Federal Bar Association
Idaho Chapter

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Bankruptcy Appeals: We're Off to See the Wizard

Now What do we Do?

Even as an experienced federal litigator, you were somewhat uncomfortable when your client asked you to represent its interests in that Chapter 11 case in bankruptcy court. Now, you're bordering on sheer panic since the bankruptcy court has honored you with an adverse ruling, and your client is screaming "APPEAL!" You feel like you're over the rainbow and longing for Kansas. If not before, is now the time to bite the bullet and consult a bankruptcy specialist?

Written by:
Jim D. Pappas
United States Bankruptcy Judge
District of Idaho

Not necessarily. You've handled lots of appeals, and what you can expect to encounter in prosecuting a bankruptcy appeal should seem familiar, even if the yellow brick road you must navigate is foreign. To help you along the way, here's some advice from the man behind the curtain about what you will encounter on your voyage through this appellate process.

Judge Pappas is also a Member of The Ninth Circuit Bankruptcy Appellate Panel

An Overview of Bankruptcy Appellate Jurisdiction and BAPs

When Congress rewrote the bankruptcy laws in 1978 by creating separate federal bankruptcy courts in each district, it also adopted an innovative new system for processing appeals from the decisions of those courts. First, it granted jurisdiction to the U.S. District Courts to hear appeals from all final judgments and orders entered by the bankruptcy courts, and, with the district court's permission, from interlocutory orders. 28 U.S.C. § 158(a). There was little new or exciting about this approach.

U.S. PROBATION AND PRETRIAL SERVICES OFFICE

By Marilyn Grisham, Chief

As an arm of the Court, statutorily mandated to carry out certain functions, the U.S. Probation and Pretrial Services Officers in the District of Idaho, along with support staff (including an IT department), are some of the very best and brightest in the nation.

The District of Idaho, encompassing the State of Idaho, combines probation and pretrial functions. While headquartered in Boise, there are four divisional offices located in Coeur d'Alene, Moscow, Twin Falls, and Pocatello. Our staff is comprised of twenty-one officers, eight administrative personnel, including clerks and a staff of two in the IT department.

The officers are responsible for carrying out the duties associated with three primary functions: preparing pretrial services reports and supervising those defendants the Court places under their supervision; preparing presentence reports and supervising offenders placed on probation, parole, supervised release and military parole. Many officers specialize in one area; however several officers still work as generalists, primarily because geography has so dictated.

Much has changed in the last twenty years and the same is true of the probation office. Since 1987 the District of Idaho has opened a divisional office in Coeur d'Alene, hired the first female officer (now there are five), moved from word processors to personal computers for all staff, secretaries were replaced by clerks, officers learned to type and the Sentencing Reform Act became effective.

As a result of the Sentencing Reform Act, the Sentencing Commission was created and sentencing guidelines were promulgated and enacted. The implementation of the sentencing guidelines has changed our landscape more so than any other law, rule, regulation or order. Although earlier challenges to the constitutionality of the sentencing guidelines did not prevail, after 19 years the Supreme Court in its Booker decision marked another major transformation in the law of federal criminal sentencing. Simply stated, Booker rendered the sentencing guidelines advisory rather than mandatory. This by no means completes the circle of federal sentencing history. Within those 19 years there have been 679 Amendments to the sentencing guidelines, appellate court decisions that affect many, if not all aspects of sentencings and significant court decisions that affect post-conviction supervision.

PROBATION & PRETRIAL SERVICES (continued from page 2)

Not unlike the changes in federal sentencing laws, the types of cases prosecuted and thus ultimately supervised have changed significantly. Officers now supervise a much more violent and dangerous population than they did 20 years ago. They have many more tools available to them and the emphasis is squarely on officer safety. While equipped with pepper spray, ballistic vests, firearms and aided by laptops, cell phones/PDAs and government vehicles, it is their professional demeanor that allows them to return home safely at the end of each day. Every officer knows their first line of defense is their presence accompanied by their verbal skills. In 20 years no officer has been accosted by an individual under supervision, although there have been threats made by offenders' family members and attacks made by dogs.

Throughout the years, officers and staff have learned to expect and accept change; some even embrace it. As a national probation system, the philosophy has changed to a more results driven organization. We have begun to use evidence-based practices and policies when dealing with offenders, while concurrently experiencing cut-backs and cost-containment efforts.

As mentioned, there are eight administrative staff and two IT staff who also play a very important role in the success of the organization. The District of Idaho is always, and proudly so, on the cutting edge of information technology. The IT staff is often called upon by the national office to assist in problem solving or to act as a beta court for new projects. The IT staff are admired for the creative, innovative and intelligent approach they have to furthering the goals of the office. Perhaps more so than any other position, the clerical positions have been completely transformed in the past 20 years. Whereas typing/proofreading was their primary function 20 years ago, and even 10 years ago, they are now responsible for all data entry, starting with a pretrial defendant's first court appearance and ending with the conclusion of an offender's term of post-conviction supervision. The importance of the data entry can not be underscored, as it is this national data base that determines staffing levels. In addition to these duties, they are involved in procurement, budget and dozens of other tasks.

Our greatest resource is our staff, and I am proud to say we have a team that is unmatched anywhere else in the country. While no-one can predict what changes the next 20 years will bring, I am confident we will rise to the occasion and continue to provide a service to the Court and public that is professional and viewed as extremely valuable.

# # #

JUDGE JIM PAPPAS

(continued from page 1)

However, in a rather bold move, Congress also provided that, if the judicial circuits desired to do so, special bankruptcy appellate panels ("BAPs") could be established to hear bankruptcy appeals. 28 U.S.C. § 158(b)(1). If a BAP was established in a circuit, individual districts within the circuit were authorized to refer bankruptcy appeals to the BAP. 28 U.S.C. § 158(b)(6).

The Ninth Circuit almost immediately authorized the creation of its BAP in 1979, and it has operated continuously since then. And all districts in the Ninth Circuit have adopted orders or rules referring, with the consent of the parties, bankruptcy appeals to the BAP. Currently, BAPs are also operating in the First, Sixth, Eighth and Tenth Circuits, although the Ninth Circuit's BAP, not surprisingly, handles the most appeals by far.

As mentioned, appeals go to the BAP only by consent of the parties. However, the bankruptcy court will presume the parties intend an appeal to be heard by the BAP unless one or more of them "opt out." To opt out, the appellant *at the time of filing the notice of appeal*, or any other party *not later than 30 days after service of the notice of appeal*, must file an election to have the appeal decided by the district court in which the bankruptcy case is pending. 28 U.S.C. § 158(c). If a timely opt out election is not filed, the appeal will be heard by the BAP. In most instances, a notice of appeal from a decision by the bankruptcy court must be filed within ten days of entry . 28 U.S.C. § 158(c)(2); Fed. R. Bankr. P. 8002. As a result, the appellant must not only promptly decide whether to appeal, but must also determine *where* to appeal very early in the process. And even if the appellant decides its best prospects are to take its appeal to the BAP, the appellees may veto that decision in favor of the district court.

But there's another consideration for appellant's counsel. In 2005, again in connection with a package of changes to the bankruptcy laws, Congress has adopted yet another innovative approach to processing bankruptcy appeals. It is now possible to appeal a final order of the bankruptcy court *directly to the court of appeals*, bypassing the district court/BAP in some instances. 28 U.S.C. § 158(d)(2). This option applies only to appeals from orders entered in bankruptcy cases commenced on or after October 17, 2005, the date the new law became effective. To qualify for a "direct appeal" to the circuit, the order must be "certified" as either involving a question of law as to which there is no controlling circuit authority; a question of law as to which there is conflicting authority; or where immediate appeal to the circuit will materially advance the progress of the case in which the appeal is taken. 28 U.S.C. § 158(d)(2)(A). Depending upon the status of the appeal, either the bankruptcy court, district court, the BAP, or in limited instances, the parties themselves, may make the necessary certification for direct appeal. 28 U.S.C. § 158(d)(2)(B), (c). However, even if certified, the court of appeals must authorize the direct appeal. It will be interesting to see how many, and under what circumstances, the busy Ninth Circuit will accept direct appeals.

JUDGE JIM PAPPAS

(continued from page 4)

At the Emerald City – The Ninth Circuit BAP

Now here's where the federal litigator starts to feel more at home. While Part 8000 of the Federal Rules of Bankruptcy Procedure governs bankruptcy appeals, those Rules are very similar to the Federal Rules of Appellate Procedure. The Rules describe how to designate and assemble the record on appeal, motion practice, briefs, and oral arguments. The Ninth Circuit BAP also has adopted local rules to fill in gaps of the national rules.

The Ninth Circuit BAP is headquartered in the historic Court of Appeals courthouse in Pasadena, California where the BAP clerk and staff supervise processing of about 400-500 appeals annually. Last year, the BAP handled about 55% of the total bankruptcy appeals in the Ninth Circuit. The BAP has an internet website (www.ce9.uscourts.gov/bap) where all sorts of helpful information may be accessed, and the BAP's docket (but, as of yet, not its files) is available to access at this website via the federal courts PACER system (http://pacer.bap09.uscourts.gov/).

An appeal to the BAP is heard by a panel of three sitting bankruptcy judges. Of course, no bankruptcy judge may hear an appeal originating in the judge's own district. 28 U.S.C. § 158(b)(5). The circuit judicial council is responsible for appointing members of the BAP. In the Ninth Circuit, the BAP currently consists of six members from different districts, each appointed for seven-year terms. At least two members of the Panel, randomly assigned, will participate in deciding each appeal; pro tem judges are occasionally designated by the Ninth Circuit to participate on BAP panels.

Notably, and contrary to the common practice in most district courts, all bankruptcy appeals to the Ninth Circuit BAP are scheduled for oral arguments. The BAP conducts oral arguments monthly in different locations around the circuit. It attempts to hear appeals in the districts where they originate, but for smaller districts where there are few appeals, parties will occasionally be invited to appear at a regional location. However, the BAP attempts to accommodate requests by parties to appear and argue appeals by telephone or video conference, if practicable. While the parties may waive oral argument before the BAP, counsel should carefully weigh the decision to do so. Frequently, the panel judges have important questions to pose to counsel about an appeal, in many instances about items or topics which may not be readily apparent from the record and briefs.

JUDGE JIM PAPPAS

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All dispositions of BAP appeals are set forth in written, reasoned decisions. Occasionally, a disposition will be designated by the BAP for publication, in which event it will be afforded precedential value in deciding future BAP appeals. BAP decisions are not binding in the district courts; whether BAP decisions are binding in the bankruptcy courts has not been resolved by the Ninth Circuit. Whether binding on other courts or not, though, experience teaches that well-reasoned BAP decisions are regarded as persuasive by the Court of Appeals, as well as district and bankruptcy courts, in this circuit.

Was it all just a dream?

Usually within six to nine months after deciding to appeal the bankruptcy court's decision, you and your client will have a decision. Hopefully, in addition to being a quality disposition, it was a favorable result. If not, you can then decide whether to appeal further to the Court of Appeals. 28 U.S.C. § 158(d).

In a circuit the size of the Ninth, I am fortunate to have been appointed to serve on its BAP. The other Panel judges are experienced, knowledgeable bankruptcy jurists, and the BAP maintains a skilled, professional staff. While participating in disposing of ten or more appeals per month can be a chore, I believe the BAP offers lawyers and litigants in bankruptcy cases a unique opportunity to obtain review before a panel of bankruptcy law specialists. While all sorts of factors and strategies may impact your decision whether an appeal from a bankruptcy court's order should go to the district court or BAP, counsel should not be discouraged from trying the BAP route simply because they lack experience!

If Idaho's federal lawyers have questions about the BAP or bankruptcy appeals, please contact me. If appropriate, I'd like to give you some additional helpful information and refer you to those who can answer all your questions.

# # #

BRAD WILLIAMS, NEW FBA EXECUTIVE COMMITTEE MEMBER

The Idaho Chapter of the Federal Bar Association welcomes its newest member to the Executive Board, Brad Williams.

Welcome Brad!

Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

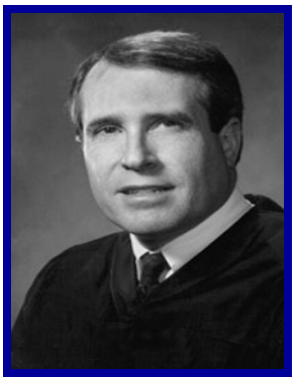
Bradley J. Williams joined the firm in 1991 after serving a two-year judicial clerkship for Idaho Supreme Court Chief Justice Robert E. Bakes. His practice includes insurance defense, commercial and real estate litigation, legal malpractice, medical malpractice, products liability, premises liability and employment law. Mr. Williams has represented clients in over twenty court and jury trials, and has appeared before the Idaho Appellate Courts on numerous occasions. He is a frequent lecturer on litigation, insurance, employment and trial practice, and has authored articles on insurance bad-faith and employment litigation.

Mr. Williams is a member of the American Bar Association, Litigation and Tort and Insurance Practices Sections, and the Idaho State Bar Litigation Section. Mr. Williams is a member of the Idaho Association of Defense Counsel, the Defense Research Institute, and is a member of the Executive Committee of the Federal Bar Association. Mr. Williams was on the Committee of the Idaho State Bar of Professionalism and Ethics Section. Mr. Williams is a member of the Federal Bar Association, Idaho Chapter.

Mr. Williams earned his Bachelor of Arts degree in American Studies from Idaho State University in 1986. He received his Juris Doctor from the University of Idaho College of Law in 1989.

IDAHO STATE BAR'S DISTINGUISHED LAWYER OF THE YEAR: JUDGE B. LYNN WINMILL

The Hon. B. Lynn Winmill was born in Blackfoot, Idaho during a blizzard in March of 1952. His parents owned and operated a dairy farm, though not financially a success, did provide this parents with ample opportunities to teach their children about hard work, about reaping what one sows, and to seek their life's work somewhere besides dairy farming. During his high school years Lynn was a good debater and student. He applied to and was accepted at Idaho State University where he planned to major in medicine. An English 101 paper he wrote on Clarence Darrow caused him to look more closely at the legal profession and the critical role lawyers play in changing and improving society. While doing research and reading about lawyers like Adams, Jefferson, and Hamilton who provided the nation's democratic theory: Lincoln who steered the country as it weathered the Civil War; and Charles Hamilton Houston, Thurgood Marshall, and Jack Greenberg who worked to liberate the nation from segregation, Lynn decided a legal career would be more satisfying than a medical career. He spent the next four years working towards that goal, managing to serve as ISU Student Body President and still graduate with High Honors before attending Harvard University to pursue his law degree. After graduation Lynn joined the law firm Holland & Hart in Denver for a couple of years before moving back to Pocatello. It was here that Don Burnett, current Dean of the University of Idaho College of Law taught him every client – big or small, rich or poor, lofty or humble – is deserving of the same first-quality legal advice and representation. Judge Winmill said, "Dean Burnett's commitment to exactness, preparation, and professionalism, even when it is unlikely services will be compensated inspired me to be a better lawyer." Judge Winmill carried this philosophy over to his career on the bench saying, ". . . it is critical every litigant, including those whose cases arise in obscurity, receives the same careful, thoughtful, and reflective attention of the presiding judge."



When Judge Winmill was 21 his father died. A compassionate, empathetic, and caring man he could deal with life issues with optimism, confidence, and firmness. His influence has followed Judge Winmill through life. Judge Winmill often asks himself, "what would my Dad do? Invariably, the answer to that questions has proven to be, not only the proper choice, but the one that has made all the difference in my life."

As a lawyer right out of law school, the biggest hurdle facing Lynn was confidence. As a new lawyer at Holland & Hart, he was assigned to work with litigator Bill McClearn on a large antitrust case. One day, Bill took his young charge to lunch to talk about the nuances of their case. He told Lynn he was developing into a fine lawyer, but needed to work on having more confidence. Bill told him it was important to have confidence in any undertaking, and important to do all the preliminary work necessary for success, whether writing briefs, preparing for oral argument, or getting your case ready for your case for trial. If Lynn would do everything within his power to make those things happen

CHIEF JUDGE WINMILL

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then going forward with confidence would carry him the rest of the way. Lynn has followed that lesson – to be thorough in preparation and confident in presentation throughout his career.

Judge Winmill has many professional accomplishments in life. Being appointed as a federal judge was clearly one of the highlights. But, being appointed a state district court judge by Governor Cecil Andrus in 1987 gave him the most pleasure. It was his work as a state district judge that defined his judicial philosophy, temperament, and outlook; and had a fundamental affect on his entire outlook on life and the human experience.

Reflecting on his time in the legal field, Judge Winmill believes there are important attributes about being an attorney that haven't changed: your word as your bond; your arguments are zealous but never personal; and your approach to the profession as a calling rather than a job. However, the challenge for today's young lawyers is trying to maintain these standards with more competition, and fewer chances to be financially successful without taking ethical shortcuts. Computerized legal research, electronic filing, and evidence presentations systems are an integral part of being an effective practitioner in today's legal field. Continuing legal education and mentoring programs are more available and relevant to the practice of law; and the makeup of the Bar has changed to reflect the changes in society. While the practice of law has changed, Judge Winmill feels the fundamental values of hard work; honesty, integrity, and ethical conduct remain the same.

Judge Winmill has long been active in Bar/Foundation committees and activities. As a young lawyer he was involved in grading bar exams, organizing Law Day activities, writing a weekly law column for the Idaho State Journal and doing pro bono work for the Idaho Volunteer Lawyers Program. After his appointment as District Judge of the Sixth Judicial District he continued to support the Bar by speaking at bar association meetings, Law Day events, and Bar-sponsored CLE programs. He wrote a sentencing exercise for laypersons that has been presented in speaking engagements throughout Idaho, and is used as a lesson for the Citizens' Law Academy, and is now part of a program discussing the merits and efficacy of the death penalty. He was awarded the 1995 Professional Achievement Award from the ISU Alumni Association, the 2000 Statesman of the Year Award given by Pi Sigma Alpha, ISU Political Science Honor Fraternity; 2004 Advocate Award Best Article from the Idaho State Bar, and named in 2006 as one of the 500 Leading Judges in the United States. He has been a Scoutmaster for the Boy Scouts of America, a Board Member of the Idaho Humanities Council, on the Adjunct Faculty of ISU, Chair of Idaho Supreme Court's Evidence Rules Committee, Member of Board of Visitors of the J. Reuben Clark Law School, Moot Court judge for University of Idaho College of Law and J. Reuben Clark Law School; current member of Information Technology Committee of the Judicial Conference of the United States; Instructor at UI College of Law Trial Advocacy Course, initiated formation of the Idaho Chapter of the Federal Bar Association, instructor for the Citizens' Law Academy, co-founder and member of the Idaho Legal History Society, current member of Ninth Circuit Judicial Council, and Chair of the Council of the Ninth Circuit Chief District Judges.

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CHIEF JUDGE WINMILL

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The recognition, experiences, and awards Judge Winmill has received in his professional life are reflective of his career. But, the most important, and most satisfying aspect of his life is that of husband, father, and grandfather. Judge Winmill said, "I would not trade a lifetime of success in the business world or the courtroom for any of the precious moments I have experienced while caring for a sick child, coaching a son or daughter in basketball or soccer, seeing the smile on their faces when I came home from work, and witnessing their growth into adulthood."

He has been married to his high school sweetheart, Judy since 1973. They have four children: Kristen Southwick (husband Brady, two children - Clair and Eliza), Singapore; Jeff, George Washington University Law School, Caitlin, New York City, and Carley Tanner (Jonathan) Provo, Utah.

William "Bud" F. Yost, left, also received the 2006 Distinguished Lawyer of the Year Award. He is pictured with Chief Judge B. Lynn Winmill.

LISA MESLER RECEIVES SERVICE AWARD FROM THE IDAHO STATE BAR

Lisa Mesler received a Distinguished Service Award from the Idaho State Bar at the 2006 Annual Convention in July, 2006 in Sun Valley, Idaho. She was recognized for her contributions to the improvement of the legal profession through her service to the Idaho State Bar Foundation.

Ms. Mesler is a career Law Clerk to the Honorable Mikel H. Williams, U.S. District Court. She is a graduate of Touro College/Jacob D. Fuchsberg Law Center. Lisa has been an active volunteer since she joined the Idaho Bar in 2001. She is a member of the Lawyer Assistance Program Committee and is serving a second term on the Professional Conduct Board. She has been a bar exam grader since 2001, a CLE program presenter and serves as a high school Mock Trial competition judge.

Ms. Mesler also belongs to the American Inn of Court — the bencher level and serves as program director. She is a member of the Board of the Idaho Women Lawyers and is a member of the Idaho Chapter of the Federal Bar Association.

She and her husband Ron live in Boise and have two dog-children, Duke and Chili.

Order Published by District Judge Gregory A. Presnell, District of Florida

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

AVISTA MANAGEMENT, INC., d/b/a Avista Plex, Inc.,

Plaintiff,

-vs-

Case No. 6:05-cv-1430-Orl-31JGG (Consolidated)

WAUSAU UNDERWRITERS INSURANCE COMPANY,

Defendant.

ORDER

This matter comes before the Court on Plaintiff's Motion to designate location of a Rule 30(b)(6) deposition (Doc. 105). Upon consideration of the Motion – the latest in a series of Gordian knots that the parties have been unable to untangle without enlisting the assistance of the federal courts – it is

ORDERED that said Motion is DENIED. Instead, the Court will fashion a new form of alternative dispute resolution, to wit: at 4:00 P.M. on Friday, June 30, 2006, counsel shall convene at a neutral site agreeable to both parties. If counsel cannot agree on a neutral site, they shall meet on the front steps of the Sam M. Gibbons U.S. Courthouse, 801 North Florida Ave., Tampa, Florida 33602. Each lawyer shall be entitled to be accompanied by one paralegal who shall act as an attendant and witness. At that time and location, counsel shall engage in one (1) game of "rock, paper, scissors." The winner of this engagement shall be entitled to select the location for the 30(b)(6) deposition to be held somewhere in Hillsborough County during the period July 11-12, 2006. If either party disputes the outcome of this engagement, an appeal may be filed and a hearing will be held at 8:30 A.M. on Friday, July 7, 2006 before the undersigned in Courtroom 3, George C. Young United States Courthouse and Federal Building, 80 North Hughey Avenue,

(continued from page 4)

Orlando, Florida 32801.

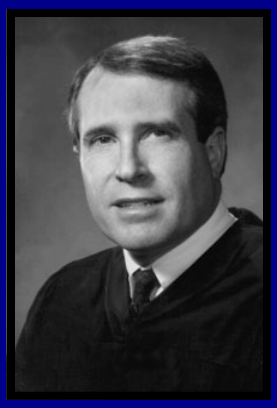
DONE and **ORDERED** in Chambers, Orlando, Florida on June 6, 2006.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies Furnished to:

Counsel of Record
Unrepresented Party

Jury Verdicts, District of Idaho



Chief Judge
B. Lynn Winmill
District of Idaho

United States v. Quincy Pongah
CR-04-263-E-BLW
Judge Winmill, May 2006

Guilty: possession with intent to distribute methamphetamine, and assault on a federal officer

For the Government:
Michael J. Fica
Assistant United States Attorney

For the Defendant:
Manuel T. Murdoch
Parmenter and Associates
Blackfoot, Idaho

United States v. Quintana-Ramirez and Gomez-Guevara
CR-05-124-S-BLW
Judge Fm. Nielsen, May 2006

Verdicts: Guilty, possession with intent to distribute methamphetamine and marijuana, and use of phone to facilitate felony drug offenses

For the Government:
Monte J. Stiles

For the Defendant:
- **Teresa Hampton (for Quintana-Ramirez)**

Hampton & Elliott
- **Rob S. Lewis (for Gomez-Guevara)**

Judge Edward J. Lodge
District of Idaho

Millenkamp Cattle v. Davisco
CV-03-439-S-EJL
Judge Lodge, May 2006

For the Plaintiff:
C. Tom Arkoosh and David Heida
Arkoosh Law Offices

For Defendant Davisco:
Kenneth Ross White
Law Office of Kenneth R. White
Mankato, Minnesota

Thomas H. Lopez
Lopez & Kelly, Boise, Idaho

Christopher H. Meyer
Givens Pursley, Boise, Idaho

Verdict: Judgment for Plaintiff Damages in the Amount of $303,758.92

US v. Madsen/Nelson
CV-06-42-E-BLW
Judge Winmill, July 2006

For the Government:
AUSA Michelle Mallard

For Defendant Madsen:
Mark A. Echohawk
Echohawk Law Offices

For Defendant Nelson:
Keith A. Zollinger
McDermott & Zollinger

Verdict: Guilty—possession of iodine to be used for producing methamphetamine

PRO BONO ATTORNEYS — THANKS FROM THE DISTRICT OF IDAHO!!!

These attorneys deserve special recognition for their pro bono work in the District of Idaho. Thank you for your dedication and hard work for pro se litigants and prisoners in our district!!

Tyler Anderson and Larry Hunter, Moffatt Thomas (Boise)
Richard Boardman, Perkins Coie (Boise)
Eric Boyington (Boise)
Lea Cooper (Boise)
Pat Costello, University of Idaho College of Law (Moscow)
Debra Ellers (McCall)
Nicole Hancock, Stoel Rives (Boise)
Lowell Hawkes and Ryan Lewis (Pocatello)
James D. Holman, Thomsen Stephens (Idaho Falls)
Dana Hofstetter (Boise)
Fred Hoopes, Hopkins, Roden, Crockett, Hansen & Hoopes (Idaho Falls)
Maureen Laflin, University of Idaho College of Law (Moscow)
Ken Lyman (Boise)
Mia Mazza, Morrison & Foerster (San Francisco)
Ted Murdock, Holland & Hart (Boise)
Sheryl Musgrove (Boise)
Ellen Smith (Boise)
Brad Sneed, Givens Pursley (Boise)

News by Chapter President Ted Creason

IN REVIEW . . .

As the Idaho Chapter of the Federal Bar Association completes its second year, I would like to highlight some activities that have brought the Chapter recognition and success. These activities are successes because of the creative and conscientious work of the Chapter's Executive Board with extraordinary, volunteered personal time from Susie Headlee and Lisa Mesler.

If you have visited the District Court's website lately, you already know that the Chapter's newsletter has been judged by the national organization to be an outstanding publication. We are proud of the recognition the newsletter has received and we are grateful for the special contributions by Judge Myers (first issue) Chief Judge Mary Schroeder (second issue) and Judge Pappas. All have shared important information from the bench of interest to our membership.

Do you as a member of this Chapter have a contribution of general interest to federal practitioners you believe is worth sharing? If you do, please submit it for consideration. Our newsletter provides a valuable and widely read forum for our membership. Thoughtful contributions from our members and from judges will keep the publication strong and vibrant.

A first cabin multi-jurisdictional CLE and conference is poised and ready to launch on September 22 and 23 in Sun Valley. You can read all about it and how you can participate elsewhere in this newsletter. Please take this opportunity to benefit from the outstanding planning and execution skills of Wendy Olson, Barry McHugh and the rest of the Executive Committee. We plan to have some fun as we inform ourselves of the needs and services of our federal courts and meet a number of the people who make things happen in our district, Wyoming, Utah and Montana.

Chapter President's Message

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The Chapter's annual meeting and elections in Sun Valley in July brings another great resource to the Executive Board. It has been my privilege to work with a very talented group of lawyers this past year, and as I say farewell to the Executive Committee I would like to introduce to those who do not know him already, our newest member, Bradley J. Williams.

Brad practices with the eastern Idaho contingent of the Moffatt Thomas firm. He is a highly respected and experienced practitioner in federal court as well as Idaho trial and appellate courts. After a two-year judicial clerkship for Chief Justice Robert E. Bakes, Brad has practiced in the areas of insurance defense, commercial and real estate litigation, legal malpractice, medical malpractice, products liability, premise liability and employment law. Brad is an alumna of the University of Idaho College of Law. Brad is an all around good lawyer, and you can be sure that with this kind of leadership the organization will find ways to meet the needs and objectives of the federal court system and the lawyers who practice there.

Congratulations on your election, Brad, I know you will enjoy your work with the FBA.

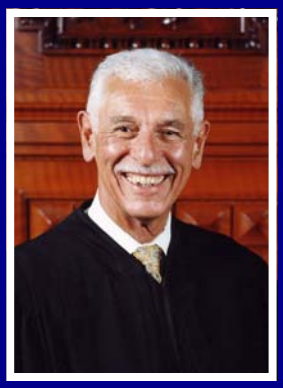
FBA Local Chapter

Contact Information:

Theodore O. Creason
1219 Idaho Street
P.O. Drawer 835
Lewiston, ID 83501
(208) 743-1516

tcreason@cmd-law.com

RECENT DECISIONS—NINTH CIRCUIT



Judge Carlos Bea
Ninth Circuit Court of Appeals

United States v. Manzo-Jurado, 452 F.3d 1028 (June 20, 2006), amended by 2006 WL 21117377 (D. Mont.) (Bea, Canby and Gould (dissenting)). The Court reversed the denial of a suppression motion, holding that officers lacked reasonable suspicion to believe the defendant was in the country illegally. Border patrol officers saw a group of Hispanic men stopped outside a championship high school football game near the Canadian border. The officers suspected the men of being illegal aliens based on their apparent Hispanic ethnicity, their appearance as a work crew, their proximity to the Canadian border, their inability to speak English, the fact that they appeared out of place at the football game, and defendant's behavior in leaving the game early and changing course when he saw a border patrol officer. The Court held that the men's Hispanic appearance, language, proximity to the border and appearance as a work crew could have some relevance, that was not sufficient to establish reasonable suspicion. The Court held that the other factors were not relevant in the context of other observations made by the border patrol officers. Because the stop was improper, the district court should have granted the defendant's motion to suppress his admission that he was in the United States illegally and his motion to suppress the evidence of his fake social security card. Judge Gould dissented, believing that the Court should have deferred to the judgment of the border patrol officers in drawing inferences from their observations of the persons involved.

Opinion by Judge Bea, United States Court of Appeals for the Ninth Circuit

Photo Above

United States v. Romm, 2006 WL 2042827 (July 24, 2006) (D. Nev.) (Bea, B. Fletcher, Thompson). The defendant had a laptop on which he had viewed, but did not save or download, several child pornography images. When he flew to Canada on business, he admitted to Canadian customs officials that he had a prior state misdemeanor for trying to entice a minor into a sexual encounter. Canadian customs officials asked to look at his laptop and saw the child porn sites in the history. They ultimately refused his admission and sent him back to the United States. In Seattle, the defendant was Mirandized and interviewed and his computer was seized. Examination of the laptop revealed ten images that at one point had been in his temporary cache. The Court held that the seizure and analysis of the computer was a valid border search; the fact that he had been denied admission into Canada did not mean that he had not left the United States, so long as he was physically across the border. The Court also held that the images in the temporary cache were "visual depictions" as defined in the child pornography statute, and that the images and the defendant's statements were sufficient to prove possession. The Court relied on the fact that while the images were displayed on the defendant's screen, and simultaneously saved to the cash, the defendant had control over them, could print them, enlarge them, copy them or e-mail them to others.

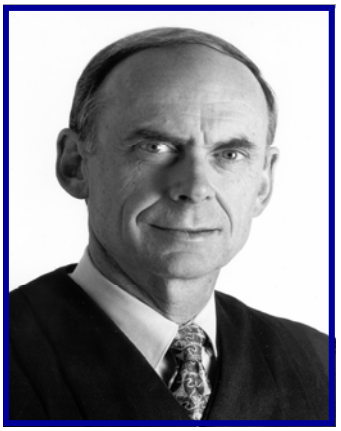
United States v. Cortez-Rivera, 2006 WL 2042894 (July 24, 2006) (S.D. Cal.)(Trott, Reinhardt, Wardlaw). In this appeal, the defendant challenged the model instruction given to the grand jury as unconstitutionally invading the grand jury's province. Specifically, he challenged the instruction that the grand jury "should not be concerned about punishment in the event of convictions; judges alone determine punishment." The Court held that because the instruction reads "should" rather than "shall," it leaves sufficient flexibility to the grand jury to disregard the instruction should it decide to, and therefore does not invade the grand jury's province.

Judge Stephen S. Trott
Ninth Circuit Court
of Appeals

United States v. Lyons, 2006 WL 1975901 (July 17, 2006) (D. Hawaii) (McKeown, Thomas, King). The Court upheld the defendants' First Amendment and evidentiary rulings challenges following the defendants' mail fraud/money laundering convictions in connection with their operation of a fundraising business (NAA) operated through telemarketers' solicitation of contribution for several churches they formed that had no congregations, services or places of worship. To facilitate the scheme, the defendants created six charities with names to attract sympathy and donations, i.e., Children's Assistance Fund and Handicapped Youth Services. The telemarketers took 80%, 10 % went to the charities and 10% went to the NAA. The telemarketers script and pamphlets written by the defendants made representations about how the charities would use the donations. Throughout the trial, the government referred to the "high commissions" taken by the telemarketers as evidence that defendants spent almost no money on charitable activities. The district court instructed the jury that high fund-raising costs, or the mere failure to tell the donee the fund-raiser's fee, was insufficient to establish fraud. On appeal, the Ninth Circuit upheld the jury instructions and concluded that the instructions did not allow the jury to convict for protected First Amendment activity.

Judge Margaret
McKeown
Ninth Circuit Court
of Appeals

United States v. Adjani and Reinhold, 452 F.3d 1140 (July 11, 2006) (C.D. Cal.) (Fisher, Schroeder, Friedman). The Court held that the affidavit stated probably cause for the search of a non-target's computer where the computer itself was located in the home of the target of an extortion plot carried out through the use of computers. The Court also held that the warrant was not overbroad and rejected the defendant's argument that the warrant should have limited the areas for search within a computer, such as restricting the search to e-mail in and out boxes. The Court observed that "[c]omputer files are easy to disguise or rename" and that "[t]he government should not be required to trust the suspect's self-labeling when executing a warrant."



Judge Raymond Fisher
Ninth Circuit Court
of Appeals

CIVIL DECISIONS—NINTH CIRCUIT COURT OF APPEALS

Per Curiam Opinion

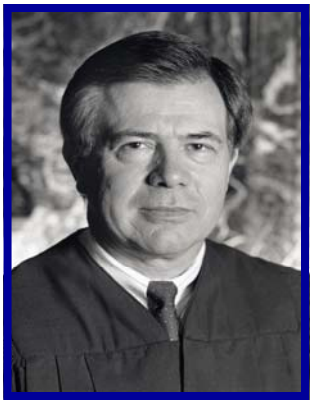
In re Mikhel, 2006 WL 1916082 (July 7, 2006)(C.D. Cal.)(Hawkins, Thomas, Silverman)(per curiam). In a review of the Crime Victims' Rights Act's expedited mandamus procedure, the Court granted the government's petition seeking review of the district court's order limiting the attendance of the victim witnesses at an upcoming capital murder trial. The CVRA requires that crime victims (which include family members of deceased victims) be permitted to attend all public proceedings unless the court finds by clear and convincing evidence that testimony by the victim would be materially altered if the victim heard other testimony. Based on that provision, the government moved in the district court for an order allowing the murder victims' family members to attend the entire trial. The district court denied that request, instead excluding each victim from any portion of the trial involving their loved one until after the victim had testified. The Ninth Circuit reversed. While recognize the general rule that non-party witnesses cannot listen to other witnesses' testimony, the Court noted that there is an exception to the rule for "a person authorized by statute to be present." The Court held that the CVRA created just such an exception for crime victims. The Court held that the district court erred by not determining by clear and convincing evidence whether the victims' testimony would be materially altered and by not considering whether there were reasonable alternatives that would enable the victims to attend the trial. The Court noted that the mere possibility that testimony would be altered is insufficient under the CVRA; the trial court must find by clear and convincing evidence that it is "highly likely" that the victim-witness will alter his or her testimony.

Judge Diarmuid O'Scannlain Ninth Circuit Court of Appeals

United States v. Johnson, D. Nev. (August 29, 2006, 2006 WL 2473442) (O'Scannlain, Hug, Miller). The Ninth Circuit joined the 1st, 4th and 7th Circuits in holding that the "innocent possession" defense is not available as a legal excuse in a felon in possession case where the defendant presents evidence that he obtained the weapon innocently and his possession is transitory. Only the D.C. Circuit has recognized this defense. The Court reasoned that the defense is not in the text of the felon in possession statute, that it is inconsistent with the intent requirement of "knowingly," that there is nothing in the legislative history to support a view that Congress intended that there be such a defense, and that it would unduly burden the prosecution of such cases. The defendant's conviction was affirmed.

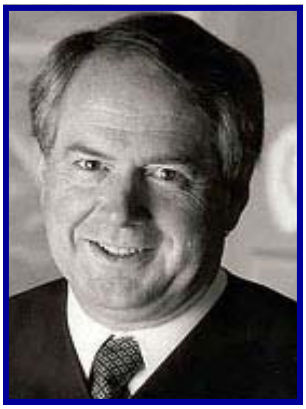
United States v. Salazar-Gonzalez, 2006 WL 1044216 (April 21, 2006)(D. Ariz.)(Fisher, Fletcher, Rymer). In an illegal re-entry case, the Court held that a Certificate of Non-existence of Record, used to prove that the defendant had not received the permission of the appropriate government official to re-enter the United States after having been deported, was not testimonial evidence under *Crawford v. Washington*, 124 S. Ct. 1354 (2004) and was properly admitted as a non-testimonial public record.

Pebble Beach Co. v. Caddy, 04-15577, (April 5, 2006) (N.D. Cal.) 453 F.3d 1151, Judges Schroeder, Trott, and Kleinfeld. Plaintiff Pebble Beach Co., appealed the District Court's ruling that there was no personal jurisdiction over the Defendant. The Defendant operates a bed and breakfast in Barton-on-Sea, England. It sits on a cliff overlooking a pebbly beach. Defendant advertised using the name "Pebble Beach" in the URL. The panel found that there were no minimum contacts with California. The Defendant did not do anything in the forum state and did not direct his activities at the forum state. The Defendant was simply promoting his business in England with a passive website that used the name "Pebble Beach;" this did not constitute purposeful direction of his activities at California.



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

Anderson v. Warner, 04-15505 (October 21, 2005) (N.D. Cal.) 451 F.3d 1063, Judges Thomas, W. Fletcher, District Judge Mahan. The Panel affirmed in part and reversed in part the District Court's grant of summary judgment in the Plaintiff's 42 U.S.C. § 1983 claim. The claim arose out of a traffic accident. Plaintiff rear-ended the Defendant's pickup truck. The Defendant, an off-duty Mendocino County Jail Commander, got out of his car and began to assault the Plaintiff. The Defendant identified himself as a law enforcement officer when bystanders attempted to stop the assault. The panel reversed the lower court's decision that the Defendant was not acting under color of state law at the time of the assault, on the grounds that the Defendant pretended to perform his official duties, invoked his governmental status, and prevented bystanders from assisting the plaintiff. The panel affirmed the lower court's ruling that the county's deficiencies in hiring and training did not show deliberate indifference.



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

MULTI-STATE CLE PROGRAM—September 22 and 23, 2006

The Federal Bar Association's two-day multi-state CLE program will be held September 22-23 at the Sun Valley Lodge. The program, sponsored by the Idaho, Utah, and Wyoming FBA chapters and hosted this year by the Idaho chapter, has been approved by the Idaho State Bar for 9.25 CLE credits.

The program kicks off Friday morning, September 22, with welcoming remarks from Idaho chapter President Ted Creason, followed by national FBA president William LaForge and executive director Jack Lockridge, who will address FBA national priorities. The 2006 legislative agenda includes a number of issues of importance to the three chapters involved in the program, including the split of the Ninth Circuit–which the national FBA has opposed, the need to reaffirm the importance of the independent judiciary, and the need to support efforts to advance fairness and consistency in federal sentencing, while preserving judicial independence and discretion to deal with the particular circumstances of individual cases.

The morning session will feature a multi-faceted presentation addressing "The Politicization of the Federal Bench." Panelists John Flynn, professor emeritus from the University of Utah's S.J. Quinney College of Law, William LaForge, Jack Lockridge, Betty Richardson, former U.S. Attorney for the District of Idaho, and staff members from the offices of United States Senators Orrin Hatch and Larry Craig will discuss the increasing attacks on judicial independence, attempts by Congress to limit federal courts' jurisdiction, heated confirmation battles and the new Supreme Court, including its most recent confirmation hearings. Professor Flynn has commented extensively on the topic of "judicial activism," writing in a 2005 Utah Bar Journal article that "Bar associations and individual members of the bar have been noticeably silent in coming to the defense of judges and an independent judiciary in our system of government. The silence of the Bar has been disquieting, particularly in the face of physical attacks on judges, the growing trend of contested elections for judges at the state level, and by simplistic political attacks on the judiciary for doing the job judges are asked to do in a society governed by the rule of law."

The morning session will conclude with a panel of chief district court judges from the participating chapters, providing an opportunity for both the judges and practitioners to address topics of interest in the federal courts.

The September 22 afternoon session kicks off with a panel on sentencing in federal courts in the twenty months since the United States Supreme Court in *United States v. Booker*, 125 S. Ct. 738 (2005), which found the mandatory use of sentencing guidelines to be unconstitutional. Panelists are B. Lynn Winmill, Chief United States District Judge for the District of Idaho, Kelly Rankin, Assistant United States Attorney, District of Wyoming, Tom Monaghan, Federal Defender's Office of Eastern Washington and Idaho, and Marilyn Grisham, Chief Probation Officer for the District of Idaho. The second afternoon panel features Chief Bankruptcy Judge Terry Myers from the District of Idaho, Janet Tyler of the U.S. Trustee's Office in Wyoming, and Celeste Miller, criminal bankruptcy fraud coordinator in the Ninth Circuit, addressing federal bankruptcy practice after BAPCA, as well as fraud referrals in the bankruptcy process.

The first day of the program closes with retired Idaho State Supreme Court Justice Byron Johnson's presentation on "The Trial of the Century"– the trial of Big Bill Haywood for the assassination of former Idaho Governor Steunenberg. ("Big Bill" on far left).

WILLIAM D. HAYWOOD ON THE WITNESS-STAND AT BOISE, JULY 11

The second day (September 23) is a joint program with the Idaho Association of Defense Counsel and will focus on electronic discovery, including the use of electronic discovery in federal cases, changes in the rules to accommodate and acknowledge electronic discovery, and ethical issues arising out of electronic discovery. At 8:30 a.m. Steven C. Bennett, a partner and commercial litigator in the New York City offices of Jones Day, will give a presentation on strategic issues in electronic discovery. Mr. Bennett has addressed electronic discovery issues before such groups as the American Corporate Counsel Association, Defense Research Institute, the New York States Bar Association and the National Employment Law Conference.

United States Magistrate Judge Mikel Williams, District of Idaho, will discuss federal courts and electronic discovery, including relevant rule changes. The program will conclude with a half hour presentation on ethical considerations in electronic discovery by Brad Andrews of the Idaho State Bar.

Registration fee for the conference is $150.00 for members of the Federal Bar Association, $190.00 for non-members, and $120.00 for federal court staff. Contact Lisa Mesler, Chambers of Judge Williams at (208) 334-9330.

# # #

UPCOMING EVENTS

MULTI-STATE CLE PROGRAM

September 22 and 23, 2006
Sun Valley, Idaho

MULTI-STATE
FBA PROGRAM
including Local Chapters of Idaho, Montana, Utah, and Wyoming

See Previous Page for Details!!

NOTE OF APPRECIATION!

Special thanks to
David Fuller and Russell Wheat
Judicial Externs
United States District Court
Summer Semester, 2006
for preparing case evaluations
For Federal Bar Association newsletters—

Thank you very much!