Utah Bar JOURNAL

Volume 17 No. 3
April 2004

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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: High Uintahs, by Brett P. Johnson, McKay, Burton & Thurman, Salt Lake City.

The *Utah Bar Journal* is published monthly by the Utah State Bar. One copy of each issue is furnished to members as part of their Bar dues. Subscription price to others, $45.00; single copies, $5.00. For information on advertising rates and space reservation, call or write the Utah State Bar offices.

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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.

The Utah Bar Journal

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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.

By Creating Safe Harbors For Non-Lawyers, the Proposed UPL Rule Will Increase Access to Legal Services

by Debra Moore

If you haven't yet focused on developments surrounding the unauthorized practice of law in Utah, now's the time. The Supreme Court Advisory Committee on the Rules of Professional Conduct has recommended adoption of a proposed rule that creates safe harbors for non-lawyers who practice law. Most of us probably assume the practice of law is what lawyers, and only lawyers, do. In a distinct departure from that assumption, the proposed rule defines the practice of law as representing others by applying law to their specific facts and circumstances – regardless of who does it. The proposed rule starts from the premise that only licensed attorneys may practice law, but then creates numerous exceptions that effectively create safe harbors for non-lawyers.

Many of the exceptions merely recognize the reality that a great deal of law practice already is conducted by non-lawyers and that much of that practice is virtually impossible to control. For example, the internet has made abundant legal information and self-help resources available to the public from sources around the globe. More fundamentally, creating safe harbors reflects sound public policy whenever the public benefit from access to legal assistance by non-lawyers outweighs the risk of harm.

Determining when those conditions exist is not a job for the faint of heart. As noted by a task force charged with making recommendations for a new definition of the practice of law in Texas, "[P]ublic and lawyer opinion on UPL issues is driven by deep-felt divisions . . .that . . . make impossible – in the short term – the forging of a consensus, even among lawyers, as to how, or even whether, the regulation of the unauthorized practice of law should be changed. These divisions of opinion are made even more problematic by the rapid changes now resulting from the computerization and internationalization of American life and business, which changes will necessarily occur as well in American legal practice."

Often, the lack of consensus arises from a failure to consider both sides of the equation. Some tend to focus on the risk of harm from unlicensed providers without considering cost and other barriers to access to licensed attorneys. Others consider only the cost while minimizing the risk of harm. As in Texas, little consensus may emerge on these issues in Utah. As revolutionary as the proposed rule may seem to many, it leaves some questions unresolved. For example, the rule doesn't address whether minimal regulation, such as certification, could permit non-lawyers to provide routine legal services with minimal risk to the public. For example, the Arizona Supreme Court has adopted regulations for document preparers and the Washington Supreme Court regulates Licensed Practice Officers who provide closing and escrow services. Nor does the rule create a process for determining when it might be appropriate to adopt additional safe harbors given rapid changes in the delivery of legal services. In adopting a similar rule, the Washington Supreme Court created a Practice of Law Board whose charge includes "making recommendations regarding the circumstances under which non-lawyers may be involved in the delivery of certain types of legal and law-related services."

Whatever the specifics of the final rule, the basic concept of creating safe harbors permitting non-lawyers to provide limited legal services when the benefits of increased access outweigh the risks should prevail. The comment period will be important in identifying what those benefits and risks are in particular circumstances. The most helpful comments, however, will be those that consider not just the potential harm or the increased access, but both.

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President-Elect & Bar Commission Candidates

President-Elect Candidates

DAVID R. BIRD

David R. Bird is a shareholder at the law firm of Parsons Behle & Latimer where he has practiced since graduation from the Brigham Young University Law School in 1977. Mr. Bird concentrates his practice in natural resources and governmental relations. He is admitted to practice in all courts in Utah, the Tenth Circuit Court of Appeals and the United States Supreme Court.

Mr. Bird has been active in Utah State Bar activities since his admission to practice and has served on many committees and in many sections; chairing the Bar's Governmental Affairs Committee for over 10 years. He is currently a Bar Commissioner from the Third Division and serves on the Commission's Executive Committee. He served as a Bar representative on the Judicial Conduct Commission and is the Bar representative on the Judicial Council.

He is married to Stephanie J. Bird and they are the parents of 4 children.

Statement of Candidacy

I have been a member of the Utah State Bar for over 25 years. When I was a newly admitted lawyer, senior members of my firm advised me to become active in Bar activities. Following that advice has kept me involved with the best and brightest of our profession.

I have had the opportunity to move through the chairs of the Energy, Natural Resources and Environmental Law Section. I chaired the Governmental Relations Committee for 10 years. During my first term on the Bar Commission I have also been privileged to serve on the Judicial Conduct Commission, the Judicial Council, and the Bar Executive Committee.

Bar activities have been important in my professional career. I hope to share my enthusiasm for the Bar with others. If elected I will focus on strengthening relationships between the Bar, the Bench, and the Legislature; on improving civility and professionalism; and on connecting lawyers and those who need their services.

Bar governance depends on the talents and efforts of many people. I recognize I will not be the source of most good ideas. If elected I will seek broad participation. I have enjoyed my relationship with other Bar Commissioners and expect to work with them, committee and section leaders, Bar members, and staff to continue moving our profession forward.

I ask for your vote as President-elect.

GUS CHIN

A native of Jamaica, I have lived in Utah since 1983. A municipal prosecutor with Salt Lake City since 1998, I received my undergraduate and J.D. degrees from the University of Utah. Prior to joining the Salt Lake City prosecutor's office, I briefly worked at the Attorney General's office and was a law clerk and law clerk-bailiff for the Honorable Tyrone E. Medley.

In addition to my daily routine as a prosecutor I also volunteer as a Small Claims Pro Tempore Judge in the Third District Court. Each spring I coach as well as judge the junior and high school teams who participate in the annual Mock Trial Competition. For the past several years I also volunteer as a guest speaker for Marty Bernstein's class at Central High School. I am also a member of the S.J. Quinney College of Law Alumni Board of Trustees.

On a personal note, I am semi-fluent in Spanish and enjoy reading, cooking, meeting people, traveling, and most of all spending time with my family who keep me grounded, and provide balance.

Statement of Candidacy

Although prepared to address concerns about issues such as resource management, lawyer referral service, CLE, dues, occupational stress, and the disciplinary process, I seek the opportunity to also fulfill the mission of our Bar by focusing on Professionalism and Service.

On the subject of Professionalism, we need to dispel the misguided perception or expectation of an absolutely adversarial system. To this end, I plan on advocating courtesy, civility and competence. Our profession is ill-served when attorneys are uncivil, engage in questionable practices, render ineffective assistance, or fail to fulfill their oath and responsibilities. On the other hand, those who "play by the rules" as well as mentor and provide needed guidance greatly enhance our profession.

On the subject of Service, I would encourage continued service to profession as well as the community, thereby advancing the vision of the Bar: "To lead society in the creation of a justice system that is understood, valued, respected and accessible to all." In addition to pro bono service, we can also serve the community by fostering respect for the role and contributions of attorneys. One way is to inform the public and address issues in practice areas such as employment law, family law, property law, constitutional law, and criminal law.

I would gladly welcome your support to be your next Bar President.

Second Division Candidates

Uncontested Election… According to the Utah State Bar Bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected."

Felshaw King is running uncontested in the Second Division and will therefore be declared elected.

FELSHAW KING

Lifetime resident of Utah and Second Judicial District. Graduated from the University of Utah Law School. Admitted to Bar in 1962. Admitted to the Bar of Supreme Court of United States, Tenth Circuit and Fifth Circuit.

Representative in Utah House of Representatives 1965-66, Chairman of House Judiciary Committee and House Majority Whip; Commissioner, Davis County Housing Authority, 1979-1984; Chairman of Education Section of Utah State Bar, 1984; Chairman Utah Committee of Consumer Services, 1977-1989; President, National Association State Utility Consumer Advocates (NASUCA), 1985-1987; State Committee of Association of Trial Lawyers of America 1965-1967, State Representative to Legislative Section, 1969-1970; Member of Board of Governor's Utah Trial Lawyers Association, 1967; President, Aldon J. Anderson American Inns of Court, 1997; Two years sea duty as Line Officer in the United States Navy, Retired from U.S. Naval Reserve as Commander, Judge Advocate General Corps.

Engaged in private practice in small firm for over 38 years representing school districts, municipalities, special service districts and private clients on a variety of matters, including primarily personal injury, estate planning and business matters.

Statement of Candidacy

Serving as Utah State Bar Commissioner for the Second Division for the past three years has been an honor. I look forward to the opportunity to serve for the next three years. Serving as a Bar Commissioner has been rewarding and exciting as well as sometimes frustrating. During the next three years I would like to see the Bar concentrate its focus on the core functions of the Bar, which include extended member benefit programs, such as CaseMaker. The Bar is in the process of developing a strong relationship with the Legislature and I fully support that effort. The first steps have been made toward providing some assistance to attorneys dealing with OPC complaints and I strongly support expansion of that program. For those of us who practice outside of Salt Lake County, I support efforts of the Bar to make Bar programs more inclusive for us. The Bar should be a key factor in the professional career of every lawyer and the Bar should make every reasonable effort to be "user-friendly" to everyone. In order to do this, each member should express his or her feelings or suggestions to his or her Commissioner so that the Commission can feel close to the members and responsive to their needs. Full support from all members of the Bar, wherever located and however situated is important for continued success of the legal profession.

Third Division Candidates

There are three vacancies in the Third Division. Each eligible Bar member may vote for three of the following six candidates.

IRSHAD A. AADIL

Statement of Candidacy

Dear Members of the Bar – This is to introduce myself and provide a voice to those who have some concerns, solutions and ideas about the use of the Bar dues, effectiveness and extent of CLE; unjustifiable charges for seminars and services on Lawyers Helping Lawyers; the need for universal health and life insurance through the bar without segregating the healthy from those not so fortunate; fresh views; need of diversity in this noble profession; and other issues. I believe that effective listening is the beginning of solutions to a service oriented Bar and am committed to listening to the concerns you have.

I am a graduate of New York University School of Law. I came to Utah to join Utah Issues as a VISTA (Volunteer In Service To America) and I grew to appreciate Utah and decided to settle here. I also assisted Utah Legal Services in resolving issues concerning low income citizens, minorities and landlord/tenant issues. My practice is focused primarily on immigration, family law and the problems faced by the immigrants and the poor. I am committed to the ethics of pro bono service. I am a believer in the value of mediation in which I have training. In 1986, I helped mediate between the U.S. Attorney, Brent Ward and the adult theater owners which resulted in the closure of the theaters. My involvement was prompted by my concern about the degrading effects of such entertainment on women, children and the community's moral values. I have always offered my services to my colleagues and the Bar in times of need. I have first hand experience with bias in employment, judicial conduct and the way we practice law.

I am a student of simplicity and the application of ethical precepts to practical problems, learned from a father who walked with great teachers such as Mahatma Gandhi. I sincerely believe in making things easy for humanity and the creation around us to know good and God. Though I have found my colleagues here dedicated to high standards and moral values yet lacking in incorporating those values in solutions to disputes and the guidance that the clients deserve and expect.

I have served the community and minorities at large for the last twenty years and now I feel the need to devote some time for my colleagues to elevate the image of the profession. I believe we can create a model Bar which is not an end itself but a cultured family of decent professionals assisting each other and leading this nation in these days of unprecedented challenges to our democracy, and our moral leadership to humanity. So, I propose regular informal gatherings to cultivate our own spirits, friendships and peace of mind.

I would appreciate your vote and hearing your thoughts. Considering the uncertainty of life and while I have the opportunity I will also appreciate your forgiveness in case I have ever disturbed your peace in pursuit of the mundane.

DAVID R. BIRD

Please see David Bird's biographical information under the title President-Elect on page 8.

Statement of Candidacy

During my three years on the Bar Commission it has been my privilege to serve with capable and dedicated commissioners, bar committee and section leaders, professional staff, local bar leaders and lawyers throughout Utah. I stand in awe at the tens of thousands of hours donated by you to improve the justice system and our practices.

There are numerous difficult issues confronting our profession: How to provide affordable legal services to all who need and desire them? What is the proper balance for attorney oversight and discipline? How do we foster civility between practitioners? How is the profession to be regulated? And, even, what is the proper definition of "the practice of law?"

Continued widespread public acceptance of the Rule of Law is crucial to a civil society. Tensions between the three branches of government in recent years have tarnished public perception of the system. Lawyers and judges have also lost some public respect. The organized Bar has a critical part to play in fostering and maintaining public confidence in the legal system and respect for participants in it.

I want to be involved in these issues and solicit your vote for the Bar Commission.

GUS CHIN

Please see Gus Chin's biographical information under the title President-Elect on page 8.

Statement of Candidacy

My experiences as a voting Bar Commissioner and as an ex-officio Bar Commissioner coupled with my continued desire to serve have motivated me to seek another three year term representing the Third Division members. I have enjoyed serving on various committees and being a bar liaison. Most of all, I still believe that effective bar governance requires active participation and committed representation of diverse views.

Over the past three years, the Commission has addressed a multitude of issues such as the admission process, diversity, access to justice, reciprocity, and professionalism. Despite an absence of unanimity on all issues, the Commission's focus has been and continues to be "the Best Interest of the Bar." As a commissioner I have enjoyed discussions with many of you about the Bar and serving your needs.

I am mindful of the many concerns expressed about issues such as the disciplinary process, the administration of justice, professionalism, resource management, lawyer referral, dues, and CLE. I seek the opportunity to continue to serve on the commission and ask for your support for another three year term.

CHRISTIAN W. CLINGER

Christian W. Clinger is a shareholder with the law firm of Clinger Lee Clinger, LLC where his practice areas include civil and commercial litigation, business law, governmental relations/political consulting, and mediation. Christian earned his law degree from Creighton University School of law in Omaha, Nebraska. Following graduation, Christian worked for Ameritrade, Inc. in its corporate offices in Omaha. In 2000, he accepted a judicial clerkship with the Third District Court in Salt Lake City. Prior to founding Clinger Lee Clinger, Christian was an attorney with Callister Nebeker and McCullough.

During the past six years, Christian has been elected as the ABA 8th Circuit Lt. Governor representing law school students from Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota, the 2001-2002 Utah State Bar Young Lawyers Division Treasurer, and the 2003-2004 President of the Utah State Bar Young Lawyers Division. This past year, he has served on the Utah State Bar Commission as an Ex Officio member. He is currently a committee member of the *Brown vs. Board of Education* 50 Year Anniversary Committee and the chair of the *Brown vs. Board of Education* Film Festival. As President of the Young Lawyers Division, Christian oversees its operating budget and 12 subcommittees which include Tuesday Night Bar, "and Justice for all," Continuing Legal Education, Bar Convention Committee, Public Education, and Community Service.

Christian and his wife, Suzanne Lee Clinger, who is also a member of the Utah State Bar, reside in Salt Lake City, and they are the parents of four children.

Statement of Candidacy

Dear Colleagues and Friends – Thank you for your encouragement and nomination as a Bar Commission candidate from the Third District. I appreciate your support, and I ask for your vote this coming May.

This past year I have served as an Ex Officio member of the Bar Commission. I have learned of the many important administrative responsibilities that the Bar Commission controls and directs such as budgetary issues, community outreach, and member services. I am prepared to represent you and lend your voice to the deliberations and policy decisions before the Bar Commission.

As I have met with many of you, I have come to appreciate the strength, integrity, and commitment to public service that members of the Utah State Bar share. I hope to continue in these traditions and increase communication and activity within the Bar.

SCOTT SABEY

Mr. Sabey is a shareholder at the law firm of Fabian & Clendenin. He focuses his practice in real estate law and development, business law, and related litigation. He has been involved in both residential and commercial real estate developments and transactions since 1985. Mr. Sabey is past Chair of both the Real Property Section and Business Law Section of the Utah State Bar. He has served on the Bar's Governmental Relations Committee since 1997, and is currently its Co-Chair. Mr. Sabey is also a registered lobbyist and has lobbied on behalf of the Bar on legislation affecting its members. He served on the Rules Committee for Small Claims Court, served on the Committee reorganizing the Judge Pro Tempore system, wrote the Small Claims Judge's Benchbook, and currently teaches the classes for

new Small Claims Judges.

Mr. Sabey received his Bachelor of Arts Degree from Brigham Young University, a degree from the University of Florence, Italy, and later his Law Degree from Golden Gate University, School of Law in San Francisco, California. During law school he was on the Dean's Honor List, and acted as Chairman of the Graduation Committee.

Mr. Sabey currently serves as President of the Board of Directors for the Camp Kostopulos Dream Foundation, as well as on several other community groups, and sits monthly as a Pro Tem Judge. In his spare time he visits with his wife and son.

Statement of Candidacy

My involvement with the Bar and the Legislature over the past several years has taught me that neither our profession, nor our organization is held with the degree of esteem we deserve up on the Hill. I believe the problem lies mainly with a lack of communication and regular interaction between the two groups. Some members of the Bar may feel that such a relationship is unimportant. I think, however, that the importance of the effect that the Legislature can have on us is demonstrated by the passage last year of House Bill 349, which defined the practice of law as only appearing in a court of record. Every year we see bills that attempt to modify the Rules of Practice or Evidence by statute rather than by Rules Committee, or make the judicial nomination process and the judicial review process more and more political. We also see attempts to bring the Bar under the Legislature's control through regulation by the Department of Occupation and Professional Licensing.

While I recognize the natural tension which exists between the different branches of government, I would like to see the relationship improve between the Bar and Legislature. An improved relationship would allow for more constructive input by the Bar on the laws we all must deal with. It would also reduce the amount of negative legislation directed at the Bar and Courts. I would like to work on this as a Bar Commissioner.

It is your Bar. Please take the time to vote, and I hope I can count on your support.

CLAYTON A. SIMMS

Clayton A. Simms received his Bachelor of Business Administration from the University of Houston and his Juris Doctor from the University of Utah.

Mr. Simms has worked in Washington D.C. for Congressman Jose E. Serrano. Mr. Simms past president of the Utah Minority Bar Association and currently sits on the Utah State Bar Commission as an Ex Officio member. As a member of the Utah Minority Bar Association Mr. Simms has been instrumental in securing the support of Utah law firms for the *Pledge to Racial and Ethnic Diversity for Utah's Legal Employers,* which encourages Utah law firms to hire, train and promote minority attorneys. Mr. Simms is a partner in the law firm of Overson & Simms, LLC, which is one of the founding sponsors of the *Pledge to Racial and Ethnic Diversity for Utah's Legal Employers.*

Mr. Simms' practice is focused almost exclusively in criminal law, and he is currently the co-vice chair of the Utah State Bar Criminal Law section. Mr Simms is a trial lawyer who has tried numerous Murder, Kidnapping, Robbery, Burglary, Sex Crimes and Drug Cases. *Utah Business Magazine* recently listed Mr. Simms as one of the top Criminal Law attorneys in Utah.

Statement of Candidacy

Dear Third Division Colleagues – I am seeking your vote for Utah State Bar Commission, Third Division. I am a criminal defense attorney with the firm of Overson & Simms and have worked as a criminal defense attorney since graduating from the University of Utah, College of Law in 1997.

Simply put, I am running for Bar Commissioner to ensure that our Bar dues are not raised to fund unnecessary projects. As a partner in a small law firm, I understand how to run an organization in a financially conservative manner.

Together, I believe, we can start to change the negative public perception of attorneys. More can be done to protect the legal profession from attacks by everyone from politicians to accountants.

As a criminal defense attorney, I firmly believe in the right to a jury trial and understand, respect and appreciate the jury trial process. For this reason I would urge the Utah State Bar to actively fight mandatory arbitration or any other legal strategy designed to chip away at our Constitutional rights.

I am also an advocate of a restrained bar discipline process, which should focus on the serious and egregious breaches of ethics and allow the rest of us to practice law.

Again, I am seeking your vote. Thank you.

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UTAH STATE BAR

July 12 - 18, 2004

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Confirmed reservations require an advance deposit equal to one night's room rental, plus tax. **In order to expedite your reservation, simply call our Reservations Office at 1-800-786-8259.** Or, if you wish, please complete this form and return it to our **Reservations Office, P.O. Box 10, Sun Valley, Idaho, 83353.** A confirmation of room reservations will be forwarded upon receipt of deposit. **Please make reservations early for best selection!** If accommodations requested are not available, you will be notified so that you can make an alternate selection.

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Two Bedroom (up to 4 people)	$249.00
Three Bedroom (up to 6 people)	$279.00
Four Bedroom (up to 8 people)	$329.00

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Accomodations requested: _____ Rate: _____ # in party: _____

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Airline/Airport: _____ Arrival Date/Time: _____ Departure Date/Time: _____

Please place the $ _____ deposit on my _____ Card # _____

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Practice Pointer: Training and Supervising Non-Lawyer Assistants

by Kate A. Toomey

Start with the premise that if you're a law firm partner, your responsibilities include seeing to it that your firm adopts measures that give "reasonable assurance" that the conduct of your non-lawyer employees and associates is "compatible" with your professional obligations. *See* Rule 5.3(a), R. Pro. Con. Likewise, if you have direct supervisory authority over someone else, you must "make reasonable efforts to ensure that the person's conduct is compatible" with your professional obligations. *See* Rule 5.3(b), R. Pro. Con. Remember, too, that you're responsible for conduct that would constitute a violation of the Rules of Professional Conduct if you did it, ordered it, knew about and ratified it, or knew about it "when its consequences can be avoided or mitigated" but failed to fix it. *See* Rule 5.3(c), R. Pro. Con. The policy reasons behind the rules are sound: they promote professional competence and protect the public interest. *See e.g. Mays v. Neal,* 938 S.W.2d 830, 835 (Ark. 1997).

Training and supervision are the keys to avoiding problems, and careful documentation of your efforts will help you avoid being sanctioned for the actions of rogue employees. This article will help you consider the measures to take in protecting your clients, and in turn, may help you avoid or more easily resolve a Bar complaint. Here are some basic suggestions:

Vet your prospective employees. The best thing you can do for your practice and your own peace of mind is to hire honest and reliable employees. Thoroughly check references, but don't stop there. Talk to former employers, ask about unexplained gaps in the work history, and make forthright inquiries about arrests and convictions. I'm not suggesting that people don't deserve a second chance, but you might think twice about hiring someone who has embezzled money from a previous employer, or forged documents for personal gain, or been fired from a previous position for hiding the mail. *See e.g. In re Marshall,* 498 S.E.2d 869 (S.C. 1998) (attorney hired childhood friend; after employment terminated, employee's embezzlement came to light, and attorney discovered employee had criminal record for fraudulent checks). Law offices require personnel of the highest integrity.

Educate your employees about your ethical obligations. I'd start by having them read the current Rules,[1] then meeting to review those with special significance for non-lawyer employees. Be sure to explain the reasons for particular rules – some of them aren't obvious to non-lawyers. From my perspective, the short list would include the rules governing diligence, communication, confidentiality, conflicts of interest, trust accounts, candor and honesty, communications with persons represented by counsel, and the unauthorized practice of law. Illustrate with examples, and encourage questions. Underscore the importance of confidentiality by having employees sign a confidentiality agreement. Make a note in the personnel file that you've taken these steps, and keep a copy of the agreement.

Make training a continuing priority. Encourage your employees to attend appropriate skill improvement courses and workshops, but even if this isn't something you can afford, make time to meet periodically to review the office's ethical obligations. Keep in mind that people grow into their jobs, and the nuances of the rules may become clearer to someone who has had a little experience. Use internal memoranda to remind people of their responsibilities, and put copies in the personnel files as appropriate. Seek literature that reinforces ethical responsibilities and encourage your assistants to read it; this is an inexpensive way to keep ethics issues in the forefront.

Don't share fees with your assistants. Attorneys with the best intentions sometimes consider fee-splitting as a means of developing incentive to work harder or more creatively on a case. Still, it's forbidden. So think of another way to stimulate employee incentive – additional time off later, career enhancing training, access to a more convenient parking place, or the like.

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And bear in mind that if you can afford it, paying your valued employees a generous regular salary is often the best incentive of all.

Keep your hands on the wheel. Remember, you're the lawyer. This means that you don't allow your non-lawyer assistants to accept cases on your behalf. This means that you don't allow non-lawyer assistants access to your trust account. This means that you don't allow non-lawyer assistants to file pleadings you haven't personally reviewed. *See Oklahoma Bar Ass'n v. Patmon,* 939 P.2d 1155, 1161 (Okla. 1997) (attorney disciplined for allowing secretary to file misleading motion). And to these ends, you don't keep a signature stamp in the office for non-lawyer assistants' general use without direct supervision. (Better yet, don't have a signature stamp.) This also means that you don't delegate all client communications to your non-lawyer employees, even if you're spread so thin that you're having trouble doing it yourself. *See e.g. In re Struthers,* 877 P.2d 789, 797 (Ariz. 1994) (noting "it is no excuse that [the attorney] overburdened himself with so many cases that he was unable to properly supervise his employees").

Don't blame your staff for errors. If you do this, you only look as though you're trying to avoid responsibility. And even if you're not trying to avoid responsibility, blaming others is never the classy response.

Don't ask or allow your staff to lie for you. It's legitimate to be unavailable, but don't instruct your staff to tell people you're out when you're in. Likewise, don't ask or permit them to fudge about a case's status or anything else for that matter. If you request or permit lying on your behalf, even on seemingly trivial matters, that becomes tacit endorsement of fundamental dishonesty.

Set the tone. If you take your ethical responsibilities seriously, your employees are more likely to do so as well. By the same token, nothing undermines an ethically conscientious atmosphere more profoundly than an attorney who adopts a disrespectful attitude toward the Rules of Professional Conduct. Likewise, overt expressions of cynicism about the legal system and the integrity or competence of judges and others who serve the system tend to rub off and be repeated. Conduct yourself as an officer of the court and your staff will follow suit.

Consider some cautionary tales. Essentially, we all know the general parameters of the rules. But because the intricacies of their application depend in large measure upon specific facts, here are some examples from reported cases.

A passive approach to communicating with clients isn't sufficient.

So, for example, your duty of communication isn't fulfilled solely by providing your telephone number so the client can initiate contact. *See In re Flack,* 33 P.3d 1281, 1285-1286 (Kan. 2001). Indeed, the rules require an attorney to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4(b), R. Pro. Con. An attorney who never met the client, who never spoke with her on the phone, and whose only contact with the client was through his staff, violated this rule of communication. *See Mays v. Neal,* 938 S.W.2d 830, 834 (Ark. 1997).

Don't allow your staff to serve as a complete buffer between you and your clients. For example, an attorney was disciplined for permitting her paralegal to direct all appointment-making, telephone calls, and mail to herself, and otherwise delegated unfettered authority over the office. *See In re Marshall,* 498 S.E.2d 869 (S.C. 1998). Only later did the attorney realize that correspondence had come and gone without her knowledge, and that she had clients whom she had never met.

The rules prohibit attorneys and law firms from sharing legal fees with non-lawyers.[2] *See* Rule 5.4(a), R. Pro. Con. An attorney who received a nominal amount of the fee collected by a "company of client service representatives" and its associated companies was disciplined for violating the rule against fee sharing. *In re Flack,* 33 P.3d 1281, 1287 (Kan. 2001). An attorney who turned over all fees to a company of non-lawyers, with any profit remaining after the payment of expenses "distributed by agreement of the parties," also violated the rules. *In re Struthers,* 877 P.2d 789, 796 (Ariz. 1994).

The trust account rules require an attorney to keep the attorney's money separate from client money, to promptly pay clients money received on their behalf, and so on. *See* Rule 1.15, R. Pro. Con. An attorney was disciplined for "allow[ing] incompetent and untrustworthy employees to manage his trust account and then fail[ing] to supervise them." *In re Struthers,* 877 P.2d 789, 792 (1994 Ariz.). Among other things, the attorney "routinely signed pages of blank checks for his employees to complete in his absence," and this left them "free to decide whether and how much to pay clients." *Id.*

Personally review your trust account records; don't leave this to others. *See In re Stransky,* 612 A.2d 373 (N.J. 1992) (attorney's wife able to conceal misappropriation over period of years because attorney failed to review trust accounts and personal accounts). Direct your bank not to accept anything but your original signature. *See Oklahoma Bar Ass'n v. Mayes,* 977 P.2d 1073, 1078 (Okla. 1999). Adopt an office policy that only you may open your bank statements; if you don't get one, contact your bank. *See id.*

On a related subject, don't allow your staff to "borrow" money from the trust account. *Curtis v. Kentucky Bar Ass'n,* 959 S.W.2d 94, 95 (Ky. 1998) (attorney's wife/office manager/secretary/bookkeeper used trust account check to purchase dog, and fully reimbursed trust account within a few days).

An attorney who acknowledged her responsibility, but nevertheless blamed her staff for various failures was sanctioned for violating the rule regarding responsibility for non-lawyer assistants. *See In re Kellogg,* 4 P.3d 594, 603 (Kan. 2000). Likewise, an attorney "cannot rely on the high degree of competence [his secretary] exhibited over the years and the trust he developed in her to excuse his failure to . . . guard funds over which he was a fiduciary." *Office of Disciplinary Counsel v. Ball,* 618 N.E.2d 159, 162 (Ohio 1993).

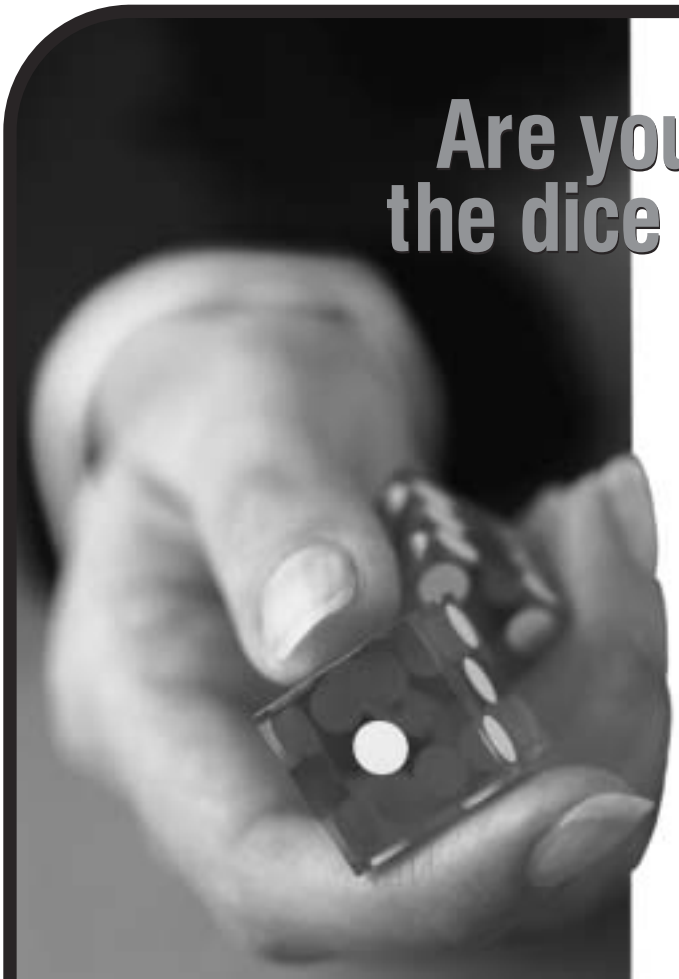
Merely instructing your non-lawyer employees not to give legal advice is not enough. You must "be pro-active to ensure that they [are] not giving legal advice to clients and other callers." *In re Farmer,* 950 P.2d 713, 718 (Kan. 1997). This means following up with your assistants to find out what was said during any conversations they had with your clients. *See In re Wilkinson.* 805 So.2d 142, 145-146 (La. 2002).

Take extra precautions in working with assistants who have been suspended or disbarred from the practice of law. It's a serious temptation for recently licensed attorneys to hire someone no longer allowed to practice. After all, the thinking goes, the disbarred former attorney often knows more about the law than a green attorney, fresh from law school. Likewise, loyal friends of those whose licenses have been suspended or taken away often offer comfort in the form of paralegal work. But beware the substantial pitfalls; in my experience, former attorneys have considerable difficulty avoiding the practice of law, particularly when it comes to offering advice. *See e.g. In re Jubnke,* 41 P.3d 855 (Kan. 2002). One way to avoid problems is to maintain a firm rule against having the former attorney meet with clients, or communicate with them in any manner.

Some final thoughts. Most of us aren't naturally gifted managers; we have to work at it. But if you take a mindful approach to educating and supervising your staff and cultivating an atmosphere of ethical awareness, you can avoid close encounters with the disciplinary system and better serve your clients at the same time.

1. These are revised from year to year, and it's essential to obtain the annual Utah Court Rules Annotated volume or print the Rules of Professional Conduct published on the court web site. I recommend that attorneys take the time to read the rules in their entirety at least once a year; it doesn't take that much time, and it will keep you aware of changes.

2. The rule provides several narrow exceptions that aren't relevant to this article.



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Making Appeals More Child Friendly

by Martha Pierce

> *"Once the termination hearing is over and the record closed, both parents and children would benefit from a more timely appellate decision."*
>
> – Judge Gayle Nelson Vogel, Iowa Court of Appeals.

Chrissie's Story

Three year-old Chrissie was found dirty, disheveled and hungry, wandering near the downtown liquor store in Salt Lake City. The police scoured the neighborhood trying unsuccessfully to find the child's family. Police located her parents the next day when they raided a meth house. The juvenile court, after establishing jurisdiction over the family, ordered the child into foster care and the parents into treatment programs. The court conditioned the parents' visits with the child on them providing two consecutive clean drug screens. As the parents' disinterest in drug treatment grew, visits became fewer and farther between.

During the twelve months Chrissie was in foster care, the parents were each dismissed from their residential drug treatment program for lack of commitment and for testing dirty. The case worker scrambled to find an outpatient program for each parent.

After spending time in the children's shelter and a shelter home, Chrissie spent her fourth birthday in a foster home and her fifth birthday in yet another foster home. The Division of Child and Family Services ("DCFS") refrained from putting her in an adoptive home because many adoptive families were skittish about taking a child that hadn't been legally freed for adoption.

Some time after the twelve month mark, DCFS petitioned to terminate the parents' rights. Trial was completed six months later. Chrissie was now five. Two months later, the court entered an order terminating the parents' rights. The mother appealed the order, which resulted in Chrissie remaining ineligible for adoption until the resolution of the appeal. Two years later, the appellate court affirmed the termination order freeing seven year-old Chrissie for adoption.

During this time, Chrissie watched four summers and holiday seasons pass. She knows she has no family, does not belong and is not wanted. Consequently she is angry. As Ohio Supreme Court Justice Evelyn Stratton put it: "There is no award of interest on a judgment that will make her whole."[1]

Our Legislature, aware of a child's urgent sense of time and need for permanency, has tightened juvenile court time frames for moving dependency cases through the system. Despite local press to the contrary, Utah has led the nation in setting strict time lines and adopting concurrent planning.[2] Cases like Chrissie's can now be resolved at the trial level in twelve months or less. More importantly, Chrissie would often be lucky enough to be placed in a foster/adopt home where the family would be committed to the reunification goal, but would be willing to adopt in the event that reunification efforts were not successful. Now the focus has turned to the appellate court.[3]

Expediting Appeals

Until recently, cases like Chrissie's now move quickly through the trial court, only to stall, sometimes for two years or more at the appellate level because of delays at both the trial and appellate levels.[4] For instance, the trial court would need time to appoint appellate counsel. Appellate counsel often would have to wait to get up to speed on the case until the record was prepared and paginated and the hearings were transcribed. Only then could appellate counsel determine whether there were any meritorious issues for appeal. Delays at the appellate level would occur when counsel would seek and be granted multiple extensions of time for filing the docketing statement or brief.

Ohio Supreme Court Justice Evelyn L. Stratton, a major leader in the national movement to expedite child welfare appeals, recognized that "[c]ases involving termination of parental rights and adoption issues are about the lives of children, rather than contracts, insurance, business disputes, or water rights. . . . to a

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child, waiting for resolution seems like forever – an eternity with no real family and no sense of belonging."[5] Justice Stratton recommended that state appellate courts trim the time frames for appeal, improve case management, prioritize transmission of the record and otherwise reduce delay.[6]

Utah has done just that. The Utah Court of Appeals has designated a clerk to track child welfare cases, to shepherd them through the system and to assist district court personnel prepare and transmit records and transcripts. Our Court of Appeals has adopted a policy that limits extensions of time for child welfare matters to no more than 45 days for each event. But that is just the beginning.

Appellate Innovations

While most states, including Utah, streamlined an existing system, Iowa rebuilt its system from the ground up.

Judge Gayle Nelson Vogel of the Iowa Court of Appeals came to Utah not long ago to explain to the appellate bench, the juvenile bench and various practitioners, including defense attorneys, how Iowa managed to make its system more child and parent friendly. Judge Vogel's committee, which revised Iowa's appellate procedure for child welfare cases, agreed on one fundamental principle: "Once the termination hearing is over and the record closed, both parents and children would benefit from a more timely appellate decision."[7] The time between the issuing of the final order at trial and the final order on appeal has been reduced from 397 days to about 100 days. So far, Iowa's abbreviated procedures have survived three constitutional challenges.[8] What makes this feat even more amazing is that Iowa faces many of the problems our state faces: underfunded counties, inexperienced and overworked defense counsel, and large case loads.

An Iowa State of Mind

Why discuss Iowa? Because Utah's Court Improvement Project[9] is recommending that Utah adopt a child-friendly, parent-friendly appellate system much like that of Iowa.

The CIP Committee has approved the following innovative changes:

- Trial counsel must file the notice of appeal.
- The notice of appeal must be filed within 15 days.
- The client must sign the notice of appeal, thus demonstrating an actual desire to pursue an appeal.

- The Petition on Appeal must be prepared by trial counsel and filed within 15 days of the notice of appeal. Thus, there is no down time waiting for new counsel to get up to speed.
- The Petition on Appeal, available in a formatted form, is designed to *raise* issues rather than *argue* them. The format is designed to assist even inexperienced counsel in directing the appellate court to the portion in the record where the alleged errors occurred.
- The Petition on Appeal and the trial record arrive at the appellate court within 30 days of the final order on appeal.
- The Appellee, including the Guardian ad Litem may, but are not required to, respond.
- The appellate court will examine the petition and record at the earliest opportunity to determine if the issues raised can be immediately resolved, or if instead they merit full briefing.
- The appellate court may, with or without briefing, resolve an appeal by simple order, by memorandum decision, or by opinion.
- Extensions of time are not favored and are limited to ten days beyond the prescribed time period.

What next? The Court Improvement Project has approved the drafted rules and recommended that they be sent to the Supreme Court's advisory committees on the rules of appellate and juvenile procedure, and that the necessary legislative changes be made.[10] Our appellate court has indicated its willingness to implement the new rules and to be part of the solution to create and follow an expedited process for child welfare appeals. The result will be that more Utah children will find happy endings and loving homes as Utah streamlines its appellate procedures.

1. Evelyn Lundberg Stratton, Expediting the Adoption Process at the Appellate Leval, 28 Capital Univ. L. Rev. 121, 121 (1999).
2. Two examples come to mind. One, the National Council of Juvenile and Family Court Judges (NCCJCJ) designated the Third District Juvenile Court as a Model Court Site in 1995 when Utah enacted its Child Welfare Reform Act. Two, Utah, having already refurbished its system, had to make only minor changes in response to the federal requirements of the Adoption and Safe Families Act of 1997, whereas many states struggled to make requisite changes.
3. "Permanency for a child cannot be achieved if the child's case languishes in the appellate system." Ann L. Keith and Carol R. Flango, Expediting Dependency Appeals: Strategies to Reduce Delay, xi, National Center for State Courts (2002).
4. "[T]he standard appellate process is slow. For a child in foster care, a lengthy appellate process can often mean months or years in limbo, without a hope of achieving permanency, to the obvious detriment of the child involved." National Council of Juvenile and Family Court Judges, Adoption and Permanency Guidelines: Improving Court Practices in Child Abuse and Neglect Cases, 38 (2002).
5. Stratton, supra note 1.
6. *Id.* at 124-25. *See also* National Council of Juvenile and Family Court Judges, Resource Guidelines: Improving Practice in Child Abuse and Neglect Cases (1995).
7. Gayle Nelson Vogel, J., "Overview of New Appellate Rules for Termination of Parental Rights" 1, (2002).
8. *In re D.B.,* 2002 Iowa App. LEXIS 1257 (no due process violation where petition on appeal had to be prepared prior to receiving transcript); *In re C.M.,* 652 N.W.2d 204 (Iowa 2002) (no due process violation for formatted brief because procedures minimized error, no equal protection violation because process narrowly tailored to advance state's interest in permanency for children); *In re L.M.,* 654 N.W.2d 502 (Iowa 2002) (no equal protection violation where parent has shorter time to file appeal).
9. Utah's Court Improvement Project Committee, formed pursuant to a federal grant to Utah's courts to improve their handling of abuse, neglect, foster care and adoption proceedings. *See* Public Law 103-66, Subsection 1311(d)(2), 13712, 107 Stat. 649. Members of the Court Improvement Project were appointed by Utah's Chief Justice and have been meeting since 1994, the same year that Utah's Child Welfare Reform Act became effective. The Committee consists of various participants in the child welfare community, including parental defense attorneys and juvenile judges. *See* Mark Hardin, Improving State Courts' Performance in Child Protection Cases, ABA Center for Children and the Law (1995).
10. The enabling legislation passed. It becomes effective May 3, 2004.

Attorneys and the Child Abuse Reporting Statute

by The Needs of Children Committee of the Young Lawyer Division

Recently the Needs of Children Committee of the Young Lawyers Division worked with the Child Abuse Prevention Center of Utah to update their informational pamphlets. These pamphlets describe the legal definition of child abuse, how to spot possible abuse, and when and how to report suspected abuse. The pamphlets, one produced for the general public and three others produced for educators, child care providers and clergy, may be obtained from the Child Abuse Prevention Center of Utah's Salt Lake City office.

As our committee was researching and updating the abuse reporting statutes, our eyes were opened to the dilemma Utah's stringent reporting requirements may create for practitioners as confidants and advisors to our clients. This article will first describe Utah's child abuse reporting requirements, exceptions to that requirement and the criminal sanctions for failure to report actual or suspected abuse. We will then address the ethical issues presented by the reporting requirements followed by a detailed discussion of how to detect possible child abuse. It is our hope that this article will inform the legal community and aid it in the prevention of future and ongoing child abuse, without compromising the ethical standards of attorneys.

The Abuse Reporting Statute

Utah Code §62A-4a-403 addresses child abuse reporting requirements. With one very narrow exception, any person, including medical professionals, who

> "has reason to believe that a child has been subjected to or who observes a child being subjected to incest, molestation, sexual exploitation, sexual abuse, physical abuse, or neglect or who observes a child being subjected to conditions or circumstances which would reasonably result in sexual abuse, physical abuse, or neglect shall immediately notify the nearest peace office, law enforcement agency, or [the Division of Child and Family Services]."[1]

Any person, official or agency required to report a case of suspected child abuse, including suspected fetal alcohol syndrome or fetal drug dependency, who willfully fails to do so is guilty of a class B misdemeanor.[2] A criminal action for failure to report must be commenced within four years from the date of knowledge of the offense and the willful failure to report.

Good faith reports of abuse will remain confidential and the investigating agencies must ensure the anonymity of the person or persons making the report.[3] Also, any person making a report of abuse is immune from any liability, civil or criminal, that may otherwise result from reporting abuse information.[4] It is significant to note, however, that to remain immune from liability, the report must be made to a law enforcement officer or investigating agency listed above.[5]

The only exception to the reporting requirement is for clergypersons or priests acting only under certain circumstances.[6] To be exempt from the Abuse Reporting Statute, the priest or clergyperson must learn of the abuse through a confession. This confession must be made to the priest or clergyperson within his or her professional capacity and in the course of discipline enjoined by his or her church. Further, this confession must be made to the priest or clergyperson by the perpetrator. Abuse learned of from someone other than the perpetrator must be reported. To be exempt from the reporting requirement, the confession made to the priest or clergyperson must also be of the sort that must be maintained confidential pursuant to canon law or church doctrine.[7]

The Ethical Dilemma

Pursuant to Rule 1.6(a) of the Utah Rules of Professional Conduct, "A lawyer shall not reveal information relating to representation of a client…unless the client consents after consultation."

How does the legal practitioner go about dealing with the dilemma of having to reconcile his or her ethical responsibilities under Rule 1.6(a) and his or her legal duties under the Abuse Reporting Statute? In going about this dilemma, there is recourse one can take. In due course, Rule 1.6(a) goes on to list exceptions in which an attorney can reveal information without violating a duty of confidentiality. That is to say, Rule 1.6(b) states, "A lawyer may reveal such information to the extent the lawyer believes necessary: (1) To prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another; (2) To rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used; (3) To establish a claim or

defense on behalf of the lawyer in a controversy between the lawyer and the client or to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or (4) To comply with the Rules of Professional Conduct or other law."

An attorney can fulfill his or her legal obligation under the Abuse Reporting Statute without violating Rule 1.6(a) of the Professional Rules of Conduct by applying either exceptions (b)(1) or (b)(4) of Rule 1.6(b). To be sure, if in the course of representing a client, an attorney discovers that he or she reasonably believes in good faith that a child may be abuse, he or she can report this to prevent the client from committing a criminal act that the attorney believes is likely to result in the death or substantial bodily harm of another. Alternatively, Rule 1.6(b) allows the legal practitioner to comply with the law, or specifically, to comply and act as necessary pursuant to the Abuse Reporting Statute.

Summarily, Rule 1.6 permits an attorney to report suspected child abuse while the Abuse Reporting Statute requires an attorney to report this suspected child abuse. Accordingly, how should an attorney go about his or her legal practice to most effectively maintain the ethical integrity of the professional and legal obligations without compromising client representation? A good rule of thumb is for an attorney to disclose to a client at the onset of the attorney-client relationship that due to legal and ethical obligations, he or she may not be able to keep all information confidential. That is to say, the attorney should explain to the client the Abuse Reporting Statute as it applies to the attorney and also the consequences to those found to be in violation of the statute. "A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[8] "A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation."[9] "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation."[10] Furthermore, if the case is to proceed to the trial stage, "A lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client."[11]

Lastly, if there is still a scintilla of doubt as to whether there is a conflict between Rule 1.6(a) and the Abuse Reporting Statute, one should always comply with the statute before the ethical rules.

Potential Signs of Child Abuse

Both for purposes of preventing child abuse and in order to fulfill their statutory duty to report suspected abuse, it is imperative that attorneys be able to recognize the signs of possible child abuse.

While it seems that recognizing child abuse should merely be a matter of exercising one's common sense, experts on the subject now say that individuals involved in child abuse do not necessarily behave the way in which the layperson might expect. For instance, children who are being abused do not necessarily, or even usually,

run to the nearest adult to report the abuse. In fact, in situations when the person abusing the child is a parent or other authority figure, the child often shies away from reporting the abuse or even actively lies on behalf of his or her abuser to protect him or her. This is because the child experiences conflicting emotions as he or she loves the parent or other abuser, is dependent upon him or her for survival, and does not wish to see the adult get into trouble, leaving the child helpless.

The reluctance with which some victims report child abuse demonstrates the difference between how the common sense of the layperson predicts a child abuse victim will behave and reality. An abused child might naturally be distrustful of adults, as the person abusing him or her is likely an adult. The child also might feel a great deal of shame about suffering abuse and not wish to draw attention to a situation because he or she incorrectly perceives the abuse as resulting from his or her fault. Experts now tell us that abusive persons wield enormous psychological power over their victims, often in measures far greater than the physical harm which they inflict. In fact, some abuse of children or other individuals does not involve physical or sexual abuse but psychological or emotional abuse where, by threats, intimidation, isolation or lack of attention, the victim is made to feel that he or she is worthless, no good, or cannot survive or even perform the smallest task without the "help" of the abuser.

Child abuse is perpetrated by members of every racial, religious and socio-economic group. Both men and women abuse children. One cannot ignore the possibility that a client or other person is a child abuser merely because he or she is a well-to-do woman, or comes from a background which the attorney does not consider to be at-risk for child abuse. Instead, in predicting child abuse, experts find that persons who live with certain stressors are more likely than others to commit child abuse. These stressors include death of a loved one, poor health, loss of a job or relationship, and financial difficulty.

The four main kinds of child abuse are physical, sexual, psychological or emotional, and neglect. Psychological or emotional abuse may exist alone or in combination with other forms of abuse. Neglect may be physical, emotional, or both. Physical or emotional neglect also may exist alone or in combination with other forms of abuse. The specific definitions of abuse vary according to whether one consults statutes or mental or other health professional standards. Traditionally, medical standards for defining child abuse have been broader and more encompassing than the legal standards have been. However, the stringency of the Abuse Reporting Statute demonstrates the increasing seriousness with which the law considers child abuse. It should be noted that both the medical and legal definitions for child abuse are somewhat controversial as both professions define child abuse in terms which render forms

of corporal punishment, which had previously found acceptance, unacceptable child abuse.

Physical abuse includes inflicting almost any physical harm to a child. Prohibited behaviors include, but are not limited to, torturing, beating, hitting, slapping, kicking, biting, burning, scalding, cutting, pushing, shoving and intentionally making a child ill. Sexual abuse includes any sexual contact between a child and another person. Prohibited behaviors include, but are not limited to, rape; sodomy; aggravated sexual assault; sexual assault; touching the private parts of a child with any part of the body or with any object; forcing or encouraging a child to touch the other's private parts with any part of his or her body or with any object; forcing or encouraging a child to touch his or her own private parts with any part of his or her body or with any object; and forcing or encouraging a child to watch one touch his or her own private parts with any body part or with any object. Emotional or psychological abuse is by its nature more amorphous and difficult to define. This kind of abuse is often defined as a pattern of unacceptable behaviors which tend to harm the psychological or emotional well being of a child. Unacceptable behaviors include, but are not limited to, shouting, yelling, screaming, insulting, belittling, demeaning, manipulating, or limiting contact with the outside world. Neglect is depriving a child of basic care which is necessary to his or her physical or emotional well being. Neglect includes, but is not limited to, the following behaviors: leaving a child alone longer than is safe or appropriate for someone of his or her age; not feeding a child enough; leaving a child exposed to dangers such as unlocked guns, drugs, dangerous chemicals or toilets overflowing with feces; using illegal drugs in front of the child or allowing someone else to do so; not keeping a child clean of feces or urine or otherwise safely clean; not keeping a child adequately clothed; depriving a child of basic medical care; not allowing the child to attend school; and ignoring the child.

In order to recognize child abuse, we must learn what the signs of abuse are. We begin with physical symptoms, which are most obvious to the eye but whose importance, though great, is perhaps overstated in light of the fact that a child who is physically abused often bears no marks of physical trauma which are observable when the child wears street clothing. Broken bones, cuts, scars, bruises, bruises in the shape of on object, burn marks, burn marks in the shape of an object, and being sick all of the time with various maladies, such as when a parent intentionally over salts food, are all potential signs of abuse. Of course, like anyone else, children may injure themselves in the normal course of their lives. However, it raises a red flag with experts when children have repeated injuries or injuries for which neither they nor their parents have good explanation or of which their parents attempt to minimize the importance.

Experts detect emotional or psychological abuse of a child mostly by observing his or her behavior and by asking questions of the child. Children who are abused physically or sexually are also often abused psychologically, so these behaviors are also seen in victims of sexual and other physical abuse. Depression, anxiety, withdrawal, isolation, excessive sleepiness, boredom, misbehavior or conversely, agitation, hyperactivity, an overly great need for attention or need to please may all indicate that a child is suffering from abuse.

Child sexual abuse is one of the more difficult forms of child abuse to detect because of the intense secrecy which surrounds this type of abuse and the shame which the victims are made to feel. For the attorney or other layperson coming into casual contact with a child who might be a victim, sexual abuse is even more difficult to diagnose. It is obvious that any physical signs of sexual abuse would probably be covered up by the street clothing of the child. Therefore, the attorney or layperson might begin to suspect that a child is being sexually abused by his or her exhibiting a pattern of questionable behavior, such as is described in the above paragraph about psychological or emotional abuse. In addition,

some victims of sexual abuse display some or all of the following behaviors: needing to go to the bathroom too much; an overly great interest in sex than is appropriate for their age; an overly great knowledge about sex than is appropriate for their age; and conversely, an overly great amount of modesty than is usually observed in children of their age. Disconcertingly, many victims of child sexual abuse exhibit none of the above behaviors so that detection of their plight is often delayed for months or years. Boys and girls are equally at risk of being victims of sexual abuse.

Another under-reported forms of child abuse is physical neglect. This type of abuse is under-reported because its detection is often dependent upon observing the condition of the home in which the child lives, to which most attorneys or other layperson probably would not have access. This is further complicated because laypersons generally are unqualified to decipher such problems as whether a child is simply skinny or whether he or she is malnourished due to neglect. In addition to appearing malnourished, the neglected child might appear unkempt or have insufficient clothing. Or he or she might be chronically truant or left home alone for a period of time which is longer than is appropriate for his or her age. He or she might exhibit any of the questionable behaviors listed in the above paragraph about psychological or emotional abuse.

Since the signs of child abuse are many and diverse, how does the busy attorney or any layperson go about spotting potential abuse? Awareness about the various physical and behavioral symptoms of child abuse and vigilance in paying attention for them are our best hope to stop child abuse and to fulfill our statutory duty to report this problem.

1. *See*, 62A-4a-403(1).
2. *See,* §62A-4a-411.
3. *See,* 62A-4a-412(3).
4. *See,* 62A-4a-410
5. In *Allen v. Ortiz,* 802 P.2 1307 (Utah 1990), the Court held that a report of suspected abuse must be made to those persons or agencies listed in the reporting statute remain immune.
6. *See,* 62A-4a-403(2).
7. *See,* id.
8. Rule 1.2(c), Rules of Professional Conduct.
9. Rule 1.4(b), Rules of Professional Conduct.
10. Rule 2.1, Rules of Professional Conduct.
11. Rule 3.3, Rules of Professional Conduct.

Significant Utah Criminal Law Decisions In 2003

by Patrick W. Corum

This article examines some of the more important, and hopefully interesting, criminal cases decided by the Utah appellate courts in 2003. This is by no means intended to be an exhaustive list or discussion, just a brief overview of a few of the cases that have impacted the criminal justice system. The author concentrated on substantive cases to the exclusion of the many important procedural cases decided last year. Although the author is a public defender he has attempted to keep this article as non-biased as he is able.

Right to Appear at All Stages of Prosecution

All too frequently, defendants fail to appear for a scheduled court date. In the vast majority of those cases, the trial court will simply issue a bench warrant, the defendant will be arrested sometime in the future, and the proceeding will be held with the defendant in custody. However, in some instances, the trial court will choose another path, finding that the defendant has waived the right to be present and proceed in absentia. In *State v. Wanosik,* 2003 UT 34, 79 P3d 937, the Utah Supreme Court addressed the requirements of such a finding.

After pleading guilty to misdemeanor drug charges, the trial court informed Wanosik of his sentencing date. When Wanosik did not appear for his sentencing, defense counsel asked the trial court for time to locate him. The trial court denied the request and sentenced Wanosik in absentia to the maximum amount of jail time on each charge. Most importantly, the trial court stated that it must assume that Wanosik's absence was voluntary because he had not informed counsel or the trial court that he would be unable to appear.

The Court of Appeals, in *State v. Wanosik,* 2001 UT App 241, 31 P.3d 615, held that there is no automatic presumption in favor of voluntary waiver of the right to be present arising from mere nonappearance. The court stated that, beyond providing notice, the trial court did not need to specifically warn a defendant that the hearing could proceed in absentia. However, the trial court did need to make some inquiry into voluntariness and determine, based upon the totality of the circumstances, that the defendant was voluntarily absent. To aid in the voluntariness inquiry, the court suggested that the State could determine whether the defendant is incarcerated, contact local hospitals, contact the defendant's employer, make a "reasonably diligent" attempt to contact the defendant at his residence, contact Pretrial Services, and the bail bond company. Once reasonable inquiry has been made, and a "compelling" reason for the absence remains unknown, voluntariness may be presumed. Even then, defense counsel must be given the opportunity to rebut the inference by gathering additional information.

Additionally, the court held that, under Due Process and Rule 22(a) of the Utah Rules of Criminal Procedure, trial courts have an affirmative duty to provide the defendant and counsel an opportunity to address relevant sentencing information prior to imposition of sentence, even if the defense does not request the opportunity to speak.

On certiorari, the Utah Supreme Court affirmed the Court of Appeals, but clarified some of the requirements of the voluntariness inquiry. Specifically, and in contrast to the lengthy list provided by the Court of Appeals, the court stated that the prosecution should ensure that the defendant is not incarcerated and that defense counsel should attempt to contact the defendant or those familiar with him to determine if an explanation for the absence exists. Once those inquiries have been made after a short continuance, and have produced no evidence of involuntary absence, the trial court may then properly infer that the absence was voluntary. In his concurring opinion, Justice Ronald E.

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Nehring briefly addressed the practicalities of in absentia proceedings, stating that judicial economy was ill served and that the principles announced in the case should be "stored in the closets of trial judges and retrieved only on unusual occasions," and cautioned trial court to avoid the practice absent "highly unusual circumstances."

Right to Allocution

As a practical matter, defendants who maintain their innocence after pleading guilty or being convicted at trial face much stiffer sentences. For example, for those convicted of certain sex offenses, refusal to take responsibility may lead to denial of offender treatment and, thus, serving the full term of the sentence. As a result, defendants and counsel were faced with a serious dilemma. Namely, is it better to admit responsibility in hopes of a more lenient sentence or to maintain innocence in the hopes of another trial? The Utah Supreme Court alleviated some of these concerns in *State v. Maestas,* 2002 UT 123, 63 P.3d 621.[1] In *Maestas,* majority of the court, over the rigorous and lengthy dissent of two justices, barred the use in a subsequent trial of admissions made as part of a pre-sentence investigation and at a sentencing hearing.

Maestas, after taking the stand and maintaining his innocence, was convicted at trial. Maestas then essentially confessed to the charges both in the pre-sentence report and at the sentencing hearing in an effort to seek mercy. The conviction was overturned on appeal based on ineffective assistance and, on retrial, the trial court ruled that the statements made in the report and at sentencing would be admissible.

As to the statements made in the pre-sentence report, the majority looked to the Utah law on access to protected records, and held that a defendant's interests in the right to seek mercy at sentencing outweigh the public's interest in using a defendant's statements in a pre-sentence report in a subsequent prosecution.

Regarding the statements made at the sentencing hearing, the majority found that they too were inadmissible, but for different reasons. Chief Justice Christine M. Durham, writing the lead opinion, first addressed Rule 24(d) of the Rules of Criminal Procedure which places a defendant in the "same position as if no trial had been held" when a trial judge grants a motion for new trial. Chief Justice Durham relied on the court's supervisory powers to craft an analogous rule applicable to the situation where the appellate court orders a new trial.

Next, Chief Justice Durham discussed the right to allocution

contained within Article I, Section 12 of the Utah Constitution, stating that the right to allocute at sentencing would be meaningless if those statements could then be used in a subsequent trial. She noted that, in any case in which an appeal was contemplated, most competent attorneys would advise their clients to not allocute. Furthermore, given that continued denial of responsibility can greatly affect one's sentence and position with the Board of Pardons, the Chief Justice recognized that even a truly innocent person may "confess" at sentencing in a plea for mercy. Now retired, Justices Richard Howe and Leonard Russon, while concurring in the result, based their decision solely on the right to allocution.

The Corpus Delicti Rule

In *State v. Mauchley,* 2003 UT 10, 67 P.3d 477, the Utah Supreme Court abandoned the long-standing *corpus delicti* rule in favor of a trustworthiness standard regarding the admission of confessions. Under the *corpus delicti* rule, the prosecution was required to prove by clear and convincing independent evidence that a crime had been committed before introducing a defendant's confession. In contrast, the trustworthiness standard focuses on the circumstances surrounding the confession itself to determine admissibility. In recent years, the *corpus delicti* rule has played a significant role in cases in which the alleged victim was covered by privilege or had flatly refused to testify. In driving under the influence cases the rule came into play where the only connection between the impaired person and the operation of a motor vehicle was his or her own admission.

Mauchley filed an insurance claim, alleging that he had fallen into an open manhole. A subsequent investigation showed that the manhole was indeed uncovered, and because Mauchley had been treated for injuries, the veracity of the claim was not questioned. However, some six months after the case settled, Mauchley walked into the police department and voluntarily confessed that he had made up the story about falling in the manhole. Absent the confession, there was no evidence to even suggest that a crime of insurance fraud had been committed.

The court examined the ancient history and policy surrounding the *corpus delicti* rule and found that it was anachronistic, did not adequately protect the innocent, and may actually serve to obstruct justice. The court found the trustworthiness standard, previously adopted by the United States Supreme Court in 1954, was better suited to modern needs.

According to the trustworthiness standard, the State must introduce "substantial independent evidence" in support of the confession. This need not include evidence of the actual crime. As to the nature of the requisite "independent evidence," the court discussed separate situations.

The first and most classic, and that involved in the *Mauchley* case itself, is where there is no independent evidence whatsoever that a crime has occurred. In such case, the court held that evidence that is "typically used to bolster the credibility and reliability of an out-of-court statement" can be used to establish trustworthiness. In particular, the court can look to "the absence of deception, trick, threats, or promises to obtain the statement; the defendant's positive physical and mental condition, including age, education, and experience; and the presence of an attorney when the statement is given" to determine trustworthiness.

Secondly, the court addressed cases in which independent evidence of the crime existed, but there was no independent evidence of the identity of the perpetrator or cases in which there was independent evidence of the crime and the perpetrator, but not enough to establish guilt. In these situations, the court suggested that the independent evidence may be used to bolster the confession "by showing a person's confession demonstrates the individual has specific personal knowledge about the crime " including "highly unusual elements of the crime" or "mundane details" that have not been made public

Regardless of the specific situation, there must be a "degree of fit" between the confession and the known facts. Thus, statements that are demonstrably false or merely parrot widely known details may be untrustworthy.

As with the *corpus delicti* rule, the trustworthiness standard requires that the trial court to act as gatekeeper. Before a confession may be admitted, the trial court is required to consider the totality of the circumstances and find that the confession is trustworthy by a preponderance of the evidence.

Finally, because the adoption of the trustworthiness standard lowers the amount and nature of evidence needed to convict a

person, the *Ex Post Facto* Clause found in Article 9 of the United States Constitution is implicated and will be applied prospectively only.

The Enhancement of Charges by Prior Offenses

As defendants acquire more and more enhanceable prior convictions and prosecutors file more enhanced charges, the enhanceability of offenses has taken on greater importance is recent years. A frequent question in enhancement cases is whether a particular prior offense is indeed enhanceable. In *State v. Gutierrez,* 2003 UT App 95, 68 P.3d 1035, the Utah Court of Appeals addressed the validity of prior convictions used for enhancement purposes. Specifically, the case involved the amount and quality of evidence necessary to raise a challenge an enhanceable prior conviction.

Gutierrez was charged with driving under the influence as a third degree felony due to four previous alcohol-related driving convictions. Gutierrez filed a motion to dismiss, challenging the validity of two of his previous convictions.

As to the first challenged conviction, Gutierrez asserted that the guilty plea had been taken without the full plea colloquy required by Rule 11 of the Utah Rules of Criminal Procedure. The court held that, while a defendant may withdraw a guilty plea that violates Rule 11, strict compliance with Rule 11 is unnecessary on collateral attack. The only question at that point is whether the plea was voluntary.

Once established, usually by a certified copy of the judgment, a prior conviction is due a "presumption of regularity." Moreover, if the defendant had counsel at the time of the plea, it is presumed to be voluntary. Thus, it becomes the defendant's burden to put forth "some evidence" of that the plea was involuntary. Should the defendant produce such evidence, the burden would then shift back to the State to prove voluntariness by a preponderance of the evidence. Since Gutierrez produced absolutely no evidence of involuntariness, the court found that the plea was voluntary.

Regarding the second challenged plea, Gutierrez submitted his own affidavit which asserted, inter alia, that he had not been adequately informed of his rights and had not read the plea forms prior to signing them. The court found that a self-serving affidavit is insufficient to rebut the presumption of regularity. Rather, a transcript, testimony, a docket, or other affirmative evidence is required to rebut the presumption. Even though the plea was not taken in a court of record, the defendant could have produced testimony from those present during the plea or a docket sheet.

In a somewhat related case, the Utah Court of Appeals reaffirmed the principle that recidivist statutes do not violate the *Ex Post Facto* Clause Article 9 of the United States Constitution. *State v. Marshall,* 2003 UT App 381, 81 P.3d 775. The *Marshall* court upheld the 2001 amendments to the DUI statute which extended the period that prior convictions could be enhanced from six to ten years.

Search and Seizure

No review of criminal appellate cases would be complete without at least some discussion, albeit cursory, of search and seizure issues. What follows are just a few of the many search and seizure cases decided last year.

In *State v. Abell,* 2003 UT 20, 70 P.3d 98, the Utah Supreme Court again addressed the validity of highway checkpoints under the Utah Constitution. *See also State v. DeBooy,* 2000 UT 32, 996 P.2d 546.

The checkpoint at issue authorized eleven different checks from seatbelts and driver's licenses to external safety devices and detection of impaired drivers, all to further seven stated purposes. Furthermore, the checkpoint instructed officers to detect and enforce driver license violations, registration violations, proof of insurance violations, equipment violations, safety inspection violations, alcohol and DUI violations.

Although the decision rests on Article I, Section 14 of the Utah Constitution, the court carefully examined federal cases for their persuasive value. In particular, the court emphasized the "primary purpose" test adopted by the United States Supreme Court in *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000). Under this test, if the primary purpose of the checkpoint is general law enforcement, as opposed to highway use and safety, the checkpoint will fail scrutiny in the absence of individualized suspicion. The court held that "multiple purpose checkpoints that permit numerous independent checks related to one another only through their loose connection to the operation of a vehicle on the highway are constitutionally infirm." Specifically, the checkpoint at issue afforded police officers too much discretion because it did not specify which safety violations to inspect, the length of the stop, or when to conduct a sobriety check.

In *State v. Warren,* 2003 UT 36, 78 P.3d 590, the Utah Supreme Court determined the role that an offcier's subjective belief as to whether a suspect is armed plays in determining the reasonableness of a *Terry* frisk.[2] The officer suspected drug or prostitution activity when he observed an unknown person leaning into the open passenger door of Warren's car late at night in a deserted downtown location. After Warren pulled away, the officer made a traffic stop based upon a signal violation and found that Warren did not have a current driver's license or registration. The officer decided to impound the car and ordered Warren out of the car. The officer asked Warren if he had any weapons. Warren answered that he did not. The officer testified that Warren did not do anything to make him suspect Warren was armed or caused him concern, and that he had no intention of arresting Warren. Nevertheless, the officer performed a *Terry* frisk. In addition, the officer testified that he performs *Terry* frisks as a matter of routine for anyone he orders out of a car. During the frisk, a small twist of cocaine fell out of Warren's shirt, further search of his person revealed additional paraphernalia and controlled substances.

The Court of Appeals overturned the trial court's denial of Warren's motion to suppress, finding that the officer "did not believe, and had no basis on which to reasonably conclude, that Warren might be armed." *State v. Warren,* 2001 UT App 346, 37 P.3d 270. Moreover, the Court of Appeals stated, the officer's subjective belief that Warren was not armed took the frisk "outside of Terry's limited justification for warrantless searches."

The Utah Supreme Court affirmed the Court of Appeals result, but clarified the decision as to the level of importance of an officer's subjective belief in determining the reasonableness of an officer's

actions. Although the officer had testified as to his subjective belief that Warren was not armed, this fact alone was not dispositive. Rather, that belief is just one factor in the objective analysis of the totality of the circumstances. Additionally, the Utah Supreme Court held that the inherent dangerousness of traffic stops is another factor to be considered. However, "any reduction in that danger resulting from ordering the occupants out of the vehicle should be factored into the totality of the circumstances analysis."

In *State v. Bissenger,* 2003 UT App 256, 76 P.3d 178, the Court of Appeals was confronted with the question of whether a passenger in a vehicle has a reasonable expectation of privacy in the passenger's closed containers found inside the vehicle.

Bissenger was a passenger in a car stopped for a registration violation. Based upon an odor of alcohol, the driver was asked to perform field sobriety tests, which he passed. The officer then asked whether there were any open alcohol containers in the car. The driver said there were none, and the officer could observe none. Undeterred, the officer asked for, and received, permission to search the car for open containers. Prior to the search, the officer ordered Bissenger out of the car. While Bissenger exited, she left behind some personal items, including an opaque lip-balm container. The officer knew the lip-balm container was Bissenger's when he unscrewed the cap to reveal methamphetamine.

The Court of Appeals found that a passenger does have standing to challenge the search of closed containers left behind in the car. For Fourth Amendment purposes, the court refused to draw a distinction between the closed lip-balm container and a purse, bag, or jacket, stating that "each of these items is a closed container that keeps the owner's personal things hidden from public view." Furthermore, the court held that Bissenger did not abandon possession of the container when she exited the car as she did not voluntarily relinquish her expectation of privacy. Finally, the officer exceeded the scope of the stop, when he asked for consent to search the car after resolving the suspicions for the traffic stop.

1. While not technically a 2003 case, *Maestas* merits attention in any recent case law discussion. Furthermore, even though *Maestas* was officially filed on December 20, 2002, it was not released for publication until January 22, 2003.
2. A Terry Frisk takes it's name from the seminal United States Supreme Court opinion in *Terry v. Ohio,* 392 US1 (1968). In *Terry* the Court held a frisk during a routine traffic stop could only be conducted and evidence obtained used from the frisk if the officer has a reasonable suspicion that a crime was committed and the suspect is armed.

Appointments

The Bar appoints or nominates for appointments to various state boards and commissions each year. The following is a listing of positions which will become vacant in the next twelve months. If you are interested in being considered for one or more of these positions, please send a letter of interest and resume to John C. Baldwin, Utah State Bar, 645 South 200 East, Salt Lake City UT 84111 or e-mail john.baldwin@utahbar.org.

Term Ends

Technology Standing Committee
Barbara Polich . . . . . .January 1, 2004

Executive & Judicial Compensation
John T. Nielsen . . . . . .April 1, 2004

Utah Sentencing Commission
Mary Corporon . . . . . .April 1, 2004

Judicial Conduct Commission
David R. Bird
Denise Dragoo . . . . . .June 30, 2004

Alternative Dispute Resolution Providers Certification Board
Ann E. LaPolla . . . . . .June 30, 2004

ABA House of Representative
Charles R. Brown . . . . . .July 1, 2004

6th District Trial Court Judicial Nominating Commission
Douglas Neeley . . . . . .July 1, 2004
Marcus Taylor . . . . . .July 1, 2004

Ethics Advisory Committee
Nelson T. Abbott . . . . . .July 1, 2004
Mary C. Corporon . . . . . .July 1, 2004
Hon. Denise P. Lindberg . . . . . .July 1, 2004
Maxwell A. Miller . . . . . .July 1, 2004
Toni M. Sutliff . . . . . .July 1, 2004
Michael D. Wims . . . . . .July 1, 2004

Online Court Assistance Programs
Eric A. Mittelstadt . . . . . .July 1, 2004

Appellate Court Nominating Commission
Daniel L. Berman . . . . . .August, 2003
Kate Lahey . . . . . .August, 2003

Utah Legal Services Board of Directors
Stephen E.W. Hale . . . . . .August, 2004
Catherine F. Labatte . . . . . .August, 2004
A. Howard Lundgren . . . . . .August, 2004
Michael D. Zimmerman . . . . . .August, 2004

5th District trial Court Judicial Nominating Commission
Curtis M. Jensen . . . . . .September 15, 2004
Clifford V. Dunn . . . . . .September 15, 2004

Notice of Petition for Reinstatement to the Utah State Bar by H. Delbert Welker

Pursuant to Rule 25(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of a Petition for Reinstatement ("Petition") filed by H. Delbert Welker in *In re H. Delbert Welker,* Third Judicial District Court, Civil No. 020909349 on February 23, 2004. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Notice Appointing Trustee to Protect the Interests of the Clients of the Late Carolyn Driscoll

On February 6, 2004, the Honorable William B. Bohling, Third Judicial District Court, entered an Order Appointing Trustee to Protect the Interests of the Clients of Carolyn Driscoll. Pursuant to Rule 27 of the Rules of Lawyer Discipline and Disability, Heidi C. Leithead is appointed as trustee to take control of client files and other property that was in Ms. Driscoll's possession, and distribute them to the clients.

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

Notice of Amendments to Utah Court Rules

The Supreme Court and the Judicial Council have posted approved and proposed rule amendments to the state courts' website. You are invited to comment on the proposed changes. The deadline for comment is June 1, 2004. Comments may be submitted directly through the website (preferred) or by email, mail or fax.

Approved amendments are organized first by the effective date of the change and then by the body of law in which the rule appears. Rules published for comment are organized first by the comment deadline date and then by the body of law in which the rule appears. To view the text of the amendments, click on the rule number. You will need Adobe Acrobat Reader, which you can download for free by clicking on the link to Adobe. Proposed rule amendments are also published in the Pacific Reporter Advance Sheets.

In addition to the traditional methods of submitting comments (email, mail, fax), you can comment by clicking on the "comment" link associated with that body of rules. You can also view the comments of others by clicking on the comment link. It's more efficient for us if you submit comments through the website, and we encourage you to do so. After clicking on the comment link, you will be prompted for your name, which we request, and your email address and URL, which are optional. This is a public site and, if you do not want to disclose your email address, omit it. Time does not permit us to acknowledge comments, but all will be considered.

The web page to visit to see proposed rule amendments and submit comments is: www.utcourts.gov/resources/rules/comments/

The web page to visit to see approved rule amendments is: http://www.utcourts.gov/resources/rules/approved/

The web page to visit to see the rules currently in effect is: http://www.utcourts.gov/resources/rules/

Each page has links to the others.

The "comments" web page now contains proposed amendments to the Rules of Appellate Procedure, Rules of Evidence, Rules of Juvenile Procedure, Rules of Small Claims Procedure, and Code of Judicial Administration. We anticipate proposed amendments to the Rules of Civil Procedure and Rules of Criminal Procedure later this month. The comment deadline is June 1, 2004.

We will notify you by email when rule amendments, proposed and approved, are posted, but you may visit the website at any time. Lawyers, to be included in future email notices, notify the Bar offices of changes to your email address. Email addresses for judges and court staff are updated automatically on the courts' network. We hope you find this information timely, useful and convenient.

Submit comments directly through the website or to: Tim Shea

Email: tims@email.utcourts.gov
Fax: 801-578-3843
Address: Administrative Office of the Courts
P.O. Box 140241
Salt Lake City, Utah 84114-0241

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.

Paralegal's Day

The Honorable Olene Walker, Governor of the State of Utah, has declared every third Thursday in May as Paralegal's Day in the State of Utah. She encourages the citizens of Utah to actively participate in this Declaration. The Paralegal Division of the Utah State Bar and Legal Assistants Association of Utah are hosting a luncheon on May 20, 2004 in celebration of Paralegal's Day. Both organizations encourage all attorneys to join them in celebrating this day. Please take advantage of this opportunity to recognize the contributions that your paralegal makes in your practice as well as in the legal community.

As part of this celebration, we are honored to have Justice Michael J. Wilkins joining us to speak about the Utah Standards of Professionalism and Civility which he has been instrumental in promulgating (see Supreme Court Adopts Professionalism Standards, Utah Bar Journal Volume 16 No. 9). We believe these standards are applicable to paralegals as well as attorneys and have adopted them as standards for the Paralegal Division.

A copy of the announcement for the luncheon celebration may be found in the Paralegal Division section of this issue of the Bar Journal. Please note that 1 hour of CLE will be given to all attorneys and paralegals in attendance.

We look forward to seeing you on May 20th.

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.

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.

Discipline Corner

ADMONITION

On January 16, 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), 1.4(a) (Communication), 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to represent a client in a divorce case. The client paid the attorney a retainer fee. The attorney failed to promptly file the divorce action consistent with the client's instructions, failed to complete the case, and failed to keep the client informed of the status of the case. The attorney also failed to perform meaningful legal services for the retainer fee collected, failed to return the unearned portion of the fee, and abandoned representation of the client.

Mitigating factors include: absence of dishonest or selfish motive, timely good faith effort to make restitution or to rectify the consequences of the misconduct involved, cooperative attitude toward OPC's proceedings, and remorse.

PUBLIC REPRIMAND

On February 7, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court publicly reprimanded James Gilland for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.6(a) (Confidentiality of Information), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Gilland represented a client in a personal injury claim. Mr. Gilland did not file a complaint or pursue the client's claim before the statute of limitations expired. Mr. Gilland gave the client's file to another attorney to review. The attorney was not Mr. Gilland's partner or otherwise associated with Mr. Gilland's law office. Mr. Gilland failed to consult with the client or obtain the client's consent to reveal information relating to the case before giving the attorney the client's file.

Mitigating factors include: absence of a prior record of discipline and full and free disclosure to the client.

ADMONITION

On February 9, 2004, the Honorable Frank G. Noel, Third Judicial District Court, admonished an attorney for violation of Rules 4.2(a) and (d)(2) (Communication with Person Represented by Counsel) and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney represented a client in a case involving custody and visitation issues concerning a minor child. The opposing party was changing counsel. The opposing party's new counsel at the time had not filed a substitution of counsel. The attorney was aware of the opposing party's change of counsel, but contacted the opposing party directly without the opposing party's substitute counsel's consent. The court disqualified the attorney from the case based upon the telephone conversation with the opposing party.

Mitigating factors include: No prior record of discipline, lacked a dishonest of selfish motive, displayed a cooperative attitude toward the proceedings, responded promptly and candidly to the Office of Professional Conduct's inquiries, inexperienced in the practice of law at the time of the misconduct, which contributed to calling the opposing party without consent of the opposing party's counsel and continuing the call after the opposing party stated the opposing party was represented, remorseful concerning the intemperate content of the comments made to the opposing party, and apologized to the opposing party, the opposing counsel, and to the court. The attorney also acknowledged the call was improper.

ORDER OF SUSPENSION

On February 12, 2004, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order of Suspension, suspending Ray Harding, Jr. from the practice of law pending final disposition by the Utah Supreme Court.

PUBLIC REPRIMAND

On February 13, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court publicly reprimanded Brent E. Johns for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 3.2 (Expediting Litigation, 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Johns was retained to modify a client's divorce decree. Approximately one month later, Mr. Johns told the client the paperwork was ready to be signed. There were errors on the

paperwork and approximately one month later, the paperwork was ready again for the client's signature. The attorney's office told the client it would be signed by the judge in approximately a week or so. Two months later, the paperwork was signed by the judge. By this time, the client's child had turned eighteen years of age. The Office of Recovery Services ("ORS") informed the client that the client was ineligible for child support for the four month period it took to modify the divorce decree. Mr. Johns sent a letter to the ORS informing them of the error. The client was still not receiving child support six months later. The client was subsequently informed by ORS that the court ordered amount on the modification had been omitted. The ORS informed the client that it had informed Mr. Johns's office of the error five months earlier. The client attempted to contact Mr. Johns, but Mr. Johns did not promptly contact the client. The client was then informed by Mr. Johns's office that Mr. Johns would make the necessary corrections as soon as possible. As of the date of the client's complaint to the OPC, the error had not been corrected.

PUBLIC REPRIMAND

On February 20, 2004, the Chair of the Ethics and Discipline Committee of Utah Supreme Court publicly reprimanded Bruce Embry for violation of Rules 1.4(b) (Communication), 1.5(b) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Embry was retained to file a Chapter 13 bankruptcy petition. The clients paid a retainer fee exceeding $750. Mr. Embry did not provide a written fee agreement to the clients. The plan was confirmed but a creditor sought relief from the stay. Following a dispute over the valuation of stock, the plan confirmation was overturned by the Bankruptcy Court. Mr. Embry agreed to appeal the dismissal and mailed a notice of appeal to the trustee and clients. However, Mr. Embry required the clients to pre-pay the filing fee for the notice of appeal before he would file it with the court. Mr. Embry delegated to his secretary the responsibility to call the clients to inform them of this requirement. The notice of appeal was never filed in court because Mr. Embry did not ask his clients for the filing fee until after the deadline had expired.

ADMONITION

On February 20, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court admonished an attorney for violation of Rules 1.4(a) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney represented a client to prevent the client's former spouse from leaving the state with their child, or file a petition to modify the divorce decree. The attorney failed to respond to the client's requests for information and failed to explain the strategy issues when the client clearly did not understand the proceedings. The attorney also failed to respond to the Office of Professional Conduct's lawful requests for information.

ADMONITION

On February 20, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court admonished an attorney for violation of Rules 1.3 (Diligence), 1.4(a) and (b) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney represented a client in an uncontested divorce. The attorney did not return the client's calls and failed to keep the client informed about the status of the case. As time went on, the client's informal settlement agreement with the client's spouse was no longer applicable and the divorce became contested. The attorney failed to advise the client of the client's options in the contested divorce. The attorney also failed to respond to the Office of Professional Conduct's lawful requests for information.

INTERIM SUSPENSION

On February 25, 2004, the Honorable Lynn W. Davis, Fourth Judicial District Court, entered an Order of Interim Suspension, suspending Richard S. Clark II from the practice of law pending final disposition of the Complaint pending against him.

In summary:

On January 24, 2001, the Honorable Donald J. Eyre, Fourth Judicial District Court entered a Sentence, Judgment, Commitment Notice in the case, *State of Utah v. Richard S. Clark.* Mr. Clark was adjudged guilty under the judgment for Driving Under the Influence of Alc/Drugs based on a guilty plea taken November 29, 2000. The interim suspension is based upon this conviction.

Utah State Bar Celebrates

the 50th Anniversary of the

Brown v. Board of Education

Supreme Court Decision

May 17th 2004 marks the 50 year anniversary of the US Supreme Court Decision on *Brown v. Board of Education.* The Utah State Bar is coordinating a number of events and projects to commemorate this anniversary. For complete information on these efforts, go to www.utahbar.org/brownvboard.

Classroom Presentations

Perhaps the most notable project is getting volunteer lawyers into high school classrooms to direct dialogues on *Brown.* These sessions will help high school students better understand and appreciate the impact of *Brown* on the law and society. Excellent materials will be available to make this very easy on the participating lawyers. Lawyers interested in participating should e-mail brownvboard@utahbar.org or call (801) 297-7027.

Film Festival

A number of *Brown* related films will be presented, generally in the May 1st to May 17th time frame. These will occur at various locations. For more information on the films, go to: www.utahbar.org/brownvboard.

Newspaper Insert

The Bar is planning on running an insert in many Utah newspapers on May 3rd. This insert will include a variety of information about the *Brown* decision and be designed to generate interest in learning more about *Brown*.

Letter to the Editor Contest

The Utah Minority Bar Association, in cooperation with some local and regional bars, is running a Letter to the Editor Contest. To enter this contest, high school students will write and submit letters to the editor on the *Brown* decision and its impact. Prizes will be awarded and participating newspapers will run submissions as appropriate.

Law Day Dinner

This year the Law Day Celebration will be held on May 7th. This event will feature Robert Grey Jr., the President-Elect of the ABA. Mr. Grey is the second African American to hold this position and will make a presentation on the *Brown* decision and its impact on the profession and society. Held in the evening this year, the event will be at the Grand America hotel in Salt Lake. Check out the Bar's web site for more information as this date draws nearer.

Thoughts on *Brown v. Board of Education…*

YVETTE DONOSSO DIAZ is an attorney at Manning Curtis Bradshaw & Bednar LLC. She is currently serving as a Bar Commissioner for the Third District.

May 17, 2004, marks the 50th anniversary of the landmark decision of *Brown v. Board of Education.* As a mother, I am deeply grateful and humbled by the tremendous sacrifices made by courageous men and women of all colors in America to ensure that my children, and your children, will have the opportunity to live in a society where they can flourish according to their personal talent, determination and aspiration, and not be excluded from the American Dream solely on the color of their skin.

On behalf of the Utah Minority Bar Association, I express gratitude to the Utah State Bar for its efforts to celebrate this historic event. As an association we hope that every member of the Utah State Bar takes time to reflect about the impact of the *Brown* decision. Accordingly, we have gathered personal thoughts about the *Brown* decision from some of our members to share with you below. We hope together, we can work to fulfill the *Brown* legacy of justice and equality.

JUSTICE CHRISTINE M. DURHAM is the Chief Justice of the Utah Supreme Court.

I am old enough to remember the issuance of the Court's first opinion in *Brown v. Board of Education,* and the "Impeach Earl Warren" billboards that dotted the highways when my family moved from California to Washington DC in 1957. It is an enormous source of pride to me as an American that the courts were responsible for closing doors on segregation and racial discrimination and opening them to the possibility of fairness and justice for all. The courage of all who made that decision possible is an inspiration to me as a lawyer, a judge, and an American. Even in the face of all we have yet to do to achieve justice and equality in this nation, we can and should honor and celebrate this part of our history.

RAYMOND UNO is a retired Third District Court Judge and one of the founders of UMBA.

For me, *Brown v. Board of Education* was a significant case. It was one of the engines that propelled the civil rights movement throughout the country. Raised in Ogden, Utah before WWII, our family moved to El Monte, California in 1938, where I was enrolled in a segregated school of about 500 Mexicans and a handful of Japanese. On December 7, 1941, Japan attacked Pearl Harbor. Thereafter, people of Japanese descent were submitted to curfews and travel restrictions of a 5-mile radius from our home. Although my father was an American citizen and veteran of WWI, I vividly recall the day the FBI came and thoroughly searched our house, taking whatever documents and material they thought important. To this day I do not know if they had a search warrant. On February 19, 1942, President Roosevelt issued Executive Order 9066 authorizing the forced removal of persons of Japanese ancestry from the West Coast. I spent the next 3 years in Heart Mountain, a concentration camp in Wyoming, where my father died on January 21, 1943. As youths in these camps, ironically, we recited the Pledge of Allegiance. However, we would end by saying, "and justice for all," and then whisper, "except for us."

In the 1950's and 1960's, the Utah State Bar membership consisted of only a handful of minorities. Opening the doors of the legal profession was not easy. Historically, the powers that be in the legal profession had paid little or no attention to the plight of minority lawyers. We were tolerated, but not recognized as part and parcel of the legal community. Slowly, progress was made. In 1965, the Utah Attorney General, Phil Hansen, hired Ken Hisatake, Hank Adams, and myself as Assistant Attorney Generals. That same year, Jimi Mitsunaga founded the Legal Defender Association and became its first Director. Today we have minority attorneys working as judges, as counsel in large and small firms, in corporations and as law professors. As I reminisce, much progress has been made. But there are still many subtle and grinding obstacles that must be hurdled. One day in the near future, I hope we can look back with pride and say, "We have done the best we could with what we had. We are a better profession for the progress made. We helped create a better community for everyone to live in because of the sacrifices we made to implement diversity." With this progress and hope, *Brown* was one of the pivotal forces that made life, liberty, and the pursuit of happiness and equal protection under the law a possibility for all, even minorities.

JUDGE SHAUNA GRAVES-ROBERTSON from the Salt Lake County Justice Court.

Brown was the crown jewel in a line of cases that sounded the death knell for the doctrine of "separate but equal" in the educational arena. *Brown,* along with the 1950 case of *Sweatt v. Painter* personally affected me in two ways. First, these cases gave me the knowledge that if a legal education was what I wanted, no one could legally stop me from getting it. Second, and for me more importantly, these cases gave me role models. Whenever I have been faced with what I thought were barriers in my career, I have drawn strength from my three legal heros and "sheros," Robert L. Carter, Thurgood Marshall and Constance Baker Motley. These individuals paved the way that made my chosen career possible. It is now up to me, and others in the legal field, to ensure that the next generation will have the same opportunities we have had.

JUDGE WILLIAM A. THORNE, JR. serves on the Utah Court of Appeals.

Brown transformed the way this country thinks of itself. The vast majority of people in this country now expect to have equal access to schools, services, the courts and every other facet of life. While expectations may not always be a reality, as a society we are no longer willing to simply accept less than equal treatment – whether it be based on gender, socioeconomic status, religion, or "other" factors. Equality has leapt off the page where the Constitution was written and has truly sunk deep roots into the fabric of our society. We are all blessed by this occurrence. While some may believe that *Brown* was primarily a benefit to African-Americans, I believe the impact is much deeper and broader. *Brown* was an overdue redemption of a promised equality for not only African-Americans, but for all ethnic minority groups in this country. But the impact does not stop even there. Our country, our society, and all of our communities (not just so-called minority communities) are truly stronger and healthier for the legacy of this decision. We are fortunate to be able to pass onto our children the "expectation" of equality that is the true legacy of *Brown v. Board of Education.*

SEAN D. REYES is an attorney at Parsons Behle & Latimer and President-elect of the Utah Minority Bar Association.

Every first year law student knows the mechanical recitation of the ruling in *Brown v. Board of Education.* Namely, that the concept of equal protection espoused in the 14th Amendment overturned the *Plessy v. Ferguson* "separate but equal" doctrine. The tremendous social impact of that simple pronouncement is something all of our society should realize and remember. What *Brown* did was reject fifty years of legally sanctioned segregation while providing another critical impetus in turning back centuries of legally and socially sanctioned racism in general. Although *Brown* specifically struck down segregation in public schools, it was a catalyst for undermining segregation in all aspects of American life. Relying on *Brown,* subsequent court decisions enjoined segregation in areas such as public services and employment. Because of the literal and symbolic effect of the high court's ruling in *Brown,* the nascent civil rights movement drew inspiration and gained momentum, leading to the landmark Civil Rights Act of 1964, Voting Rights Act of 1965, and other invaluable gains. That legacy continues today.

While *Brown* is most commonly viewed as a victory for African-Americans, and rightly so, it was also a triumph for all minority groups and society at large. At the time *Brown* was decided, Latinos, Asians and other racial minority groups could be, and often were, subject to segregation in schools. In addition to the specific legal rights granted by *Brown,* all minority groups have benefited from the legal and social gains that followed from it. One personal example involves my father, a Filipino-Spanish immigrant, who came to this country in 1968 and was a direct beneficiary of the legal rights and social change *Brown* helped establish. The kindness and intervention of Reverend Martin Luther King's family, and many other champions of the principles embodied in *Brown,* assisted my father in staving off deportation and becoming an enthusiastic participant in the American Dream. I know he, and many others like him, have made significant contributions to our society simply because they were given a chance to participate in it on an equal basis. As an Asian, Hispanic and Polynesian-American, I am deeply appreciative of the sacrifices made by those who paved the way for, participated in, and have continued the legacy of *Brown v. Board of Education.*

ERIKA GEORGE is a professor at the S.J. Quinney College of Law, University of Utah.

My parents, my grandparents, and my great-grandparents were born into a segregated society sanctioned by a system of discriminatory laws. My family was from Louisiana, where any resistance by an African-American to the system of racial segregation intended to relegate him or her to an inferior place in society was met with brutality. When I was a child, my mother showed me the scars she got as a child when a mob beat her after playing on the "wrong" (the Whites only) playground near her home. I did not grow up in Louisiana. I spent my childhood in Chicago, after my mother's repeated arrests for participation in civil rights protests drove my parents up North.

I am eternally grateful to have been born into a different world, one made possible in no small measure by the Court's decision in *Brown v. Board of Education.* Declaring racial segregation in public schools an unconstitutional deprivation of equal education opportunities, the Court in *Brown* signaled the end of public and legally mandated racial separation paving the way for the civil rights movement. In short, without *Brown,* I simply could not be. Indeed, it chills me to imagine where our society would be today had the Court failed to formally bring to an end the legal doctrine of "separate but equal." *Brown* did not bring about the world we live in overnight. Indeed after the ruling, various Southern legislatures passed laws imposing penalties on anyone who attempted to implement desegregation and enacted school closing plans that authorized the suspension of public education to keep Black and White children separate. Despite these obstructions, *Brown* served as a catalyst for change. Arguably, the legal and social obstacles that many Southern states erected in an effort to thwart integration served as flashpoints for the subsequent student protests that launched the civil rights movement. *Brown,* coupled with the struggles and sacrifices made by people who courageously stood up for their convictions and advanced the cause of social justice and equality, has brought America closer to realizing its promise. As we become an increasingly multiracial society, the benefits of diversity and equality remain just as valid fifty years after *Brown* – while we have made tremendous strides towards social justice and equality, we still have quite a distance to go.

CECILIA M. ROMERO is an attorney at Ray Quinney & Nebeker.

The landmark decision of *Brown v. Board of Education,* decided on May 17, 1954, declared racial segregation in public schools unconstitutional. The result, however, was more than the end of racial segregation in public schools, *Brown* served, and continues to serve, as a tool to end segregation and racial hatred. For me, the landmark decision ensured that I had, and my children will have, the privilege and opportunity to attend a diverse school, where cultural education and desegregation is valued not only because it is morally right but because of the value of learning from one another. It means that I am valued not only for the color of my skin, but because of the contributions that I make to society. Most importantly, *Brown* set the precedent that racial inequality will not be tolerated and when necessary, it is the sword that enables us to continue to fight against discrimination.

AKIKO KAWAMURA practices Community Association Law and related civil litigation at Hobbs & Olson, L.C.

We have not achieved racial equality. The truth is, the vestiges of the "separate but equal" doctrine remain with us, and equality will elude us until our community learns that true equality cannot be contained within a framework of separation. On a daily basis, I watch people try to decide how to compartmentalize me. People tell me that I speak English very well for a foreigner. Complete strangers ask me questions about my ethnicity, and others have suggested to me that they fear interracial unions. But despite the subtle and blatant xenophobia that is still with us, our world is evolving. The legacy of *Brown* is its promise to us that the predominant ideology can be challenged and defeated. Until 1954, this country embraced the belief that equal treatment meant substantially equal, but separate, facilities. Until 1967, 16 states had anti-miscegenation statutes. Linda Brown reminds us that we should always be wary of the prevailing rule. Why, for example, does it make sense to make marriage illegal between any two people who are committed to sharing a life together? Chief Justice Warren, in his analysis, aptly explained, "In approaching [segregation in public education], we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation." *Brown v. Board of Education,* 347 U.S. 483 (1954). The enduring message is that our laws should progress as our civilization advances. As lawyers, I hope you believe, like I do, that one of our duties is to question, and when necessary, challenge those outdated rules.

SHARRIEFF SHAH is an attorney at Parsons Behle & Latimer and concentrates his practice in general commercial litigation and medical malpractice.

When I pause, reflect and begin to critically analyze my plight in Utah as an African American attorney, I know, indisputably, that I am a direct beneficiary of the vast opportunities that began to flourish nearly fifty years ago as a result of the *Brown v. Board of Education* decision. Although *Brown's* holding was aimed at directly ending segregation in public schools, the decision's rippling effect has given African Americans, as well as others, the firm foundation upon which to confidently stand and pursue other meaningful areas that extend far beyond the realm of education. As the great-grandson of slaves, I feel the depth and meaning of the statement, "we shall overcome," and realize today that *Brown* gives continued substance to this enduring afrocentric mantra. Ultimately, as change is inevitable, *Brown* ensures that 'change' will not only be ubiquitous, but also fundamentally equitable. Thank you *Brown.*

JANISE MACANAS works in the Criminal Division of the Utah Attorney General's Office.

In 1954, racial segregation in public schools was commonplace across America. In Topeka, Kansas, a black third-grader named Linda Brown had to walk one mile through a railroad switchyard to get to her black elementary school, even though a white elementary school was only seven blocks away. Linda Brown's experience was illustrative of the challenge faced by minorities in 1950's America – Linda Brown underwent great inconvenience, if not outright hardship, merely to get that which white Americans took for granted. At the *Brown v. Board of Education* hearings, when asked for a definition of "equal" by Justice Frankfurter, Thurgood Marshall replied, "Equal means getting the same thing, at the same time and in the same place."

Sadly, "separate but equal" was a state of mind and not just a backward school policy. When the Supreme Court ruled that "separate educational facilities are inherently unequal" it accomplished more than the forced desegregation of public schools in 21 states. Brown legitimized the rejection of racial prejudice in America. The civil rights movement, women's movement, and successive struggles for social equality draw strength and legitimacy from Brown's decision. As both a woman and a minority I feel I owe Chief Justice Warren's court a great debt for the opportunities that my children and I enjoy in modern America.

Utah State Bar Request for 2004-2005 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more of 18 different committees which participate in regulating admissions and discipline and in fostering competency, public service and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name _____ Bar No. _____

Office Address _____ Telephone _____

Committee Request

1st Choice _____ 2nd Choice _____

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

_____

_____

_____

_____

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

Committees

1. **Admissions.** Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.
2. **Annual Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
3. **Bar Examiner.** Drafts, reviews and grades questions and model answers for the Bar Examination.
4. **Bar Exam Administration.** Assists in the administration of the Bar Examination. Duties include overseeing computerized exam-taking, security issues, and the subcommittee that handles requests from applicants seeking special accommodations on the Bar Examination.
5. **Bar Journal.** Annually publishes editions of the *Utah Bar Journal* to provide comprehensive coverage of the profession, the Bar, articles of legal importance and announcements of general interest.
6. **Character & Fitness.** Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.
7. **Client Security Fund.** Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.
8. **Courts and Judges.** Coordinates the formal relationship between the judiciary and the Bar including review of the organization of the court system and recent court reorganization developments.
9. **Fee Arbitration.** Holds arbitration hearings to resolve voluntary disputes between members of the Bar and clients regarding fees.
10. **Ethics Advisory Opinion.** Prepares formal written opinions concerning the ethical issues that face Utah lawyers.
11. **Governmental Relations.** Monitors proposed legislation which falls within the Bar's legislative policy and makes recommendations to Bar Commission for appropriate action.
12. **Law Related Education and Law Day.** Organizes and promote events for the annual Law Day celebration.
13. **Law & Technology.** Creates a network for the exchange of information and acts as a resource for new and emerging technologies and the implementation of these technologies.
14. **Lawyer Benefits.** Review requests for sponsorship and involvement in various group benefit programs, including health, malpractice, disability, insurance and other group activities.
15. **Mid-Year Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes social and sporting events.
16. **Needs of the Elderly.** Assists in formulating positions on issues involving the elderly and recommending legislation.
17. **New Lawyer CLE.** Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality and conformance with mandatory New lawyer CLE.
18. **Unauthorized Practice of Law.** Reviews and investigates complaints made regarding unauthorized practice of law and recommends appropriate action, including civil proceedings.

Detach & Mail by May 31, 2004 to:
N. George Daines, President-Elect • 645 South 200 East • Salt Lake City, UT 84111-3834

Paralegal's Day Celebration

by Sanda R. Kirkham, Chair – Paralegal Division

The Honorable Olene Walker, Governor of the State of Utah, has declared every third Thursday in May as Paralegal's Day in the State of Utah and encourages the citizens of Utah to actively participate in this Declaration. We invite all attorneys and their paralegals to join us in celebrating this grand day and are pleased to have Justice Michael J. Wilkins as the speaker for our celebration this year (please see invitation below).

As paralegals in the State of Utah, we take great pride in our profession. The paralegal field is currently one of the fastest growing professions in the country.

A paralegal's primary role is to help attorneys in the delivery of low cost and professional legal services to the public. The valuable contribution of paralegals is recognized by the Utah State Bar through it's creation of the Paralegal Division in 1996 (fka The Legal Assistant Division)

The paralegal profession is based upon the need for the availability of high-quality legal services at the lowest possible cost within the team of lawyer and para-professional who share the responsibility for the ethical, competent, and cost-efficient provision of legal services, exercising high professional standards.

The Utah Supreme Court defines a paralegal as a person, qualified through education, training or work experience, who is employed or retained by a lawyer, law office, governmental agency or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such a paralegal, the attorney would perform the task.

Paralegals should at all times maintain the integrity of the legal profession and are subject to the rules of professional conduct governing lawyers licensed to practice in the State of Utah known as Rules of Professional Conduct of the Utah State Bar.

The utilization of paralegals in rendering legal services has been recognized and promulgated by the American Bar Association and other professional societies.

The Paralegal Division of the Utah State Bar is committed to serving both the profession and the community at large. The Division thanks the Bar as well as the many law firms and attorneys that continually give support to the Division. We look forward to a bright and promising future.

Your Attendance is Requested…

at a luncheon honoring Utah Paralegals and supervising attorneys

Hosted by the Legal Assistants Association of Utah & the Paralegal Division of the Utah State Bar

Thursday, May 20, 2004 • 12:00 noon
Grand America Hotel • 555 South Main Street • Salt Lake City, Utah

Keynote Address: Judge Michael J. Wilkins – Utah Supreme Court
"Utah Standards of Professionalism and Civility" – 1 hour CLE

Special Guest: The Honorable Governor Olene Walker – presenter of Paralegal's Day Declaration

Cost is $35 per person

For registration information contact: Marion Eldredge with the Utah State Bar at 531-9077

Spring Practice Updates

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
04/15/04	**Annual Real Property Section Seminar.** 8:30 am – 12:30 pm. Agenda pending.	3.5
04/22/04	**Annual Collection Law Section Seminar.** 9:00 am – 1:00 pm. Topics include FDCPA and Legislative Update. Ethics topic pending. $50 section members, $75 others.	3.5 includes 1 hr. Ethics
05/06/04	**Annual Spring Corporate Counsel Section Seminar.** 9:00 am – 1:30 pm. Topics: Legislative Update, Business Development, Warranties, Ethics – Current Events. $45 section members, $85 others (lunch included).	3.5
05/13/04	**Annual Business Law Section Seminar.** 9:00 am – 12:00 pm. Sarbanes-Oxley and Corporate Governance, House Bill 240 Utah Venture Capital Enhancement Act, Legislative Update. $25 section members, $50 others.	3
05/14/04	**Annual Family Law Section Seminar.** 9:00 am – 5:00 pm. Non-Traditional Relationships – There Are More Than One Kind, New Rules on Professionalism and Civility, Case Statute and Rule Update, Contempt Orders. $125 section members and paralegal division members, $155 others.	7 CLE pending
05/19/04	**Annual Labor & Employmet Law Section Seminar.** 9:00 am – 1:00 pm. Agenda pending.	3.5
05/21/04	**Annual Elder Law Seminar.** Half day. Agenda pending.	TBA
06/18/04	**Annual Paralegal Division Seminar.** Full day. Agenda pending.	TBA

Additional Seminars

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
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. $120 for Appellate Practice and Litigation Section Members, $140 others.	7 approx.
06/11/04	**New Lawyers Mandatory.** 8:30 am – 12:30 pm. $50	Satisfies New Lawyer Requirement
06/17/04	**Nuts & Bolts of Personal Injury.** 5:30 – 8:45 pm. $50 YLD, $60 other.	3
07/21/04	**OPC Ethics School.** Full day. $125 before 07/09/04, $155 after. Pre-registration recommended. Space limited.	6 Ethics Credit Mandatory course for those admitted on motion only.

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.

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.

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

POSITIONS AVAILABLE

POSITION – ASSISTANT CITY ATTORNEY Full-time position available as assistant city attorney in the Provo City attorney's office. Three to five years experience required with a preference for municipal legal experience. Salary is negotiable depending on the experience of the successful applicant. Applications and resumes must be filed before 6:00 p.m. on Thursday, April 22, 2004 with the Provo City Department of Human Resources, 351 West Center Street, Provo, Utah 84601. For information about Provo City, visit www.provo.org or call (801) 852-6182.

Help Wanted – Wanted attorney with bankruptcy and litigation experience to rent office space and assist with significant amount of overflow work on a contract basis. Call (801) 501-0100 or (801) 635-9733.

SENIOR-LEVEL PATENT ATTORNEY – Lewis and Roca, a 150+ attorney law firm in Phoenix, Arizona, continues to develop a team-oriented patent practice to provide substantial technical expertise to the firm's clients in prosecution, transactional and counseling matters. We currently seek an attorney (EE preferred) with at least 12 years of experience. The attorney's practice will focus on the preparation and prosecution of patent applications for firm clients, counseling on patent issues and working on technology transfer and related transactions. Please reply in confidence to: Julie Moy, Director of Lawyer Recruiting, 40 North Central, Phoenix, AZ 85004, or to jmoy@lrlaw.com

South Salt Lake solicits proposals for its public defender contract beginning July 1, 2004. The contract includes representation in the Justice Court and Third District Court for appeals and class A misdemeanors. In Justice Court, public defender pre-trials and bench trials are two Mondays per month with jury trials on Fridays. District Court pre-trials and juries are set by individual judges. Submit proposals for a set fee per month. Send proposals to: South Salt Lake City Attorney, Attention: Janice L. Frost, 220 East Morris Avenue, South Salt Lake, Utah 84115. The deadline is May 14, 2004.

Michael L. Hutchings is seeking applications for a position as a land use litigation attorney. His main client is a large development company, Anderson Development. Experience in land use, municipal law, real estate and litigation is preferred. Please e-mail or fax resumes and payment requirements to Michael L. Hutchings, Attorney at Law, at mikeh@and-dev.com or 990-4998 (fax).

United States District Court District of Utah: Half-time Law Clerk to the Honorable Paul G. Cassell. One-year position with a possible extension to two years. Closing Date: June 25, 2004. Starting Salary $24011 (JSP 11) to $28778+ (JSP 12) or JSP 13, commensurate with qualifications and experience. Starting Date: October 4, 2004. Applicants should send letter, resume, writing sample and three references to: Ms. Yvette Evans, United States District Court, 350 South Main Street, Room 112, Salt Lake City, Utah 84101. Equal Employment Opportunity. web at utd.uscourts.gov

EXPERIENCED PART-TIME PARALEGAL: Downtown law office needs experienced part-time LITIGATION paralegal. Must be able to take charge. Flexible schedule. Salary commensurate with experience. Send your resume to: Christine Critchley, Utah State Bar Confidential Box #8, 645 South 200 East, Salt Lake City, UT 84111, or e-mail to: ccritchley@utahbar.org.

OFFICE SPACE/SHARING

DRAPER/SOUTHTOWN AREA OFFICE for rent in busy professional 2 atty firm. Own secretary station. Use of conference room, fax, copier, kitchen. Overflow/contract work available. $650 per month. janmarshall74@msn.com

Professional Office Suites of Boise – Executive and Virtual Office Suites available starting at $245 per month! Instant telephone and high-speed Internet access; full administrative support services; receptionist/answering services; fully furnished executive suites; conference room access and much more! Contact POS of Boise at 208-947-5895, officeinfo@officeidaho.com or www.officeidaho.com.

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.

Office Space Exceptionally nice office space available in small new office building in East Sandy in office sharing arrangement with two other attorneys. Facilities include receptionist, secretarial station, fax, copier, T-1 line and programmable telephone system. Overflow work available. Call (801) 501-0100 or (801) 635-9733.

Park City Office Space with secretarial area available in existing law office. Includes receptionist services, conference room, kitchen facilities, copier, internet access, telephone system. Parking adjacent to building. Great views, very light and airy. Prospector Park area, easy access to I-80. $1500/month. Call (435) 940-0336.

Farmington Office Space for rent for one or two attorneys. Share with other attorneys. Fax, copy machine, conference room, kitchen, plenty of parking and easy access to freeway. Wally at 451-8400.

ATTORNEY OFFICE SHARE/LAYTON: Layton Law firm seeking attorneys to share office space and do overflow work in Business Law, Real Estate Law and Estate Planning as well as some personal injury. All the nice amenities, wood desk, conference room, reception area, law library, secretarial and paralegal support, computer network, phones, etc. Durbano Law Firm 476 W. Heritage Park Blvd., #200, Layton, Utah 84041. Phone: (801) 776-4111. Fax: (801) 776-1121.

Deluxe Downtown Office Space (prime location) to share with other attorneys which includes large private office; reception area; conference rooms; library; electronic fax; copier; telephone system; full service secretary; paralegal support; computer network; time and billing system. Please email inquiries to ccritchley@utahbar.org and reference confidential box #7. Or mail to Christine Critchley, Utah State Bar Confidential Box #7, 645 South 200 East Salt Lake City, UT 84111

Executive Offices and Virtual Offices now available in the Judge Building. Includes receptionist, copy room, break room and conference room. Secretarial, research and messenger services available. Secretarial bays also available. Rates from $350 per month. Please call Kelly at (801) 355-4300 for more information.

Attractive law suites available at the Judge Building. Various sizes and layouts at competitive rates. Inexpensive storage space also available. Please call Kelly at (801) 355-4300 for more information.

SERVICES

CHILD SEXUAL ABUSE – DEFENSE. Forensic Statement Services provides a complete objective case analysis – Assess relevance of criminal charges – Identify and determine effects of evidence contamination, coersion, bias and prejudice – Evaluate for false allegations – Apply objective Daubert, peer-reviewed research to case evidence and motions to limit/suppress. B.M. Giffen, Psy.D. Evidence Specialist (801) 485-4011. Member: American Psychology-Law Society.

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UTAH STATE BAR ADDRESS CHANGE FORM

The following information is required:

- **You must provide a street address for your business and a street address for your residence.**
- **The address of your business is public information. The address of your residence is confidential and will not be disclosed to the public if it is different from the business address.**
- **If your residence is your place of business it is public information as your place of business.**
- **You may designate either your business, residence, or a post office box for mailing purposes.**

***PLEASE PRINT**

1. Name _____ **Bar No.** _____ **Effective Date of Change** _____

NOTE: Date means months, day, and year. "Now," "Immediately," or other such phrases will not be accepted. If you do not provide a date the effective date of the change will be deemed to be the date this form is received.

2. Business Address – Public Information

Firm or Company Name _____

Street Address _____ Suite _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-mail address (optional) _____

3. Residence Address – Private Information

Street Address _____ Suite _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-mail address (optional) _____

4. Mailing Address – Which address do you want used for mailings? (Check one) (If P.O. Box, please fill out)

_____ Business _____ Residence

_____ P.O. Box Number _____ City _____ State _____ Zip _____

Signature _____

All changes must be made in writing. Please return to: UTAH STATE BAR, 645 South 200 East, Salt Lake City, Utah 84111-3834: Attention: Arnold Birrell, fax number (801) 531-9537.

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