THE *DYNAMICS* OF CIVIL DEFENSE

Official Newsletter of the Idaho Association of Defense Counsel

Winter 2019

FEATURING

ENFORCABILITY OF SETTLEMENT

Jeffrey J. Grieve – Beniot Law, Twin Falls

Settling litigation involves not only the real work of marshalling clients to a reasonable state of mind, but also properly articulating and memorializing the agreement so that the litigation can come to a true end. Nothing is worse than "settling" a case only to have to deal with a motion for enforcement of the settlement agreement. This article addresses some of those issues through the lense of a recent Idaho Supreme Court case dealing with enforcement of a settlement agreement.

In September 2018, the Idaho Supreme Court issued its opinion in *Seward v. Musick Auction, LLC*, 164 Idaho 149, 426 P.3d 1249. *Seward* stemmed from an earnings dispute between an employee/independent contractor (the status was disputed but never resolved in the underlying litigation) and the defendant who had hired him. After attending a court-ordered mediation conducted by a district judge,[1] the parties settled the dispute. There was no court reporter and the proceedings were not audio recorded because of a technical error. Therefore, the only record of the proceedings were the clerk's court minutes, which documented only that a settlement had been reached, that the terms and conditions had been recited for the record, and that the parties and counsel agreed with that recitation. It did not state what those terms and conditions were.

Defendant's attorney was tasked with drafting and submitting the proper paperwork. When he provided the first draft of the settlement agreement to Plaintiff's counsel, it contained a confidentiality term and also sought to bind the Plaintiff's wife to its terms. In the ensuing email spat between the attorneys,

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[1]The author's firm has noted a considerable uptick in "court-ordered mediation," and/or threats by plaintiffs to move for such orders. Another consideration related to mediation is whether you should agree as part of a Court's normal scheduling order to participate in mediation.

PRESIDENT'S MESSAGE: RECAP OF 54TH ANNUAL MEETING

Matthew Walters – Elam & Burke, Boise

IADC's 54th Annual Meeting took place at the Shore Lodge in McCall. The meeting was very well attended with 66 IADC members (as compared to 48 members the year prior) along with a number of presenters, vendors and our Executive Director, Deborah Katz. We are hoping to see that type of turnout this year at the 55th Annual Meeting at the Limelight Hotel in the Sun Valley area.

After lunch and the IADC membership meeting, the presentations were kicked off on Friday afternoon by Keely Duke (Duke Scanlan Hall, PLLC) and Judge Steven Hippler (Fourth Judicial District) and we all learned a lot about the real life experiences and workloads for Idaho District Court judges. Next, we had six participants in the Rapid-fire Decision Reviews: Molly Mitchell, Ben Ritchie, Aubrey Lyon, Tyler Cobabe, Joe Southers and Casey Hemmer. In order to keep the decision reviews lively, a bat decided to grace us with her/his presence. Friday's presentations concluded with Brad Andrews (Idaho Bar Counsel) who helps us all practice law in a more ethical manner.

An unusual number of IADC members were in attendance for the early CLE session on Saturday. The reason was our stellar panel on the appellate practice of law: Judge Randy Smith (U.S. Court of Appeals – Ninth Circuit), Justice Robyn Brody (Idaho Supreme Court) and Jeffrey Thomson (Elam & Burke). The final presenter, John Trimble (Lewis Wagner), was available thanks to DRI. Mr. Trimble presented on two different legal topics: the shifting sands of the legal practice and insurance company metrics. The IADC board received overwhelming positive feedback on the CLE presentations.

The weather was kind enough on Saturday to allow many to enjoy a round of golf at Whitetail. The 54th Annual Meeting concluded on the Whitetail Golf Course patio (following a scramble to find a new location when the cruise was unexpectedly cancelled). Many thanks to the presenters, the IADC board, Ms. Katz and the staff at Shore Lodge/Whitetail for making the 54th Annual Meeting a success. Δ

Newly-elected president Matt Walters (left) presents outgoing president, Tony Sasser (right), with IADC's Award of Appreciation for his five years of service on the Board, including his year as president.

Find more photos in the Members-Only section of IADC's website.

Matt Walters (center) receives a special award for valor. He went above and beyond the duties of president-elect when he acted quickly to confine a rogue bat that flew into the meeting room at Shore Lodge. We know he'll cherish that Batman keychain forever!

ENFORCEABILITY. *Continued from Page 1*

Plaintiff's counsel asserted her position that these terms were beyond the oral agreement that had been reached at mediation. Although there were some attempts at negotiating the issues, the Defendant would never agree to a resolution that did not include at least one of the two new conditions. Plaintiff moved to enforce the settlement agreement without the additional terms five months later, and the Court granted the motion.

The appeal dealt with aspects of the evidence supporting on Plaintiff's Motion, and the district court's ultimate ruling that the agreement was enforceable without the additional terms. For purposes of this article, most notable is the Court's holding concerning enforceability, and the evidence that the Court used to support that holding. *Seward* yields several important reminders when participating in your next mediation or settlement negotiation.

I. Understand your client's expectations, especially what your client views as non-negotiable terms, prior to mediation.

The problem for the Defendant in *Seward* was the post hoc attempt to add the confidentiality provision and bind the Plaintiff's spouse to the agreement. Given the ensuing litigation, it is obvious that the Defendant viewed confidentiality and the ability to bind Plaintiff's spouse as non-negotiable. It is anyone's guess why these issues weren't raised until after the mediation, but if those non-negotiables had been clearly identified prior to the mediation, they could have been addressed at the appropriate time. There is no better solution than to simply ask your clients ahead of time what they view as essential to resolving the dispute.

II. Don't assume there is "standard" language for a settlement and release.

In a similar vein, problems can arise from making an assumption that a particular term is considered "material" to the agreement, but waiting until noting their absence from the written draft of the agreement to ask for them. The line drawn for oral settlement agreements later reduced to writing is the same line that is drawn in contract law generally: if there is no meeting of the minds on the essential terms, there is not an enforceable agreement. *Lawrence v. Hutchinson*, 146 Idaho 892, 898, 204 P.3d 532, 538 (Ct. App. 2009). The point is that nothing goes without saying when it comes to settlement agreements. You should not rely on your experience or what you consider common practice to make assumptions about what would be a standard term in a settlement agreement.

A commonly overlooked term is confidentiality, which was at issue in both *Seward* and *Lawrence*. Other examples from those cases include who is actually bound by the agreement and terms concerning indemnity. Likewise, a Medicaid reporting term, a covenant not to execute, and the time and manner of payment are all items that, while

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INADVERTENTLY PERPETUATING WAGE DISCRIMINATION: THE NINTH CIRCUIT FINDS EMPLOYERS' RELIANCE ON SALARY HISTORY VIOLATES THE EQUAL PAY ACT

I. Introduction

A business hiring practice by employers hiring a new worker was once commonly to ask about the candidate's salary history. With this information, the employer gauged the candidate's salary expectations, and prepared and proposed a job offer in line with those expectations. This practice, however, came with a problematic twist: it encouraged an employer to offer a lower starting wage to some job candidates than they would have otherwise. If the candidate's prior salary was the result of wage discrimination, even the most well-intentioned employer could be perpetuating wage discrimination. A recent Ninth Circuit decision held an employer could not rely solely on a female employee's lower prior salary to justify paying her a lower starting wage than the starting wage provided to a similarly situated male employee, and that prior salary was not an acceptable factor to qualify for an exception under the Equal Pay Act.[1]

The Equal Pay Act was enacted in 1963 under a simple principle: Equal Pay for Equal Work. Yet over 50 years later, women continue to earn 20% less than men.[2] The simple principle has proven not so simple to follow, in part due to the multiple factors that account for the wage gap between men and women. Gender expectations, education, training opportunities, and advancement opportunities (to name just a few) all play a role in wage discrepancy.[3]

II. The Ninth Circuit's Holding in *Rizo v. Yovino*

The first step to wage equality is an equal starting wage, which is the issue in *Rizo v. Yovino*.[4] The method for determining a starting salary can be complicated, with each position requiring different education, skills, hours, and experience. To complicate matters further, each person applying for the position is a unique individual with a different work history. In recognition of these complex problems, the Equal Pay Act provides four exceptions to account for varying pay: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex.*"[5]

In *Rizo*, an employer (a public school) utilized a system to set its employee's starting salary by taking the candidate's prior salary and adding 5%.[6] The employer argued this system was gender neutral and fell under the

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[1] *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018).
[2] AAUW, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 7 (2018), https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The_Simple_Truth.
[3] *Id.* at 14-17.
[4] 887 F.3d 453 (2018).
[5] 29 U.S.C. § 206(d)(1) (emphasis added).
[6] *Rizo*, 887 F.3d at 457.

SAVE THESE DATES

IADC's 55th Annual Meeting

September 20-21, 2019
Limelight Hotel - Ketchum
with golf at the Sun Valley Resort

ENFORCEABILITY. *Continued from Page 2*

subject to a great argument that they are "standard" terms, might not actually be standard to the opposing party or counsel. There are likely countless other examples.

Even the scope of the all-important release term, which may seem obvious, should be clarified orally during the settlement negotiation. In an older case before the Idaho Court of Appeals, the extent of the release actually became an issue where one party had intended to preserve an appeal right as part of the settlement agreement. *See Suitts v. First Sec. Bank of Idaho, N.A.*, 125 Idaho 27, 867 P.2d 260 (Ct. App. 1993). Rather than guess or assume that your client is buying a full release, it is always best to clarify.

III. Err on the side of providing too much information when placing the settlement on record.

Another significant issue in *Seward* was the lack of audio record of the proceeding in which the parties placed the terms of the agreement on the record. This meant that in the enforcement proceeding the Court had to rely on less-than-ideal evidence, such as the court minutes and affidavits of the litigants, to determine the terms of the agreement whether it was enforceable.

Even if you are in a situation where you are "on the record" with the Court and its clerk, your goal should be ensuring that if it came down to it, your client could, with a clear conscience, sign an affidavit that explicitly sets forth the details of the agreement and that those were openly discussed during the negotiation. The *Seward* Defendant had particular difficulty supporting its position because it was unable to do just that, and could only discuss what he "thought" or "assumed" would happen. If your client only has subjective expectations about what should appear in the settlement agreement, that is not enough to translate them into enforceable terms. Items I and II will help with this, but there is no substitute for clearly verbalizing them during the mediation.

IV. Brush up on contract rules.

The constant refrain in settlement agreement cases like *Seward* and *Lawrence* is that settlement agreements are nothing more than contracts. They can be offered and accepted orally, and can be binding before any documents are drafted. Terms added at the time of memorializing the oral agreement might be attempts to modify a binding contract, which do not bear on the enforceability of the original agreement and may also require additional consideration. Keeping in mind the legal context of a settlement negotiation may give you an edge over opposing counsel when it comes to putting pen to paper or defending or prosecuting an action to enforce the settlement agreement.

These reminders are not groundbreaking—they are about the fundamentals. Settlement agreements are not particularly thrilling and may even feel anti-climactic. But nothing is more important than handling them right for our clients. Whether you are approaching your first or hundredth mediation, consider these reminders from *Seward*. Δ

ABOUT THE AUTHOR

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EQUAL PAY. *Continued from Page 3*

fourth exception; the prior salary being a differential based on a "factor other than sex".[7] The Ninth Circuit noted the fourth (catchall) exception was "limited to legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance;"[8] and concluded the employee's prior salary is not considered a job-related factor.[9] As the Court reasoned, at the time the Equal Pay Act was enacted, the prior salary of a female employee would have been lower than that of a male employee because the work place was discriminatory.[10] If an employer could use prior salary as a basis for offering lower starting salaries to female employees, then the Equal Pay Act, at the very outset of its enactment, would do nothing to remedy the discrimination because the prior salary incorporated the historically discriminatory behavior. An employer cannot follow the "mandate of equal pay for equal work"[11] when relying on a prior salary that has incorporated a history of unequal pay for equal work. Therefore, using prior salary to justify paying a lower wage to one employee than to another perpetuates wage discrimination.[12] The Court held it is impermissible for an employer to rely on prior salary as a factor in setting starting salaries.[13]

It is understandable that a business may be motivated to reduce labor costs by hiring workers at lower salaries. A business may free up resources to be used elsewhere if it hires an employee at less than the business had projected to pay for that position. Even though this practice may make good business sense, according to the Ninth Circuit this business objective does not meet the exception set forth in the Equal Pay Act.[14] The candidate's prior salary may not have been appropriate. The salary could be lower based on a legitimate factor such as performance, or due to a lack of negotiating skills to lobby for a raise, or due to illegal wage discrimination. The relationship between an employee's prior salary and a legitimate, job-related factor is too attenuated to be relied upon by the employer.[15] Pursuant to the Ninth Circuit, although the catchall exception applies to a wide variety of job-related factors, it does not encompass reasons that are simply good for business.[16]

III. The Circuit Split on Prior Salary as a "Factor Other Than Sex"

The Ninth Circuit is not the only Circuit to address whether the use of prior salary falls under the fourth (catchall) exception. These Courts have come to varying conclusions, and the decision in *Rizo* only adds to the different interpretation and analyses among the Circuits. The Seventh and Eighth Circuits have held exactly opposite
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[7] *Id.* at 458.
[8] *Id.* at 460.
[9] *Id.*
[10] *Id.* at 461.
[11] *Id.* at 459.
[12] *Id.* at 468.
[13] *Id.*
[14] *Id.* at 466.
[15] *Id.* at 467.
[16] *Id.*

NEW!

THE IADC CARL P. BURKE AWARD OF EXCELLENCE IN LEGAL DEFENSE

Accepting nominations now for IADC's most prestigious award!

The Carl P. Burke Award of Excellence in Legal Defense was established by unanimous Board action in January 2019. The award honors IADC's first president, Carl P. Burke, and his contribution to civil defense practice in Idaho. It celebrates and recognizes his distinguished service and extraordinary accomplishments in the field.

Carl P. Burke had the opportunity to hang around his father's law office while attending Boise High. After serving in World War II, he earned his law degree and was admitted to the Idaho Bar on November 17, 1950, Bar #624. After clerking for the Federal Court, he worked for a federal stabilization program tasked with enforcing price controls under President Truman's administration. In 1952, he moved to his father's firm, now Elam & Burke, and worked his way to one-third partnership interest. He was there until 2005.

In addition to practicing law, Burke had a passion for community involvement through politics. He served on campaigns for Frank Church and others; held an advisory position for the National Park Service; and represented State Senate Democrats in a case that went to the Idaho Supreme Court in 1990. Always a strong supporter of mentoring young attorneys, Burke provided guidance and training to many. Seen as a lion in Idaho law, his mantra shared with younger attorneys was: ***Be tough but be fair***. Both of Burke's sons, Cameron and Chris, work in the legal field, too. Chris Burke, Parsons Behle-Boise, is a current member of IADC.

Burke was highly regarded for his civility and carried himself as a consummate gentleman, even in the depths of a tough case. He was known for his loyalty, professionalism and high standard of ethics. For those reasons, IADC's Board saw naming the award after Burke as a way to honor his contributions and to set a standard for future award winners. *Continued on Page 8.*

Members attending the luncheon at IADC's 54th Annual Meeting in McCall.

EQUAL PAY. *Continued from Page 5.*

the Ninth Circuit and permit salary history as a means to determine an employee's starting salary.[17] The Second and Sixth Circuits take an expansive view of the fourth exception, and allow prior history so long as the employer has a legitimate business purpose for relying on the information.[18] The Tenth and Eleventh Circuits allow prior salary to be considered so long as it is not the sole factor.[19]

A Petition for Certiori in the *Rizo* matter has been docketed by United States Supreme Court, and may resolve the Circuit split. Even so, many states and localities have enacted legislation that prohibits inquiries regarding prior salary. There are at least 11 state bans and 10 local bans.[20]

IV. Conclusion

With the varying state and local jurisdictional requirements, as well as the Circuit split, employers must proceed with caution, especially employers whose businesses span multiple jurisdictions. Best practice for employers should be to develop starting salaries ranges based on the required qualifications for the position while considering market conditions. During the recruitment process, instead of asking about prior salary, the employer may discuss the salary range expectations for that position. Using this range, the employer should then individualize the starting salary based on the skills, experience, and performance of the employee. These factors, even under the Ninth Circuit's interpretation of the fourth exception, are legitimate, job-related factors that allow a pay disparity between employees. Such an approach allows the employer to appropriately assess salaries and reduce the risk of perpetuating illegal discriminatory practices embedded within a candidate's prior salary. Δ

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[17] *Lauderdale v. Illinois Department of Human Services*, 876 F.3d 904 (7th Cir. 2017); *Taylor v. White*, 321 F.3d 710 (8th Cir. 2003).
[18] *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520 (2d Cir. 1992); *Beck-Wilson v. Principi*, 441 F.3d 353 (6th Cir. 2006).
[19] *Riser v. QEP Energy*, 776 F.3d 1191 (10th Cir. 2015); *Irby v. Bittick*, 44 F.3d 949 (11th Cir. 1995).
[20] *Salary History Bans*, HR DIVE (Dec. 19, 2018), https://www.hrdive.com/news/salary-history-ban-states-list/516662/.

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WE'RE ALWAYS LOOKING FOR NEW MEMBERS

If you know an attorney who should be a member of IADC and isn't, please invite that individual to join by passing along this membership application. Or, forward their name to the IADC Office and we'll reach out.

Idaho Association of Defense Counsel

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MEMBERSHIP APPLICATION

1. The Undersigned hereby applies for membership in the Idaho Association of Defense Counsel:

   Name:_____ Idaho State Bar No.: _____

   Year of Birth: _____ (yyyy) Year of admission to the Bar: _____

2. If a member or an associate of a law firm:

   Firm Name: _____ Years at firm: ___

3. Firm Mailing Address: _____

   City: _____ State: _____ Zip: _____

   Phone: _____ E-mail: _____

4. Are you a member of D.R.I? Yes / No
5. Have you ever before applied for membership in IADC? Yes / No
6. Have you ever before been a member of this Association? Yes / No

7. My primary practice areas are (circle all that apply):

a.	Automobile	g.	Insurance
b.	Commercial Litigation	h.	Medical
c.	Construction	i.	Product Liability
d.	Employment	j.	Professional Liability (other than medical)
e.	Government Liability	k.	Worker's Compensation
f.	In-House Counsel	l.	Other _____

8. Please provide a representative list of the names of any insurance companies, self-insured clients, businesses, organizations, or entities that you represent as defense counsel:

   _____

   _____

   _____

9. How did you learn about IADC and/or who referred you? _____

10. Memberships Dues:

    ____ Attorney - **$250**

    ____ Retired Member - **$175**

    ____ Law Student - **$25** List name of law school: _____

11. ACKNOWLEDGMENT: By signing below, I represent and acknowledge that a substantial portion of my practice is devoted to the representation of defendants or business in civil litigation. To the extent that I engage in personal injury litigation, I DO NOT, for the most part represent plaintiffs. I have read the foregoing, agree to same, and hereby submit this confidential application for membership with the Idaho Association of Defense Counsel.

    DATE: _____ SIGNATURE: _____

Contributions or gifts to IADC are not tax deductible as charitable contributions for income tax purposes. However, membership dues may be tax deductible as ordinary and necessary business expenses subject to restrictions imposed as a result of association lobbying activities. IADC spent $0 on lobbying/advocacy expenses in the 2018 membership year. Please consult your tax advisor.

Calendar of Events

June 1, 2019	**Nomination deadline for Carl P. Burke award**
Sept 20-21, 2019	**IADC 55th Annual Meeting** *Limelight Hotel-Ketchum*
Oct 16-19, 2019	**DRI Annual Meeting** *New Orleans, LA*
Jan 9-10, 2020	**DRI Leadership Meeting** *by invitation only*
Feb TBD, 2020	**DRI NW Regional Meeting** *by invitation only*
Sept 18-19, 2020	**IADC 56th Annual Meeting** *Shore Lodge - McCall*

AWARD. *Continued from Page 5.*

To nominate an individual for the Carl P. Burke Award of Excellence in Legal Defense, please send a letter describing the reasons for the nomination to IADC's Board via the IADC Office. Nominations will be accepted only from IADC members in good standing. **Nominations must be submitted to the IADC Office by June 1st each year.** Nominees do not need to be current or former IADC members or licensed attorneys.

Award recipients will be selected by a majority vote of IADC's Board. When approved, the award will be presented at IADC's Annual Meeting or as soon thereafter as reasonably possible. The quantity of award recipients may vary each year, as determined by the Board. Δ

Wishing you an active 2019 filled with laughter and good health!

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