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VISION OF THE BAR: *To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.*

MISSION OF THE BAR: *To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.*

COVER: Mountain Stream above Kamas, Utah, by first-time contributor Judy Jorgensen, Lundberg & Associates, Salt Lake City, Utah.

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Utah Bar JOURNAL

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Letters to the Editor

Dear Editor,

I would like to make a couple of observations concerning proposals for more liberal multi-jurisdictional practice rules. During 15 years of practice as a military attorney, I practiced law in Maryland, Tokyo, Washington, DC, Omaha, and San Francisco with only my Utah State Bar license. The federal government is represented by thousands of attorneys who are admitted in one state but practicing law in another, and yet I have seen no adverse effects from this multi-jurisdictional practice.

When an attorney works in an area that is dominated by federal law (such as environmental law, in my case, or federal labor or securities law), there is little relationship between knowledge of state law and competence. When states have gone to great lengths to adopt uniform laws, such as the UCC, state lines again have little relation to competence.

I have taken three bar examinations (Utah, California, Washington) while continuing to practice environmental law, and have detected no increase in my competence that I can attribute to my repeated exposure to BAR-BRI lectures on community property.

We need to ask ourselves whose interests are being protected by requiring formal admission in every state where an attorney advises his or her clients. It seems to me that, at least in the case of a multi-billion dollar international corporation (such as my employer), its corporate legal department can judge for itself the competence of the lawyers it hires. My bosses would look askance if they were told that they could not send someone from headquarters in San Francisco to negotiate a contract in Boston. So are we using licensing to protect clients from unqualified attorneys or to protect a guild monopoly?

We should also recognize that American lawyers combine the very different functions of barrister and solicitor which are distinct in British law, while in many other nations only the barrister function is carried out by licensed attorneys. The strongest argument for state licensing is competence in the courts of that jurisdiction, while advising a single client about its business concerns in multiple jurisdictions is simply a reality in today's global economy.

We lawyers are capable of creating flexible contracts that take account of many exigencies. Surely we can create more rational and realistic rules of licensing that will let us work alongside our multi-state, multi-national clients without meaningless barriers that cause our clients to question the sanity of the legal profession.

Raymond Takashi Swenson

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2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.
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The Editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine.

If you have an article idea or would be interested in writing on a particular topic, contact the Editor at 532-1234 or write *Utah Bar Journal*, 645 South 200 East, Salt Lake City, Utah 84111.

Choosing the Future of the Bar

by David O. Nuffer

The San Juan River in Southern Utah winds through canyon walls of steep rock, formed of many layers formed over millions of years. The river is most famous for its goosenecks, created as the water winds its way through the stone of least resistance. The river may travel a mile to go a hundred yards in straight-line distance. The San Juan River's wearing process has created interesting features, one of which is the "perched meander."

Over the years, as the river cuts ever deeper, the water sometimes enters a lower strata of rock which is more or less resistant than the former river bed. The river cuts a new, sometimes shorter path. An old meander is abandoned; cut off from the flow of water, and "perched" above the new lower river flow. It is a curiosity, seen from the new bed river and the former river path is never traveled.

Lawyers, the court system and the system of laws – and bar associations – may be in danger of becoming a "perched meander." Tensions of the outside world, the society where most people live, press upon our safe haven as lawyers, our profession, the system of laws and the courts. If we are too resistant, the fluid society around us will find another path, and gravity will drive it to its destination, by another route. The response to pressures and the adaptation made – or the lack of it – will create a different future for courts, lawyers and citizens – and for bar associations.

This article briefly mentions the particular points of stress and suggests alternative reactions to those tensions. Three of the many possible future scenarios that could arise for the Utah State Bar will be proposed. In the future, any bar leaders' work will be insufficient without scanning the environment, charting a future, and learning the skills of change management.

Points of Stress

The principal sources of stress for the courts, legal systems and lawyers are:

- Availability of information – information, the lawyer's stock in trade, is now readily available
- Transactional technology – transactional technology enables inquiry, response and solution without face-to-face contact.
- Irrelevance of geography – communications technology and uniformity of law, coupled with mobility of persons, has made state and national boundaries less relevant.
- Unavailability of legal services to most persons – the increasing cost of legal service has run away from the average consumer, making most lawyers irrelevant to the public.
- Increasing complexity of society and processes – even routine processes need specialized advice, and every act has legal implications. This drives the demand for legal service.
- Competition by other professionals – other professionals are encroaching on traditionally legal turf, without restraint as lawyers sit with hands tied by ethical rules preventing inroads into new business forms.
- Blurring with other professionals – just as other professionals perform legal work, lawyers often perform work that is not the practice of law.

Three Scenarios for Bar Associations

There are three possible future roles for bar associations:

- Continued Status Quo;
- Administration of Litigators; or
- Overarching Administration of Legal Service Providers.

Status Quo

For many, the status quo is the most comfortable view of the future. In this view, lawyering continues to be a protected profession, and the bar similarly does not change. The practice of law will be effectively confined to lawyers because legal protections will be upheld by courts and

respected by legislatures. Non-lawyers would cease to make inroads on traditional areas of legal practice such as appearance in administrative and judicial proceedings, estate planning, and business and compliance services. Lawyers would withdraw from work which is not the practice of law, such as family counseling, business advising, and land use planning.

Critical to this scenario is the assumption that technological means for delivery of service do not further emerge. Technology can deliver information and transactions without intervention of individuals, across state boundaries and at relatively low cost. This scenario requires that technology does not emerge as a means of delivery. Distrust of technology for its complexity, unpredictability, lack of privacy, and impersonal nature may prevent any further internet or purchased software delivery of legal service.

Great assistance in maintaining status quo can be provided by the continued adoption of non-uniform laws in each state coupled with each state's resistance of federal standards. Provincialism will isolate each bar association from its neighbors, and enhance the value of state-specific legal certification and service. States' rights trends in the Supreme Court may assist in maintaining turf distinctions between states.

Effective enforcement of unauthorized practice statutes will also be essential to ensure the status quo continues. The blurring of professional lines could diminish as service consumers realize that expertise ends at the boundaries of certification.

In this future which resembles the status quo, bar associations will be largely unaffected. State bars will continue to regulate all lawyers within a given jurisdiction. For local bars, the status quo will be the most likely future if a closed political system is maintained. The value of a state bar will lie in the members' common local interest distinct from outside interests. This "insider" quality can retain the relevance of geography and heighten the value added of a state bar association.

Administration of Litigators

Another potential future for bar associations would arise if Courts relinquish all regulation of professional services which occur outside state court. This may happen as the traditional regulation of "officers of the court" is confined to those who actually appear in court. Pressures for this already exist.

Corporate or association counsel, and governmental employees and other lawyers who are employed in any situation not serving "retail clients" see little need for a traditional bar association. Few of the detailed ethical criteria and CLE presentations apply to these attorneys. The common interest of these attorneys is be met more by a section of a bar, or a specialty bar association, or even by a union.

Transactional lawyers see no relevance to state bar associations as most transactions occur across state lines. Regulation by a court in which they never appear seems illegitimate. One state's regulation of visiting transactional lawyers may be viewed as unfriendly to interstate commerce.

Trends to fractured regulation of lawyers within a single geographic unit now emerge as federal courts adopt state-independent admissions criteria and liberal pro hac vice practice rules which make state bar admission irrelevant. Administrative agencies establish specific minimal qualifications of professionals providing legal services within their hearings and processes. The Arizona Supreme Court has recognized this "carving off" in its rules listing 14 areas of legal practice which it does not regulate.

Under this view of the future, bars would accept (or initiate) limits on the scope of their regulation. Other state licensing organizations may regulate non-litigators (including legal service providers not graduated from law school) who provide legal services to public.

Integrated Bar associations (where membership is mandatory) would continue to function under court aegis providing discipline and admissions for state court litigators. Voluntary organizations would emerge to provide CLE and member services to all professionals (litigators, non litigating law school graduates and non law school graduates) providing legal services.

Overarching Administration of Legal Service Providers

Another possible scenario for the future is that the Bar may regulate all legal service providers, including nonlawyers and technological providers. This breadth of regulation would be consistent with the traditional role assumed by courts, and with the express authority of constitutions consistent with Utah's Article VIII, Section 4:

> The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.

Steps in this direction have been taken in several states. Washington has created a "limited practice license" permitting non-lawyers to handle real estate closings. California permits non-lawyers to assist in immigration matters and act as document preparers. Virginia's UPL Ruling 183 permits non-lawyers, regulated by the Bar, to handle real estate closings. ADR programs which involve non-lawyer providers as neutrals and participants exist entirely outside the court system. The response of the Utah State Bar has been to admit non-lawyer neutrals to the Bar's ADR section. (And certainly, lawyers belong to ADR related associations which are not bar associations.)

The rationale for this broad role would not just be conceptual,

but would recognize the need of all recipients of legal service for some measure of consumer protection. Distinct admissions tests, ethical rules, discipline systems, could co-exist with amalgamated education and member services common to all regulated providers. This stratification of providers would be consistent with the efforts of many bar associations to certify specialists. That certification already recognizes hierarchies of legal service.

This stratification might be accelerated by movements toward nationalization of professional standards. Regional and national standardization of laws occurs to accommodate business. Legislatures often relinquish their independence in the interest of facilitating uniformity. This in turn lowers the learning curve for specific areas of law, enabling non-lawyer practice. Increase in non-lawyer practice drives the need for consumer protection and establishment of standards.

Personal Predictions

Of the scenarios above, the least likely is the status quo. External pressures will not abate, and the pace of social evolution will not slacken.

A variant of "status quo" may occur, however. If lawyers and bar associations remain insulated from society, they may each remain operative but in ever smaller spheres of influence. Just as the bus lines still exist, but are a minor form of transportation compared to airlines, traditional lawyering may remain as a viable, though less and less accessible profession.

My personal preference is that the bar administer the entire practice of law. I believe this is consistent with the Constitutional charge to our Court. What do you think? E-mail me at president @utahbar.org.

Overview of Elder Law

by TantaLisa Clayton

Introduction

How often are we confronted with issues related to aging? The aging of the American population impacts all of society. Whether we are seeing a TV drama dealing with physician-assisted suicide, listening to the Ronald Reagan family discussing their ability to deal with Alzheimer's, watching Bill Moyers' outstanding recent PBS series on end-of-life, "On Our Own Terms," reading a newspaper article about an abused elder, dealing with a relative's announcement of a terminal illness, answering six telemarketing calls in twenty minutes while visiting your mother's home, or a having a valued employee quit to care for an ill parent, we are dealing with aging issues at an ever accelerating pace.

Americans 65 and older are the fastest growing segment of the population.[1] It stands to reason, we will all be increasingly affected by the unique issues relating to the elderly, on both a personal and professional level. Attorneys are no exception. We must be able to recognize the problems which our older clients are likely to have and be aware of resources available to address these problems.

To aid us in the challenge, this special issue of the *Utah Bar Journal* is devoted to elder law issues. Obviously, since we cannot address all topics in this short amount of space, we tried to include articles with useful resources, on some of the most prevalent and difficult issues.

Lawyers have always dealt with older clients, but the term "elder law" is relatively new. This article will attempt to give a brief overview of elder law, reasons for its growth, and related Bar activities.

Overview of Elder Law

Definition of Elder Law – Elder law describes a body of laws that focuses on a population group, older persons, and the variety of legal problems faced by individuals within that group. Rather than being defined by technical legal distinctions, elder law is defined by the client to be served.[2] In other words, the lawyer who practices elder law may handle a wide range of issues but has a specific type of client, seniors, and works with a variety of legal tools and techniques to meet the goals and objectives of the older client.[3]

Lifetime Planning – Increased longevity and the possibility of long term illness or incapacity has forced clients and their families to seek new ways to plan for old age. It is a variation and expansion on traditional estate planning. Life planning has clients take the necessary steps to establish systems to manage their financial affairs and make health care decisions in event of illness or incapacity, and consider ways to pay for chronic long-term health care.[4] This approach includes areas of law such as public benefits advice (Medicaid, Medicare, social security, Veteran's benefits); legal capacity and commitment matters; employment, pension, and retirement advice; insurance advice (health, life, long-term disability); housing and mortgage alternatives; and residents rights (nursing home, assisted living facilities).

Unique Challenges – Elder law attorneys may be immediately confronted with ethical issues when the older client arrives at the law office with a family member. Although the family member may have the best interest of the older relative in mind, there will likely be conflicts. The family member may be exacerbating negative conditions unwittingly, or even contributing to a potentially abusive situation. The elder law attorney must have a heightened awareness of potential problems arising with mental incapacity, elder abuse, and fraud.[5]

In addition, working with older clients involves being present in an environment where there may be intense grief. Clients are anticipating their own death, and the attorney may be dealing with families with a member who is demented or nearing life's end.[6] Even in domestic matters, such as remarriage, unique issues arise, such as avoiding a new spouse's medical obligations or dealing with adult children.[7]

New Ancillary Disciplines – The care of the older client is not something that can be ignored. The elder law attorney should be aware of young and growing disciplines, such as geriatric care management, which have evolved in response to the increased aging of our population. Geriatric care managers are professionals from various backgrounds, such as social work or nursing, who help families learn how to cope with and

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care for dependent family members.[8]

Reasons for Growth in Elder Law

U.S. Demographics – The older population (persons 65 years or older) in the United States numbered 34.5 million in 1999.[9] They represented 12.7% of the population, about one in every eight Americans.[10] The number of older Americans increased by 3.3 million or 10.6% since 1990, compared to an increase of 9.1% for the under-65 population.[11]

The older population itself is getting older. In 1999, the 65-74 age group (18.2 million) was eight times larger than in 1900, but the 75-84 group (12.1 million) was 16 times larger, and the 85+ group (4.2 million) was 34 times larger.[12] This segment of the population referred to as the very old (those over the age of eighty-five), is larger and living much longer than at any point in history.[13]

By 2030, there will be about 70 million older persons, more than twice the number in 1999.[14] People 65+ will represent almost 13% of the population in the year 2000, a figure expected to grow to be 20% of the population by 2030.[15]

Utah Demographics – If you think those statistics don't apply in Utah, think again. The older component of Utah's population has grown significantly in the last 10 years. In 1999, Utah's 65+ population was 185,603.[16] That was 8.7% of Utah's total population, and less than the 12.7% national average.[17] But Utah's increase of 65+ population from 1990 to 1999 was 23.1%, as opposed to the national average of 10.6%.[18]

This Utah growth rate will be even faster over the next 20-30 years. Looking at Utah residents aged 65 and older, it is estimated that there will be 341,593 in 2020 and 482,542 in 2030.[19] By 2030, there will be 43,566 Utahns over 85, an increase of 223% over 1990.[20] Utahns aged 60 years and over are estimated to comprise 17.14% of the state's population in 2030.[21]

Increased Caregiving Burdens and Medical Costs – The miracles of modern medicine have created a situation where older Americans suffer from serious chronic illness and incapacity, which can create independence and costly long-term care. Limitations on activities because of chronic conditions increase with age. In 1997, among those 65-74 years old, 30.0% reported a limitation caused by a chronic condition.[22] In contrast, over half (50.2%) of those 75 years and over reported they were limited by a chronic condition.[23]

Older Americans may need in-home assistance with daily living, or they may need the type of assistance available in alternative day care or other institutions. In 1994-95 more than half of the older population (52.5%) reported having at least one disability, 21% reported difficulties with instrumental activities of daily living (IADLs).[24] IADLs include preparing meals, shopping, managing money, using the telephone, doing housework, and taking medication.[25] Many older Americans are providing assistance to each other. Slightly more than one-fourth (26%) of Americans aged sixty-five and older provided assistance to a sick or disabled relative, friend, or neighbor.[26] This raises legal questions regarding the rights of care recipients, the responsibilities and capabilities of care providers and the financing and monitoring of this health care.

In 1965, the year Medicare and Medicaid were enacted, national health expenditures were $41.6 billion, representing 5.3% of the Gross Domestic Product (GDP).[27] In 1991 that had risen to 13.2% of GDP, or $751.8 billion.[28] In 1992, health care costs rose to $800.2 billion.[29] In twenty-seven years, the cost of health care increased 1,900%.[30] This has resulted in an ever expanding maze of bureaucratic rules and regulations to be interpreted, in order to understand how healthcare is to be financed. This makes it increasingly difficult for seniors and their families to attain and maintain quality health care.

Bar Activities

Nationally – A major step in attorney participation in elder law on the national level began in 1978 when the American Bar Association formed the Commission on Legal Problems of the Elderly (CLPE) . The Commission is dedicated to examining the law-related concerns of older persons. It has sought to improve legal services for the elderly, particularly through involvement of the private bar, and has explored issues such as long-term care, surrogate decision-making, housing, social security, and elder abuse.[31] In 1985 the American Association of Law Schools (AALS) formed the AALS Aging and the Law Section. There is an increasing number of elder law courses in law schools and state bar associations with elder law sections or committees.

The CLPE, in partnership with the Albert and Elaine Borchard Foundation Center on Law and Aging, sponsors The Partnerships in Law and Aging Program (PLAP). They award mini-grants to a variety of organizations developing collaborative projects focused on serving the legal needs of the elderly. Utah has been the recipient of two of these grants, the most recent being an award in 2000 to the Multi-Cultural Legal Center of Salt Lake City to develop a program that coordinates outreach efforts in cases of elder abuse, neglect, and exploitation.[32]

The National Academy of Elder Law Attorneys, Inc. (NAELA) is a non-profit association that was founded in 1987. It assists lawyers, bar organizations and others who work with older clients and their families and provides information, education, and networking services.[33] The National Academy of Elder Law Foundation (NAELF), created by the NAELA, offers elder law certification.

Utah Bar and Legislative Activities – In 1993, the Senior Lawyer Volunteer Project (SLVP) was launched. The SLVP utilizes volunteer lawyers, mostly retired, to provide free legal help to financially eligible clients, regardless of age, in the area of simple estate planning and end-of-life issues. These volunteer lawyers, along with the project's staff, meet with clients in the Salt Lake office of Utah Legal Services or in the residences of homebound clients statewide. Clients interested in receiving services should call Utah Legal Services at (801) 328-8891.

In 1999, the Utah Legislature created the Office of Public Guardian (OPG).[34] This is the state agency responsible for public guardianship and conservatorship services in Utah. The OPG is to serve as a guardian, conservator, or both, to incapacitated persons who have no one else to serve as their guardians or conservators. Because of limited resources, the OPG will give priority to persons who are in life-threatening situations, or who are experiencing abuse, neglect, self-neglect, or exploitation. The OPG telephone number is (801) 538-8255.

The Utah State Bar Needs of the Elderly Committee (NOE) has been an active committee for over a decade. The Committee has focused on education and conducted CLE sessions in 1998 and 1999 on guardianship and conservatorship. Their two CLE sessions in 2000 on end-of-life issues helped expand the dialog between physicians and attorneys.

For several years the NOE has run the Volunteer Lawyers Senior Legal Clinics. The purpose of this program is to help seniors evaluate whether they need legal assistance and help them access legal services and other appropriate resources to solve their problems. Volunteer lawyers meet one-on-one with clients for 20 minute consultations over a two-hour period. The goal is not to provide in-depth legal representation, but to determine whether the individual has a legal problem and then to identify potential legal services to address the problem. The volunteers are currently visiting approximately 14 senior centers every month, and that number is growing. Volunteers need not have expertise in elder law. If you wish to volunteer, please contact, Vicki Firestack at (801) 355-3431 Ext.338. It is two hours of pro bono service that you will truly enjoy. The NOE website is http://www.utahbar.org/sites/noecomm/html/.

Conclusion

In 1998, persons reaching age 65 had an average life expectancy of an additional 17.8 years.[35] Hopefully, that 17.8 years can be spent as productively as possible. Gene D. Cohen, M.D.,Ph.D., in his book, *The Creative Age: Awakening Human Potential in the Second Half of Life,* challenges us to create new metaphors for aging, "if we view our aging adults as a national resource of talent and creativity, then the challenge for our society is to cultivate that resource and tap it for the common good. In terms of public policy and in many other ways on the whole, society has not yet risen to a sense of challenge or responsibility to maximize the benefits of this enormous and growing national resource." As attorneys, we can meet that challenge by helping our clients make choices that will contribute significantly to their peace of mind, autonomy, and financial security in their later years.

1 Administration on Aging, Profile of Older Americans: 2000, http://www.aoa.gov/aoa/STATS/profile/

2 This is the description of elder law given by the National Academy of Elder Law Attorneys, Inc., http://www.naela.org

3 Id.

4 Peter Strauss, Et al., *Aging and the Law,* CCH, Inc., ¶115 (1999).

5 For a more complete and extensive discussion of the older client, see William E. Adams and Rebecca C. Morgan, *Representing The Client Who Is Older In The Law Office And In The Courtroom,* 2 Elder L.J. 1-38 (1994).

6 Clifton B. Kruse, Jr., *The Elder Law Attorney: Working with Grief,* 3 Elder L.J.99-109 (1995).

7 Joanna Lyn Grama, *The "New" Newlyweds: Marriage Among the Elderly, Suggestions To The Elder Law Practitioner,* 7 Elder L.J. 379 - 407 (1999).

8 For an example of how private care managers work, see Margy M. Campbell, *Private Care Managers: Assisting the Newly Appointed Guardian/Conservator* 2 Intermountain Aging Review 2 (Fall/Winter 2000-2001) 20-21.

9 Administration on Aging, Profile of Older Americans: 2000, http://www.aoa.gov/aoa/STATS/profile/

10 Id.

11 Id.

12 Id.

13 Id.

14 Id.

15 Id.

16 Id.

17 Id.

18 Id.

19 State of Utah Long Term Economic and Demographic Project, Governor's Office of Planning and Budget, Demographic and Economic Analysis Section UPED Model System, http://www.qgetstate.ut.us/projections/demographic/DemoFrame.htm

20 Id.

21 Id.

22 Administration on Aging, Profile of Older Americans: 2000, http://www.aoa.gov/aoa/STATS/profile/

23 Id.

24 Id.

25 Id.

26 Gene D. Cohen, M.D., PH.D., *The Creative Age: Awakening Human Potential in the Second Half Of Life,* Avon Books, Inc. 278 (2000).

27 Peter Strauss Et al., *Aging and the Law,* CCH, Inc. ¶101 (1999).

28 Id.

29 Id.

30 Id.

31 See the CLPE website at http://www.abanet.org/elderly/

32 20 BIFOCAL 4 (Winter 99-00)12.

33 See the NAELA website at http://www.naela.org

34 Utah Code Ann. §62A-14-101 to §62A-14-112 (2000).

35 Administration on Aging, Profile of Older Americans: 2000, http://www.aoa.gov/aoa/STATS/profile/

Social Security Changes . . . As We Do

by John Borsos

General Background

Over 31 years ago, I generally ignored individual Social Security taxes because they comprised only 7.5% of the first $7,800 in earnings – a monetary impact that was near negligible and individually endurable. At that time, high-income taxpayers were in a world of 70% income tax rates so the prime focus for social security planning was to help businesses avoid taxes – FICA, FUTA and workmen's compensation premiums.[1] During the following years, as the overall FICA rates jumped to 15.3% on $76,000[2] and Medicare premiums continued on all income the purposes of financial planning and taxation became to eliminate all FICA wages from taxation. Some business owners, using offsetting tax deductions, eliminated income taxes, but still found to their amazement that their income could still be subject to hefty self-employment taxes. Now in the twenty-first century, we have additional and sometimes different Social Security planning problems. This article looks at the different programs and how the legal problems of our clients may be affected by the changing law which the Supreme Court has said is the most intricate law adopted by Congress.[3]

In the sixties, we had a war on poverty, that some say we lost. However, as part of the initiatives of that war, we began the Supplemental Security Income and Medicaid programs, under the premise that no resident of the richest country of the world should live in poverty or without medical care – just because they were disabled.[4] So the concept of a minimum income[5] and health insurance for the disabled was instituted. Both of these are federally funded welfare programs (that are administered by the states) and are based on income and resources of the participants.[6]

Social Security programs, modeled on the German social programs of over a 100 years ago, are to protect United States workers in retirement. To understand Social Security, one must think of our capitalistic system in terms of work cessation. As the Social Security system has grown, it grew from that fundamental Calvinistic soil of the work ethic that was frustrated by the depression when the banks and the stock market failed the former wage earners who had invested in their future. The Social Security system was to be a stabilizing force in economic uncertainty and insecurity. If one is retired – at a certain age or because of disability – or because of death, benefits may be paid to oneself or one's family.

So we start with the Social Security System (OASDI)[7] which provides cash payments to workers, their dependents and survivors. The amount of the benefits (PIA)[8] is determined by the wages credited to the workers account. Each year of earnings is indexed, and if enough wages are earned, then retirement benefits,[9] disability[10] benefits, or auxiliary benefits may be shared and paid to children[11] and spouse.[12] In addition, a divorced spouse and/or a surviving spouse may share in the retirement benefits, if their retirement benefits are too low.

Retirement Planning

Supposition #1: Nine years ago, Anne, a refugee from Sweden, met, married and moved to the United States with her husband, N. E. Countant, a US citizen. She worked for 9 years before retiring at 65 as a non-resident alien. Anne comes to you to do her estate plan and wonders what benefits she will get.

Discussion Ordinarily, the coverage requirement for insured status[13] for retirement is 40 quarters. Anne worked in the US for 9 years (36 quarters); however, under totalization treaties[14] with other countries, it is possible for her to receive Social Security This allows benefits when neither country would justify enough quarters of coverage. The amount of her benefit will be determined by her PIA (Primary Insured Amount)[15] but would be reduced for foreign Social Security benefits. The calculation of the PIA is extremely complicated[16] but will be done by SSA upon request.

Part A Medicare benefits are payable to her because she is insured for benefits and Part B Medicare benefits are available

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because she has lived in the US for over 5 years, is a current resident and is over 65. Estate planners should note that because Anne is not a US citizen she is limited in ability to get an estate tax marital deduction. Also, if Anne elects not to take Medicare coverage because she is covered under some other insurance, the attorney should carefully review the policy because some insurers will decline coverage if "other insurance" (such as Medicare) is in force or available.

Supposition #2: Jerry Mandering retired from his state job knowing that with his ten years of self employment Social Security benefits and his state retirement, he would have the good life. Although his divorce decree specified that he would keep benefits in place for his ex-wife, Allie Kwat, instead of his current wife, Cher, Jerry named his brother the beneficiary of his retirement and survivor of his state pension and wrote to Social Security that he wanted the maximum benefit and did not want any benefits to go to his "child, wife, or former wife." Unfortunately, Jerry died two months after retirement. In doing the probate of his estate, advice is given to Allie, his ex-wife, and Cher, his widow, about the survivor portions of Jerry's state retirement (which Jerry appointed to his brother) and Jerry's Social Security survivor's benefits which he renounced. What suggestions would you make about the benefits available?[17]

Discussion After starting out as just retirement benefits, Social Security and related laws have established a number of programs[18] for providing material needs, for reducing illness expenses, for keeping families together, and for giving children the opportunity to grow up in health and security. Over the years, survivorship benefits for spouses[19] have been extended to divorced[20] spouses.[21] However, the spouse's benefit could be reduced if the wage earner was entitled to any governmental benefits which were not subject to Social Security taxes.

In this situation, if Jerry effectively had renounced these benefits, Allie or Cher would be entitled to social security benefits. However, ERISA, under federal preemption, does not let a spouse's right in a retirement plan annuity be unilaterally waived by the worker. A solution may be to have Allie be entitled to the government benefit and no social security benefits (because she would then be subject to a Government Pension Offset (GPO) dollar for dollar against any Social Security from Jerry). Cher could then qualify for Social Security spouse's benefits – without any offset. If both claimed social security benefits... both of their benefits would be offset.

Survivor and Children's Benefits

Supposition #3: Ora Phan's 19 year old father, Gene Poole, (who had never married Ora's mother), died when Ora was only five months old. Although Gene had worked for only a year and a half, are there any benefits available?

Discussion Although only working for a few years[22], his father may be covered by Social Security. Ora (and any other children of Gene) will jointly share equally in the money until they are through high school. As each child attains nineteen or graduates from high school, their share is lost[23] and the remaining amount divided among the remaining beneficiaries. The mothers of any of Gene's children can also take a share if they are not working and their child is under 16, and they are caring for that child. However, in order to take benefits, Ora needs to be acknowledged by Gene, received support from Gene, or be capable of inheriting under intestacy laws. A recent Utah case recognized the issue of a California wage earner, a Utah unacknowledged child and a 99% paternity test. Social Security argued the paternity test was not controlling.

Disability Benefits

Supposition #4: When they got married, Ned and Freda opened a café. On the advice of an attorney, to save paying duplicate FICA taxes, they reported all the income earned under Ned's Social Security number. Freda found out she has lupus at 40 years old, but is uninsured for Social Security purposes because of incorrect reporting. They sued their accountant and attorney for mistakenly preparing their income tax return and not correctly reporting the Social Security earnings.

Discussion FICA[24] protects only insured people. While Freda could claim a retirement benefit on her husband's Social Security, there is no equivalent disability benefit. To be entitled, Freda would have to have worked 20 quarters. For the year 2000, one quarter is worth $780, or $3120 or a tax of $477. Were this health and disability insurance benefit and its cost of $477 discussed? Did Ned and Freda authorize and properly waive this tax scheme?[25]

Supposition #5: A property settlement and alimony decree of Mary Vorce (a disabled individual) and Dee Vorce, specified that Mary receive alimony income of $800 per month to help her pay her medical expenses and so much of the assets of the property proceeds as would be needed for the rehabilitation process.

Discussion: An eligible individual cannot have monthly countable income[26] in excess of the current Federal benefit rate (FBR).[27] These amounts are set by statute and are subject to annual increases as dictated by cost-of-living adjustments. As of January 2001, the FBR for an individual is $530 and that for an eligible couple is $795.[28] In addition to income, an eligible individual without a spouse cannot own countable real or personal property (including cash) in excess of a specified amount at the beginning of each month. For an individual with an eligible or ineligible spouse, the applicable limit is one and one-half times as much as that for an individual without a spouse. These limits are set by statute. They are not subject to regular cost-of-living adjustments, but change from time to time. Since January 1997 figures have been $2,000 for an individual and $3,000 for a couple. If the decree specified that the $800 could only be spent on medicine or medical procedures, then it is not countable income. If the property distributed in the property settlement was given to a qualifying trust, it could be exempt from countable resources.

Only low income disabled citizens, refugees and some children can qualify for Medicaid and SSI benefits. Like most welfare programs, the requirements and conditions are stringent. People have been denied one month's benefits because on the day measuring their resources, they exceeded $2000 because an uncashed rent payment had not cleared.

Medicaid Benefits

Supposition #6: When Earnest N. Dever developed Alzheimer's disease, his wife, Chance N. Dever, consulted her attorney because she wondered if anything could be done to avoid the nearly $45,000 a year nursing home costs from their retirement earnings and savings. Based on Earnest's age, and his illness, his estate will have to pay over $380,000.

Discussion Because Medicaid[29] can pay for nursing home expenses, some estate planning could be done. First the tests for resources[30] can be met if the individual disposes of his property

prior to entering a nursing home. Gifts within 36 months to individuals or 60 months to trusts are partially included back to determine eligibility. In addition, certain trusts which Earnest owns can be excluded as a resource. In addition, a certain amount[31] of assets are allowed under provisions of Spousal Impoverishment.[32]

Because Utah is a "needs based"[33] state, needy individuals may spend down their income[34] to meet the guidelines. So Earnest can pay his pension, Social Security and other income and become a Medicaid patient of the institution for the excess medical cost. With proper planning, Earnest would be able to shelter $84,000 in a QMB trust, $84,000 in spousal division of property, and the remainder in gift to the children who then set up a trust for their mother, Chance.

Supposition #7: Sir Roe Ciss, a U.S. citizen, needs a kidney, liver and pancreas transplant costing over $350,000. He has over $400,000 and is willing to pay for the operation. His doctor says that the length of the list for prospective transplant patients in his state would prevent him from receiving an operation for over three years, by which time he might be so terminally ill that no operation would be possible. He has heard that Medicaid will pay for the operation. What advice do you give him?

Discussion After setting up a special medical trust, Roe qualifies for Medicaid and, as a Medicaid patient, goes to the top of the transplant list. Medicaid will pay for almost all of the operation, and for the rest of his life, Roe can enjoy the trust and only has to pay back Medicaid the cost of the operation – without interest – upon his death – and only then if Roe has any money. Medicaid eligibility is established nationally, but since it is administered by the states, each state can have its own benefits and enforcement procedures. Since retirement benefit planning is so popular, the qualification for Medicaid benefits has been the object of people having more than $2000 in resources. Countable resources do not include one's home, automobile used for medical purposes, burial plot or reasonable clothing and furnishings. Previous to 1993, a common planning technique for people anticipating large custodial or medical expenses was to give away property to beneficiaries. Since OBRA 1993[35], there is a waiting period of 60 months for gifts to trusts and 36 months for gifts to individuals. During this waiting period, the value of the transfer is added to countable resources and the fractional portion of the transferred property (1/60th, 1/36th) is subtracted from the value each month.

Parents, grandparents or the disabled individual can now create Special Needs Trusts[36] which allow the disabled person to exclude the trust created for their own benefit as a resource, as long as the Medicaid bills are repaid. With such planning, people now effectively get a loan from Medicaid for the value of medical services, while still enjoying the benefits of the trusts — then pay back the cost of medical services (without interest) when they die and only if there is money in the trust!

Because of the complexity of the laws, the involvement of activist congressional lobbying and the difficulty of predicting the future, Medicaid trusts, Special Needs trusts, Trigger[37] trusts and Medicaid Qualifying trusts[38] are risky because they can lose benefits for people if not done correctly and should only be used with care because of the opportunity for abuse by relatives.

Conclusion

Last year, nearly 4,000,000 people got Social Security benefits. With over 400,000,000 Social Security cards issued, Social Security benefits are affecting more and more of our clients in ways we need to pay attention to – no matter what our specialty.

1 Businesses do not need to pay the employer portion of Medicare and FICA if they hire independent contractors. The contractor, as a self employed entity, needs to pay both parts of the FICA and Medicare premiums.

2 The amount increases annually with inflation for FICA.

3 Justice Powell stated: *"The Social Security Act is among the most intricate ever drafted by Congress. Its byzantine construction as Judge Friendly has observed, makes the Act 'almost unintelligible to the uninitiated.' Friedman v. Berger, 547 F.2d 724, 727, n. 7 (CA2 1976), cert. denied, 430 U.S. 984 (1977)"*...In footnote 14 the court goes on state: *"The District Court in the same case described the Medicaid statute as 'an aggravated assault on the English language, resistant to attempts to understand it.' 409 F. Supp. 1225, 1226 (SDNY 1976)".* Schweiker v. Gray Panther, 453 U.S. 34, 43; 69 L. Ed.2d 460 at 469 (1981).

4 Social Security altered the requirement of not being able to work for addiction diseases by a 1996 amendment that precludes people with an addictive disease from receiving benefits. Also eliminated in that amendment were disabled children who were not medically disabled.

5 The amount of Supplemental Security Income that may be received by disabled people is adjusted annually for inflation and this year that amount is $530 or $550 (if they are also entitled to Social Security). If a husband and wife are both disabled and entitled to benefits, the total SSI and SSA cannot exceed one and half times the annual amount ($530 + $265 = $795).

6 As the 1965 study revealed, many disabled people never worked enough yearly quarters because their disabilities were not tolerated by employers. Also, many wives who cared for children, and therefore, did not work, had no ability to earn money or qualify for benefits when they became disabled and were divorced.

7 Old Age, Survivors, and Disability Insurance Program.

8 Primary Insured Amount. This is a complex calculation of benefits calculated by adjusting reported earnings for time and then using the index of the countable years to determine the average amount which may then be affected by early retirement or disability. The formula is found in the regulations 20 CFR 404.201-290. Pamphlets are also available at the local Social Security office or may be down loaded from www.ssa.gov. In addition, there is an interactive free software – AnyPia that may be downloaded.

[9] 40 quarters of coverage over a lifetime of work in the US or countries having a treaty agreement with the US.

[10] 20 quarters of coverage earned in the last 40 quarters before becoming disabled.

[11] Paid to children under 19 and in school.

[12] Paid to a non working spouse who stays home to tend minor children under 16.

[13] There are special rules for people born in different years, but since January 2, 1929, the number of quarters has been 40.

[14] The United States currently has Social Security agreements in effect with 17 countries – Austria (1991), Belgium (1984), Canada (1984), the Federal Republic of Germany (1979), Finland (1992), France (1988), Greece (1994), Ireland (1993), Italy (effective 1978), Luxembourg (1993), the Netherlands (1990), Norway (1984), Portugal (1989), Spain (1988), Sweden (1987), Switzerland (1980) and the United Kingdom (1985).

[15] The PIA may be obtained through calling SSA at 800-772-1213, visiting the website ssa.gov and downloading a PEBES application, or downloading an interactive program AnyPIA from ssa.gov or ssas.com.

[16] Inequities in the calculation were prominently demonstrated by the problem with "gap" babies who lose out on certain earnings. President Franklin Delano Roosevelt's son, who was a gap baby, argued for legislative equality in treatment.

[17] Receipt of a governmental pension. A benefit payable to a spouse, divorced spouse, surviving spouse, surviving divorced spouse, or a deemed spouse may be reduced if the person receives a periodic payment based on his or her own employment that was not covered under Social Security from the Federal Government, a State or a political subdivision of a State. A periodic payment includes payment on a monthly or other than monthly basis or a lump sum that replaces a payment on a monthly basis. For governmental pension offset purposes, the definition of State includes the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

[18] These programs include: retirement insurance, survivors insurance, disability insurance, hospital and medical insurance for the aged, the disabled, and those with end-stage renal disease, black lung benefits, supplemental security income, unemployment insurance, public assistance and welfare services, aid to needy families with children, medical assistance, maternal and child health services, child support enforcement, family and child welfare services, food stamps, and energy assistance. The Federal Government operates the retirement, survivors, disability, hospital and medical insurance, black lung benefit, and the supplemental security income programs.

[19] Surviving spouses must be married for 9 months (unless the deceased worker was killed accidentally, or the worker married knowing he or she was not expected to live 9 months) and the spouse is over 60 and retired or over 50 and disabled.

[20] He or she must have been divorced after being married for over 10 years to the wage earner.

[21] It is possible for a man who was married numerous times to have several sequentially divorced spouses or minor children claim against his earnings. (However not several concurrent divorced spouses). The entitled people will share in what is know as the Family Allowance and equates to a maximum of fifty percent of the worker's Primary Insured Amount.

[22] Social Security requires at least 6 quarters but does not require the 20 or 40 quarters required for other older disabled and retired people.

[23] The benefits may also be lost if the child earns more than the yearly exempt amount or works outside the U.S. for more than 45 hours in a month or is an alien who is outside the U.S. for more than 6 consecutive calendar months, or does not have a Social Security number and refuses to apply for one.

[24] the Federal Insurance Compensation Act.

[25] Similarly, an attorney/accountant structuring businesses so that losses occur would produce the same liability questions for the loss of SSDI and Medicare coverage for both Freda and Ned.

[26] Countable income is earned income above $60 and unearned income above $20.

[27] The Federal Benefit Rate for SSI for an eligible couple is one and one half as much as that for an individual.

[28] The amount of earned income can be reduced by vocational rehabilitation expenses – Impairment-related Work Expenses – which are services and items that a disabled (but not blind) person needs in order to work. They can be deducted from earnings in determinations of SGA, even if these items and services are also needed for nonwork activities. Impairment-related work expenses (IRWE) are also excluded from earned income in determining monthly countable income.

[29] The Aged, Blind or Disabled Programs are medical assistance programs for individuals aged 65 years or older, blind or disabled. Persons who receive SSI (Supplemental Security Income) or Social Security Disability benefits meet the conditions for disability. For other persons to qualify on the basis of blindness or disability, the person must have a physical or mental impairment which either (1) can be expected to result in death or (2) lasts for not less than 12 months. The impairment must be of such severity that the person is unable to do his or her previous work and cannot (considering age, education and work experience), engage in other kinds of substantial, gainful work. The income standard, after allowable deductions, is based on a percentage of the financial assistance grant level, as determined by the Utah State Legislature.

[30] The asset tests are the same as for SSI, 1 person – $2,000.00; and 2 Persons – $3,000.00 For each additional person, add $25.00.

[31] The assets of spouses can be apportioned. (See following footnote) In addition, the home, a car needed for medical purposes and certain burial plans are exempt (i.e. they are not counted as resources – but may be liened) and not counted for purposes of qualifying for benefits.

[32] Half of the estate may be preserved or a specified amount ($16,824 minimum and $84,120 maximum).

[33] Medicaid applicants whose income exceeds the monthly income standard may be considered for the Medically Needy program, sometimes referred to as the Spenddown Program. This program allows a person who is otherwise eligible either to pay "excess" monthly income to the state or to accept responsibility for a portion of their monthly medical bills.

[34] Utah allows for the SSI tests of income by deducting $20.00 general income exclusion; $65.00 and 1/2 of the remaining gross earned income; health and accident premiums, and impairment-related work expenses and as stated in the prior footnote, if the income is still too high, the individual can spend down.

[35] SSI regulations were not changed in 1993, but the Foster Care Independence Act of December 14, 1999 conformed the trust provisions of both laws.

[36] The individual must be disabled, under 65 years old, and the trust must be established by the parent, grandparent, legal guardian or court.

[37] So called because the disability event creates the transfer.

[38] Actually these were really Medicaid non-qualifying trusts.

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Determining Capacity: Is Your Older Client Competent?

by Lois M. Brandriet and Brian L. Thorn

Introduction

A 92 year old female client requests legal assistance for drafting a durable power of attorney and a basic will. Realizing that she must be competent (or "capacitated") for such documents to be valid and legally binding, the attorney engages the client in conversation to make an assessment. The client remembers the attorney (whom she knew since the attorney was a youngster) as well as numerous events from that earlier time period (around which she centers much of the conversation). She is dressed beautifully, and appears to be a very "young" 92 years of age. She answers all questions cordially and appropriately, and speaks and acts with social flair and grace. Moreover, she has some degree of understanding about the legal proceedings, indicating that she wants you to appoint her oldest daughter, the one she "always trusted the most" (as agent on the power of attorney). You are the attorney: is your client competent?

Challenges in determining client competence. As memory, judgment, and other cognitive abilities decline, compensatory mechanisms develop and serve to "cover" for such deficits. These compensatory mechanisms may take many forms including excuses, rationalization, and even dishonesty. Remaining skills and abilities tend to be emphasized or overemphasized, so that deficits are not so readily observed. As one example, older adults tend to focus on the past as this is what they can most vividly recall (as short-term memory is impaired first). Simply stated, it is not always possible to accurately determine whether a person is capacitated (or incapacitated) during the course of normal conversations.

While it is necessary to know when true incapacity exists, it is equally important to avoid declaring a client incapacitated if they are capable of making sound decisions. The right to make independent decisions for personal and financial affairs is valued very highly in our society; and obviously, those rights should be maintained and respected whenever possible. Among the consequences of legal incapacity are severe personal and financial restrictions including having another person (fiduciary) decide what the protected person will wear, where they will live, whether they can marry, and how to spend their money. So, declaring incapacity and appointing a guardian and/or conservator must be the option of last resort, with every effort made to implement a less confining measure.

Utah Definition of "Incapacitated Person." In considering a person's capacity for decision-making, it is often helpful to use the definitions of incapacity from the current and previous Utah Code.

The current definition reads: "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

Previous Utah Code definitions for incapacity have had broader terminology to include: consideration of "his or her personal safety" and attendance to and provision for "such necessities as food, shelter, clothing, and medical care, without which physical injury or illness may occur."

Dementia is a common cause of incapacity. When working with older clients who are requesting that substantive changes be made to their estate or other legal/financial arrangements, it is always important to consider the possibility that dementia is impacting their decision-making ability. *Dementia* is a blanket term that refers to a syndrome characterized by neurological and cognitive decline (i.e., impaired thinking) affecting more than one area of brain functioning. Most older individuals do

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not suffer from dementia, but its prevalence increases with age and studies have found that as many as 48% of 85 year-olds exhibit measurable symptoms of dementia. There are many forms of dementia, but Alzheimer's Disease and vascular dementia account for the vast majority of all cases. The thread of connection between these various syndromes is that they are all associated with degradation of brain cells, albeit by different means and in different regions of the brain. Additionally, nearly all cases of dementia are progressive illnesses characterized by mild (early), moderate (middle), and severe (late) stages of decline. Although there are some differences in presentation, reduced memory (particularly for new information), reduced ability to plan, organize, and execute complex activities, impaired judgment, and impaired reasoning tend to be present to some degree in most forms of dementia. Impaired language and neuromuscular deficits are also common features.

Types of Dementia

Reversible or Treatable Dementia. Among the important reasons to refer your elderly client for a capacity evaluation is the fact that some common forms of dementia are actually treatable or reversible. Some experts would argue that these cases are best described as delirium rather than true dementia, but many of the symptoms are similar. A delirium is characterized by rapid onset with altered level of consciousness, multiple impairments in thinking, behavior change, and (often) visual hallucinations (Rabins, Lyketsos, and Steele, 1999). Delirium may be superimposed on an underlying dementia syndrome and as a result the symptoms of confusion and behavioral disturbance can be particularly pronounced. States of delirium are usually treatable and are commonly caused by metabolic problems, infections (urinary tract and respiratory, for example), medication toxicity, and/or low blood oxygen levels, among other possibilities. Other treatable conditions that can cause dementia-like cognitive impairments include: certain endocrine problems such as hypo/hyperthyroidism, vitamin B deficiencies, major depression, and some cerebral tumors. It's important for capacity examiners to consider these possibilities and make arrangements for an evaluation by a physician when indicated.

Irreversible or Progressive Dementia. Demographic trends clearly demonstrate that people are living longer and the elderly are becoming an increasingly large proportion of our society. Similarly, the number of people with irreversible or progressive dementia is increasing rapidly. Medical science and better nutrition have combined to increase life span, but the goal of preventing neurological decline in late life remains elusive. Prior to age 65, the prevalence of dementia is very low (less than 1%) and most cases can be attributed to traumatic brain injuries. After age 65, the occurrence of dementia increases significantly with each year of age.

Alzheimer's disease is the most common form of dementia and is associated with development of protein-based plaques and tangles between and within the neural cells of the brain. The cause of these brain lesions is still not clear to researchers, but heredity does play a role. Symptoms of Alzheimer's include memory loss, confusion, disorientation, and personality changes. Problems with short-term memory and abstract reasoning tend to be the first manifest symptoms. Your client with Alzheimer's may have clear and accurate recollections of what happened 50 years ago, but will have trouble remembering breakfast or finding a new address.

Cerebrovascular disease is the cause of vascular dementia, which is second to Alzheimer's in terms of prevalence, but still very common among the frail elderly. Some recent research indicates that vascular dementia is more common than previously realized and may be associated with high cholesterol during early and middle adulthood. Damage is caused by reduced blood flow to the brain as a result of strokes, also known as cerebrovascular accidents or CVAs, Strokes can be both small and large, with commensurate damage to the surrounding brain tissue. They are usually accompanied by a loss of consciousness and often create localized impairments in specific areas of functioning such as speech or muscle control. Memory impairment (especially short-term initially) is also characteristic of vascular dementia, but can appear to fluctuate to a greater extent than with Alzheimer's disease. In later stages, it can be difficult to distinguish vascular dementia from Alzheimer's disease.

There are numerous other forms of dementia associated with other etiological factors. Other neurological conditions may or may not be associated with cognitive decline. For example, Parkinson's disease is primarily characterized by tremors and loss of muscle control, but 30% of Parkinson's patients also show signs of dementia. It is also possible that dementia causing medical conditions can coexist simultaneously.

In your work with older clients, keep in mind that it may be difficult to make simple assessments of their cognitive capacity. For example, it is possible for a stroke victim to have unintelligible speech while the capacity for abstract reasoning and good judgment remain intact. A qualified examiner will be able to assess overall capacity while accounting for specific neurological deficits and will consider possible treatable causes of impairment.

Considerations in Finding a Qualified Examiner

The Utah Code is somewhat vague in stipulating who should be determining capacity. We suggest that the most important consideration is whether the examiner has specialized training and experience in geriatric competency assessment in addition to an advanced clinical degree. Given that caveat, individuals from several different professions may provide quality evaluations. Physicians, psychologists, advanced practice nurses, and clinical

social workers with the requisite training and experience may all bring particular strengths and perspectives associated with their respective professions. For example, a physician may be more likely to rely on medical information while a psychologist may be more likely to incorporate standardized cognitive testing when formulating an evaluation report. It will be in your client's best interest for you to evaluate the credentials and experience of an examiner before making a referral for capacity assessment.

The Assessment Process: How to Determine Capacity

The outcome of a capacity determination can be very grave, possibly resulting in forced surrender of personal and/or financial decision-making rights. Thus, it is imperative that the assessment be accurate, complete, and performed and documented with care. Both objective and subjective assessment are components of a capacity evaluation. Standardized tests and measures are used to increase objectivity. As human evaluators, some subjective evaluation is inherent (which can be an advantage as not all human behavior can be objectively measured). Professional perspective of a person's capacity, though not necessarily the outcome, may vary depending upon the specific professional discipline of the evaluator(s).

The definition of "incapacitated person," as stated in the Utah Code, should serve as a basis upon which evaluators base their conclusions and recommendations to the court. A crucial determining factor in a capacity evaluation is whether the person's basic needs, such as food, shelter, nutrition, and safety, are met.

Rule out a reversible or treatable condition that mimics symptoms of dementia. A common error in capacity evaluations is neglecting to rule out a reversible or treatable condition that mimics symptoms of dementia. As noted earlier, many ailments or healthcare problems can appear as a progressive or irreversible dementia, but instead, are treatable and reversible. Though healthcare professionals who are not physicians may be well-trained to conduct other portions of a capacity evaluation, the expertise of a medical doctor is needed to rule out a reversible dementia. A physical examination, laboratory work, and possibly, a CT scan and/or tests will likely be necessary.

(In)capacity is assessed on a continuum. Many conditions, including the level of capacity, are best described on a continuum. For instance, levels of pain or anxiety are often rated on a scale of 1 to 10 (with 10 generally indicating the most pain or anxiety). In assessing concepts such as pain or anxiety, an evaluator is given much input from the person (or patient) as to exactly how much pain or anxiety is being experienced. But unlike assessing the level of pain or anxiety, the responsibility for determining capacity rests solely with the evaluator as the proposed protected person cannot be relied upon to accurately state their level of capacity.

(In)capacity must be determined holistically. To increase the accuracy of a capacity evaluation, it is essential that the proposed protected person, along with their specific situation and living environment, be assessed "holistically" as opposed to consideration of only their mental or cognitive status. Assessing mental status is a necessity, but should never suffice as the entire evaluation. To illustrate, certain individuals may score very poorly on standardized mental status exams, yet function well, safely, and without putting themselves or others at risk (most decisions may be sound). Other individuals may score quite well on standardized tests, but subject themselves and others to risk on a daily basis (most decisions are likely poor).

Physical health, physical disability, functional ability (to do daily activities), nutrition, safety, sensory function, and emotional status must be determined in addition to mental status as each contributes to the ability (or inability) of a person to make sound decisions. If sensory loss, for example, was not considered, a person might be labeled as incapacitated due to unintelligible answers that were the result of deafness and the inability to hear what was being asked of them. Thus, failing to consider an individual in a holistic fashion could lead to an appointment of a guardian and conservator when the more appropriate provision for protecting the person might have been less restrictive.

Use multiple data sources. The person being evaluated may be incapacitated; therefore, it is crucial to obtain data from other sources to help verify or refute information offered by the proposed protected person. Reliable sources who know the person well should be consulted. Sources may include family, friends, neighbors, healthcare and/or allied professionals, and the medical record (when appropriate).

Assess on more than one occasion. The thought process of persons with dementia can vary a great deal within a short period of time. If at all possible, interviewing the person on more than one occasion is wise. This helps ensure that the person does not get overtired with questioning or tests. Moreover, it helps the evaluator collect more data and to determine if responses are consistent from one period of time to another.

Assess in person's own environment. While a capacity assessment could be conducted in an office or clinical setting, assessing clients in their own environment is likely to offer more and better information. In addition, the evaluator may be able to determine whether or not the person could continue to live in their home (considering cleanliness, upkeep, and safety factors) if that is their desire.

Assess person without others present. Any person, but especially a vulnerable older adult, might be needlessly biased in the presence of others (especially a family member who might be petitioning the court for guardianship). The proposed protected

person should be strongly encouraged to be forthright in expressing their desires (to the evaluator) in order that those needs and desires can be appropriately communicated to the judge (such as trusting one person over another or wishing to remain in their home when they have the financial means to do so).

Utilize cognitive testing to increase objectivity. It is often helpful in the assessment process to incorporate data from objective tests designed to measure particular areas of functioning. A few screening instruments are simple to use and score with a minimal amount of training. When indicated, more comprehensive and reliable information may be gathered with the use of standardized tests for which specialized training is required to assure appropriate administration and interpretation procedures are followed. Psychologists are more likely to utilize such standardized tests as a core part of their clinical training is focused on testing. Neuropsychology is a specialization within psychology that emphasizes skills in cognitive and neuropsychological testing, including evaluation of dementia. The skills of a neuropsychologist may be particularly helpful when the pattern of cognitive impairment is atypical.

As mentioned above, some screening instruments are simple to use and may be helpful for attorneys to incorporate in their own process of deciding whether to refer a client for a capacity assessment. It cannot be emphasized strongly enough that one should seek appropriate training before using these tests. In order for the results to be reliable and valid, these tests must be administered under the right conditions and the scores must be interpreted in context. Otherwise, the results might overestimate or underestimate the individual's level of functioning. Unfortunately, it's beyond the scope of this article to provide such training. The Mini Mental Status Exam (MMSE), the Short Portable Mental Status Questionnaire (SPMSQ), and the Clock Test are examples of screening tests that are simple to use and can be administered in 15 minutes or less. Although useful as a brief screening device, none of these instruments provides enough information alone to constitute an adequate evaluation of capacity.

Summary and Recommendations

In summary, to be declared legally "incapacitated" is synonymous with abdication of all decision-making rights. If some level of capacity is retained, alternatives to a plenary guardianship should be considered. Given its serious nature and potentially grave outcome, a capacity assessment must be performed and documented with care and caution. A holistic assessment approach is recommended, with evaluation of cognitive, physical, psychological, functional, and emotional domains. A crucial point to consider is the general well being of the proposed protected person and their capacity to meet their needs without risk to themselves or others. Only then can an accurate conclusion be drawn about capacity for decision-making.

The use of standardized mental status exams by attorneys may be useful as an initial (and superficial) screening tool to assess client capacity. Attorneys have voiced concerns about asking their clients mental status questions for fear that such questions might be "insulting." This fear can be minimized by assuring clients that the purpose of such questioning is to protect them should their capacity (when documents were signed) be questioned or challenged at some future point. A critical issue is that these brief screening tools represent only one component of (what should be) a multifaceted assessment. If client capacity is unclear or questionable, consulting with a qualified healthcare professional is recommended. Formal written reports detailing client assessments, submitted by healthcare experts to attorneys and District Court Judges, have proven helpful in supporting or refuting claims of (in)capacity.

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Medicaid, An Incredibly Brief Overview[1]

by W. Paul Wharton

"Mom wants to give her property to her children, but she needs long-term nursing home care in a couple of weeks, after the stroke left her so disabled she can't survive at home. Could she get Medicaid to pay for the nursing home?"

"Dad has Medicare, but they say that his coverage is about to run out. I thought Medicare covered health care needs for seniors!"

If you haven't heard those questions, you will soon. The number of Americans, including Utahns, who are entering retirement age as "baby-boomers" mature, is cause for study.

Medicare and Medicaid[2] are often confused, but they are different programs and the distinctions are crucially important.

Medicare is federally established insurance covering health care costs for persons age 65 or over and eligible for retirement benefits under the Social Security program (or who have received disability benefits for more than two years or suffer end-stage renal disease). Medicare is available to all within those "covered" groups – regardless of income, assets, resources, investments, retirement benefits from IRAs, 401(k)s, or anything else. Medicare is funded by contributions from workers (in the form of their FICA taxes or "self-employment" taxes); insureds pay a premium each month ($50.00 during 2001) for a portion of the coverage. Medicare does *not* cover every medical situation; suffice it to say that it does *not* cover the expenses of long-term care in a "nursing home."

Medicaid, on the other hand, is a joint federal- and state-funded program that provides healthcare coverage for persons of modest means. But not for all persons. Coverage is available to persons who are blind or disabled – and for persons who are aged.

One who is age 65 or over, is "aged."

A typical 73-year old nursing home patient fits within a category of persons (aged) who are possibly covered by the Medicaid program. If the patient is poor, Medicaid can pay her nursing home costs. Consider, then, a female patient; her spouse is alive, residing in their marital home (he is referred to in the Medicaid statute and regulations as the "community spouse" – i.e., the spouse residing in the community).

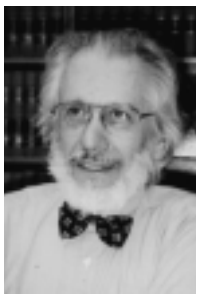
Prior to Congress' 1998 enactment of the Medicare Catastrophic Coverage Act, (MCCA or "mecca"), the community spouse would be impoverished before the nursing home patient could be found eligible for Medicaid coverage. Mecca changed that, and although the Medicare portions were later repealed, the "Spousal Impoverishment" provisions remain the law. The provisions protect the community spouse, at least to some extent, from himself becoming impoverished and a charge upon the state.

The Spousal Impoverishment provisions treat the couple's assets and income as if they reside in a modified "community property" state. Assets of each are considered assets of both; income of the wife (the institutionalized spouse) may be considered to be income of her husband – although his would *not* be counted as hers in determining whether she is eligible.

Who is likely to need Medicaid's assistance to pay nursing home costs? As of the date of this writing, for each patient covered, Medicaid pays up to $3,118 for long-term care (that's called the Medicaid reimbursement rate). A patient who enjoys an income greater than that does not "need" Medicaid coverage – but if her spouse at home has no source of income, he might need some of hers to survive. Medicaid could be an important source of coverage of her nursing home costs.

Assuming that the patient needs Medicaid's assistance, the income of the couple is treated thus: The patient keeps $45 (allotted from her own income, if she has any) for her personal needs ("PNA") each month (to cover such items as clothing, or having her hair done every couple of weeks). Her husband, the community spouse, will be able to keep all of his own income, no matter how high it is. If his income is less than $1,407 per month[3], he will be able to claim some, even as much as all but that $45 PNA, of his wife's monthly income so that his income is at least $1,407. (But if both incomes combined are less than $1,407 the community spouse can get only the combined amount.) If the community spouse has extraordinary shelter costs, he will be able to claim more of his spouse's income. If he receives any portion of his wife's income, his total income, including what he keeps of his wife's income, cannot exceed $2,175 per month, unless a court order mandates that he receive more, or he successfully convinces an administrative

W. PAUL WHARTON (J.D. 1979, University of Utah College of Law) is a senior staff attorney at Utah Legal Services, where he has provided services to older Americans since 1984. He is "senior" also in the sense that he plas to retire to his Central Salt Lake City garden, effective June 30, 2001.



law judge to increase the amount. Whatever remains of the patient's income is paid to the nursing home; the balance of the nursing home costs are paid by Medicaid.

Assets are more complicated. "Assets" refers to all resources owned by the couple or either of them – anything of value that could be converted to cash.

Some assets are not counted in determining eligibility: the home in which the community spouse resides, for example. (Of interest in rural Utah – the "home" includes the land it sits on, no matter how extensive the acreage and no matter the total value, so long as the property is one contiguous lot not divided by another's property (except if the divider is, for example, a public roadway).) A pre-paid burial plan (worth not in excess of $7,000) and a burial plot are not counted; household goods worth up to $2,000. One motor vehicle per household, worth up to $4,500 is not counted. The value of the vehicle does not matter if it is used for employment, or at least four times per year to get health care (visit the doctor, go to the hospital, etc.), or it is modified for a handicapped person, or the family lives in an area without public transportation and needs the vehicle for daily activities.

Also not counted: assets necessary for employment, including self-employment; and up to $6,000 in equity value in other assets, such as rental property and livestock, if the asset results in a 6% return per year. (Such an asset may still be exempt if the lack of a 6% return is unavoidable.)

This is only a summary of the most important rules. Not covered here: lump sum payments received from Social Security, or from the sale of a house, since lump sum payments must be evaluated specially; special Native American assets; payments received for destroyed property. These, too, must be specially evaluated. If a home is sold on contract, both the value of the contract itself and the monthly payments will be exempt as long as the income is used to purchase another home; to the extent income from the contract exceeds payments for the new home, income will be counted. But if no new home (house, condo, mobile home) is to be purchased with the proceeds from the sale, *the fair market value of the contract* will be counted as an asset for purposes of Medicaid eligibility. Other contracts having some fair market value that pay monthly income will be treated as assets, as well.

Under the current rules, applicable to persons admitted (or readmitted following at least a 30-day discharge) to nursing facilities on and after October 1, 1989, the value of all the assets of both spouses are added together, excluding only those assets not counted by Medicaid, such as the value of a residence. The timing for the valuation is the date of the institutionalized spouse's entry into the facility, whether or not that spouse is then eligible for Medicaid.

The community spouse is presumed to own: (a) *all* of the assets, if the total is less than $17,400; (b) $17,400, if the total is between $17,400 and $34,800; (c) *half* of the assets, if the total is between $34,800 and $174,000; and, (d) $87,000 if the total is above $174,000. It does not matter who *legally* owns the assets; the community spouse is apportioned these amounts by federal law. The remainder of the combined assets are imputed to the institutionalized spouse. In other words, this federal law divides the marital property and establishes a rebuttable presumption that some of the marital property may be available for the institutionalized spouse's health care costs. Utah has adopted the most restrictive guidelines allowed under the federal rules; a state *may* permit the community spouse to keep all of the combined assets up to $87,000 instead of requiring that lesser amounts be split. Other states have adopted varying positions between the maximum and the minimum.

Under state rules adopted in early 1991 additions to the wealth of *either* spouse *after* one spouse enters a nursing facility but *before* that spouse becomes eligible for Medicaid are always considered as part of the *institutionalized* spouse's assets, thereby delaying that spouse's eligibility for Medicaid. Moreover, Utah's rules now explicitly disregard prenuptial agreements when assessing the assets of the spouses.

The institutionalized spouse may not have more than $2,000 in liquid assets and still be eligible for Medicaid. (Note, however, that many non-liquid assets, like burial funds, are counted toward the liquid asset limit.) If the assets imputed to the institutionalized spouse exceed Medicaid's limitations, she will not be eligible until the assets are spent to below the $2,000 limit, perhaps by paying for nursing home care for some time.

Perhaps the most troubling provisions of the Medicaid program are the so-called "transfer of assets" rules. "Troubling" because these rules are beyond the usual radar coverage of estate planners. Running afoul of the rules is easy, and can be costly for clients.[4] Congress has changed the rules many times regarding uncompensated transfers of assets, that is, "gift giving."

Congress wants to stop people from giving away their life savings or their homes and then applying for Medicaid. To achieve its goal, Congress established this presumption: Whenever someone gives away an asset for less than the asset's fair market value, the law presumes that the donor gave the asset away to deplete her net worth in order to become eligible for Medicaid's help in paying nursing home costs. This presumption lasts for up to 36 months after the date of the gift. The presumption is invoked when a person applies for Medicaid's help to pay nursing home costs.

The rules apply when someone *gives away* a valuable asset, including a home; the rules do *not* apply to exchanges of fair market values, such as the sale of a home, or trading in one car on another. And gifts can be given to certain people without causing a Medicaid problem.

The current rule against uncompensated transfers calls for a 36-month look-back period, except in the case of trusts for which a 60 month (5 year) look-back period is used. All gifts given by a Medicaid applicant or the applicant's spouse within 3 years prior to application for Medicaid coverage will cause a problem. The potential period of ineligibility is determined by the value of the gift. The period is calculated by dividing the uncompensated value of the gift by the state's current Medicaid reimbursement rate – the $3118 described above (an amount unchanged since October, 1999). There is no limit to the period of ineligibility; the uncompensated value of the gift controls.

Annuities are treated in a new and extensive section of the regulations – they are fraught with unseen dangers for practitioners. They may be treated as assets; there may have been an "uncompensated transfer" to create the annuity; the income could be allocated other than as the estate planner envisioned.

The presumption of "improper motive" may not seem harmful, until it is coupled with another provision of the law: if *any* of the motives for the gift giving was to make the donor eligible for Medicaid, the donor will be found to be ineligible for Medicaid's help paying nursing home costs. A $125,000 transfer made 7/1/01 would result in a period of ineligibility lasting 40 months (7/1/01 through 10/31/2004), based upon the integral quotient found by dividing $125,000 by $3,118. A $62,500 gift made at the same time will cease to cause a problem after 20 months, *even though it must be reported for 36 months.*

If a person transfers $125,000 on 7/1/01 and the same amount on 12/1/01, then waits and applies for Medicaid on 6/1/04, she would still be ineligible for a very long time because sanctions run consecutively, not concurrently. In this example, the second 40-month sanction period would not begin to run until 11/1/2004, making the individual ineligible until March 2008. (If the individual waits until August 2004 to file the initial application, however, the 7/01 gift would be uncountable; only the 12/01 gift would be within the look-back period, causing ineligibility until 4/2005 – assuming the rules remain the same for that long! And if she waits until January 2005 to apply, there would be no sanction period whatever.) There is no "whoops" factor: applicants cannot withdraw an application in order to let one or more gifts pass out of Medicaid's memory.

Transfers between spouses are never presumed to be for the purpose of acquiring Medicaid eligibility, no matter what the gift is. And a parent can give anything, including the home, to a handicapped ("dependent") child without running afoul these rules.

Special rules apply to homes. If a sibling of the person who needs nursing home care has been living in the home for at least a year *and* the sibling already has some title to the home (e.g., joint tenancy between sisters), the person who needs nursing home care can give her share of the home (but not other gifts) to her sibling. A parent may give her interest in the home to a child, but *only* if ***either*** the child is under age 21; ***or,*** if the child is 21 or older, the child has been living in the home and caring for the parent for *at least* two years prior to the parent's need for nursing home care. **The transferee cannot then give the transferred assets away to others,** with few exceptions. One exception: a community spouse can do whatever he likes with his retained assets and the home, once the institutionalized spouse becomes eligible for Medicaid, i.e., Medicaid starts paying some of the nursing home costs. But the community spouse runs the risk of his own ineligibility for Medicaid if he gives away assets less than 36 months prior to needing help paying his own nursing home costs.

Medicaid and Medicare cover different portions of the health care needs of Americans. Medicaid is the only program that comprehensively covers the cost of nursing home care. Planning an estate with a reliance on Medicaid requires foresight (can you know what a client will need in three years – but not a day sooner?) and caution. While the lawyer may not go to jail, he or she may leave a client or the client's family in the lurch – a gift made today can be counted as an asset, within three years – and the gift's value can cause an extended period of ineligibility for a patient, during which the patient's family must pay for nursing home care.

[1] The Utah manual of eligibility regulations (see note 3) is more than two hundred pages long. Utah Legal Services offers a 15-page flyer that gives more detail than this brief article. I have attempted here to highlight only some of the most important aspects of this complex program.

[2] Medicare is codified at 42 U.S.C. §§ 1395 et seq. (Title XVIII of the Social Security Act); Medicaid is codified at 42 U.S.C. §§ 1396 et seq. (Title XIX of the Social Security Act). Both are administered federally by the Health Care Financing Administration (HCFA). Federal regulations are published at 42 CFR Parts 400 - 499. Utah administers Medicaid through the Utah Department of Health, Division of Health Care Financing. Eligibility determinations are based on applications submitted to the Utah Department of Workforce Services (DWS). I have reached the state's eligibility regulations through the state's website at **http://sitedir.state.ut.us.** Click on "State of Utah Available Infobases" and there locate the "manual" relevant to the material in this article: DWS's **Volume III-M - Medicaid Nursing Home.** The federal Medicaid statute is extensive, complex, redundant, convoluted, arcane, and generally not the best bedtime reading. It may have more exceptions upon exceptions upon exceptions even than the Internal Revenue Code.

3 That amount is scheduled to increase to $1451.25, effective July 1, 2001.

4 Congress enacted a punishment for the patient who tried unsuccessfully (i.e., who was found ineligible for Medicaid coverage on account of the transfers) to give away assets (the "granny goes to jail" provision). That was revised to punish the estate planner who, for a fee, arranged transfers, if the effort failed ("granny's lawyer goes to jail"). A federal District Court in New York invalidated the "lawyer" provision on behalf of a nationwide class, on constitutional bases; then-Attorney General Janet Reno announced her intention not to enforce the statutory provision nor to appeal the court decision.

Commission Highlights

During its regularly scheduled meeting March 15, 2001 which was held in St. George, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. The Supreme Court's order dated February 20, 2001 amended the Rules for Integration and Bylaws to provide for a direct election of the President-elect as well as for the removal and vacancy procedures for officers including the President and President-elect.
2. Lowry Snow reported on the National Conference of Bar Presidents.
3. Updates of MDP, MJP and Admissions were addressed.
4. The Commission approved the grant to the Unauthorized Practice of Law Committee in conjunction with the Legal Assistant Division, the Multi-Cultural Legal Center and Utah Legal Services requesting a grant of $7,500 to assist in defraying the costs of newspaper advertising, and the printing and distribution of flyers. The project is intended to inform the ethnic and racial minority communities as well as the general public about those who may be engaged in the unauthorized practice of law.
5. It was noted that the newest member of the Bar Commission, Josie Valdez, the public member appointed by the Supreme Court, has resigned. The Court will need to appoint her replacement. David Hamilton and Felshaw King are running for the representative of the Second Division. In the Third Division there are three openings and three candidates consisting of Gus Chin, Karin Hobbs and David Bird. Therefore no election will be necessary.
6. The Commission reviewed the financial statements.
7. Charles R. Brown reported on the ABA meetings.
8. Katherine Fox led the discussion on the proposed amendments to the Bar Examination Review and Appeal Procedure as well as administrative licensing policies. The Commission approved the revisions.
9. Randy Kester reported on the recent Judicial Summit Conference.
10. The Commission slated Denise Dragoo and John Adams as the President-elect nominees. It was noted that there would be an opportunity for the President-elect nominees to speak at the Mid-year Convention next year.

A full text of minutes of this and other meetings of the Bar Commission is available for inspection at the office of the Executive Director, or on the Bar's website, www.utahbar.org.

Ethics Advisory Opinion Committee Seeks Applicants

The Utah State Bar is currently accepting applications to fill a vacancy on the 14-member Ethics Advisory Opinion Committee. Lawyers who have an interest in the Bar's ongoing efforts to resolve ethical issues are encouraged to apply.

The charge of the Committee is to prepare formal written opinions concerning the ethical issues that face Utah lawyers and to forward these opinions to the Board of Bar Commissions for its approval.

Because the written opinions of the Committee have major and enduring significance to the Bar and the general public, the Bar solicits the participation of lawyers and members of the judiciary who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in résumé or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.), and substantive areas of practice.
- A brief description of your interest in the Committee, including relevant experience and commitment to contribute to well-written, well-researched opinions.

Appointments will be made to maintain a Committee that:

- Is dedicated to carrying out its responsibilities; i.e., to consider ethical questions in a timely manner and issue well-reasoned and articulate opinions.
- Involves diverse views, experience and backgrounds from the members of the practicing Bar.

If you want to contribute to this important function of the Bar, please submit a letter and résumé indicating your interest to:

Gary G. Sackett, Chairman
Ethics Advisory Opinion Committee
P.O. Box 45444 • Salt Lake City, Utah 84145

Utah State Bar 2001 Mid-Year Meeting Awards

Dorathy Merrill Brothers Award for the Advancement of Women in the Legal Profession

Laura Milliken Gray graduated with honors from the University of Utah College of Law in 1991 and was admitted to the Utah State Bar that same year. She served judicial clerkships with Utah Supreme Court Chief Justice Gordon R. Hall, and with Utah Court of Appeals Judge James Z. Davis.

Since 1996, Ms. Gray has owned and operated her own law firm, Laura Milliken Gray, P.C. Laura's areas of practice include estate planning, probate, trust and will administration, guardianship, adoption, mediation and small business law. She has volunteered her time on several high profile civil rights cases, including the *East High Gay Straight Alliance vs. Board of Education of the Salt Lake City School District.*
Ms. Gray previously served as the Chairperson of the Utah State Bar's Alternative Dispute Resolution (ADR) Committee, and is presently a member of the Utah State Bar's ADR and Estate Planning Sections. She belongs to the National Network of Estate Planning Attorneys and the Salt Lake Estate Planning Council.

Ms. Gray is a member of the University of Utah College of Law's Alumni Association Board of Trustees and sits on the Salt Lake Olympic Organizing Committee's Volunteer Work Group.

Ms. Gray has served as an Adjunct Professor at the University of Utah, where she taught a course entitled *Women and the Law.* She has authored many published articles about estate planning and other legal topics. She lectures and speaks regularly on various estate planning subjects, and has developed a specialty in estate planning for nontraditional couples.

Raymond S. Uno Award for the Advancement of Minorities in the Legal Profession

Hon. Tyrone E. Medley graduated from the University of Utah College of Law in 1977. He was admitted to the Utah State Bar in 1978. Following his admission to the Bar, he worked as a Deputy Salt Lake County Attorney until 1981. In 1981, he entered private practice with an emphasis in criminal law, domestic relations, sports law, contract negotiations and was a Certified Advisor under the National Football League Certification Program.

In 1984, Judge Medley was appointed to the Third Circuit Court by Governor Scott M. Matheson. He served in this capacity until 1993, when he was appointed to the Third Judicial District Court.

Judge Medley has been a member of several organizations and associations including the American Bar Association, the American Judges Association, the Utah State Bar Committee for Women and Minorities, the Statewide Transition Team for Consolidation of Circuit and District Courts, the Utah State Sentencing Guidelines Task Force, the Utah State Commission on Minority Education, the Utah Jazz Minority Intern Development Committee and the Utah Sentencing Commission.

Judge Medley is the recipient of many awards including the Distinguished Service Award from the Outstanding Professional Minority Business and Professional Directory, the Mt. Calvary Baptist Church Role Model Award of Recognition, The National Asian Pacific American Bar Association and Utah Minority Bar Association Award in Recognition of Outstanding Achievement, Leadership and Contribution to the Minority Legal Community and the NAACP Albert B. Fritz Civil Rights Worker of the Year Award.

He distinguishes himself by becoming the first African-American Judge in the history of the State of Utah.

ANNOUNCEMENT

The Formation of a new Section of the Utah State Bar

NONPROFIT/CHARITABLE

This section will focus on the needs of nonprofit, charitable and tax-exempt organizations. Sign up for the section on your 2002 Licensing Form or via email at sections@utahbar.org

Questions: Call Bruce Olson, Ray, Quinney & Nebeker, 532-1500

NOTICE

of Legislative Rebate

Bar policies and procedures provide that any member may receive a proportionate dues rebate for legislative related expenditures by notifying the Executive Director, John C. Baldwin, 645 South 200 East, Salt Lake City, UT 84111.

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 2001 and ends June 30, 2002. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its July 4, 2001 meeting.

The Commission is interested in assuring that the process includes as much feedback by as many members as possible. A copy of the proposed budget, in its most current permutation, will be available for inspection and comment at the Law & Justice Center after May 31, 2001. You may pick up a copy from the receptionist.

Please call or write John Baldwin at the Bar office with your questions or comments.

Notice Regarding Reappointment

The current term of office of Judith Boulden, United States Bankruptcy Judge for the District of Utah in Salt Lake City, is due to expire on January 3, 2002. The United States Court of Appeals for the Tenth Circuit is considering the reappointment of Judge Boulden to a new term of office.

Upon reappointment, Judge Boulden would continue to exercise the jurisdiction of a bankruptcy judge as specified in title 28, United States Code; title 11, United States Code; and the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 101-122, 98 Stat. 333-346. In bankruptcy cases and proceedings referred by the district court, Judge Boulden would continue to perform the duties of a bankruptcy judge that might include holding status conferences, conducting hearings and trials, making final determinations, entering orders and judgments, and submitting proposed findings of fact and conclusions of law to the district court.

Members of the bar and the public are invited to submit comments for consideration by the court of appeals regarding the reappointment of Bankruptcy Judge Boulden to a new term of office. All comments will be kept confidential and should be directed to Elisabeth A. Shumaker, Circuit Executive, Byron White U.S. Courthouse, 1823 Stout Street, Denver, CO 80257.

Comments must be received by June 30, 2001.

Discipline Corner

SUSPENSION

On August 21, 2000, the Honorable Anne M. Stirba, Third Judicial District Court, entered an Order of Discipline suspending Thomas Rasmussen for one year for violation of Rules 1.5(a) and (b) (Fees), 1.15(a) (Safekeeping Property), 5.1(a) and (b) (Responsibilities of Partner or Supervisory Lawyer), 5.3 (Responsibilities Regarding Nonlawyer Assistants), 7.5(d) (Firm Names and Letterheads), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The entire one year suspension was stayed; Rasmussen was placed on supervised probation for one year.

Rasmussen was retained to represent a client in a legal dispute regarding purchase of a business. The client paid Rasmussen an advance of attorney's fees that substantially exceeded $750. Rasmussen did not provide the client with a retainer agreement. Rasmussen assigned the client's matter to his assistant and thereafter failed to properly supervise the assistant. The client paid Rasmussen additional monies; the additional monies constituted an excessive fee. Rasmussen failed to keep an accounting of the fees paid by the client and failed to promptly provide the client with an accounting when one was requested. Rasmussen failed to promptly transfer funds out of his trust account as fees were earned. Rasmussen failed to adequately supervise his nonlawyer employee. Rasmussen's letterhead misrepresented the status of his association with another attorney.

Mitigating circumstances include: no prior record of discipline; lack of dishonest or selfish motive; cooperative attitude toward disciplinary proceedings; and remorse.

Aggravating circumstances include: vulnerability of the victim and substantial experience in the practice of law.

ADMONITION

On February 21, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rule 1.9(b) (Conflict of Interest: Former Client) of the Rules of Professional Conduct.

The attorney was legal counsel for an association. The attorney later was terminated as legal counsel for the association. Thereafter, the attorney began representing a group of individuals whose interests were adverse to the association. The association never agreed to waive the conflict of interest created when the attorney undertook representation of the group of individuals. During the course of representing the group, the attorney used information concerning the association to its disadvantage.

ADMONITION

On March 1, 2001, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah State Bar for violation of Rules 1.3 (Diligence) and 1.4(a) (Communication) of the Rules of Professional Conduct.

For a three year period, while working as a solo practitioner, the attorney failed to keep a number of clients reasonably informed about the status of their matters and did not promptly comply with those clients' reasonable requests for information. The attorney failed to act with reasonable diligence and promptness in representing a number of clients.

Mitigating circumstances include: absence of dishonest or selfish motive; personal or emotional problems; good faith effort to rectify the consequences of the misconduct involved; inexperience in the practice of law; and remorse. The attorney also agreed to submit to binding fee arbitration.

SUSPENSION

On March 6, 2001, the Honorable Robert T. Braithwaite, Fifth Judicial District Court, entered an Order of Discipline by Consent suspending E. Kent Winward for six months for violation of Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct. The entire six month suspension was stayed.

Winward was charged with forgery as a result of his having signed another person's name on a check and depositing that check in connection with a real estate transaction. Winward was convicted and sentenced to a term of one to fifteen years in the Utah State Prison. In addition, Winward was suspended from the practice of law. Winward appealed his conviction and the conviction was overturned. Winward later entered into a diversion agreement with the Iron County Attorney's Office and has since successfully completed the terms of that agreement.

Mitigating circumstances include: imposition of other penalties and sanctions.

SUSPENSION

On March 13, 2001, the Honorable Leslie A. Lewis, Third Judicial District Court, entered an Order of Discipline suspending Steven Lee Payton for six months for violation of Rule 4.4 (Respect for Rights of Third Persons) of the Rules of Professional Conduct. The entire six month suspension was stayed and Payton was placed on probation for one year, effective January 17, 2001.

Payton used his office as an attorney and officer of the court to contact and communicate with an individual's employer for no substantial purpose other than to embarrass the individual. Further, Payton used his office as an attorney and officer of the court to improperly seek private information from an individual's employer.

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Utah State Bar Request for 2001-2002 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more of 20 different committees which participate in regulating admissions and discipline and in fostering competency, public service and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name _____ Bar No. _____

Office Address _____ Telephone _____

Committee Request

1st Choice _____ 2nd Choice _____

Please describe your interests and list additional qualifications or past committee work.

_____

_____

_____

Instructions to Applicants: Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon ar at the end of the workday.

Committees

1. **Advertising.** Evaluates trends in lawyer advertising and assists Office of Professional Conduct in resolving related offenses.
2. **Annual Meeting.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
3. **Bar Examiner Review.** Drafts and grades essay questions for the February and July Bar Examinations.
4. **Bar Examiner Review.** Reviews essay questions for the February and July Bar Exams to ensure that they are fair, accurate and consistent with federal and local laws.
5. **Bar Journal.** Annually publishes editions of the *Utah Bar Journal* to provide comprehensive coverage of the profession, the Bar, articles of legal importance and announcements of general interest.
6. **Character & Fitness.** Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.
7. **Client Security Fund.** Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.
8. **Courts and Judges.** Coordinates the formal relationship between the judiciary and the Bar including review of the organization of the court system and recent court reorganization developments.
9. **Fee Arbitration.** Holds arbitration hearings to resolve voluntary disputes between members of the Bar and clients regarding fees.
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17. **Needs of Children.** Raises awareness among Bar members about legal issues affecting children and formulates positions on children's issues.
18. **Needs of the Elderly.** Assists in formulating positions on issues involving the elderly and recommending legislation.
19. **New Lawyer CLE.** Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality and conformance with mandatory New lawyer CLE.
20. **Unauthorized Practice of Law.** Reviews and investigates complaints made regarding unauthorized practice of law and recommends appropriate action, including civil proceedings.

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Some Current Causes for Popular Dissatisfaction With the Administration of Justice

by Judge J. Thomas Greene

EDITOR'S NOTE: *The following remarks were made by Judge J. Thomas Greene at the Federal Bar Association's Annual Litigation Practice Seminar, held on November 3, 2000. He has graciously permitted them to be reprinted here.*

My presentation today has to do with public perceptions of our justice system. The adage public opinion pollsters live by is that "Reality is what the public *thinks* is real." This is also the engine that drives much of our economy, including consumer spending and some lawyers' jury practice. Abraham Lincoln was well aware of the significance of public perceptions. He said: "Public sentiment is everything. With it, nothing can fail; without it nothing can succeed."[1] This proposition is of the utmost importance to our justice system, including lawyers, judges, juries and the overall workability of the system, because it implicates public trust and confidence. In this regard, much introspection within the system, as well as inquiry by individuals and organizations not a part of the system, has been conducted over the past two decades in the form of polls, surveys and studies. Many of the perceptions which have emerged are negative and need to be understood and corrected.

Public perception of our system seems to be that the adversary system is broken, the jury system is not working properly, the amount of justice meted out depends on the amount of money a person has, there is a disparate and unequal treatment of the races, lawyers are greedy and judges are insensitive. Moreover, extensive surveys have revealed three basic things about public perception of our civil and criminal justice system. *First,* that the general public knows little or nothing about how our courts function. *Second,* that there is an underlying feeling of hostility toward the Third Branch of Government. And *third,* that what people do know or think they know about the courts comes mostly from sound bites, television dramas or sensational and atypical high profile cases.[2] In general, the portrayals of our judicial system and the legal profession by the media provide entertainment rather than the reality of how our justice system works.

Three polls and surveys recently have been conducted to gauge public perceptions of our justice system. They are the American Bar Association's comprehensive nationwide survey on public perceptions published February 1999,[3] the National Center of State Courts' survey funded by the Hearst Corporation in 1999,[4] and the most recent of the Harris polls, released in August 2000.[5]

These polls revealed some positive and supportive perceptions, which I will mention later, but the negative perceptions cause very great concern. In these survey results, either a majority or near majority of those polled responded thusly:

1. LAWYERS. "We would be better off with fewer lawyers." "The legal profession does [not] do a good job of disciplining lawyers." We don't need lawyers because people "could represent themselves in court if they wanted to."

The Harris poll reported that only one out of five persons surveyed regards the practice of law as a prestigious profession and that lawyers, as a group, are not worthy of being admired. This represents a sharp decline as of August 2000, compared with prior years. (Doctors, scientists and teachers were ranked as "most prestigious." A few professional groups – notably journalists – were ranked even lower than lawyers.) The August 2000 poll reflects the continued negative perception of lawyers reported in a Harris poll taken shortly after the O.J. Simpson trial: "[L]awyers' prestige has plummeted at a pace unmatched by that of other professions during the past 20 years."

The O.J. Simpson trial may be the cause of a good deal of public dissatisfaction with lawyers. In this regard, Albert Alschuler, an advocate for jury reform, made this comment about that trial: "Though the Simpson trial was atypical, it tells us a great deal about the legal system. It shows how readily this system can be abused when skillful lawyers have the resources to press it hard." He went on to conclude that the O.J. Simpson trial "could mark a turning point in our legal history, the moment when the need for America to reinvent a fair and workable trial procedure became too obvious to deny."[6] This may be an extreme reaction, but it is food for thought. In any event, that trial not only set back the cause of those who advocate cameras in the courtroom, but also has resulted in much public dissatisfaction with lawyers.

2. COURTS. The courts and judges did not fare much better. For instance, these perceptions were expressed: Going to court "takes too long" and "costs too much." "The courts let too many criminals go free on technicalities." "Courts are not effective in informing the public about court procedures and services." "Wealthy persons receive better treatment from the courts than do others." "Politics influence judges in their decisions." "Minorities and persons who do not speak English

receive worse treatment from the courts." "Juries are not representative of the community from which they are chosen." (The percentage of persons sharing the last sentiment is higher among African-Americans and Hispanics.) "The justice system needs a complete overhaul."

Because of these negative perceptions, the question must be asked: What are the current causes of the popular dissatisfaction with the administration of justice? The root causes go very deep.

In 1906, the venerable Roscoe Pound, who later became a notable Dean of the Harvard Law School, addressed the American Bar Association and delivered a challenging address entitled, "The Causes of Popular Dissatisfaction with the Administration of Justice."[7] Much of what he said is applicable today in understanding negative public perceptions and dissatisfaction. For instance, he said that the public perceives the law itself to be arbitrary, full of technicality, favoring the rich and lagging behind current public opinion and changed cultural values. In the public's mind, the practice of law is but a game, like a sporting event, which simply requires knowing the rules. He pointed out that the contentiousness inherent in the adversary system fosters dissatisfaction. Roscoe Pound also observed that the public perceives the courts to be too slow, that the dual system of concurrent state-federal jurisdiction is a waste of judicial power, and that the courts are infected with politics. He said that lawyers are abandoning professionalism in favor of commercialism and that the attorney-client relation is being lost. He observed that the public generally regards the jury system to be a bore, troublesome and inconvenient, and that juries are too expensive. Concerning the media as a cause of popular dissatisfaction, he said: "Finally, the ignorant and sensational reports of judicial proceedings, from which alone a great part of the public may judge the daily work of the courts, completes the impression that the administration of justice is but a game."

Most of what Dean Pound had to say about the causes of popular dissatisfaction could have been said today. Let me suggest some additional causes for dissatisfaction. I will mention six such causes, focusing on lawyers, the judiciary, Congress, the media, the entertainment industry, and societal attitudes in today's culture.

LAWYERS

The public's current dissatisfaction with the legal profession appears to have been brought on by an unsavory minority who have abused the system and employed sharp practices that have tended to discredit and demoralize the profession as a whole. In this regard, a recent cover story in U.S. News and World Report highlighted the following:

> One area in which this kind of respect for institutions has eroded dramatically in recent years is the law. Outside of their profession, lawyers have become symbols of everything crass and dishonorable in American public life; within it, they have become increasingly combative and uncivil toward each other.[8]

This negative perception is echoed locally as recently as this week in a *Salt Lake Tribune* editorial which notes that "Lawyers have a reputation for rapacious greed." This editorial concludes that the "popular perception [is] that lawyers are greedier than hogs."[9]

Negative perceptions of lawyers as a whole are overgeneralized and unfair. The vast majority of lawyers selflessly devote a good portion of their time, gratis, in providing legal assistance to the poor, working on law reform, taking on unpopular causes, and counseling people who cannot afford to pay. These positive facts about lawyers need to be heralded and made more widely known, but before lawyers can effectively speak out to defend and improve the public perception of the justice system, they must work at improving their own public image.

THE JUDICIARY

Judges are often perceived as insensitive, arbitrary and aloof. In part, this comes from the need to avoid undue familiarity with members of the bar and organizations likely to be litigants, as well as ethical restrictions against speaking about cases at the time the public is most interested in them – when they are pending.

Ideally, the judiciary itself should be its own best spokesperson. However, given the prohibitions on judges explaining and discussing their own rulings or other judicial rulings in pending cases, this is not always possible. This inability to respond is particularly troubling when the judge fails to make his or her rulings clear and understandable in the first place. The lack of a response by the judge or others to "set the record straight" may also contribute to the public's unfavorable impression.

A recent example where a judge could not resist responding to public criticism in a high profile case occurred in the Microsoft anti-trust case. The U.S. District Judge who tried that case gave interviews to the Wall Street Journal, the Washington Post, Newsweek and CNN. He explained that these media statements were necessary to prevent "public misperceptions" due to unwarranted "public relations campaigns," and said, "I believed and still believe that it is vitally important to public confidence in the judicial system that my role be fully understood."[10] This has been labeled as unethical and inappropriate conduct – or at the least ill advised – raising the specter that the appellate court may not reach the merits in the case but rather remand with an order of recusal and reassignment to another judge. Others have defended the judge as having said no more than what he had essentially said in open court and in duly issued rulings.[11] In all events, this illustrates the delicate and difficult position judges are in concerning even well-intentioned public comments about pending cases. Being muzzled concerning current trials and matters on appeal is a real handicap for judges.

Concerning the inability of judges effectively to defend themselves or the system against public criticism, Chief Justice Rehnquist recently stated: "The adversarial nature of many court proceedings is not easily conducive to universal good feelings. In a democratic atmosphere of wide-open comment and criticism on the work of the courts, judges cannot always bend to public will, nor should they try."[12]

Judges can do things to improve the perception of the judicial system, such as speaking at service clubs, participating in educational seminars, and conducting moot courts. Outreach programs in the courtroom to acquaint the public with the court and court procedures hold great promise.

CONGRESS

Congress contributes to the current popular dissatisfaction with the justice system by enacting laws which require the courts, in effect, to become regulators. In this regard, Robert Reich, former Secretary of Labor in the Clinton administration, has said, "So, how do we deal with the big regulatory issues: tobacco, handguns, sweatshops, high-tech? Through lawsuits."[13] He decries the lack of expertise by judges relative to such issues and worries that cases will be settled without regard to the fate of alleged victims. The federalization of criminal law in statutes aimed at such things as violence against women, immigration and extreme penalties for crimes already prohibited under state law places undue strain upon an already heavy federal caseload. It also contributes to the negative perception of inappropriate judicial actions and intrusions into social issues beyond what ought to be the role of courts.

It is unlikely that the Congress will stop passing laws which leave politically sensitive matters for the courts to decide even though, in substance and effect, this amounts to a transfer to the courts of substantive decision-making. The interpretation of such laws may result in rulings affecting the entire society, which may be perceived negatively, transferring public blame – if blame is to be placed – to the courts.

THE MEDIA

When the media reports on the justice system, it appears to be looking for negative subjects to cover because they are the ones thought to be the most newsworthy. Clearly, the media rejects the notion that it has a duty to educate the public about the virtues of the court system, as evidenced by statements made by some very prominent news reporters during a free-wheeling panel discussion recently sponsored by the American Judicature Society.[14] Eminent journalists and judges offered differing perspectives concerning media reporting of the justice system. For instance, a long-time correspondent of the *Baltimore Sun,* whose assignment for many years had been reporting on the United States Supreme Court, said, "The better news stories are when the court system doesn't work very well at all." He further stated, "We're going to cover [the courts] the way we want to," and "We do not have to perform in a way that will earn a Good Housekeeping seal of approval for the judiciary."[15] This echoes the statement made by Walter Cronkite, the former CBS News anchorman, who put it this way some years ago: "It simply isn't our job to report on every cat that isn't caught up a tree."

The bottom line is that although some positive things occasionally may be reported, public perception of the justice system is not likely to be made noticeably more favorable because of media reporting.

THE ENTERTAINMENT INDUSTRY

Our society apparently has an insatiable hunger for stories about the law and lawyers. Hollywood most often satisfies this hunger by fictional or grossly exaggerated presentations in a vast outpouring of popular legal culture. There are numerous fictional television shows about the law, including *Ally McBeal, The Practice, JAG,* and *Law and Order,* and several others, with new ones on the way. In addition, each year sees a constant stream of lawyer novels and docudramas based on often fanciful legal situations. Court TV continues to draw only a small (albeit devoted) audience, but Judge Judy and her imitators on the daytime television bench have a much larger following and are seen as the personification of our judiciary. A competitor, Judge Julie, who I am informed is seen on the Playboy Channel, wears a black negligee rather than a robe and specializes in – what else? – sex cases.

Fictional portrayals of courtroom scenes and other aspects of law practice are entertaining and can be worthwhile. But it must be realized that these constitute entertainment, not education. Fictional fantasies about legal matters tend to translate, in the public perception, into what they believe to be an understanding of the real justice system. The mischief is that they are distortions of the real world and tend to trivialize the justice system.

Distorted and inaccurate presentations about how the system works contribute to the perception that the practice of law is, as Dean Pound said, a game much like a sporting event. The lawyer who is most adept at manipulating the "rules of the game" is thus perceived as the one who should prevail. Court proceedings are perceived as something other than the search for truth and justice.

SOCIETAL ATTITUDES IN TODAY'S CULTURE

A unique phenomenon of our day seems to be that we have become a nation of victims, playing the "blame game." This may be one of the causes for the litigation explosion in our country, which is fanned by the perception that by filing "creative" and sometimes intimidating lawsuits someone else can be held liable for the bad things that happen to us, regardless of our own fault, and that the justice system can be manipulated. The result is often frivolous and unwarranted litigation, born of attitudes in our society which reflect a refusal to accept responsibility for our own actions.

Some of the unfavorable public perception of judges and courts may reflect broader social and cultural dissatisfaction with the very structure of our society, such as the disparity in wealth. The perception of how wealth may affect justice is typified in the well-known *New Yorker* cartoon in which the rich lawyer asks a client who is seeking to have her rights vindicated, "How much justice can you afford?" That cartoon illustrates the widespread feeling that justice can be bought and that it is unequally dispensed based on ability (or inability) to pay.

Often it has been said that "any fool can file a lawsuit." But judges must take all litigation seriously and rule on the merits. The perception that too many foolish lawsuits are taken too

seriously by the courts, and that they are allowed to consume an inordinate amount of judicial time, leads to exasperation and doubt as to the workability of the system.

* * *

Like the democracy in which it operates, our justice system is not without its cumbersome inefficiencies and defects. But in spite of all of the foregoing, our system is better than any other. This is recognized in positive perceptions of the system reflected in the extensive polls just mentioned. For instance, the key positive findings of the comprehensive ABA survey were these: "In spite of its problems, the American justice system is still the best in the world." "The jury system is the most fair way to determine the guilt or innocence of a person accused of a crime," and "Juries are the most important part of our judicial system." Concerning access to the courts, the perception is: "It would be easy to get a lawyer if I needed one." A key positive finding in the National Center for State Courts study was: "Judges are generally honest and fair."

Even the media occasionally awakens to the fact that positive stories about the justice system are often newsworthy and interesting to the public. Positive reporting on the judiciary was advocated by a former ABC News law correspondent, who said, "People just don't understand how our system works, and, in my view even more unfortunate, they don't understand how well it works." He went on to say that "the best kept secret of the judiciary is how well they work . . . But it's not a secret we should be keeping. Keeping it secret undermines confidence in, and respect for, the courts . . . ."[16]

Notwithstanding these favorable perceptions, efforts of *individual* lawyers, judges and well-intentioned media persons to change public perception from unfavorable to favorable may be largely ineffective. Generally speaking, the reality in today's atmosphere is that presentations by lawyers are perceived as self serving, making lawyers ineffective spokespersons for their own cause as well as for the cause of the justice system. Similarly, judges often are not able to say or do anything, at least about adverse perceptions concerning current cases, and the media is more likely to look for and report apparent flaws in the system rather than to extol its virtues. Hollywood-type fiction and entertainment based on legal themes almost never supply the true picture of how our system works, and in fact contribute to the blame game and victim-oriented mind set.

In addition to direct positive outreach to the public by individual lawyers and judges,[17] the organized bar, the law schools and service organizations can probably do the most to help improve positive public perception of the justice system. This can best be achieved by maximizing public awareness and understanding of the judicial system as it actually works.

* * *

In conclusion, we can hope and predict, as did Roscoe Pound in the year 1906, that our present justice system with excellent law schools and active bar associations such as this splendid Federal Bar Association, will "revive professional feeling and throw off the yoke of commercialism; [that] we may look forward confidently to deliverance from the sporting theory of justice; [and that] we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all."

Let us work together to make that "near future" Roscoe Pound envisioned in 1906 come to pass in the "near future" of this Millennium.

[1] *The Collected Works of Abraham Lincoln,* Roy P. Basher, ed., Vol. III, Lincoln-Douglas Debate at Ottaway (Aug. 21, 1858) p. 27.

[2] The results of various polls conducted by CBS News/*New York Times,* ABC News/*Washington Post, Los Angeles Times* and others are contained in the Wirthlin Group Database as published by the American Judicature Society in an article by John M. Graecen, *What Standards Should We Use to Judge Our Courts?,* 72 JUDICATURE 23 (June/July 1988).

[3] *Perceptions of the U.S. Justice System,* February 1999. American Bar Association publication based on Survey and Report prepared by M/A/R/C® Research.

[4] Survey conducted by National Center for State Courts, Williamsburg, VA in early 1999 reported in ABA Journal, July 1999 at 86.

[5] The Harris Poll #51, September 6, 2000, Humphrey Taylor, Chairman, Reuters News Service 2000WL25623796.

[6] *Our Faltering Jury System* by Albert W. Alschuler, 1/1/96 PUBINTST 28. 1996 WL 12333056.

[7] *The Causes of Popular Dissatisfaction with the Administration of Justice* by Roscoe Pound, 35 F.R.D. 241 (1906).

[8] Reported in National Law Journal, Nov. 15, 1999.

[9] *Salt Lake Tribune,* "Unbridled Greed," Nov. 1, 2000.

[10] *The Washington Post,* Sept. 29, 2000 - James V. Grimaldi, Washington Post Staff Writer.

[11] "Jackson Press Interviews," The Recorder, Http://www.law.com.

[12] *Judicature,* September-October 1999, Vol. 83, Number 2 at 87.

[13] *See* note 8, *supra.*

[14] *Shall We Dance? The Courts, The Community and the Media,* 80 JUDICATURE 30 (July-August 1996)—An edited transcript of a panel discussion conducted at the American Judicature Society's 1996 midyear meeting (citing surveys by the National Center for State Courts, Hearst Corporation, and state and citizens groups).

[15] Remarks of Lyle Denniston, Correspondent, *Baltimore Sun.* Mr. Denniston went on to state:

> Nobody has the guts to tell me I can't cover a public institution because of the way I'll cover it. But, God bless them, the judiciary around this country, the judge who tried the Susan Smith case in South Carolina, the judge who's trying John Salvi in Massachusetts, they sit there on their high and mighty bench and decide that if the coverage is not what they're going to like, you can't even be in their courtroom. Judges need to understand that if television and radio people can't bring their mikes and their cameras, they're not there. They are simply not there. And there's no reason to assume that anybody is ultimately going to tolerate a judiciary that says coverage of the courts depends on the judiciary's agreement with the scope of coverage. Judges have got to get that straight. It's not their call.

[16] Tim O'Brien, *Best Kept Secrets of the Judiciary,* 73 JUDICATURE 341 (April/ May 1990).

[17] At a national Conference on Public Trust and Confidence in the Justice System in Washington, D.C., in May 1999, a consensus was reached by the judges and lawyers attending that they are primarily responsible to address the issue, calling for:

> Better communication and outreach to the public, better internal management and use of technology, more diversity, stricter enforcement of court procedures and supervision of lawyers, and a stronger commitment to handling cases fairly, swiftly and economically.

These are some nuts and bolts recommendations which have merit and warrant further study and implementation.

Important Utah Decisions

EDITOR'S NOTE: *Supreme Court Justice Michael J. Wilkins and Court of Appeals Judge Judith M. Billings recently addressed last year's important Utah appellate decisions at well-attended CLE events. Although the information will be of more limited utility for those not in attendance, the* Utah Bar Journal *thought its readers might find the case summaries, distributed as handouts during the presentations, to be of interest. Accordingly, the handouts are reprinted here, with the speakers' permission. Especially because readers will not have the benefit of the narrative commentary provided by the speakers, readers are cautioned that the summaries should not be relied on for any purpose other than generally explaining what each case involves.*

Utah Supreme Court Review 2000

By Justice Michael J. Wilkins, Utah Supreme Court

1. Dramshop

Adkins v. Uncle Bart's, Inc., 2000 UT 14, 1 P.3d 528. Three different establishments were sued by the parents of a child killed by a driver who was served alcohol in all three. The supreme court held that remedies under the Dramshop Act were the only ones available to the parents, and that those damages were limited to funeral and burial expenses in the case of the Adkins's deceased son. The Adkins could not bring actions based on negligence, wrongful death, or for punitive damages.

MacKay v. 7-Eleven Sales Corp., 2000 UT 15, 995 P.2d 1233. In a case issued simultaneously with *Adkins,* the supreme court held that 7-Eleven could be liable for selling alcohol to an underage third party who gave it to an underage driver whose intoxication resulted in the death of his passenger, if the trier of fact found that the injury was foreseeable and proximately caused by the sale.

Red Flame, Inc. v. Martinez, 2000 UT 22, 996 P.2d 540. The supreme court held that a provider of alcohol could seek allocation of fault under the comparative negligence statute from the drunk driver in response to an action against it under the Dramshop Act.

Gilger v. Hernandez, 2000 UT 23, 997 P.2d 305. Milissa Hernandez held a party and served alcohol to a minor guest, Jason Martinez. In a fight, Martinez injured the plaintiffs. The plaintiffs sued their host, alleging she was liable for their injuries. The supreme court held that in a private setting, a host has no liability under the Dramshop Act.

2. Attractive Nuisance

Kessler v. Mortenson, 2000 UT 95, 16 P.3d 1225. Six year old Eric Kessler went to play in the house under construction near his home. He backed into a hole in the floor and fell. Eric's mother sued the home builder and his contractor. The trial court dismissed the action on the grounds that Eric was a trespasser, and that under *Taylor v. United Homes, Inc.,* 21 Utah 2d 304, 445 P.2d 140 (1968) and *Featherstone v. Berg,* 28 Utah 2d 94, 498 P.2d 660 (1972), the attractive nuisance doctrine did not apply to residential home construction. The court held that while the trial court had correctly applied the rule of *Taylor* and *Featherstone,* the exception of residential construction from the general applicability of the attractive nuisance doctrine no longer made sense. Reversing *Taylor* and *Featherstone,* the court adopted Section 339 of the Restatement Second of Torts, and held that attractive nuisance was uniformly applicable to residential construction as to other circumstances, reasoning that the hazard was temporary, created and controlled by the builder, and subject to reasonable steps to exclude children and minimize the danger to them, even as trespassers.

Pullan v. Steinmetz, 2000 UT 103, 16 P.3d 1245. Young Arielle Pullan fed Rocky the horse some oats kept near the stables. Rocky bit the hand that fed him. Arielle lost the top of her left ring finger and sued the owners and keepers of the horse. The court held that strict liability as applied to dogs does not apply to horses, even those kept in an urban setting like a pet or hobby. Also, the court declined to apply the attractive nuisance doctrine to Rocky, without reaching the question of whether or not a horse is an "artificial condition upon the land," because the plaintiff admitted that the defendants did not have knowledge that the place where the condition existed was one where children were likely to trespass.

3. Juvenile Law

State ex rel. M.W., 2000 UT 79, 12 P.3d 80. In response to cross petitions for certiorari, the supreme court held that adjudication of a neglect petition in juvenile court against a parent that results in a finding of neglect against the parent constitutes a final order, and deprives the parent of the "parental presumption" under *Hutchison v. Hutchison.*

State v. Bybee, 2000 UT 43, 1 P.3d 1087. Alexander Bybee, a juvenile tried as an adult, pleaded guilty to murdering a six year old boy, reserving issues for appeal. Bybee had committed the murder in Utah, but moved to Nevada shortly thereafter, and was admitted to a youth mental health facility there by his father. Bybee was 16, almost 17, when he admitted the murder to his father, then police. Bybee was given the *Miranda* warnings prior to questioning by Utah officers, and waived those rights. On appeal, he argued that Utah Rule of Juvenile Procedure 8(d) prohibiting questioning of a child without his parent's permission in a "detention facility" made the questioning improper. The supreme court held that the Nevada mental health facility was not a "detention facility" within the meaning of the rule and affirmed.

4. Criminal

State v. Clark, 2001 UT 9, 414 Utah Adv. 10. The quantum of evidence necessary to support a bindover to stand trial on a criminal charge is less than that necessary to survive a directed verdict motion. The prosecution must present sufficient evidence to support a reasonable belief that an offense has been committed, and that the defendant has committed it. The standard is the same as for an arrest warrant.

State v. Burns, 2000 UT 56, 4 P.3d 795. Becky Burns was convicted of murdering her six month old son, Shawn, by starvation and dehydration. A relative had paid for defense counsel, but Burns was unable to afford expert witnesses to testify regarding the medical causes and circumstances of Shawn's death. The trial court required Burns to accept representation by the Legal Defenders Association as a condition to receiving funds to hire an expert. The trial court noted that the LDA contract with the county made arrangements for experts when needed, and that the procedure was a reasonable way to handle the problem. The supreme court held that the Sixth Amendment right to effective assistance of counsel includes the right to expert witnesses when necessary, and that under the Utah Code of Criminal Procedure, at section 77-32-6 (now 77-32-306) and Rule 15(a) of the Utah Rules of Criminal Procedure, counties, cities and towns are required to provide for payment of expert witnesses needed by indigent defendants. The right to expert witness assistance cannot be conditioned upon use of counsel of the county's choosing. Ms. Burns had the right to counsel of her choice, where that counsel was made available to her, and to the assistance of expert witnesses at county expense, if she was indigent.

State v. Nelson-Waggoner, 2000 UT 59, 6 P.3d 1120. Stacey Lamar Nelson-Waggoner was convicted of the rape of a USU female student in his dorm room. She reported a sequence of events related to the rape that were almost identical to those reported by other women who also accused Nelson-Waggoner of rape. Reports of two other women were admitted at trial over defense objections. The supreme court reviewed application of Rule 404(b) of the rules of evidence and held that admission of the evidence of prior bad acts introduced for non-character purposes to establish a pattern of behavior was not error. The court also applied Rule 402 (relevance) and Rule 403 (probative value versus prejudice) in affirming the action of the trial court, and the conviction.

State v. James, 2000 UT 80, 13 P.3d 576. James was parked in his own driveway, having been followed there by officers investigating allegations of DUI. James refused to open the door or window, so the officer opened the door to ask James to get out of the truck. When he opened the door, the officer saw an open alcohol container in the front floor area. The supreme court held that the officer could have required James to open the truck door, and that there was no distinction between James and the officer doing it. To clarify a point made by the court of appeals, the supreme court went on to say that the independent source doctrine and the inevitable discovery doctrine are not one and the same. To avoid application of the exclusionary rule, the burden is on the prosecution to establish by a preponderance of the evidence that the objected-to information ultimately would have been discovered by lawful means. It does not require a showing that the discovery would have resulted from an independent source, only that it would have lawfully come to light in any event.

State v. Visser, 2000 UT 88, 408 Utah Adv. 9. Midway through a jury trial, Visser decided to plead guilty. In conducting the rule 11 plea colloquy, the trial court failed to inform Visser of his right to a speedy trial before a jury. The supreme court concluded that Visser's experience in trial to that point "communicated at least as much as would the mere oral recitation" of the right to a speedy and public trial before an impartial jury and held that the failure to address the issue orally was not error.

State v. Vargas, 2001 UT 5, 413 Utah Adv. 23. Vargas was convicted of the murder of his wife. In the course of trial, he objected to testimony by an investigating officer, and sought to introduce evidence of the officer's prior dishonesty. The supreme court held that Rule 404(b) of the Rules of Evidence applies to witnesses, as well as the accused, and that the evidence of prior bad acts could be admitted.

5. Criminal appeal

State v. Litherland, 2000 UT 76, 12 P.3d 92. The supreme court held that where, on direct appeal, the defendant raises an ineffectiveness of trial counsel claim, defendant bears the burden of assuring the record is adequate. Where trial counsel's alleged ineffectiveness caused or exacerbated the deficiencies in the record, defendants now have an appropriate procedural tool in rule 23B of the rules of appellate procedure for remedying those deficiencies. In addition, the supreme court held that only where a juror expresses a bias or conflict of interest that is so strong or unequivocal as to inevitably taint the trial process should a trial court overrule trial counsel's conscious decision to retain a questionable juror.

6. Attorney fees

Promax Development Corp. v. Raile , 2000 UT 4, 998 P.2d 254. Promax built a home for the Railes. A dispute arose about the payment due for the construction, and Promax filed a mechanic's lien action. In the course of the proceedings, the trial court dismissed the complaint. The parties continued to spar over the question of attorney fees, but proceeded with an appeal and cross-appeal of the underlying judgment. The supreme court held that a judgment is not final, and therefore not appealable, until all issues of attorney fees and costs for trial are resolved. The court reasoned that judicial economy dictated the result, since a disputed award of attorney fees entered after the judgment on appeal could result in a second appeal.

Softsolutions v. Brigham Young University, 2000 UT 46, 1 P.3d 1095. Following an arbitration regarding a software licensing agreement between the parties, the arbitrator awarded attorney fees under terms of the agreement to BYU for the work of in-house counsel. Plaintiff challenged the award in court as beyond the power of the arbitrator, and contrary to law. The supreme court held that BYU was entitled to recover attorney fees on a "cost-plus" rate: the proportionate share of the attorney salaries, including benefits, which are allocable to the case based upon the time expended, plus allocated shares of the overhead expenses, which may include the costs of office space, support staff, office equipment and supplies, law library and continuing

legal education, and similar expenses. The court distinguished pro se litigants who were in the business of providing legal services (lawyers and law firms) and individual litigants who represent themselves. These continue to be ineligible for awards of attorney fees.

Faust v. KAI Technologies, 2000 UT 82, 15 P.3d 1266. Faust sued his former employer for work-related expenses the employer admitted it owed. The trial court awarded attorney fees only for the work needed to draft the complaint and take the default of the employer, refusing greater fees sought for negotiating with the employer. The supreme court agreed with the trial court that $1500 was a reasonable amount for fees, noting that section 34-27-1 limits fee awards to "suit" brought to enforce a wage claim, a default by the employer did not present a "bad faith" defense authorizing fees under 78-27-56, and the trial court's equitable power to award attorney fees was to be applied only in extremely rare circumstances, and this was not one of them.

Robinson et al. v. UDOT, 2001 UT 3, 413 Utah Adv. 6. In an inverse condemnation action arising from UDOT's publication of an Environmental Impact Statement regarding US 89 in Davis County, homeowners whose value dropped as a result and sued for inverse condemnation were also entitled to attorney fees under regulations adopted by UDOT directly from federal statutory language, despite UDOT's later claim that it did not have the legal authority to adopt the regulations.

7. Recovery of costs

Young v. State, 2000 UT 91, 16 P.3d 549. Tamilyn Young sued the University of Utah hospital for complications she suffered after she delivered a healthy child at the hospital. The hospital was successful at trial, and the trial court awarded the hospital a variety of costs and expenses. The supreme court disallowed a number of the claimed costs and expenses, holding that the trial court may award the prevailing party its costs of depositions only if it finds that the depositions are taken in good faith, and are essential to the party's development and presentation of its own case. To be essential, they must either be used in a meaningful way at trial or be necessitated by the complex nature of the case and involve information that cannot be obtained in a less expensive way. In addition, fees paid to witnesses above the statutory witness fee are not recoverable. And as a matter of law, trial exhibit expenses are not recoverable costs.

Coleman v. Stevens, 2000 UT 98, 17 P.3d 1122. Mr. Coleman sued for medical malpractice and lost before a jury. The trial court awarded Dr. Stevens costs and expenses that included deposition costs, expenses for trial exhibits, and expert witnesses charges that exceeded the statutory witness fee. The supreme court remanded for review of the deposition costs under the standard set out in *Young v. State,* above, and reversed as to the expense of trial exhibits and the amount of the expert witness's charges that exceeded the statutory witness fee.

8. Statute of Limitations

In Re Marriage of Juanita Gonzalez, 2000 UT 28, 1 P.3d 1074. Ms. Gonzalez lived with Mr. Briceno from September 1983 until October 1995. Ms. Gonzalez brought a petition to adjudicate her as the wife of Mr. Briceno. The petition was dismissed by the trial court for failure to establish the marriage relationship within the required period set forth in statute. The supreme court reversed. Section 30-1-4.5(2) provides, "The determination or establishment of a marriage under this section must occur during the relationship..., or within one year following the termination of that relationship." Based upon its reading of that language, the court held that Ms. Gonzales need only file an action within the period of the relationship or within one year following the termination of the relationship in order to meet the requirements of the statute. To hold otherwise would defeat the intent of the Legislature, the court said. Further, since the timing of the determination of the marriage relationship is within the control of the courts, and not exclusively the parties, fairness requires such a result. The court held that "section 30-1-4.5 requires only that an action to determine or establish a marriage be *commenced* within a year of the termination of the relationship."

Potomac Leasing Company v. Dasco Technology Corp. 2000 UT 73,10 P.3d 972. Potomac Leasing brought suit in Texas against Dasco and was awarded a judgment. Twelve years later Potomac filed the Texas judgment in Utah district court pursuant to the Utah Foreign Judgment Act. In a case of first impression, the supreme court held that the eight year statute of limitations on the enforcement of judgments of section 78-12-22(1) applied, barring the action by Potomac. To take advantage of the Utah courts, a plaintiff must abide Utah's restrictions on the bringing of stale actions. The judgment must be enforceable in the foreign jurisdiction, and be presented less than eight years since the rendering or last renewal of the judgment, at the time it is sought to be filed in the Utah court for enforcement.

Kittredge v. Shaddy et al. 2001 UT 7, 414 Utah Adv.3. Failure to timely request a pre-litigation review panel within the 60 days provided under §78-14-12 also prevents the tolling of the statute of limitations otherwise available in a medical malpractice action.

9. Long Arm/Service of Process

Phone Directories Co. Inc. v. Henderson, 2000 UT 64, 8 P.3d 256. In a case of first impression, the court held that contracts containing forum selection/consent to jurisdiction clauses create a presumption in favor of jurisdiction so long as there is a rational nexus between the forum selected and/or consented to, and either the parties to the contract or the transactions that are the subject matter of the contract.

Southland Corp. v. Semnani, 2001 UT 6, 413 Utah Adv. 22. The constable attempted to serve the defendants by leaving a copy of the summons and complaint with a John Doe at an address believed to be that of the defendants. The affidavit of service recited that it was left with John Doe at his "usual place of abode" but said nothing about the usual abode of the defendants. The court of appeals relied upon the presumption afforded the sheriff's return of service as correct and prima facie evidence of the facts stated therein to confirm service. The supreme court agreed on the law, but concluded that since the affidavit of service made only mention of where John Doe's place of abode was, and did not mention defendants, it was defective service and reversed.

10. Constitutional/Political

Brown v. Glover, 2000 UT 89, 16 P.3d 540. Catherine Brown challenged the failure of the court of appeals to afford her the opportunity to orally argue her appeal. The supreme court held that the right of appeal provided by the Utah constitution is not offended by an absence of oral argument. It further said that an appellate court need not explain its reasons for denying oral argument, although doing so would have clarified the issues on review by the supreme court.

Ellis v. Swensen, 2000 UT 101, 16 P.3d 1233. During the 1998 general election, the county clerk was a candidate for reelection, and interpreted 20A-6-301 to allow or require her to place her name and "county clerk" on every page of the multi-page ballot. Her opponent vigorously disagreed and sought an injunction and post-a-note fix, which was granted by the trial court. Two years later the supreme court agreed and affirmed the trial court, noting that although the matter was otherwise moot, to not reach the issue would mean never reaching it in timely fashion.

Spackman v. Board of Ed. of Box Elder Co. School Dist. 2000 UT 87, 16 P.3d 533. Ten year old Jennifer Spackman was assaulted at her school. As a result, she contracted a series of serious medical conditions, and the school made no accommodation for her condition. She missed a lot of school, and the school barred her from further attending. Her parents sued. The supreme court held that the Open Education Clause of the Utah constitution is self-executing, requiring no implementing legislation, and that its mandate that the state have a public education system "open to all children of the state" had been violated by the school.

Utah School Boards Assn. v. Utah State Bd. of Ed. 2001 UT 2, 17 P.3d 1125. The School Boards Association challenged the constitutionality of the Charter Schools Act, § § 53A-1a-501 et seq. in the Legislature's delegation of control of the charter schools to the State Board of Education. The supreme court held the act is constitutional, in that the Legislature has the plenary authority to establish charter schools as means of pursuing the goal of improving and customizing public education, and that vesting control in the Utah Board of Education is not violative of Article X, section 3 of the state constitution.

11. Lawyers in trouble

Lieber v. ITT Hartford Insurance Center, 2000 UT 90, 15 P.3d 1030. Counsel for ITT Hartford Insurance made representations in its briefs regarding the state of the law that the supreme court found to be not only inaccurate, but misleading. It noted the obligation of counsel to disclose adverse authority, required counsel to appear and address possible contempt, and cited three specific instances in the brief of law presented as controlling or applicable that was miscited or had been reversed. After a hearing on the issue, the court reissued the opinion, deleting the reference to counsel for ITT Hartford appearing "to have attempted to mislead" the court.

Morse v. Packer, 2000 UT 86, 15 P.3d 1021. The supreme court reversed the trial court's refusal to grant rule 11 sanctions against counsel for plaintiff sought by the pro se defendant, and remanded. Counsel had filed two pleadings relying on the "truth" of statements made by his client, and made a statement in oral argument supporting the same position. Defendant's motion for sanctions included a copy of a motion made by counsel in a separate matter involving the same disputed fact, in which counsel had been presented with the evidence that his client had not been truthful with him. Counsel failed to make any reasonable inquiry, and the court held him to be accountable for representations to the contrary in the two written pleadings. The court declined to extend the liability to oral advocacy.

In Re Discipline of Pendleton, 2000 UT 77, 11 P.3d 284. The supreme court affirmed the disbarment of Pendleton for misconduct involving his possession, use, procurement, and distribution of methamphetamine.

Pendleton v. Utah State Bar, 2000 UT 96, 16 P.3d 1230. Pendleton sued the Bar, and bar counsel, for defamation arising from an extensive report of proceedings against Pendleton that eventually resulted in his disbarment. The supreme court held that the bar's publication was in the course of its official duty to disseminate public disciplinary results, and that in doing so the bar enjoyed immunity from suit. However, the court also cautioned the bar that in exercising this duty, it bears a burden of restraint and good judgment commensurate with its position as an arm of the court itself.

Significant Court of Appeals Cases From 2000

By Judge Judith M. Billings
Utah Court of Appeals

CIVIL CASES

Harmon City, Inc. v. Draper City, 2000 UT App 31, 997 P.2d 321. Harmon's supermarket chain sought a rezoning to build a store and shopping complex. The planning commission recommended that the city council approve the rezoning, but the city council denied the rezoning application. The district court granted summary judgment for the city, stating that "so long as it is reasonably debatable that it is in the interest of the general welfare, this court will uphold the city's zoning decision."

We concluded the district court properly reviewed the city council's denial of an application for rezoning under the "reasonably debatable" standard of review, rather than under the "substantial evidence" standard of review requested by Harmon's. We concluded that recent statutory changes did not eliminate different deference when municipality acting in legislative versus adjudicative role. Held the substantial evidence standard and public clamor doctrine only applied when municipality acts in administrative or adjudicative capacity.

Judge Jackson's dissent noted that in Utah Code Ann. § 10-9-1001 (1999) the Utah Legislature enacted a "one size fits all" standard of review – arbitrary and capricious– for all municipal land use decisions, and that the Utah Supreme Court decision in *Springville Citizens for a Better Community v. City of Springville,* 1999 UT 25, 979 P.2d 332 had interpreted the statute to require a "substantial evidence standard," thus precluding a more deferential standard for legislative decisions.

Debry v. Goates, 2000 UT App 58, 999 P.2d 582, *cert. denied,*

9 P.3d 170 (Utah 2000). Medical malpractice action stemming from a divorce case. Without consulting Debry, Goates gave an affidavit on medical condition of Debry to Mr. Debry during divorce. Debry sued Goates for malpractice, alleging he had breached her therapist-patient privilege by providing the affidavit. Trial court granted summary judgment for Goates holding no privilege as she claimed in her deposition she didn't see him for treatment. Under Rule of Evidence 506, the determination of whether a person is a "patient," and thus entitled to assert the physician-patient or therapist-patient privilege, does not turn on whether the person voluntarily consulted the physician or therapist, but rather on whether the encounter was for purposes of treatment. Here there was evidence of treatment.

Exceptions to the Rule 506 privilege include situations in which the patient's condition is put at issue; Goates argued Debry's condition was at issue, though raised by a third party (her husband), and thus the privilege did not apply to Goates's affidavit. We reversed and remanded. Although we concluded the privilege can be waived even when the mental state is put at issue by a third party, that the doctor may not testify without giving patient notice so patient can have a chance to limit the disclosure. Goates should have notified Debry so she could pursue the appropriate procedural safeguards.

Dipoma v. McPhie, 2000 UT App 130, 1 P.3d 564, cert. granted, 9 P.3d 170 (Utah 2000). Summary judgment was granted against a pro se plaintiff when her personal check for the filing fee of her complaint was returned by the bank for insufficient funds and the four-year statute of limitations ran before she properly paid the filing fee. The trial court agreed with the defendant that filing fees were jurisdictional, and that no action could be commenced without proper payment of the filing fee.

We concluded that the plain language of Rule 3 of the Utah Rules of Civil Procedure contains no specific reference to filing fees as a jurisdictional necessity; all that is required is that the complaint be "filed." Thus, Rule 3 does not require that filing fees be paid prior to commencing an action to vest a trial court with jurisdiction.

Collins v. Sandy City, 2000 UT App 371, 16 P.3d 12 51. (Case of first impression). Recognized general rule that a subsequent change in the operative facts or controlling law generally relieves a party from the application of res judicata. However, in a situation where one party in cases litigating the same legal issue chooses not to pursue an appeal, that party may not benefit from the change of law exception to res judicata where had that party chosen to appeal the change of law would have been obtained.

Baczuk v. Salt Lake Regional Medical Center, 2000 UT App 225, 8 P.3d 1037. The plaintiff underwent surgery to reattach severed fingers, but following the surgery noticed that he had suffered a burn or pressure injury on his buttocks and nerve damage to his leg. He sued the doctors and hospital for negligence, relying on the doctrine of res ipsa loquitur. Summary judgment was granted for the defendants on the ground that they provided unrebutted expert testimony that plaintiff's injuries could have resulted in the absence of negligence. Where a plaintiff relies on the knowledge and understanding of laypersons to establish the evidentiary foundation from which negligence may be inferred, a defendant may challenge the adequacy of that foundation with evidence showing that the inference of negligence is actually beyond the common knowledge and experience of the layperson. However, under the factual circumstances of the case, defendants' evidence did not conclusively demonstrate that the injuries were beyond the understanding of laypersons, nor that the burns occurred in the absence of negligence; thus, summary judgment was inappropriate.

Beard v. K-Mart Corp., 2000 UT App 285, 12 P.3d 1015. In negligence action, plaintiff who underwent a number of surgeries and sought damages for the same was required to present expert testimony on whether the injuries caused by Kmart's negligence required the surgeries performed. We concluded it was beyond the expertise of laypersons as to whether the injuries she suffered as a result of Kmart's negligence necessitated her multiple surgeries. Thus, testimony on medical causation issue was required before the issue of damages arising from the surgeries could be submitted to jury. We therefore reversed and remanded for a new trial.

Robinson v. Tripco Inv. Inc., 2000 UT App 200, 398 Utah Adv. Rep. 26. A purchaser of land was barred by the merger doctrine from asserting a negligent misrepresentation cause of action for alleged misrepresentations that occurred prior to transfer of the deed. Under merger doctrine, the deed is the final agreement, and all prior terms are extinguished. Fraud in the transaction is one of four recognized exceptions to the merger doctrine, but the majority held negligent misrepresentation does not fall within that exception because negligent misrepresentation does not require a knowing or reckless state of mind – as required for fraud.

Judge Billings concluded in dissent that when, as here, negligent misrepresentation is a form of fraud, an exception to the merger doctrine should apply, allowing the action to proceed. The terms of the parties' contract should dictate whether a claim for negligent misrepresentation is precluded; in this case there was no such term in the contract, thus the claim should have been allowed.

CRIMINAL CASES

State v. Chevre, 2000 UT App 6, 994 P.2d 1278. Truck stopped because of malfunctioning brake light. Stop O.K. even if traffic violation a pre-text. Because of "spacy" behavior of driver, officer did field drug evaluation. Held detention O.K. because reasonable suspicion of drug use. Officer determined driver to be under influence of stimulant and arrested driver. Officer returned to truck to look for stimulants; opened curtains to sleeper compartment and found 350 pounds of marijuana.

Police search of sleeper compartment of defendant's tractor-trailer truck cab was lawful as a search incident to arrest under Fourth Amendment. The sleeper compartment could properly be considered part of passenger compartment, as it was accessible without exiting the cab and was separated from driver's area only by a curtain.

Salt Lake City v. Davidson, 2000 UT App 12, 994 P.2d 1283.

Police were dispatched to a possible heroin overdose. Defendant was only other person present but refused to answer questions. Officer arrested defendant for failure to cooperate. Defendant was searched and the officer found marijuana. The trial court denied defendant's motion to suppress, finding the search was justified under the emergency aid doctrine because the officers were trying to determine what substance the victim had overdosed on.

The court adopted for the first time the emergency aid doctrine: the standard for a warrantless search under the emergency aid doctrine is (1) police have a reasonable basis to believe an emergency exists and believe there is an immediate need for their assistance to protect life; (2) the search is not primarily motivated by intent to arrest and seize evidence; and (3) there is a *reasonable basis* to connect the emergency with the area or place to be searched. Standard under (3) is not probable cause.

Defendant's marijuana conviction was reversed; a majority of the court held there was insufficient evidence that a search of defendant would have uncovered information helpful in treating the unconscious victim. Concurring opinion would limit emergency aid doctrine only to search of victim needing aid.

State v. Ostler, 2000 UT App 28, 996 P.2d 1065, *cert. granted,* 9 P.3d 170 (Utah 2000). Merely having a defendant view a videotape that discussed in general terms the consequences of pleading guilty and the waiver of constitutional rights, but that did not apply specifically to defendant's situation, did not satisfy the Rule 11(e) requirement that guilty pleas be knowing and voluntary. The record indicated the trial court discussed on the record only one of seven Rule 11 requirements. The videotape did not provide proper notice of the charges against the defendant and thus could not replace the required on-the-record colloquy. Court reached issue even though motion to set aside was made beyond 30 day jurisdictional limit established in *State v. Price.* Court held it could reach this issue under plain error.

State v. Morgan, 2000 UT App 48, 997 P.2d 910, *cert. granted,* 4 P.3d 1289. Interprets and clarifies *State v. Brickey,* 714 P.2d 644 (Utah 1986). The prosecution's innocent miscalculation of the quantum of evidence needed to bind over a criminal defendant is not "good cause" under *Brickey* for allowing refiling of the dismissed charges unless new or previously unavailable evidence is uncovered to support such refiling. A dissent was written by Judge Greenwood.

American Fork City v. Pena-Flores, 2000 UT App 323, 14 P.3d 698. So long as a police officer is acting within the scope of his or her authority and the detention or arrest has the indicia of being lawful, a person can be guilty of interfering with a peace officer even when the arrest or detention is later determined to be unlawful.

Salt Lake City v. Roberts, 2000 UT App 201, 7 P.3d 789. The key inquiry in determining whether a place is "open to public view" for purposes of a city ordinance making it unlawful for person to engage in sexual conduct "in a place open to public view," is whether the conduct is likely to be observed by a member of the public. This is a fact-sensitive inquiry. we reversed the trial court, which held that it was a public place because it was a public parking lot. Here, defendant was parked next to wall behind two flat-bed trucks that officers had to crawl under to view conduct.

West Valley City v. Hutto, 2000 UT App 188, 5 P.3d 1. In a domestic violence case, officer interviewed victim the morning after alleged violence. The trial court allowed the officer to relate the victim's entire narrative. Utah Rule of Evidence 803(2), providing the excited utterance exception to the hearsay rule is limited to only "spontaneous outbursts" and does not allow a witness to simply recount a declarant's entire story under the guise of the exception. Further, where six hours had elapsed and victim had gone to mother's house she was no longer under the influence of stress.

State v. Widdison, 2000 UT App 185, 4 P.3d 100. (Case of first impression). A baby living in the same house as defendant died after suffering traumatic injuries from abuse. The defendant was the mother's boyfriend, and had assumed a parental role, feeding, babysitting, bathing, and getting up at night with the baby. He was convicted of child abuse, but argued on appeal that there was insufficient evidence to prove he was in the presence of the baby when the injuries occurred and did not have custody of the baby; thus he did not have "care or custody" of the baby for purposes of the child abuse statute.

We concluded the term "care" within the phrase "having care or custody" as used in Utah Code Ann. § 76-5-109 (1999) means accepting responsibility for someone's well being. Thus, evidence that defendant was extensively involved in child's life – lived in same household, helped feed, babysit, and bathed child – was sufficient to support defendant's conviction of child abuse.

State v. Swink, 2000 UT App 262, 11 P.3d 299. Swink, a juvenile correctional facility inmate, was not "in custody" at time of an interview such that *Miranda* warning had to be given prior to confession of a crime. In a correctional facility setting, traditional "in custody" analysis is inadequate since a prisoner is not free to leave. Rather, *Miranda* is triggered only upon a "change in the surroundings of the prisoner which results in an added imposition on his freedom of movement," or "some act which places further limitations on the prisoner." *Cervantes v. Walker,* 589 F.2d 424, 428 (9th Cir. 1978). Four relevant circumstances are: (1) the language used to summon the inmate; (2) the physical surroundings of the interrogation; (3) the extent to which the inmate is confronted with evidence of his guilt; and (4) the additional pressure exerted to detain the inmate. *See id.*

JUVENILE CASES

In re A.C.C., 2000 UT App 120, 2 P.3d 464, cert. granted, 11 P.3d 708 (Utah 2000). We held the exclusionary rule applies to juvenile delinquency proceedings. The Fourth Amendment provides individuals, including juveniles, a reasonable expectation of privacy by prohibiting unreasonable searches and seizures. Probation officer's search of juvenile probationer's home, car, and backpack, must be consistent with *State v. Ham,* 910 P.2d 433 (Utah Ct. App. 1996), and be based on a reasonable suspicion that juvenile probationer had violated the law or terms of his probation.

Whaaaaasuppp With the YLD?

With about 1700 members, the Young Lawyers Division (YLD or "Baby Bar") is the largest and among the most active sections of the Bar. The YLD has been busy this year. Here is an update:

The T**uesday Night Bar** Committee (chair Victoria Bushnell & vice-chair Sam Webb) arranges for YLD volunteer attorneys to meet with members of the public every Tuesday evening at the Law and Justice Center, assisting in every imaginable legal problem. This meaningful effort was recently written up in the national ABA YLD magazine, "The Advocate," as a successful program for other states to emulate. Thanks to the hard work of Bar staff member Diane Clark, and Tuesday Night Team Leaders Kyle Lieshman, Michael Stout, Damian Davenport, Heather Brereton, David Condie, and Wade Budge. We also thank law firms including Fabian & Clendenin and Perry Anderson & Mansfield that have staffed evenings.

The **Public Education** Committee (Alison Adams and Adrianne Goldsmith) has provided assistance to the Law-Related Education Project in staffing the annual mock trial program and conflict resolution classes in elementary schools.

The **Bar Journal** Committee (Dave McKinney and Scott Wood) has solicited, edited, and submitted articles by and for young lawyers.

The **Annual Meeting** Committee (Brian Jones and Scott Finlinson) is planning and staffing activities at this year's summer bar convention, including the 5k fun run and the kids carnival. The **Activities** Committee (Blaine Rawson and David Bernstein) will be hosting a social in Sun Valley.

The **CLE** Committee (Scott Peterson) continues to offer informative, free-or-low cost new lawyer CLE.

The **Law Day** Committee (Russell Hathaway and Shannon Freedman) organized the successful May 1st Luncheon at the new Little America Grand Hotel, featuring the Honorable Dee Benson as the keynote speaker.

The **Membership** Committee (Kelly Williams and Martha Knudson) went to the "U" and "Y" law schools to offer ice cream and information about becoming involved in the YLD upon admission to the Bar.

The **New Lawyer Development** Committee (Justin Palmer and Diana Hagen) has arranged for new bar admittees to have access to prior new lawyer CLE materials.

The **Community Service** Committee (Brandon Hobbs and Annalisa Steggell) has arranged to help serve breakfast at the Utah AIDS Foundation fundraising walk in May.

The **Website** Committee (Mark Pugsley and Todd Weiler) continues to make the YLD website user friendly and helpful.

Past President **Mark Quinn** will be pitching Salt Lake City as the host of the March 2002 ABA YLD regional Spring Convention. **Mike Mower** continues to offer his services to the YLD as "the" publicity guru. **Scott Lythgoe** has been kind enough to act as our Northern Utah representative on the executive committee. **Amy Dolce,** our ABA Representative, was recently given the "Star of the Quarter" award at the ABA Mid-Year Meeting in San Diego in recognition of her diligent work.

It has been a busy, eventful year for the YLD. **Elections** are now upon us. This is a great way to get involved. (See the accompanying article.) Thanks to those who have participated with us.

Stephen W. Owens	President 2000-01
Nate Alder	President Elect 2001-02
Stephanie Ames	Treasurer
Steven G. Shapiro	Secretary
Amy A. Dolce	ABA Representative

YLD ELECTIONS & APPOINTMENTS

It is election time for the Young Lawyers Division. This article will tell you what you need to know to vote and run for office. If you want to get involved, but do not wish to run for office, this article will explain how to express an interest in being appointed as a YLD Committee chair, vice-chair, or member.

Elections Conducted by E-mail: YLD elections will be conducted by e-mail, which will save the division about a thousand dollars. This means that you need to be sure that the Bar has

your current e-mail address. You may call the Bar to confirm it, or e-mail it to webmaster@utahbar.org. If you do not have an e-mail address, but desire to vote, you can request a physical ballot from immediate past president Mark Quinn, 550 E. South Temple, Suite 500, P.O. Box 30825, Salt Lake City, Utah 84130, fax (801) 524-2747.

Eligibility: All members of the Utah State Bar in good standing under 36 years of age and those members who have been admitted to their first Bar less than three years are members of the YLD. A copy of the Election Rules will be made available on request via e-mail at swowens5@cs.com.

Officers: You may run for one of three offices: President-Elect, Secretary, and Treasurer. The President-Elect plans programs in cooperation with the Executive Council and becomes President the following year. The President presides over the YLD and meetings of the Executive Council. The president participates in the Bar Commission as a nonvoting member.

The Secretary keeps minutes of all meetings, sends out notices, prepares agendas, and acts as administrative assistant to the president. The Treasurer prepares an annual budget and handles all financial matters of the YLD.

Term of Office: The officers are elected for one year terms, commencing at the Annual Bar Convention in July. The president-elect automatically succeeds to the office of the president for a one-year term.

Call for Nominations: Nominations for office must be signed by three members of the YLD in good standing, set forth the office sought, and must be received by Stephen Owens by Monday, June 4, 2001, 5 p.m, at 10 West 100 South, Suite 500, Salt Lake City, Utah 84101, fax 801-983-9808. Each nomination must be accompanied by a written statement which contains the candidate's biography, qualifications, and platform. The written statement will be no longer than the equivalent of two pages, typewritten, and double-spaced on one side of a sheet of paper. Each candidate may obtain one mailing list of the Division's membership at the cost of the Division.

Election Dates: An e-mail will be sent out by the Bar to all YLD members on or about June 14 with the candidates' names and written statements, along with a ballot. YLD members can then fill out the ballot and reply by e-mail. Bar staff will print out the physical ballots, verify YLD membership of the voter, and provide the physical ballots to the election committee on June 22nd. Winners will be announced within one week.

Committee Chairs, Vice-Chairs, and Members: If you do not want to run for office, but still wish to be involved, sent a brief letter indicating your desire to President Elect Nate Alder, 50 South Main Street, Suite 1500, Salt Lake City, Utah 84144, fax 801-355-3472, nathan.alder@chrisjen.com, phone 801-323-5000. The letter should be received by June 4, 2001.

Please consider getting involved with the YLD.

Elections Committee:
Stephen W. Owens, President
Nate Alder, President-Elect
Mark Quinn, Past-President

Message from the Chair

by Ann Streadbeck

All members of the Legal Assistant Division should mark their calendars for Friday, June 8th for the LAD Annual Meeting and Seminar. In addition to a great lineup of CLE topics and speakers, members will be able to participate in the LAD Annual Meeting and voting for new Directors. At the Annual Meeting, members will get the opportunity to meet their new Chair, Deborah Calegory, and to volunteer for committee assignments. We hope to involve many more of our members in the operation of the LAD this coming year.

The Annual Meeting and Seminar is also a great opportunity to complete the yearly 10 hours of CLE requirement. The Seminar agenda includes 6 hours of CLE, including one hour of ethics credit. The cost of the Seminar will be $65 for LAD members and $75 for non-LAD members. Registration forms will be mailed in mid-May for this important, once-yearly event. Hope to see you there!

We have received many responses to our 2001 LAD Salary and Utilization Survey and the results will be informative. Thanks to all those legal assistants who took the time to complete the Survey. After the results are tallied, a report on the Survey will be published in the June/July issue of the *Bar Journal.* The information will help further the career goals of legal assistants, and will provide updated, comparative salary and utilization information for attorneys and others who employ legal assistants.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
5/03/01	**Annual Corporate Counsel Seminar** 8:30 am–1:30 pm (lunch provided). MDP, I.P. issues on the internet, staying relevant with your practice, technology and the legal profession. Speakers: Kim Cooper, Toby Brown, Lincoln Mead and Michael Blackburn. $45 section members, $80 others (includes membership dues). (Continental breakfast and registration check-in 1/2 prior.)	3 (includes 1 hr. ethics)
5/10/01	**Annual Business Law Section Seminar** 8:30 am–noon. Recent Changes in Utah L.L.C. Act. Registry of judgments and in UCC Article 9. Free for section members, $55 all others.	3
5/11/01	**Annual Family Law Section Seminar** 8:30 am–4:30 pm. (lunch provided). Stock options, attorney's liens in divorce, case law update, standing committee report, toolbox, love letters, staying out of trouble, do's and dont's from the Judges' perspective, shrinking the client. $120 section members, $130 all others.	7.5 (includes 1 hr. ethics)
5/16/01	**Annual Labor & Employment Law Section Seminar** 8:30 am–noon. Interaction between the ADA, FMLA and state workers' comp laws, employment case law update. Speakers: Elisabeth Blattner, Lauren Barros and Lauren Scholnick. $60 section members, $75 all others.	3
5/17/01	**ENREL Wetlands Workshop: Getting Your Feet Wet** 5:30–8:30 pm.. Takings 101, how to practice in front of the State Engineers' Office, overview of practicing water law in Utah. Speakers: Craig Call, Shawn Draney, Steve Clyde. $40 for YLD, $55 all others.	3 NLCE/CLE
6/08/01	**Annual Legal Assistant Seminar** 8:30 am–4:30 pm (lunch provided). Annual business meeting, basic accounting principles for paralegals, privacy rights issues, mediation/arbitration for the paralegal. $65 for Division members, $75 non-members.	6 (includes 1.5 hrs. ethics)
6/21/01	**Business Law Workshop: 2001 a Cyberspace Odyssey** 5:30–8:30 pm. Presenters: Marsha Thomas and Erik Johnson. $40 for YLD, $55 all others.	3 NLCE/CLE
7/4-7/07/01	**Annual Convention** Sun Valley Idaho. $245 before 6/4. Legal asst. registration $122.50 before 6/4. All registration $275 post-dated after 6/4. See on-line for agenda.	12 (includes up to 3 hrs. ethics & 3 hrs. NLCLE)
8/17&18/01	**Annual Securities Law Seminar** Jackson Hole Wyoming, Snow King Resort. Watch on-line calendar for updates.	TBA
8/17/01	**Criminal Law Workshop: DUI Defense, I Fought the Law and I Won!** 5:30–8:30 pm. Defending a DUI in court and in front of the Drivers License Division, intoxilizer test. $40 for YLD, $55 all others.	3 NLCE/CLE

Full agendas can be found for each of these programs on our web site at: www.utahbar.org/cle. Need CLE? Try an on-line course for self-study credit.

REGISTRATION FORM

Registration for each seminar must be received at least 2 days prior to ensure availability. Cancellations must be received in writing 48 hours prior to seminar for refund, unless otherwise indicated. Door registrations are accepted on a first come, first served basis, plus a 25% late charge unless otherwise indicated.

Registration for (Seminar Title(s)):

(1) _____ (2) _____

(3) _____ (4) _____

Name: _____ Bar No.: _____

Phone No.: _____ Total $ _____

Payment: ☐ Check Credit Card: ☐ VISA ☐ MasterCard Card No. _____

☐ AMEX Exp. Date _____

Classified Ads

RATES & DEADLINES

Bar Member Rates: 1-50 words – $35.00 / 51-100 words – $45.00. Confidential box is $10.00 extra. Cancellations must be in writing. For information regarding classified advertising, please call (801)297-7022.

Classified Advertising Policy: It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age. The publisher may, at its discretion, reject ads deemed inappropriate for publication, and reserves the right to request an ad be revised prior to publication. For display advertising rates and information, please call (801)538-0526.

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CAVEAT – The deadline for classified advertisements is the first day of each month prior to the month of publication. (Example: May 1 deadline for June publication). If advertisements are received later than the first, they will be published in the next available issue. In addition, payment must be received with the advertisement.

FOR SALE

FOR SALE: Perfect for a home business. This absolutely stunning two story in Holladay features a business suite in the basement with two separate offices, reception area, future wiring, separate entrance, client parking and much more. Quality construction throughout with too many extras to list. This is a luxury home (440K) with a perfect business combination. The home is located on a private lane close to freeway access. For more info call Jake Dreier, ColdwellBanker Premier (801) 560-3161 or see our virtual tour on www.utahhomes.com (go to: Find agent, enter: Jake Dreier)

Ogden law building for sale or lease. Tastefully decorated offices for three attorneys; secretary/receptionist; conference room and library; kitchen. Full basement for storage. Off-street parking. Close to court house. Attorney retiring. 801-621-2630

POSITIONS AVAILABLE

ATTORNEY UTAH COUNTY Public interest law firm seeks attorney for American Fork Office to advocate for the rights of people with disabilities. Experience preferred. Background in the areas of mental health, disability, civil rights, public interest law preferred. Minorities, persons with disabilities, and others encouraged to apply. Full time position. Excellent benefits and progressive work environment. Submit resume and letter of application to Executive Director, Disability Law Center, 455 East 400 South, Suite 410, Salt Lake City, Utah 84111. Equal Opportunity Employer.

ASSOCIATE ATTORNEY – Salt Lake City medical malpractice firm seeks associate attorney with minimum 3 years experience, preferably in medical malpractice or litigation. Strong writing skills required. Base salary plus bonuses commensurate with experience. Please submit resume to Utah State Bar, Attn: Christine Critchley, Confidential Box #12, 645 South 200 East, Salt Lake City, Utah 84111.

ATTORNEY POSITIONS AVAILABLE – COLORADO Thirteen lawyer, AV rated firm in western Colorado seeks two associates, one atty with 0-4 years' general experience, another atty with minimum three years health law experience. Excellent academic credentials, writing and analytical skills required. Sophisticated practice in a small town setting with year-round outdoor recreational opportunities. Send resume and writing sample to: Firm Administrator, Hoskin, Farina, Aldrich & Kampf, Professional Corporation, Post Office Box 40, Grand Junction, Colorado 81502.

ST. GEORGE UTAH FIRM SEEKS REAL ESTATE ASSOCIATE, with 1-3 years experience in development, zoning, townhome and condominium, covenant, sales, and foreclosures. Admissions in Utah, Arizona and Nevada desirable. Send letter summarizing real estate work, resume and writing sample to Jana Stratton, Snow Nuffer, P.O. Box 400, St. George, UT 84771-0400. jana.stratton@utahlaw.com

Chief Appellate Mediator Utah Court of Appeals. The Utah Court of Appeals is seeking an experienced mediator to manage the appellate mediation program including conducting mediation conferences, conversing with counsel and parties concerning merits of the case, conducting independent legal research in preparation for negotiations, developing and implementing appellate mediation policies and practices, and overseeing office operations. **Minimum Qualifcations:** graduation from an ABA accredited law school with a juris doctorate, six years of legal experience and completion of 40 hours of mediation training. Appellate and administrative experience is preferred. Must be a member in good standing of the Utah State Bar. **Salary:** $40.36/hour plus an excellent benefits package. In the event the position is underfilled, salary will be commensurate with experience. **Closing Date:** May 15, 2001, at 5:00 pm. **Applications** may be obtained from the Administrative Office of the Courts, 450 S. State, 3rd floor North, from our website at http://courtlink.utcourts.gov/jobs, or from Workforce Services. Return applications to: Director of Human Resources, P.O. Box 140241, SLC, UT 84114-0241. Equal Opportunity Employer.

Salt Lake based medical malpractice law firm is seeking an attorney with strong litigation, research and writing skills to join its practice. Candidates should have at least two years of litigation experience. Send cover letter and resume to Epperson & Rencher, 10 West 100 South, Salt Lake City, Utah 84101, fax 983-9808 or e-mail at erlaw@aros.net.

Estate Planning Attorney wanted for experienced, growth oriented financial planning company. International asset protection/tax planning a plus. Full compensation package including bonus. Immediate availability. Fax or e-mail resume to 801-266-0114/ hr@merrillscott.com

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HOLLADAY OFFICE in building with several lawyers and accountants, includes use of conference room, break room, receptionist, voice mail. Furnished $700/month; unfurnished $650/month. Contact Deirdre @ (801) 272-8261.

Beautifully restored office space at First South and Main in Salt Lake City, just being completed on remainder of fifth floor in historic Crandall Building. Five spacious offices and three stationary secretarial spaces. Lease all or part. For information and rates contact Epperson & Rencher at 983-9800.

OFFICE SPACE FOR RENT. Prime downtown location. The Berdene Building, 466 South 400 East, SLC, UT. Several office areas available for rent. Main level 1500 sq. ft. Second floor two office at 400–450 or one area 850 sq. ft. Utilities, trash, included. Secure covered parking available. Call for details toll free 1-877-342-0877, or 1-801-554-3194. Terms negotiable.

Avoid the Daily Commute – Office Share in Sandy. Located across the street from the new Sandy Courthouse and City Hall, class A office suite with its own conference room, work/copy room, reception area, and large offices. All standard office equipment and high speed Internet connection available. Share office suite with two attorneys with established practices and opportunity for significant client referrals. Share an excellent secretary/assistant. Contact Jeff Skoubye (tax, business planning, estate planning, probate and real estate) at (801) 562-8855 or Justin Olsen (commercial litigation, construction, trucking, and collections) at (801) 561-1114.

Salt Lake Rentals: Online reservation system for rental property during next year's winter events is now operational at www.stayutah.com. Advertising available. To reserve or list property or to find out more about advertising your products or services, check out www.stayutah.com today or email pattie@stayutah.com.

Share office space with two other established attorneys. 4-5 offices available. Includes receptionist, conference room, library, fax, copier, phone, kitchen. Call Marcie @ (801) 532-3555.

SERVICES

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