



April, 2010

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## PRESIDENT'S MESSAGE BY WENDY J. OLSON

Wow! Thanks to all of you who joined us on April 9, 2010, for the Idaho Chapter's full day CLE held at the Washington Group Plaza auditorium. We enjoyed a unique and diverse view of judicial perspectives, including updates on the district and bankruptcy courts from Chief U.S. Magistrate Judge Candy Dale and Chief Bankruptcy Judge Terry Myers. We also shared Boise attorney Phil Gordon's adventure in Bougainville as part of his representation of residents there in an Alien Tort Claims Act class action law suit. It's not every day you get kidnapped by one of your clients.



The afternoon portion of our program showcased Gary Anderson, who brought legal history to life through "Clarence Darrow's Judicial Perspective," with excerpts from four of Darrow's most famous trials – including the Big Bill Haywood trial – and a poignant lesson on racial tensions in Detroit in the early 1900s through the Sweet murder trials. For those of you unfamiliar with the case, Ossian Sweet, a prominent African-American doctor, moved with his family into a nice home in an all-white Detroit neighborhood only to find angry white mobs surrounding his home on a nightly basis and a very small police contingent happy to stand by.

With the Sweet family hiding in their own home – and armed – the mob advanced. Shots were fired and one among the crowd was killed. Detroit prosecutors charged eleven Sweet family members with murder. Darrow, by then in his late 60s, wanted to make clear to the potential jurors that the case was about race.

**PRESIDENT’S MESSAGE** CONT’D.

Over the prosecution’s objection, Judge Frank Murphy (portrayed by former Attorney General and long-time Boise attorney Tony Park) allowed Darrow to continue. The first jury hung; the second resulted in an acquittal. Time and again, Anderson, Park and the other Idaho lawyers and former judges who joined Anderson in his program, former Supreme Court Justice Robert Huntley, senior Court of Appeals Judge Alan Schwartzman and Fourth Judicial District Judge Ronald Wilper, reminded us how high profile cases demand courage and fidelity to the law from the bench, often in the face of public outrage.



**Left to Right: Alan Schwartzman, Ron Wilper, Gary Anderson, Bob Huntley, and Tony Park**

“Clarence Darrow” followed William Domnarski’s commentary on his new book, *Federal Judges Revealed*, a collection of excerpts from nearly 100 Article III judges’ oral histories. Domnarski told the audience that he put the oral histories together to shed more light on how judges are selected, what they think of that process and how their early careers shaped their selection to the federal bench. He called former U.S. District Judge for the District of Idaho Fred Taylor the “star” of the book. Contact information:

Gary Anderson, (406) 925-0718 / [darrowfoundation@yahoo.com](mailto:darrowfoundation@yahoo.com) and William Domnarski, Esq., (951) 334-0529 / [domnarski@sbcglobal.net](mailto:domnarski@sbcglobal.net)

The event closed with a reception, and the opportunity to meet Gary Anderson and the other actors. Also, Bill Domnarski signed copies of *Federal Judges Revealed*, and was joined by his wife Kathleen Peach.



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**William Domnarski  
J.D., Ph.D.  
Riverside, California**

**PRESIDENT’S MESSAGE CONT’D.**

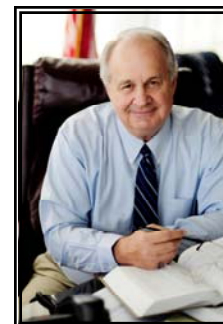
Our April 9th CLE was the starting point for what will be an exciting spring and summer for our Idaho Chapter. On Tuesday, May 4, Judge Larry M. Boyle and Judge Mikel H. Williams will host “Conversations with the Court,” an opportunity for young lawyers to sit with and meet Idaho’s first federal magistrate judges, with more than forty years combined on the federal bench. If you’re not a new lawyer, encourage the new lawyers in your firm or legal organization to sign up. There is no cost to attend; although pre-registration is requested, if possible. Contact Julie Tetrick, Idaho Chapter’s Young Lawyer Representative at (208) 334-9088, or email [Julie\\_Tetrick@id.uscourts.gov](mailto:Julie_Tetrick@id.uscourts.gov)

On Tuesday, May 18, we are co-hosting with the Federal District Court a CLE program on Section 1983 civil rights cases. The CLE program is designed to train attorneys interested in pro bono representation of Idaho prisoners who initially file pro se lawsuits. I encourage all FBA Idaho Chapter members to attend, and bring a friend. Pro bono representation of prisoners provides a service both to the prisoner and to the district court. There is no cost to attend; although pre-registration is requested, if possible. Contact Trudy Hanson Fouser, Idaho Chapter’s Pro Bono Representative, (208) 336-9777, or email [tfouser@g-g.com](mailto:tfouser@g-g.com)

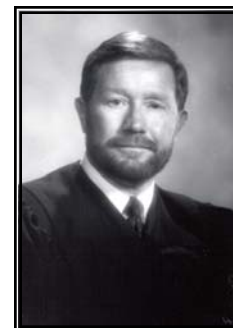
On Monday, May 24, we will be co-hosting a reception after the opening of Judge N. Randy Smith’s remodeled chambers at the United States Federal Courthouse in Pocatello. The May 24 events will include oral arguments before a Ninth Circuit panel – the first of their kind in the Pocatello Courthouse.

Finally, on Wednesday, July 14, we are joining the Idaho State Bar’s Diversity Section to sponsor a three-hour CLE program on Native American issues, in Idaho Falls. Our one-hour portion of the program will feature a presentation by Assistants United States Attorney Traci Whelan and Jack Haycock on federal criminal jurisdiction in Indian Country.

Our executive committee also has been busy this spring in other areas. In March, national delegate Larry Westberg attended the Federal Bar Association’s mid-year meeting in Arlington, Virginia. Larry serves on the government relations committee, which has devoted much of its efforts to supporting legislation to increase the number of federal judgeships. Our chapter is fortunate to have someone as devoted and hard-working as Larry in this important position. President-elect Kim Toryanski, President Emeritus Trudy Hanson Fouser and Executive Director Susie Headlee are attending the chapter leadership meeting this week in Arlington.



The Honorable  
Larry M. Boyle



The Honorable  
Mikel H. Williams

## PRESIDENT'S MESSAGE CONT'D.

I had the opportunity to represent our chapter at the April 15 University of Idaho College of Law's Bellwood Lecture Series opening reception, which featured Federal Bar Association President Lawrence Baca.

As I mentioned in my January president's message, 2010 is bringing some early changes to our executive committee. To fill some open positions and replace Barry McHugh as one of our CLE directors, the executive committee temporarily appointed Don Harris as Vice President, Dan Williams as Special Events/Programs Chair and Nick Vieth as CLE co-chair, along with Robert Schwarz. Don, Dan and Nick will appear on the slate of candidates for the executive committee at the 2010 annual meeting. New two-year terms of office begin in October.

The spring and summer may bring more early changes. As many of you know, President Obama has nominated me to be United States Attorney for the District of Idaho. If I am confirmed by the Senate, I will have to step down as our chapter president. In short, Kim Toryanski may be taking over a few months earlier than anticipated. If that change comes, we will be sure to let all of you know. In the meantime, please come join us at one of our May events, or at the Idaho State Bar annual meeting in July in Idaho Falls.

~ WJO ~



**JUDGE JIM D. PAPPAS**  
**FELLOW IN THE AMERICAN COLLEGE**  
**OF BANKRUPTCY**



Judge Jim D. Pappas, United States Bankruptcy Judge for the District of Idaho, was inducted on March 12, 2010, as a Fellow in the American College of Bankruptcy at a ceremony at the Great Hall of the United States Supreme Court in Washington, D.C.



The mission of the College is to honor and recognize distinguished bankruptcy professionals who are qualified by membership in an effort to set standards of achievement for others in the insolvency community. Membership in the College is by invitation of its Board of Regents only, and those selected as Fellows have the highest professional qualifications and ethical standards, and have demonstrated a commitment to scholarship, teaching and writing bankruptcy law and practice, and to the overall improvement of the bankruptcy process.

Judge Pappas graduated from Idaho State University in 1974, and received his law degree from the University of Idaho College of Law in 1977. After practicing in Idaho and throughout the Northwest in the area of commercial law, banking, workouts, secured transactions, and aspects of bankruptcy law, Judge Pappas was appointed to the bench in 1990. In addition to serving as one of Idaho's two bankruptcy judges, in August 2005, Judge Pappas was appointed by the Ninth Circuit Court of Appeals to serve as one of six permanent judges on the Ninth Circuit's Bankruptcy Appellate Panel, a Court that reviews the decisions made by other bankruptcy courts throughout the Western United States.

There are only about 650 Fellows in the College, five of which are from Idaho. In addition to Judge Pappas, they are Larry Prince, Joe Meier, Randy Peterman, and Ford Elsaesser.

*JUDGE CANDY WAGAHOFF DALE  
HONORED BY IDAHO WOMEN LAWYERS*

Chief United States Magistrate Judge Candy Wagahoff Dale has been selected by the Idaho Women Lawyers as the recipient of the prestigious Kate Feltham Award. This award is intended to honor individuals who have made extraordinary efforts to promote equal rights and opportunities for women and minorities within the legal profession and legal justice system in Idaho. Judge Dale was honored at a banquet celebration held on April 7, 2010.



The honor bestowed upon Judge Dale recognized her accomplishments throughout her legal career, both as a lawyer in private practice as well as Chief U.S. Magistrate Judge for the District of Idaho. The award acknowledges her tireless and effective advocacy for equal rights for women and minorities in the workplace and lauded her efforts in implementing improvements that extend the protection of the law to cover these groups and ensure fairness.

The namesake of this award, Kate Feltham, has a remarkable place in Idaho's history as an early pioneer for women's rights and women in the legal profession. Her many accomplishments included acting as vice-president of the Idaho Equal Suffrage Association and leading the drive to give Idaho women the right to vote; teaching English and Public Speaking at the College of Idaho; becoming only the fifth woman admitted to practice law in Idaho in 1914; and being appointed the first female county prosecutor in Idaho.

Past recipients include Cecil Andrus, Mary Smith, Susan Graham, Cathy Silak, Debora Kristensen, Betty Richardson, Kelly Miller, Deborah Nelson, and Leslie Goddard.



## JUDGE RAY McNICHOLS MEMORIAL FUND

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The Honorable Ray McNichols served as a United States District Court Judge for the District of Idaho from 1964 until 1985. A 1950 graduate of the University of Idaho College of Law, Judge McNichols is the namesake for the College of Law's intramural moot court competition. Since 1989, the moot court competition named for Judge McNichols has provided an opportunity for law school students to argue before panels of Idaho's and the Northwest's top judges and practitioners.

Last June, some of Judge McNichols former law clerks put together a committee to strengthen the endowment to keep the memory of Judge McNichols alive at the College of Law through support of the competition that bears his name. Chaired by Ron Schilling, Judge McNichols' law clerk from 1971-72, the committee is trying to raise \$50,000 to enable the endowment to provide meaningful support for the McNichols competition, including prizes for the winning participants. An anonymous donor has pledged to match every gift, up to a total of \$25,000.

Idaho Chapter, Federal Bar Association members interested in supporting this project, can contact Ron Schilling at [adresolutions@cablone.net](mailto:adresolutions@cablone.net) or visit <http://www.sites.uidaho.edu/gifts>. The gifts are made through the University of Idaho Foundation, Inc., Judge Ray McNichols Memorial Fund.

Contact: Ron Schilling at [adresolutions@cablone.net](mailto:adresolutions@cablone.net)

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# SHOSHONE-BANNOCK JUSTICE CENTER FORT HALL, IDAHO



After twenty years of planning and preparation, the new Shoshone-Bannock Tribal Justice Center opened in February 2010. Several members of the federal judiciary attended the dedication and ceremony. The Justice Center houses the police station, jail, courts, and juvenile in a beautiful, state-of-the-art facility.

The 66,200 square foot structure’s circular entryway was said to resemble Stonehenge, the prehistoric stone circle in the fields of England. Local artwork decorates the halls, which reflects the hearts and minds of the people it was designed for, through several local artists that contributed their art. The Tribes have been fortunate in that construction of



the Center came at a time when most construction projects had halted due to the recession, said Marlin Fellows, tribal project manager. This was met on time and within budget completion of the project at Fort Hall.

When Congressman Mike Simpson visited Fort Hall in August, he spent nearly a half hour in the old tribal police station — an eternity for a congressman’s visit. He commented that, while in Washington, D.C., he attended a hearing where the problems of law enforcement in Indian Country were shared with Congress. At his August visit, he was able to



see it firsthand — an overcrowded bunkroom for male inmates and, a few steps down the hall, a small cell for women. Around the corner, holding cells that formerly housed juveniles in violation of federal standards.

# SHOSHONE-BANNOCK JUSTICE CENTER



Upon returning to Washington, Congressman Simpson worked to draft language in the 2010 House appropriations bill strongly urging the Bureau of Indian Affairs to help fund the Justice Center. The Tribes are thankful Congressman Simpson and the entire Idaho Delegation for their support and hard work for the building of the Center. Fort Hall Business Council



Chairman Alonzo Coby expressed the Tribes' gratitude to the Obama Administration and Congress for making the Justice Center a priority and making the Center a reality.

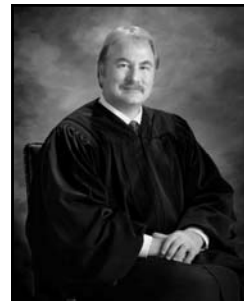
Additionally, the Council expressed gratitude and appreciation, acknowledging their community for its patience and support in getting the police, detention, and court under one roof.

## COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

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### ***IBI, LLC v. Construction Truck & Trailer, Inc. - CV-10-101-S-REB*** **Federal Question Jurisdiction**

- Kim D. Gourley, Jones Gledhill Hess Fuhrman Bradbury & Eiden Boise, Idaho for Plaintiff/Counter-Defendant
- Stephen K. Christiansen, Van Cott Bagley Cornwall & McCarthy, Salt Lake City, Utah for Defendant/Counter Claimant/Third Party Plaintiff
- David G. Ballard, Capitol Law Group, PLLC, Boise, Idaho for Third-Party Defendants



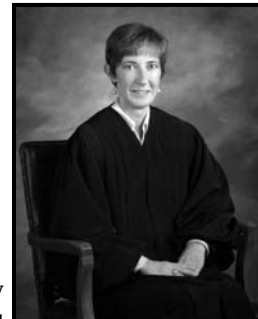
IBI filed this action on January 11, 2010, asserting claims for a Carmack Act violation, 42 U.S.C. § 11706, and for breach of contract. In February, Defendant removed the case to federal court. This case arises from IBI's need to transport a generator and enclosure to Washington. IBI arranged for transport of the generator through a broker, Power Draft LLP, and provided Power Draft the load specifications. Power Draft entered into a contract with Construction Truck & Trailer (CTT) to transport the generator. IBI alleges that Construction Truck & Trailer erred in calculating the size of the load and in obtaining permits, resulting in the load being turned back once it entered Oregon and the load being broken apart and shipped on multiple trucks to satisfy the permits' dimension requirements.

CTT filed an Answer, Counterclaim, and Third Party Complaint asserting defenses of lack of privity and contributory negligence, along with other defenses. CTT also asserted a counterclaim against IBI for tortious interference with contract and third-party claims for breach of contract and breach of the implied covenant of good faith and fair dealing against Power Draft and the individuals doing business as Power Draft, Linda Johnson and Rolland Warmka. CTT asserts it informed Power Draft that (1) it would be impossible to get the necessary permits to deliver such a large load in that time frame, (2) the generator would be over-height and that it could not pull the necessary permits for Oregon and Washington until it knew the actual dimensions of the load once the generator was mounted on the trailer, and (3) it would take at least 4-5 days to pull the necessary permits and deliver the generator to Seattle. CTT alleges that Power Draft informed CTT that this delivery time would be acceptable and instructed CTT to deliver the generator as soon as possible and that, after the load had been taken to the Oregon border, Power Draft informed CTT that IBI had ordered CTT to return from Oregon to Idaho so the generator could be broken down into two loads.

## COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

***Bully Dog Sales & Distribution, LLC v. Speed Technologies et al.***  
**CV-10-94-S-CWD - Diversity Jurisdiction**

- Shelly C. Shannahan, Perkins Coie, LLP, Boise, Idaho for the Plaintiff
- Counsel for Defendants have not yet appeared.



In 2008, Defendants Speed Technologies, LLC and Superlite, LLC (collectively referred to as “Speed”) engaged Bully Dog to assist Speed with building and promoting a SuperLite Class of the Lucas Oil Off Road Racing Series (“LOORRS”). LOORRS provides short course off road racing venues for various classes of vehicles. Bully Dog thereafter prepared a fixed bid agreement for Speed outlining the services that Bully Dog agreed to perform in connection with the 2009 SuperLite class series and its \$250,000 sponsorship of the 2009 Series. Bully Dog alleges that Speed accepted the terms of the fixed bid agreement and agreed to pay Bully Dog \$1,435,740, as well as an amount equal to fifteen percent (15%) of \$1,435,740, which was due on February 1, March 1, and April 1 of 2009, with the remaining fees to be paid in seven equal monthly installments thereafter.

Bully Dog also alleges that, in August of 2009, Speed attempted to negotiate obtaining a credit against certain line item expenses in order to improperly reduce the amount of money that Speed owed Bully Dog under the parties’ Agreement, unilaterally reducing the amount by \$176,100. Thereafter, Speed allegedly approached Bully Dog and requested that Bully Dog continue its services related to marketing SuperLite and Bully Dog agreed to resume these services and the remaining agreed upon services set forth in the parties’ Agreement, except those that it claims were frustrated by or prevented by Speed.

Bully Dog claims that Speed has failed to pay amounts owed under the Agreement for services Bully Dog rendered and to pay for two additional In Car Cameras from Bully Dog valued at \$50,000. Bully Dog also alleges that Chuck Dempsey communicated false and defamatory information about Bully Dog to Bully Dog’s customers and sponsors, attempted to solicit Bully Dog’s customers, vendors, and distributors to cease doing business with Bully Dog, and instead conduct their business through Defendants directly. Bully Dog asserts that its business and business relationships have been damaged as a result of Defendants’ allegedly defamatory communications.

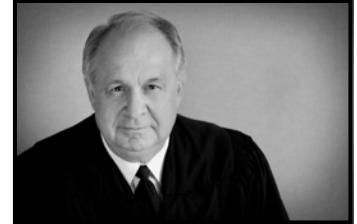
Bully Dog brings claims for breach of contract, tortious interference with economic business expectancy, defamation, and unjust enrichment. Defendants have not yet responded to the Complaint.

# COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

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***Dixon et al. v. Coeur d'Alene - CV-10-78-N-LMB***  
**Federal Question Jurisdiction**

- Lawrence R. Beck, Beck & Poorman, LLC, Hayden Lake, Idaho  
for the Plaintiffs
- Michael L. Haman, Haman Law Office, Coeur d'Alene, Idaho  
for the Defendant



Plaintiff Dan Dixon was employed by the City of Coeur d'Alene (the "City") as a lieutenant in the police department (the "Department"). He worked for the Department for 17 years and alleges that he received all satisfactory or exemplary reviews. In 2007 and 2008 a fellow employee raised multiple complaints about Mr. Dixon's shifts and scheduling. Mr. Dixon requested that the Department do something about the continued, and allegedly baseless, complaints. Instead, the Department decided to investigate a complaint alleging that Mr. Dixon had claimed pay for time he had not actually worked. Mr. Dixon requested that someone outside of the Department conduct the investigation into whether he had claimed pay for hours not actually worked. A captain in the Department conducted a six month investigation, during which time Mr. Dixon was not allowed to work. The memo resulting from the investigation recommended that Mr. Dixon's employment be terminated.

Mr. Dixon participated in a pre-termination hearing with a personnel officer from the City. The personnel officer upheld all of the reasons for the Department's discharge decision but recommended that Mr. Dixon be offered a demotion back to entry level patrol officer in lieu of discharge. Mr. Dixon refused the demotion offer, the Department again recommended discharge, and Mr. Dixon was terminated after a second pre-termination hearing. Plaintiffs allege this amounted to constructive discharge and that the City violated Mr. Dixon's substantive right to due process by terminating his employment in an arbitrary and capricious manner. Plaintiffs also state claims for breach of contract, negligent infliction of emotional distress, and negligent training and supervision.

## COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

### ***Rodriquez v. Saxon Mortgage Services, Inc. et al. - CV-10-61-S-MHW*** **Federal Question Jurisdiction**

- John L. Gannon, John Gannon Law Offices, Boise, Idaho for the Plaintiff
- Counsel for Defendants have not yet appeared.



An individual named Maria Rodriquez of Florida obtained a loan for her home in Florida before she incurred various debts and filed bankruptcy in August 2008. Plaintiff Maria Rodriquez alleges that she has resided in Nampa, Idaho for 13 years and has never lived in Florida. She alleges that Saxon Mortgage Services (“Saxon”) is a debt collector as defined in the Fair Debt Collection Practices Act, 15 U.S.C. 1692, *et seq.*, (the “Act”), and Experian Information Solutions (“Experian”) is a consumer reporting agency as defined by the Act. She claims that Saxon has repeatedly represented that the debt from the Florida home loan was incurred by Plaintiff for a home Saxon represents she purchased in Florida, even though she provided Saxon with her social security number, which is completely different from the Maria Rodriquez who incurred the Florida home loan debt. Saxon sent written notification to Defendant Experian that this debt belongs to Plaintiff. Plaintiff alleges that Experian merged her credit file with that of the Maria Rodriquez of Florida, and failed to use reasonable procedures to insure the maximum accuracy of these reports.

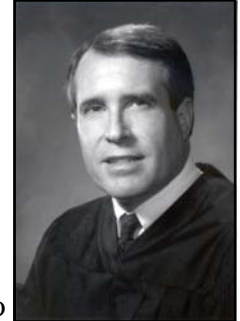
Plaintiff states a cause of action under the Fair Debt Collection Practices Act for attempting to collect an amount not authorized by any agreement or permitted by law and for engaging in false and misleading representations in collecting on this debt. Plaintiff asserts that because of Defendants’ actions she has been denied credit needed to save her own home and has had to employ a credit repair company.

## COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

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### ***Gustin v. Toyota Motor Sales, USA, Inc., et al. - CV-10-114-S-BLW*** **Diversity Jurisdiction**

- James M. Piotrowski, Herzfeld & Piotrowski, Boise, Idaho for the Plaintiff
- Counsel for Defendants have not yet appeared.



Plaintiff filed this class action complaint on behalf of Plaintiff Gustin, a consumer who purchased a Toyota automobile, and all other similarly situated individuals. Plaintiff alleges that his Toyota may no longer be safe to operate due to a potential sudden acceleration problem caused by a defective accelerator pedal. Plaintiff's Complaint reports that Toyota automobile owners have been reporting incidents of sudden unintended acceleration of their vehicles since the 1990s and, in 2007, due to an overwhelming number of customer complaints, Toyota conducted an investigation and determined that the floor mats were the cause of the accelerator problems. In September of 2009 Toyota recalled approximately four million vehicles from model years as far back as 2004.

In January, 2010, Toyota announced in a press release that "Our investigation indicates that there is a possibility that certain accelerator pedal mechanisms may, in rare instances, mechanically stick in a partially depressed position or return slowly to the idle position." Toyota announced an additional recall of U.S. built cars and trucks, including the type of vehicle Plaintiff owns, a 2008 Toyota Tundra. Plaintiff brings claims for breach of express warranty, breach of the implied warranty of merchantability, breach of the implied warranty of fitness for a particular purpose, unjust enrichment, and breach of the covenant of good faith and fair dealing, and he seeks class certification.

## COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

### ***Hakes et al. v. Ambic Equipment Limited et al. - CV-10-70-E-EJL*** **Federal Question Jurisdiction**

- Frank J. Dykas, James L. Cornwell and Scott D. Swanson, Dykas Shaver & Nipper, LLP, Boise, Idaho for the Plaintiffs
- C. Clayton Gill, Moffatt Thomas Barrett Rock & Fields, Boise, Idaho and Michael R. Annis, Husch, Blackwell, Sanders, St. Louis, Missouri for Defendant Coburn Company, Inc.
- Counsel have not yet appeared for remaining Defendants



Plaintiffs' Complaint alleges that Dennis Hakes invented a new and useful dip cup for applying non foaming germicidal dip to the teats of cattle, which dramatically reduces waste and results in significant savings to dairy farmers without any decrease in the effective application of the dip (United States Patent No. 7,165,510, referred to as '510 Patent). Plaintiffs claim that Mr. Hakes also patented a method of applying non foaming germicidal teat dip (U.S. Patent 7,387,086, referred to as '086 Patent). Mr. Hakes also patented the non foaming germicidal dip cup in the UK. Mr. Hakes and Plaintiff Mark L. Anderson are the owners of the entire right, title, and interest in the '510 and '086 patents.

Plaintiffs allege that Defendant Ambic was aware of Plaintiff's patents, as shown by a May 19, 2009 request for a validity opinion from the UK Intellectual Property Office. Documents filed in Ambic's request for the validity opinion from the UK Intellectual Property Office refer to the '510 Patent. Plaintiffs claim that Ambic copied the device patented by Plaintiffs with full knowledge of the rights secured by Plaintiffs in the '510 and '086 Patents. Plaintiffs bring claims for direct infringement and contributory infringement on the '510 patent, and active inducement on the '086 patent. Plaintiffs claim they have suffered damages by reason of Defendants acts of active inducement, including lost sales of patented products and lost sales of replacement parts therefore, loss of reputation and good will and other irreparable harm and thus, are entitled to recover damages adequate to compensate for Defendants' infringement which in no event can be less than a reasonable royalty. Plaintiffs also seek both a preliminary and permanent injunction and a judgment declaring the patents valid and enforceable.

# COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

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***MetLife Bank, N.A. v. John Badostain et al., CV-10-118-S-CWD***

**Diversity Jurisdiction**

- Erik F. Stidham and Scott Randolph, Holland & Hart, LLP, Boise, Idaho, and Martin Harris, Harris & Affiliates, Chicago, Illinois for the Plaintiff
- Matthew T. Christensen, Angstman, Johnson and Associates, Boise, Idaho for the Defendant

Plaintiff MetLife Bank filed this action for breach of a non-piracy covenant, breach of fiduciary duty, and tortious interference with contracts. All of the individuals named in the Complaint were managers at MetLife Bank, and all resigned and accepted similar positions with a competitor, Eagle Home Mortgage, LLC (“Eagle”).

Simultaneously or soon afterwards, these Defendants hired many of the employees they had supervised at MetLife Bank to join them at Eagle, allegedly causing a mass exodus from four of Plaintiff’s branches in Idaho. Plaintiff alleges that within a three-week period, nearly all of Plaintiff’s loan officers (mortgage consultants) at its branches in Eagle, Meridian, McCall, and Pocatello, Idaho, quit their jobs at MetLife and followed Defendants to Eagle.

Plaintiff claims that, by hiring employees they had supervised at MetLife Bank to work for a competitor, each of the individual Defendants violated his non-piracy covenant, which provides, in part, that for 18 months following the termination of employment with MetLife the employee will not solicit any employee of MetLife or its affiliated entities to become employed, associated, or contracted by or with him or any other entity in which he becomes an employee, owner, or investor. Plaintiff further alleges that some or all of the Defendants engaged in these actions while still employed by Plaintiff, which breached their fiduciary duties (i.e., their duty of loyalty), and that the corporate defendant, Eagle, was aware that the individual Defendants were subject to a non-piracy covenant, but still encouraged and/or knowingly permitted the individual defendants to violate their contractual duties (and breach their fiduciary duties) by hiring away Plaintiff’s employees.

## COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

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### ***Klein v. American Finance Limited Partnership - CV-10-82-E-REB* Federal Question Jurisdiction**

- John F. Kurtz, Hawley Troxell Ennis & Hawley, LLP, Boise, Idaho for the Plaintiff
- Steven J. Wright, Wright Wright & Johnson, PLLC, Idaho Falls, Idaho for the Defendant

This case arises from Complaints filed by the Securities and Exchange Commission (“SEC”) and the Commodity Futures Trading Commission (“CTFC”) against Trigon Group, Inc., (“Trigon”) and the assets of Daren L. Palmer (“Palmer”) alleging that they operated an investment program, or Ponzi scheme, whereby they fraudulently took millions of dollars from investors. Plaintiff R. Wayne Klein is the court-appointed receiver of Trigon and Palmer in those cases.

Plaintiff filed this Complaint to Avoid Fraudulent Transfers, for Constructive Trust and Other Provisional Remedies, and for Damages on February 17, 2010 as one of several actions seeking to recapture and return funds invested in Trigon that were allegedly fraudulently diverted by Trigon and Palmer to pay phony returns to early investors or for Palmer’s personal use.

Defendant is an Idaho partnership that allegedly received from Trigon a check for \$212,500 in October of 2006, and possibly other amounts. Plaintiff alleges the payment was made by Trigon with actual intent to hinder, delay, or defraud its investors who consist mostly of innocent investors who gave their money to Trigon and Palmer believing it was being invested on their behalf. Plaintiff asserts that the payment is avoidable by the Receiver and requests a constructive trust be imposed on the assets. Defendant has filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) arguing that the Court does not have ancillary jurisdiction over Plaintiff’s state law claims merely because the Court has jurisdiction over the SEC and CFTC actions to which Defendant is not a party. Defendant requests that this action be dismissed for lack of subject matter jurisdiction.

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# COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

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***Klobucher v. Matrixx Initiatives, Inc. & Zicam LLC - CV-10-123-N-REB***      **Diversity Jurisdiction**

- Craig Young, Goicochea Law Offices, Lewiston, Idaho for the Plaintiff
- Richard E. Hall and Keely E. Duke, Hall Farley Oberrecht & Blanton, Boise, Idaho  
for the Defendants

Defendant Matrixx Initiatives develops and manufactures over-the-counter pharmaceuticals, such as Zicam cold remedy products. Plaintiff alleges that the Zicam Cold Remedy Gel Swabs and Nasal Gel contain zinc gluconate which, if the products are used properly, is delivered to the patient's nasal membranes, and that these products and their labels are not approved by the Food and Drug Administration. Plaintiff further alleges that he used these products and, as a result, has lost his sense of smell and partially lost his ability to taste. Plaintiff claims that, at the time of Defendant's manufacture and distribution of the products, it knew or should have known that the products could cause these problems. Plaintiff's causes of action are for designing, manufacturing, and marketing an unreasonably dangerous product, misrepresentation, deceptive trade practices, breach of implied and express warranties, negligence, and gross negligence and recklessness.

The parties filed a stipulation to stay this action and extend the time for Defendants to respond to the Complaint because a multi-district litigation panel has been established to handle claims of this nature that involve the Zicam Cold Remedy products, and Defendant anticipates requesting a transfer of the case to that court.

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# COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

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*Smith v. Home Depot USA Inc. - CV-10-106-S-BLW*

**Diversity Jurisdiction**

- Patrick E. Mahoney, Mahoney Law Office, Boise, Idaho,  
and William R. Kendall, Law Office of William R. Kendall for the Plaintiff
- William A. Fuhrman, Trout Jones Gledhill Fuhrman, Boise, Idaho and  
Paul V. Kaulas, McVey & Parsky, Chicago, Illinois for the Defendant

Plaintiff purchased a Multimatic ladder from a Home Depot store and was the sole owner and user of that ladder. Plaintiff alleges that he was using the ladder in a careful and prudent manner, and for an intended use, when he shifted his weight, moved his foot, and unintentionally struck the locking mechanism, unlocking the hinge and causing the ladder to abruptly collapse. Plaintiff asserts that he was injured in this event and that Home Depot is liable for his damages. Specifically, Plaintiff alleges that the ladder was not safely designed because a user could accidentally disengage the locked hinge and that the ladder lacked warnings and instructions sufficient to inform users of the hazard.

# COMPLAINTS FILED IN FEDERAL COURT DISTRICT OF IDAHO

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*Hardenbrook v. United Parcel Serv., Co.* - CV-07-509-S-EJL

**Motion for New Trial**

- Eric S. Rossman, Rossman Law Group, Boise, Idaho for the Plaintiff
- B. Newal Squyres, Scott D. Hess and A. Dean Bennett, Holland & Hart, Boise, Idaho  
for the Defendant

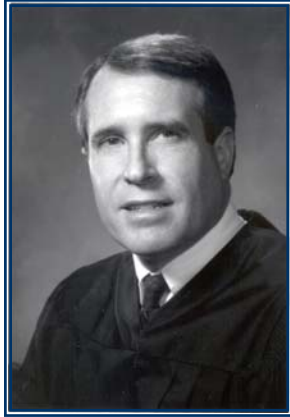
After a seven-day trial on Plaintiff's claim for retaliation in violation of public policy, a jury returned a verdict in Plaintiff's favor and judgment was entered awarding Plaintiff \$40,000 in back pay damages and \$1,436,367.00 in front pay damages, for a total award of \$1,476,367.

Defendant UPS recently filed a Motion for New Trial on liability and damages based on the following assertions: (1) throughout trial, culminating in closing argument, Plaintiff's counsel allegedly improperly played to the passion and prejudice of the jury by continuously misstating fact and law representing to the jury that record keeping regulations apply to supervisors and that UPS violates federal law by not keeping records of the hours its supervisors work and drive; and (2) extraneous prejudicial evidence regarding other UPS lawsuits was likely introduced to the jury and there exists a reasonable possibility that such material could have affected the verdict.

UPS argues that Plaintiff's counsel continuously attributed unproven systemic violations of federal law to UPS over consistent objections by UPS that the Court sustained, including telling the jury that UPS violates federal law by knowingly disregarding regulations that are not applicable to UPS supervisors, and not relevant to Plaintiff's single claim for termination in violation of public policy. UPS asserts that the verdict was not an amount to make Plaintiff whole, but instead was a punitive measure aimed at changing UPS's internal record keeping practices.

UPS also argues that a new trial is warranted because one juror researched other UPS lawsuits and informed other members of the jury of his research during deliberations. UPS requests a new trial because it believes passion and prejudice introduced by that juror and by Plaintiff's counsel induced what UPS describes as the jury's excessive damage award.

# JURY TRIALS -DISTRICT OF IDAHO



Chief Judge B. Lynn Winmill  
 U.S. District Judge  
 U.S. District Court, Idaho

**US v. Fred Covey**, CR-09-213-S-BLW

February 16 - 18, 2010 . Boise, Idaho

- Wendy Olson, Attorney for United States
- Defendant was Pro Se, and J.D. Merris, Reardon Merris & Herndon  
 Stand by counsel

Verdict: Guilty of Corruptly Endeavoring to obstruct or impede the due administration of the internal revenue laws, in violation of 26 U.S.C. § 7212(a), between on or about March 4, 2005 and May 26, 2009.

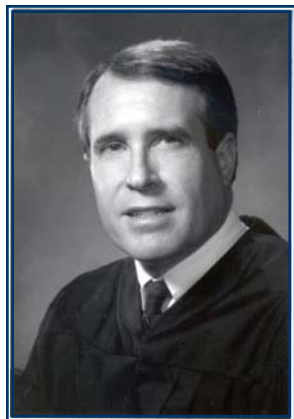
**Kevin Davis v. Kootenai County, Idaho, et al.**, CV-08-250-N-BLW

Jury Trial: March 1 -5 2010 . Coeur d'Alene, Idaho

- Lawrence Kuznetz, Spokane, Washington for the Plaintiff
- Peter Erbland, Paine Hamblen, and Tyler Wirick,  
 Law Offices of Tyler S. Wirick  
 Coeur d'Alene, Idaho for the Defendants

Verdict: In favor of Defendants

# JURY TRIALS -DISTRICT OF IDAHO



Chief Judge B. Lynn Winmill  
 U.S. District Judge  
 U.S. District Court, Idaho

**US v. Jack Barron**, CR-09-43-N-BLW  
 Jury Trial March 29, 2010 - April 15, 2010  
 Coeur d'Alene, Idaho

- Nancy Cook, Assistant United States Attorney  
 and J. Ronald Sutcliffe for the Government
- James Edward Siebe, Siebe Law Office, Moscow, Idaho  
 for the Defendant

Verdict in Favor of the Defendant; not guilty on all counts.

# JURY TRIALS -DISTRICT OF IDAHO



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

**US v. Fen-Ling Wang / Andrea Wang**, CR-10-09-S-EJL  
Jury Trial March 30, 2010 - April 2, 2010 . Boise, Idaho

- Wendy J. Olson, Assistant U.S. Attorney, Boise, Idaho for the Government
- J.D. Merris, Reardon Merris & Herndon, Boise, Idaho for Defendant Fen-Ling Wang
- S. Richard Rubin, Federal Defender, Boise, Idaho for Defendant Andrea Wang

Verdict: Hung Jury; case will be retried in June 2010

**US v. Russell Nuxoll / Janet Rose Sylten**

Jury Trial March 8 - 9, 2010 CR-09-242-S-EJL

- Christian Nafzger, Assistant U.S. Attorney, Boise, Idaho for the Government
- John DeFranco, Ellsworth Kallas Talboy & DeFranco, Boise, Idaho for Defendant Russell Nuxoll
- Charles Peterson, Peterson Law Office, Boise, Idaho for Defendant Janet Rose Sylten

Verdict:

Guilty on Count 1 - Destruction of Government Property

Not-Guilty on Count 2 - Theft of Government Property

# JURY TRIALS -DISTRICT OF IDAHO



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

**US v. Chris Arthur Christensen**, CR-05-274-N-EJL

Jury Trial January 26, 2010 - February 2, 2010 . Coeur d'Alene, Idaho

- Assistant U.S. Attorney Nancy Cook, Coeur d'Alene, Idaho
- David E. Dokken, Creason, Moore & Dokken, Lewiston, Idaho

Verdict: Not Guilty on all Three Counts

Unlawfully Dispensing Controlled Substance

# JURY TRIALS -DISTRICT OF IDAHO

**Ellis v. Idaho Elks Rehabilitation Hospital**, CV-08-387-S-WFN  
 Jury Trial, February 16 – 23, 2010 . Boise, Idaho

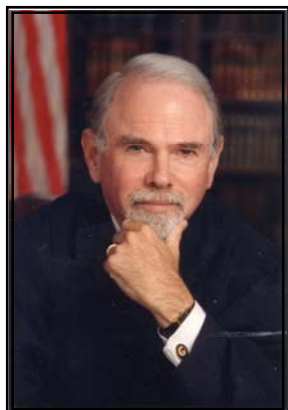
Trial Conducted by Judge Wm. Fremming Nielsen,  
 sitting by special designation

- John Kormanik and Brad Sneed, Kormanik Hallam & Sneed  
 Meridian, Idaho for the Plaintiff
- J. Kevin West and Sally Jane Reynolds, Hall Farley Oberrecht &  
 Blanton, Boise, Idaho for the Defendant

**Verdict:** In favor of Defendant

Judge Wm. Fremming Nielsen  
 U.S. District Judge  
 for the District of Washington  
 sitting by special designation

# JURY TRIALS -DISTRICT OF IDAHO



Judge William B. Shubb  
 U.S. District Judge  
 for the Eastern District of California  
 sitting by special designation

**Lance Woods v. Idaho Dept. of Correction**, CV-04-99-N-BLW

Jury Trial: March 15 - 17, 2010 . Boise, Idaho

- Patrick D. Costello, University of Idaho College of Law  
 Legal Aid Clinic, Moscow, Idaho for Plaintiff Wood
  
- Graham Cease and Jeremy Yuill, Legal Interns  
 University of Idaho College of Law Legal Aid Clinic  
 Moscow, Idaho for Plaintiff Wood
  
- Keely Duke and Bryan A. Nickels, and Sarah H. Arnett  
 Hall Farley Oberrecht & Blanton, Boise, Idaho for Defendant

**Verdict:** In favor of Defendant



Judge Sandra Ikuta  
Ninth Circuit Court of  
Appeals

## NINTH CIRCUIT DECISIONS

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United States v. Velasquez-Bosque, 09-50126

Panel: Canby, Gould, Ikuta (author)

Subject Matter: Criminal Law

Holding: Reversing the district court's decision not to apply a prior crime of violence enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii), the panel held that carjacking under Calif. Penal Code § 215 is a categorical crime of violence under § 2L1.2(b)(1)(A)(ii).

The panel concluded that *United States v. Becerril-Lopez*, 541 F.3d 881 (9th Cir. 2008), which held that Calif. Penal Code § 211 was a crime of violence for purposes of § 2L1.2, controls its decision regarding section 215, which is materially identical.

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Judge Cynthia Holcomb Hall  
Ninth Circuit Court  
of Appeals

## NINTH CIRCUIT DECISIONS

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Eneh v. Holder, 05-75264

Petition for Review from: Board of Immigration Appeals

Panel: Hall (author), Noonan, and Thomas

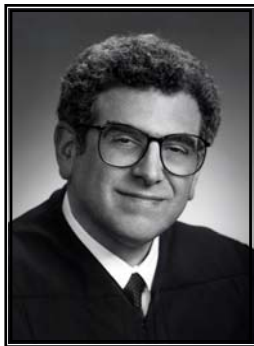
Subject Matter: Immigration

**Holding:** The panel granted a petition for review of a decision of the Board of Immigration Appeals affirming an immigration judge's denial of an application for deferral of removal. Eneh, a native and citizen of Nigeria, asserted that as a criminal deportee, he would immediately be taken into custody and imprisoned by Nigerian officials, where he would not have access to medication to treat his AIDS, cancer, and Valley Fever.

Because it was unclear whether the Board adopted the IJ's reasoning in its entirety, affirmed on alternate grounds, added an additional ground for denying Eneh's claim, or simply misconstrued the IJ's decision, the panel remanded for the Board to provide a reasoned explanation for its decision. To the extent the Board stated that Eneh was not likely to be detained if returned to Nigeria, a ground not mentioned by the IJ, the panel took judicial notice of the existence of Nigeria's Decree 33, which mandates a 5-year sentence for any Nigerian citizen found guilty in any foreign country of an offense involving narcotic drugs or psychotropic substances, and held that substantial evidence did not support the Board's determination.

The panel further held that even liberally construing the Board's decision as adopting the IJ's analysis in its entirety, both the Board and the IJ failed to acknowledge or analyze testimony and documentary evidence that Eneh would be individually and intentionally targeted for mistreatment because of his HIV status and associated medical problems. The panel directed the Board on remand to give reasoned consideration of this potentially dispositive evidence.

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Judge Andrew J. Kleinfeld  
Ninth Circuit Court of  
Appeals

## NINTH CIRCUIT DECISIONS

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United States v. Alderman, 08-30322

Panel: O’Scannlain, Kleinfeld (author), and Berzon

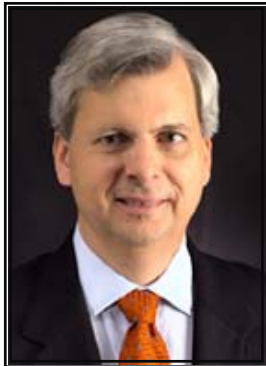
Subject Matter: Criminal Law

**Holding:** Affirming a sentence, the panel held that first degree theft under Wash. Rev. Code § 9A.56.030 (2005) is a “crime of violence” under the Sentencing Guidelines and that the district court therefore properly applied an upward adjustment under U.S.S.G. § 2K2.1 (2007) based on the defendant’s prior conviction under that statute.

In so holding, the panel concluded that *Begay v. United States*, 128 S. Ct. 1581 (2008) (holding that felony driving under the influence under New Mexico law was not a “violent felony” under the Armed Career Criminal Act), leaves in force the holdings of *United States v. Wofford*, 122 F.3d 787 (1997) (California grand theft from a person was categorically a “violent felony” under the Armed Career Criminal Act), and *United States v. Jennings*, 515 F.3d 980 (9th Cir. 2008) (§ 9A.56.030 conviction was categorically a “violent felony” under the Armed Career Criminal Act).

The panel upheld the district court’s upward adjustment for possession of a pistol in connection with another felony offense – assault – where the defendant shot at the victim nine times, intending to frighten.

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Judge Richard Clifton  
Ninth Circuit Court of  
Appeals

## NINTH CIRCUIT DECISIONS

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PhotoMedex, Inc. v. Irwin, 07-56672

Panel: W. Fletcher, Clifton (author), and M. Smith

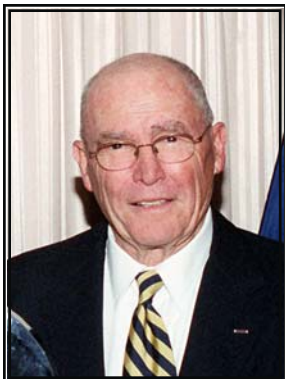
Subject Matter: Lanham Act

**Holding:** The panel affirmed in part and vacated in part the district court's summary judgment in favor of defendants on Lanham Act claims for misleading advertising and on California state law claims for false advertising and unfair competition brought by defendants' competitor in the production and sale of dermatological lasers.

The panel held that the plaintiff could not proceed as to its allegations of misrepresentations regarding clearance by the Food and Drug Administration for defendants to market their laser device where the FDA permitted the defendants to determine in the first instance whether their device was covered by clearance previously given to a similar device and to market their device without an affirmative statement of approval by the FDA. Following other circuits, the panel concluded that because the Food, Drug, and Cosmetic Act bars private rights of action, a private action brought under the Lanham Act may not be pursued when the claim would require litigation of the alleged underlying FDCA violation in a circumstance where the FDA has not itself concluded that there was such a violation.

The panel held that claims based on allegations of misrepresentations regarding the anticipated date the defendants' laser would be available for purchase and one defendant's role as inventor of the plaintiff's laser device were potentially viable. The panel held that, although a forecast of future events may ordinarily be a statement of opinion, such a statement may be actionable if the speaker knew at the time the statement was made that it was false or did not have a good faith belief in the truth of what was said. The panel held that the commercial depiction of one defendant as inventor of the plaintiff's laser was actionable because it might misrepresent his actual contribution.

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Judge Harry Pregerson  
Ninth Circuit Court of  
Appeals



Judge Susan Graber  
Ninth Circuit Court of  
Appeals  
Specially Concurring

## NINTH CIRCUIT DECISIONS

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Joseph v. Holder, 05-74390

Petition for Review from: Board of Immigration Appeals

Panel: B. Fletcher, Pregerson (author), and Graber (specially concurring)

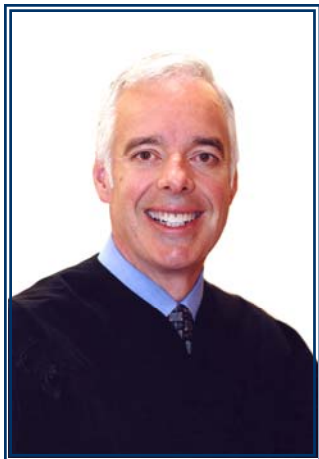
Subject Matter: Immigration

**Holding:** The panel granted a petition for review of a decision of the Board of Immigration Appeals affirming an immigration judge’s denial of asylum, withholding of removal, and protection under the Convention Against Torture to a native and citizen of Haiti. The panel held that, pursuant to 8 C.F.R. § 1003.19(d), the IJ erred by relying on her unrecorded notes from Joseph’s bond hearing in concluding that his testimony at the merits hearing was inconsistent with his earlier testimony. 8 C.F.R. § 1003.19(d) states that “[c]onsideration by the [IJ] of an application or request of a respondent regarding custody or bond under this section shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceedings.”

The panel held that 8 C.F.R. § 1240.7(a), which states that an IJ “may receive in evidence any oral or written statement that is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing, or trial,” does not apply in this case, because the evidence in question was not any oral or written statement, but rather was the IJ’s own notes, which were not part of the record, and were taken during Joseph’s unrecorded, uncounseled bond hearing. The panel held that substantial evidence did not support the IJ’s other grounds for finding Joseph not credible. The panel remanded for the Board to determine, taking Joseph’s testimony as credible, whether Joseph established eligibility for relief from removal.

Specially concurring, Judge Graber agreed that the petition in this case must be granted, but wrote that in situations other than the particular one presented here statements made at a bond hearing may be admissible and may support an adverse credibility determination.

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Judge Richard C. Tallman  
Ninth Circuit Court of  
Appeals

## NINTH CIRCUIT DECISIONS

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Mora-Meraz v. Thomas, 09-35413

Panel: Paez, Tallman (author), and M. Smith

Subject Matter: Habeas Corpus

Holding: The panel affirmed the district court’s denial of a 28 U.S.C. § 2241 habeas corpus petition challenging a decision by the Bureau of Prisons denying petitioner eligibility for admission to a Residential Drug Abuse Program. The Bureau denied eligibility based on an unwritten policy requiring use of the same substance within twelve months prior to incarceration.

The panel first held the Bureau’s unwritten twelve-month rule is not inconsistent with prison regulations, is interpretive and therefore exempt from the notice and comment requirement of 5 U.S.C. § 553(b). The panel next held the Bureau’s rule bears a rational connection to the prison regulation requiring a verifiable documented drug abuse problem, and therefore the rule is neither arbitrary nor capricious under § 706 of the Administrative Procedures Act.

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- 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.

### SUSIE'S BOOKSHELF *LET HISTORY JUDGE* BY ROY A. MEDVEDEV

The original version of *Let History Judge*, which is the version I own, was published in 1972 by Alfred A. Knopf. It reflects the thinking of historian Roy A. Medvedev in the period of August 1962 to August 1968. The book has been described as “weighty” — both physically and emotionally.

Medvedev’s writings stem from notebooks and files he secretly kept about the history of his time, from the emergence of Josef Stalin as a leader in the 1917 Revolution to the dictator's death in 1953. Some of the documents Medvedev gathered, including memoranda on secret agreements with Nazi Germany, shocked Russian readers when these notebooks first began to appear in 1988.

The book is interesting, scholarly and Stalin’s gradual rise to power is fully chronicled — with concrete examples of his motives, behavior and his life in Soviet society.

