Utah Bar JOURNAL

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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: Sunset on Utah Lake, by Craig McAllister, Orem, Utah.

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Letters Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author and shall not exceed 300 words in length.
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.
5. No letter shall be published which (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published which advocates or opposes a particular candidacy for a political or judicial office or which contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

Cover Art

Members of the Utah State Bar or members of the Legal Assistants Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their print, transparency, or slide, along with a description of where the photograph was taken to Randall L. Romrell, Esq., Regence BlueCross BlueShield of Utah, 2890 East Cottonwood Parkway, Mail Stop 70, Salt Lake City, Utah 84121. Include a pre-addressed, stamped envelope for return of the photo and write your name and address on the back of the photo.

Interested in writing an article for the *Bar Journal?*

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.

Submission of Articles for the Utah Bar Journal

The *Utah Bar Journal* encourages Bar members to submit articles for publication. The following are a few guidelines for preparing your submission.

1. Length: The editorial staff prefers articles having no more than 3,000 words. If you cannot reduce your article to that length, consider dividing it into a "Part 1" and "Part 2" for publication in successive issues.
2. Format: Submit a hard copy and an electronic copy in Microsoft Word or WordPerfect format.
3. Endnotes: Articles may have endnotes, but the editorial staff discourages their use. The *Bar Journal* is not a Law Review, and the staff seeks articles of practical interest to attorneys and members of the bench. Subjects requiring substantial notes to convey their content may be more suitable for another publication.
4. Content: Articles should address the *Bar Journal* audience, which is composed primarily of licensed Bar members. The broader the appeal of your article, the better. Nevertheless, the editorial staff sometimes considers articles on narrower topics. If you are in doubt about the suitability of your article for publication, the editorial staff invites you to submit it for evaluation.
5. Editing: Any article submitted to the *Bar Journal* may be edited for citation style, length, grammar, and punctuation. Content is the author's responsibility–the editorial staff merely determines whether the article should be published.
6. Citation Format: All citations should follow *The Bluebook* format.
7. Authors: Submit a sentence identifying your place of employment. Photographs are discouraged, but may be submitted and will be considered for use, depending on available space.

The Utah Bar Journal

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Letter to the Editor

Thank you for the substantial coverage of the proposed revision to Rule 1.5 of the Utah Rules of Professional Conduct. Steven Densley's article clearly outlines the specifics of the rule change he and Common Good are proposing. The rebuttal by plaintiff's lawyer Ralph Dewsnup, however, seems to argue against a proposal not on the table – a proposal to cap all contingent fees. Contrary to the strong impression given by many of Mr. Dewsnup's arguments, our proposal would limit fees only in the subset of cases where a personal injury plaintiff accepts an early offer of settlement. The proposal would have no effect in cases that do not settle early and where lawyers do substantially more work. Most of the arguments Mr. Dewsnup makes are therefore inapplicable to our proposal.

One of Mr. Dewsnup's arguments does go right to the heart of the matter. He argues against the proposed rule because it "creates conflicting incentives" for lawyer and client:

> "The plaintiff may have an incentive to accept an early offer of settlement, particularly where the defendant is telling him he won't do better at trial and will have to pay his attorney a greater percentage. At the same time, plaintiff's counsel may have an incentive to reject what he thinks is an unreasonably low offer and earn his full, agreed upon fee. An ethical rule that creates a conflict of interest between attorney and client is a contradiction in terms." (p. 17-18)

The proposed rule doesn't create a conflict between lawyer and client, it acknowledges the potential for one and prescribes ethical conduct for lawyers: put the client's interests first.

Nancy Udell,
Director of Policy & General Counsel, Common Good
Washington, D.C.

Editor's Note: *On January 28, 2004, the Utah Supreme Court Advisory Committee on the Rules of Professional Conduct rejected Common Good's petition to amend Rule 1.5(d) of the Utah Rules of Professional Conduct.*

"And Justice for all" Nominated for ABA National Public Service Award

by Debra Moore

On February 6, 2004, the following application was submitted to the American Bar Association to nominate "And Justice for all" for national recognition. The Utah lawyers who led and contributed to the Access to Justice Task Force and "And Justice for all" can be justly proud of the truly remarkable and meaningful accomplishments outlined below. The stage is now set for a broader community effort to develop and implement a statewide plan to realize the goal of access to civil justice for all Utah citizens.

Nhu Ly
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Application for National Public Service Award

Nominee:	"And Justice for all"
Nominator:	Debra Moore, President Utah State Bar
Nominee Address:	Nominee can be reached at "And Justice for all" Community Legal Center 205 North 400 West Salt Lake City, UT 84103 (801) 578-1204
Nominator Address:	645 South 200 East Salt Lake City, Utah 84111

Nominee's Resume:

The nominator seeks to honor the organization "And Justice for all" and its eight member volunteer Board of Trustees. "And Justice for all" is not a direct service provider, but has established the following mission:

"And Justice for all" works to increase access to civil legal services for the disadvantaged and for persons with disabilities in Utah by:

- Creating and sustaining resources to support civil legal services;
- Sharing and consolidating resources so that services are delivered in a cost-efficient and effective manner, enabling service providers to serve additional clients;
- Strengthening the individual agencies and the distinct roles they play in the delivery of civil legal services.

"And Justice for all" efforts in the past five years have encouraged 5,917 hours of pro bono assistance (estimated value of $710,040), raised a total of $5,982,429 to support the frontline agencies providing legal aid, helped front-line providers increase the number of individuals served from 16,320 in 1998 to 28,946 in 2003 and greatly increased the collaborative efforts between legal service agencies in the state.

In 1995, in response to the Legal Services Corporation funding cuts to the only statewide service provider of legal aid to the poor (Utah Legal Services), the Utah Supreme Court and the Utah State Bar appointed The Access to Justice Task Force. The task force was charged to review current legal services options for the poor in Utah, to explore new ideas for improving and expanding those services, and to make recommendations to the Bar and the Supreme Court to implement improved services. The task force issued recommendations to increase funding to address the State's need and innovations in services to better and more efficiently serve the poor in Utah.

In 1998, "And Justice for all," a non-profit organization, was established in conjunction with the Utah State Bar, members of Utah's legal community and the state's primary providers of free legal aid to ensure the availability of civil legal aid in the state based on the recommendations of the Access to Justice Task Force. Initially, "And Justice for all" focused on maintaining and increasing funding – the most immediate need. The state's three largest providers of civil legal aid – The Disability Law Center, Legal Aid Society of Salt Lake and Utah Legal Services – agreed to join together to create a statewide Bar-based fundraising campaign.

The largest source of Utah's private funding had come from Utah foundations followed by attorney donations. Many Utahns, in

particular local foundations leaders, expressed the opinion that attorneys needed to lead the efforts to increase available funding. Four local foundations felt so strongly that attorneys needed to be the lead supporter of civil legal that they offered $325,000 in challenge grants in the first three years of the campaign to encourage law firm and individual attorney donations and institutionalize an annual campaign.

In 1998, when "AND JUSTICE FOR ALL" was established, only 5% of the Bar's membership donated funding to civil legal aid. Through the annual campaign, this amount increased to well over 30% in the first two years. In 1998, the legal community provided less than $75,000 in support, but now provides approximately $400,000 each year. As of January 29, 2004, "AND JUSTICE FOR ALL" has raised a total of $2,115,000 to support direct civil legal aid in Utah.

Building on the success of the annual campaign, "AND JUSTICE FOR ALL" began tackling the next recommendation of the task force – to create service innovations to increase access to legal aid. The task force had recommended a centralized intake system to utilize technological advances to simplify and, hopefully, reduce the cost of providing services. Funding sources, however, were not very supportive of this technology-based system, and technology-based centralized intake also presented significant problems with confidentiality issues. "AND JUSTICE FOR ALL" remained undeterred by these problems, and adapted their plan to site-based centralized intake by creating the Community Legal Center. This innovative project is believed to be the first of its kind in the country that co-locates several service providers in a shared building.

The Community Legal Center allows the state's primary providers of civil legal aid to be housed in one location not only to simplify access for clients, but also to create efficiencies for service providers that allow more clients to be served. The Community Legal Center is a 30,000 square-foot building that serves as the state's hub for civil legal aid. Instead of clients trekking across town to various service providers or calling numerous numbers before accessing service, clients are now able to simply go up or down one story in the same building or have their call transferred to the proper agency.

This very visible form of centralized intake resonated with community leaders. Recognizing that attorneys had truly stepped up to the plate to help ensure that their services are also available to the poor, foundations, corporations and individuals from outside the legal community became strong supporters of legal aid as well. The capital campaign to finance the Community Legal Center was supported by $3,550,000 in support. What is so significant about this support is that over $2,100,000 came from outside the legal community and encouraged the State of Utah to provide its first-ever support of civil legal aid.

The Community Legal Center has exceeded expectations. In addition to being a vehicle to reach beyond the legal community for financial and volunteer support, it has helped save the agencies located at the Center a combined $444,541 in its first year of operation. Owning a building has allowed partner agencies to pay only 42% of market rate rents for similar space. Additional cost savings have come through administrative and fundraising consolidation and by sharing a common phone system allowing for lower rates.

In addition to operating the annual campaign and the Community Legal Center, "AND JUSTICE FOR ALL" is now beginning to tackle the issues of statewide planning in conjunction with other service providers, the courts, the Utah State Bar, the legislature, law schools and other community stakeholders.

Narrative

"AND JUSTICE FOR ALL" meets all of the criteria for the National Public Service Award.

1. It has demonstrated devotion to the development and delivery of civil legal services to the poor and people with disabilities in a business context by establishing and running a non-profit organization dedicated to increasing access to justice. It has also used its experiences to offer consultation, funding and advice to other agencies committed to increasing access to justice.
2. It has contributed significantly to developing innovative approaches to the delivery of volunteer legal services by creating new resources to support volunteer legal services, providing increased opportunities for volunteers, and by creating the Community Legal Center to co-locate the state's non-profit providers to simplify client access and increase agency efficiencies.
3. Through the annual fundraising campaign and the Community Legal Center, it has been the primary force in helping Utah's three primary legal aid groups to increase the number of individuals assisted by over 77% in just five years, while also making it simpler for clients to locate the appropriate service agency.
4. It has enlisted a cadre of volunteer attorneys, business leaders and politicians to provide sustained counsel to "AND JUSTICE FOR ALL" as well as Utah's direct legal aid providers in creating a new organization and strengthening existing organizations to increase access to legal representation and advice.

Development and delivery of legal services to the poor and people with disabilities in a business context.

"AND JUSTICE FOR ALL" is a private non-profit organization established in 1998 to increase access to justice to the poor, people with disabilities, the elderly and ethnic minorities by creating a stable source of lawyer-based financial support. "AND JUSTICE FOR ALL" is the first 'Bar campaign' which from the outset involved all of the state's major providers of free civil legal services. The Board and the partner organizations used a business model of enhanced service delivery and increased efficiencies to overcome turf battles, differing missions and diverse service populations to meet the overall goal of increasing access to justice.

"AND JUSTICE FOR ALL" volunteers have provided 5,917 hour of pro bono assistance in a business context. Volunteer efforts include:

- Creation of Articles of Incorporation,
- Creation of Bylaws,
- Creation of Fundraising Agreement dictating terms of shared development efforts of member agencies,
- Establishing the organization's 501(c)(3) status,
- Bylaws review and revision,
- Review of loan documents,
- Creation of Trust documents,
- Tenancy Agreements for Community Legal Center,
- Operating Service Agreements,
- Real Estate Transactions,
- Tax assistance,
- Contract creation and review,
- Developing the accounting system and overseeing the organization's fundraising agreement and grant making process
- Encouraging others to donate time,
- Sharing documents and experiences with other non-profit organizations so they can benefit from this model as well.

Development of innovative approaches to the delivery of volunteer legal services

In her State of the Judiciary address in January of this year, Chief Justice Christine Durham singled out "AND JUSTICE FOR ALL" and the Community Legal Center as a model for pro bono leadership.

"There have been and are now many conversations going on in Utah to address the problem of access to civil justice and the delivery of legal services. I believe the time has come for the creation of a broad-based community initiative to assess the need for legal services in Utah and to bring together the many strands of interest in this problem. We have remarkable resources, and admirable collaboration, in our state, including the Community Legal Center, which the legislature helped fund in its inception and which now houses four different legal service entities under one roof, the "AND JUSTICE FOR ALL" project, a cooperative fund-raising program that supports those entities, ..."

"AND JUSTICE FOR ALL" has marshaled the energies of 269 volunteers, the majority of whom are members of the Utah State Bar, in a variety of ways. "AND JUSTICE FOR ALL" and its volunteer Board of Trustees has relied on volunteers to provide assistance with all of the organizational structuring documents to day-to-day contracts review. Additionally, a 36-member Leadership Committee, chaired by a prominent member of the Bar, solicits donations from firms and other supporters. The Community Legal Center project relied on 177 volunteers to assist with numerous activities ranging

from developing leases to real estate transactions and contracts to fundraising and tax exemption filings. Other annual activities include the Law Day Run, a silent auction and the Young Lawyers Division pool tournament called "Bar Sharks for Justice". These volunteer activities serve not only as a means to increase financial support but also to increase awareness of the assistance provided by legal aid groups, provide a mechanism to increase volunteerism to the partner agencies, and most importantly, increase their ability to provide direct services through staff or pro bono service.

An example of an innovative volunteer service that benefits both the legal profession and those in need of legal assistance is the annual CLE fundraiser, "and Ethics for all" which raises additional resources for legal aid. Last year's CLE enlisted the assistance of eight volunteer attorneys to create and present " Ethical and Professional Issues for Lawyers In the Post Enron World", which focused on the Sarbanes Oxley Act of 2002 and Proposed S.E.C. rules. This year's CLE had 13 volunteers and focused on the controversial Parker Jensen case, involving parental rights, which has dominated the news this summer and is now the subject of over 50 pieces of legislation. These volunteers research topical issues, plan the CLE, present at the CLE, find donated space, find and copy supporting materials, etc. This year's CLE netted approximately $9,000 to support volunteer legal services.

Address unmet needs and extend services

"AND JUSTICE FOR ALL" was established to address declining federal support for civil legal aid and to find innovative ways to provide services at lower costs. The organization has been successful in increasing support from the Bar membership by 533% in its short existence. "AND JUSTICE FOR ALL'S" Community Legal Center project created incredible operating efficiencies for service providers that allowed them to decrease overhead expenses to the tune of nearly 10% of the agencies' collective budgets. These two things have enabled Utah's front-line providers to increase the number of individuals served each year by over 77%.

"AND JUSTICE FOR ALL" has also established an annual process to ensure that funds raised do not only benefit its partner organizations, but all non-profit organizations that share the commitment to provide legal aid to the poor. In the past five years, the Trustees have established a simple request for proposal process that has awarded $66,000 in support to other organizations with missions focusing on ethnic minorities, immigration, and rural providers like the Navajo nation's DNA People's Legal Services.

"AND JUSTICE FOR ALL" and the Community Legal Center have provided opportunities to bring the legal aid story to the general population who may not understand these services are often a first defense to individuals facing homelessness, domestic abuse, eviction, discrimination or denial of benefits due to poverty, disability or

racial or ethnic status. Over the past five years, "AND JUSTICE FOR ALL" has increased visibility of the services provided, the need for these services and the legal community's, as well as the general public's, willingness to support these services.

Partners and volunteers also work closely with other civil legal aid providers to provide consultation and advice, to encourage increased collaboration between all service providers and to offer assistance with their fundraising efforts by reviewing grants and referring grant opportunities to appropriate agencies. "AND JUSTICE FOR ALL" provided a challenge grant when one agency was on the verge of closing. This challenge grant helped the very small agency with a volunteer executive director raise over $20,000 in just three months.

Provide sustained counsel

"AND JUSTICE FOR ALL," in meeting its mission, has provided sustained counsel to several other organizations, including Disability Law Center, Legal Aid Society of Salt Lake, and Utah Legal Services. Each of the above agencies has two members from the "AND JUSTICE FOR ALL" Board who also serve on their individual agency Boards. This serves to not only maximize collaboration between the various service providers, but also to ensure that the "AND JUSTICE FOR ALL" Board is aware of the most pressing current issues faced by service providers.

Through this increased collaboration, partner agencies have been positioned to successfully find new sources of support that would not have been previously available to them. The primary example is the Community Legal Center project in collaboration with the Boards of all the participating agencies. "AND JUSTICE FOR ALL," as the lead agency, serves as advisor, mediator and referral source for specialized volunteer attorneys for all issues within the Community Legal Center as well as the agencies located there. "AND JUSTICE FOR ALL" was able to secure volunteer legal services to draft leases, service agreements, contracts and trust documents. Other services included review of loan documents, tax exemption filing and real estate transactions. "AND JUSTICE FOR ALL" volunteers developed a business plan, researched the feasibility of the successful implementation of the Community Legal Center, developed a $3.5 million capital campaign and represented the project to foundations, corporations, governmental entities and the general community.

Another example of continued sustained counsel is the ongoing effort to secure state funding to support legal aid. In 2002, when a grant of $451,334 to Utah Legal Services and Legal Aid Society of Salt Lake was not renewed, "AND JUSTICE FOR ALL" used its cadre of volunteers to successfully lobby the legislature for first-time ongoing funding to support direct legal assistance for family law cases and victims of domestic violence despite the state having to slash its budget by $230 million. Our volunteers continue to ensure that the State Legislature is aware of the need for civil legal aid.

Conclusion

In light of these significant achievements, despite challenges presented by a very conservative state and difficult economic times for non-profits, I am pleased to nominate "AND JUSTICE FOR ALL" for the National Public Service Award in recognition of the significant pro bono legal services this group has helped provide in Utah.

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Spoliation in Utah – A Problem In Search of a Remedy

by Robert B. Sykes & James W. McConkie

When a party is once found to be fabricating, or suppressing, documents, the natural, indeed, the inevitable, conclusion is that he has something to conceal, and is conscious of guilt.[1]

– Judge Learned Hand, 1939

"Contra spoliatorem omnia raesumuntur"
(All things presumed against the destroyer)[2]

I. SCOPE OF THE PROBLEM

Spoliation is the destruction, alteration or suppression of evidence relevant to a cause of action or potential cause of action.[3] National commentators describe spoliation as a very significant ongoing problem in litigation.[4] The renowned Harvard Law Professor, Charles R. Nesson, has stated:

> Interviews and surveys of litigators suggest a prevalent practice. For example, one half of litigators believe that "unfair and inadequate disclosure of material information prior to trial [is] a 'regular or frequent' problem . . . [and] 69% of surveyed antitrust attorneys [have] encountered unethical practices," including, most commonly, destruction of evidence. . . . ***Spoliation is an effective, and, I believe, a growing litigation practice which threatens to undermine the integrity of civil trial process.*** It is a form of cheating which blatantly compromises the ideal of the trial as a search for truth yet judges seem willing, even anxious, to ignore or minimize the role of spoliation rather than to recognize and address it as a serious problem. The practice of spoliation and the ethical hypocrisy which it spawns will continue to grow until judges stop treating the problem with what amounts to hollow rhetoric and mild sanctions.

Charles R. Nesson, "Incentives to Spoliate Evidence in Civil Litigation: the Need for Vigorous Judicial Action," Cardozo Law Review, 1991, p. 793 (citations omitted).

The problem is serious, yet judges seem reluctant to take firm action, even when the spoliation is quite blatant. Attorneys and judges who encounter spoliation should bear in mind the importance of fashioning some kind of remedy, and not simply allowing the conduct to continue. The West Virginia Supreme Court has recently observed:

> In considering these issues, we are mindful that "[f]or every wrong there is supposed to be a remedy somewhere." . . . This court has opined that "[t]he concept of American justice . . . pronounces that for every wrong there is a remedy. It is incompatible with this concept to deprive a wrongfully injured party of a remedy[.]" . . . "It is the proud boast of all lovers of justice that for every wrong there is a remedy." . . . Accordingly, one of our considerations in answering certified questions is whether a sufficient remedy already exists for the conduct at issue.

Hannah v. Heeter, 584 S.E.2d 560, 566 (W. Va. 2003) (citations omitted).

Is spoliation a concern in Utah? An informal canvas of several well-known Utah litigators suggests that it is a significant problem in this state, a problem urgently seeking a judicial remedy. The authors hope that attorneys and courts, in appropriate cases, will fashion stern remedies to discourage and punish spoliation.

II. HISTORICAL BACKGROUND

Recognition of spoliation by courts dates back to the eighteenth century case *Armory v. Delamirie,* 93 Eng. Rep. 664 (K.B. 1722). In that case a young boy working as a chimney sweeper found an old ring with a jewel in it. He took the ring to the defendant to

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be appraised. The defendant claimed the jewel was not valuable and he would only pay for the setting. The plaintiff declined the offer and asked for the ring back, but the defendant would not return the jewel. The plaintiff sued, but the defendant failed to produce the jewel for the trial. The court instructed the jury that it should assume the jewel's value to be equal to the highest possible value that could fit in that setting when determining damages. This was the first known instance of spoliation leading to an adverse inference.

III. SPOLIATION EXAMPLES

Phantom Chart Notes. Anecdotal evidence and the authors' personal experience confirm that spoliation is an ongoing, significant problem in Utah, particularly in certain types of litigation. For example, consider a recent medical malpractice case handled by one of the authors involving the failure to diagnose fetal distress and do a timely cesarean section. Plaintiffs claim that there were significant signs of fetal distress for several hours that were not properly evaluated and treated by the nursing staff, the resident and the attending physician. During a critical period, the resident admits that she made at least one, and maybe two, handwritten chart notes and placed them in the file. The medical chart is examined during discovery, but the chart notes are nowhere to be found. The defense claims there is no prejudice because, after all, plaintiffs' counsel may simply ask the defendant resident (2 1/2 years after the event) what the chart notes said. Said defendant's memory should cure any potential prejudice of the missing chart notes!

Vanishing Placenta. There is drama in labor and delivery. About eight minutes before birth, the baby's heart rate crashes and the FHR (fetal heart rate) monitor goes into a "terminal pattern." People are scurrying around and looking worried. Strange persons start showing up in the delivery room. This is nothing like Mom's other three births. The client's treating OB/GYN is called at his office but misses the delivery of a severely stressed infant by about a minute. The nurse takes the infant in her hands and literally runs down the hall to Newborn ICU. Bewildered dad and aunt follow, but are told to stay away. Mom doesn't even know yet if she has a new daughter or son. Meanwhile, the baby is fighting for her life in NICU. She is born without a pulse and with severely depressed APGARs that don't even reach the lower end of normal (i.e., about 7) until 20 minutes of life.[5] The doctor arrives just after the birth, observes the commotion, undoubtedly sees the running nurse, and then goes into the delivery room full of distressed family members. The doctor is aware that his newest patient is in NICU. A main question in the case is whether the injury resulted from medical negligence in failing to diagnose fetal distress several hours before birth, or whether problems naturally occurred due to a placental abruption a few minutes before birth (defense claim). The placenta is considered the "diary of the labor and

delivery," and its examination after a bad outcome in an obstetrics case will often confirm or exclude competing causes. For example, one can usually tell whether there has been an abruption, as claimed by the defense, by examination of the placenta. One could almost certainly have determined whether an abnormal vessel (vasa previa) had been cut during the artificial rupture of membranes. All of this was impossible because the defendant doctor sent the placenta for routine destruction just minutes following this traumatic birth.

Mysteriously Erased Tape. In a 2002 criminal case, the defendant was charged with conspiracy to sell drugs to a confidential informant. The informant goes to defendant's home and has a 20-25 minute conversation with the defendant, which the defendant alleges was about cars and tools, but not drugs. Two police officers sitting out in the car are tape-recording the conversation as it is being broadcast from the informant's "wire." The defendant allegedly discovers that the informant has a wire and makes a comment about it. The officers deem the informant to be "in danger," and burst in without a warrant, allegedly to protect the informant. The defendant is charged with conspiracy to distribute a controlled substance, based upon the affidavits of the officers, who claim that is what they "heard" during the tape-recorded conversation. The informant, however, backs up the defendant; i.e., there was no discussion of drugs. The tape would prove the issue. However, when the tape is produced, it has been almost totally erased; no actual words can be made out. It is now the officers' word against the defendant's.

Missing Ultrasound Videotape Turns Up. A case tried to a jury in Salt Lake County about two years ago involved a claim of birth injury medical malpractice. The case centered around whether there was sufficient amniotic fluid around the fetus to avoid injury to the fetus during the last few weeks of pregnancy. The plaintiffs claimed that the mother's amniotic fluid was dangerously low and that the defendant doctors and nurses misread the ultrasound videotaped films used to determine the amount of fluid in the womb and thereafter falsely concluded that there was enough fluid when in truth and fact there was not. Consequently, the baby was severely injured and suffered a severe case of cerebral palsy which required the injured baby to be confined to a wheel chair and be required to feed through a tube for the remainder of her life. Defendants claimed that there was sufficient amniotic fluid and that they had measured the amount of the fluid accurately; therefore, low fluid could not possibly be the cause of the baby's cerebral palsy. Plaintiffs sought discovery of the videotaped ultrasound films, the most complete and telling evidence of the amount of amniotic fluid. Plaintiffs were told that the actual videotaped record of the ultrasounds in question could not be found. In the alternative, defendants produced individual pictures of a few isolated portions of the videotape used by the doctors and nurses to record and determine the amniotic fluid levels. Having no alternative, the plaintiffs' lawyers sculpted their entire case around the isolated ultrasound photographs taken from the missing videotape. After two years of litigation, and a few weeks before trial, the defense moved to exclude the isolated ultrasound pictures based upon the "best evidence" rule. The trial judge denied the motion. Miraculously, a couple of days after the motion was denied, and just eleven days before trial, the missing ultrasound videotape turned up. Defendants moved for a continuance of the trial based upon the discovery of the videotape. Plaintiffs successfully opposed the motion and went to trial as scheduled. Plaintiffs were forced to re-theorize the case based upon the find. During the trial, evidence was introduced which suggested to one of plaintiff's expert witnesses that the last part of the tape which contained some of the most important pictorial evidence had been lost, erased, or otherwise destroyed.

Conversations with colleagues suggest that our experience with spoliation, sadly, is not isolated. Our colleagues regularly have problems with disappearing or altered evidence and generally get very little help from the court.

IV. SPOLIATION IN UTAH – *BURNS* and *COOK*

Utah law is scarce with regards to spoliation, but the implication is that the doctrine would be adopted in the appropriate case. The first reported case, *Burns v. Cannondale Bicycle Co.,* 876 P.2d 415 (Utah App. 1994), deals with spoliation in a tangential manner. The plaintiff had purchased a Cannondale bicycle from a local shop. While riding, the bike suddenly seized, throwing him over the handlebars and injuring him. A few weeks later, Burns asked an employee to return the bike for repairs and/or to determine what had caused the bike to suddenly stop. There was a conflict in the evidence between the plaintiff's employees who dealt with the bike shop and the owner of the bike shop, as to what conversations had occurred and exactly what, if anything, was wrong with the bike. The shop owner claimed that there were no problems with the bike and he couldn't determine a cause that made the bike stop suddenly. The case was actually filed *three years after the accident!* Defendants moved for summary judgment on the grounds that plaintiff could not show a product defect. The Court of Appeals notes:

> Burns admits that he cannot prove the existence of a defect. However, he claims the existence of a defect would properly be inferred if the factfinder determined The Bicycle Center disposed of a part while it had Burns' bike in for repair. Burns bases his claim on the doctrine of "spoliation of evidence," which holds that where a *party to an action* fails to provide or destroys evidence favorable to the opposing party, the court will infer the evidence's adverse content.

Burns, 876 P.2d at 419 (emphasis in original; citations omitted). The court then describes the spoliation doctrine as "an inference [that] will be drawn '[w]here one party wrongfully denies another

the evidence necessary to establish a fact in dispute.'" *Id.* (citation omitted). The court notes that Burns "cites no authority demonstrating that Utah has adopted the spoliation doctrine," but the court concluded that the doctrine would not apply in this case in any event. *Id.* The Court of Appeals recites these critical reasons for rejecting spoliation in this case:

> In sum, even assuming that a part was discarded, it cannot be inferred that the part was defective because defendants ***had no notice*** of the pendency of Burns's legal claim ***nor a duty to retain*** the part on any other basis.

Burns, 876 P.2d at 419 (emphasis added).

Burns was urging the adoption of spoliation as "an adverse inference;" not as a separate cause of action. This application, but not the doctrine, was rejected because the defendants had no "notice of the pendency of Burn's legal claim," and there was otherwise no "duty" to retain the part. There is an inference that the court would have entertained the question of spoliation under different facts; i.e., had there been a "duty" to retain the part.

In the recent case of *Cook Associates, Inc. v. PCS Sales, Inc.,* 271 F.Supp.2d 1343 (D.Utah 2003), Judge Paul Cassell dealt with a claim of spoliation. In *Cook,* a manufacturer of explosives for the mining industry brought suit against a supplier for alleged defects in materials. Among many other claims, Cook claimed that the defendant destroyed documents that would have proven that the products were defective. Apparently, PCS had earlier made the decision to close certain non-economically viable plants, and as part of that process various plant documents were shredded, beginning in January 2000. Cook filed its claim in May 2001, but apparently claimed that the defendant was on notice much earlier that Cook was receiving off-spec product. There was no actual evidence that any of the destroyed documents would have affirmatively demonstrated the alleged defect in the product. *Cook,* 271 F.Supp.2d at 1356. Cook was seeking both a finding of the independent tort of spoliation, and an evidentiary remedy for it. However, "Cook fails to cite any judicial authority supporting a *tort of spoliation." Id.* at 1357 (emphasis added). Referring to *Burns,* the court noted:

> The Utah Supreme Court [sic – i.e., Court of Appeals], having had the opportunity to adopt ***a tort of spoliation,*** refused to do so. As a result, Cook has no legal basis for asserting a tort of spoliation.

Id. at 1357 (emphasis added). The court then proceeds to explore a possible "evidentiary remedy for spoliation" under Rule 37(b)(2), but finds that the case law on this issue "only applies to parties who have violated a court order or acted in bad faith." *Id.* at 1357. A litigant would have to be on notice that documents or information in its possession were relevant to litigation or

potential litigation "and destroy such documents and information." *Proctor & Gamble Co. v. Haugen,* 179 F.R.D. 622, 631 (D.Utah 1998) (citations omitted).

The trial court found here that the defendant "neither violated a court order nor acted in bad faith." *Id.* at 1357. It described the destruction of the documents as "a routine housecleaning operation," which occurred "well before the filing of a lawsuit." *Id.* "There was never any notice concerning the need for documents" from a certain plant and so under these circumstances, "Cook is not entitled to any evidentiary remedy for spoliation." *Id.*

Neither *Burns* nor *Cook* contained a strong factual basis for spoliation. The alleged critical evidence was destroyed or discarded long (in fact, years) before suit was filed. The other spoliation prong, a "duty to retain" the evidence, is also either nonexistent or exceptionally weak in these cases. For example, it is difficult to see how the bicycle shop in *Burns* could have even a scintilla of duty to retain a bicycle part when it had no knowledge that the part was allegedly defective until long after the bike had been repaired. *Burns,* 876 P.2d at 419 ("By his own admission, *Burns* did not even contemplate filing suit at that time [of the bicycle repair]"). Accordingly, neither *Burns* nor *Cook* should be read as authority against adopting spoliation as an independent tort or against imposing stern sanctions as a discovery or evidentiary remedy.

V. ELEMENTS AND VARIETIES OF SPOLIATION

Spoliation has been treated as a rule of evidence, a discovery violation, or an independent tort, depending on the jurisdiction. K. Kadigh, *Spoliation: To the Careless Go the Spoils,* 67 U. Mo. Kan. City L. Rev. 597 (Summer, 1999). Additionally, the cases often distinguish *first-party* from *third-party* spoliation and *intentional* from *negligent* spoliation. There is much overlap in the elements of these variations of spoliation.

Competing public policies are highlighted in the different ways in which courts deal with the varieties of spoliation. These policies are explained well in *Hannah,* 584 S.E.2d 560, where the West Virginia Supreme Court certified three questions by a federal court regarding the availability of an independent tort for spoliation in West Virginia. The court surveys extensively the case law and expressions of public policy from other jurisdictions and presents a well-reasoned view of current judicial treatment of spoliation.

There is general agreement by courts as to the elements of *negligent spoliation* by a *third party,* which consists of the following basic elements:

> (1) the existence of a pending or potential civil action; (2) the alleged spoliator had actual knowledge of the pending or potential civil action; (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of duty, or other special circumstances; (4) spoliation of the evidence; (5) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and (6) damages. Once the first five elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The third-party spoliator must overcome the rebuttable presumption or else be liable for damages.

Hannah, 584 S.E.2d at 563-4. Note that a "potential civil action" suffices; the action need not have actually been filed.[6] A second important feature is that the duty to preserve the evidence may arise from a variety of fairly predictable sources, such as a contract, statute, etc., but this is not an exclusive list. The duty may also arise from "other special circumstances," which leaves the rule broad enough to deal with the innovative spoliator. This rule also puts the burden on the spoliator to overcome a "rebuttable presumption" that arises once the first five elements are established.

The tort of *intentional spoliation* consists of the following elements:

> (1) a pending or potential civil action; (2) knowledge of the spoliator of the pending or potential civil action; (3) willful destruction of evidence; (4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; (5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action; (6) the party's inability to prevail in the civil action; and (7) damages. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The spoliator must overcome the rebuttable presumption or else be liable for damages.

Hannah, 584 S.E.2d at 564. These elements are similar in many respects to negligent spoliation, with this prominent difference: intentional spoliation requires "willful destruction of evidence," with the intent to "defeat a party's ability to prevail."

A controversy exists as to the remedy available in cases of first-party vs. third-party spoliation. In first-party spoliation, of course, one of the parties is the spoliator, whereas a third party obviously does the deed in a third-party spoliation. Should there be an independent tort allowing the disadvantaged party to file suit and seek damages? Or are the traditional discovery and evidentiary remedies sufficient?

The availability of the independent tort remedy for spoliation seems to be dependent on whether or not sufficient non-tort remedies exist. For example, in *Hannah,* the court held that West Virginia did not recognize "spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence *of a party* to a civil action." *Id.* at 566 (emphasis added). The reason: "suffi-

cient remedies already exist to compensate the party injured by the negligent spoliation[,]" which include "an adverse inference instruction . . . or sanctions levied [against] a party." *Id.* However, a court obviously doesn't have the same hold on a third party. Accordingly, the West Virginia Supreme Court answered the question affirmatively against a third-party spoliator:

> Unlike a party to a civil action, a third-party spoliator is not subject to an adverse inference instruction or discovery sanctions. Thus, when a third party destroys evidence, the party who is injured by the spoliation does not have the benefit of existing remedies. Such a result conflicts with our policy of providing a remedy for every wrong and compensating the victims of tortious conduct. Accordingly, we believe that the negligent spoliation of evidence by a third party ought to be actionable in certain circumstances.

Hannah, 584 S.E.2d at 568. In order to find this tort, it must be shown that the spoliating third-party defendant is "guilty of some act or omission in violation of a duty owed to the plaintiff." *Id.* Even though there is no general duty to preserve evidence, such a duty "may arise through an agreement, a contract, a statute or other special circumstance." *Id.* at 569.

The West Virginia Supreme Court answered the third certified question in the affirmative to the effect that West Virginia ***"recognizes intentional spoliation of evidence as a stand-alone tort*** when done by ***either party*** to a civil action or a third party." *Id.* at 571 (emphasis added).

The damages element causes great concern among courts. The destruction of crucial evidence is the key concept of spoliation, but it is that same destruction that often leads to a plaintiff being unable to prove the amount of damages. This factor is often cited by those courts who refuse to allow an independent tort of spoliation. The courts that have recognized an independent tort have mentioned this concern, but feel that it is acceptable for a plaintiff in a spoliation case to prove "damages as a matter of just and reasonable inference." *Smith v. Superior Court,* 151 Cal.App.3d 491, 198 Cal. Rptr. 829 (Cal. Ct. App. 1984) (citations omitted).

VI. SPOLIATION AS AN INDEPENDENT TORT

Assuming Utah courts firmly and unequivocally adopt spoliation, should it be a rule of evidence, an adverse jury inference, a discovery violation, and/or an independent tort? Obviously, holding spoliation to be an independent tort would be a rather significant – some would say extreme – new approach. Utah would be joining a small, selected group of states, should it take such a path. The course of judicial action depends on the nature of the problem perceived by the courts. One doesn't do major surgery for a broken finger, but certain heart conditions warrant opening the chest surgically. Is spoliation a "major surgery" type of problem in Utah, or is it a hangnail? Or in between? The authors believe spoliation is a serious problem that warrants Utah adopting the

doctrine as an independent tort, or at least developing a serious, meaningful remedy to deal with the spoliators.

Hollow Judicial Rhetoric? Twelve years ago, Harvard Law Professor Charles R. Nesson warned that the practice threatened to "undermine the integrity of civil trial process," and decried the "hollow" and "mild" judicial response. Nesson, *Incentives to Spoliate, supra,* 13 Cardozo L. Rev. at 793. Professor Nesson described the judicial inertia that too often results in no serious action to deter spoliation:

> But in practice, judges are extremely reluctant either to expose discovery violations or to punish discovery violations once exposed, applying the rules instead in ways that minimize or avoid the problem. Judges understandably feel a tremendous drive to get cases resolved. Perhaps judges feel that exposing spoliation undermines respect for trial process more than camouflaging it with hollow rhetoric. The more spoliation is exposed and punished, the more endemic the practice of spoliation will appear to be, thus encouraging the public perception that lawyers are cheats and the justice of the courts a sham. Perhaps judges feel that if they seriously punish spoliation with monetary sanctions, they will create powerful incentives for opponents to raise spoliation claims, resulting in a flood. Better perhaps to leave the lid of the box closed. Perhaps complaints about spoliation strike judges as particularly unpleasant and aggravated examples of squabbling among the lawyers, all to be avoided if possible. Whatever the motivation, the resulting judicial behavior sends a message to every litigator: the rules against spoliation will not be seriously enforced. ***What is needed is a change in judicial attitude, to take the problem of spoliation seriously rather than sweep it under the rug.*** Judges and lawyers alike would like to assume that lawyers are too ethical to resort to spoliation as a litigation tactic. But this assumption is naive. Ethics can all too easily be undermined when one's opponent wins by being unethical and the ***judges who run the system and embody its values seem not to care.***

Id. at 806-7 (emphasis added). Other commentators have condemned the practice. For example, the following description was published in the *Duke Law Journal:*

> The prevalence of spoliation in civil litigation is alarming. In 1991, a study reported that ***fifty percent of all litigators consider spoliation to be a frequent or regular occurrence.*** Less than ten years later, the Tort and Insurance Practice Section of the American Bar Association published the first book devoted solely to the developing law of spoliation, in which the authors characterize spoliation as an ***"unfortunate reality of modern-day civil litigation."*** Other commentators have likewise noted that "deliberate obstructionism is commonplace" and that it is "difficult to exaggerate the pervasiveness of evasive practices."
>
> In response to the rise of spoliation cases nationwide, ***courts are subjecting spoliation to intense scrutiny.*** One court has noted that "destruction or loss of potentially relevant evidence is a long-standing problem, but it has attracted increased attention in the past decade," and this attention has prompted rather rapid development of spoliation law. Although the judicial approaches to spoliation law vary widely . . . it is nevertheless reassuring to upstanding litigators that ***recent decisions indicate the "beginning of a nationwide anti-spoliation trend."***

Note, *Linking the Culpability and Circumstantial Evidence Requirements for the Spoliation Inference,* Drew D. Dropkin, 51 Duke L. J. 1803, 1806-07 (2002) (emphasis added; internal citations omitted). Evidencing this trend are the many jurisdictions that have determined to address the problem of spoliation by providing for judicially recognized penalties. Of these jurisdictions, "six have recognized the tort for negligent spoliation of evidence, while seven have recognized the tort in situations of intentional spoliation." Note, *Spoliation of Evidence in West Virginia: Do Too Many Torts Spoliate the Broth?,* Sean R. Levine, 104 W. Va. L. Rev. 419, 420-21 (2002).

Stand-Alone Tort – The Most Effective Solution. The Ohio Supreme Court responded to the spoliation crisis a full decade ago, affirmatively declaring that in Ohio, "[a] cause of action exists in tort for interference with or destruction of evidence." *Smith v. Howard Johnson Co.,* 615 N.E.2d 1037, 1038 (Ohio 1993). A few years later a New Jersey Superior Court followed suit, justifying its decision with the following persuasive language:

> Spoliation of evidence ***creates enormous costs for both the victimized party and the judicial system, prevents fair and proper adjudication of the issues, and interferes with the administration of justice.***
>
> Recognition of the tort of negligent spoliation of evidence would likely ***reduce the possibility of negligent as well as intentional destruction of evidence by putting individuals, business, and government entities on notice of acceptable societal behavior.*** The increased availability of relevant evidence would in turn further an individual's due process right to have one's grievances heard by a court of competent jurisdiction utilizing all relevant evidence. The ***failure to recognize negligent spoliation as a separate tort would invite destruction or suppression of relevant evidence by an opponent or third party,*** thus creating or continuing the perception that individual due

process rights are unimportant or are somehow being trampled by the judicial system itself.

Recognition of negligent spoliation as a separate cause of action would also ***benefit litigants by reducing litigation costs.*** Costs associated with evidence reconstruction and identification of categories of documents requiring preservation would be avoided, as would the costs of propounding discovery to ascertain the fate of spoliated evidence.

Adoption of negligent spoliation as a separate tort would also ***benefit society*** by promoting testimonial and discovery candor. If litigating parties are made responsible for preserving all relevant evidence, the number of cases in which decisions are made based on all relevant information would increase. An explicit prohibition against negligent spoliation would also ***tend to conserve judicial resources*** by reducing the number of motions to compel production of evidence and the corresponding costs of discovery.

Callahan v. Stanley Works, 703 A.2d 1014, 1017-18 (N.J. Super. 1997) (internal citations omitted; emphasis added). Other jurisdictions have similarly considered the pros and cons of adopting an independent or stand-alone spoliation tort, and decided it was in their best interest to do so, at least in some form. *See Hannah,* 584 S.E.2d 560 (recognizing stand-alone tort for third party negligence and first or third party intentional spoliation, but rejecting stand-alone tort for first party negligence); *Holmes v. Amarex Rent-a-Car,* 710 A.2d 846, (D.C. Ct. A. 1998) (adopting tort for negligent spoliation); *Oliver v. Stimson Lumber Co.* 1993 P.2d 11, 19 (Mont. 1999) (adopting tort for negligent and intentional spoliation); *Levinson v. Citizen's Nat'l Bank,* 644 N.E. 2d 1264 (Ind. App. 1994) (intentional spoliation tort); and *Coleman v. Eddy Potash, Inc.,* 905 P.2d 185 (N.M. 1995) (intentional spoliation). For a good, recent survey of cases, see *Dowdle Butane Gas Co., Inc. v. Moore,* 831 So.2d 1124 at 1129-1130 (Miss. 2002).

The authors urge Utah courts to consider recognizing spoliation as a specific cause of action because other remedies are often shown to be "ineffective in deterring the widespread problem of spoliation." Kristin Adamski, *A Funny Thing Happened On The Way To The Courtroom: Spoliation of Evidence in Illinois,* 32 J. Marshall L. Rev. 325, 337 (1999). The District of Columbia Court of Appeals recognized one element of this limitation when it said: "[b]ecause sanctions may not be levied upon a disinterested, independent third party, an ***independent tort action*** for negligent spoliation of evidence is the ***only means to deter the negligent destruction of evidence and to compensate the aggrieved party for its destruction."*** *Holmes,* 710 A.2d at 849 (quoting John K. Stipancich, Comment, *The Negligent Spoliation of Evidence: An Independent Tort Action May Be The Only Acceptable Alternative,* 53 Ohio St. L. J. 1135, 1141-42 (1992)).

In summary, the issue of how to handle the problem of spoliation in Utah is ripe for judicial action. Parties have all too frequently destroyed, withheld or altered critical pieces of evidence. Utah must now provide a remedy for such conduct by formally recognizing a spoliation tort.

VII. SPOLIATION AS AN ADVERSE INFERENCE

Many of the courts that recognize spoliation as a rule of evidence generally purport to remedy the problem by the adverse inference jury instruction. This concept has been explained:

> The spoliation inference is a product of the legal maxim omnia praesumuntur contra spoliatorem (all things are presumed against the destroyer). The spoliation inference allows the fact finder to draw an unfavorable inference against the spoliating party.

Hirsch v. General Motors Corp., 628 A.2d 1108, 1126 (N.J. Super. 1993). Almost every state allows for some adverse inference to be drawn against the spoliator. The adverse inference is common in medical malpractice cases, as the problem of tampering with medical records is widespread. T. G. Fischer, *Annotation, Medical Malpractice: Presumption or Inference From Failure of Hospital or Doctor to Produce Relevant Medical Records,* 69 A.L.R.4th 906 (1990).

General Adverse Inference as a Jury Instruction. In those states where an adverse inference is the method for dealing with spoliation, the inference is given as a jury instruction. The following are examples of very general model jury instructions from two states:

> FAILURE TO PRODUCE EVIDENCE
>
> PART I. GENERAL INTRODUCTION
>
> In presenting his case, defendant did not produce ____. The general rule is that where evidence which would properly be part of a case is within the control of, or available to, the party whose interest would naturally be to produce it and he or she fails to do so without satisfactory explanation, you may draw the inference that, if produced, it would be unfavorable to him or her.
>
> PART II. FAILURE TO PRODUCE AN OBJECT OR DOCUMENT
>
> Applying that general rule to this case and to defendant's failure to produce ____, you may draw the inference that it would have been unfavorable to him, if you find all of the following: that ____ exists and is within his control, that it would naturally have been in his interest to produce it and that there has been no satisfactory explanation of the failure to produce.

Pennsylvania Pattern Adverse Inference Jury Instruction, ¶5.06 (2002) (simplified, pronouns omitted).

There is a difference between Part I and Part II. Part I of Pennsylvania's Pattern Instruction is what is commonly known as an adverse inference. That is, the jury may infer that the spoliated evidence would be adverse to the party who fails to produce it. To trigger such an instruction, the injured party only needs to offer some proof that relevant evidence was spoliated by the other party.

Part II of the pattern instruction is more similar to a rebuttable presumption instruction. In other words, the jury is instructed that the failure to produce evidence raises a presumption that the evidence would be unfavorable to the spoliating party, but that presumption can be rebutted if the spoliating party can offer some sort of reasonable explanation for its failure to produce the evidence. Wyoming has a similar rebuttable pattern instruction:

> FAILURE TO PRODUCE EVIDENCE OR A WITNESS
>
> If a party to this case has failed to offer evidence within his power to produce, or to produce a witness, you may infer that the evidence or testimony of the witness would be adverse to that party if you believe each of the following elements:
>
> 1. The evidence or witness was under the control of the party and could have been produced by the exercise of reasonable diligence.
>
> 2. The evidence or witness was not equally available to an adverse party.
>
> 3. A reasonably prudent person under the same or similar circumstances would have offered the evidence or produced the witness if he believed it to be, or the testimony to be favorable to him.
>
> 4. No reasonable excuse for the failure has been shown.

Wyoming Pattern Instruction – Adverse Inference, ¶2.12 (2002) (simplified, pronouns omitted).

The problem with these general, adverse inference instructions is their failure to specifically address the wrongful nature of spoliation. In many spoliation cases, the issue isn't really failure to produce "evidence in your control"; it is alteration or destruction of evidence that hurts you. If evidence has actually been destroyed, it seems almost absurd to tell the jury that "defendant's failure to produce the destroyed evidence" should be considered "against the defendant's interests." It is one thing to tell a jury that a party may have it within its power to produce stronger evidence, and to infer an adverse interest because that evidence isn't produced. It is quite another thing to tell a jury that there is an allegation that evidence has been wrongfully destroyed, hidden, concealed or tampered with. The latter kind of spoliation requires a stronger instruction, which is referred to in this article as the "inference of impropriety" instruction.

Inference of Impropriety Instruction. Under the standard used in other jurisdictions, a trial court "may at its discretion impose an adverse inference instruction after consideration of three factors: (1) the degree of negligence or bad faith involved, (2) the importance of the evidence lost to the issues at hand, and (3) the availability of other proof enabling the party deprived of the evidence to make the same point." *Williams v. Washington Hosp. Center,* 601 A.2d 28, 32 (D.C. App. Ct. 1991) (quoting *Battocchi v. Washington Hosp. Center,* 581 A.2d 759, 767 (D.C. App. Ct. 1990). Each of these factors may support an adverse inference of impropriety instruction that is much more strongly

worded than the bland, non-specific instructions above from Pennsylvania.

In Utah, a plaintiff may request that a court grant a very specific instruction relating the law to the facts of the case. *State v. Potter,* 627 P.2d 75, 78 (Utah 1981) ("[t]he trial court has a duty to instruct the jury on the law applicable to the facts of the case"). The authors of this article have studied spoliation instructions from other jurisdictions and believe that Utah courts should adopt a version similar to that used in Alabama, which reads:

> In this case, the plaintiff claims that the defendant is guilty of wrongfully destroying, hiding, concealing, altering, or otherwise wrongfully tampering with material evidence (including attempts to influence a witness's testimony). If you are reasonably satisfied from the evidence that the defendant did or attempted to wrongfully destroy, hide, conceal, alter, or otherwise tamper with material evidence, then that fact may be considered as an inference of defendant's guilt, culpability, or awareness of the defendant's negligence.

Alabama Pattern Jury Instruction 15.13 (2002). The Alabama instruction is similar to spoliation instructions used in other jurisdictions, including Rhode Island and Maryland. In *Vodusek v. Bayliner Marine Corp.,* 71 F.3d 148 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit affirmed the Maryland District Court's use of the following spoliation instruction, which strongly resembles the Alabama version:

> The defendants contend that their access to relevant and potentially relevant evidence was substantially hindered by the actions of plaintiff's counsel and agents, including Mr. Halsey . . . . ***It is the duty of a party, a party's counsel and any expert witness, not to take action that will cause the destruction or loss of relevant evidence where that will hinder the other side from making its own examination and investigation of all potentially relevant evidence.***
>
> If you find in this case the plaintiff's counsel and agents, including Mr. Halsey, failed to fulfill this duty, then you may take this into account when considering the credibility of Mr. Halsey and his opinions and also ***you are permitted to, if you feel satisfied in doing so, assume that the evidence made unavailable to the defendants by acts of plaintiff's counsel or agents, including Mr. Halsey, would have been unfavorable to the plaintiff's theory in this case.***

Id. at 155 (emphasis added). Similarly, the Supreme Court of Rhode Island gave a specific inference of impropriety jury instruction in the spoliation case of *Tancrelle v. Friendly Ice Cream Corp.,* 756 A.2d 744 (R.I. 2000), as follows:

> During the course of this trial, you have heard evidence that one of the parties may have destroyed, may have mutilated certain evidence. When evidence is destroyed, we call it spoilage. . . . ***And under certain circumstances, the spoilage of evidence may . . . give rise to an adverse inference, that the spoliated evidence would have been unfavorable to the position of the party who destroyed or mutilated that evidence.***
>
> Spoliation of evidence may be innocent or it may be intentional, or it can be somewhere in-between the two. It is the unexplained and deliberate destruction or mutilation of relevant evidence that gives rise to an inference that the thing which has been destroyed or mutilated would have been unfavorable to the position of the person responsible for the spoliation. ***If you find that the defendant destroyed or mutilated the stairs, the photographs of the stairs, the schedule of the employees, or any other item, and did so deliberately, then you are permitted to infer that your consideration of the evidence would have been unfavorable to the defendant's position in this case.***
>
> In deciding whether or not the destruction or mutilation of the evidence was deliberate, you may consider all of the facts and circumstances which were proved at trial,

> and which are pertinent to that particular item of evidence. You may consider who destroyed it, how it was destroyed, the legitimacy, or the lack of legitimacy in the reasons given for its destruction. ***You may consider the timing of the destruction. You may consider whether the individuals destroying the evidence knew the evidence might be supportive of the opposing party.*** You may consider whether the spoliation was intended to deprive the court of evidence, as well as other facts and circumstances which you find to be true.
>
> You may also consider the extent to which it has been shown that the spoliated evidence would indeed have been unfavorable to the defendant's position. If the spoliation of the evidence is attributable to carelessness or negligence on the part of the defendant, you may consider whether the carelessness or negligence was so gross as to amount to a deliberate act of spoliation.
>
> It is the function of the jury exclusively to resolve factual issues and to decide what it is that really happened here. It is your obligation and duty to zealously guard against any erosion of that function, however unintentional that it might have been.

Id. at 749 (emphasis added).

Applying the Alabama instruction to the facts in the birth asphyxia case cited in Part III above, the Utah version might read:

> In this case, the plaintiffs claim that the defendants are guilty of wrongfully destroying, hiding, concealing, altering, or otherwise wrongfully tampering with material evidence, including (1) destroying or refusing to produce chart notes made by Dr. Doe, a resident during client's labor and delivery; (2) negligently or intentionally destroying, or allowing to be destroyed, the placenta, which could have provided confirmatory evidence of vasa previa or other cause of bleeding; and (3) negligently or intentionally allowing the original fetal heart rate strip to be destroyed, which could have included important handwritten notes. If you are reasonably satisfied from the evidence that any defendant or his or her counsel did or attempted to wrongfully destroy, hide, conceal, alter, or otherwise tamper with material evidence, then that fact may be considered as an inference of defendants' guilt, culpability, or awareness of the defendants' negligence.

This instruction is appropriate because it permits the jury to consider the significance of those specific pieces of evidence which are not available for examination, but which are critical in determining the facts of a particular, specific case. This instruction is also in line with those of other jurisdictions, including Rhode Island and Maryland.

VIII. SPOLIATION AS A DISCOVERY VIOLATION

Spoliation has also been treated by the courts as a discovery violation to be punished by appropriate sanctions. These sanctions include preclusion of evidence (*Nally v. Volkswagen of America, Inc.,* 539 N.E.2d 1017 (Mass. 1989)), and the dismissal of the case with prejudice or summary judgment. *Friend v. Pep Boys,* 3 Phila. 363, 1979 Phila. Cty. Rptr. LEXIS 96 (1979). Factors to be considered in determining the severity of the punishment include:

> (1) the degree of willfulness of the offending party; (2) the extent to which the non-offending party would be prejudiced by a lesser sanction; (3) the severity of the sanction of dismissal relative to the severity of the discovery abuse; (4) whether any evidence has been irreparably lost; (5) the policy favoring adjudication on the merits; (6) whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney; and (7) the need to deter both the parties and future litigants from similar abuses.

Rivlin, J.E., *Recognizing an Independent Tort Action Will Spoil a Spoliator's Splendor,* 26 Hofstra L.Rev. 1003 (Summer 1998). Other courts have discussed when it is appropriate to mete severe punishments on the spoliator for discovery violations. One such case, *Keene v. Brigham and Women's Hospital, Inc.,* 775 N.E.2d 725 (Mass. App. 2002) (also discussed in Part IX, *infra*), upheld a default judgment as a sanction where:

> . . . the missing records and information were critical to the plaintiff's proof of his claim, and without those records, the plaintiff's claim would be irreparably prejudiced; no lesser sanction was appropriate; the defendant must bear the responsibility for the loss of the records because it was required by law to preserve the same and it had failed in its statutory duty; and the imposition of those penalties would deter future litigants from similar abuses.

Keene, 775 N.E.2d at 730. Where the rules allow entry of default judgment as a discovery sanction in cases of wilfulness, bad faith, or fault, the court held that fault included negligently failing to preserve records that the defendant was required by law to preserve. *Id.* at 732. That court also listed several factors to consider in imposing a sanction:

> . . . the degree of culpability of the nonproducing party; the degree of actual prejudice to the other party; whether less drastic sanctions could be imposed; the public policy favoring disposition of the case on the merits; and the deterrent effect of the sanction.

Id. at 733-734 (citing *Poulis v. State Farm Fire & Cas. Co.,* 747 F.3d at 868; *Wanderer v. Johnston,* 910 F.2d 652, 656 (9th Cir. 1990); *Wlazquez-Rivera v. Sea-Land Serv., Inc.,* 920 F.2d at 1076-1078; *Archibeque v. Atchison, Topeka & Santa Fe Ry. Co.,* 70 F.3d 1172, 1174 (10th Cir. 1995); and *Bass v. Jostens, Inc.,* 71 F.3d 237, 241 (6th Cir. 1995)). Based on these criteria,

the hospital's failure to produce necessary medical records that were in its control for the period of time after the birth of the plaintiff justified the sanction of default judgment against the defendant. *Keene,* 775 N.E.2d at 735.

Keene was appealed to the Massachusetts Supreme Court, which upheld the sanction of a default judgment for the conduct in question, noting:

> [T]he matter should have been disposed of under the doctrine of spoliation, which permits the imposition of sanctions and remedies for the destruction of evidence in civil litigation. The doctrine is based on the premise that a party who has negligently or intentionally lost or destroyed evidence known to be relevant for an upcoming legal proceeding should be held accountable for any unfair prejudice that results. . . . That the missing records vanished years before the commencement of the lawsuit does not make the doctrine of spoliation inapplicable. As we stated in the *Kippenhan* decision, '[s]anctions may be appropriate for the spoliation of evidence that occurs even before an action has been commenced, if a litigant or its expert knows or reasonably should know that the evidence might be relevant to a possible action.'

Keene v. Brigham and Women's Hosp., Inc., 786 N.E. 2d 824, 832-3 (Mass. 2003) (citations omitted).

IX. RECENT COURT REMEDIES FOR SPOLIATION

Independent Tort – Split of Authority. Spoliation as an independent tort is controversial, but accepted by a significant number of courts. *Hannah,* 584 S.E. 2d at 568-573. Spoliation as a stand-alone tort has also been rejected by a number of courts. *See Dowdle Butane Gas,* 831 So.2d at 1124. The recent history in California illustrates this debate.

The independent tort of spoliation was first recognized in California in the case *Smith v. Superior Court,* 151 Cal. App.3d 491, 198 Cal. Rptr. 829 (Cal. App. 1984), where the plaintiff was injured when the wheel came off a van and struck her windshield. The defendant agreed to maintain certain evidence but destroyed or lost it before the plaintiff's experts could look at it. That court quoted from Prosser regarding the recognition of new torts, holding:

> "New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before. . . . *Where it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant,* the mere fact that the claim is novel will not of itself operate as a bar to the remedy." (Italics added, quoting Prosser, Torts (4th ed. 1971) § 1, pp. 3-4).

Id. at 495-496. The court held that the tort of intentional spoliation of evidence met the criteria laid out by Prosser and recognized the stand-alone tort.

However, in 1998, the California Supreme Court retreated from *Smith,* refused to recognize a tort for *first-party spoliation,* and left open the question of a tort for third party spoliation. *Cedars-Sinai Medical Center v. Superior Court,* 954 P.2d 511 (Cal. 1998). The Court held that there are *adequate remedies* to the injured party for spoliation of evidence through the rules of evidence and discovery sanctions; any additional benefit from having an independent tort of spoilation was outweighed by policy considerations and costs. *Id.* at 521. In 1999, the California Supreme Court, weighing the usefulness of third party spoliation claims against the burdens of allowing them and taking into account existing non-tort remedies that deter spoliation, declined to recognize a tort for *third party spoliation* claims. *Temple Community Hospital v. Superior Court,* 20 Cal. 4th 464, 976 P.2d 223, 233, 84 Cal. Rptr.2d 852 (Cal. 1999). *Accord: Timber Tech Engineered Building Products v. The Home Insurance Co.,* 55 P.3d 952 (Nev. 2002).

Thus, we are left with a split of authority on the issue of an independent, stand-alone tort for spoliation. However, almost all the cases that reject the stand-alone tort option have done so because of the view that non-tort remedies and sanctions, such as a default judgment on the issue of liability, issue preclusion and similar remedies, are adequate to deal with the problem. This brings us back to a Catch-22 issue. The basis for rejecting the independent tort is the adequacy of the remedies that will be applied by our judges, but what if the judiciary is non-responsive, as alleged by Prof. Nesson? If the judicial response is to "sweep it [spoliation] under the rug" [Nesson, *supra* at 807], then the spoliators have the best of both worlds: no risk of tort liability and no risk of serious sanctions. The authors respectfully submit that the better judicial choice is to affirm the stand-alone tort of spoliation. Absent that, there must be a strong judicial response to spoliation with an array of effective sanctions.

Spoliation Jury Instruction. A good jury instruction can be very effective in the appropriate case. *See* Part VII, *infra.* The instructions for spoliation in Rhode Island and Maryland were undoubtedly extremely effective in those cases. *See* discussion of *Vodusek* and *Tancrelle,* above.

A contrary view was recently taken in *Wal-Mart Stores, Inc. v. Johnson,* 39 S.W.3d 729 (Tex. App. 2001), where the court faced a claimed destruction of a decorative reindeer that fell off a shelf and injured the plaintiff. There was a conflict as to whether the reindeer was heavy and made of wood, or light and made of paper products. Wal-Mart claimed that the reindeer was seasonal and had been disposed of in the ordinary course of business (either sold, broken down or thrown away). Wal-Mart offered to produce "a reasonable facsimile," but plaintiff claimed this was insufficient. Plaintiffs requested and obtained a spoliation instruction similar to the Pennsylvania sample in Part VII above. The jury found Wal-Mart negligent and awarded $76,000 in damages, and the Texas Court of Appeals affirmed.

The Texas Supreme Court was concerned about the appropriate remedy for Wal-Mart's perceived misconduct, and thus faced a classic issue that appears in some spoliation cases: was plaintiff entitled to a spoliation instruction for conduct which is merely "negligent"? The Court noted that other Texas appellate courts had generally limited spoliation instructions to two circumstances: deliberate destruction of evidence and the "failure of a party to produce relevant evidence or to explain its non-production." The Texas court avoided that issue by observing that the analysis must begin with the threshold "issue of duty," and "the opposing party must establish that the non-producing party had a duty to preserve the evidence in question." *Wal-Mart Stores, Inc.* at ¶ 8-9. The court observed that such a duty arises only when a party knows, or reasonably should know, that there is a substantial chance that a claim will be filed and that the evidence in its possession or control would be relevant to that claim. *Id.* Wal-Mart argued that it had no duty to preserve the reindeer as evidence because it had no notice of any future claim until after the reindeer had been disposed of in the normal course of business. This was disputed by the plaintiffs.

On its face, these facts appear hauntingly similar to the Utah *Burns* case. The Texas Supreme Court observed that it was undisputed that neither Wal-Mart nor the plaintiff knew on the day of the accident that the injury might be serious and that it might result in legal action. Since the foundation of a spoliation instruction required plaintiffs to show that the reindeer was disposed of after Wal-Mart knew, or should have known, about the substantial chance of litigation, and plaintiffs could not show that fact, the instruction was erroneous. *Id.* at ¶3. The Supreme Court further found that the instruction was prejudicial "because it unfairly stigmatized Wal-Mart as a party who [sic] had concealed evidence, thereby prejudicing the jury's view of its side of this closely contested case." *Id.* at ¶14. The verdict was accordingly reversed.

Sanction – Default Judgment. In *Keene v. Brigham and Women's Hospital, Inc.,* 775 N.E.2d 725 (Mass. App. 2002), the Massachusetts Court of Appeals upheld a default judgment against the defendant as ***a sanction*** for its failure to produce lost hospital records. The plaintiffs were the parents of a young man born at the defendant hospital, who was discharged with a note that the parents should watch for signs of sepsis. There were 20 critical hours of records missing, and when they resumed they showed that the plaintiff had gone into septic shock and began having seizures. The records had been requested numerous times, but the defendants testified that they could not be found and that defendants' agents did not know the names of the doctors or nurses who treated the plaintiff during that relevant period of time.

Ultimately, plaintiffs filed a motion for sanctions and asked that the answer be stricken and the defendant be defaulted due to the irreparable loss of the records, which caused prejudice. *Id.* at 729. Defendant argued for a lesser sanction. The judge had found that the defendant's inability to comply with an order to produce the documents was not due to willfulness or bad faith, but rather was due to negligence in preserving the records. The court also noted that the plaintiffs' case would be irreparably prejudiced by the loss of the records because the condition during the missing period was critical to prove that antibiotics should have been administered sooner and that the failure to do so caused the injuries.

This is a classic case of the use of spoliation *as a discovery sanction.* The court found this sanction to be just because the loss of the records "irreparably damaged the plaintiffs' proof of his case and deprived him of the opportunity to litigate his claim against his individual caregivers." *Id.* at 735. The Massachusetts Supreme Court upheld the sanction of a default, but reversed the damages award because of a local statute limiting damages against a charitable institution. *Keene,* 786 N.E. 2d at 835.

Sanction – Answer Stricken. The case of *Baglio v. St. John's Queens Hospital,* 755 N.Y.S.2d 427 (2003), involved the failure to diagnose fetal distress in a medical malpractice case. The infant suffered oxygen deprivation and brain damage allegedly due to the hospital's negligence. Just prior to commencing the action, plaintiff's attorney requested that the hospital provide the fetal heart rate (FHR) strips which continually assess the heart rate in relationship to the maternal contractions. These strips are continually analyzed to determine whether there is fetal distress caused by lack of oxygen. Initially, the hospital sent the incorrect FHR strips (from another pregnancy), and then stated that it was "unable to locate the correct monitoring strips." *Id.* at 428. Plaintiff moved to strike the hospital's answer based upon spoliation of evidence, which was denied by the trial court. Plaintiffs appealed, and the *Baglio* appellate court provided this statement of law:

> It is well settled that when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading. . . . A pleading may be stricken 'even if the evidence was destroyed before the spoliator became a party, provided it was on notice that the evidence might be needed for future litigation.'

Baglio, 755 N.Y.S.2d at 428 (citations omitted). The court held that the plaintiff had demonstrated that the FHR strips were the most critical evidence to determine fetal well-being, and that the strips would provide fairly conclusive evidence as to the presence of fetal distress. The court further found that their loss deprived the plaintiff of the means of proving the medical malpractice, and accordingly imposed the sanction. *Id.*

Intentional Spoliation Tort Rejected – Detailed Discussion. In *Dowdle Butane Gas Co., Inc. v. Moore,* 831 So.2d 1124 (Miss. 2002), the court faced injury claims arising from an exploding underground propane tank. After the tank exploded, the gas company contacted a propane expert and engineer and requested that he perform an initial inspection on the premises. The State of Mississippi had also dispatched an investigator who, with the gas company's investigator, entered the property in question and removed the tank. These actions were alleged to have intentionally destroyed some particular evidence. The court addressed the issue of a separate cause of action for intentional spoliation (while leaving the issue of a cause of action for *negligent spoliation* for another day). *Dowdle,* 831 So.2d at 1128. The court held:

> We refuse to recognize a separate tort for intentional spoliation of evidence against both first and third party spoliators. . . . Chief among these concerns [in rejecting the tort] is the important interest of finality in adjudication. We should not adopt a remedy that itself encourages a spiral of lawsuits, particularly where sufficient remedies, short of creating a new cause of action, exist for a plaintiff. . . . ***Non-tort remedies for spoliation are sufficient in the vast majority of cases,*** and certainly, as the California courts learned after 14 years of experience with this tort, any benefits obtained by recognizing the spoliation tort are outweighed by the burdens imposed.

Id. at 1135 (emphasis added). Thus, the adequacy of "non-tort remedies" is hoisted as the banner reason for rejecting the stand-alone tort.

X. RESPONSE TO ARGUMENTS AGAINST AN INDEPENDENT TORT

Why should Utah adopt the independent tort of spoliation, especially when the trend in some recent cases seems to be to the contrary? Wouldn't an independent tort simply encourage more litigation between two parties who probably have already been litigating for some time? Doesn't it have adverse social consequences and costs? Aren't there sufficient non-tort remedies to handle the problem?

These questions, and the affirmative answers given in the cases rejecting the independent tort concept, reflect a naivete about the reality, breadth and depth of the problem. It is akin to taking a fly swatter to the barn to take care of an obvious problem. Sure, you will dispatch a few flies, but at the end of the day the flies will still be overwhelming.

Take, for example, the problem of the destroyed placenta discussed in Part III. It is uncontested medically that the placenta literally is "the diary of the labor and delivery" of a pregnant woman at

term. It usually will tell the story of what went wrong in a "bad outcome" birth. In that case, the doctor examined the placenta, pronounced it normal and then ordered it processed for destruction, all within minutes of a disastrous outcome (child was born severely depressed and in distress). Defense counsel had nothing to do with this destruction, so all discovery and professional sanctions against counsel are not applicable. Under the majority opinion in *Dowdle,* the plaintiff would be basically left with an adverse evidentiary inference. As noted above, some of the states give some pretty bland instructions. *See, e.g.,* Pennsylvania's Instruction, Part VII above. The authors strongly suspect that some Utah judges would only go that far, and no further, were this issue to come before them. In other words, for the doctor's destruction of the single most important piece of evidence in the case, the jury might be told that it might find an "adverse inference" because a party failed to "produce more powerful evidence" that it had in its possession. That hardly seems an adequate remedy for such an egregious action.

CONCLUSION

Spoliation is a very significant problem throughout the nation and in Utah. It is akin to perjury or suborning perjury. Like perjury, spoliation involves the alteration or suppression of relevant evidence in a cause of action or potential cause of action. And, like perjury, spoliation should carry with it serious consequences to the perpetrator because it goes without saying that complete, forthright and honest disclosure by both sides in a lawsuit is essential to the fact finding process. If the evidence is tampered with in an effort to alter the outcome of a proceeding, then the integrity of the process is called into question. Telling the whole truth and building in safeguards to bring to light corrupted or altered evidence is at the root of reaching a fair and just outcome. Accordingly, lawyers must be vigilant to alert judges of instances of spoliation. Likewise, judges must take seriously allegations of spoliation and fashion and implement effective, swift, and helpful remedies which discourage bad behavior. The risk of getting caught must be severe.

To punish those who engage in spoliation tactics in Utah, lawyers should be able to pursue at least three different remedies for both first and third party spoliation, including: tort liability against the spoliator, descriptive inference of impropriety jury instructions, and meaningful sanctions imposed by the court (such as default judgment and issue preclusion). The jury instruction approach should include language which allows the jury to draw adverse inferences against the perpetrator and which explains the duty of the perpetrator to maintain and not destroy or alter evidence. The Alabama and Rhode Island jury instructions are good examples of the kind of instructions that should be followed in Utah courts. The jury instruction approach is advantageous because knowing of its availability at the trial stage allows the parties and the court to address alteration or destruction of evidence during litigation, and discuss how such tactics may or may not impact on the litigation process. Most importantly, if the case proceeds to a trial, it allows the jury to factor in the extent to which spoliation should be taken into consideration when the verdict is decided.

If it makes sense to fashion jury instructions to meet the problem of spoliation head on at trial, why then shouldn't a separate tort for spoliation be permitted? In some cases the destruction of the evidence may make it difficult if not impossible to file a case against the defendant in the first place. Consequently it makes more sense to file a cause of action that focuses specifically on the issue of spoliation. At a minimum, this would allow an aggrieved party, if it could prove spoliation, to address the resultant issue of potential damages in one case.

Finally, courts should not be hesitant to consider their inherent power to impose sanctions. Such sanctions could range all the way from fines, striking the pleadings, or suppression of evidence that may be controverted by the spoliated evidence, to a default or consideration of a summary judgment motions on the issue of liability, allowing the plaintiff to move directly to the issue of damages. In light of the seriousness of the problem at hand and our experience in Utah, sanctions against those who spoliate the evidence, either intentionally or negligently, ought to be imposed by courts to squarely meet the seriousness and pervasiveness of the problem.

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1. *Warner Barnes & Co. v. Kokosai Kisen Kabushiki Kaisha,* 102 F.2d 450, 453 (2d Cir.), modified, 103 F.2d 430 (2d Cir. 1939).
2. Black's Law Dictionary, p. 1401 (6th ed. 1990)
3. Black's Law Dictionary, p. 975 (6th ed. 1991)
4. Stephen Mackauf, a prominent medical malpractice attorney from New York City, stated his belief several years ago that spoliation occurred in at least half of all medical malpractice cases. (Personal conversation with Robert Sykes at medical malpractice seminar in Monterrey, California, 1988.)
5. The infant's Apgars were 1, 3, 5, 6 and 7 at 1, 5, 10, 15 and 20 minutes respectively. A normal healthy infant should be at least a 7 at 5 minutes.
6. Some defendants, where the issue has been brought to the court's attention, defend by citing cases that appear to say that there must be a "pending action" in order for spoliation rules to apply. If that were truly the law, which it isn't, attempts to combat spoliation would be severely hampered since the potential spoliator would have an incentive to go out and spoliate quickly before an action is actually filed.

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Digital Photographs as Evidence in Utah Courts

by Wesley M. Baden

This past holiday season, you were not alone if you purchased or received a digital camera as a gift. Digital cameras were in great demand, reflecting the 28 percent increase in sales that occurred in the period January to August 2003. In contrast, analog cameras, such as the 35mm single lens reflex (SLR), were not as popular. Sales of analog cameras declined by 37 percent in January to August 2003.[1]

The general public is using digital cameras more and more often, and analog cameras less so. Law enforcement agencies are doing so as well. Increasingly, agencies are relying on digital photography to preserve a visual record of crime scenes, physical evidence, and victims' injuries. The Orange County (California) Sheriff's Office is making the transition from conventional film to digital photography. The Pittsburg (Kansas) Police Department now takes just five percent of its photographs using 35 mm or Polaroid film. Ninety-five percent of photographs are digital.[2] The New York City Police Department uses only digital photographs as evidence in domestic violence cases.[3] Among Utah agencies, too, the clear trend is away from film and toward digital technology.

Some are worried about police using digital cameras. There is fear – totally unjustified – that digital photography represents novel scientific evidence that is not generally accepted or inherently reliable. There is also fear – largely exaggerated – that digital photographs can be manipulated to fabricate evidence for improper purposes.

Basic Difference Between Analog and Digital Photography

In analog photography, the camera captures an image on film. The film is developed using chemicals. This process creates a negative. The negative is turned into a positive and printed on paper stock, again using chemicals.

In digital photography, there is no roll of film. There is no negative. The camera uses a charge coupled device (CCD) to capture an image, converting it to a series of pixels (picture elements). As a rule, more pixels produce higher picture resolution and color quality. Pixels are stored in a memory device of some kind, located inside the camera. When it is time to create a print, data from the device is loaded into a personal computer. The computer, using specialized software, reconstructs the image and displays it on a monitor. The computer then routes the image to a printer where a print is actually made. No chemicals are used, aside from what is in ink cartridges in the printer.

Two Legislative Reactions to Digital Photography

A potential problem in digital photography is that the software used to make pictures also allows those pictures to be altered. At worst, objects that were not in the original image can be added and those that were there can be removed. The photograph of President Bush, on the cover of the December 1, 2003 issue of *Time* magazine, is an example of the first kind of digital manipulation. To illustrate the story, "Love Him! Hate Him!," the photograph shows the President with a lipstick kiss on his right cheek and a black left eye.

Reportedly, a Wisconsin state legislator became upset when high school students manipulated a digital photograph by putting heads on bodies of the opposite sex. If students can do that, he concluded, then police could do worse, that is, fabricate photographic evidence against innocent criminal defendants. The legislator sponsored Wisconsin Assembly Bill 584 (introduced October 2003, currently in committee). AB 584 "prohibits the introduction of a photograph ... of a person, place, document ... or event to prove the content ... if that photograph ... is created or stored by data in the form of numerical digits." If the bill is passed and signed into law, digital photographs would not be admissible in Wisconsin courts for purposes of proving content.

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A number of legislators in Hawaii are also concerned about digital photography, though they have taken a more muted and sensible course of action. They sponsored Hawaii House Bill 1309 (introduced January 2003, currently in committee). It amends Hawaii Rule of Evidence 1001 by defining "photographs" to include "electronic pictures including digital pictures...." At the same time, HB 1309 directs the Hawaii Supreme Court to establish, within one year, written procedures governing police use of digital photography. The bill observes, "Although current rules do not preclude the admission of digital photographs as evidentiary material, such admissibility is contingent upon the basic data and collection technique meeting a threshold requirement of reliability that has not yet been established by the Hawaii Supreme Court's Standing Committee on the Rules of Evidence."

Digital Photography and Utah Law

To date, the Utah Legislature has not concerned itself with the issue of the admissibility of digital photographs. Utah Rule of Evidence 1001 gives no clear indication regarding whether such photographs are admissible. Also, Utah appellate courts have dealt with the matter only obliquely in one case.

Utah Rule of Evidence 1001(2) defines "photographs" to include "still photographs" but draws no distinction between analog and digital photographs. It could be argued that, absent a distinction, "still photographs" means photographs of all kinds, analog and digital. On the other hand, section (3) of the rule suggests that only analog photographs are described, because of reference to a "negative." Subsequent language about "data" appears to relate exclusively to "magnetic impulse, mechanical or electronic recording, or other form of data compilation," all examples of "writings and recordings," in section (1).

In *State v. Powell,* 2003 UT App 127, defendant argued that the manner in which police conducted a pretrial photo array was impermissibly suggestive and therefore violated due process. Defendant did not object to the fact, however, that the array was composed of six digital photographs, including his. The Court of Appeals affirmed defendant's conviction, holding that no due process violation occurred, but it did not address the issue – not raised in the first place – of whether the photographs were admissible. The matter is open for debate. Especially in the absence of a footnote in *Powell,* of the kind that former Chief Justice Zimmerman was famous for writing in his opinions, it is anyone's guess whether Utah appellate courts regard the admissibility of digital photographs as a serious issue worth examining or a

complete and total non-issue.

Likely Result in Utah Appellate Courts

My own best guess, given case law elsewhere, is that Utah courts would have little or no trouble holding that digital photographs are generally admissible. A line of Utah cases also supports this hunch. Of course, whether a specific photograph is admissible will continue to depend on usual considerations, *e.g.* adequate foundation including a showing that the photograph is an accurate and fair representation of the scene, object, or person portrayed.

The seminal case in this area is *State v. Hayden,* 950 P.2d 1024 (Wash. 1998). Defendant, convicted of murder, claimed that the trial court erred in admitting enhanced fingerprint evidence after conducting a *Frye* hearing. Police obtained latent fingerprints from the victim's bed sheet. The fingerprints were digitally photographed, after which software was used to filter out background patterns and colors to enhance the images. All this, defendant argued, involved a novel process that had not received general acceptance in the scientific community and did not satisfy the *Frye* standard. The Washington Supreme Court rejected defendant's argument and affirmed. The court expressly held that enhanced digital imaging is generally accepted in the scientific community.

Recent cases upholding the admissibility of digital photographs, some of them enhanced, include *Almond v. State,* 553 S.E.2d 803 (Ga. 2001) (crime scene), *State v. Hartman,* 754 N.E.2d 1150 (Ohio 2001) (fingerprint), and *People v. Perez,* 2003 WL 22683442 (Cal. App. 4 Dist.) (shoe print).

Even Utah's more restrictive admissibility test, set forth in *Phillips v. Jackson,* 615 P.2d 1228 (Utah 1980), *Kofford v. Flora,* 744 P.2d 1343 (Utah 1987), and *State v. Rimmasch,* 775 P.2d 388 (Utah 1989), should not present a problem. The test, one of inherent reliability, has been broadly satisfied already in light of the origins of digital photography in the U. S. space program.

The technology used in today's digital cameras is essentially the same as found in space applications. Beginning in the late 1960's, satellite cameras captured and stored images digitally, the images were radioed back to earth as data, and then computers assembled the data to create pictures. The computers also enhanced pictures, restoring true color, sharpening detail, and the like. In short, the reliability of digital photography, including computer enhancement, is largely self-evident given nearly forty years of accurate, highly detailed pictures of the earth, the solar system, and a myriad of objects in the visible universe.

At this point, common types of digital manipulation, for instance image sharpening, may not even trigger application of the inherent reliability test. More complex or not well-known manipulations will raise the question of reliability. But, in time, as reliability becomes less of an issue, most forensic evidence in the form of digital photographs promises to become routinely accepted in court, with little or no need for expert testimony.

Analog Photography's Forgotten Secret

Forensic digital photography is generally accepted in the scientific community. Also, it is inherently reliable in its applications. Fear about manipulation of digital images is exaggerated, perhaps because of the perceived novelty of the technology. We often fear what is or seems new. Certainly, this fear has made many forget a secret of analog photography, namely that conventional photographs also may be manipulated to alter reality and at worst to fabricate false evidence.

In 1882 a Georgia trial court enthused, "We cannot conceive of a more impartial and truthful witness than the sun, as its light stamps and seals the similitude of the object on the photograph put before the jury; it would be more accurate than the memory of witnesses, and as the object of all evidence is to show the truth, why should not this dumb witness show it?" *Franklin v. State,* 69 Ga. 39, 42 (1882).[4] The passage of time, however, has shown that this view was sadly naive.

All kinds of manipulation – some artistic, others deliberately devious in nature – are possible in analog photography. Anyone who has spent time in the darkroom knows that picture sharpness, contrast, and even mood may be varied dramatically by simple changes in the type of developer, development time, and paper stock used. Undesirable objects may be removed by cropping. The physical appearance of individuals may be changed using techniques such as burning in and dodging. That is, hair may be darkened or lightened, a beauty mark highlighted, a mole removed, teeth whitened. Double exposure or cutting and splicing of negatives may be used to create prints of supposedly real objects like ghosts and flying saucers.

Even more manipulation is now possible. Conventional film negatives and prints may be scanned, converted into pixels, and put into a computer. Then, using digital imaging software, new prints may be made, manipulated in all the same ways as digital prints.

Types of Photographic Manipulation

There is good and bad, acceptable and unacceptable manipulation of photographs intended to be introduced into evidence in court. The following categories of manipulation are proposed, beginning with the Unmanipulated Image.[5] Examples of manipulated images are merely illustrative and only hint at the many types of manip-

ulation possible, especially in digital photography.

The Unmanipulated Image – Type 0

In analog photography, the Type 0 Unmanipulated Image is the full negative, made using generally accepted equipment, chemicals, and techniques. In digital photography, the Type 0 Unmanipulated Image is the full digital image stored in an appropriate memory device, not necessarily the actual device used in the camera, without software adjustment of any kind, and viewed on a color-calibrated monitor.

The Manipulated Image – Type 1

In analog photography, the Type 1 Manipulated Image is a print made of the full negative, on appropriate paper stock, using generally accepted equipment, chemicals, and techniques, without manual adjustment of any kind. In digital photography, the Type 1 Manipulated Image is a print made of the full digital image, on appropriate paper stock, using generally accepted computer equipment, software, and techniques, without software adjustment of any kind.

The Manipulated Image – Type 2

In analog photography, the Type 2 Manipulated Image is a print that has been manipulated in some generally accepted manner, using manual adjustment, and for legitimate forensic reasons. Examples: Portion of picture greatly enlarged to show serial number on gun; dodging used to heighten contrast, to better show license plate number on vehicle. In digital photography, the Type 2 Manipulated Image is a print that has been manipulated in some generally accepted manner, using software adjustment, and for legitimate forensic reasons. Examples: Sharpening used to better see robbery suspect's face on bank surveillance photo; frequency filters used to isolate backlit fingerprint off drinking glass.

The Manipulated Image – Type 3

The Type 3 Manipulated Image is a print that has been manipulated, using either manual or software adjustment, in some manner that is not generally accepted, or for illegitimate forensic reasons. Examples: burning in used to darken an African-American's skin in a photo, in a deliberate effort to appeal to a viewer's prejudice;[6] morphing used to change facial features on suspect's picture in police photo array, resulting in picture being suggestive; copy and paste used to place individual in picture of others engaged in illegal activity, fabricating evidence of criminal liability.

General Rules

The categories just described suggest a number of general rules concerning the production of photographic evidence for court purposes, as well as whether specific photographs should be actually admissible in court. Whenever possible, all unmanipulated images, in either negative or memory device form, should be preserved and made available for examination by interested parties. The absence of unmanipulated images should raise questions about prints. Prints should be rigorously compared with their original, unmanipulated images, plus other prints that have been or now may be made from them. The less manipulation used to make a print, the better. Manipulation should occur only for legitimate forensic reasons. All manipulations should be generally accepted as appropriate for their intended purposes. Any manipulation that is not generally accepted as appropriate should trigger heightened scrutiny. The possibility of fabricated evidence and fraud upon the court never should be overlooked.

From General Rules to Universally Accepted Standards

At present, there are no universally accepted standards concerning the forensic use of digital imaging. In the near future, there may well be such standards. A number of groups, agencies, and individuals are at work creating standards or already have proposed them.

Five years ago, the Federal Bureau of Investigation established the Scientific Working Group on Imaging Technologies (SWGIT),

composed of approximately 25 representatives from federal, state, and local law enforcement agencies and imaging scientists from academia. The mission of SWGIT is "to facilitate the integration of imaging technologies and systems in the criminal justice system by providing definitions and recommendations for the capture, storage, processing, analysis, transmission, and output of images." The group in fact has published a number of recommendations and guidelines for the use of digital imaging in the criminal justice system. All publications, dating from 1999 to 2002, are available on the FBI's web site, www.fbi.gov. The publications carry considerable weight, given their source and history. The recommendations and guidelines that they contain may come to be regarded, in time, as universally accepted standards for forensic digital photography.

To ensure admissibility, one prosecutor has recommended that (1) original images should be recorded in unalterable form as soon as possible, *e.g.,* on a writable CD; (2) every manipulation of an image should be saved as a separate photograph to create a photographic trail; and (3) custody control and access limitations should be established.[7] Another prosecutor has similarly recommended that (1) a protocol always should be adopted for handling image evidence; (2) the original image always should be preserved; (3) manipulations of an image should be kept in a separate file; and (4) a reliable chain of custody should be established.[8]

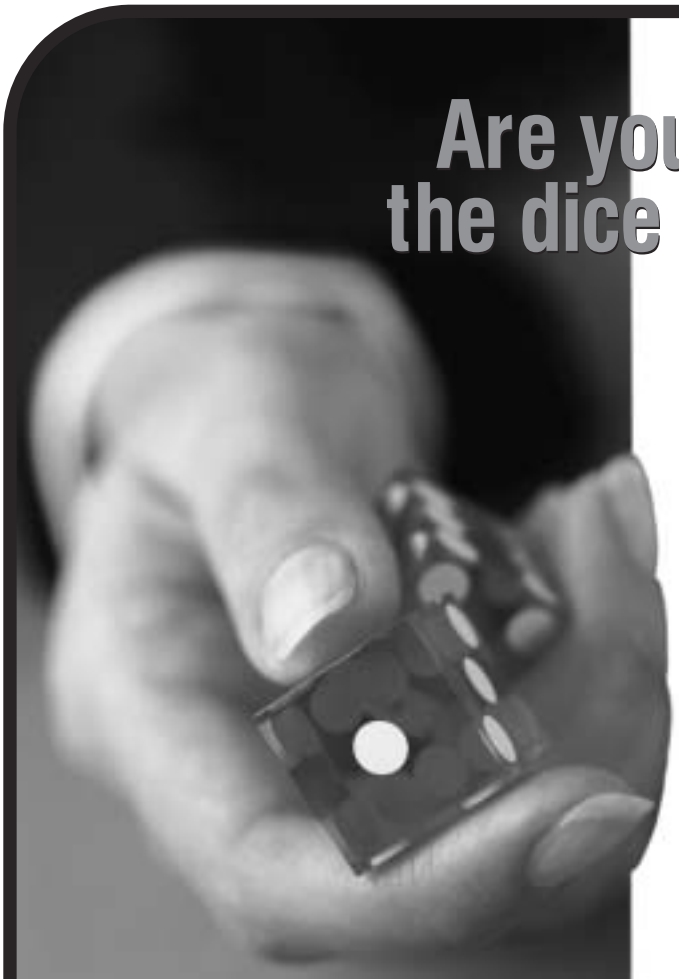
A private attorney and the Executive Director of the Indiana Crime Lab Institute have recommended that all written standard operating procedures concerning digital imaging technology should include the following: "(1) Images must be recorded in an unalterable, archival form soon after the records are created; (2) The images should include information regarding their creation; (3) The agency must control custody of all image records at all times; (4) All agency personnel who prepare exhibits for court should be trained in digital imaging processing and should understand which images might require a special notation to show that the changes are not prejudicial; and (5) The agency must establish rigorous procedures for entering work-in-progress into proper file systems."[9]

Recommendations to Utah Bar, Judiciary, and Law Enforcement

Digital photography is a fascinating modern technology. As in the case of other such technologies, however, the law has not caught up with it, at least not fully. In this context, the following recommendations are respectfully offered up to the Utah bar, judiciary, and law enforcement.

1. Both criminal and civil attorneys who use or encounter digital photographic evidence have a special obligation to study and understand the underlying technology, along with related legal issues such as admissibility. At a minimum, appropriate self-study is necessary and should take place.
2. Forensic digital photography is a highly suitable subject for formal continuing legal education. The Utah State Bar, as well as organizations like the Utah Prosecution Council and the Utah Association of Criminal Defense Attorneys, should actively assist members by sponsoring CLE about digital imaging and issues raised by its use in Utah.
3. The Utah Supreme Court, through its already existing advisory committee, should review and consider amending Utah Rule of Evidence 1001, possibly along with other rules, for the purpose of governing the admission and use of digital photographs in Utah courts.
4. All Utah law enforcement agencies should adopt and put in place written policies and procedures regarding the collection and preservation of digital imaging evidence, specifically in order to ensure the successful introduction of such evidence into court.

1. *PMA Processing Survey: Highlights and Overview through August 2003,* Photo Marketing Association International News Release (October 27, 2003).
2. *Police Department – Digital Cameras Make the Difference,* Pittsburg, Kansas Police Department, available at http://www.pittks.org/departments/police/technology/cameras.asp.
3. Sarah Kershaw, *Digital Photos Give the Police A New Edge in Abuse Cases,* N.Y. Times, Sept. 3, 2002, at A1.
4. Quoted in Thomas Thurston, *Hearsay of the Sun: Photography, Identity, and the Law of Evidence in Nineteenth Century American Courts,* American Quarterly (1999), *available at* http://chmn.gmu.edu/aq/photos/index.htm.
5. Here I have deliberately chosen not to call some forms of manipulation "enhancements." Some writers on the subject of digital photography do distinguish between "enhancement" and "manipulation" of images. This is certainly attractive for court purposes. Trial courts typically are less worried about "enhancement" as opposed to "manipulation" of photographic evidence. But even something as simple as enlarging a portion of a negative or stored digital image and causing it to be printed on paper stock is, arguably, a form of manipulation. "Manipulation" does not necessarily have negative connotations in my view. Only what I call Type 3 Manipulated Images are objectionable and should not be admitted as evidence in court.
6. O. J. Simpson's skin was darkened in a police photograph. *See* John C. Russ, Forensic Uses of Digital Imaging 125 (CRC Press 2001).
7. Penny Azcarate, *Digital Imaging: The Technology and the Prosecutor,* 34 The Prosecutor Magazine (Jan./Feb. 2000), *available at* http://www.paamtrafficsafety.com/Hot%20Topics/Digital%20Pictures/digital.htm.
8. Christina Shaw, *Admissibility of Digital Photographic Evidence: Should it be Any Different Than Traditional Photography?,* 15 AMERICAN PROSECUTORS RESEARCH INSTITUTE NEWSLETTER (2002), *available at* http://www.ndaa.org/publications/newsletters/update_volume_15_number_10_2002.html.
9. Richard Kammen and Herbert Blitzer, *Ensure Admissibility of Digital Images, available at* http://www.iowaiai.org.



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Practice Pointer: Disengagement Letters

by Diane Akiyama

Every attorney in private practice experiences the nightmare client that they knew they never should have agreed to represent. When dealing with nightmare clients, attorneys are usually careful to document everything in writing including sending a disengagement letter. However, in their dealings with other types of clients, attorneys may not regularly send disengagement letters or otherwise document the steps taken when terminating the representations. While the Rules of Professional Conduct do not require such notices, disengagement letters are a good habit for attorneys to adopt in their practice.

Rule 1.16 of the Rules of Professional Conduct[1] provides:

> Upon termination of representation, a lawyer shall takes steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law, but must provide, upon request, the client's file to the client. The lawyer may reproduce and retain copies of the client file at the lawyer's expense.

Rule 1.16(d) (Declining or terminating representation).

While the rule does not require written notice of the disengagement, a written disengagement letter can build good client relations for future employment when the attorney-client relationship ends amicably. Additionally, if the attorney-client relationship ends on a bad note, a written disengagement letter gives the attorney documentation showing that the attorney complied with the ethical requirements of Rule 1.16. A disengagement letter can also protect attorneys against malpractice claims if the client misses a statute of limitation or other deadline after the attorney-client relationship ended. A disengagement letter can be particularly useful when an attorney has agreed to represent a client for a limited part of the client's legal problem. For example, if an attorney only agrees to help with negotiating a settlement and does not agree to file an Answer to a Complaint or provide other services, the limited scope of the representations can be confirmed in the disengagement letter.

Although a disengagement letter adds time to wrapping up a matter when the representation is terminated, the time and money expended to send a disengagement letter to the client is small in comparison to the time and money needed to defend oneself against a malpractice claim or a Bar complaint. Please note that a disengagement letter is not meant to replace verbal notice of the disengagement when there is an opportunity for verbal notice. Rather, it should serve as a written summary of what was discussed at the final consultation meeting.

Elements of a Disengagement Letter

1. Identify the matter that is the subject of the letter.
For example: "This letter will memorialize our recent discussions concerning the termination of my representation of you in connection with your personal injury matter." If you represent the client on more than one legal matter, you may need to address each matter and inform the client about the status of the case and the attorney-client relationship in each matter.

2. Affirm the current status of the case and remind the client of any pending deadlines.
If the case is closed, affirm that it is closed and identify any appeal deadlines that may be applicable. If the matter is still pending, inform the client of the current status of the case and highlight any deadlines that may be pending. For example, you may need to remind the client of a statute of limitations deadline or the need to have new counsel enter an appearance with the court within thirty days or they will need to proceed pro se. If you previously discussed options for the client to consider on how to proceed, summarize the discussion in your letter.

3. Summarize the status of any fees and costs collected and outstanding.
In your letter, identify payments you have received to date from the client and state any fees or costs still owed. Inform the client that you will shortly send them a statement for services rendered to the date of termination. If you have collected unearned fees, the unearned fees must be returned timely since Rule 1.16(d) requires attorneys to return any advance payment of fees that have not been earned.[2] If there is a dispute over what portion of the retainer or collected fees has been earned, pursuant to Rule 1.15, you must hold the disputed portion in your trust account, separate from your own funds, until the dispute is resolved.[3]

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4. Reconfirm that your representation has concluded and outline what that means.

State when the representation ended or will end and confirm that you will have no further obligations to advise the client on legal matters. Inform the client you will be closing the files on the case. If the matter is still pending, urge them to seek new counsel if they have not already done so.

5. Suggest that the client keep copies of any documents you have sent them in the matter.

When the representation is terminated, Rule 1.16(d) requires the attorney to provide the file to the client upon request.[4] Rule 1.16(d) also prohibits attorneys from charging clients for a copy of the file. When the subject matter of the representation has ended, suggest that the client keep copies of any documents you have given them during the representation for their records. If you are providing a copy of the file to the client, state you have done this in the letter. If the matter is still pending, state that you will transfer the file to the new lawyer, or to the client, and indicate you will need a letter acknowledging receipt of the file. You may also want to have a client sign a statement confirming the client received the file in case questions about the return of the file arise at a later date.

Often attorneys will ask whether they must still provide the client a copy of the file, at no charge, at the end of the attorney-relationship if they have been providing clients copies of all documents as the attorney received them and generated them. Rule 1.16(d) states that an attorney's duty to protect the client's interest can include a duty to give the client the file when the relationship terminates. However, Rule 1.16(d) is unclear as to whether the duty to provide the file free of charge can be fulfilled before the relationship terminates, at least with regards to copies of documents in the file that have been given to the client during the representation. I recommend that attorneys not charge the client for a copy of the file when it is requested after the representation ends. Even if the rule can be interpreted as having no requirement for an attorney to provide the client free copies of documents already provided, it may be difficult to prove that you provided the information during the representation if you did not send cover letters with all of the documents as you forwarded them to the client. Providing the copy without charge when the file is requested at the end of the representation promotes good will and may help you avoid the time and cost required in defending yourself against a Bar complaint. However, this does not mean that the attorney is required to continue to fulfill multiple requests for copies of the file at no cost.

6. Describe what measures you have taken to protect the client's interest when the matter is still pending.

If there is a discovery or other deadline pending that needs to be continued to protect the client's interest and allow you to withdraw, state what steps you have taken to protect the client. For example: "I have arranged with opposing counsel for an extension of the deadline for your response to the interrogatories to allow your new counsel to review your case and I have confirmed the stipulation for the extension in my letter to opposing counsel dated January 5, 2004."

Conclusion

Most complaints that the Office of Professional Conduct receives originate from a belief that an attorney is not adequately communicating with the client about the representation. Written disengagement letters are a simple practice which attorneys can adopt to promote better communication with their clients and to protect themselves from malpractice claims and Bar complaints.

1. All rule references are to the Utah Rules of Professional Conduct unless otherwise indicated.
2. An unearned fee could include an unearned retainer or a flat fee when the flat fee collected would be considered clearly excessive in light of the work performed pursuant to Rule 1.5(a).
3. Rule 1.15(c): When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claims interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.
4. Generally, attorney work product documents are not considered part of the client file, but other documents provided to the client are part of the file. The comment to Rule 1.16 helps define which documents are considered part of the client's file.

A Problem of Perception: Race and the Legal System in Utah

by Charles G. Wentworth

Racial and ethnic bias is an evil that must be addressed day in and day out, in every generation. It never goes away.

– Michael Zimmerman

I. Introduction

Perception is immensely important in the administration of justice because, at least on an individual basis, justice is in the eye of the beholder. This article examines problems associated with perceptions of Utah's legal system, especially as those perceptions have lead some to believe either that it is fraught with prejudice or, alternatively, that law enforcement and court personnel are simply doing their jobs. It then proposes continued solutions that may be enacted by the Legislature or implemented by individual members of the Bar.

II. The Perception of Racism in Utah's Legal System

Anyone who has renewed a driver's license recently may have noticed two new questions on the application: do you want your race to appear on your license and, if so, what is it? These are the result of Utah's Traffic Stop Statistics Act. The purpose of these questions is to help the state track whether individuals are stopped by police officers solely because of their race, a practice frequently called "racial profiling." Utah has not escaped the specter of racial profiling, as recognized by the Statistics Act. However, that the Act was even necessary also demonstrates that racial profiling may occur in Utah. There is disagreement over whether and the extent to which profiling occurs, and the Statistics Act is in part intended to provide data on the matter.

In May 1999, Mani Kang, a Sikh Indian man, drove through southern Utah on Highway 191. A Utah Highway Patrol car driven by Officer James Curtis approached Kang and followed him from only a few car lengths back. Kang stopped at a service station where he filled his gas tank, while Curtis pulled into the parking lot behind him. Curtis noted how much gasoline Kang purchased, observed him from the parking lot, then left. After paying, Kang resumed his journey as well, but only a few miles down the road Curtis again began following him.

It wasn't long before Curtis stopped Kang for a lane change violation. Kang explained that he was traveling home to Arkansas after having visited some friends and family in Los Angeles. Curtis noted that Highway 191 through southern Utah was not the most direct route to Arkansas, but Kang responded that he was a photographer and had come to see Utah's beautiful landscapes. After this discussion, Curtis told Kang that he was "free to go." Curtis then asked if he could search Kang's car. Kang responded that he could, but the search turned up nothing.

Some may believe that this was simply a matter of Officer Curtis doing his job. In his experience, it was strange for a person from another state to stop at a service station, purchase only $4.80 of gasoline, all the while nervously looking out of the store window. These factors might have made Curtis believe something suspicious had or was about to happen. After all, in 1999 UHP officers confiscated more than $228,000 in cash, 23 kilos of cocaine, 4,000 pounds of marijuana, and 21 kilos of methamphetamine. It's not as though drug interdiction was uncommon for the area. Kang, however, perceived the situation very differently. As a minority driving alone near small, culturally and racially homogeneous town, he felt he was targeted because of the color of his skin, and that Curtis had no reason to assume that Kang had done anything wrong. Kang believed that the lane change violation was a pretext used by a racist police officer to stop and harass minorities.

Such different explanations of the same incident show the problems of perception associated with racial profiling. Members of minority groups who have been victims of racial discrimination may interpret the actions of others as racial bias, even when not intended as such. Likewise, members of majority groups who have not been victims of racial discrimination may tend to find any explanation other than racial bias for incidents involving racial minorities. These perceptions explain why some individuals have brought lawsuits against Utah law enforcement agencies alleging racial

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profiling. A suit filed by the ACLU on behalf of Kang is one example. Kang's experience was particularly egregious because of the following additional facts alleged in Kang's complaint.

First, Curtis did not simply happen upon Kang. Rather, he passed Kang traveling in the opposite direction on the highway and, upon seeing Kang, turned around and began following him. Second, Kang had a conversation with the service-station clerk while waiting for Curtis to leave the parking lot. The clerk told Kang, "That Patrolman's after you. He was checking out your car when you were in here, and now he'll be waiting for you somewhere up the road. He does this all the time. Anyone that doesn't seem from around here, he goes after[,] . . . especially if they're persons of color." Finally, Kang's lawsuit alleged that Curtis had been trained not simply to look for suspicious persons, but to look for suspicious *Hispanic* persons, which in his case translated into unreasonable suspicion of Kang. Kang's complaint quoted a Department of Public Safety officer who trains members of the Utah Highway Patrol. The officer allegedly stated that "[a] lot of Hispanics are transporting narcotics. That's common knowledge." True or not, an unqualified statement like this – unaccompanied by appropriate training in matters of race relations – may lead to unlawful racial profiling.

Although many if not most traffic stops involve more innocuous circumstances, those surrounding Kang's traffic stop made it easier to find racial bias in his stop. This explains the resulting judgment: a $2,000 award in favor of Kang.

Situations such as Kang's create justified perceptions of racism within the law enforcement community, perceptions which often carry over into Utah's entire legal system, both criminal and civil. They lead some individuals to distrust anyone that represents the system, whether it be the police, the prosecutor, the judge, or even the individual's own attorney. Because these perceptions tend to infect the entire legal system, it is in everyone's best interest to actively promote both equality and equal access to every aspect of the Utah's legal system.

III. Proposed Solutions and Their Problems

In his case, Kang alleged that racist tendencies motivated the officer's actions, while Curtis maintained that he was simply protecting the public. Indeed, in many cases (drug cases in particular) that is exactly what happens. But bare suspicion is legally insufficient. To stop a car, an officer must be able to articulate facts creating a reasonable suspicion that some criminal activity has been committed. While race clearly does not create reasonable suspicion, the general public unfortunately still associates minori-

ties with illegal drugs. Many worry that this association leads law enforcement to detain minorities in situations where they would not stop a white individual. The concern was addressed, although some would say dismissed, by the Supreme Court in *Whren v. United States,* 517 U.S. 806 (1996). There the Court held that, as long as a police officer has an objective reason for stopping a car, the officer's subjective reasons are irrelevant. "As a general matter," Justice Scalia wrote, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."

What makes this issue so difficult is that the courts are ill-equipped to solve problems of perception. One solution may be to disqualify minor infractions, such as mandatory seatbelt laws or the lane change violation Kang committed, as sufficient to warrant traffic stops. During one Utah legislative session, Representative Yvonne Baca, a Hispanic woman representing Salt Lake City, referred to minor traffic violations and the impact they have on the minority community. "We do everything in our power to make sure we're not pulled-over. . . . It affects our self-esteem. It hurts us." Baca appealed to the Legislature to change the substantive law because, where courts are able to determine whether probable cause existed in a given situation, the Legislature is able to reclassify what constitutes a primary infraction, one for which an officer may obtain the requisite cause to stop an individual.

Data collection is often proposed as another way to ensure that police officers do not abuse their discretion by disproportionately stopping minorities. The premise of data collection is that, if officers are not profiling, people of all races will be stopped in proportion to their presence in the community. If the data shows that stops are being made disproportionately, the conclusion is that racial profiling is occurring in the jurisdiction. As Representative Duane Bourdeaux frequently says in describing data collection and its purpose, "You cannot manage what you don't measure."

But there are many problems with data collection. Who will collect and interpret the data? How much disparity constitutes profiling? Who determines the race of a stopped driver – the individual or the officer? And even if these can be overcome, police departments are still hesitant to participate in studies that may be used against them in subsequent lawsuits. Indeed, even if it is proved that profiling occurs, what then? If the debate over its existence is complicated, finding a solution is even more so. Should police reduce patrolling areas that are heavily populated by minorities, thereby avoiding possible profiling accusations? Should there be quotas on how many of each race an officer or department may stop in a given time period? These are admittedly extreme examples, but could become the unwritten policy of departments in a world of protracted and expensive litigation against law enforcement agencies. Furthermore, what if the data shows that police do not systematically profile? Will the minority communities believe the data, or see it as a literal "whitewashing" of the numbers? And if the data shows that there is no overt profiling, will it simply give police departments an excuse not to make other changes, giving them an "if it ain't broke, don't fix it" attitude?

IV. Utah's Approach to Solving the Problem

Racial profiling and complaints of its occurrence are symptomatic of an underlying distrust of law enforcement by minority communities. Some scholars have suggested that such distrust is best addressed by initiating a dialogue between law enforcement and minority communities. Utah chose this approach to address racial profiling, as well as other problems of race and criminal justice, through the creation of the Utah Task Force on Racial and Ethnic Fairness in the Legal System and its successor, the Commission on Racial and Ethnic Fairness in the Criminal and Juvenile Justice System.

The Task Force was established in March 1996 by the Utah Judicial Council. Its purpose was "to examine issues related to real and perceived racial and ethnic bias" in the legal system. Members of the Task Force included leaders of state law enforcement, juvenile justice, courts, prisons and parole agencies, as well as representatives of racial and ethnic minority groups. At its inception, most members did not trust each other. Then Chief Justice Michael Zimmerman headed the Task Force and compared many of the meetings to a circus. However, as time went on, its members began to trust each other and the Task Force was able to examine many issues involving race and Utah's criminal justice system.

The Task Force then began collecting data on minority perceptions of Utah's law enforcement community. While it tried to examine data that had already been accumulated by the State's various law enforcement agencies, differences in the modes of data collection, as well as incomplete databases made analysis unproductive. To compensate for this, the Task Force began collecting anecdotal evidence from public hearings where people were invited to discuss their impressions of the system and its relationship to minorities.

In September 2000, the Task Force issued its Final Report. Although the report was issued unanimously by the members of the Task Force, many of the state's police officers and members of the minority community criticized the methodology. Particularly disturbing to police was the Task Force's heavy reliance on anecdotal evidence. They claimed that the report was full of half-truths and relied solely on anecdotal information contributed by

second- and third-hand sources.

Those participating in the Task Force, however, felt that it had been a huge success. Having spearheaded the effort, Justice Zimmerman hoped that it would continue. "It would be a real shame to lose th[e] sense of cooperation instead of confrontation. You can accomplish a lot more by persuading a department head to make changes than by standing outside on the street and calling names." He recognized that the Task Force had created an entirely new entity in Utah politics: a civilized and respectful environment where members of minority, law enforcement, and court system communities could meet and discuss the issues each side was confronting.

One of the recommendations made by the Task Force was the establishment of a statewide, uniform database by which the incidence of traffic stops could be studied based on various factors, particularly race. Representative Duane Bourdeaux, the only African-American in the Utah Legislature, sponsored the legislation. He told legislators that Utah's minority community distrusts law enforcement in this state. "[T]here is truly a perception in the minority communities that this is happening, and the only way to get this information is to have a standardized reporting process."

Other legislators were not as enthusiastic. Senator Chris Buttars worried about the bill's unforeseen outcomes. "You could actually be creating problems in our community rather than bringing us together," he said. Senator John Valentine compared the inclusion of race on a person's driver's license to Germany's forcing of Jews to carry identification cards. "It was wrong then and it's wrong now. Do we want to make race an issue? I don't think so. We are all Americans [and] there's a real danger in having a record like that." Senator Pete Suazo, the Legislature's only Hispanic member, responded by recognizing that race is already an issue. "[W]e're not accepted as full Americans. If you'd ever been pulled over for no other reason than color, you would want this bill."

Additionally, many police officers in the state did not understand the need for racial profiling legislation. Salt Lake City Police Chief Ruben Ortega stated that Bourdeaux needed better evidence of profiling before requesting that the state spend so much money collecting data on traffic stops. "Before we start spending all that money to do this, you're going to have to convince us there's a need." Although this was a ridiculous claim (how could Bourdeaux convince anyone that profiling existed if the state was not willing to spend the money to study the issue?), Ortega was not the only police chief to make such arguments. Roy Police Chief Chris Zimmerman also felt that what little (and inconsistent) data

did exist supported law enforcement claims that profiling was not a problem. Despite this opposition, in 2002, the Traffic Stop Statistics Act finally passed.

V. Conclusions and Recommendations

While the creation of a uniform system of data collection will be very useful to understanding whether, and to what extent, profiling exists in Utah, it will not provide a magic solution to these problems. Primarily, those on either side of the issue may also question the accuracy of the data, as has been demonstrated in St. George and Salt Lake City. Before the state created its own data collection system, these cities each gathered their own statistics. But when the cities first released reports showing that profiling did not occur, many saw the data as too good to be true. Speaking of the Salt Lake City numbers, Theresa Martinez, an Hispanic professor of Sociology at the University of Utah, explained, "This study doesn't mean individual officers are not [engaged in] racial profiling, only that there isn't a systemic problem."

Furthermore, even if the data is accurate, there likely will remain a rift between the minority and law enforcement communities. Ron Stallworth, an African-American Lieutenant in the Department of Public Safety, noted, "I'm too black for white people to accept, but often too blue for my ethnic brothers." Identifying the problem is only the first step down a long road to solving it. However, there has been some progress on this front. After working very closely with the Salt Lake City Police Department on racial and ethnic training, Martinez now recognizes the progress that has been made in trying to overcome all problems of race, not simply racial profiling. While she knows data collection "will not be a panacea for this issue," she and other members of the minority community see the efforts made by the police to address these problems as "a series of good first steps in the right direction."

The reason the Task Force and Commission have been so successful is that they provided a forum for all interested parties to discuss issues in a manner where each of them could be equally represented. Unlike the Utah Legislature, where there have historically been only one or two minority representatives, the Task Force provided a place where members of all communities could meet and discuss issues surrounding race and ethnicity in the criminal justice system. The Bar should also provide a forum for members of Utah's legal system, not merely the criminal justice system, to discuss issues of race, and accordingly how to address them.

One of the most important areas in which we must all continue to work is that of convincing the members of our respective organizations of the importance and effectiveness of what has already been done. The leaders of the groups involved must convince their members that these efforts are neither merely token gestures with no real change in sight, nor vehicles by which only accusations of racism and intolerance are bred. Does the average African-American or Hispanic person see the changes that are being implemented? Does the local police officer in Kamas, Tooele, Hurricane, or Panguitch see the importance of working towards change? The Task Force and Commission, composed of statewide leaders, may be unanimous, but does that unanimity extend to the rest of these communities?

More importantly, as members of the Bar, do we give our time, talents, and resources to those who have been denied (purposefully or as a result of circumstance) access to the courts? Participating in the discussion through *pro bono* service and other means is the only way to change people's perceptions, so that "the system" is not the enemy but rather a tool that all groups and individuals can and do access. Racism must no longer be something we feel we do not participate in, but must rather become something we actively participate to overcome. Only when everyone recognizes this will there be any real change in the perceptions of the racial problems (or lack thereof) in Utah's legal system.

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Commission Highlights

During its regularly scheduled meeting of January 23, 2004, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Debra Moore reported that both sessions of the recent Fordham Forum were well attended and she received a good deal of positive feedback. Part of the discussion focused on the statewide plan where the Bar will take a leadership role in moving forward on access to justice and improving the legal system.

2. John Baldwin reviewed the Bar President's and Commission's election deadlines. Nominations for Bar President are due by March 1st and the Commission chooses the candidates at the March 11th meeting. There are three vacancies in the Third Division and an opening in the Second Division. Petitions are due by March 1st in order to run for those positions. All ballots are counted on June 2nd at the Bar offices.

3. Debra Moore reviewed the calendar and noted that in conjunction with the Mid-Year Convention, lunch with the Southern Utah Bar association would be held at noon at the Dixie Center in St. George and the Commission meeting would begin at 1:00 p.m.

4. Debra Moore reviewed Rep. Urquhart's previous agreement with the Bar that included exploring the feasibility of uncompensated persons giving legal advice with emphasis on family members and ecclesiastical leaders.

5. Debra Moore reviewed the legislative issues, HB 349 Repeal, Small Claims Task Force Report and Delivery of Legal Service Initiatives. Debra reported that she had last met with Rep. Urquhart last Friday and discussed the Bar's agreement with him. Debra suggested that they issue a joint statement to repeal the May 2004 definition of the practice of law statute in light of the Bar's efforts in fulfilling its obligations. George Daines and Debra distributed copies of the Small Claims Task Force Report to the Bar Commission. George said that the report was not final but that a final version would be issued in the very near future. George discussed Recommendations/Findings #3 (allowing uncompensated non-lawyers in small claims court) and #4 (no change in current rules governing business entities by employees) in further detail and noted that #5 (no change in the current discovery process) and #6 (no change in current de novo appeal process) had some additional implications vis a vis proposed Rule 6.1. It was noted that it should be emphasized that we are trying to provide legal assistance to the middle class with these recommendations.

6. Steve McCardell, new chair of the Ethics Advisory Opinion Committee, discussed some changes that the Commission previously discussed but needed to be ratified. He explained that the Committee operated under two different but related sets of rules: (a) rules which govern the Committee's internal procedures ("Rules of Procedure"); and (b) the Bar Commission's rules ("USB Rules Governing the Ethics Advisory Opinion Committee"). It was moved and seconded to adopt the changes as had previously been discussed. The motion passed without dissent.

7. John Baldwin announced that we needed to begin the process to finalize the candidates for the Bar's new Professionalism Award (Given to a lawyer whose actions and deportment represent the highest standards of fairness, integrity and civility.") Debra reminded the Commissioners that an award from each Commission Division would be given this year only and that subsequently, only one award would be bestowed.

8. Copies of the Bar's Policies and Procedures governing the creation of sections to accompany the proposed amendments to the policies and procedures in the packet materials were distributed. It was noted that several sections, including animal rights, had been proposed. Lowry Snow reported that his group's recommendations included requiring a written application with established criteria, that at least 25 Bar members indicated interest in forming a new section, that submission of by-laws could be deferred for three months from date of Board approval and that periodic section reports be submitted to the Board. Discussion followed and the proposed amendments will be submitted to sections for feedback.

9. David Hamilton, Chair of the Client Security Fund Committee appeared before the Commission to discuss the most recent requests for the Client Security Fund claims. He noted that the Committee was asking for $52,000 but that approximately $48,000 was due to one disbarred attorney. The motion to approve the claims as stated passed unopposed.

10. David Bird reported on the Judicial Council, stating that the JCC audit was issued and the appointment had been made to replace Gayle Mckeachnie. David stated that one important issue on the JCC agenda was a discussion on the timing of long term disability benefits for judges. Dave reported that the West Jordan Courthouse facility plans are moving forward as well as progress on the judiciary's budget.

11. Debra Moore wanted to update the Commission on the recent Government Relations issues: (a) Lien recovery HB 62; (b) Notary SB 102; and (c) two hate crimes bills. Discussion followed and David Bird suggesting that the Commission take time to more thoroughly explore the issues and available information before taking a position. The motion passed unopposed that the Bar endorsed hate crimes legislation in general and that the Bar favors neither bill.

12. John Baldwin reviewed the Commission's previous discussion of Bar finances and the current budget picture. John gave recommendations for continuing to balance the budget in lieu of increasing licensing fees.

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.

Utah Bar Foundation Seeks Trustee Nominees

The Utah Bar Foundation is governed by a seven-member board of trustees all of whom are members of the Utah State Bar Association. The Utah Bar Foundation is an organization separate from the Utah State Bar Association. Two Foundation trustees have terms expiring on June 30, 2004. Pursuant to the bylaws of the Foundation, trustees are selected by Bar membership. Both trustees have expressed an interest in serving another term and will be automatically nominated for the ballot. In accordance with the by-laws, any licensed attorney, in good standing with the Utah State Bar may be nominated to serve a three-year term on the board of the Foundation. If you are interested in nominating yourself or someone else, you must fill out a nomination form and obtain the signature of twenty-five licensed attorneys in good standing with the Utah State Bar.

Nomination forms may be obtained from the Foundation's website at http://www.utahbarfoundation.org/html/downloadable_forms.html or by calling the Foundation office at (801) 297-7046. If there are more nominations made than openings available, a ballot will be mailed to each member of the Utah State Bar for a vote. Nomination forms must be received in the Foundation office no later than April 30, 2004.

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.

2004 Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2004 Convention Awards, Judge of the Year, Lawyer of the Year and Section/Committee of the Year. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nomination must be submitted in writing to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Friday, April 23, 2004.

Notice of Ethics & Discipline Committee Vacancies

The Bar is seeking interested volunteers to fill two vacancies on the Ethics & Discipline Committee of the Utah Supreme Court. The Ethics & Discipline Committee is divided into four panels which hear informal complaints charging unethical or unprofessional conduct against members of the Bar and determine whether or not informal disciplinary action should result from the complaint or whether a formal complaint shall be filed in district court against the respondent attorney. Appointments to the Ethics & Discipline Committee are made by the Utah Supreme Court upon recommendations of the Chair of the Ethics and Discipline Committee. Please send resume to Lawrence E. Stevens, Chair of the Ethics and Discipline Committee, Parsons Behle & Latimer, 201 South Main Street, #1800, Salt Lake City, UT 84145-0898 no later than May 1, 2004.

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 and issue formal written opinions concerning the ethical issues that face Utah lawyers. Because the written opinions of the Committee have major and enduring significance to members of the Bar and the general public, the Bar solicits the participation of lawyers 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 resumé 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, ability 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 responsibility to consider ethical questions in a timely manner and issue well-reasoned and articulate opinions.
- Includes lawyers with diverse views, experience and background. If you want to contribute to this important function of the Bar, please submit a letter and resumé indicating your interest to:

Steven J. McCardell
Ethics Advisory Opinion
Leboeuf, Lamb, Greene & MacRae
136 South Main Street, #1000
Salt Lake City, UT 84107

"And Justice For All" Law Day 5K Run/Walk

"To Win Equality By Law"

May 1, 2004 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

Presented by the Utah State Bar Law-Related Education and Law Day Committee

Sign-Up On-Line, By Mail, In Person. Register on-line at **www.utahbar.org** or send or deliver in person the completed registration form with fee to: Law Day Run/Walk, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111. **Registration Fee** Until April 22: $20 ($10 for Baby Stroller Division, see below). **Deadline for pre-registration is April 22!** After April 22: Race day registration from 7:00 a.m. to 7:45 a.m. with a registration fee of $25 ($12 for the Baby Stroller Division, see below).

Helping To Provide Legal Aid To The Disadvantaged. Your race registration fee helps provide much needed legal aid to the needy and people with disabilities. Please consider a charitable contribution over and above the registration fee, too. Funds benefit clients of Utah Legal Services, Legal Aid Society of Salt Lake and Disability Law Center.

When? Saturday, May 1, 2004 at 8:00 a.m. T-Shirts, race numbers, and race packets with goodies should be picked up in front of the Law School between 7:00 a.m. and 7:45 a.m.

Where? Race begins and ends in front of the S. J. Quinney College of Law at the University of Utah (just north of South Campus Drive (400 South) on University Street (about 1350 East).

Parking. In the parking lot next to the Law Library at the University of Utah Law School (about 1400 East) accessible on the north side of South Campus Drive, just east of University Street. (It's just a little west of the stadium.) Limited street parking available. Or take TRAX from downtown.

The Course. A scenic route through the U of U campus (similar or identical to last year). For race course updates as race day approaches, follow the links from **www.utahbar.org**.

"and Justice for all"

Prizes For Individuals and Speed Teams. Awards for the top **Individual** finishers in each age group (male and female). Awards for the top **Speed Team** members, too. **Speed Teams** consisting of five runners (with a minimum of two female racers) can register. All five finishing times will be totaled, with a special trophy to the winning **Speed Team's** registering organization. Please be sure to specify your team designation on your registration form – there's no limit to the number of teams an organization may have. e.g., RQ&N Team A, RQ&N Team B, etc.

Chaise Lounge Division and Baby Stroller Division. Register in the **Chaise Lounge Division** and enjoy refreshments while waiting for runners/walkers to cross the finish line! (Chairs not included). Or register you and your little ones in strollers in the **Baby Stroller Division;** strollers are welcome, but to get a t-shirt and goodies, you must register your little ones. The pre-registration fee for the Baby Stroller Division is $10 and the Race day registration fee is $12. Special prizes will be awarded to the top participants to cross the finish line (after completing the race course, of course) pushing a baby stroller. Registration for the stroller "pusher" is the general race registration amount ($20 pre-registration) . . . and each registrant in the **Baby Stroller Division** registers and competes only in the **Baby Stroller Division.**

"Team Recruiters' Competition." It's simple: the firm or organization which recruits (and signs up) the most registrants wins! And the recruiter for each top organization wins a prize (top recruiters in years past have won round-trip airline tickets, hotel stays, fine dining, etc.) To become the 2004 "Team Recruiter Champion," recruit the most registrants under your organization's name. (Last year's champion, Christensen & Jensen, set a new record for most registrants!) And, most important, the greater the number of registrants, the more funds we can donate to **"And Justice for All"**!

REGISTRATION – "And Justice For All" Law Day 5K Run/Walk

May 1, 2004 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

T-Shirts, race numbers, and race packets with goodies should be picked up in front of the Law School between 7:00 a.m. and 7:45 a.m.
Race begins in front of the S. J. Quinney College of Law at the University of Utah (just north of South Campus Dr. (400 South) on University St. (about 1350 E.).

One registration form per entrant (except Baby Stroller Division)

Please send this completed form and registration fee to Law Day Run/Walk, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111. Make checks payable to "Law Day Run/Walk". If you are making a charitable contribution, you will receive a receipt for that portion of your payment directly from "and Justice for all." **Pre-registration (must be received by April 22, 2004)**

Last Name _____ First Name _____

Address _____

City, State, Zip _____

Daytime Phone _____ E-mail Address _____

Age on May 1, 2004 _____ Birth Date (MM/DD/YR) _____/_____/_____

Recruiting Organization

_____
(must be filled in for team recruiters' competition credit)

Speed Competition Team (must be received by April 22, 2004)

_____
(team name)

Shirt Size (please check one)

❒ Child S ❒ Child M ❒ Child L ❒ Adult S ❒ Adult M ❒ Adult L ❒ Adult XL ❒ Adult XXL

Long-sleeved t-shirts & tank tops, pre-registration only (add $5 to your total). ❒ Long-sleeved t-shirt ❒ Tank top

Division Selection (please check one)

Division	Male	Female	Division	Male	Female	Division	Male	Female
Baby Stroller		A ❒						
14 & under	B ❒	Q ❒	35-39	G ❒	V ❒	60-64	L ❒	AA ❒
15-17	C ❒	R ❒	40-44	H ❒	W ❒	65-69	M ❒	BB ❒
18-24	D ❒	S ❒	45-49	I ❒	X ❒	70-74	N ❒	CC ❒
25-29	E ❒	T ❒	50-54	J ❒	Y ❒	75 & over	O ❒	DD ❒
30-34	F ❒	U ❒	55-59	K ❒	Z ❒	Chaise Lounge	P ❒	EE ❒

	Payment Amount
Pre-registration (must be received by April 22, 2004)	$ 20.00
Long-sleeved t-shirt or tank top ($5.00 extra if chosen)	$ 5.00
Baby Stroller Division Registration (please indicate shirt size) ❒ 12m ❒ 18m ❒ 24m ❒ Child XS	$ 10.00
Charitable Contribution to "and Justice for all" (you will receive a receipt for tax purposes)	$ _____
Total Payment	**$** _____

❒ Check to "Law Day Run/Walk"

Charge my ❒ Visa or ❒ MasterCard

Name on Card _____

Account Number _____

Expiration Date month _____ year _____

Waiver and Agreement

In consideration of the privilege of participating in the Law Day Run/Walk, I waive and release from all liability the sponsors and organizers of the Run/Walk, the USATF and USATF-Utah, and all volunteers and support people associated with the Run/Walk for any injury, accident, illness, or mishap that may result from participation in the Run/Walk. I attest that I am sufficiently trained for my level of participation. I also give my permission for the free use of my name and pictures in broadcasts, newspapers, and event publications. I consent to the charging of my credit card submitted with this entry for the charges selected. I understand that the entry fees are not refundable.

Date: _____ Signature/Adult Entrant _____

Signature/Guardian _____ Print name of Guardian for minor entrant _____

for more info and rules, look for link at www.utahbar.org

Parking. In the parking lot next to the Law Library at the University of Utah Law School (about 1400 East) accessible on the north side of South Campus Drive, just east of University Street. (It's just a little west of the stadium.) Limited street parking available. Or take TRAX from downtown.

Helping To Provide Legal Aid To The Disadvantaged. Your race registration fee helps provide much needed legal aid to the needy and people with disabilities. Please consider a charitable contribution over and above the registration fee, too. Funds benefit clients of Utah Legal Services, Legal Aid Society of Salt Lake, and Disability Law Center.

Discipline Corner

ADMONITION

On December 15, 2003, an attorney was admonished by the Honorable Timothy R. Hanson, Third Judicial District Court for violation of the Rules of Professional Conduct. (The Order was not explicit about which Rule was violated).

In summary:

The attorney represented a plaintiff in a civil matter. The defendant in the case intended to call the plaintiff's attorney as a fact witness at trial, and notified the plaintiff's attorney shortly before trial. A few days prior to the scheduled trial, the plaintiff's attorney and the defendant's attorney filed a joint motion for continuance of the trial date, based in part on the grounds that the defendant intended to call the plaintiff's attorney as a witness. The joint motion required the plaintiff's attorney to withdraw from representation, requiring the plaintiff to obtain new counsel. The court granted the joint motion to continue the trial date. Thereafter, the plaintiff's attorney did not withdraw, but rather filed a certificate of readiness for trial. A second trial date was scheduled, and again, it became apparent that the plaintiff's attorney would be a witness at trial. The plaintiff's attorney therefore sought another postponement, which the trial court granted. The court entered an order allowing withdrawal. Thereafter, the plaintiff's attorney continued to act as counsel for the plaintiff until another attorney filed a formal appearance on behalf of the plaintiff.

Aggravating factors include: prior sanctions.

Mitigating factors include: the rule requiring withdrawal is not explicit concerning the time for withdrawal; the attorney was continuing to assist his client.

ADMONITION

On January 5, 2004, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.3 (Diligence), 1.5(a) and (b) (Fees), 1.15(b) (Safekeeping Property), and 8.4(a) and (c) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to file a writ of habeas corpus on behalf of the clients' adult child. The clients paid the attorney more than $750. The attorney did not provide a written fee agreement outlining the basis and rate of his fee. The attorney failed to send billing statements to the clients. The attorney failed to take steps to advance the petition. The attorney gave the clients fictitious court dates and later told the clients the court dates were canceled. The attorney failed to file an appearance in the case and the court did not know the attorney was involved. The attorney did not make corrections to the petition as directed by the court.

PUBLIC REPRIMAND

On January 5, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court publicly reprimanded Craig R. Chlarson for violation of Rules 8.4(a), (b), and (c) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Chlarson obtained unemployment benefits from the State of Utah's Department of Workforce Services, to which he was not entitled, while he was employed and earning wages. The funds went principally to Mr. Chlarson's ex-wife, but Mr. Chlarson endorsed and cashed some of the benefit checks issued. On March 17, 2003, Mr. Chlarson entered a plea in abeyance to one count of Unemployment Compensation – False Statement, a Second Degree Felony.

Mitigating factors over the objections of the Office of Professional Conduct include: the wrongdoing is unrelated to the practice of law; financial distress; the funds primarily went to Mr. Chlarson's ex-wife; his inactive status with the Bar; his entry of a plea in abeyance (which will result in dismissal of the criminal proceedings); payment of restitution, and community service; and his willingness to express regret and accept responsibility.

ADMONITION

On January 5, 2004, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.4 (Communication), 3.1 (Meritorious Claims and Contentions), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney was retained to represent a client in a child visitation case. The attorney failed to adequately communicate the cost of pursuing the case to the client. The attorney did not send a billing statement to the client until a Bar complaint was filed. The billing statement was inaccurate because the attorney did not keep accurate time records. The attorney filed a collection action against the client although the attorney agreed to do the work for less than the amount of the collection action.

ADMONITION

On January 5, 2004, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 5.5(a) (Unauthorized Practice of Law) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney was suspended from the practice of law for non-payment of Bar dues. While on suspension for non-payment of fees, the attorney filed two response briefs in two different cases pending before the court.

Mitigating factors include: absence of prior record of discipline and cooperative attitude toward the Office of Professional Conduct's proceedings.

ADMONITION

On January 7, 2004, an attorney was admonished by the Chair of the Ethics and Discipline Committee of the Utah Supreme Court for violation of Rules 1.1 (Competence) and 8.4 (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney was retained to represent a client in a disability compensation claim. Two days before the hearing, the attorney requested that the hearing be rescheduled because the witnesses the attorney had subpoenaed were out of town. An administrative law judge ("ALJ") informed the attorney by faxed letter that if proof of service of the subpoenas were provided, the ALJ would decide the issue of continuance at the hearing. Approximately one hour after the ALJ faxed the letter to the attorney, the attorney called another administrative law judge to sign subpoenas for the witnesses. The attorney had subpoenaed the witnesses pursuant to district court procedure, and not in accordance with administrative procedure.

PUBLIC REPRIMAND

On January 14, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court publicly reprimanded Brian C. Harrison for violation of Rules 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.5(a) and (b) (Fees), 1.16(a) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Harrison was retained to enforce two private agreements reached between his client and the client's former spouse. Mr. Harrison took six months to appropriately respond to the client, and then informed the client that there were no grounds to enforce the agreements. Mr. Harrison also failed to follow up on a request from the client to secure the signature of the client's former spouse to sell their trailer. Mr. Harrison failed to return the client's telephone calls or respond to the client's letters. Mr. Harrison's fee was excessive in light of what was accomplished and the level of communication provided. Mr. Harrison failed to provide a written fee agreement although the retainer he requested exceeded $750. Mr. Harrison unreasonably delayed in providing the client with a billing statement, and did not provide sufficient information to communicate the basis of the fee. Mr. Harrison failed to withdraw from the representation until five months after his services were terminated.

Patrick Tan: The Co-recipient of the 2002-2003 Young Lawyer of the Year Award

by Teresa Welch

The Young Lawyer of the Year is awarded annually by the Young Lawyer's Division of the Utah State Bar. One of the most recent recipients of this distinguished award is Patrick Tan, a colleague and friend of mine at the Salt Lake Legal Defenders Association. It is my honor to introduce Patrick Tan to you, and to enlighten you to the various reasons why Patrick is wholly deserving of the 2002-2003 Young Lawyer of the Year award.

Patrick's choice to be an attorney stems from personal and emotional experiences. Patrick grew up speaking English, Cantonese, and Mandarin, and although he is fluent in all of these languages, Patrick has witnessed the struggles of family members and friends who are not as well versed in the English language. Specifically, Patrick remembers an incident in which a couple of close family members found themselves in a legal quagmire because they had signed what they thought was a guest book, only to find out that their signatures committed them to a steep financial obligation. The misunderstanding was eventually cleared up, but the impact of it on Patrick was the beginning of a new focus in life for him. From this experience, Patrick realized that not only is our legal system very complicated, but it is twice as complicated if English is one's second language. He decided at that point that he wanted to spend his life in a career in which he could help out the "underdogs" in life.

Patrick attended the University of Utah where he graduated cum laude with a Bachelor of Science in Marketing and obtained his Juris Doctorate Degree. While in law school, Patrick worked for a handful of nonprofit legal agencies, including the Multi-Cultural Legal Center, the Disability Law Center, and Utah Legal Services. In 1999, Patrick was awarded the Utah Legal Services Law Student Volunteer of the Year. During law school, Patrick also spent time working at the United States Attorneys' Office and the South Salt Lake City Attorneys' Office. Working at these various places allowed Patrick to assist an ethnically diverse pool of clients in issues related to disability law, housing and public benefit law, criminal law, employment law, disability law, and immigration law.

Upon graduating from law school, Patrick was employed at Utah Legal Services (ULS). While working at ULS, Patrick handled a case load of public benefit cases and assisted in the housing unit when requested. He participated in possession bond eviction hearings and public benefit administrative hearings. He also managed the street law (legal clinic) sites, and oversaw pro bono attorneys and law students who were working on domestic law cases in conjunction with the Utah State Bar's Pro Bono Project.

Since July 2003, Patrick has been working as a trial attorney in the misdemeanor division at the Salt Lake Legal Defender Association (LDA). Patrick is happy with this new position as he has always wanted to work in criminal law. Regarding his experiences at LDA, Patrick states: "The spirit of teamwork and cooperation at LDA is unlike anything I've ever seen and I am very proud to be a part of it. I attribute this positive chemistry to LDA Executive Director F. John Hill who does the hiring, and to Patrick Anderson who supervises the misdemeanor division. Don't get me wrong, the job is grueling and the case load is huge, but the rewards of a grateful client or a supportive colleague helping me out at a pretrial calender makes it worthwhile to go to work each day."

Teresa Welch is a Trial Attorney in the Misdemeanor Division of the Salt Lake Legal Defender Association.

Patrick fills his spare time as an executive board member of both the Asian Association of Utah and the Multi-Cultural Legal Center. He is also co-chair of the Needs of Children committee of the Young Lawyer's Division under the direction of Christian Clinger, the Young Lawyer's Division President. Patrick is involved in assisting with public relations for the Utah Indochina Chinese Benevolence Society, and is a trained mediator for the Salt Lake City Corporation Weed and Seed Program. Recently, Tan also assisted as a Judge Pro Tem for the Salt Lake City Justice Court presiding over small claims matters.

In all of his endeavors Patrick is continually committed to helping out the "underdogs" in life. By devoting his energies to people who struggle with financial difficulties, language barriers, and various disabilities, Patrick is devoted to helping out the less fortunate in life. Congratulations to Patrick Tan for being the co-recipient of the 2002-2003 Young Lawyer of the Year award!

Save This Date!

Please mark your calendars for the Annual Utah State Bar Law Day celebration on

Friday, May 7, 2004!

Robert Grey, Jr., President Elect of the American Bar Association, will be our keynote speaker in honor of the 50th Anniversary of Brown v. Board of Education.

Dinner and the awards banquet will be held at the Grand America Hotel, Salt Lake City, at 6:00 p.m.

Please contact Michael Young at 801-963-9993 if you have any questions.

Paralegals v. Legal Assistants

by Sanda R. Kirkham, Chair

Paralegals v. Legal Assistants	Notice of Name Change* Judge: Ima Changin

WHEREAS, the American Bar Association ("ABA") has determined that the term *"paralegal"* is gaining prominence nationwide and that the term *"legal assistant"* is becoming less common; and

WHEREAS, in August of 2003, the ABA approved a change to the name of the Standing Committee on Legal Assistants to the Standing Committee on Paralegals, and

WHEREAS, The National Association of Legal Assistants (NALA©) has redesigned its certification mark to include a CP (Certified Paralegal©) designation; and

WHEREAS, in order to stay on the cutting edge of evolution of the paralegal profession, it has been approved by the Board and Members of the LAD, pursuant to the LAD Bylaws and proper notice and ballot, to change the name of the LAD to the Paralegal Division of the Utah State Bar; and

WHEREAS, the Executive Committee of the Board of Bar Commissioners have voted and approved of the change in name.

IT IS HEREBY RESOLVED THAT

The LAD is authorized and directed to proceed as necessary to reflect the name change on all LAD materials, including but not limited to, amendment of the LAD Bylaws, letterhead, web site, etc., and as required by the Utah State Bar to effectuate the name change in compliance with the Bars rules, regulations, and policies, and in accordance with Utah State law.

The Paralegal Division will not be referred to with an acronym, as was the LAD. Reference will be made to the "Paralegal Division" or simply the "Division" in order to avoid any unpleasant or unfavorable acronyms within the Paralegal Division.

DATED this 1st day of January, 2004.

PARALEGAL DIVISION

By *Sanda R. Kirkham*

Sanda R. Kirkham, Chair

*Please note that this pleading is intended to be humorous and not intended to be a formal court pleading.

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
03/09/04	**Estimating Damages in Antitrust Cases, Including Possible Daubert Pitfalls.** Guest Speakers Luke Froeb, Director of the Bureau of Economics Federal Trade Commission and David Scheffman, Former Director of the Bureau of Economics Federal Trade Commission. 12:00 – 2:00 pm. $40.	2

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04/18/04	**Annual Real property Section Seminar.** 8:30 am – 1:30 pm. Agenda pending.
04/22/04	**Annual Collection Law Section Seminar.** 9:00 am – 12:30 pm.
04/23/04	**Powerful Writing for Appellate Attorneys.** Guest Speaker Professor Elizabeth Francis defines the style and structure of the accomplished appellate brief. 9:00 am – 5:00 pm. $140, $120 for Appellate Practice and Litigation Section Members.
05/06/04	**Annual Spring Corporate Counsel Section Seminar.** 9:00 am – 1:30 pm. Agenda pending.
05/13/04	**Annual Spring Business Law Section Seminar.** 9:00 am – 1:30 pm. Agenda pending.
05/14/04	**Annual Family Law Section Seminar.** Full day. Agenda pending.
05/19/04	**Annual Labor & Employmet Law Section Seminar.** 9:00 am – 1:30 pm. Agenda pending.
06/20/04	**Annual Paralegal Division Seminar.** Full day. Agenda pending.

To register for any of these seminars: Call 297-7033, 297-7032 or 257-5515, OR Fax to 531-0660, OR email cle@utahbar.org, OR on-line at www.utahbar.org/cle. Include your name, bar number and seminar title.

Formation of Cyberspace Law Section

The Utah State Bar is pleased to announce the formation of a new section. The Cyberspace Law Section will focus on issues such as privacy, protection of intellectual property in e-commerce transactions, avoiding intellectual property infringement on the Internet, domain names, spam and other e-mail issues, electronic contracts, FTC and FCC do not call regulations, security, and other issues.

Please contact John Rees at Callister Nebeker & McCullough with any questions. 530-7388 or jhrees@cnmlaw.com

An organization meeting of the section will be held on April 7, 2004 • 12:00 p.m. Utah Law and Justice Center

Lunch $15
RSVP to Stephanie at 297-7032 or sections@utahbar.org

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, 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.

Utah Bar Journal and the Utah State Bar do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

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.

POSITIONS AVAILABLE

Administrative Law Judge II/Legal Counsel – $27.92-$41.95 hourly (Step Range 67-82), Full-time career service exempt Position reports to the Chairman of the Public Service Commission and serves at the pleasure of the three member Commission. Primary responsibilities include presiding at hearings as designated by the Commission, advising the Commission on legal matters, drafting orders that convey decisions of the Commission, writing legal briefs, defending Commission orders before the Utah Supreme Court, and conducting legal research. For more information regarding this position see the Public Service Commission website at http://www.psc.utah.gov/JobOpports.htm or call (801) 530-6716.

Medium size AV downtown firm seeking lateral transfers to fit in with existing practice areas in commercial litigation, real estate, bankruptcy and domestic relations. New offices, good working situation, benefit directly from your own hard work. Send inquiries to Christine Critchley, Utah State Bar, Confidential Box #5, 645 South 200 East, Salt Lake City, Utah 84111-3834.

Attorney: Jeffrey Burr & Associates, a prominent Las Vegas Estate Planning & Probate law firm, is seeking a candidate with a J.D. and CPA or LL.M. (taxation) with 2+ years experience. Highly competitive salary commensurate with experience. Fax resume to (702)451-1853 or email jamie@jeffreylburr.com

Strong & Hanni, PC, is looking for a 4+ year Family Law attorney to join the firm. Experience in Family Law is required. If you have a desire to merge your personal practice with a well established firm, or if you are looking for a change, please send your resume to resumes @strongandhanni.com or fax to Executive Director, (801) 596-1508.

Staff atorney for small Ogden General Practice Firm. No experience necessary. Send brief resume and writing sample to: Christine Critchley, Confidential Box #15, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111.

Mid-size AV rated Salt Lake firm seeks associate with 2-5 years litigation experience for commercial/real property practice. Strong writing skills and good courtroom presence required. Please respond to Christine Critchley, Utah State Bar, Confidential Box #5, 645 South 200 East, Salt Lake City, UT, 84111 or e-mail ccritchley@utahbar.org.

Salt Lake Legal Defender Association is currently updating its trial and appellate attorney roster. If you are interested in submitting an application please contact F. John Hill, Director, for an appointment at 801-532-5444.

South valley firm seeking full or P/T attorney. Pleading/writing skills necessary, must anticipate court appearances, pay commensurate to experience. Submit resume to brenda@cullimore.net or fax to Brenda 571-4888. If questions, you can call 571-6611.

Building Law Firm: Need sharp aggressive attorneys to join estate and tax attorneys at beautiful fifth floor 53rd South Frwy Towers offices. Looking for family law, bankruptcy, PI, commercial and criminal attorneys to shares cases and referrals. Would participate in joint firm promotion and advertising your specialty. Offices with T-1, multi-conference phone system, receptionist, fax and two conf. rooms. Call Randy or John at 281-0200, or e-mail richards@aros.net

POSITIONS WANTED

Graduate of private New England law school seeks entry-level attorney position. Experience as a student prosecutor in a criminal law clinic. Background in the medical field with a Bachelors degree in the health sciences. Candidate for the Feburary 2004 bar exam. Contact Richard L. Gray at 801-599-3913 or rlgray9@hotmail.com

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Historical Bld. on Exchange Place has 2 spaces available. 844 sq. ft. office suite which includes two offices, secretary/reception area and small conference room or third office for $975 per month; 310 sq. ft. office for $400 per month. Half block from State and Federal courts. Receptionist services available and parking. Contact Joanne Brooks or Richard @ 534-0909.

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