SIDEBAR

A Newsletter of the Idaho Chapter of the Federal Bar Association

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Response to Containing the Cost of Litigation

by Donna S. Fitzgerald, U.S. Department of Justice

May 2008

As a new member of the Idaho Chapter of the Federal Bar Association, I am delighted to be asked to write an article for the newsletter, and I look forward to reading future newsletters and interacting with other members of the Idaho chapter.

I read with great interest the article in the prior newsletter by J. Walter Sinclair, Stoel Rives, titled "Containing the Cost of Litigation," which addressed some thoughts that came out of a recent meeting involving judges, in-house corporate counsel, federal and state judicial administrative officers, and trial attorneys from across the country, and where the subject of the rising costs of litigation was discussed.

I wanted to provide some additional thoughts and comments from the perspective of a federal practitioner who primarily defends cases brought under the judicial review provisions of the Administrative Procedure Act, (APA) 5 U.S.C. §§ 701 et seq. These cases are typically resolved by dispositive motion based on an administrative record compiled by the agency.

In general, I believe many of the suggestions raised in the article, while geared to trial practice, could also be translated to dispositive motions practice as well, and particularly to complex cases that involve multiple parties and/or multiple claims. For example, early agreement between counsel on the process for resolving challenges to the scope of the administrative record submitted by the government are likely to expedite the running of the case, and allow for a more efficient presentation to the court.

In that regard, it was interesting to read about the potential value in returning to more simple "notice pleading." In the cases that I defend, it is often more helpful to have

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complaints that provide more detail and information, so that the agency compiling the record can be sure to include documents relevant to the claims and issues. This detail is helpful when the agency is sorting through tens of thousands of pages of documents.

Second, it was also interesting to read about the increasing time and cost associated with dispositive motions and ADR efforts in the trial process, and the interest in perhaps shifting the focus on getting the case to trial instead of spending a significant amount of time briefing dispositive motions, or considering possible settlement. Of course, our APA cases are almost always resolved on dispositive motions, which is expected as that is the governing law. However, even our non-APA cases typically benefit from a robust motions practice and at least some consideration of ADR.

For example, many of our cases present meritorious jurisdictional defenses, such as expiry of the statute of limitations, failure to pursue mandatory administrative appeals before the agency, or lack of standing. These defenses do not always eliminate the entire proceeding – at times, the defenses are only applicable to one party, or one claim, but in those instances, the successful assertion of the defenses obviously narrows the parties and issues as the case progresses through the system.

Likewise, we may find a case presents a meritorious issue for summary judgment, which may resolve only one claim, or the entire case. Ideally, such a motion will be presented with enough time for the court to rule before significant preparations are made for trial.

"Both the bench and the bar should strictly enforce the rule limiting depositions to a certain number and certain length."

While most of my federal government practice has involved dispositive motions, I have engaged in enough discovery to offer my agreement with the suggestion that both the bench and the bar should strictly enforce the rule limiting depositions to a certain number and certain length. Again, motions practice can be useful in establishing reasonable limits on discovery, and making the process less expensive and burdensome, without preventing the parties from obtaining the necessary information for their cases. Once a case proceeds to the discovery phase, it can be difficult to avoid spending time and resources on peripheral issues, particularly if there is a dispute between the parties regarding the need for certain discovery.

The need for negotiated or court-controlled discovery is even greater in a multi-district practice, where witnesses may be located all over the United States, and discovery requires a large amount of travel. I have at times had to take a practical approach to discovery issues by waiving justifiable opposition to additional or longer depositions to avoid the additional travel we would incur if we lost the discovery dispute before the court.

Finally, I also wanted to make an observation about the comment that, too frequently, attorneys and courts are sending cases to ADR rather than allowing the case to go to trial. Many of my cases, including APA record review cases, have ended up in ADR, either at the request of a party or at the direction of the court.

At times, my client agencies have found this advantageous, such as in cases where the dispute is with a party that maintains an on-going working relationship with the agency. In those instances, the ADR process has allowed the agency and the opponent to explore a variety of options for resolving their disagreement, rather than continue down a path that will likely result in a ruling favoring one party over the other.

In closing, I note that the original drafters of the Constitution did not likely envision a legal system that over two hundred years later would encompass such a vast array of federal and state statutes, and myriad possible claims and lawsuits, including suits against the executive branch. Given the complicated society we live and work in, I offer my observation that a motions practice and ADR have a role to fill, and that many of the suggestions in the article may actually improve those practices.

# # #

About the Author:

Donna S. Fitzgerald is a trial attorney with the Natural Resources Section of the Environment and Natural Resources Division, United States Department of Justice. She practices regularly in the District of Idaho, and recently joined the Idaho Chapter of the Federal Bar Association.

She has worked at the Justice Department since 1995 practicing natural resources, energy, and environmental law. Ms. Fitzgerald has specialized in National Environmental Policy Act litigation as it applies to a wide range of federal programs challenged under the statute, including grazing decisions, oil and gas leasing, wildlife management, and border security projects built by the Department of Homeland Security. She has also defended royalty accounting cases brought under various mineral royalty statutes, and has prosecuted and defended quiet title actions involving the federal government.

Ms. Fitzgerald earned her B.A., *cum laude*, in Biology from the University of Connecticut, where she was also an Honor's Program Graduate and the recipient of the 1992 Ecology and Evolutionary Biology Award for Achievement in the Study of Conservation Biology.

Ms. Fitzgerald earned her J.D., *magna cum laude*, and M.S.L. (Master of Studies) in Environmental Law, *summa cum laude*, from Vermont Law School. She was also a member of the Vermont Law Review, which published her student note, *Extending Public Trust Duties to Vermont's Agen-*

Donna S. Fitzgerald, U.S. Department of Justice

cies: A Logical Interpretation of the Common Law Public Trust Doctrine, 19 Vt. Law Rev. 509 (1995), and she was awarded the American Jurisprudence Award for her study of Corporations Law.

Ms. Fitzgerald earned an LL.M., with highest honors, in Litigation and Dispute Resolution and a second LL.M. in International and Comparative Law, both from The George Washington University Law School.

Ms. Fitzgerald is licensed to practice law in the State of Connecticut. Ms. Fitzgerald has defended cases in many district courts in the western United States, including several cases in the United States District Court for the District of Idaho, and has handled appeals to the United States Court of Appeals for the Eleventh Circuit and the Ninth Circuit.

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2008 UPCOMING EVENTS

Highlights

May 30 - 31, 2008
Fourth Annual Tri-State Seminar
Location: Jackson, Wyoming
Contact: Kelley Anderson, Gifford & Brinkerhoff
at (307) 265-3265

Community Service Project - Page 6 for more details.

Committee Chair, Katie Ball, Staff Attorney
Chambers of Chief United States Magistrate Judge Larry M. Boyle
James A. McClure Federal Building and U.S. Courthouse
550 West Fort Street, 5th Floor
Boise, Idaho 83724
(208) 334-9010
Kate_Ball@id.uscourts.gov

COMMUNITY SERVICE PROJECT

FBA Idaho Chapter — 2008 Community Service Project

Please Help!

Our Chapter has decided to donate books for needy children in northern Idaho this year as our community service project. Access to books is essential for reading development; the number of books in a home directly correlates with children's reading scores. However, while the ratio of books to children in middle-income neighborhoods is approximately 13 books to 1 child, the ratio in low-income neighborhoods is 1 book to 300 children. In addition, over 80% of childcare centers serving low-income children lack age-appropriate books.

Our goal is to provide 200 books for an elementary school or two in a low-income area. We will work with Barry McHugh and Ted Creason in identifying the schools in the northern part of our state.

This year's project is part of a continuing goal to give back to our communities by helping fill a need for children without resources to obtain educational materials. Last year we collected school supplies to help children in eastern Idaho have a successful school year.

Please help make this year's project a success by collecting new or slightly used children's books for our book drive and look for an email in May providing details on where to drop your donations. If you do not have time to purchase books, you can make a cash donation and we will purchase the books for you. Checks should be made payable to the Idaho Chapter, FBA, and mailed to the address below. Please be sure and indicate on the check it is for our Community Service Book Drive Project. Thank you for your willingness to give back to our community!

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Chambers of Chief United States Magistrate Judge Larry M. Boyle

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FOURTH ANNUAL TRI-STATE SEMINAR JACKSON, WYOMING

Mark your calendars!

The Wyoming Chapter of the Federal Bar Association will be hosting the Fourth Annual FBA Tri-State Seminar in Jackson, Wyoming on **May 30 and 31**. The Wyoming, Utah and Idaho Chapters are committed to the continued success of this annual event!

This year's seminar will again offer an opportunity to interact with several districts judges, including a panel discussion with the Chief Judges of each district. The program agenda will include a discussion of the FBA Government Relations 2007-2008 Issues Agenda, a discussion of environmental issues in the West, an update on the law governing sentencing issues, ideas for reducing the high costs of litigation, and much more.

A total of 9 CLE hours will be offered. Don't miss this unique opportunity to meet and network with colleagues from our neighboring states of Utah and Wyoming. Watch for seminar brochures to be sent out in early April, or contact Kelley Anderson, (307) 265-3265, for more information. We hope to see you there!

The Seminar will be held at Jackson's Center for the Arts. Hotel rooms have been blocked at the following locations:

The Wort Hotel ($209/night, deluxe room) - (800) 322-2727 or (307) 733-2190

Refer to the Regional Federal Bar Association Group, Booking ID # 6886

*Snow King Resort ($125 - $155) - (*800) 522-5464

Refer to the Regional Federal Bar Association block. Condominiums will also be offered on a space available basis.

Contact:
Kelley Anderson
Gifford & Brinkerhoff
(307)265-3265

A Recap by Betty Richardson of the recent Brown Bag CLE — *Environmental Issues in the West*

Few topics generate more controversy and more litigation throughout the western United States than those pertaining to the use, management and regulation of our natural resources. On March 19, 2008, the Idaho Chapter of the Federal Bar Association presented a stimulating Brown Bag CLE program addressing many of the key issues and challenges faced by environmental lawyers.

Entitled "Environmental Issues in the West," the program featured outstanding presentations by two of Idaho's most experienced environmental litigators, Assistant United States Attorney Deborah Ferguson and Laird Lucas, Executive Director of *Advocates for the West*, a public interest law firm based in Boise, Idaho.

As a senior environmental litigator in the U.S. Attorney's civil law division, Deborah has represented various federal agencies, including the Forest Service, the Bureau of Land management, the Department of Energy, and the United States Federal Highway Administration in more than 300 federal cases in Idaho and before the Ninth Circuit.

Laird's firm, *Advocates for the West*, provides free legal services to conservation groups in Idaho, as well as other western states, on environmental and natural resource issues. Laird has been lead counsel on dozens of cutting-edge cases in Idaho and around the West and is widely recognized as a most capable advocate for environmental protection.

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Although Deborah and Laird often represent opposing clients in federal court, both noted that law suits often force decisions that are overdue and that satisfactory settlements can result when all sides are willing to consider creative solutions to seemingly intractable problems. Both also acknowledged that the Ninth Circuit Court of Appeals has, on occasion, sent conflicting messages and provided somewhat uneven guidance on key environmental issues.

Although many of the attorneys in attendance practice in the area of environmental litigation, many do not. Nonetheless, both presentations offered a most helpful overview of environmental litigation, useful even to those who do not practice environmental law. As one attorney remarked upon leaving the program, "That was great. I've never had an environmental case. Now I finally have an idea what NEPA is all about."

STUDENT LOAN DEFAULT PROSECUTIONS

This year has seen a rise in debt collection actions by the U.S. Government for student loan defaults. Some of these debts are decades old as Congress eliminated any statute of limitations defenses with 20 U.S.C. § 1091a. At this point, none of the listed Defendants have retained counsel. Amy S. Howe, Assistant United States Attorney, Boise, Idaho, represents the Government.

United States v. Spanton, CV-08-95-E-BLW

In late 2003, Defendant executed a promissory note. In July 2006, Defendant defaulted on the obligation.

United States v. Weir, CV-08-093-S-BLW

The Government is seeking to collect on two prior loans. The first loan is from a promissory note executed in 1986 and defaulted in 1989. The second loan was granted and executed in 2002 and defaulted in 2006.

United States v. Johnson, CV-08-94-S-EJL

In 1988, Defendant executed promissory note to the Northwest Bank South Dakota. Again in 1990, Defendant executed another note with the same bank for the same amount and terms. Later in 1990, Defendant defaulted on these obligations. After collection efforts failed, right and title of the loans was transferred to the Department of Education.

United States v. Priest, CV-08-73-S-LMB

In 1995 and 1996, Defendant executed three promissory notes with the Department of Education. In 1997, Defendant defaulted on those obligations.

COMPLAINTS FILED IN FEDERAL COURT

Western Watersheds Project v. Interior Board of Land Appeals et al.,

CV-07-0498-BLW - Federal Question

- Todd C. Tucci, Advocates for the West, Boise, Idaho, for the Plaintiff
- Deborah A Ferguson, Assistant U.S. Attorney, Boise, Idaho, for the Defendants

Plaintiffs challenge an administrative decision of the Interior Board Land Appeals' (IBLA) denying their motion for attorney's fees and costs. Those costs were incurred from two other successfully appealed decisions, both modifying the Bureau of Land Management's (BLM) grazing decisions for the Hardtrigger allotment in the Owyhee Resource Area.

The IBLA denied the motion based on their interpretation of the Equal Access to Justice Act, 5 U.S.C. § 504, leaving Plaintiffs with the costs incurred by the past successful challenges to BLM decisions. Plaintiff seeks a reversal the IBLA decision as arbitrary, capricious and an abuse of discretion.

Fritzsche et al. v. Metropolitan Life Insurance Company,

CV-07-196-BLW - Removal, Diversity

- Daniel P. Featherston, Featherston Law Firm, Sandpoint, Idaho;
  and Michael G. Brady, Brady Law, Boise, Idaho, for the Plaintiffs
- Bruce John Blohowiak, Algeo, Clark & Erickson, Spokane, Washington;
  and Tracy Crane, Holland & Hart, Boise, Idaho, for Defendants

Plaintiffs, payees under a MetLife structured settlement agreement, claim they have been wrongfully denied certain monthly payments. Plaintiffs allege they made multiple efforts to contact the Defendant regarding the dispute, with no answer. Plaintiffs now seek damages for tortuous interference with contract, negligence, bad faith and attorney fees. Defendant claims the disputed payments were paid out in a lump-sum on a prior date.

COMPLAINTS FILED IN FEDERAL COURT

Wilson v. Northwest Cosmetic Laboratories, LLC, CV-08-101-WFD FLSA, Federal Question

- James D. Holman, Thomsen & Stephens, Idaho Falls, Idaho, for Plaintiff
- John M. Ohman, Cox Ohman & Brandstetter, Idaho Falls, Idaho, for Defendants

Defendant employed Plaintiff as a maintenance worker on manufacturing machinery. Although initially paid hourly, Plaintiff alleges his hourly pay was converted to an annual salary. Plaintiff alleges he was regularly required to work in excess of 40 hours per week without overtime compensation, a violation of the Fair Labor Standards Act (FLSA). Plaintiff seeks unpaid overtime wages plus additional amounts as liquidated damages and attorney fees.

United States v. King, CR-08-02-E-BLW Safe Drinking Water Act, Federal Question

- George Breitsameter, Assistant United States Attorney, Boise, ID for the Government
- P. Larry Westerberg, Westberg McCabe & Collins, Boise, ID for the Defendant

Defendant is the farm manager and partner at Double C Farms Partnership/Lambert Produce, Inc., a cattle feedlot operation in Burley, Idaho. King faces five counts, four related to groundwater contamination and one concerning false statements.

Irrigation wells located on or near the operation are monitored by the Idaho State Department of Agriculture (ISDA). In May of 2005, an ISDA inspection revealed a collapsed bank of a waste pond was overflowing into a ditch that empties into an irrigation pond. The inspection also revealed two irrigation well valves were improperly installed, allowing water to flow back into the subsurface. Later that day the inspector noticed the valves had been properly reinstalled. In a subsequent interview, an employee of the facility admitted installing the valves backwards to allow backflow into the aquifer.

On a subsequent visit, ISDA staff observed a valve they had been monitoring had been covered up with dirt. When asked about the buried valve, King initially denied its existence, later acknowledging it and providing additional information. An employee interviewed later provided information contrary to that given by King.

COMPLAINTS FILED IN FEDERAL COURT

Williams v. Precision Dental Arts, CV-08-092-S-EJL — FLSA, Federal Question

- James D. Holman, Thomsen & Stephens, Idaho Falls, Idaho for Plaintiff
- Counsel for Defendant to be named

Defendant employed Plaintiff as a ceramist, engaged in manufacture and repair of dentures and dental appliances. Plaintiff was paid on a monthly salary basis, during which time he alleges was consistently required to work over 40 hours per week without overtime compensation. Plaintiff seeks damages in the amount of unpaid overtime, liquidated damages and attorney fees.

Tamari v. PCS Edventures!.com, CV-08-89-S-MHW — Contract Breach, Diversity

- Matthew A. Johnson and Julie Klein Fischer, White Peterson, Nampa, ID for Plaintiff
- Lynnette M. Davis, Hawley Troxell Ennis & Hawley, Boise, Idaho, for Defendants

Defendant hired Plaintiff and signed an employment agreement in 2004. Under this agreement, Plaintiff assigned Defendant distribution rights in return for an arrangement of monthly and annual compensation. The agreement required a good faith effort by the Defendant in the sale of the relevant products. Plaintiff claims breach of contract for failure to properly compensate according to the terms of the contract. Plaintiff also claims Defendant failed to make a good faith effort to promote sales as per the contracts terms and implied covenants. Plaintiff seeks contract damages, punitive damages and attorney fees.

COMPLAINTS FILED IN FEDERAL COURT

Capetillo, et. al. v. Ford Motor Co., CV-08-75-S-EJL Product Liability, Diversity

- Tracy Crane and Walter H. Bithell, Holland & Hart, Boise, Idaho for Plaintiffs
- Jed W. Manwaring, Evans Keane, Boise, Idaho, and
  Lee Mickus, Snell & Wilmer, Denver, Colorado, for Defendant

An automobile accident occurred after the tread of Plaintiff's tires separated, causing her Ford Expedition to lose control, rolling several times. There were five passengers in the vehicle, including the driver. During the roll-over, the front passenger door opened, which Plaintiff alleges was due to a defectively designed latch mechanism. The front passenger restraint system also failed to restrain the passenger due to defective design. Plaintiffs allege these defects directly and proximately caused the damages and losses, including the wrongful death of the decedent.

Plaintiffs are injured parties for purposes of the negligence claim as well as relatives and heirs for purposes of a wrongful death claim. The original compliant listed Big O Tire, as well as other entities as Defendants. After the other parties were dismissed, Plaintiffs removed the action to federal court.

Plaintiffs claim negligence in design, manufacturing, and marketing; negligence per se; and negligent infliction of emotional distress; Plaintiffs seek damages for personal injury, property damages, as well as special damages to be proven at trial.

COMPLAINTS FILED IN FEDERAL COURT

Buck Owens v. Great Northern Broadcasting et al., CV-08-66-S-EJL

Trademark/Servicemark Infringement, Federal Question

- Ken Howell, Hawley Troxell Ennis and Hawley, LLP, Boise, Idaho for Plaintiff
- Counsel for Defendant to be named

Buck Owens owns and operates an AM/FM radio station (KUZZ) in Kern County, California. Mr. Owens also owns a restaurant called "Buck Owens Crystal Palace" in Bakersfield, California. On display at the museum housed at the "Crystal Palace" is a prototype of his trademark red, white and blue guitar. Mr. Owens claims that he began using this guitar as early as the 1960's in connection with performances including the television show "Hee-Haw." The Plaintiff has previously licensed the use of this guitar to retailers such as Sears and Roebuck and Co. In 2003 the Plaintiff obtained registration of a stylized representation of this guitar as a service mark in connection with his radio station and as a service mark for entertainment services in connection with the "Crystal Palace."

The Plaintiff alleges that the service mark utilized by radio stations operating under the trade name "K-102" is deceptively similar to the ones used by Mr. Owens in connection with his radio station and the "Crystal Palace." In his Complaint, the Plaintiff has alleged infringement of his trademark under the Lanham Act, False Designation of Origin, Unfair Competition and Deceptive Trade Practices, Injury to Business Reputation and Dilution under I.C. §48-512, Common-law Service Mark Infringement, and Unfair Competition. The Plaintiff has requested equitable and injunctive relief in addition to monetary damages.

COMPLAINTS FILED IN FEDERAL COURT

Hunt v. Team Performance, et al., CV-08-69-S-EJL

Fraud, Civil Conspiracy, and Conversion, Diversity Jurisdiction

- Robert A. Faucher and Brad A. Goergen, Holland & Hart, Boise, Idaho, for Plaintiff
- Daniel L. Glynn, Trout Jones Gledhill and Fuhrman, Boise, Idaho, for Defendant

Plaintiff and one of the defendants worked together at a company responsible for installing and monitoring security and fire protection systems. Plaintiff alleges that he and defendant Kyle agreed to form their own company to install and monitor the same types of systems. The plaintiff had the company incorporated as "Team Performance" in the state of Nevada. The plaintiff also claims that he contributed $206,000.00 in start-up costs in addition to pledging his personal credit for the benefit of the business.

The plaintiff claims that he was never issued stock in the company as was anticipated by the parties and that he was wrongfully excluded from participation in the business when one of the defendants purported to fire him. Team Performance paid $168,994.14 based on Hunt's original contribution of $206,000. Hunt reserved his claim regarding an equity position in the company. The plaintiff is seeking monetary damages, declaratory relief and a writ of mandamus to issue stock and distribute assets.

The plaintiff is requesting damages of approximately $2,800,000, including wages, bonuses, medical and dental benefits, deferred compensation, compensation under a restoration plan, and paid time off. The plaintiff also seeks an award of treble damages for any unpaid compensation found due and owing.

COMPLAINTS FILED IN FEDERAL COURT

Johnson v. URS Corporation CV-08-82-S-EJL Idaho Wage Claims Act, Contract, Diversity

- Eric S. Rossman and Erica S. Phillips of Rossman Law Group
- James L. Martin and Gerald T. Husch, Moffatt, Thomas, Barrett, Rock & Fields Boise, Idaho for Plaintiff
- Eugene A. Ritti, Hawley Troxell Ennis & Hawley, Boise, Idaho for Defendants

The plaintiff was hired by the defendant's predecessor company, Washington Group International (WGI), in 2001. In 2006 the plaintiff and WGI entered into a Severance Agreement wherein WGI promised to pay the defendant severance pay and other benefits if the company underwent a change of control and "good cause," as defined by the agreement, existed for payment. The plaintiff claims that as a result of URS acquiring WGI he was subject to an adverse change in the scope of his employment that met the "good cause" standard of the Agreement and thereby allowed the plaintiff to terminate his employment and entitled him to the benefits described in the agreement.

The plaintiff is requesting damages of approximately $2,800,000, including wages, bonuses, medical and dental benefits, deferred compensation, compensation under a restoration plan, and paid time off. The plaintiff also seeks an award of treble damages for any unpaid compensation found due and owing.

COMPLAINTS FILED IN FEDERAL COURT

Fleming v. Coverstone, CV-08-81-S-LMB

Contract, Defamation and Extortion, Diversity Jurisdiction

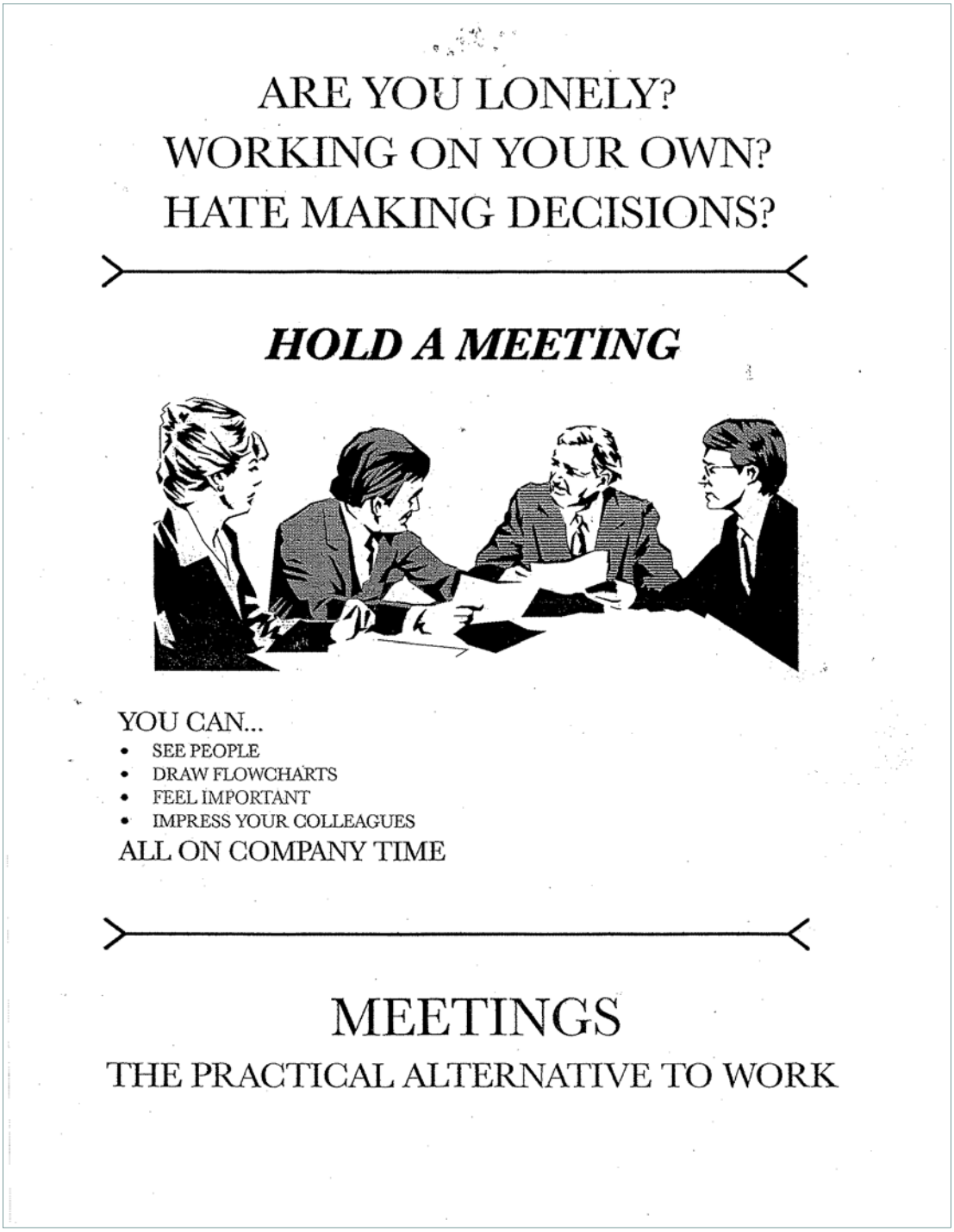
- Bradlee R. Frazer and Steven F. Schossberger, Hawley Troxell Ennis & Hawley, Boise, Idaho for Plaintiff
- Counsel for Defendant to be named

Both the plaintiff and defendant are patent attorneys. The parties entered into a contract for the defendant to buy a family of issued United States patents from the plaintiff. The defendant paid a non-refundable deposit toward the purchase price. The defendant then engaged the plaintiff to assist him with prosecution of the patents and enforcing the patents against third parties once the consummation of the purchase was to be complete.

One day before the transaction was to be complete, the plaintiff alleges that the defendant gave him notice of his decision to anticipatorily breach the contract and at which time he demanded the return of his deposit. The plaintiff claims that the defendant published false statements regarding his truthfulness, character, and veracity as well as accusing him of illegal conduct and legal malpractice. The plaintiff alleges that the defendant threatened to report the plaintiff to various Bar associations and others in an effort to "impugn and discredit" him if he did not return the defendant's deposit. The plaintiff requests monetary damages, including punitive damages for the defamation claim.

A Note from Judge Mikel H. Williams

As Judge Williams reflected upon his years on the bench and working for the judiciary, he decided to share some words of wisdom he's learned through the years. So he's offering his advice below. He thinks he might be destined to become a career coach, or better yet, a motivational speaker.



RECENT SUPREME CIRCUIT DECISION

Justice Samuel A. Alito, Jr.
United States Supreme Court

Snyder v. Louisiana, (No. 06-10119)
Argued: December 4, 2007 -- Decided: March 19, 2008
Justice Alito, author

During voir dire in petitioner's capital murder case, the prosecutor used peremptory strikes to eliminate black prospective jurors who had survived challenges for cause. The jury convicted petitioner and sentenced him to death. Both on direct appeal and on remand in light of *Miller-El v. Dretke*, 545 U. S. 231, the Louisiana Supreme Court rejected petitioner's claim that the prosecution's peremptory strikes of certain prospective jurors, including Mr. Brooks, were based on race, in violation of *Batson v. Kentucky*, 476 U. S. 79.

Held: The trial judge committed clear error in rejecting the *Batson* objection to the strike of Mr. Brooks.

(a) Under Batson's three-step process for adjudicating claims such as petitioner's, (1) a defendant must make a prima facie showing that the challenge was based on race; (2) if so, "'the prosecution must offer a race-neutral basis for striking the juror in question'"; and (3) "'in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.'" *Miller-El*, supra, at 277 (Thomas, J., dissenting) (quoting *Miller-El v. Cockrell*, 537 U.S. 322). Unless it is clearly erroneous, the trial court's ruling must be sustained on appeal. The trial court's role is pivotal, for it must evaluate the demeanor of the prosecutor exercising the challenge and the juror being excluded.

(b) While all of the circumstances bearing on the racial animosity issue must be consulted in considering a *Batson* objection or reviewing a ruling claimed to be a Batson error, the explanation given for striking Mr. Brooks, a college senior attempting to fulfill his student-teaching obligation, is insufficient by itself and suffices for a Batson error determination.

(Continued on next page)

RECENT SUPREME COURT DECISION

Justice Alito's decision in Snyder v. Louisiana continued from previous page

(1) It cannot be presumed that the trial court credited the prosecution's first race-neutral reason, that Mr. Brooks looked nervous. Deference is owed to a trial judge's finding that an attorney credibly relied on demeanor in exercising a strike, but here, the trial judge simply allowed the challenge without explanation. Since Mr. Brooks was not challenged until the day after he was questioned and thus after dozens of other jurors had been called, the judge might not have recalled his demeanor. Or he may have found such consideration unnecessary, instead basing his ruling on the second proffered reason for the strike.

(2) That reason--Mr. Brooks' student-teaching obligation--fails even under the highly deferential standard of review applicable here. Mr. Brooks was 1 of more than 50 venire members expressing concern that jury service or sequestration would interfere with work, school, family, or other obligations. Although he was initially concerned about making up lost teaching time, he expressed no further concern once a law clerk reported that the school's dean would work with Mr. Brooks if he missed time for a trial that week, and the prosecutor did not question him more deeply about the matter. The proffered reason must be evaluated in light of the circumstances that the colloquy and law clerk report took place on Tuesday, the prosecution struck Mr. Brooks on Wednesday, the trial's guilt phase ended on Thursday, and its penalty phase ended on Friday. The prosecutor's scenario--that Mr. Brooks would have been inclined to find petitioner guilty of a lesser included offense to obviate the need for a penalty phase--is both highly speculative and unlikely. Mr. Brooks would be in a position to shorten the trial only if most or all of the jurors had favored a lesser verdict. Perhaps most telling, the trial's brevity, which the prosecutor anticipated on the record during voir dire, meant that jury service would not have seriously interfered with Mr. Brooks' ability to complete his student teaching. The dean offered to work with him, and the trial occurred relatively early in the fall term, giving Mr. Brooks several weeks to make up the conflicting obligations that appear to have been at least as serious as Mr. Brooks'. Under Batson's third stage, the prosecution's pretextual explanation gives rise to an inference of discriminatory intent. There is no need to decide here whether, in Batson cases, once a

Justice Alito's decision in Snyder v. Louisiana continued from previous page

discriminatory intent is shown to be a motivating factor, the burden shifts to the prosecution to show that the discriminatory factor was not determinative. It is enough to recognize that a peremptory strike shown to have been motivated in substantial part by discriminatory intent could not be sustained based on any lesser showing by the prosecution. The record here does not show that the prosecution would have pre-emptively challenged Mr. Brooks based on his nervousness alone, and there is no realistic possibility that the subtle question of causation could be profitably explored further on remand more than a decade after petitioner's trial.

942 So. 2d 484, reversed and remanded.

Alito, J., delivered the opinion of the Court, in which Roberts, C.J., and Stevens, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Thomas, J., filed a dissenting opinion, in which Scalia, J., joined.

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RECENT NINTH CIRCUIT DECISIONS

Judge Sandra Ikuta
U.S. Court of Appeals
for the Ninth Circuit

Harrison v. Ollison, 06-55470

Appeal from: S.D. Cal. [Sabraw, J.]

Panel: Wallace, T. G. Nelson, and Ikuta (author)

Subject Matter: Habeas Corpus

Holding: Affirming the district court's denial of a federal prisoner's habeas corpus petition for lack of jurisdiction, the panel held that no certificate of appealability was required because the habeas petition was brought in good faith under 28 U.S.C. § 2241, rather than under § 2255. The panel held that the habeas petition did not qualify for the escape hatch of § 2255, allowing a federal prisoner to bring a habeas petition under § 2241 when a motion under § 2255 is inadequate or ineffective to test the legality of the prisoner's detention.

Rejecting the prisoner's claim that he was actually innocent of violating 18 U.S.C. § 844(i), and could not have brought this claim until the Supreme Court interpreted the interstate commerce requirement of § 844(i) in *Jones v. United States* in 2000, the panel held that the prisoner could have brought the claim earlier, and his failure to do so was not caused by procedural obstructions, but by his own defaults. The panel held that the prisoner's pleading must be characterized as a disguised § 2255 motion, and the district court lacked jurisdiction because the § 2255 motion was successive.

RECENT NINTH CIRCUIT DECISIONS

Judge Ronald M. Gould
U.S. Court of Appeals
for the Ninth Circuit

United States v. Davenport, 06-30596

Appeal from: D. Mont. [Molloy, J.]

Panel: Canby, Graber (dissenting), and Gould (author)

Subject Matter: Criminal Law

Holding: The panel vacated a criminal judgment imposed by the district court and remanded. Reviewing for plain error, the panel held that possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B) is a lesser included offense of receipt of receipt of child pornography under 18 U.S.C. § 2252A(a)(2), and that the defendant's simultaneous conviction for both offenses violates the Fifth Amendment's prohibition on double jeopardy. In so holding, the panel declined to consider affirmative defenses that do not directly negate an element of the crime, but instead address mitigating circumstances, as "facts" that "require" proof for purposes of the *Blockburger* lesser-included offense test.

Judge Susan Graber
U.S. Court of Appeals
for the Ninth Circuit

Dissenting, Judge Graber wrote that the majority creates a circuit split by announcing a new interpretation of the *Blockburger* test, and ignores Congress' clear intent to authorize cumulative punishment for the crimes of receipt and possession.

RECENT NINTH CIRCUIT DECISIONS

Judge Susan Graber
U.S. Court of Appeals
for the Ninth Circuit

Marceau v. Blackfeet Housing Authority, 04-35210

Appeal from: D. Mont. [Haddon, J.]

Panel: Pregerson (concurring in part, dissenting in part), Graber (author), and Gould

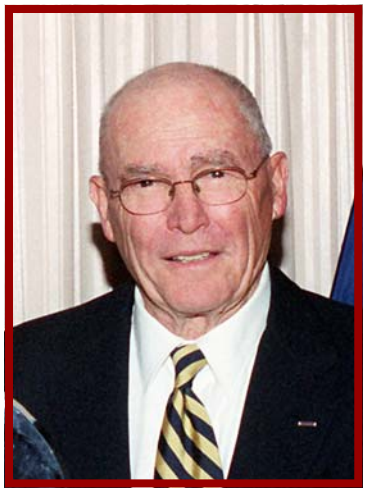
Subject Matter: Tribal Law / Administrative Procedure Act

Holding: In a published order, the panel held that its opinion filed on July 21, 2006, and published at 455 F.3d 974 (9th Cir. 2006), is replaced in part and adopted in part by the amended opinion filed concurrently with the order.

The panel affirmed in part, and reversed in part the district court's Fed. R. Civ. P. 12(b)(6) dismissal of plaintiffs' complaint. The plaintiffs, who are members of the Blackfeet Indian Tribe and who bought or leased houses built under the auspices of the United States Department of Housing and Urban Development ("HUD"), sued HUD and the Tribal Housing Authority, alleging that wooden housing foundations, which were treated with toxic chemicals, caused plaintiffs' houses to deteriorate and caused health problems for the residents. In the amended opinion, the panel held that: the Tribal Housing Authority forfeited its claim to tribal exhaustion, and in any event, waived its tribal immunity; the government did not undertake a trust responsibility toward plaintiffs to construct houses or maintain or repair houses; and plaintiffs alleged sufficient facts to state claims against HUD and the Administrative Procedure Act ("APA"). The panel adopted the earlier opinion with respect to plaintiffs' breach of contract claims. Accordingly, the panel affirmed the district court's dismissal of the case except as to plaintiffs' claims against the Tribal Housing Authority and its board members and plaintiffs' claims under the APA. The panel remanded for further proceedings.

(Continued on next page with Judge Pregerson's concurrence and dissent)

RECENT NINTH CIRCUIT DECISIONS



Judge Harry Pregerson

(concurring in part, and dissenting in part)

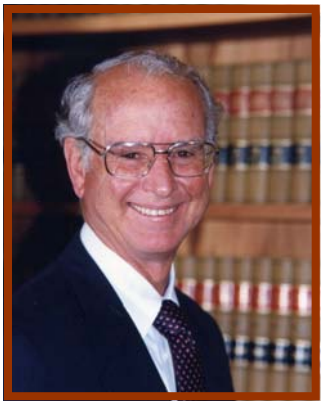
U.S. Court of Appeals for the Ninth Circuit

Marceau v. Blackfeet Housing Authority (continued)

Judge Pregerson concurred in the majority's rulings on tribal immunity and the APA, and dissented with regard to the majority's analysis of federal trust responsibility.

Judge Pregerson wrote that because the government undertook to fulfill its responsibility to provide housing for the tribe and did so through a pervasive regulatory structure, he would hold that the federal government, having undertaken this task, had an obligation to perform it in a manner consistent with its fiduciary duty to the tribe. Judge Pregerson concluded that the government breached its duty to the tribe.

RECENT NINTH CIRCUIT DECISIONS



Judge David Thompson
U.S. Court of Appeals
for the Ninth Circuit

United States v. Gianelli, 07-10233

Appeal from: N.D. Cal. [Whyte, J.]

Panel: Canby, Thompson (author), and M. Smith

Subject Matter: Criminal Law

Holding: Affirming the district court's May 2007 order reinstating an October 2001 Order Imposing Payment Plan aimed at collecting the remaining amount of restitution owed to the federal government by the defendant as part of the defendant's 1987 sentence for mail fraud, the panel rejected the defendant's contention that because California state law precludes enforcement of a judgment after ten years, the government is barred from enforcing the restitution judgment.

The panel explained that because the Victim Witness Protection Act (VWPA) does not express the intent that the federal government will be bound by state statutes of limitations in the enforcement of restitution judgments, and because neither the VWPA nor any other federal statute limits the time for enforcement of restitution judgments under the VWPA, the government may enforce against the defendant the VWPA restitution judgment at any time.

The panel also held that the defendant waived his objection under *Hughey v. United States*, 495 U.S. 411 (1990), to the amount of the 1987 restitution order by failing to file a direct appeal from the 1987 judgment.

RECENT NINTH CIRCUIT DECISIONS

Chief Judge Alex Kozinski
U.S. Court of Appeals
for the Ninth Circuit

New Hampshire Insurance Co. v. C'est Moi, Inc., 06-55031

Appeal from: C.D. Cal. [Carter, J.]

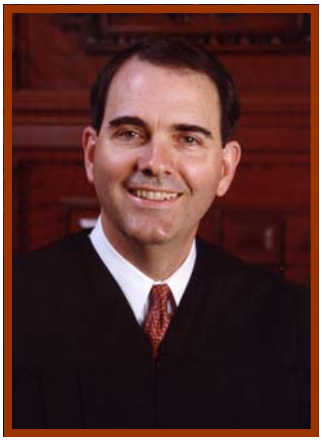
Panel: Kozinski (author), Rawlinson, and Cedarbaum, D.J.

Subject Matter: Maritime / Insurance

Holding: The panel affirmed the district court's summary judgment in favor of an insurance company that sought to rescind a marine insurance policy it had issued to a yacht owner. The doctrine of *uberrimae fidei* imposes a duty of utmost good faith so that an applicant for a marine insurance policy is bound to reveal every fact within its knowledge that is material to the risk.

The panel held that a clause in the parties' insurance policy did not eliminate the insured's *uberrimae fidei* obligation, and declined to follow the Eleventh Circuit's holding that a similar policy clause was sufficient to supersede the insured's duty. The panel also held that the insured made a material misrepresentation to the insurer in the insurance policy application. The panel concluded that the insurer was therefore entitled to rescind the policy, and that the district court correctly granted summary judgment to the insurer.

RECENT NINTH CIRCUIT DECISIONS



Judge Jay S. Bybee
U.S. Court of Appeals
for the Ninth Circuit

United States v. Holland, 06-30258

Appeal from: D. Id. [Lodge, J.]

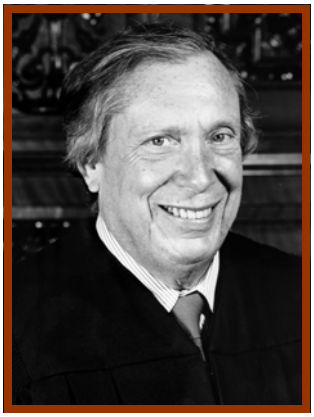
Panel: Thompson, Kleinfeld, and Bybee (author)

Subject Matter: Criminal Law

Holding: The panel withdrew an opinion filed September 4, 2007, and filed a new opinion affirming a criminal judgment imposed by the district court following the defendant's guilty plea to mailing threatening communications and threatening the President of the United States.

The defendant maintained that the district judge who imposed the sentence should have recused himself after the defendant obtained the judge's home telephone number and left at least one threatening message prior to sentencing. Reviewing for plain error, the panel held that the district judge reasonably construed the defendant's threatening phone message as an attempt to manipulate the court system, which did not warrant his sua sponte recusal under 28 U.S.C. § 455.

RECENT NINTH CIRCUIT DECISIONS



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

United States v. Approximately 64,695 Pounds of Shark Fins, 05-56274

Appeal from: S.D. Cal. [Moskowitz, J.]

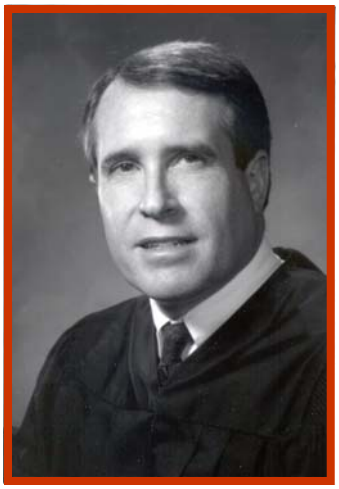
Panel: Reinhardt (author), Fisher, and Clifton

Subject Matter: Shark Fin Prohibition Act

Holding: The panel reversed the district court's judgment of forfeiture, and remanded for further proceedings. The United States government sought the forfeiture of 64,695 pounds of shark fins found on board the King Diamond II, a United States vessel. The government seized the fins pursuant to the Shark Finning Prohibition Act, which makes it unlawful for any person aboard a U.S. fishing vessel to possess hark fins obtained through prohibited "shark finning."

The panel held that neither the statute nor the regulations provided notice to the claimant that the King Diamond II would be considered a fishing vessel under the Act, and therefore the forfeiture of the shark fins violated due process.

JURY TRIALS IN THE DISTRICT OF IDAHO



Chief Judge B. Lynn Winmill
United States District Court
for the District of Idaho

United States v. Higinio Tafolla-Gonzalez, Ramiro Pimentel-Garcia, and Daniel Martinez-Brambila -
CR-07-88-E-BLW

Jury trial February 4, 2008 in Pocatello, Idaho

For the Government:
Asst. U.S. Attorney Mike Fica

For Defendant Tafolla-Gonzalez:
Randall Barnum, Boise

For Defendant Pimentel-Garcia:
John Cutler, Idaho Falls

For Defendant Martinez-Brambila:
C. Tom Arkoosh,
Arkoosh Law Offices, Gooding

Verdict: Defendants found guilty of distribution of controlled substances, and other charges

Sentencings will be scheduled in Pocatello in summer.

United States v. Peter Kim and Connie Kim
CR-07-170-S-BLW
Jury Trial March 31, 2008 in Boise

For the Government:
Assistant U.S. Attorney Kevin Maloney

For Defendant Peter Kim
Charles F. Peterson
Peterson Law Offices, Boise

For Defendant Connie Kim
Robert K. Schwarz
Federal Defenders of Idaho

Verdict: As to Peter Kim - Guilty of Trafficking Counterfeit items, and guilty of other charges; and Judgment of Acquittal for Connie Kim

Sentencing set June 27, 2008 in Boise

Chief United States
Magistrate Judge
Larry M. Boyle
United States District Court

UPDATE

Lang v. Kempthorne
CV-05-324-S-LMB
Trial held in Boise
December 2007

For the Plaintiff:

Paul J. Augustine

Augustine & McKenzie, PLLC

Boise, ID

For the Defendant:

JoAnne P. Rodriguez

Assistant United States Attorney

Boise, ID

Plaintiff awarded $37,640.00 in attorneys' fees and $1,121.63 in costs.

Judgment in favor of Plaintiff as to liability, but no award on issue of emotional distress. However, the Court later awarded Plaintiff $51,283.94 in past loses and $12,932.40 in future losses for a combined total loss award of $64,216.34.

JURY TRIALS IN THE DISTRICT OF IDAHO

Magistrate Judge
Mikel H. Williams
United States District Court
for the District of Idaho
(retired and on recall)

Bjornson v. Dave Smith Motors
CV-04-285-N-MHW
Jury Trial held in Coeur d'Alene
February 26, 2008

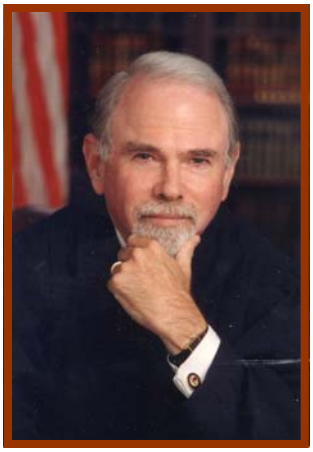
For the Plaintiff:
April M. Linscott and
Marc A. Lyons
Ramsden & Lyons, LLP
Coeur d'Alene, Idaho

For the Defendant
Phillip J. Collaer and
Robert A. Anderson
Anderson Julian & Hull
Boise, Idaho

Complaint: Charges of Sexual Harassment.

Verdict: In Favor of Plaintiff. Damages in the amount of $1.00; Punitive damages in the amount of $100,000.

VISITING JUDGES IN THE DISTRICT OF IDAHO



Judge William B. Shubb
Senior, U.S. District Judge
Northern District
of California
Sitting by Special
Designation

Muffley v. Gem County

CV-05-466-S-BLW

February 19, 2008
Boise, Idaho

For the Plaintiff:
Julie Klein Fischer
and Sarah H. Arnett
White Peterson

For the Defendant:
Bruce J. Castleton and
Kirtlan G. Naylor
Naylor and Hales

Verdict was in favor of the
Defendant

VISITING JUDGES IN THE DISTRICT OF IDAHO

Judge Marsha J. Pechman
United States District Judge for the Western District of Washington
Sitting by Special Designation

US v. Javier Castaneda

CV-07-173-S-EJL
March 11, 2008
Boise, Idaho

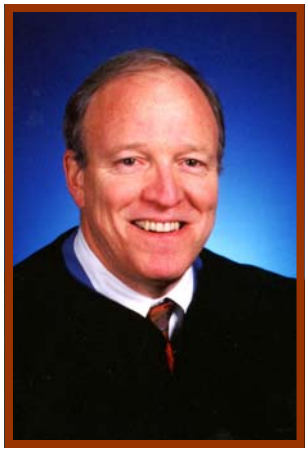
For the Plaintiff:
Monte Stiles
Assistant U.S. Attorney

For the Defendant:
Thomas B. Dominick
Dominick Law Offices, PLLC
Boise, Idaho

Verdict: Guilty as to Count 1 of Conspiracy to Distribute/Possess with the Intent to Distribute Methamphetamine; and Hung Jury as to Count 2 to Distribute/Possess with the Intent to Distribute Methamphetamine

Sentencing set July 21, 2008 at 10:30 a.m. in Boise

VISITING JUDGES IN THE DISTRICT OF IDAHO



Chief Judge Robert H. Whaley
United States District Judge
for the Eastern District
of Washington
Sitting by Special Designation

US v. Beltran, Barraza, & Burris

CR-02-179-N-EJL
March 11, 2008
Coeur d'Alene, Idaho

For the Plaintiff:
Nancy Cook
Assistant U.S. Attorney

For Defendant Jose R. Beltran
David E. Dokken
Creason Moore & Dokken
Lewiston, Idaho

Verdict: Guilty of Possession with Intent to Distribute Meth

For Defendant Juan Barraza

Christopher Alden Bugbee
Bugbee Law Offices, PS
Spokane, Washington
Verdict: Not Guilty of Possession with Intent to Distribute Meth

For Defendant Virgil L. Burris

Terence M. Ryan
Spokane, Washington

Verdict: Guilty of Possession with Intent to Distribute Meth

Sentencings set in July 2008 before Judge Whaley in Coeur d'Alene

SPECIAL THANKS!

Thanks and Appreciation to

Sean Beck and
Chris Jones Berglund, Esq.

for providing the synopsis
of this edition's Complaints

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