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Duncan v. State Bd. of Accountancy Appellant's Brief Dckt. 35804

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF:)

MICHAEL A. DUNCAN)

License No. CP-2297)

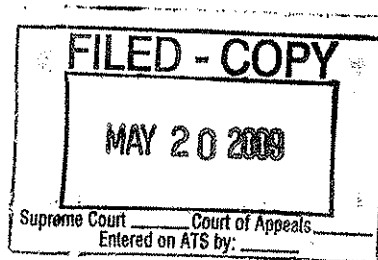
Plaintiff-Appellant,)

vs.)

STATE BOARD OF ACCOUNTANCY)

Defendant-Respondent.)

Supreme Court No: 35804



APPELLANT'S BRIEF

Appealed from the District Court of the Second Judicial District in the State of Idaho,
In and For the County of Nez Perce.

The Honorable Carl B. Kerrick, District Judge Presiding

Counsel for Defendant

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1 **STATEMENT OF THE CASE**

2 A. NATURE OF THE CASE

3 The Plaintiff-Appellant (hereafter "Duncan"), has appealed the *Memorandum Opinion and*
4 *Order on Motion to Dismiss and Petition for Judicial Review* entered by District Court Judge Kerrick
5 on September 3, 2008. Said court affirmed the *Findings of Fact, Conclusions of Law, and Final*
6 *Order* entered by the Defendant-Respondent Idaho State Board of Accountancy on August 16, 2007,
7 in which the Idaho State Board of Accountancy sanctioned Duncan for violating AICPA Rule 102.3.

8
9 B. COURSE OF PROCEEDINGS AND STATEMENT OF RELEVANT FACTS

10 A Verified Complaint was filed against Duncan with the Idaho State Board of Accountancy
11 (hereafter "Board") on September 22, 2006. On July 18, 2007 a hearing was held before a Hearing
12 Body of the Board (hereafter "Hearing Body") regarding said Complaint. At the hearing, the Board
13 alleged that Duncan violated Rule 102.03 of the AICPA Code of Professional Conduct.

14
15 The following undisputed and uncontroverted facts are pertinent to this Appeal:

16 Duncan has been licensed in the State of Idaho as a CPA since 1986.

17 Duncan has never had a complaint filed against him previously nor has he ever been
18 disciplined for professional misconduct.

19
20 Beginning in 2001, Duncan's firm prepared the tax returns for the Complainant and his then
21 wife Evelyn. Duncan never gave the Complainant and Evelyn financial advise.

1 Duncan was the supervising CPA for the preparation of the return, not the individual who
2 actually prepared the 2003 tax return.

3 As of April 28, 2004, the 2003 tax return was substantially completed. No work was done
4 on the return until August 11, 2004 (a second extension was filed on that date).

5 Sometime in the first part of May of 2004, Evelyn called Duncan requesting a referral to an
6 attorney who could handle a divorce for her.

7 Sometime later in May or early June of 2004, Duncan and Evelyn developed a personal
8 relationship.
9

10 On June 29, 2004, Evelyn filed for divorce against the Complainant.

11 Both parties were represented in the divorce by attorneys.

12 On August 11, 2004, the decree of divorce was entered.

13 On August 11, 2004, a second extension was filed by Duncan's firm for the Complainant and
14 Evelyn's 2003 tax return.
15

16 On August 13, 2004, Duncan informed the Complainant that he would no longer be
17 performing his accounting services.

18 On August 18, 2004, Complainant acknowledged that he was aware of the relationship
19 between Duncan and Evelyn.
20

21 Sometime after the decree of divorce was entered, Evelyn requested that the 2003 tax return
22 be completed.
23

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1 Pursuant to instructions, the 2003 tax return was completed with the Complainant's attorney
2 as the taxpayer's address (with the exception of the extension filed on August 11, 2004, no work had
3 been performed on said return since April 28, 2004). .

4 On or around September 14, 2004, the Claimant either picked up or had delivered the 2003
5 tax return.

6 Both Evelyn and the Complainant signed the 2003 tax return.

7 The 2003 tax return was filed by Evelyn and the Complainant.

8 The Complainant received and kept the refund that he and Evelyn received as a result of the
9 filed 2003 tax return.

10 There has not been any negative allegations regarding the 2003 tax return prepared by
11 Duncan's firm.

12 On August 16, 2007, the Hearing Body issued its *Findings of Fact, Conclusions of Law, and*
13 *Final Order*. The Hearing Body made the following factual findings:

- 14
- 15 • Duncan did not make a disclosure to the Complainant-spouse that he had a conflict of
16 interest that prevented him from continuing to represent both parties in tax preparation. He
17 did not seek the consent of either party to continue such representation. Duncan stated that
18 tax preparation was completed in a client neutral manner.
 - 19 • Duncan continued to retain responsibility for the filing of joint tax returns for both clients.
20
21

- 1 • Complainant was aware of the personal relationship that was established between Duncan
2 and Evelyn and was antagonistic toward both Duncan and Evelyn.
- 3 • AICPA Rule 102.03 does not create an exception from the duty to disclose a conflict of
4 interest and seek consent to continuation of the professional services relationship for the
5 situation in which the client is aware of the relationship.
6

7 (R. pp. 11-12).

8 The Hearing Body then made the following conclusions of law:

- 9 • If an individual licensed by the Board of Accountancy establishes a personal intimate
10 relationship with one spouse and a relationship of antagonism with the other spouse, one may
11 reasonably view the relationships to impair the member's objectivity.
- 12 • If an individual licensed by the Board of Accountancy believes the professional service can
13 be performed with objectivity, and the relationship is disclosed to the client(s) and consent
14 of the client(s) is obtained, AICPA 102.3 does not prohibit the performance of the
15 professional service.
- 16 • Duncan had a duty to terminate the professional relationship or to make disclosure of a
17 conflict of interest to both clients due to the divorce proceedings and finalization of the
18 divorce or the personal relationship that was established between Duncan and one client.
19 Duncan did not make such required disclosures and did not seek the consent of either client
20 prior to continuation of the professional services relationship.
21
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23

- 1 • Duncan violated the Idaho Accountancy Act, Idaho Code § 54-219(1)(d), specifically Idaho
2 Accountancy Rule 004.01 by not making the disclosures or seeking/receiving the consent(s)
3 required by AICPA 102.3.

4 (R. pp. 12-13).

5 Subsequently Duncan filed a timely *Petition for Judicial Review*. On September 3, 2008,
6 the District Court affirmed the *Findings of Fact, Conclusions of Law, and Final Order* entered by
7 the Board on August 16, 2007, in which the Board sanctioned Duncan for violating AICPA Rule
8 102.3.
9

10 **ISSUE PRESENTED ON APPEAL**

11 Did the District Court err in not overturning the Idaho State Board of Accountancy's decision
12 that the Appellant violated the Idaho Accountancy Act, specifically Idaho Accountancy Rule 004.01,
13 by not making the disclosures or seeking/receiving the consent(s) required by AICPA 102.3, when:
14

- 15 (a) AICPA 102.3 is silent about who needs to make a disclosure of a relationship and
16 how the disclosure of that relationship is to be made and the uncontrovertible
17 evidence in the record established that the Complainant was aware of the relationship
18 requiring disclosure prior to the finalization of the tax return; and
19
20 (b) AICPA 102.3 is silent about how consent must be obtained and the uncontrovertible
21 evidence in the record established that all parties consented to the Appellant
22 continuing to provided professional services, including the Complainant who got a
23

1 copy of final tax return, signed the final tax return, filed the final tax return, kept the
2 refund, and never alleged that the professional services provided by the Appellant
3 where in any way suspect.

4 **ARGUMENT**

5 THE DISTRICT COURT ERRED IN NOT OVERTURNING THE BOARD'S DECISION
6 THAT DUNCAN VIOLATED AICPA 102.3 BY ERRONEOUSLY GIVING THE BOARD'S
7 UNREASONABLE CONSTRUCTION OF AICPA 102.3 WEIGHT BY AFFIRMING A
8 DECISION THAT IS NOT BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD AND IS
9 ARBITRARY, CAPRICIOUS, OR AN ABUSE OF DISCRETION BASED ON THE BOARD'S
10 UNREASONABLE CONSTRUCTION OF AICPA 102.3.

11
12
13 A. STANDARD OF REVIEW

14 Judicial review of an agency action is governed by the Idaho Administrative Procedure Act.
15 See I.C. § 67-5270. A reviewing court must overturn the agency's decision if it determines that the
16 agency's findings, inferences, conclusions or decisions are:

- 17 (a) in violation of constitutional or statutory provisions;
18 (b) in excess of statutory authority of the agency;
19 (c) made upon unlawful procedure;
20 (d) not supported by substantial evidence on the record as a whole; or
21 (e) arbitrary, capricious, or an abuse of discretion.

22 See I.C. § 67-5279. The reviewing court may not substitute its judgment for that of the agency as
23 to the weight of the evidence on questions of fact. See I.C. § 67-5279. When a District Court acts

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1 in its appellate capacity under the APA, the Supreme Court reviews the agency record independently
2 of the District Court's decision. *Sons & Daughters of Idaho, Inc. v. Idaho Lottery Comm'n*, 144
3 Idaho 23, 26, 156 P.3d 524, 527 (2007).

4 A reviewing must give considerable weight to an agency's construction of a statute or
5 administrative rule or regulation **only if** the agency's interpretation is reasonable. *See Preston v.*
6 *Idaho State Tax Comm'n*, 131 Idaho 502, 504, 960 P.2d 185, 187 (1998) (Emphasis added.)

7 Administrative regulations are subject to the same principles of statutory construction as statutes.
8 *Mason v. Donnelly Club*, 135 Idaho 581, 586, 21 P.3d 903, 908 (2001). Interpretation of such a rule
9 should begin, therefore, with an examination of the literal words of the rule. *Id.* at 586, 21 P.3d at
10 908. The language of the rule, like the language of a statute, should be given its plain, obvious and
11 rational meaning. *Id.* at 586, 21 P.3d at 908.

12
13
14 B. THE HEARING BODY UNREASONABLY CONSTRUES THE REQUIREMENTS OF
15 AICPA 102.3 AND THUS ITS INTERPRETATION SHOULD BE GIVEN NO WEIGHT.

16 On a preliminary matter, the underlying basis for this appeal is that the Hearing Body
17 unreasonably constructs AICPA 102.3 in its application to this matter. The language of AICPA
18 102.3 is very clear and straightforward on what needs to be done if professional services are to be
19 continued. Rule 102.03 of the AICPA states in pertinent that:
20

21 A conflict of interest may occur if a member performs a professional service for a
22 client or employer and the member or his firm has a relationship with another person,
23 entity, product, or service that could, in the member's professional judgment, be
viewed by the client, employer, or other appropriate parties as impairing the

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1 member's objectivity. **If the member believes that the professional service can**
2 **be performed with objectivity, and the relationship is disclosed to and consent**
3 **is obtained from such client, employer, or other appropriate parties, the rule**
4 **shall not operate to prohibit the performance of the professional service.** When
5 making the disclosure, the member should consider Rule 301.

6 (Emphasis added.) What needs to be done if professional services are to be continued is that (1) the
7 relationship needs to be disclosed, and (2) that consent be obtained. What is critical to note is that
8 AICPA 102.3 is silent about who needs to disclose the relationship, that AICPA 102.3 is silent about
9 how the disclosure of the relationship needs to be made, i.e. whether it can be made orally or must
10 be in writing, and is silent on how consent must be obtained. As the Court knows, not only can
11 consent can be express as well as implied, there is no legal or practical difference between the two.
12 Nevertheless, AICPA 102.3 is silent about how disclosure and consent is to be made. The drafters
13 of AICPA 102.3 obviously had every opportunity to address how disclosure and consent is to be
14 made but opted to be silent. As such, one can only reasonably conclude that the drafters were only
15 concerned with having disclosure and consent, and were not concerned with how disclosure and
16 consent were obtained. The language of the rule must be given its plain, obvious and rational
17 meaning.

18 In this matter, the Hearing Body concluded that Duncan himself had a duty to terminate the
19 professional relationship or that Duncan himself had a duty to make disclosure of a conflict of
20 interest to both clients due to the divorce proceedings and finalization of the divorce or that Duncan
21 himself had a duty to make a disclosure of the personal relationship that was established between
22

1 Duncan and one client. The language of AICPA 102.3 does not require that Duncan himself was
2 required to disclose the relationship and is silent about how consent is to be obtained. The Hearing
3 Body ignores the plain language of AICPA 102.3 and adds additional requirements that are not found
4 in the rule. Construction of AICPA 102.3 dictates that the language of the rule must be given its
5 plain, obvious and rational meaning. The Hearing Body adds requirements to the rule that are not
6 found in the clear and unambiguous language of the rule and thus its construction of AICPA 102.3
7 is unreasonable and should be given no weight. The District Court erred in giving the Hearing
8 Body's construction of AICPA 102.3 weight in affirming the Hearing Body's decision.
9

10 The Hearing Body concluded that Duncan did not make such required disclosures and did
11 not seek the consent of either client prior to continuation of the professional services relationship.
12 Based on these conclusions, the Hearing Body ruled that Duncan violated AICPA 102.3. The
13 Hearing Body unreasonably construed the requirements of AICPA 102.3 and ignored the
14 uncontradicted facts of this case which establish that Duncan complied with the requirements of
15 AICPA 102.3.
16

17 C. THE RELATIONSHIPS WERE PROPERLY DISCLOSED IN THIS MATTER.

18 The Hearing Body held that Duncan had the duty to terminate the professional relationship
19 or to make a disclosure of a conflict of interest to both clients due to the divorce proceeding and
20 finalization of the divorce. It is important to note that the Hearing Body cites to the following
21 comment of AICPA 102.3 in its Findings of Fact, Conclusions of Law, and Final Order:
22
23

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1 A member has provided tax or personal financial planning (PTP) service for a
2 married couple who are undergoing a divorce, and the member has been asked to
provide the services for both parties during the divorce proceedings.

3 Contrary to the Hearing Body's holding, as set forth above, AICPA 102.3 does not require
4 that a conflict of interest be disclosed, AICPA 102.3 requires only that the relationship be disclosed.
5 With regards to the filing and ultimate divorce of the Complainant and Evelyn in this matter, this
6 relationship obviously had been disclosed. The Complainant and Evelyn knew that they were in
7 divorce proceedings. Furthermore, the comment to AICPA 102.3 that the Hearing Body relies upon
8 does not even apply to this matter. The comment addresses tax or personal financial **planning**
9 service, not tax preparation. There is a significant difference between tax preparation, which is what
10 Duncan's firm did, and tax or personal financial planning. The tax preparation that occurred in this
11 case was limited to the events and consequences that occurred in the calendar year of 2002. Events
12 and consequences that cannot be changed. The fact that the Complainant and Evelyn were
13 undergoing a divorce in 2003 has no bearing on the tax events that occurred in 2002. The return that
14 Duncan's firm prepared would have been prepared exactly the same way regardless of whether the
15 Complainant and Evelyn were happily married or going through a divorce. Finally Duncan never
16 gave the Complainant and Evelyn financial or tax planning advice, Duncan's firm merely provided
17 tax preparation services.
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20

21 Another critical point is that the return was substantially completed before Evelyn even
22 contacted Duncan about a referral to an attorney for a divorce. Additionally, no substantive work
23

1 was done on the return during the time period that the Evelyn contacted Duncan about a referral until
2 the divorce was final between the Complainant and Evelyn. While an extension was filed on the day
3 that the decree was entered, this event has no substantive effect on the return, in fact, failing to file
4 an extension arguably would have been professional malpractice by the Duncan's firm.

5 The Hearing Body's conclusion that the Petitioner should have disclosed the conflict of
6 interest due to the divorce proceedings is unreasonable. AICPA 102.3 only requires that the
7 relationship be disclosed, and in this case the parties obviously knew they were getting a divorce.
8 Furthermore, AICPA 102.3 does not even apply to tax preparation in this case. The return would
9 have been prepared exactly the same regardless of the relationship status between the Complainant
10 and Evelyn. Finally, no work was done on the return from the time that Duncan learned about the
11 possibility of a divorce until the divorce was final. It is ridiculous to sanction a professional for a
12 time period in which he was not even performing services.

13 The Hearing Body also held that Duncan had the duty to terminate the professional
14 relationship or to make a disclosure of a conflict of interest to both clients due to the personal
15 relationship that was established between Duncan and one client. AICPA 102.3 does not require that
16 a conflict of interest be disclosed. AICPA quite clearly states that the only thing that needs to be
17 disclosed is the relationship itself - not the conflict of interest. AICPA 102.3 is silent about who
18 needs to disclose the relationship, AICPA 102.3 is silent about how the disclosure of the relationship
19 needs to be made, i.e. whether it can be made orally or must be in writing. The facts of this case
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1 establish that the Complainant acknowledged that he knew about the relationship between Duncan
2 and Evelyn before the Complaint received the return, knew about the relationship before he signed
3 the return, knew about the relationship before he mailed the return, and knew about the relationship
4 before he accepted the refund from the return. The Hearing Body interprets that AICPA 102.3
5 requires Duncan himself to disclose the relationship. AICPA 102.3 makes no such requirement. The
6 only requirement is that the relationship be disclosed and in this case the Complainant knew about
7 the relationship between Duncan and Evelyn and thus the language of AICPA 102.3 was satisfied.
8

9 The Hearing Body made a factual finding that AICPA 102.03 does not create an exception
10 from the duty to disclose a conflict of interest and seek consent to continuation of the professional
11 services relationship for the situation in which the client is aware of the relationship. Such a
12 “finding” is not actually a factual finding but a conclusion of law, and regardless is unreasonable.
13 AICPA 102.3 only requires that the relationship be disclosed and is silent about who must disclose
14 the relationship. In this case the Complainant expressly acknowledged that he knew about the
15 relation prior to his receipt of the tax return and as such, the Hearing Body’s holding that the
16 Petitioner violated AICPA 102.3 is contrary to the clear and unambiguous language of the rule and
17 ignores the uncontradicted facts in this matter. The District Court erred in giving the Hearing Body’s
18 construction of AICPA 102.3 weight in affirming the Hearing Body’s decision which was not
19 supported by substantial evidence in the record and based on its unreasonable construction of AICPA
20 102.3 was arbitrary, capricious, or an abuse of discretion.
21
22

1 D. BOTH CLIENTS CONSENTED TO THE CONTINUATION OF THE PROFESSIONAL
2 SERVICE RELATIONSHIP.

3 To support its holding that Duncan violated AICPA 102.3, the Hearing Body determined that
4 Duncan did not seek the consent of the Complainant and Evelyn to continue offering professional
5 services. Again AICPA 102.3 is silent about how consent must be obtained and the facts of this case
6 establish that both parties consented to Duncan's firm preparing the tax return.
7

8 As set forth above, disclosure of any relationship was satisfied in accordance to AICPA
9 102.3. Not only was any relationship properly disclosed, consent was obtained after the disclosure.
10 Obviously the Complainant and Evelyn knew they were going through a divorce and the Complainant
11 knew about the relationship between Duncan and Evelyn before he received the return. After the
12 divorce was final, Evelyn requested that the return be completed - such a request clearly includes
13 consent. With regards to the Complainant, he either picked up or had delivered the return after the
14 divorce was final and after he knew about the relationship between Duncan and Evelyn. After all
15 of this he got the return, signed it, filed it, and kept the refund. There is no way that the Complainant
16 would have done any of this had he not consented to Duncan's firm completing the return.
17

18 It is important to note that the Complainant was represented by an attorney during the
19 divorce. In fact, after the divorce was final, the Complainant directed that the tax payer's address
20 on the return be changed to his attorney's address. If the Complainant did not consent to Duncan's
21 firm preparing the return, he could have chosen not to get the return, not to sign the return, not to file
22

1 the return, not to keep the refund, and not have the address changed to his attorney's address. The
2 Complainant not only consented to Duncan's firm's services, he accepted the benefits of said
3 services.

4 The Hearing Body's concluded that Duncan did not seek the consent of the Complainant or
5 Evelyn to the continuation of professional services. This conclusion is unreasonable given the clear
6 and unambiguous language of AICPA 102.03 which requires consent but does not dictate how
7 consent must be obtained. Evelyn requested that Duncan's firm finish the return and the
8 Complainant received the return, signed it, filed it, and accepted the benefits. Clearly both parties
9 consented. The District Court erred in giving the Hearing Body's construction of AICPA 102.3
10 weight in affirming the Hearing Body's decision which was not supported by substantial evidence
11 in the record and based on its unreasonable construction of AICPA 102.3 was arbitrary, capricious,
12 or an abuse of discretion.
13
14

15 CONCLUSION

16 AICPA 102.3 clearly requires that disclosure of the relationship and consent must be obtained
17 if a conflict of interest exists. However, just as clearly, AICPA 102.3 is silent about how disclosure
18 and consent must be obtained. The clear and unambiguous language of the rule places no obligation
19 on Duncan himself to make the disclosure and makes no mention on how consent is to be obtained.
20 In this case, all disclosures were made and all consents were given. That is what the rule requires
21 and that is what happened in this case.
22
23

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1 The Hearing Body's conclusion and subsequent order that the Petitioner violated AICPA
2 102.3 is not supported by substantial evidence on the record as a whole and also is arbitrary,
3 capricious, or an abuse of discretion given its unreasonable construction of AICPA 102.3. The
4 District Court erred in giving the Hearing Body's construction of AICPA 102.3 weight in affirming
5 the Hearing Body's decision which was not supported by substantial evidence in the record and
6 based on its unreasonable construction of AICPA 102.3 was arbitrary, capricious, or an abuse of
7 discretion.
8

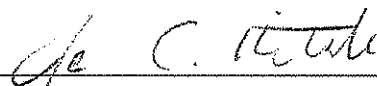
9 The Hearing Body's decision in this matter is not based on the plain and clear language of
10 AICPA 102.3. Its decision is based on what it perceives the rule to require. The board's perception
11 of the rule is not what is controlling, what is controlling are the facts coupled with the language of
12 the rule and in this case the facts establish that the Petitioner was not in violation of the rule.
13

14 An extremely troubling aspect of this matter is that there has never been an allegation, nor
15 a finding, that the tax return was prepared in any other way than it should have been. So in effect
16 what the Hearing Body is doing is punishing Duncan for providing a professional prepared tax
17 return, a tax return whose substantive preparation is beyond reproach, for not complying with
18 provisions of AICPA 102.3 that are not actually in the rule. So really what the Hearing Body is
19 actually saying is that Duncan is being sanctioned not because his work was suspect, and not
20 because of the plain language of AICPA 102.3, but because he did not comply with what it believes
21 to be the requirements of AICPA 102.3.
22

1 Quite frankly the Hearing Body's decision to sanction Duncan is not based on AICPA 102.3
2 because this rule has not been violated in this matter. As set forth above, the appropriate disclosures
3 and consents were obtained in accordance to the requirements of AICPA 102.3. The Hearing
4 Body's decision to sanction Duncan is based on its own opinion that Duncan should be sanctioned
5 for the events that transpired and justifies this opinion by interpreting AICPA 102.3 in a manner
6 inconsistent with the plain language and meaning of the rule. As such, the Hearing Body's
7 conclusion and subsequent order that Duncan violated AICPA 102.3 is not supported by substantial
8 evidence on the record as a whole and also is arbitrary, capricious, and an abuse of discretion given
9 its unreasonable construction of AICPA 102.3 and thus the District Court erred in affirming the
10 Hearing Body's decision.
11

12 DATED this 18th day of May, 2009.

13 CLARK AND FEENEY

14
15 By: 
16 Paul Thomas Clark, a member of the firm.
17 Attorneys for Plaintiff-Appellant
18
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of May, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Larry C. Hunter PO Box 829 Boise, ID 83701	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy
--	--

By: 
Attorneys for Plaintiff-Appellant