebrated his 34th wedding anniversary. After graduating from law school, he returned to Boise in 1950 where he became one of the first federal law clerks in Idaho, for U.S. District Judge and former Idaho Governor, Chase Clark.

He served briefly as counsel for the office of the U.S. Price Stabilization before joining his father and Laurel Elam in the Boise law firm of Elam & Burke in 1952, which he helped grow into one of the largest and most prestigious law firms in the state of Idaho, before retiring from that firm in 2005.

He then joined his son, Chris, in the law firm of Greener Burke Shoemaker, and continued to practice until he retired in 2008, having completed a distinguished legal career spanning almost 60 years.

Carl was well respected by his peers, and enjoyed an excellent reputation as one of Idaho's premier trial attorneys. He participated in some of the largest, most complex trials of his generation, and regularly argued matters of significant constitutional importance before the Idaho Supreme Court.

He was a fellow and former Idaho Chairman of the American College of Trial Lawyers. He was a founder and the first President of the Idaho Association of Defense Counsel. He was a past president of the Boise Bar Association and served on the Idaho Commission on Constitutional Revision 1965-70.

In 1997, he received the Distinguished Lawyer Award from the Idaho State Bar. Carl chaired and managed the U.S. Senatorial Campaigns for his life-long friend, U.S. Senator Frank Church, in 1956, 1962, 1968, 1974 and 1980. In 1976, he traveled the country as Chairman of Senator Church's campaign for President of the United States.

He was the Idaho State Chairman for the John F. Kennedy and Lyndon B. Johnson Presidential campaigns. He was also a friend and confidant of Idaho Governor Cecil Andrus, who, as U.S. Secretary of Interior, appointed Carl to the U.S. National Parks Systems Advisory Board, where he served as a member and chairman for six years.

In 1959, Carl served as a United States Delegate for the First Atlantic Conference of NATO in London, replacing former President Harry S. Truman who was unable to attend. He served on the boards of numerous civic organizations, including the Boise Philharmonic, the YMCA, the Idaho Lung Association, and the Sawtooth Society.

He was founder and the first President of the Boise Valley World Affairs Organization. Most recently, he served as a board member and Vice Chairman of the Frank Church Institute and was an Advisory Committee member of the Frank Church Chair at Boise State University.

Carl was blessed with many friends and family members. A celebration of Carl's life is scheduled at Boise State University, at the Stueckle Sky Center on July 29, 2011, at 6 p.m. The family encourages memorial contributions to be made to the Frank Church Institute, Boise State University, 1910 University Drive, Boise, Idaho 83725, or to any other charity of choice.

Teresa Ann Sobotka
1955-2011

Teresa Ann Sobotka, 55, a longtime prosecutor in the Boise area died June 30. She served on the Boise Planning and Zoning Commission and worked for the Association of Idaho Cities.

She was raised in Twin Falls and went on to attend College at the University of Idaho. During her first year of college she suffered an accident that resulted in her becoming a paraplegic. Despite this handicap Teresa went on to earn several degrees, which led to her career in criminal justice.

Teresa Ann Sobotka

She was admitted into the Idaho State Bar in 1987 and worked as a prosecutor for the City of Boise and for Ada County. She prosecuted child protection cases and later worked as a deputy in the Attorney General's office.

She will be remembered for her brilliant mind and sense of humor.

She is survived by her Mother, Shirley Sobotka, her siblings, Vicki Sobotka, Angi Sobotka-Grammer, Debi Fuss, Bryce Sobotka, Christi Coggins, and numerous nieces and nephews.

Memorial contributions may be made in Teresa's name to the Idaho Elks Rehabilitation Hospital in Boise.

Eugene "Gene" Lantz Miller
1922 - 2011

Long active in professional and community organizations, Eugene "Gene" Lantz Miller, of Coeur d'Alene, died on July 9, 2011. He served as a commissioner and president of the Idaho State Bar and earned its Distinguished Lawyer Award.

Eugene "Gene" Lantz Miller

Born in Shelby, Ohio, Gene was raised in Medford Oregon. He moved back to Ohio to attend the University of Toledo before enlisting in the Army in 1943. He served in the U.S. Army Air Forces, flying B-17 and B-29 bombers. Following his service, Gene attended the University of Idaho, earning his law degree.

Gene enjoyed a long and successful career as an attorney in Coeur d'Alene beginning in 1949. Gene became a senior partner at Paine Hamblen in 1986, where he practiced professional liability litigation until his retirement in 2006. During this time, he served as legal adviser and general counsel to several North Idaho hospitals.

Gene was also heavily involved in many community service activities. He served on the Idaho State Board of Education for five years and became President of the Board in 1983. He was a member of Rotary International for 18 years, served on the University of Idaho Board of Regents and was on the Board of Directors of Lake City General Hospital. He was also active in the F.O.E. No. 486 Eagles, the Boy Scouts Advisory Council and a member of the B.P.O. Elks, where he served as both the Local and District Exalted Ruler.

In his free time, Gene was an avid golfer and swimmer. In his retirement he enjoyed playing cards and spending time with his family at his Fernan Lake Home. Gene was preceded in death by his son, Kirk Miller. He is survived by his loving wife of 63 years, Mary Ellen Miller; his children, Patrick Miller and Kathleen Seppi; his grandchildren, Justin Seppi, Nathan Seppi, Charles Miller, Keith Miller, Bret Miller and Tara Miller.

John Clifford Hepworth
1927 - 2011

John Clifford Hepworth, longtime trial lawyer in the Magic Valley, died July 10, 2011, at home, holding the hand of his wife, Bonita. He died of complications due to Parkinson's disease.


John Clifford Hepworth

John was a member of The Idaho State Bar from which he received the highest attorney accolade of "Distinguished Lawyer." He was also President of the Fifth District Bar Association, served on the State Redistricting Committee, and was one of the founding members of the Idaho Trial Lawyers Association. He served on the board of the American Board of Trial Advocates, and was a member of the American College of Trial Lawyers, an invitation-only group limited to fewer than 1% of the nation's trial lawyers.

John's mother passed away when he was five years old and John was raised by his father and siblings in Albion, Idaho. His father was a butcher and had a small meat market in Albion. During his youth, John enjoyed and excelled in all sports, especially basketball. After high school, John enlisted in the Navy where he served until the end of the war in 1946. He was stationed on the USS Attu. After the war, John attended Idaho State University and went on to the University of Utah from where he received his law degree. John married his high school sweetheart, Donna James, in 1947 and they had four children. The Hepworth family lived in Buhl, Idaho from 1952 until 1978. Sadly, Donna Hepworth passed away in 1972.

At his law firm, he was joined by Bill Nungester in 1960 and by Mike Felton in 1965. Later, Brent Martens joined the firm in Buhl. In the '60s and '70s the law firm of Hepworth, Nungester and Felton developed a strong reputation in Magic Valley and throughout the state.

In 1977 John married his wife, Bonita. They moved from Buhl to Twin Falls in 1978 where they continued to live until the present.

Throughout the '60s and '70s, John tried many jury trials to successful verdicts and, in a few cases, set records for the largest verdicts in the state of the types of cases he handled.

The one constant throughout the life of the law firm was the skill and leadership that John provided. He was hard-working, smart and fiercely competitive; all attributes that served his clients well until he retired from the firm and the practice of law at the age of 75. Many of his courtroom adversaries were his closest friends, which was a reflection of his professionalism. He had a long and distinguished career as a trial lawyer.

He was listed in "The Best 100 Lawyers in America" in several editions.

One of the great joys in John's life during the time he lived in Twin Falls, was his relationship with Bonita's son, Bradley. Bradley was born with special needs and he lived with John and Bonita until his death in 2009.

Watching his children and grandchildren succeed and chatting with his sister Yvonne on the phone were highlights for John. He was a devoted husband and father and his legacy will live on in his children and grandchildren.

John was asked as the only Idaho lawyer to join the Inner Circle of Advocates, a distinguished group of 100 of the best trial attorneys in the United States. John was also a frequent speaker on trial advocacy throughout the country.

In the mid 1960s he worked with his good friend, Ted Eastman, to start a commercial trout company called Clear Springs Trout Company. With a lot of hard work and persistence, Clear Springs grew from a fledgling trout company to becoming the world's largest privately owned commercial trout company. John was chairman of the board for the company for many years. He was very proud of his role in helping to form and grow the company.

John served on the board of directors for College of Southern Idaho for many years helped to form the school's foundation.

He enjoyed playing golf, but mostly enjoyed playing tennis with his buddy, Bob Seibel. He and Bonita loved to travel and did so extensively, creating many good friends and memories. Going to Normandy Beach was a particularly memorable trip, but traveling to Italy was also a favorite. John was a member of Immanuel Lutheran Church. He was also a member at the Blue Lakes Country Club.

John was a devoted husband and Bonita meant the world to him. He knew he was very lucky to have her especially these last few years.

John is survived by his wife, Bonita, of 34 years; his children, Tanya (Craig) Storti of Boise, Janet (Lynn) Askew of Hailey, Charlie (Margaret) Hepworth of Boise, and Jeff (Leslie) Hepworth of Twin Falls; stepson Rod Mason of Twin Falls; his sister Yvonne Chatburn of Spokane; sisters-in-law Helen Meyer and Loretta O'Connell, 11 grandchildren and many nieces, nephews and cousins.

Fleming Opens Firm

Timothy L. Fleming announced the opening of Fleming Law Offices, PLLC in June 2011. The practice focuses on criminal defense, divorce and custody proceedings, Wills, Trusts, Guardianships and Conservatorships, Estate Planning and Probate. Mr. Fleming received his JD from the University of Idaho College of Law in 1997 and his BA from the College of Idaho in 1994. Before entering private practice, Mr. Fleming served in various prosecutorial capacities in Boise, Canyon and Gem Counties. He served as the elected prosecutor for Gem County from 2005-2009 and the appointed Boise County Prosecutor from 2006 to 2009. He has served on the Magistrate Commission for the Third District and is a past president of the Third District Bar Association. Fleming has served on various Boards in the community, including the Idaho Elks Rehabilitation Hospital Board of Directors as well as Idaho Department of Juvenile Corrections Board. He was recently appointed by Chief Justice Eismann to serve on the Guidelines and Standards Committee for Drug Courts and Mental Health Court for the State of Idaho.

Timothy L. Fleming

Fleming Law Offices can be contacted at (208) 365-9400 or by email at timflem-inglaw@gmail.com. The office is located at 1312 South Washington Avenue, Suite F, Emmett, Idaho, 83617.

Andrews joins Zarian Midgley and Johnson PLLC

Baxter Q. Andrews joins Zarian, Midgley and Johnson, PLLC as the firm's newest Litigation Paralegal. Andrews has extensive experience working as a litigation paralegal and is familiar with all aspects of litigation and research support.

Baxter Q. Andrews

Andrews earned both her Bachelor of Science in Criminal Justice degree and her Paralegal Studies certificate from Boise State University.

Fourth District Spring Fling golf tournament

The Fourth District Bar Association announced the results of its annual Spring Fling golf tournament:

- 1st place women's division, score of 72: Deborah Bail, Darla Williamson, Rae Ann Nixon, Tara Therrien, Janine Korsen and Tammy Emmons
- 1st place men's and senior division, score of 55: Craig Meadows, Bart Harwood, Max Eiden, Tom Miller, Bob Tunnicliff and Todd Points

Putting Contest:

- 1st: Davies, Shockley, Gustavel, Hansen, Harwood and Turcke
- 2nd: Dingel, Bjorkman, McFadden, Orndorf, Neumeyer, McMillan
- 3rd: Eidam, Dryden, Owen, Day, Gjording and Foster

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Photo by Dan Black

Jim Huegli talks about doing pro bono from his home in the Boise Foothills. While not working on a case, he enjoys bird watching, feeding koi and spending time "with the light of my life, Carla."

Federal Prisoner Rights Case Gets Pro Bono Firepower: James Huegli Finds Meaning Helping Inmates, Evading Pirates and Giving Back

Dan Black
The Advocate Managing Editor

> *An inmate has rights under the Constitution to find relief through the courts. But in the absence of money, those rights are lost to him. In the absence of pro bono service, the poor have no civic and constitutional protection.*
>
> – James Huegli

At 63, James Huegli has paid his dues. He litigated medical malpractice, insurance, and product liability cases around the country and retired in 2003. He and his wife, Carla, sold their belongings, bought a sailboat and set out to circumnavigate the globe. If it weren't for pirates, they would have made it.

Their seven-year high seas adventures behind them, (more about pirates later), the couple bought a home in Boise to be close to their children and grandchildren. Jim hung up his Mediation-ADR shingle, got his Idaho State Bar license and signed up for some pro bono work with the Idaho Volunteer Lawyers Program. After a few small cases, he got a large assignment – a federal prisoner rights case that has so far taken 800 hours.

"It would be a waste not to use those skills to help other people," he said of his semi-retirement. "One of the central responsibilities of an attorney is to do his part to see that every person has equal access to the courtroom. Unfortunately, most people don't have access."

As a young lawyer, "I admit, I was chasing the dollar," he said. But pro bono cases ended up giving a deep sense of satisfaction. "I found some of the most rewarding cases as a young attorney were pro bono. I still get notes from clients 30 years later."

Five weeks into his first job, Jim took his first pro bono case, which was mandatory at the firm. He explained that the managing partners at Schwabe, Williamson in Portland were

decorated World War II veterans who "held a deep conviction that they were given two gifts, their lives and their law degree. They believed they needed to pass on the blessings they had been given. That's the way I was taught. When it's required, it becomes a habit."

It is a habit that still enriches his daily life.

Riggs vs. Valdez

On a shelf in Jim's office, among personal mementos and great books, sit three large white binders. Each one has scores of plastic sheets holding hand-written personal letters from prisoners – a corpus of woe, legal grievances, gratitude and desperation. Jim could have thrown them away, or stuffed them in a file somewhere. Numbering in the hundreds, they came from inmates he originally interviewed in the course of preparing for the class-action case against Corrections Corporation of America, a private company which operates the Idaho Correctional Center just south of Boise. The inmates subsequently sent the letters on other matters, even though there would be no way for Jim to help them. "The need is overwhelming," Jim said, but he does what he can.

The plaintiff's case alleges CCA allowed attacks on prisoners, violence that was witnessed by guards who did nothing, and by medical staff who ignored life-threatening injuries.

Jim said he believes that a prison sentence is punishment enough, and that prisoners deserve to be protected. "These things (abuses) don't happen at the state prisons. They just don't. CCA is a for-profit company and they have every incentive to have fewer guards, and spend less on medical care," he said.

Jim joined a team on the case that includes The American Civil Liberties Union lead attorney Steven L. Pevar from Connecticut, and locally, Lea Cooper. "I'm not really an ACLU guy," Jim said, "but now that I'm involved with this case, I can see they really are the guardians of the Constitution. People say you are protected by the Constitution. No. You are protected by the guardians of the Constitution."

Commitment to service evolves

Jim planted the seeds for his advocacy long ago. Raised by parents who had little formal education, Jim had strong ties to his hometown of Portland, and to Oregon, where his family had lived for three generations. Before he moved to Boise, he served on the boards of the Girl Scouts of America, the Rose Festival and the Portland Civic Theater. In Idaho, he flies very sick patients in his airplane to regional medical facilities. That job, through a non-profit called Angel Flight, "helps me understand that the path God creates for us is not within our control," he said.

People say you are protected by the Constitution. No. You are protected by the guardians of the Constitution.

These experiences helped to develop a humble sense of public service, and an ever-evolving sense of what it means to be an attorney. "One lawyer has tremendous power. With that power comes some social responsibility to exercise for the community. We can only do so much. But if you really help people, then that's your part," he said. "That's a big deal."

Calamity on the high seas avoided, another lesson learned

Travelling also helped solidify a sense of humility and service. Jim and his wife, Carla, began their voyage around the world in 1998, Jim maintaining some law practice by using "satellite phone, email, land lines, whatever we could find," he said. They stopped along the way and Jim flew back to the United States occasionally to move cases forward. Back aboard the boat, it was a different story.

"The daily rhythm was slow, slow, slow," he said. "We learned to slow down and enjoy today, just for today. Today is all we are really guaranteed."

Their journey stretched into its seventh year when it ended abruptly in South Asia. Having been warned about pirate activity in the Indian Ocean between India and the Middle East, he and Carla had to decide whether or not to finish the trip.

"We still have children and grandchildren back home," he said. "We decided we just couldn't take the risk."

He explained that fellow leisure sailors who travelled in tandem along the same route became friends and decided to continue. Those friends reported back they were attacked off the coast of Yemen. A gun battle ensued and all four pirates were killed.

The Hueglis managed to bring home photos, mementos and first-hand experiences of hospitality from around the world. "We made the right call," Jim said.

Safely back at home, the couple continued to find treasure: "We are more grateful now than ever," Jim said. "We no longer really have a 'wants or needs' list as everything necessary in our life like health, family, food and shelter, are provided."

Perhaps Jim's sense of contentment has disposed him to help others. Or maybe it was his upbringing, or dedication to justice. But his compassion includes an understanding that there is only so much a person can do. Then again, there is so much a person can do.

"If you take pro bono because you feel guilty, then it's a burden," he said. "Don't take on more than you can handle or you won't enjoy it. You can't do a good job. One at a time is plenty."

Pro-bono Case Contacts

- Idaho Volunteer Lawyers Program
  Mary Hobson
  Legal Director
  (208) 334-4500
  mhobson@isb.idaho.gov
  www.isb.idaho.gov

- U.S. Federal Court
  Susie Boring-Headlee
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