Idaho Chapter, Federal Bar Association

SIDEBAR

April 2009

Inside this Issue

START Program	1
Upcoming Events	7
April 1 - CLE	8
May 1 - CLE	9
Celebrate Law Day	10
Complaints Filed	15
Jury Trials	27

Highlights

- Advanced Mediation Training
- President Wendy Olson's Message
- Chief Justice John G. Roberts
- New Coeur d'Alene Courthouse
- Larry Westberg Government Relations
- Susie's Bookshelf: *Crusaders in the Courts*

Starting a bridge to the future by Judge Mikel H. Williams

Mikel H. Williams
U.S. Magistrate Judge
District of Idaho

The snow on the road crunches under the tires as the four-door government sedan rolls to a stop. The neighborhood is one that not many would want to be in at night when your car literally shouts *Federal Probation*. Senior Probation Officer Tim Messuri reaches for his portable urinalysis testing kit, exits the vehicle and knocks on the door. A pillow case substituting for a window shade is pulled aside and a young woman looks out. The door slowly opens and with two young children clutching her legs, she goes to get the reason for the visit.

With two missed UAs over the last several days, it was time for a surprise visit and an unannounced test. Before much, if anything, can be said, the young man who has just entered the room takes one look at the test kit and says, "No need, I'm dirty."

On the one hand, this is not what you want to hear from one of the six members of the inaugural class of the District of Idaho's re-entry court, Success Through Assisted Recovery and Treatment (START).

But on the other, it is indicative of the challenges that all recovery programs have to deal with when breaking patterns of long-term drug addiction and substance abuse.

Several months earlier and absent the START program, the consequences for this young man would have been clear. A petition from the U.S. Probation Office would have been filed with a district judge requesting revocation of supervision. Counsel would have been appointed and following a hearing, the likely result would have been revocation of supervision followed by another term of imprisonment.

Months later the young man would again be released from prison and back in the same

START PROGRAM CONT'D.
BY JUDGE MIKEL H. WILLIAMS

environment and dealing with the same challenges that led to his substance abuse and addiction in the first place. It is common for federal defendants to repeat this cycle, often with two or three petitions for revocation filed against them before their sentences finally expire.

The good news is that the cycle has been temporarily halted for this young man. He will be sanctioned by the START Court for the missed and positive UAs, but he will not go back to prison this time.

Instead, additional emphasis will be placed on counseling, supervision and testing in an effort to help him maintain a sober lifestyle. Whether he will complete the one year program and graduate remains to be seen, but it will not be because of lack of support from the START Team.

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Overview of Problem Solving Courts

The term, "problem solving courts" can describe a variety of relatively new ancillary court-sponsored programs that address behavioral and addiction issues outside of the traditional justice system. These can cover a broad gamut, ranging from mental health courts, domestic violence courts, veteran courts, to the more familiar drug courts.

Drug courts have been around for almost two decades, having first started in Florida in 1989, and now total more than 2,100 at the state level.

Drug courts have merged two models in our society that have attempted to address substance abuse. As judges, prosecutors, defense attorneys, and probation officers, we are most familiar with the criminal model where drug addiction is generally manifested in criminal activity, such as possession and sale of drugs or committing other offenses to get money to buy drugs.

The criminal system seeks to punish (generally through incarceration) and deter future criminal conduct. Unfortunately, there is a high percentage who reoffend or fail to complete supervision or probation.

The medical model in the civilian community has its own limitations. The medical model views drug addiction as a chronic and relapsing disease. The treatment community emphasizes therapeutic relationships to help motivate addicts to reduce their dependence on drugs, take charge of their behavior and take control of their lives. While treatment has proven to be effective, studies show that at least 12 months of treatment is the minimum needed to address addiction issues. The problem is that 80 to 90 percent of conventional clients drop out of their counseling programs before the 12 months are up.

START PROGRAM CONT'D.
BY JUDGE MIKEL H. WILLIAMS

Drug courts provide a marriage between these two models. Treatment coupled with supervision from the court helps to exert pressure on the participant to stay with the program and graduate.

A 2006 study by the U.S. Department of Justice, National Institute of Justice, shows that this structure works. More than 66 percent of those entering a year-long drug court program stayed to completion, compared to the 80 to 90 percent that dropped out of conventional counseling programs.

Federal Re-Entry Courts

While problem solving courts at the state level are now entering their second decade, federal courts have only recently implemented similar programs. Part of the stimulus for this effort has come from former state judges who were involved in state drug court programs and have now joined the federal bench and ask themselves why these programs would not also work at the federal level.

Federal courts started to experiment with similar programs beginning with the Eastern District of New York in 2002. In developing "drug court" programs and procedures in federal court, it was not as simple as just taking the state model and applying it at the federal level. Many state programs use a diversionary approach. Taking the State of Idaho as an example, the most common practice is to have the defendant plead guilty to the charge, agree to enter the drug court program and upon graduation, have the charge dismissed by the state. A successful participant would not have a criminal conviction for that offense on his or her record.

The Department of Justice was reluctant to participate in a similar diversionary program at the federal level.[1] Facing this issue, federal judges and probation officers started to explore other alternatives. When imposing a prison sentence, federal judges almost always include a requirement that the defendant be placed on a term of supervised release after completion of the prison sentence. For serious felonies, the term of supervised release can be up to five years. While in the community and under supervision, their conduct is monitored by probation officers with a goal to deter future criminal conduct and assist them in becoming productive members of their community, in other words to successfully "re-enter" society.

Federal judges also have the authority under 18 U.S.C. § 3583(e) to reduce the term of supervised release after a defendant has been released from prison, much in the same manner as judges could historically reduce an offender's term of probation.

"Facing this issue, federal judges and probation officers started to explore other alternatives."

Footnote 1: Prior to his election, President Obama stated that he would seek legislation to replicate state and local drug court programs at the federal level. In the future we may see a federal program very similar to the state model, where a successful participant would not have a felony conviction on his or her record upon successful completion of the program.

START PROGRAM CONT'D.
BY JUDGE MIKEL H. WILLIAMS

While state courts could use dismissal of the charges at graduation as motivation for defendants to enter their program, the "carrot at the end of the stick" in the federal system would be a reduction in the term supervised release, *e.g.*, reducing a previously imposed five year term of supervised release to four years upon graduation from the program.

The federal model would be post-conviction and as mentioned earlier, designed to assist individuals who would otherwise be high risk and likely to violate the conditions of supervision by illegal use of drugs. While "drug court" describes the model used in most states, the term "re-entry court" more accurately describes the model developed at the federal level.

Those agreeing to become a participant in a re-entry court program are advised at the beginning that in many ways it will be more difficult than regular supervision. They will be under closer supervision from their probation officer and subject to more frequent drug testing. They will also be required to attend counseling and are expected to be employed. Finally, they will have to meet with the court on a periodic basis to discuss their progress.

There are no "silver bullets" to ending criminal conduct related to long term drug abuse/addiction and re-entry courts are not successful in every case. Approximately 35% of those that enter the program will not make it to graduation. But for those that do, studies show that they have a much lower probability of committing new crimes and returning to the criminal justice system.

Getting STARTed in Idaho

In 2005, shortly after Oregon implemented their pilot program, S. Richard "Dick" Rubin, with the Community Defenders' Office, and Chief Probation Officer Marilyn Grisham began discussing the possibility of implementing a similar program in Idaho.

The Board of Judges agreed that developing a re-entry court in Idaho should be a high priority, but at the time limited judicial resources delayed implementation. When Magistrate Judge Larry M. Boyle and I left active service in 2008, it seemed like a good time to revisit a re-entry court for Idaho.

We were also fortunate that both Chief Magistrate Judge Dale and Magistrate Judge Ronald E. Bush enthusiastically endorsed the concept, and have helped in getting the program implemented and off the ground.

Having the support of the district judges who initially placed the defendants on supervised release is critical to the success of the program.

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START PROGRAM CONT'D. BY JUDGE MIKEL H. WILLIAMS

Chief Judge Lynn Winmill and Judge Edward Lodge have supported the program from its inception. Judge Lodge warmly greeted the inaugural START class by commenting that the last time some had seen him was when he was in his robe, on the bench and imposing a prison sentence. That day, however, his role was to offer encouragement and wish them success in the START program.

The quality of any reentry program depends in large part on the team that is assembled to work with the participants. Personally, it is hard to imagine a stronger team than the one that has been assembled for the first of three START Courts envisioned for our District.

Rafael Gonzalez, Chief Criminal Assistant United States Attorney, ensures that public safety issues are considered in the program. Dick Rubin and Lindsey Simon from the Community Defenders' Office, as members of the Team, do not have the traditional attorney-client relationship with the participants.

Instead, the participants are advised they may consult with the Community Defenders, but those communications are not privileged and may be shared with the Team as a whole. If a need develops for traditional defense counsel, one will be appointed at that time. Another integral part of the START Team are the mental health and drug counselors who meet with participants weekly and attend all court sessions.

Whether a participant will successfully complete the program depends in large part on the supervision and assistance provided by our dedicated probation officers. These duties for the START Team have been shared by Senior Probation Officers Tim Messuri and Kevin Hocevar, under the leadership of Marilyn Grisham, Chief of the U.S. Probation Office.

In Boise, Judges Dale, Boyle and I have been ably assisted by Amy Hickox, In-Court Deputy, Deputy and Lisa O'Hara, our Career Law Clerk. In the next few months, Magistrate Judge Ron Bush will be starting our second START Court in Pocatello, and an equally strong and impressive team has been established there.

Participation in START is entirely voluntary and lasts for a minimum of one year. The goal is to provide participants with ongoing encouragement and individually tailored assistance. Each month the START Team meets prior to the START Court session and reviews the participants' progress based on shared information from the treatment providers, probation officers and others. Frequent drug testing and participation in substance abuse treatment are the backbone of the program and are good measurements of how well the participant has been doing over the past month.

"Magistrate Judge Ron Bush will be starting our second START Court in Pocatello, and an equally strong and impressive team has been established there."

START PROGRAM CONT'D.
BY JUDGE MIKEL H. WILLIAMS

During the START Court session, the participants receive rewards or sanctions based on his or her performance. All decisions in this regard are made by consensus and no one member of the Team dictates a decision.

Studies have shown that immediate rewards and recognition for progress provide strong motivation to the participants, even when the reward can be something as simple as a candy bar or "kudo" from the START Team.

Sanctions that are truly immediate are also effective, as one participant found out when he was handcuffed by the U.S. Marshal and escorted from the courtroom in front of other participants and family members. Sanctions that may be imposed range from writing an essay to serving up to seven days in jail.

As mentioned, the ultimate reward for successful completion of the START program is a one-year reduction in the participant's term of supervised release.

To say that there is a serious need for drug and re-entry courts, both nationwide and in Idaho, would be a gross understatement. Breaking a pattern of multiple incarcerations for individuals who have a high risk of violating the terms of their supervised release by new drug use has real benefit, both economically and socially. Studies have shown that for every dollar invested in a drug court, ten are saved by the correctional system.

It is staggering when one realizes that the federal Bureau of Prisons spends $4.4 billion dollars annually and that of the 192,584 prisoners in the system in 2006, 53.6% were for drug offenses.[2]

While the economics behind funding drug and re-entry courts are compelling, there can be no dollar value placed on restoring an individual's dignity.

What do you say to a spouse or parent who learns that their wife or daughter has just given birth to one of the more than 900 drug-free babies that have been born to female drug court participants nationwide.

And no words can describe the expression on the face of a 40-year-old man who had just graduated from a re-entry court program and upon leaving a federal courtroom, remarked that for the first time in 20 years, he was leaving a courtroom and not going to prison.

These instances are prime examples of what re-entry courts, like START, are able to achieve through their commitment to helping individuals recover from drug addiction and re-enter society — successfully!

# # #

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Footnote 2: For comparison purposes, the 2006 budget for the entire federal judiciary, including personnel salary and benefits and space requirements, was 5.95 billion dollars.

UPCOMING EVENTS

Wednesday, April 1, 2009 - 12:00 p.m. to 1:30 p.m.

Brown Bag CLE - Applied for 1.5 CLE credits
Nuts and Bolts of Federal Drug and Gun Prosecutions and Applicable Sentencing Guidelines
Aaron Lucoff and Monte Stiles, U.S. Attorney's Office
Tom Monaghan, Federal Defender's Office
James A. McClure Federal Building & U.S. Courthouse, Boise
Contact: Robert Schwarz, Federal Defenders Office, (208) 388-1600
Email: **robert_schwarz@fd.org**

Friday, May 1, 2009 - Annual CLE Program
Civil Rights Topics - Applied for 5 CLE credits

James A. McClure Federal Building & U.S. Courthouse, Boise
Contact: Barry McHugh, Kootenai County Prosecutor, (208) 661-8922
Email: **bmchugh@kcgov.us**

May 27, 28 and 29, 2009 - Advanced Mediation Training

Sponsored by the Northwest Dispute Institute and the ADR Program at the United States District Court, District of Idaho

Breaking Through Impasse: Enhancing Your Settlement Rate and Market Share in Employment, Personal Injury, and Professional Liability Disputes
Contact: Susie Boring-Headlee, ADR Coordinator, (208) 334-9067

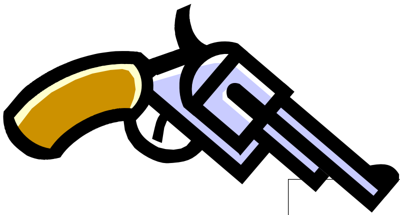
October 9 and 10, 2009 - Tri-State Federal Bar Conference

including federal bar members from Utah, Wyoming and Idaho

Sun Valley, Idaho

Evening Reception, Thursday, October 8, 2009

Email: Susie_Boring-Headlee@id.uscourts.gov



FEDERAL DRUG AND GUN PROSECUTIONS

FEDERAL DRUG AND GUN PROSECUTIONS AND APPLICABLE SENTENCING GUIDELINES

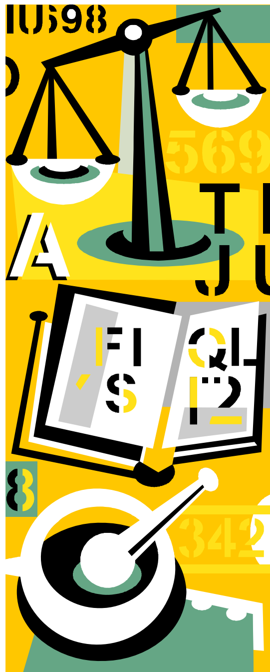
Wednesday, April 1, 2009
12:00 p.m. to 1:30 p.m.
James A. McClure Federal Building & U.S. Courthouse
Boise . Idaho

BROWN BAG CLE:

Aaron Lucoff and Monte Stiles
United States Attorney's Office

Tom Monaghan
Federal Defender's Office

Contact: Robert Schwarz, Federal Defender's Office
(208) 388-1600 / robert_schwarz@fd.org



Pre-registration is Requested

Make Checks payable to:
Idaho Chapter, FBA

Mail to:
Susie Headlee
550 West Fort Street, 6th Floor . Boise, ID 83724

Cost: $20.00 - Idaho Chapter members
$35.00 for non-Chapter members
Judicial Externs - No Charge

MAY 1, 2009 CLE
CIVIL RIGHTS FOCUS
James A. McClure Federal Building & U. S. Courthouse

8:30 a.m. - 9:00 a.m.	Registration, serving Coffee & Muffins
9:00 a.m. - 9:05 a.m.	Welcome - Wendy J. Olson
9:05 a.m. - 9:20 a.m.	Pro Bono Commission - Trudy Hanson Fouser
9:20 a.m. - 10:15 a.m.	Historical Civil Rights Case Study
10:15 a.m. - 10:30 a.m.	Break
10:30 a.m. -11:00 a.m.	Judge U.W. Clemon, retired January 2009 United States District Court District of Alabama (Birmingham)
11:00 a.m. - Noon	Judge Candy Wagahoff Dale, District of Idaho Civil Rights: Idaho Employment Issues
Noon - 1:15 p.m.	Lunch on Your Own
1:15 p.m. - 2:30 p.m.	Civil Rights Division, Department of Justice Human Trafficking
2:30 p.m. - 2:45 p.m.	Break
2:45 p.m. - 4:30 p.m.	Judge Ronald E. Bush, District of Idaho Idaho's Prisoner Civil Rights Litigation Nicole Hancock, Stoel Rives, Pro Bono Program Lea Cooper, ACLU, Pro Bono Program Paul Panther, Deputy A.G., State of Idaho

LAW DAY IS MAY 1, 2009

A Legacy of Liberty – Celebrating Lincoln's Bicentennial

Established in 1957, Law Day is a national day set aside to celebrate our legal system. Law Day programs are conducted across the country, designed to help people understand how the rule of law keeps us free and how our legal system strives to achieve justice. In addition to our Chapter's CLE program at the Federal Court, please join the 4th District Bar Association celebrate Law Day as a participant or volunteer. Questions? Contact Heather McCarthy at ***hmccarthy@adaweb.net***

Oral Argument 101: On May 1, 2009, Timberline High School will host the Idaho Court of Appeals during oral argument. The school's senior class will not only observe this oral argument, but also will study summaries of the parties' briefs in their government classes. Questions? Contact Gabriel McCarthy at 343-8888 or ***mccarthylaw@cableone.net***

The 6.1 Challenge: Modeled after Idaho Rule of Professional Conduct 6.1 concerning the number of pro bono hours an attorney should handle during a year, this year's 6.1 Challenge represents a friendly competition to recognize and encourage pro bono and public service from law offices within the Fourth District. The winner of the Pro Bono Award will be announced at the Law Day Reception, held on May 1, 2009 at the Rose Room in downtown Boise. Applications due by April 1, 2009. Questions? Contact Heather McCarthy at ***hmccarthy@adaweb.net***

Liberty Bell Award: Every year, the Liberty Bell Award acknowledges outstanding community service by an individual in the local community. The 2009 Liberty Bell Award recipient will be named at the Law Day Reception, held on May 1, 2009 at the Rose Room in downtown Boise. Please submit nominations for award recipients by March 30, 2009. Questions? Contact Nicole Hancock at ***nchancock@stoel.com***

Law Day School Outreach Program: Conducted in the classrooms during April and May, attorneys are matched with teachers in elementary through high school in Fourth District schools. The attorneys speak in classes about legal careers, law-related topics, and this year's Law Day Theme: A Legacy of Liberty – Celebrating Lincoln's Bicentennial. Volunteers should contact Chris Christensen at ***IdahoLawDay@gmail.com***

Ask-a-Lawyer Call-in Program: This May 1, 2009 program is very popular in the community with over 500 callers during last year's program. The general public can call in on at least three phone lines to speak to an attorney about a variety of legal matters. Attorneys and callers use only first names to remain anonymous. Calls are limited to 15 minutes. Volunteers may sign up by contacting Heather McCarthy at 287-7700 or ***hmccarthy@adaweb.net***

The Law Day Reception will cap off 2009's Law Day activities. This year, the Reception will take place on May 1, 2009 at the Rose Room in downtown Boise, 4:00 p.m. to 6:00 p.m.

ADVANCED MEDIATION TRAINING

May 27, 28 and 29, 2009

Northwest Dispute Institute & the ADR Program
United States District Court for the District of Idaho

Mediating Employment, Personal Injury and Professional Liability Cases More Effectively: Raising Your Settlement Rate and Enhancing Your Market Share

This highly interactive course moves beyond basic mediation theory and technique, and into the realm of how highly experienced mediators from around the country handle the difficult dimensions unique to these subject matters. Together the class and faculty will pull back the curtains to demonstrate and dissect the inside of the mediation room from multiple perspectives. Goals of the class include stretching the limits of participants' abilities, providing confidence to go beyond the norm and creating greater market opportunity through of traditional and nontraditional strategies and techniques.

TRACY L. ALLEN is a full-time national and internationally recognized conflict management specialist and neutral ADR provider and teacher. As a business, commercial and tax attorney, she now provides ADR and conflict management, design, prevention and resolution services throughout the world. She has authored numerous articles and training materials on ADR and conflict management for neutrals, advocates, users and service providers. She has also lectured and coauthored materials on specific subject matter topics in ADR including healthcare, real estate, tax, securities, employment, business separations and business planning. As a former college and law school professor, Allen is an adjunct professor at Lipscomb University Institute for Conflict Management and at Straus Institute Pepperdine School of Law. She serves on the roster of several dispute resolution organizations including the CPR Distinguished Panel of Neutrals, AAA, FINRA, and the American Health Lawyers Association. Ms. Allen is a Distinguished Sustaining Fellow and past president of the International Academy of Mediators.

ERIC R. GALTON is a full-time mediator, arbitrator and lecturer. Galton's book, *Mediation: A Texas Practice Guide*, received the Center for Public Resources Annual Book Award. His most recent work, *Ripples from Peace Lake*. Galton is a Fellow of the International Academy of Mediators and the Academy of Attorney-Mediators. He is a member of the Texas State Bar ADR Section and serves on the American Bar Association Dispute Resolution Section, and the Board of Directors for the Texas Association of Mediators. He has practiced law for 26 years and is currently a partner in the mediation firm Lakeside Mediation and the law firm of Galton, Cunningham & Bourgeois, a purely dispute resolution and mediation firm in Austin, Texas.

Contact: Susie Headlee . ADR Coordinator, District of Idaho . (208) 334-9067

President's message

by Wendy J. Olson

Judges, North Idaho practitioners and court staff feted the new Coeur d'Alene federal courthouse as a beautiful institution of democracy and invited the public to make great use of their building. Idaho Chapter executive committee members Ted Creason and Barry McHugh joined me during the day-long festivities, which included oral argument before Ninth Circuit Court of Appeals Judges David Thompson, Stephen S. Trott and N. Randy Smith. Several cases were argued, and one by the University of Idaho College of Law students participating in their Pro Bono Clinic.

As part of the dedication ceremonies, our Chapter took the Court up on their offer to use the new Courthouse by presenting a 1.5 hour CLE. The program included presentations on the state of the art audio and visual technology and evidence presentation systems available to practitioners in the new courtrooms. More than forty North Idaho lawyers participated as the court's chief IT specialist Doug Ward, U.S. Attorney's Office automated litigation support specialist Pam Rocca, and career law clerk Dave Metcalf demonstrated the persuasive powers of trial presentation software, document cameras, and using the courtroom's high resolution monitors.

"The Idaho Legal History Society recognized the courthouse art committee's contribution of preserving Idaho history through its use of historical photographs and a stunning etching of the preamble to the Constitution near the first floor entry."

PRESIDENT'S MESSAGE CONT'D.

Judge Lynn Winmill encouraged participants to embrace the new technology not only to make their cases more powerful but also to make court time faster and more efficient. No more handing exhibits to a witness; no more passing out copies to the jury.

Although Ninth Circuit Judge T.G. Nelson was unable to make the trip, the March 16 dedication ceremony featured the rest of Idaho's federal judges, along with two others from the Ninth Circuit, Senior Circuit Judge David Thompson and District Judge Stephen McNamee of Arizona. The dedication ceremony itself included comments from all of the judges, as well as The Honorable Sandi Bloem, Mayor for the City of Coeur d'Alene.

Additionally, the Idaho Legal History Society recognized the courthouse art committee's contribution of preserving Idaho history through its use of historical photographs and a stunning etching of the preamble to the Constitution near the first floor entry. The etching, which can be seen through the courthouse windows as one approaches the building, was designed by Teresa McHugh, Barry's wife. The dedication ceremony ended with a solo violin performance by the Court's Operations Manager Kathy Stutzman.

Our Chapter has much to be proud of with regard to the new courthouse dedication — from our contribution to the courthouse art project, to our participation in the dedication ceremonies and our co-sponsorship of the reception. Most importantly, we have a fantastic new facility for North Idaho practitioners, and for those of us who are lucky enough to practice in all of the district's courthouses.

# # #

CHIEF JUSTICE JOHN G. ROBERTS
UNITED STATES SUPREME COURT
& MEMBERS OF THE FEDERAL JUDICIARY
DISTRICT OF IDAHO

The University of Idaho College of Law hosted Chief Justice John G. Roberts, United States Supreme Court, at a very large and welcoming reception at the Boise Center on the Grove on Thursday, March 12, 2009. In honor of the College of Law's centennial at the University of Idaho, The Chief Justice spoke at the UI's 13th annual Sherman J. Bellwood Memorial Lecture.

Chief Justice Roberts's lecture marked the fifth appearance by a United States Supreme Court justice and the first by a chief justice in the university's history. The Chief Justice has presided over the Supreme Court since 2005. He and UI law professor Richard Seamon were colleagues during their time at the Office of the U.S. Solicitor General from 1989 to 1993. While there, they represented the United States in several Supreme Court cases. Since then, Seamon went on to become a professor of law and UI's associate dean for Administration and Students while Roberts ascended to become former President George W. Bush's favored choice to replace Chief Justice William Rehnquist after his passing.

Front Row (left to right)

Magistrate Judge Mikel H. Williams, Magistrate Judge Larry M. Boyle, Ninth Circuit Judge Stephen S. Trott, Chief Justice John G. Roberts, U.S. Supreme Court; Chief District Judge B. Lynn Winmill, District Judge Edward J. Lodge, Chief Magistrate Judge Candy Wagahoff Dale, and Susie Boring-Headlee

Top Row (left to right)

Shannon Harris, Chief Deputy Clerk; Bankruptcy Judge Jim D. Pappas, Chief Bankruptcy Judge Terry L. Myers, Ninth Circuit Judge N. Randy Smith, Magistrate Judge Ronald E. Bush, and Court Executive Cameron S. Burke

COMPLAINTS FILED IN FEDERAL COURT
DISTRICT OF IDAHO

Norton v. Kootenai Co., et al, CV-09-58-N-CWD Sec. 1983 Civil Rights
Federal Question Jurisdiction

- Larry D. Purviance, Attorney at Law, Coeur d'Alene, ID for Plaintiff
- Peter C. Erbland, Paine Hamblen, LLP, Coeur d'Alene, ID for Defendants

Plaintiff Norton alleges four causes of action against Defendant Kootenai County Adult Misdemeanor Probation Department, as follows: (1) deprivation of civil rights, including life, liberty, property and the right to be free of an established religion and right to freedom of religion; (2) conspiracy to interfere with civil rights; (3) failure to adequately train and supervise probation officers; and (4) negligent hiring, retention, and failure to discipline or take necessary corrective action.

Norton's claims arise from a supervised probation order entered against him, which stems from a DUI charge. A condition of his probation was that Norton had to attend two Alcoholics Anonymous ("AA") meetings per week. Norton, a self-proclaimed lifelong agnostic who does not believe in God or a Higher Power, was offended by the religious overtones and prayer that took place at the AA meetings. Norton claims that despite his assertion to his probation officer that mandatory attendance at AA meetings violated his First Amendment rights, and his arrangement to get professional drug and alcohol counseling through another certified counselor. Plaintiff claims Defendants violated his First Amendment rights by requiring him to continue attending AA meetings.

Norton prays for actual or compensatory damages under Sections 1983, 1985, 1986, 1988 et seq, punitive damages, attorney's fees, and other relief as the Court may deem appropriate, just, and equitable.

Wolfley v. Dunn et al., CV-09-42-E-REB Motor Vehicle Tort - Diversity Jurisdiction

- Alan F. Johnston and Edward W. Pike, E. W. Pike & Associates, P.A., Idaho Falls, ID for Plaintiff
- Counsel for Defendants have not filed an Answer, nor filed an Notice of Appearance

In February 2007, while traveling north on Interstate 15 in Jefferson County, Defendant lost control of her rental car and ended up in the southbound lanes of the interstate. Around 4:30 a.m. while traveling south, Plaintiff collided with the Defendant's car. There were no visible lights or flares.

Plaintiff suffered physical and mental injuries. He seeks to recover these and other compensable damages from Defendant through a negligence claim. Plaintiff also claims the rental car company is liable through imputed negligence.

COMPLAINTS FILED IN FEDERAL COURT
DISTRICT OF IDAHO

Steve Peel v. Gary Mosh & Expressions Originals, Inc., CV-09-106-S-BLW

Securities Fraud - Federal Question Jurisdiction

- Michael R. Christian, Marcus Christian & Hardee, LLP, Boise, ID
- Counsel for Defendants has not filed an Answer, nor a Notice of Appearance

Defendant Gary Mosh is the CEO and a primary owner of Defendant Expressions Originals, Inc., alleged to be a licensee of the right to manufacture and market products using images and other copyrighted or trademarked material related to the Speed Racer cartoon television series and film. Expressions Originals operates a website, speedracer.com, through which it markets various Speed Racer products.

Plaintiff alleges that Defendants solicited him to invest in Expressions Originals for the purpose of upgrading the website and product inventory in anticipation of the nationwide release of the Speed Racer film and television cartoon. Plaintiff provided $100,000 and provided collectable Speed Racer model cars. In return, Plaintiff allegedly was to be paid a percentage of the net revenue from sales and was entitled to an accounting of the net sales associated with each payment to him. Instead, Plaintiff received only two checks from Defendants and these checks were returned for insufficient funds. Plaintiff alleges that Defendants omitted several material facts when soliciting Plaintiff's investment.

Plaintiff demanded the return of his model cars and an accounting of sales, but has received neither. Plaintiff claims that Defendants' investment opportunity was a security, but was not registered with the Securities and Exchange Commission, and that Defendants have violated the Securities Act of 1933, the Securities Exchange Act of 1934, the Idaho Securities Act, and the Idaho Consumer Protection Act. Plaintiff also brings causes of action for common law fraud and conversion and seeks the remedy of rescission.

COMPLAINTS FILED IN FEDERAL COURT
DISTRICT OF IDAHO

Melaleuca, Inc. v. Caissy et al., CV-09-48-E-EJL Breach of Contract- Diversity Jurisdiction

- Curt R. Thomsen, Thomsen Stephens, Challis, ID for Plaintiff
  T. Jason Wood, Thomsen Stephens Law Offices, PLLC, Idaho Falls, ID for Plaintiff

- Edward Pike, E.W. Pike & Associates, P.A., Idaho Falls, ID for Defendants

Plaintiff Melaleuca, Inc. brought suit in state court against Defendants for violating an Independent Marketing Executive Agreement ("IMEA") contract that each defendant had entered into with Plaintiff. Defendants removed the action to this Court.

Plaintiff claims that Defendants used confidential and proprietary business information and trade secrets to convince Plaintiff's customers and other Marketing Executives to switch to Defendants' new business, in violation of a non-solicitation provision in the IMEA.

Plaintiff alleges that Defendants' actions amount to a breach of contract, tortious interference with contractual relationships, and unjust enrichment. Plaintiff seeks damages that resulted from Defendants' actions, judgment that requires Defendants to return the benefits unjustly received and profits obtained from their actions. An injunction against Defendants to compel them to cease and desist from soliciting Plaintiff's customers and Marketing Executives, and attorney's fees and costs. nPlaintiff also reserves the right to seek punitive damages.

U.S. v. Nation Millworks Inc., CV-09-43-E-MHW Occupational Safety and Health - U.S. Government Plaintiff

- Amy S. Howe, Assistant U.S. Attorney, U.S. Attorney's Office, Boise, ID for Plaintiff
- Counsel for Defendant has not appeared, nor filed an Answer

In November, 2004, the Occupational Safety and Health Administration ("OSHA") identified 26 safety violations at Defendant's site for a total of $26,850 in penalties. OSHA settled with the Defendant for $18,677 to be paid in installments. After paying $10,500, Defendant ceased making payments. OSHA brings this claim under the Debt Collection Improvement Act of 1996 to collect $16,880 – total initial penalties, interest, and costs less the $10,500 paid.

On March 20, 2009, the Government filed a motion for Entry of Default Judgment.

COMPLAINTS FILED IN FEDERAL COURT
DISTRICT OF IDAHO

Precision Craft Log Structures, Inc. v. Wisconsin Log Homes, Inc., et al., CV-09-93-S-BLW
Copyright Infringement - Federal Question Jurisdiction

- Jon M. Steele, Runft & Steele Law Offices, Boise, ID for Plaintiff
- Counsel for Defendants has not filed an Answer, nor a Notice of Appearance

Defendant Wisconsin Log Homes, Inc., is a Wisconsin corporation that markets and sells log homes and plans for the construction of homes. Plaintiff Precision Craft Log Structures, Inc., is an Idaho corporation that designs and manufactures milled and handcrafted custom log homes for construction throughout the United States, Asia, and the Middle East. Plaintiff has submitted copyright applications for five of its home models and received a Certificate of Copyright Registration for each.

Plaintiff alleges that Defendant displayed on its website, copyrighted floor plans for some of Plaintiff's models, but used different names to label the models. Plaintiff notified Defendant of the suspected copyright infringement and demanded that Defendant immediately remove the architectural works from its website. Plaintiff alleges that Defendant has displayed Plaintiff's copyrighted work in marketing material and media and has sold or constructed log structures using Plaintiff's copyrighted work.

Plaintiff filed this action claiming copyright infringement under the Copyright Act of 1976, 17 U.S.C. § 101, et seq., and that the infringement is willful. Defendant has not yet responded to these claims.

COMPLAINTS FILED IN FEDERAL COURT
DISTRICT OF IDAHO

The Aardema Group, L.L.C. et al v. Northwest Dairy Assn. et al, CV-09-45-S-EJL

Breach of Contract - Diversity Jurisdiction

- Brian J. Hilverda and Jarom A. Whitehead, Pedersen and Whitehead, Twin Falls, ID for Plaintiffs
- J. Walter Sinclair, Julie S. Tetrick, and Mark S. Geston. Stoel Rives, Boise, ID for Defendants

This action was originally brought by Plaintiffs in state court and subsequently removed to this Court. Plaintiffs allege two causes of action: breach of fiduciary duty and fraud. Plaintiffs allege that they entered into a membership and marketing agreement with Defendant Northwest Dairy Association ("NDA") to become a member of the Northwest Dairy Cooperative, and upon entering the agreement, NDA agreed to market Plaintiffs' dairy products.

Plaintiffs signed a "Forward Milk Pricing Master Contract" with NDA, and Plaintiffs claim NDA breached its fiduciary duty to them for withholding information regarding anticipated changes in the forward milk pricing market, thereby causing Plaintiffs to suffer monetary damages. Plaintiffs also claim that Defendants committed fraud by failing to disclose information about the Forward Milk Pricing Contract program (such as Defendants' interests in profits on members' sales) and misrepresented to Plaintiffs that $13.35 per hundred weight was the best price they could get for their dairy products.

Plaintiffs pray for rescission of the Forward Milk Pricing Master Contract, damages, and attorney's fees and costs.

COMPLAINTS FILED IN FEDERAL COURT
DISTRICT OF IDAHO

Lil' Brown Smoke Shack v. Wasden et al, CV-09-44-N-CWD

Unconstitutional State Statute - Federal Question Jurisdiction

- Theresa L. Keyes and J. Michael Keyes, K&L Gates, LLP, Spokane, WA for Plaintiff
- Brett T. DeLange, Attorney General's Office, Boise, ID for Defendants

Plaintiff Lil' Brown Smoke Shack (LBSS), seeks an injunction preventing Defendant, the Idaho Attorney General's Office, from enforcing the Prevention of Minors' Access to Tobacco Act (the Act). LBSS is located on the Yakama Nation Indian Reservation outside of Idaho, licensed by the Yakama Nation, and owned by a member of the tribe. The tribe licensed LBSS to sell tobacco products. Through the internet it sells tobacco products, but not cigarettes, and other convenience store food and merchandise.

On December 23, 2008, the AG's Office notified LBSS that it was in violation of the Act and an action would follow if LBSS did not comply. The AG's Office interprets the Act to apply because LBSS ships through intermediaries to Idaho residents – a delivery sale according to the Act. Idaho Code § 39-5718(1) requires businesses to obtain permits prior to making delivery sales. The AG's Office sees the regulation as permissible notwithstanding any treaty rights because it has a public purpose other than revenue generating.

LBSS claims the Act violates the Commerce Clause, the Indian Commerce Clause, tribal sovereignty, and LBSS's treaty rights under the 1855 Treaty between the Yakama Nation and the United States. The treaty protects the right to take goods to market free of restriction. The Act would require LBSS to obtain a permit, which requires consenting to random compliance searches of LBSS that could subject it to criminal or civil penalties.

COMPLAINTS FILED IN FEDERAL COURT
DISTRICT OF IDAHO

Collette et al v. Wilde et al, CV-09-41-E-EJL Breach of Contract - Diversity Jurisdiction

- Billie Jean Siddoway, Adam B. Price, and Mark D. Tolman,
  Jones Waldo Holbrook & McDonough, P.C., Salt Lake City, Utah, for Plaintiffs
- Defendants' Answer has not yet been filed, nor have they filed a Notice of Appearance

Plaintiffs Robert Collette and R&L Limited Partnership brought suit against Defendants Bevan Wilde and Intellectual Capital Investments, LLC on several counts: breach of contract, breach of fiduciary duty, fraud, conversion, unjust enrichment, and securities fraud. Plaintiffs forwarded investments in excess of $75,000 to Defendants, to be invested in a piece of commercial real estate. Plaintiffs received Subscription Agreements and Promissory Notes from Defendants for all of the funds they invested, and each Promissory Note promised a return of Plaintiff's principal investment plus 3% interest per month. Defendants have not returned any of the interest payments on Plaintiffs' investments and upon Plaintiffs' demand for a return of all investments, Defendants informed Plaintiffs that they no longer possess any of the funds.

Plaintiffs claim breach of contract for Defendants' failure to make interest payments; breach of fiduciary duty for using Plaintiff's funds to pay off other investors in the nature of a Ponzi scheme; fraud for failing to represent to Plaintiffs that Defendants intended to use the investment to pay off prior investors in the nature of a Ponzi scheme; conversion of investments made placed by Plaintiffs; unjust enrichment for retaining Plaintiffs' money; and securities fraud under U.C.A. § 61-1-22 and I.C.A. § 30-14-509(b) for making untrue statements of material fact and/or engaging in fraudulent acts with respect to Plaintiffs' investments.

Plaintiffs request the following relief: damages to be determined at trial plus pre- and post-judgment interest; attorney's fees and costs; punitive damages; pursuant to U.C.A. § 61-1-22 and I.C.A. § 30-14-509(b). Plaintiffs seek to recover the consideration paid for the securities sold by Defendants, interest on the consideration of 12%, and costs and attorney's fees; additionally, pursuant to U.C.A. § 61-1-22(2), Plaintiffs seek to recover from Defendants three times the amount paid for the securities.

COMPLAINTS FILED IN FEDERAL COURT
DISTRICT OF IDAHO

Aaseby v. Longo et al, CV-09-51-N-EJL Sec. 1983 Civil Rights- Federal Question Jurisdiction

- Larry D. Purviance, Attorney at Law for Plaintiff
- Defendants have not yet Answered, nor filed an Appearance

Plaintiff Guy Kevin Aaseby brought suit against Defendants City of Coeur d'Alene, Coeur d'Alene City Police Department, Chief of Police Wayne Longer, and several specifically-named police officers for deprivation of his civil rights, conspiracy to interfere with his civil rights, failure to adequately train and supervise police officers, and negligent hiring, retention, and failure to discipline or take necessary corrective action.

Plaintiff claims that he was unlawfully arrested without probable cause on charges of stalking and violation of a "no contact" order, then maliciously prosecuted for the crimes. Plaintiff further claims that the Defendants conspired to deprive him of his constitutional rights, as evidenced by two false and improperly-investigated police reports and the subsequent jury verdicts of "Not Guilty" for each charge.

Plaintiff claims that Defendants' actions resulted in a deprivation of his civil rights and unnecessary and wanton infliction of pain. He therefore requests the following relief: actual or compensatory damages, punitive damages of not less than $1,000,000.00, attorney's fees and costs, and any other relief as the Court may deem appropriate.

Byington v. Brad Lott and Brian Lott dba Holiday Motor Coach, Inc., CV-09-59-E-BLW
Equal pay - Federal Question Jurisdiction

- James D. Holman, Thomsen Stephens, Idaho Falls, ID for Plaintiff
- R. Fred Cooper, Cooper Wetzel Avery & Lee, Idaho Falls, ID for Defendants

Plaintiff worked for Defendants as a charter bus driver and mechanic. He was paid hourly for the mechanic work and a fixed fee for the driving. Defendants allegedly required him to work over 40 hours per week, work on his days off, and work extra hours after the charter bus trip was over.

Plaintiff alleges he was not paid for his work according to the Federal Labor Standards Act of 1938. When Defendants fired Plaintiff, he stated they withheld $450 from his last paycheck in violation of Idaho Code § 45-609. Plaintiff seeks back pay, penalties, and attorney's fees.

COMPLAINTS FILED IN FEDERAL COURT
DISTRICT OF IDAHO

Air and Sea Composites, Inc. et al v. Boundary Co. Sheriff's Dept. et al, CV-09-47-N-EJL
Sec. 1983 Civil Rights - Federal Question Jurisdiction

- Larry D. Purviance, Attorney at Law, Coeur d'Alene, ID for Plaintiffs
- Peter C. Erbland, Paine Hamblen, LLP, Coeur d'Alene, ID for Defendants

Plaintiffs James and Beverly Conachen and Air and Sea Composites, Inc. filed suit against Defendants Boundary County Sheriff's Department and several specifically-named officers for RICO violations and for violating Plaintiff James Conachen's civil rights. Plaintiffs claim that Defendants refused to enforce local traffic laws and allowed Plaintiffs' neighbors to speed and drive recklessly, despite Plaintiffs' proffer of video evidence of numerous traffic violations near his home.

Plaintiff James Conachen ("Conachen") claims that on several occasions, he attempted to inform Defendants of the reckless drivers and sign citizen complaints to this effect; however, Conachen's attempts to initiate the complaints were thwarted or disregarded by Defendants. Conachen also alleges that he contacted several other governmental entities in an effort to get Defendant Boundary County Sheriff to enforce the traffic laws. Conachen also alleges that he signed a written complaint for "obstruction of justice" against Defendants and signed citations with the Idaho State Police for the Defendants' willful inaction in resolving the traffic issues. Additionally, when Conachen attempted to report another instance of disturbing the peace and harassment to Defendant Boundary County Sheriff's Department, Defendant Donald Van Meter visited Conachen at his residence and tasered, punched him and arrested him for delay and obstructing an officer (Conachen was later acquitted of the charge).

Plaintiffs also allege that they were threatened at least once by a neighbor who brandished a gun and others had vandalized his residence and business. Conachen also claims that as a result of the stress of living in Boundary County, he was diagnosed with a stomach ulcer, high blood pressure, and suffered signs of a heart attack. Conachen alleges that because of the harassment by speeding neighbors and threats from Boundary County Sheriff's Department officers, he was forced to sell his home under its value and lost $67,000.00 on the sale.

Plaintiffs have several causes of action, including the following: a violation of the Racketeer Influenced and Corrupt Organizations Act, deprivation of civil rights, conspiracy to interfere with civil rights, failure to adequately train and supervise police officers, and negligent hiring, retention, and failure to discipline or take necessary corrective action. Plaintiffs pray for the following relief: actual or compensatory damages for violates of civil rights in an amount not less than $1,000,000.00, punitive damages in an amount not less than $1,000,000.00, three times the damages. Plaintiff claims he has suffered as a result of Defendants' violation of the RICO Act, and requests attorney's fees and costs, and other relief as the Court may deem appropriate.

Thank You

THANKS AND APPRECIATION TO KATE BALL
EXTERN COORDINATOR
U OF I COLLEGE OF LAW

AND

ADAM LITTLE AND RACHEL PARISE
JUDICIAL EXTERNS
UNIVERSITY OF IDAHO COLLEGE OF LAW

FOR PROVIDING THE SYNOPSIS
OF THIS EDITION'S COMPLAINTS

GRC REPORT TO THE FBA NATIONAL COUNCIL LARRY WESTBERG, GRC CHAIR MARCH 21, 2009

I'd like to begin by acknowledging the presence of several members of the Government Relations Committee (GRC) who are with us today and whose contributions to the Committee are continually appreciated: West Allen, Patrick O'Keefe, Will Hoch, and Lawrence Baca, and our counsel for government relations, Bruce Moyer.

As you know, the Government Relations Committee is the arm of the FBA that counsels the association's leadership and coordinates the setting of association policy on the federal legal system. Our committee, comprised of 15 members, regularly meets each month to identify emerging issues that will help or hurt the federal bar and to recommend to FBA's top leaders how the Association should best act and respond.

To carry out that responsibility, we use an FBA Issues Agenda, to help explain to our members, the legal community and Washington decision-makers the legislative and policy priorities that FBA believes should guide the future of the federal courts and federal jurisprudence. The Issues Agenda is on the FBA website in the Government Relations area of the site, and I encourage you to take a look at it.

Our process for revising the Issues Agenda each year to take account of new developments and trends attempts to be as inclusive as possible, and I would like to thank the members, chapters and sections who have provided input to our formulation of the Agenda in the past. We need your input once again this year and ask for your input by May 21, 2009, in order to keep the Issues Agenda process on track, with final approval by the Board of Directors later this summer.

Now I would like to report on several issues and developments that will affect the federal bar and are capturing the FBA's attention. First, judgeships. Earlier this week, the Judicial Conference asked Congress to create 63 new judgeships -- 12 appeals court judges and 51 at the district court level. The Conference additionally recommended adding 51 more district judgeships in 28 judicial districts.

FBA has supported the Judicial Conference's recommendations for additional judgeships in the past, and Congress has occasionally added district judgeships, but has not enacted any comprehensive judgeships measure or created any new appeals court seats since 1990. It is likely that the FBA will recommend that we once again endorse the Judicial Conference's recommendations urge Congress to approve these 63 additional circuit and district judgeships.

Next judicial pay. There's good news and bad news here. The recently passed FY 2009 Omnibus Appropriations Act provided a cost-of-living adjustment for federal judges, retroactively effective to January 1, 2009. This will provide a pay raise of $4,700 to judges, similar to the raise Congress approved for itself and the Executive Branch months ago. This raises the pay of members of Congress and federal district judges to $174,000.

GRC REPORT BY LARRY WESTBERG CONT'D.

However, the law contained a provision that bars a Congress' pay raise for 2010, that in turn may bar a COLA for judges. In addition, Congress could alter the mechanism that has provided automatic COLAs to Congress each year, unless Congress has stepped in to stop them, which it occasionally has. The Senate last week approved the termination of the automatic COLA mechanism, requiring affirmative action by the Congress each year to authorize a COLA.

If Congress proceeds to dismantle the automatic COLA approach for itself, the annual political imperative to deny themselves a pay raise will take stronger root, sapping momentum for regular pay adjustments for federal judges, which will be held captive by the action that Congress applies to itself.

Third, Congressional action last fall in restricting the receipt by judges of honorary members initially have had a disastrous impact upon the FBA's practice of making honorary memberships available to federal judges. Fortunately, we were able to ultimately work out with the Congress a narrowing of the final language that focused the restriction on the receipt by judges of honorary memberships in private clubs, such as country clubs, and not on memberships in professional associations like the FBA. This is an example of the benefit of FBA's maintenance of a presence in Washington that keeps its eyes and ears attuned daily to what's happening on Capitol Hill, to assure the protection of FBA's interests and those of our members.

Finally, I'd like to recognize and congratulate those sections and divisions that, with encouragement and assistance from the GRC, have been engaged on Capitol Hill in promoting policy issues that affect legal practice in their substantive areas. Our Social Security Section, Veterans Law Section, and Indian Law Section all have been engaged in dialogue with Capitol Hill on a variety of issues and securing positive recognition to the Federal Bar Association.

In conclusion, I'm pleased to report that FBA continues to maintain an active advocacy presence in Washington that advances the interests of our members and the association. With your continued support at the chapter and section levels, we will continue to remain a respected and representative voice of the federal bar in Washington.

FEBRUARY JURY TRIALS
DISTRICT OF IDAHO

Judge Mikel H. Williams
U.S. Magistrate Judge
U.S. District Court, Idaho

Trujillo vs. Tally, et al., CV-03-533-S-MHW
Jury Trial beginning February 9, 2009,
and was conducted by Videoconference
Section 1983 Civil Rights Complaint filed by Plaintiff

Plaintiff Trujillo is a Prisoner Pro Se

William M. Loomis, Deputy Attorney General, Boise, Idaho
Attorney for Defendants Tally, Payton, Acree & Cobb

Joseph D. McCollum, Jr., Michelle R. Points,
and Ryan Thomas McFarland, Hawley Troxell Ennis & Hawley
Boise, Idaho
Attorneys for Defendant Earl Callahan

Verdict in Favor of Defendants — Special Verdict Form

Question #1: Has Mr. Trujillo proved, by a preponderance of the evidence, that Mr. Callahan violated Mr. Trujillo's Eighth Amendment rights on March 19, 2002, as defined in these instructions?

______ YES ___√___ NO

FEBRUARY JURY TRIALS
DISTRICT OF IDAHO

Judge Edward J. Lodge
U.S. District Judge
U.S. District Court, Idaho

US vs. Edgar Chavez-Hernandez, CR-08-113-S-EJL
Jury Trial beginning February 26, 2009

For Defendant: Charles Crawford Crafts, Boise, Idaho (retained)
For the Government: Aaron N. Lucoff, Assistant U.S. Attorney

Verdict — Judgment of Acquittal for Defendant
The Defendant was found not guilty.

Judge Alfred Goodwin
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

Griffin v. Wardrobe (In the Matter of Wardrobe), 07-16635
Appeal from: BAP
Panel: Goodwin (author), Schroeder, Hawkins

Subject Matter: Bankruptcy

Holding: The panel affirmed a judgment of the Bankruptcy Appellate Panel in a creditor's action objecting to the discharge of a state court judgment. The panel held that the bankruptcy court's order granting limited relief from the automatic stay did not authorize the creditor to pursue a fraudulent misrepresentation claim against the debtor in state court because the order modified the stay only as to claims that were actually pending in the state court litigation as of the date of the order. In addition, the creditor did not bring the fraudulent misrepresentation claim to the attention of the bankruptcy court during the relief-from-stay proceedings.

Judge Friedman
Federal Circuit Judge
(No Photo)

NINTH CIRCUIT DECISIONS

United States v. Gutierrez-Sanchez, 08-50254
Panel: Bea, Federal Circuit Judge Friedman (author), Ikuta

Subject Matter: Criminal Law

Holding: The panel affirmed a sentence imposed by the district court following the defendant's guilty plea to making a false statement to a federal official, in violation of 18 U.S.C. § 1001. The panel held that because the defendant in his plea agreement stipulated that he committed the additional offense of being a deported alien illegally present in the United States (8 U.S.C. § 1326), the district court – consistent with U.S.S.G. §§ 1B1.2(c), 1B1.2 cmt. n.3, and 3D1.3 – properly calculated the defendant's Sentencing Guidelines range based on the offense level for the more serious reentry offense rather than on the offense level for the false statement offense.

Rejecting the defendant's contention that the district court gave impermissible weight to the statutory factor of deterrence, the panel held that the district court did not abuse its discretion in applying the statutory factors, and concluded that the sixteen-month sentence was reasonable.

Judge Kim McLane Wardlaw
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

Li v. Holder, 05-70053+
Petition for Review from: BIA
Panel: Schroeder, Wardlaw (author), Tallman

Subject Matter: Immigration

Holding: The panel granted a petition for review of a decision of the Board of Immigration Appeals denying asylum, withholding of removal, and protection under the Convention Against Torture to a citizen of China. Petitioner, who is of North Korean descent, alleged persecution by the Chinese police on account of his provision of humanitarian assistance, including food and shelter, to North Koreans seeking refuge in China.

The Board denied relief after characterizing the Chinese authorities' treatment of petitioner as prosecution for a criminal act – that of harboring foreign citizens – rather than persecution on account of political opinion. The panel held that substantial evidence did not support the Board's denial of relief where petitioner's actions, although in defiance of China's unofficial policy of discouraging such aid, violated no Chinese law.

The panel held that the IJ erred in concluding that the harm petitioner suffered, including repeated beatings and exposure to freezing temperatures, did not rise to the level of persecution. The panel also held that substantial evidence did not support the IJ's adverse credibility determination, which was based on speculation, fabricated inconsistencies, and minor discrepancies that did not go to the heart of petitioner's claims for relief. The panel held that the record compelled the conclusion that petitioner was persecuted on account of his political opinion, and it remanded the petition for a determination of whether changed country conditions rebutted the presumption of a well-founded fear of persecution.

Judge Wm. Fletcher
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

United States v. Christensen, 06-30402
Appeal from: E.D. Wash. [Shea, J.]
Panel: Hug, McKeown, W. Fletcher (author)

Subject Matter: Criminal Law

Holding: The panel withdrew a memorandum disposition filed May 25, 2007, and issued an opinion reversing a sentencing decision by the district court and remanding for further proceedings.

The panel held that because statutory rape may involve consensual sexual intercourse, it does not necessarily involve either "violent" or "aggressive" conduct, and that under *Begay v. United States*, 128 S. Ct. 1581 (2008), a conviction for statutory rape under Washington Revised Code § 9A.44.079 therefore does not qualify under the categorical approach as a violent felony under the Armed Career Criminal Act. The panel remanded for the district court to consider in the first instance whether the defendant committed an ACCA violent felony under the modified categorical approach.

Judge Diarmuid O'Scannlain
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

Trout Unlimited v. Building Industry Ass'n of Wash.,
07-35623 and 07-35750

Appeal from: W.D.Wash. [Coughenour, J.]

Panel: O'Scannlain (author), Rymer, Kleinfeld

Subject Matter: Endangered Species Act

Holding: The panel affirmed in part and reversed in part the district court's judgment in an action brought by plaintiff environmental groups challenging the National Marine Fisheries Service's decision to downlist a population of Upper Columbia river steelhead from endangered to threatened species under the Endangered Species Act. The panel held that the Service's hatchery listing policy is entitled to deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984); and the panel reviewed under an "arbitrary and capricious" standard the Service's rejection of plaintiffs' petitions to split natural and hatchery fish into separate "evolutionary significant units" and the downlisting of the steelhead fish.

The panel agreed with the district court's conclusion that the denial of the petitions to split natural and hatchery fish into separate "evolutionary significant units" was not arbitrary and capricious. The panel also held that the hatchery listing policy was consistent with both the plain language of the ESA and with the statutory goal of preserving natural populations. The panel held that the district court erred in granting summary judgment to plaintiffs' on their claim that the hatchery listing policy and the downlisting of the Upper Columbia River steelhead violated the ESA; and on remand, the panel ordered that the district court grant the Service's motion for summary judgment. The panel rejected the intervenors' contention that the Service impermissibly distinguished hatchery and naturally spawned salmon.

Judge Stephen S. Trott
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

Martinez-Madera v. Holder, 06-73157
Petition for Review from: BIA
Panel: Trott (author), Thomas (dissenting), and District Judge Hogan

Subject Matter: Immigration

Holding: The panel denied Juan Jose Martinez-Madera's petition for review from the Board of Immigration Appeals' decision finding him not entitled to derivative United States citizenship and removable as an aggravated felon. The panel held that to establish citizenship under Immigration and Nationality Act § 301(g), 8 U.S.C. § 1401(g), at least one of a petitioner's parents must be married to a United States citizen at the time of the petitioner's birth. The panel held that Martinez could not be deemed "born in wedlock" under § 1401 because he was born to two unwed non-citizen parents, and that he could not meet his burden to prove citizenship under § 1409 because there was no blood relation between him and his U.S. citizen stepfather, who never legally adopted him.

Dissenting, Judge Thomas would hold that courts should look to state law to determine whether a person may properly be considered legitimate or born in wedlock, for the purposes of § 1401. Applying state law, Judge Thomas would hold that Martinez is "for all purposes legitimate" under California Civil Code § 230 and is thus entitled to derivative citizenship under § 1401.

Judge N. Randy Smith
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

United States v. Mayer, 07-30274
Appeal from: D. Or. [Aiken, J.]

Order & Superseding Opinion to be Filed: 3/16/09
Panel: Tallman, Clifton, N. Randy Smith (author)
Dissenting from the Denial of Rehearing En Banc: Kozinski, joined by Reinhardt and W. Fletcher

Subject Matter: Criminal Law

Holding: The panel withdrew an opinion filed June 30, 2008, filed a superseding opinion, and denied a petition for panel rehearing. The court denied a petition for rehearing en banc.

In the superseding opinion, the panel affirmed a criminal judgment imposed by the district court. The panel held that under the totality of the circumstances police officers had probable cause to believe that the defendant was living at the residence into whose backyard the officers entered during a probation search and that, accordingly, the district court correctly ruled that the officers' warrantless entry into the backyard did not violate his Fourth Amendment rights and that the officers' observations of criminal activity were properly included in an affidavit supporting a warrant to search the residence. The panel held that the district court properly held that the search of the defendant's residence, which was authorized both by the conditions of the defendant's probation and by a search warrant supported by probable cause, did not violate the Fourth Amendment, and that the district court therefore properly denied the defendant's motion to suppress a firearm found inside.

Observing that in the ordinary case, conduct falling within Oregon's first-degree burglary statute (Oregon Revised Statutes 164.225) presents a serious possibility of risk of physical injury to others, the panel held that the district court properly found that the defendant's prior conviction for first-degree burglary was a predicate "violent felony" under the residual clause of the Armed Career Criminal Act (ACCA).

(Continued on Page 36).

United States v. Mayer cont'd.

The panel wrote that *United States v. Fish*, 368 F.3d 1200 (9th Cir. 2004), does not prevent this court from finding a non-enumerated offense falls under the ACCA's residual clause when the non-enumerated offense is outside the strict definition of, but nevertheless similar to, generic burglary; and concluded that Oregon's first-degree burglary statute, which does not implicate the statutory concerns found in *Fish*, is exactly the type of crime Congress intended to include under the ACCA. The panel explained that the risk of potential injury due to a face-to-face confrontation between the burglar and a third party is not lessened simply because, under Oregon law, the dwelling does not have to be a generic "building" or "structure," or because the offense does not necessarily involve fleeing the scene of the burglary.

The panel rejected as foreclosed by *United States v. Parry*, 479 F.3d 722 (9th Cir. 2007), the defendant's contention that because the maximum sentence that may actually be imposed under Oregon's sentencing guidelines for his two prior Oregon drug offenses is only 90 months (notwithstanding the ten-year statutory maximum), the two offenses were not "serious drug offenses" under the ACCA.

Dissenting from the denial of rehearing en banc, Chief Judge Kozinski (joined by Judges Reinhardt and W. Fletcher) wrote that the panel's approach of cleaving the formerly uniform *Taylor* categorical approach into two branches – one for most things, a separate incompatible version for a single clause of the ACCA – is novel, difficult to administer, and will encourage future panels to splinter the categorical approach into even smaller pieces. Chief Judge Kozinski wrote that the panel reads the residual clause so broadly that nearly any crime will qualify and does so by embracing an argument that the Supreme Court rejected this term.

Judge Michael D. Hawkins
U.S. Court of Appeals
for the Ninth Circuit

NINTH CIRCUIT DECISIONS

McCoy v. Chase Manhattan Bank, USA, 06-56278
Appeal from: C.D. Cal. [Selna, J.]
Panel: Seventh Circuit Judge Cudahy (dissenting), Pregerson, and Hawkins (author)

Subject Matter: Truth in Lending Act

Holding: The panel affirmed in part and reversed in part the district court's dismissal of a class action regarding interest rate increases on credit card accounts. The panel held that the notice requirements of the Truth in Lending Act and Regulation Z require a creditor to provide contemporaneous notice of discretionary interest rate increases that occur because of consumer default. Acknowledging that Regulation Z is ambiguous, the panel rejected the argument that the Federal Reserve Board Official Staff Commentary and the Board's 2007 Advance Notice of Proposed Rulemaking interpreted the regulation to require no notice.

The panel held that state law claims that the defendant's practice of retroactively raising interest rates was unconscionable were not foreclosed because the practice was not specifically authorized by Delaware law. The panel affirmed the dismissal of claims of consumer fraud and tortious breach of the implied covenant of good faith and fair dealing and reversed the dismissal of a claim for breach of contract under Delaware law.

Dissenting, Judge Cudahy wrote that the majority should have deferred to the Federal Reserve Board's interpretation of Regulation Z.

Idaho Chapter FBA

Wendy Olson, President
Assistant U.S. Attorney
U.S. Department of Justice
(208) 334-1211

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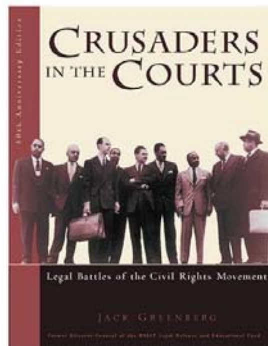
- To provide meaningful service for the welfare and benefit of the members of the Association;
- To provide quality education programs to the Federal legal profession and the public;
- To keep members informed of developments in their respective fields of interest;
- To keep members informed of the affairs of the Association, to encourage their involvement in its activities, and to provide members opportunities to assume leadership roles;
- To promote professional and social interaction among members of the Federal legal profession.

CRUSADERS IN THE COURTS

"Susie's bookshelf"



The focus of our May 1 CLE is civil rights — in Idaho and nationally.

Therefore, I thought I'd share with you one of my favorite books — *Crusaders in the Courts*. It was written by Jack Greenberg, who was a key figure at the NAACP Legal Defense and Educational Fund (LDF) for thirty-five years.

Mr. Greenberg represented Martin Luther King, Jr., in Birmingham and won for him the right to march from Selma to Montgomery. Under Greenberg's leadership, the LDF forced the University of Mississippi to admit its first African American James Meredith, and integrated the University of Alabama when George Wallace blocked the entrance to African Americans. Greenberg won the cases in which the Supreme Court repudiated the "all deliberate speed" doctrine, which had made school desegregation intolerably slow.

Crusaders is the only book written by a lawyer who argued *Brown v. Board of Education*. Before his 28th birthday, Greenberg argued the first of more than 40 cases before the United States Supreme Court.

Starting as Thurgood Marshall's assistant, Greenberg became Marshall's chosen successor as head of the NAACP Legal Defense Fund. His cases involved sit-ins and freedom riders, school segregation, capital punishment and affirmative action.

Crusaders discusses the boycott of his class at Harvard Law School by black students because he was white. It includes the Supreme Court's recent affirmative action decisions, as well as his observations about schools today.

We'll see how my book stacks up against Oprah's — happy reading!

~ Susie Headlee, Executive Director ~