

UNITED STATES SENATE
COMMITTEE ON THE
JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

David Charles Nye

2. **Position**: State the position for which you have been nominated.

United States District Judge for the District of Idaho

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

Bannock County Courthouse
624 East Center, Room 303
Pocatello, Idaho 83201

4. **Birthplace**: State year and place of birth.

1958; Lynwood, California

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

1983 – 1986, J. Reuben Clark School of Law at Brigham Young University; J.D., 1986

1980 – 1982, Brigham Young University; B.A. in English, 1982

1976 – 1977, University of Utah; no degree

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

2007 – present
Idaho Sixth District Court
624 East Center, Room 303
Pocatello, Idaho 83204
State District Court Judge

1987 – 2007
Merrill & Merrill, Chartered
109 North Arthur, Fifth Floor
Pocatello, Idaho 83204
Partner (1989 – 2007)
Associate (1987 – 1989)

1986 – 1987
Idaho Fifth District Court
1459 Overland Avenue
Burley, Idaho 83318
Law Clerk for District Judge George G. Granata

1984 – 1986
Utah Attorney General Office
Criminal Appeals Division
350 North State Street, Suite 230
Salt Lake City, Utah 84114
Law Clerk

1982 – 1984
BYU Food Services, Cougcreat
(now defunct)
Provo, Utah
Part-Time Employee

1982 – 1984
Swire Coca Cola
2269 South 3270 West
Salt Lake City, Utah 84119
Employee

Other Affiliations (uncompensated):

2007
Idaho Sixth District Bar Association
No physical address
Pocatello, Idaho
Secretary/Treasurer (2007)

2001 – 2006
The Church of Jesus Christ of Latter-day Saints
Indian Hills Ward
Pocatello Stake
5425 Bannock Highway
Pocatello, Idaho 83204
LDS Bishop

1994 – 1996
United Way of Southeastern Idaho
275 S. 5th Avenue, #250
Pocatello, Idaho 83201
Board Member

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the U.S. Military. I was born in 1958 and was not required to register for selective service.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Certificate of Completion, Faculty Development, presented by the Idaho Supreme Court, for work with developing the Judicial Education Department Curriculum (four-day course) (2014).

Certificate of Completion, Sentencing and Management of Sex Offenders, The National Judicial College, Reno, Nevada (two-day course) (2012).

Certificate of Completion, General Jurisdiction Course, The National Judicial College, Reno, Nevada (two-week course) (2008).

Business Associate of the Year, Ee Dah How Charter Chapter, American Business Women's Association (2008).

Completed a drug court institute with the National Drug Court Institute, Annapolis, Maryland (five-day course) (2007).

Silver Beaver Award, Boy Scouts of America (approximately 1999)

9. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the

titles and dates of any offices which you have held in such groups.

American Bar Association (approximately 1988 – 2005)

Idaho Association of Defense Counsel (1989 – 2007)

Idaho Sixth District Bar Association (1987 – present)
Secretary/Treasurer (2007)

Idaho State Bar Association (1987 – present)
Fee Arbitration Committee (2000 – 2005)
Professional Conduct Board (1997 – 2001)
Client Security Fund Committee (approximately 1993 – 1995)

Idaho Supreme Court
Administrative Conference (2009 – 2012)
Judicial Education Committee (2007 – present)
Felony Sentencing Committee (2007 – present)

International Association of Defense Counsel (1989 – 2007)

J. Reuben Clark Law Society (de facto member) (approximately 1988 – present)
Judges' Section (approximately 2010 – present)

Portneuf Inn of Court (1993 – 1998 and 2007 – present)

Utah State Bar Association (1986 – 2007)

10. **Bar and Court Admission:**

- a. List the date(s) you were admitted to the bar of any state and any lapses in membership. Please explain the reason for any lapse in membership.

Utah, 1986
Idaho, 1987

There have been no lapses in membership. I took inactive status in Utah in 2007 when I became a judge in Idaho.

- b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

United States District Court for the State of Utah, 1986

United States District Court for the State of Idaho, 1987

There have been no lapses in membership. I took inactive status in Utah in 2007 when I became a judge.

11. **Memberships:**

- a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, since graduation from law school. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.

Boy Scouts of America

Merit Badge Counselor (1991 – 2016)

Scoutmaster (1998)

Chartered Organization Representative (2001 – 2006)

Centennial Rotary Club of Pocatello (approximately 1990 – 1998)

The Church of Jesus Christ of Latter-day Saints

LDS Bishop (2001 – 2006)

United Way of Southeastern Idaho

Board Member (1994 – 1996)

- b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

It is my understanding that Rotary International previously restricted its membership to men. That practice ended before the Centennial Rotary Club was created in the late 1980s and before I became a Rotary member. To the best of my knowledge none of the other organization listed above currently discriminates or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies.

12. **Published Writings and Public Statements:**

- a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

David C. Nye, *Drunk Driving: The New Automobile Homicide Statute's Overlapping Effect*, 1 BYU J. Pub. L. 183 (1986). Copy supplied.

- b. Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. If you do not have a copy of a report, memorandum or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

While serving as the Administrative District Judge for the Idaho Sixth District I sat on the Administrative Conference of the Courts. Meeting minutes from a July 12, 2011 meeting and an April 18, 2013 meeting that I was able to locate are supplied.

While serving as the Secretary/Treasurer of the Sixth District Bar Association in 2007, I would have prepared a one page financial report of the District's funds. Those reports are only kept for five years and I have been unable to locate a copy of the 2007 report.

- c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

On April 20, 2016, I testified at my confirmation hearing before the Judiciary Committee of the United States Senate to be a United States District Judge for the District of Idaho. I also answered Questions for the Record presented to me by Chairman Grassley and Senator Tillis. Video of the hearing is available at <https://www.judiciary.senate.gov/meetings/06/21/2016/nominations> for the 114th Congress and a copy of my responses to the written questions is supplied.

- d. Supply four (4) copies, transcripts or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered, and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

2007 – present: Speaker, Bannock County Felony Drug Court Graduation Ceremonies, Bannock County Courthouse, Pocatello, Idaho. I have conducted 24 graduation ceremonies, on the following dates: January 30, 2008; December 16, 2008; February 03, 2009; July 07, 2009; August 25, 2009; December 08, 2009; April 27, 2010; August 24, 2010; November 16, 2010; February 22, 2011; June 07, 2011; August 29, 2011; January 15, 2013; April 23, 2013; December 10, 2013; January 28, 2014; May 6, 2014; January 20, 2015; February 23, 2016; March 7, 2016; August 2, 2016; September 20, 2016; March 7, 2017; and April 4, 2017. For most of the ceremonies, I gave concluding remarks. For August 24, 2010, and April 23, 2013, I was the primary speaker at the commencement ceremonies. The speeches involved national statistics regarding drug courts and encouragement to the graduates to view graduation as a beginning rather than an end. I have no notes, transcripts or recordings. The address of the Bannock County Courthouse is 624 East Center Street, Pocatello, Idaho 83204.

1993 – 1998 and 2007 – present: Panelist, various panels, Portneuf Inn of the American Inns of Court, Pocatello, Idaho. I have occasionally served as a member of a panel on various legal topics, such as civil procedure, recent Idaho Supreme Court cases, and closing arguments. I have no notes, transcripts or recordings. The address of the American Inns of Court is 225 Reinekers Lane, Suite 770, Alexandria, Virginia 22314.

May 1990 – present: Speaker, Law Day, Idaho Sixth District Bar Association and Pocatello School District #25, Pocatello, Idaho. Each Law Day (May 1), students from the local high schools have the option of shadowing a lawyer or judge for the day. I have often participated in this event both as a lawyer and as a judge. I talk to the students about the legal profession and answer questions from them about careers in the law. They attend any hearings I have that day and ask questions afterwards. I have no notes, transcripts or recordings. The address of the Idaho Sixth District Bar Association is c/o Aaron Thompson, President, P.O. Box 370, Pocatello, Idaho 83204-0370.

March 14, 2017, and March 15, 2016: Presenter, “Criminal Procedure” and “Attorney Fees,” New Idaho Judges’ Orientation Training, Idaho Supreme Court, Boise Idaho. PowerPoint and outline supplied previously. I used the same outline and PowerPoint presentation in 2017 as I supplied for the 2016 presentation.

March 2014 and March 9, 2015: Presenter, “Bail, Bonds, and Probable Cause” and “Attorney Fees” (2015 only), New Judges’ Orientation Training, Idaho Supreme Court, Boise, Idaho. Outlines supplied.

March 1 – 2, 2013, March 6 – 7, 2015, and March 3 – 4, 2017: Mock Trial Judge, “Trial Skills Academy,” Idaho State Bar Association Litigation Section, Boise, Idaho. I participated as a mentor as a sitting judge in one of the courtrooms for the mock trial experience. I have no notes, transcripts or recordings. The address of the Idaho State Bar Association is P.O. Box 895, Boise, Idaho, 83701.

May 13 – 14, 2016: National High School Mock Trial Championship in Boise, Idaho. I participated as a mentor as a sitting judge in one of the courtrooms for the national high school finals. I have no notes, transcripts or recordings.

December 10, 2010: Panelist, “What Civil Court Judges Want You to Know,” National Business Institute, Pocatello, Idaho. I was one of four state district judges who performed a day-long question/answer session for attorneys on civility in the courtroom, case management, and productive settlement practices. I have no notes, transcript or recording. The address of the National Business Institute is 1218 McCann Drive, Altoona, Wisconsin 54702.

2007: As secretary/treasurer of the Sixth District Bar Association, I would sometimes introduce the presenters and conduct the quarterly meetings for the Sixth District. I have no notes, transcripts, or recordings. The address for the Sixth District Bar Association is c/o Aaron Thompson, President, P.O. Box 370, Pocatello, Idaho 83204-0370.

January 2001 – October 2006: As a Bishop in The Church of Jesus Christ of Latter-day Saints, Indian Hills Ward, Pocatello Stake, I would have given two or three talks or sermons each year to my ward congregation. I have no notes, transcripts, or recordings, and I do not recall the topics of any talks. The address of The Church of Jesus Christ of Latter-day Saints is 5425 Bannock Highway, Pocatello, Idaho 83204.

- e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Betsy Z. Russell, *Senator Defends Secretive Way Federal Judge Candidate Picked*, Spokesman-Review (Spokane, Washington) April 13, 2016. Copy supplied.

Risch: Nye Should Be Idaho's Next Federal Judge, NBC – 7 KTVB (Boise, Idaho), April 6, 2016. Copy supplied.

Betsy Z. Russell, *Obama Names New Idaho Judge, David Nye*, Spokesman-Review (Spokane, Washington), April 5, 2016. Copy supplied (quote reprinted in multiple outlets).

Debbie Bryce, *New Judge Achieves 20-Year Goal – Nye Decided While Clerking That He'd Like to Be a Judge*, Idaho State Journal (Pocatello, Idaho), June 14, 2007. Copy supplied.

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed,

and a description of the jurisdiction of each such court.

On June 6, 2007, I was appointed by the Idaho Governor as a District Judge in the Idaho Sixth Judicial District. This court handles all felony criminal cases and all civil cases in excess of \$10,000. It also handles all appeals from the Magistrate Court, except for parental termination cases. On March 19, 2010, and again on May 20, 2014, I was re-elected as a District Judge in the Idaho Sixth Judicial District.

From September 1, 2009, to September 1, 2012, I served as the Administrative District Judge in the Idaho Sixth Judicial District. The district judges in each district elect the Administrative District Judge to serve for a three-year term. I supervised the four district judges and nine magistrate judges in the district, as well as all court personnel and employees in the district. I also sat as a member of the Administrative Conference of the Idaho Supreme Court. That conference has jurisdiction to make decisions to promote the effective administration of justice throughout Idaho and to make recommendations to the Idaho Supreme Court regarding policies for the judiciary.

- a. Approximately how many cases have you presided over that have gone to verdict or judgment?

All cases in Idaho, including those settled by mediation, go to judgment. I have presided over approximately 1,500 cases as a judge. Of those, 47 went to verdict or judgment after a trial. Those 47 trials are reflected in the percentages below.

- i. Of these, approximately what percent were:

jury trials:	78%
bench trials:	22%
civil proceedings:	40%
criminal proceedings:	60%

- b. Provide citations for all opinions you have written, including concurrences and dissents.

As an Idaho State District Court Judge, my opinions are not published or placed online. They are available in the court file. Idaho has not yet transitioned to an electronic filing system so access to my opinions is limited to a review or copy of the court file.

- c. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (3) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported).

1. *Chidester v. Bingham County*, Bingham County Case No. CV-2012-2487.

This was a case brought by several male high school students after felony criminal charges against them were either dismissed or reduced to misdemeanors. The state and school officials accused the students of hazing amounting to sexual abuse. These charges were not substantiated at the preliminary hearing stage of the criminal case. The students then sued the state and school officials for malicious prosecution, making false public statements, supervisory and municipal liability, intentional infliction of emotional distress, conspiracy, and obstruction of justice. The state and school officials moved for summary judgment on all claims. I granted summary judgment to the county and city municipalities and their officials on the basis of immunity. I further granted summary judgment to all other defendants because the plaintiffs could not provide evidence of material facts as to each of their theories. There was no appeal. A copy of my summary judgment decision is supplied.

Plaintiff's Counsel:

Stephen J. Blaser
Blaser, Oleson & Lloyd, Chartered
285 Northwest Main Street
Blackfoot, Idaho 83221
(208) 785-4700

Defense Counsel:

Blake G. Hall
Hall Angell Starnes, LLP
1075 South Utah Avenue, Suite 150
Idaho Falls, Idaho 83402
(208) 522-3003

2. *Diviesti v. Union Pacific Railroad*, Bannock County Case No. CV-2006-5063.

This was a case brought by a train engineer against Union Pacific Railroad under the Federal Employers Liability Act for personal injuries he alleged were caused by a poorly designed engineer's seat. After four years of motions and discovery, this case went to a two-week jury trial in May 2010. The jury found no liability on the part of the railroad. There were no post-judgment motions and no appeal. Decisions supplied.

Plaintiff's Counsel:

Reed Larsen Cooper & Larsen
151 North Third Avenue
Pocatello, Idaho 83201
(208) 235-1145

Defense Counsel:

Reha Kamas (formerly Reha Deal)
Kent Hansen
Union Pacific Railroad
280 South 400 West, Suite 250
Salt Lake City, Utah 84101
(801) 212-3985

3. *Fire Services of Idaho v. Keller*, Bannock County Case No. CV-2014-4653.

This case involved a non-competition clause in an employment contract and a request for preliminary injunction. Defendants were former employees of plaintiff, who started their own competing business and were accused of stealing customers and confidential information from plaintiff. I issued a temporary restraining order and then held a two-day trial on the issue of a preliminary injunction. Several witnesses testified. I issued an order that denied most of the preliminary injunction. Decision supplied. There was no appeal.

Plaintiff's Counsel:

David Gardner
Moffatt Thomas Barrett Rock & Fields Chartered
412 West Center Street #2000
Pocatello, Idaho 83204
(208) 233-2001

Defense Counsel:

Dave Maguire
Maguire Law, P.C.
P.O. Box 4758
Pocatello, Idaho 83205
(208) 232-5167

4. *Merrill v. Merrill*, Power County Case No. CV-2013-292.

This case involved the attempted dissolution of a family-owned gravel business, composed of a corporation and limited liability company, worth over \$4 million. The majority shareholders decided to buy out the dissenting shareholder rather than dissolve the corporation and the LLC. I issued a summary judgment decision resolving the ownership issues for the LLC and limiting the remaining issue in the case to a valuation of the corporation and LLC for purposes of a court-ordered buyout. After a one-day trial, I issued a decision regarding the valuation issue. I valued the dissenting shareholder's share of corporate assets at about \$1.9 million dollars. Decisions supplied. There was no appeal.

Plaintiffs' Counsel:

Monte C. Gray
Gray Law Office
2220 North Hillside Lane
Pocatello, Idaho 83204
(208) 478-3781

Defense Counsel:

John A. Bailey, Jr.
Scott J. Smith
Racine Olson Nye Budge & Bailey, Chartered (now Racine Olson)
201 East Center Street
Pocatello, Idaho 83201
(208) 232-6101

5. *Peterson v. Gentillon*, Bingham County Case No. CV-2007-2306.

This case went through two trials and an appeal to the Idaho Supreme Court before being assigned to me on remand. It involved a property dispute between three parties: a seller (Gentillon), a first buyer (Peterson) and a second buyer (Gentillon Partnership). The property involved two large farm parcels and a small acreage with a residence on it. The dispute focused on the boundary lines between the parcels and acreage. The original judge found in favor of the first buyer, giving him the small acreage and a significant portion of the two farm parcels. On remand, it was necessary for me to hold a third court trial. That trial lasted two days. I then issued a decision and a judgment in favor of the second buyer, giving it all of the two farm parcels. There was no appeal from my decision. Decision supplied.

Plaintiff's Counsel:

Kip Manwaring (for plaintiff Peterson)
Manwaring Law Office, PA
2677 East 17th Street, Suite 600
Idaho Falls, Idaho 83406
(208) 403-0405

Defense Counsel:

Dwight Baker (for defendant Gentillon Partnership)
Baker & Harris
266 West Bridge Street
Blackfoot, Idaho 83221
(208) 785-2310

Hyrum Erickson (for defendant Gentillon)
Rigby, Andrus & Rigby, PLLC
25 North Second East
Rexburg, Idaho 83440
(208) 356-3633

6. *Seasons of Hope, LLC v. Idaho Dept. of Health and Welfare*, Bannock County
Case No. CV-2013-4952.

This was an appeal from an administrative decision. Seasons of Hope was a Medicaid provider that was effectively put out of business by a notification letter from the Idaho Department of Health & Welfare on March 28, 2013. That letter imposed a monetary fine against Seasons of Hope in the amount of almost \$500,000 and prohibited Seasons of Hope from being a Medicaid provider for five years. Seasons of Hope asked for and received an administrative hearing that lasted over nine days. The hearing officer dismissed all allegations of fraud, removed the suspension of payments and restored Seasons of Hope's provider status. The Department of Health & Welfare appealed and the director of the Department issued a decision that reversed the hearing officer in almost all respects. Seasons of Hope appealed to district court and the matter was assigned to me. The appeal involved over 8,300 pages of record and nine days of transcript. After oral argument, I issued an opinion that reversed the director's decision. Decision supplied. There was an appeal; however, the appeal was dismissed by stipulation of the parties.

Plaintiff's Counsel:

Eric S. Lind
Solo Practitioner
9703 North 6670 West
Highland, Utah 84003
(385) 208-8803

Defense Counsel:

Robert M. Adelson
Office of the Idaho Attorney General
700 West Jefferson Street
Boise, Idaho 83720
(208) 334-4901

7. *State v. McDermott-Reid*, Bannock County Case No. CR-2010-1499.

This is a vehicular manslaughter case in which there were three occupants in a vehicle that rolled. One occupant died when she was ejected out of the sun roof. There was a dispute over who was driving. This case had to be tried twice due to jury nullification in the first trial that resulted in a mistrial. The jury convicted the

defendant in the second trial. This case involved rulings on two motions to dismiss. My decisions are provided.

Prosecution Counsel:

Clive Colsen (formerly with the Bannock County Prosecutor's Office)
Bingham County Prosecutor's Office
501 North Maple Street #302
Blackfoot, Idaho 83221
(208) 782-3101

Defense Counsel (first trial):

Victor Bunitsky
Solo Practitioner
Post Office Box 77
Virginia City, Montana 59755
(406) 843-5432

Defense Counsel (second trial):

Dave Martinez
Bannock County Public Defender's Office
141 North Sixth Avenue
Pocatello, Idaho 83201
(208) 236-7040

8. *State v. Miller*, Bannock County Case No. CR-2007-16851.

This is a home invasion case. A young family had moved to Idaho from California to get out of a high crime city. In the middle of the night, Defendant broke into their home and held them hostage with a gun. At one point, he held a shotgun to their baby's head. Police were able to subdue the Defendant without injuries to anyone involved. Defendant pled guilty to burglary, assault with intent to commit serious felony, and to possession of a controlled substance. I sentenced defendant to a combined total of 28 years in prison, which included a sentence enhancement for being a persistent violator. After sentencing, defendant appealed, the Idaho Court of Appeals reduced the sentence in a 2-1 decision, *State v. Miller*, 2010 WL 2348613 (June 14, 2010), ruling that I abused my discretion in misinterpreting Miller's mental health evaluation and in discounting Miller's longstanding substance addiction. The Idaho Court of Appeals changed the sentence to 15 years. The State appealed, and the Idaho Supreme Court, in an unanimous decision, reinstated my sentence. *State v. Miller*, 151 Idaho 828, 264 P.3d 935 (2011). In doing so, the Supreme Court wrote that I appropriately perceived the limits of discretion and sentenced the defendant within those limits.

Prosecution Counsel:

Vic Pearson (formerly Bannock County Chief Deputy Prosecutor)
Franklin County Prosecutor
39 West Oneida Street
Preston, Idaho 83263
(208) 852-9119

Defense Counsel:

Dave Martinez
Bannock County Public Defender's Office
141 North Sixth Avenue
Pocatello, Idaho 83201
(208) 236-7040

9. *State v. Sanchez*, Bannock County Case No. CR-2008-1761.

This was a criminal case involving the abuse and torture of a woman by her boyfriend over a period of about 112 days. It involved forcing her to burn her body with a wood-burning tool and forcing her to pull out her own teeth. Experts testified for both sides on the issues of victim's psychological trauma and why she would burn herself at his insistence. The trial lasted for 28 days. Defendant was convicted on all 112 counts of abuse. I sentenced him on all 112 counts to a total sentence of 28 years in prison. There were no written decisions, only rulings from the bench. The Idaho Court of Appeals affirmed the conviction and sentence in an unpublished decision at 2011 WL 11038952 (March 25, 2011).

Prosecution Counsel:

JaNiece Price
Bannock County Prosecutor's Office
624 East Center Street
Pocatello, Idaho 83201
(208) 236-7280

Defense Counsel:

Doug Dykman
Solo Practitioner
Post Office Box 4981
Pocatello, Idaho 83205
(208) 237-8300

10. *United II Potato Growers of Idaho, Inc. v. Wahlen Farms, et al.*, Bingham County Case No. CV-2009-1605.

This was a large antitrust, constructive fraud, and breach of fiduciary duties case brought by potato growers against a large non-profit marketing cooperative. The cooperative brought a counterclaim against the growers. Multiple summary judgment motions and other pretrial motions were filed by the parties. After I reached my summary judgment decision, several other motions were filed by the parties and decided by the court. The parties then reached a confidential settlement. My decisions are supplied.

Plaintiff's Counsel:

John A. Bailey, Jr.
Scott J. Smith
Racine Olson Nye Budge & Bailey, Chartered (now Racine Olson)
201 East Center Street
Pocatello, Idaho 83201
(208) 232-6101

Defense Counsel:

Michael D. Gaffney
Beard, St. Clair, Gaffney, PA
2105 Coronado Street
Idaho Falls, Idaho 83404
(208) 557-5203

- d. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published; and (3) the names and contact information for the attorneys who played a significant role in the case.
1. *Chidester v. Bingham County*, Bingham County Case No. CV-2012-2487.
Decision previously supplied in response to Question 13c.

Plaintiff's Counsel:

Stephen J. Blaser
Blaser, Oleson & Lloyd, Chartered
285 Northwest Main Street
Blackfoot, Idaho, 83221
(208) 785-4700

Defense Counsel:

Blake G. Hall
Hall Angell & Associates, LLP
1075 South Utah Avenue, Suite 150 Idaho
Falls, Idaho 83402

(208) 522-3003

2. *Idaho Wireless v. Barker*, Bannock County Case No. CV-2006-2982. Decision on motion for summary judgment in case addressing a non-compete clause of an employment contract is supplied.

Plaintiff's Counsel:

Honorable Candy W. Dale (formerly of Hall, Farley, Oberrecht, and Blanton)
United States District Court for the District of Idaho
550 West Fort Street
Boise, Idaho 83724
(208) 334-9111

Defense Counsel:

John M. Ohman
Cox, Ohman & Brandstetter
510 D Street
Idaho Falls, Idaho 83405
(208) 522-8606

3. *Lambert v. Minister*, Bannock County Case No. CV-2013-1231. Decisions on motions for summary judgment supplied.

Plaintiff's Counsel:

Lowell Hawkes (retired)

Counsel for Defendant Aasand and Country Real Estate:

Donald Carey
Carey Perkins, LLP
980 Pierview Drive, Suite B Idaho
Falls, Idaho 83402
(208) 529-0000

Counsel for Defendant Minister:

Gary Cooper
Cooper & Larsen
151 North Third Avenue Suite 210, Second Floor
Pocatello, Idaho 83201
(208) 235-1145

4. *Miles v. Newbold*, Bingham County Case No. CV-2011-1535. Decision on motion for summary judgment supplied.

Plaintiff's Counsel:

Lance Nalder
Lane Blake
Nalder Law Office
591 Park Avenue, Suite 201
Idaho Falls, Idaho 83404
(208) 542-0525

Counsel for Defendants Percy:

Michael Elia
Moore & Elia, LLP Key
Financial Center
702 West Idaho Street, Suite 800
Boise, Idaho 83707
(208) 336-6900

Counsel for Defendant P. Newbold:

Michael Kelly
Kelly, Talboy & Simmons, PA
380 East Parkcenter Boulevard, Suite 200
Boise, Idaho 83701
(208) 342-4300

Counsel for Defendants Muchow and A. Newbold: John

A. Bailey
Racine Olson Nye Budge & Bailey, Chartered (now Racine Olson)
201 East Center Street
Pocatello, Idaho 83201
(208) 232-6101

Counsel for Defendants Clarke:

Brendon Taylor
Merrill & Merrill, Chartered
109 North Arthur, Fifth Floor
Pocatello, Idaho 83204
(208) 232-2286

Counsel for Blackfoot School District & Blackfoot High School:

Chris Hansen
Anderson, Julian & Hull, LLP
C.W. Moore Plaza

250 South Fifth Street, Suite 700
Boise, Idaho 83707
(208) 344-5800

5. *Popoca-Garcia v. State*, Bingham County Case No. CV-2012-200. Decision on post-conviction proceeding supplied.

Petitioner's Counsel:

Maria Andrade Andrade Law Firm
3775 Cassia Street
Boise, Idaho 83701
(208) 342-5100

State's Counsel:

J. Scott Andrew (formerly with Bingham County Prosecutor's Office)
Bannock County Public Defender's Office
141 North Sixth Avenue
Pocatello, Idaho 83201
(208) 236-7040

6. *Power County Prosecuting Attorney Kline v. Power County Board of Commissioners*, Power County Case Nos. CV-2011-248 and CV-2011-279. Decision on judicial review supplied.

Plaintiff's Counsel:

Honorable Randall Kline (formerly with Power County Prosecutor's Office)
Canyon County Courthouse
1115 Albany Street
Caldwell, Idaho 83605
(208) 454-7365

Defense Counsel:

M. Jay Meyers (now deceased) Thomas D. Smith (formerly with
Meyers Law Office)
Service & Spinner
1335 East Center Street
Pocatello, Idaho 83204
(208) 232-4471

7. *Seasons of Hope, LLC v. Idaho Department of Health & Welfare*, Bannock County Case No. CV-2013-4952. Decision previously supplied in response to

Question 13c.

Plaintiff's Counsel:

Eric S. Lind
Solo Practitioner
9703 North 6670 West
Highland, Utah 84003
(385) 208-8803

Defense Counsel:

Robert Adelson
Office of the Idaho Attorney General
700 West Jefferson Street
Boise, Idaho 83720
(208) 334-4901

8. *State v. Christensen*, Bannock County Case No. CR-2007-7001. Decision on motion to suppress and follow-up decision on motion for reconsideration are supplied.

State's Counsel:

Mark L. Hiedeman (retired)

Defense Counsel:

Jeromy Stafford
Solo Practitioner
381 Shoup Avenue, Suite 207B
Idaho Falls, Idaho 83401
(208) 521-8119

9. *Still Standing Stables, L.C. v. Christensen*, Caribou County Case No. CV-2008-44. Decision on motion for partial summary judgment supplied.

Plaintiff's Counsel:

Michelle Points Points
Law, PLLC
910 West Main Street, Suite 222
Boise, Idaho 83702
(208) 287-3216

Defense Counsel:

Kipp Manwaring
Manwaring Law Office, PA
2677 East 17th Street, Suite 600
Idaho Falls, Idaho 83406
(208) 403-0405

10. *United II Potato Growers of Idaho, Inc., v. Wahlen Farms, et al.*, Bingham County Case No. CV-2009-1605. Decisions previously supplied in response to Question 13c.

Plaintiff's Counsel:

John A. Bailey
Racine Olson Nye Budge & Bailey, Chartered (now Racine Olson)
201 East Center Street
Pocatello, Idaho 83201
(208) 232-6101

Defense Counsel:

Michael D. Gaffney
Beard, St. Clair, Gaffney, PA
2105 Coronado Street
Idaho Falls, Idaho 83404 (208)
557-5203

- e. Provide a list of all cases in which certiorari was requested or granted.

To my knowledge, no party has requested certiorari to the United States Supreme Court in any case I have presided over.

- f. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

To the best of my knowledge and as far as I can determine from research, I have been reversed in the following cases. I have supplied a copy of the Westlaw citation for the appellate opinions, and a copy of my underlying decision where I was able to obtain a copy.

Bennett v. Patrick, Bannock County Case No. CV-2008-4528. This was a personal injury action tried by a jury. It arose out of a motor vehicle accident. The jury awarded about \$13,000 damages to plaintiffs. There were several post-verdict motions to adjust plaintiffs' awards. I increased the awards to about \$15,000 but

denied attorney fees on the basis that plaintiffs waived attorney fees under the applicable statute by asking for more than \$25,000 in their complaint and by including a significant new item of damage in their evidence at trial. The Idaho Supreme Court reversed on the issue of attorney fees, holding that the complaint did not need to allege less than \$25,000 so long as the original demand letter did. 152 Idaho 854, 276 P.3d 726 (2012). My decision on attorney fees is supplied.

Beus v. Beus, Bannock County Case No. CV-2009-1822. This was a lawsuit involving the rights of three brothers who were residuary beneficiaries under their father's testamentary trust. The primary asset of the trust was a 2500-acre farm. One brother leased and managed the farm from the trust. The trust language stated that if the brothers could not agree upon the operation, management, and division of the real property, the trustee was to sell the farm and divide the assets. The two non-managing brothers terminated the managing brother's lease and demanded the sale of the farm. The managing brother sought to recover for improvements he claimed to have made on the farm. The case was to be tried by the court without a jury. The parties filed cross motions for summary judgment and I granted summary judgment to the non-managing brothers. The managing brother appealed. The Idaho Supreme Court affirmed my decision on all issues except the question of whether the managing brother installed a sprinkler main line during the term of the lease. I ruled there was nothing in the record that supported the claim that the main line was installed during the lease period. The appellate court ruled that was a factual issue created by language in the memorandum opposing summary judgment that should not have been resolved on summary judgment. The case was remanded for trial on that single issue but the parties settled the case before any trial. 151 Idaho 235, 254 P.3d 1231 (2011). My decision is supplied.

Cook v. State, Bear Lake County Case No. CV-2004-267. This was a post-conviction proceeding. Mr. Cook pled guilty to nine counts of grand theft by deception and was sentenced by another judge to an aggregate sentence of 29 years fixed and 49 years indeterminate. He was ordered to pay almost \$1.5 million in restitution. In a separate federal case, he was ordered to pay \$3.4 million in restitution. At a Rule 35 hearing in front of the sentencing judge, Cook presented a plan that would allow him to repay his victims if he was placed on probation. The judge denied the Rule 35 motion, ruling that the victims wanted Cook to serve a long prison sentence and recognizing that the victims had no hope for getting restitution. Cook then filed a post-conviction proceeding in front of the sentencing judge. That judge denied the post-conviction request. The Idaho Court of Appeals reversed the sentencing judge on the length of the sentence and reduced the sentence to 17 years fixed and 29 years indeterminate. The Court of Appeals further held, on the restitution plan, that the sentencing judge abused his discretion by forcing Cook to accept the State's wording and perspective of a stipulation regarding the victim's position on the restitution plan. The case then came to me when the sentencing judge retired. Cook filed a Rule 60(b) motion for relief from a judgment based on mistake, inadvertence, excusable neglect, newly discovered evidence or fraud. I granted the Rule 60(b) motion and the State appealed. The

Idaho Court of Appeals, in a second amended unpublished opinion at 2010 WL 9589151 (Aug. 27, 2010), reversed my decision. The Court of Appeals held that I did not properly require Cook to show that his attorney performed incompetently at his Rule 35 hearing and that his second attorney performed incompetently in his first post-conviction action.

Cummings v. Stephens, Bear Lake County Case No. CV-2009-183. This was a dispute regarding the sale of a farm. The buyer (Cummings) claimed he bought land on both the west and east side of the highway. The seller (Stephens) claimed he sold land only on the west side of the highway. The title company (Northern Title) issued a title policy covering land on both sides of the highway. During the trial, at the close of the buyer's case in chief, I granted the seller's motion to dismiss himself from the case. Trial continued against Northern Title. I issued a decision that held that Northern Title negligently issued the title policy and Northern Title had to pay the buyer \$50,000 in damages. The buyer appealed. The Idaho Supreme Court affirmed me on all issues except the award of \$50,000 in damages. On the damage award, the court held that it was based upon a theory not raised in the buyer's pleadings. A copy of my decision is supplied. The Idaho Supreme Court's decision is at 157 Idaho 348, 336 P.3d 281 (2014).

Kawamura v. Kawamura, Bannock County Case No. CV-2011-4217-DR. This was a divorce case that came to me on appeal from the magistrate division. The magistrate ruled that the house was the separate property of the husband because it was purchased with his separate property even though the warranty deed listed both parties as owners. The magistrate also ruled that a "razor" (an ATV-type vehicle) was the husband's separate property because it was a gift from his father to him. The wife appealed. I reversed as to the house, and held it was community property, because Idaho law states that where the language in a deed is plain and unambiguous the intention of the parties must be determined from the deed itself, and parol evidence cannot be admitted to show intent. I found the language in the deed to be clear and unambiguous. As to the razor, I held that the issue was not properly raised before the magistrate court and I therefore could not address it. The husband appealed the issue of the house to the Idaho Supreme Court, which held that its prior language in two different cases, which I relied upon, was erroneous. However, the Supreme Court then affirmed my decision that the house was community property, but on different grounds. My decision is supplied. The Supreme Court decision is *Kawamura v. Kawamura*, 159 Idaho 1, 355 P.3d 630 (2015).

Sadid v. Idaho State University, Bannock County Case No. CV-2008-3942. This was a case where a professor sued his university and various administrators for breach of employment contract and a § 1983 claim of retaliation. The tenured professor had been publicly critical of the university and the administrators. I granted summary judgment to the defendants and dismissed the amended complaint but denied an award of attorney fees to the defendants. Both sides appealed. The Idaho Supreme Court affirmed the summary judgment but remanded for a

determination of reasonable attorney fees to the university against the plaintiff. In affirming summary judgment, the Supreme Court addressed four of my holdings. As to the first two holdings, the Supreme Court ruled that I erred in determining that the professor spoke as a public employee rather than a private citizen and that I erred in determining that the professor did not speak on a matter of public concern. Nevertheless, the Supreme Court affirmed the summary judgment on an alternative ground – that the professor failed to present any evidence that he sustained adverse economic action. The Supreme Court also affirmed the supreme judgment on the breach of contract claim. The only issue remanded to me was the issue of attorney fees. The Supreme Court held that the university, but not the administrators, was entitled to attorney fees under I.C. § 12-120(3) because the employment contract was a commercial transaction. My decisions on summary judgment and denying a motion for reconsideration are supplied. The Supreme Court’s decision is at *Sadid v. Idaho State University*, 151 Idaho 932, 265 P.3d 1144 (2011).

Samples v. Hanson, Bingham County Case No. CV-2011-0002069. This is a medical malpractice case where a patient brought an action against his physician and the hospital. I granted summary judgment to the physician and hospital after determining that the plaintiff failed to establish the necessary foundation under Idaho law to admit testimony from the plaintiff’s only medical expert. In doing so, I relied on existing Idaho case law from the Idaho Supreme Court that stated that physicians who hold themselves out as board-certified specialists must adhere to a national standard of care, not a local community standard of care. The defendant physician did not hold himself out as a board certified specialist at the time of the operation. On appeal, the Supreme Court “eliminate[d] the ‘holding out’ requirement with respect to physicians who are actually board certified in a specialty, whether or not they hold themselves out to be.” The Supreme Court then held that I erred by relying on the language that had been part of Idaho law for 30 years and that was not eliminated until this appeal. The summary judgment was vacated and the matter remanded for trial. My decision is supplied. The Supreme Court’s decision is at *Samples v. Hanson*, 161 Idaho 179, 384 P.3d 943 (2016).

Navo v. Bingham Memorial Hospital, Bingham County Case No. CV-2010-2965. This is a medical malpractice case where the patient died during surgery. The family of the patient brought the case against the anesthetist and the hospital. The hospital moved for summary judgment on several grounds and this court granted summary judgment. Plaintiff appealed and the Idaho Supreme Court affirmed on all grounds except the ground of failure to plead that the anesthetist was an agent of the hospital under a theory of apparent authority. On that ground the Supreme Court recognized that the plaintiff’s complaint never expressly set forth a theory of agency but did include the language that the hospital and its “agents” failed to exercise reasonable care in the hiring, training, and supervision of its employees. The complaint did not specify who the hospital’s agents are. However, the Supreme Court held that under Idaho’s notice pleading requirements this was enough to put the defendant’s on notice that plaintiff alleged that the anesthetist was acting as an agent of the hospital. The case was remanded on the single issue of apparent

authority. My decision is supplied. The Supreme Court's decision is at *Navo v. Bingham Memorial Hospital*, 160 Idaho 363, 373 P.3d 681 (2016).

State v. Erickson, Bear Lake County Case No. CR-2007-1198. This was a case in which the defendant was convicted by a jury of two counts of sexual abuse of a child. Defendant appealed, asserting prosecutorial misconduct during trial, that I erred in not holding that the prosecutor made discriminatory use of peremptory challenges to exclude male jurors (although that objection did not occur until the jury was deliberating), and that I erred in admitting improper character evidence. I issued no written decision in the case; however, several of my procedural rulings were challenged on appeal. The Idaho Court of Appeals reversed. The court held that there was prosecutorial misconduct, which rose to the level of fundamental error, and remanded for a new trial. 148 Idaho 679, 227 P.3d 933 (Ct. App. 2010).

State v. Gonzales, Bannock County Case No. CR-2011-1447. This is an injury to child case. The State alleged it was a shaken baby case. The defendant claimed the two-year-old child ran into the kitchen cupboard while under defendant's watch. The morning of trial, when the State showed up with two treating doctors who were going to testify that the injuries suffered by the child could only have come from being shaken, not from hitting a cupboard, the defendant pled guilty. After sentencing, defendant moved to withdraw his guilty plea. I denied his motion and he appealed. The Idaho Court of Appeals, at 158 Idaho 112, 343 P.3d 1119 (Ct. App. 2015), vacated my order and remanded for a finding as to whether defense counsel correctly advised the defendant as to the elements of the offense. On remand, I scheduled a hearing to take evidence on this issue and I issued a transport order to bring defendant back from prison so he could participate in the hearing. The hearing was vacated when defendant withdrew his motion to withdraw guilty plea. My decision denying a motion to reconsider and to withdraw guilty plea is supplied.

State v. Miller, Bannock County Case No. CR-2007-16851. This was a home invasion case. Defendant pled guilty to burglary, assault with intent to commit a serious felony, and to possession of a controlled substance. He also admitted to being a persistent violator. After sentencing, where I imposed a term of a combined 28 years on all charges including the persistent violator enhancement, defendant appealed, and the Idaho Court of Appeals reversed and reduced the sentence. *State v. Miller*, 2010 WL 2348613 (June 14, 2010). The State appealed, and the Idaho Supreme Court reinstated my sentence. *State v. Miller*, 151 Idaho 828, 264 P.3d 935 (2011). I did not write a decision.

State v. Moon, Bannock County Case No. CR-1996-367. This was a criminal case in which the defendant pled guilty to escape and was sentenced. Years later he filed a Rule 35 motion to correct illegal sentence, claiming that the district court lacked jurisdiction to take the guilty plea because the statute defining escape did not make it clear that cutting the strap on a home monitor was escape from custody. Relying on an Idaho Supreme Court case that held that a Rule 35 motion could not be used

to attack a conviction but only to attack a sentence, I denied the Rule 35 motion for lack of jurisdiction to hear that motion. In an unpublished decision, the Idaho Court of Appeals held that a recent Idaho Supreme Court case, decided after I ruled on the Rule 35 motion, made it clear that I had jurisdiction to decide the Rule 35 motion. The Idaho Court of Appeals remanded the case to me to decide if res judicata barred the Rule 35 motion. 2015 WL 1529403 (April 6, 2015). On remand, I held that the issues in the Rule 35 Motion were barred by the doctrine of res judicata because Moon had raised the exact same issue in 2002 and again in 2003.

Wanner v. State Department of Transportation, Franklin County Case No. CV-2008-364. A motorist appealed the suspension of his driver's license by the Idaho Department of Transportation after he failed a breath test. I ruled that the notice from the police officer of the suspension was inadequate in regards to his commercial driver's license as opposed to his regular driver's license and I reversed the department's suspension of the commercial driver's license. The department appealed to the Idaho Supreme Court. The court recognized that the notice was inadequate regarding the commercial driver's license but held that the motorist did not exhaust his administrative remedies before appealing to district court. The court therefore reversed and remanded. By the time the case returned to the department, the suspension had expired and the motorist had no reason to exhaust his administrative remedies. 150 Idaho 164, 244 P.3d 1250 (2011). Franklin County Clerk's Office has searched their files and cannot find my written decision.

State v. Harer, Bannock County Case No. CR-2014-13437-FE. This was a criminal case where the State moved for \$200 in restitution at sentencing for the costs of prosecution. Idaho law allows the costs of prosecution for drug cases and leaves the award of such costs to the court's discretion. In denying the costs of prosecution, I held that the state failed to make an adequate showing of any economic loss because the prosecutor was paid on a salary basis whether she won or not. The Court of Appeals held that there is a difference between economic loss and out-of-pocket loss. The statute does not require out-of-pocket loss and the prosecutor's salary is an economic loss. The Court of Appeals remanded for further deliberation. On remand, I found economic loss but declined to award the restitution because of the defendant's financial situation which is a proper factor to consider under the statute. That decision was not appealed. The Idaho Court of Appeals decision is *State v. Harer*, 160 Idaho 98, 369 P.3d 316 (2016). My decision is supplied.

- g. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

100% of my opinions are not formally published. My opinions are available in the court files in the courthouse where the matter was handled.

- h. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

Although I have applied constitutional provisions in my decisions, I have not had occasion to interpret those provisions beyond what has already been decided by the Idaho Supreme Court or the U.S. Supreme Court. Thus, I have not authored any opinions that could fairly be considered significant opinions on federal or state constitutional issues.

- i. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I have never sat by designation on a federal court of appeals.

14. **Recusal:** If you are or have been a judge, identify the basis by which you have assessed the necessity or propriety of recusal (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case, and for each provide the following information:

- a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;
- b. a brief description of the asserted conflict of interest or other ground for recusal;
- c. the procedure you followed in determining whether or not to recuse yourself;
- d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.

Automatic judicial recusal in Idaho is governed by Idaho Rules of Civil Procedure, Rule 40(d)(1) in civil cases and by Idaho Criminal Rules, Rule 25(a) in criminal cases. Under these rules, any party has the right to one disqualification without cause of the judge within a very limited time period after the case commences. As a judge, I would be aware of the recusal but not the basis for the recusal. There are no records kept as to the number of times a judge is automatically recused without cause.

Any party may also make a motion to disqualify for cause under IRCP 40(d)(2) in a civil case or under ICR 25(b) in a criminal case. If a "for cause" motion is made, then Canon 3 of the Idaho Judicial Code comes into play and the judge must decide if the motion has

merit or is an attempt to gain an inappropriate advantage in the case. I am aware of only one case in which a party has moved to disqualify me for cause. That motion was made after judgment was entered following a court trial, and after the party unsuccessfully appealed my judgment. The party claimed I have demonstrated bias against him from the outset and sought a new trial in front of a new judge. The case is *Cummings v. Stephens and Northern Title Co.*, Bear Lake Case No. 2009-183. I denied the motion. My decision is supplied. The party appealed my decision but declared bankruptcy before the appellate court could hear the appeal and the matter has been stayed pending the outcome of the bankruptcy proceeding.

I recuse myself in any case in which I have a conflict of interest under Canon 3 of the Idaho Judicial Code. Specifically, where I have a familiarity or involvement with a party or victim, I immediately disclose that fact to both sides. If a valid concern is voiced, I recuse myself. I do not keep records of my voluntary recusals but it has occurred in criminal cases where I know the defendant or the victim and in civil cases where I know one of the parties.

15. **Public Office, Political Activities and Affiliations:**

- a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Other than my current position as a district judge, I have never held a public office. I have never had an unsuccessful candidacy for elective office or unsuccessful nomination for appointed office.

- b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I have never served in any capacity for any political party or political campaign.

16. **Legal Career:** Answer each part separately.

- a. Describe chronologically your law practice and legal experience after graduation from law school including:
 - i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

I served as a law clerk to the Honorable George G. Granata, Idaho District Judge for the Fifth Judicial District in Burley, Idaho, from 1986 to 1987.

- ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced law alone.

- iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

Merrill & Merrill, Chartered
109 North Arthur, Fifth Floor
Pocatello, Idaho 83204
Associate Attorney (1987 – 1989)
Partner (1989 – 2007)

- iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I did not serve as a mediator or arbitrator in alternative dispute resolution during my law career. As a judge, I have informally facilitated settlements for many cases.

While sitting on the Idaho State Bar Fee Arbitration Committee, I participated in two hearings. In 2000, I was a hearing member but not the chair. No opinion was issued as a result of that hearing. In 2005, I was the chair of a hearing. There was no opinion issued as a result of that hearing. All records pertaining to these hearings have been purged by the Idaho State Bar.

b. Describe:

- i. the general character of your law practice and indicate by date when its character has changed over the years.

For the twenty years I practiced as a lawyer, the general character of my law practice was litigation. I primarily practiced insurance defense work, but also handled some plaintiff personal injury cases, family law cases, wills and estate litigation, real estate litigation, and administrative cases.

- ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

My typical clients were defendants in automobile accidents or property accidents, along with insurance companies who insured those defendants. I also represented the local school district in special education dispute

matters and the local hospital in contract dispute matters. I also represented injured parties in personal injury cases.

- c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

Throughout my private practice legal career, my practice was largely focused on litigation and litigation related matters. I appeared in court frequently throughout my private practice legal career; however, I tried many more trials during the second ten years of practice than I did during the first ten years of practice.

- i. Indicate the percentage of your practice in:

- | | |
|-----------------------------|-----|
| 1. federal courts: | 10% |
| 2. state courts of record: | 85% |
| 3. other courts: | 0% |
| 4. administrative agencies: | 5% |

- ii. Indicate the percentage of your practice in:

- | | |
|--------------------------|-----|
| 1. civil proceedings: | 98% |
| 2. criminal proceedings: | 2% |

- d. State the number of cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

During my first ten years of practice, I tried about 15 trials as sole counsel or associate counsel. During my second ten years of practice, I tried about 75 trials as sole or chief counsel. Additionally, during my 20 years of practice, I took hundreds of cases to full summary judgment or final decision without a trial.

- i. What percentage of these trials were:

- | | |
|--------------|-----|
| 1. jury: | 80% |
| 2. non-jury: | 20% |

- e. Describe your practice, if any, before the Supreme Court of the United States. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice.

I have not appeared before the United States Supreme Court. I participated in one petition for certiorari, in *Krueger v. Board of Professional Discipline of the Idaho State Board of Medicine*, No. 92-115, 1992 WL 12073492 (filed Dec. 28, 1992), *cert. denied*, 507 U.S. 918 (1993).

17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally

handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
- b. the name of the court and the name of the judge or judges before whom the case was litigated; and
- c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *Davis v. Diesher*, Twin Falls County Case No. CV-2006-536.

This was a wrongful death action. Two young boys died of smoke inhalation when the house they were living in caught fire. Their parents made it out of the house but the boys did not. The defendants were the owners of the house and the rental managers of the house. I represented the rental managers. Plaintiffs claimed there was no smoke alarm in the house. Defendants claimed someone took the alarm after the fire and that you could see from the smoke on the wall that there had been an alarm there during the fire. Defendants also claimed the fire started on the couch the father was sleeping on when the marijuana joint he was smoking dropped onto the couch while he slept. This case was to be a four-day jury trial; however, it settled on the second day for the offer that we had on the table when the trial started. There was no appeal.

Plaintiff's Counsel:

John Lezamiz (formerly with Hepworth, Lezamiz)
Lezamiz Legal Counseling
847 Canyon Springs Road
Twin Falls, Idaho 83301
(208) 734-9075

Other Defense Counsel:

Rodney R. Saetrum (for defendant homeowner)
Saetrum Law Offices
3046 South Bown Way
Boise, Idaho 83706
(208) 336-0484

2. *Fuhriman v. State Department of Transportation*, 143 Idaho 800, 153 P.3d 480

(2007).

This was a wrongful death and personal injury action brought by road workers and their families due to an accident at a road construction site. As plaintiffs' counsel, I represented one of the injured workers and the family of one of the deceased workers. Judge Don Harding granted summary judgment to the State on the basis of immunity due to being a statutory employer under Idaho's workers' compensation laws. We appealed. The Idaho Supreme Court, Justices Burdick, Schroeder, Trout, Eismann, and Jones, affirmed the district judge's decision. This case clarified that statutory employer immunity is an affirmative defense but the court also held that the State's failure to plead this affirmative defense did not constitute a waiver.

Other Plaintiff's Counsel:

Thomas M. Smith (trial court only)
Thomas M. Smith, Inc., PS
1402 West Broadway Avenue, Suite 102
Spokane, Washington 99201
(800) 621-1969

M. Brent Morgan (on appeal only)
M. Brent Morgan Chartered
1106 East Center Street
Pocatello, Idaho 83201
(208) 232-7800

State's Counsel:

Justice Warren Jones (formerly with Eberle, Berlin, Kading, Turnbow, McKIveen & Jones)
Idaho Supreme Court
P.O. Box 83720
Boise, Idaho 83720
(208) 334-3324

3. *Heath v. Magera*, Jefferson County Case No. CV-2004-658.

This case was a personal injury case with strongly contested facts. Plaintiff claimed that defendant ran him down with his truck. Defendant claimed that he was stopped and plaintiff ran up and punched his truck. Plaintiff also claimed he was permanently injured and could no longer lift things with his right arm. I represented the defendant. We had video of plaintiff lifting 100 pound bales of hay with his right arm just weeks after the incident. The case went to a four-day trial. The jury returned a verdict of 50% liability on defendant and 50% liability on plaintiff. Under Idaho law that meant plaintiff recovered nothing. There was no appeal.

Plaintiff's Counsel:

Robert W. Horn
Robert W. Horn, PC
230 East Broadway
Jackson Hole, Wyoming 83001
(208) 733-5747

Defense Assistant Counsel:

Ian Johnson (formerly with Merrill & Merrill, Chartered)
Pocatello City Prosecutor's Office
911 North Seventh Avenue
Pocatello, Idaho 83201
(208) 234-6148

4. *Karlson v. Harris, et al*, 140 Idaho 561, 97 P.3d 428 (2004).

This case arose from an accident where a cow escaped from the landowners' property, gained access to the freeway via an on-ramp that lacked a cattle guard, and was struck and killed by a semi-truck. A motorist and passengers brought a negligence action against the State of Idaho, the landowners, and the owners of the cow after their vehicle struck the cow's carcass. The case was tried for two weeks to a jury in front of Judge N. Randy Smith of the Idaho Sixth District. The jury found in favor of all defendants. Plaintiffs appealed. Plaintiffs argued that the defense expert gave an opinion that was not supported by the facts but only by a hypothetical question. The Idaho Supreme Court, Justices Schroeder, Trout, Kidwell, Eismann and Burdick, affirmed the judgment and jury verdict. I represented the cow owner in the trial court and on appeal.

Plaintiff's Counsel:

Lowell Hawkes (retired)

Defense Counsel for landowner:

Michael Wheeler
Thomson Holman Wheeler, PLLC
2635 Channing Way
Idaho Falls, Idaho 83404
(208) 522-1230

Defense Counsel for the State:

Honorable Mitchell Brown (formerly with Racine Olson law firm)
Idaho Sixth District Court
159 South Main Street

Soda Springs, Idaho 83276
(208) 547-2146

5. *Krueger v. Bd. of Professional Discipline of the Idaho State Bd. of Medicine*, 122 Idaho 577, 836 P.2d 523 (1992).

This 1992 case involved the revocation of a doctor's medical license, stayed upon certain conditions, for violating the community standard of care even though a jury found that the doctor did not violate the community standard of care in a medical malpractice action. I represented the doctor in the medical malpractice action and in the appeal of the Board's decision to the Idaho Supreme Court. The medical malpractice action was tried in the District Court of the Fourth Judicial District in front of Judge Duff McKee. The jury found in favor of the doctor. The appeal of the Board's decision was to the Idaho Supreme Court in front of Justices Bistline, Johnson, Schilling, Trout (pro tem) and Reinhardt (pro tem). The Idaho Supreme Court reversed the district court's decision as to five of seven patients and affirmed that decision as to two patients.

Board's Counsel:

Jean Uranga
Uranga, Uranga & Bieter
714 North Fifth Street
Boise, Idaho 83702
(208) 342-8931

6. *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 245 P.3d 992 (2010).

I was the lead trial counsel for the defense in this case. This was a real estate transaction that involved the sale and trade of two residential homes. I represented the real estate company and three of its agents. There were allegations of fraud and misrepresentation against the agents. It was obvious that one agent had misrepresented certain facts in order to induce the sale. I tried to obtain separate counsel for each agent and the real estate company, but the insurer was in bankruptcy in New York and the New York trustee refused to appoint separate counsel. The first day of trial the plaintiffs offered to settle for about \$150,000. I gave a written opinion to the defendants and their insurer that they should accept that offer. The defendants requested that the insurer accept the offer. The insurer refused. The trial lasted four weeks. The jury found for the plaintiffs and awarded approximately \$1.2 million in damages. The matter was appealed to the Idaho Supreme Court and the verdict was affirmed. I was not involved in the appeal, which occurred after I went on the state bench. There is still an ongoing bad faith case between the realtors and their insurer over the failure to provide separate counsel.

Plaintiff's Counsel:

Lowell Hawkes (retired)

7. *Loza v. Arroyo Dairy*, 137 Idaho 764, 53 P.3d 347 (Ct. App. 2002).

This was a personal injury action in which a dairy employee was injured while milking a cow. His right arm was mangled when the cow kicked him. I represented the dairy farmer. The farmer allegedly told Loza that he was insured and Loza would get a big check from the insurer. The insurer did pay for medical expenses, but Loza wanted more. I filed a motion in limine to preclude Loza from putting the insurance statement into evidence. The trial court granted my motion in limine and the plaintiff agreed to have a judgment entered against him so he could appeal. The Idaho Court of Appeals affirmed.

Plaintiff's Counsel:

Harry DeHaan (current business contact information unavailable)
335 Blue Lakes Blvd. N.
Twin Falls, ID 83301
(208) 733-0731

8. *State v. Brown*, 856 P.2d 358 (Utah App. 1993).

This case involved a constitutional challenge to Utah's law regarding exhibiting harmful material to a minor. The case went to a jury with another attorney representing Mr. Brown. I represented Mr. Brown only on the appeal. Defendant appealed both the facial constitutionality of the statute and the enforcement procedure which formed the basis of his conviction. The Utah Court of Appeals stated that it had grave concerns with the police conduct in this case but that defendant's trial counsel failed to properly preserve his issues for an appeal. The appeal was heard by Judges Garff, Greenwood and Orme of the Utah Court of Appeals.

Prosecution Counsel:

Jan Graham (formerly with the Utah Attorney General's Office)
Graham Law Office
599 East 3945 South
Salt Lake City, Utah 84107
(801) 596-9199

9. *Vega v. Neibaur*, 127 Idaho 606, 903 P.2d 1303 (1995).

This was a personal injury action that I handled on appeal for the defendant. I was also the associate defense counsel at trial. Vega was injured by a potato sorting machine and suffered a permanent scar on his chest. The jury awarded Vega

\$30,000 in damages and found that he was 35% comparatively negligent. Under Idaho law, the comparative negligence would reduce the damage award by 35%. The presiding juror read the verdict in open court and the judge thanked the jury for their service and discharged them. As the jury was leaving, the presiding juror had an exchange with the judge in which the juror stated he thought the jury made an error. The judge allowed the jury to return to the jury room for further discussion and the jury then returned a verdict of \$46,000 with 35% comparative negligence on the plaintiff. I filed a motion to amend to put the verdict back to the original amount of \$30,000. The trial judge granted that motion and Vega appealed. On appeal, the Supreme Court held that we failed to object to the continuing deliberation and thus waived our objection. In reality, our offer of judgment was still higher than the amended verdict so my client chose to pay the \$30,000 and then seek costs and fees for the trial.

Plaintiff's Counsel:

E. Lee Schlender
Schlender Law Offices
2700 Holly Lynn Drive
Mountain Home, Idaho 83647
(208) 587-6888

Defense Co-counsel:

Honorable Stephen S. Dunn (formerly with Merrill & Merrill)
Bannock County Courthouse
624 East Center Street, Room 220
Pocatello, Idaho 83201
(208) 236-7250

10. *West v. El Paso*, 122 Idaho 133, 832 P.2d 306 (1992).

This case involved a tort action brought by two workers against a former owner of a fertilizer plant to recover damages for burn injuries in an ammonia granulator. I represented the former plant owner. District Judge Lynn Winmill of the Sixth Judicial District granted my client full summary judgment based upon the applicable statute of limitations and the workers appealed. I also represented the former owner on the appeal. This was the first Idaho case to involve Idaho's statute of limitation applicable to an "improvement to real property." The Idaho Supreme Court affirmed Judge Winmill's summary judgment decision.

Plaintiff's Counsel:

Brent Roche
Racine Olson Nye Budge & Bailey, Chartered (now Racine Olson)
201 East Center Street
Pocatello, Idaho 83201

(208) 232-6101

Involuntary Plaintiff/Appellant Liberty Mutual Fire Insurance Co. Counsel:

Justice Warren Jones (formerly with Eberle Berlin Law Office)
Idaho Supreme Court
P.O. Box 83720
Boise, Idaho 83720
(208) 334-3324

18. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As an attorney, I co-chaired my firm's litigation section and had the opportunity to mentor and assist young attorneys as they began their legal careers. As a judge, I have that same opportunity, to mentor and assist young attorneys as they serve as my law clerks. I also actively participate in the local chapter of the American Inns of Court as a mentor from the bench. I am on the Idaho Supreme Court's Education Committee and provide mentoring to new judges in the form of training and classes.

From June 2007 to the present, I have presided over the Bannock County Felony Drug Court. This diversionary or specialty court has jurisdiction over high-risk participants who have failed all other attempts of treatment or rehabilitation and are likely to go to prison but for the drug court.

I have never performed lobbying activities.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

I have not taught any formal courses at any schools.

20. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

21. **Outside Commitments During Court Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have no such plans, commitments, or agreements.

22. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached.

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

See attached.

24. **Potential Conflicts of Interest:**

- a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

I have a son, Jeff Nye, who is a litigator for the DC Office of Kirkland & Ellis, LLP. Although Kirkland & Ellis is a national firm that practices in courts across the country, my son has not yet had a case in Idaho. If my son's firm had a case in Idaho in the Federal District Court, I would recuse myself—just as I would currently if his firm had a case in the Idaho State Courts.

- b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

I would resolve any potential conflict of interest by adhering to the Code of Conduct for United States Judges, 28 U.S.C. Section 455, and all applicable policies and procedures of the United States Courts. I would recuse myself in any case in which my impartiality might reasonably be questioned.

25. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

As a lawyer, I served in both the Guardian Ad Litem program (CASA) for children and the Idaho Volunteer Lawyers Program for low income people. I averaged over 50 hours per year in pro bono assistance to children or to disadvantaged clients.

As a judge, I preside over the Felony Drug Court in Bannock County. It is a diversionary court that assists addicts in obtaining substance abuse treatment and mental health treatment that they could not otherwise afford. The drug court is an evening court held once a week and I serve on a voluntary basis as the presiding judge.

26. **Selection Process:**

- a. Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, please include that process in your description, as well as whether the commission recommended your nomination. List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

On January 28, 2016, I had a telephone conference interview with Senator Mike Crapo and Senator Jim Risch of Idaho regarding my interest in seeking the nomination for this position. I spoke with the Senators in several follow-up conversations concerning my qualifications and the appointment process in general. The Senators informed me on February 4, 2016, that they submitted my name for White House consideration and potential nomination. From February 4, 2016, to March 9, 2016 I was in contact with officials from the Office of Legal Policy at the Department of Justice regarding the paperwork required for the nomination process and for this Committee. On March 9, 2016, I interviewed with attorneys from the White House Counsel's Office and the Department of Justice in Washington, DC. On April 5, 2016, President Obama submitted my nomination to the Senate. On June 20, 2016, I again met with attorneys from the White House Counsel's Office and the Department of Justice in Washington, DC. On June 21, 2016, I went before the Senate Judiciary Committee for a hearing. I was passed out of the Committee by a voice vote in July 2016. The Senate did not hold a floor vote on my nomination and on January 3, 2017 my nomination was returned by the Senate to the President under provisions of Senate Rule XXXI, paragraph 6 of the Standing Rules of the Senate. On March 14, 2017, I received a telephone call from the White House Counsel's Office informing me that President Trump had authorized the vetting process for my potential nomination. Since that date, I have been in contact with officials from the Office of Legal Policy at the Department of Justice regarding the paperwork required for the new nomination process and for this Committee.

- b. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any currently pending or specific case, legal issue or question in a manner

that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully.

No.