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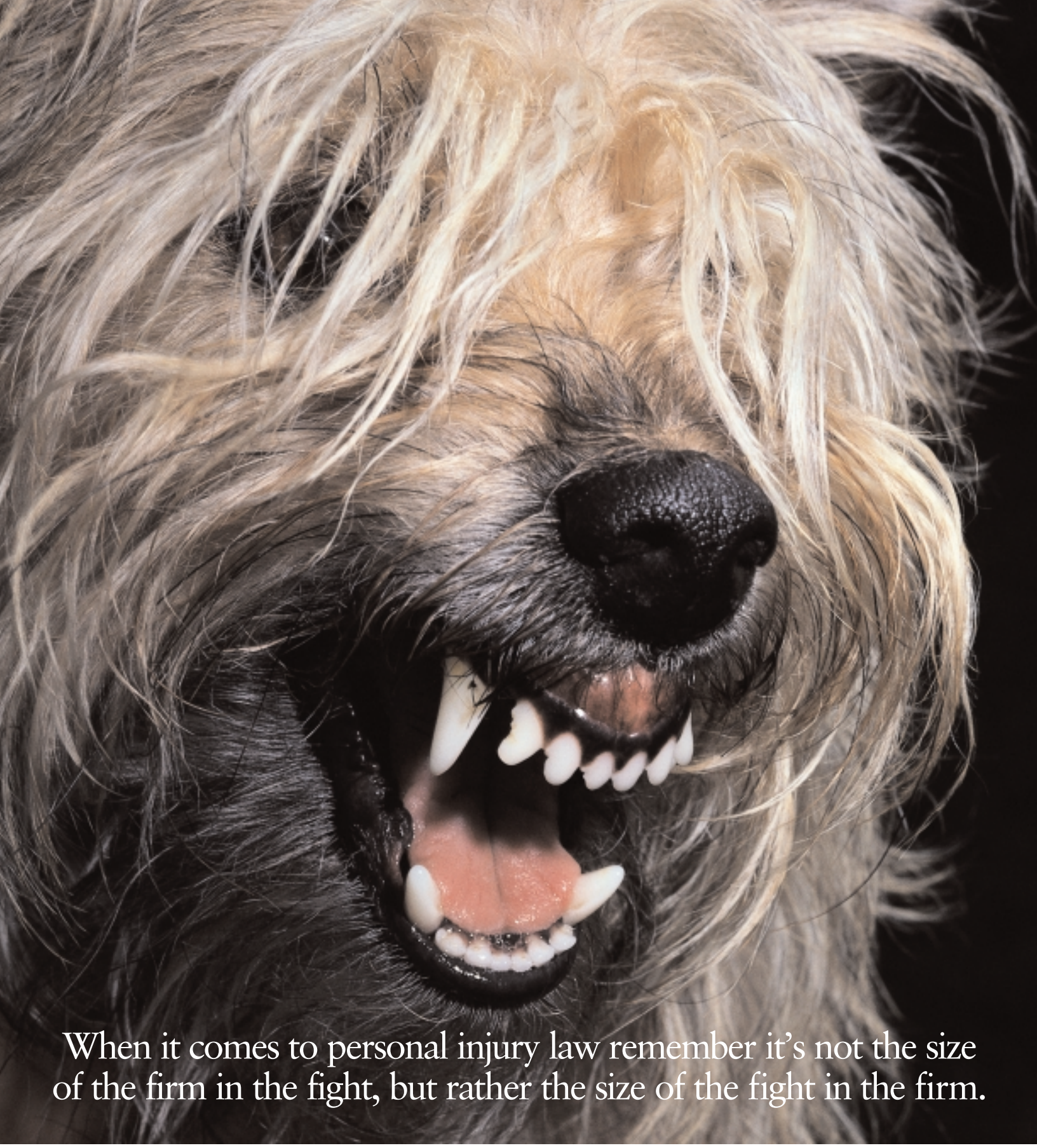

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MISSION OF THE BAR: *To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.*

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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

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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.

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Practice Pointer: When Can a Lawyer End an Attorney-Client Relationship?

by Kate A. Toomey

Attorneys sometimes ask about the circumstances under which they must withdraw from a representation, and those under which they are permitted to end it. The answers vary with the situations: some are essentially no-brainers (for example, you *must* withdraw from the representation if the client fires you) while others are far more ambiguous (for example, you want to withdraw because it has become clear the lawyer-client relationship requires high maintenance).

When Must You Withdraw From Representing a Client?
The Rules of Professional Conduct require you to withdraw if continuing the representation "will result in violation of the rules of professional conduct or other law." Rule 1.16(a)(1), R. Pro. Con. This subsection recognizes that some duties trump others; the Comment following the rule exhorts us to "be mindful of [our] obligations to both clients and the court under Rules 1.6 and 3.3." So, for example, if a conflict emerges between your interests and those of your client, you may have to withdraw.[1] Likewise, if the client demands that you engage in unethical conduct, you may end up having to withdraw.

You also must withdraw if your "physical or mental condition materially impairs [your] ability to represent the client." Rule 1.16(b)(2), R. Pro. Con. This is a little tricky because sometimes the attorney isn't the best person to evaluate whether the condition warrants withdrawal. Obviously, if you know you're ill or injured or impaired and will remain so for a long period, it behooves you to withdraw. I always encourage Ethics Hotline callers to take the approach that best protects their clients, and the conservative response here would be to make arrangements to withdraw sooner than later. Likewise, you ought to avoid taking new cases.[2]

The rule also requires an attorney to withdraw if "discharged."[3] Rule 1.16(b)(3), R. Pro. Con. Earlier, I referred to this as a "no-brainer" situation, but you might be surprised to learn that not all attorneys take appropriate action.[4] Sometimes it's because a contingent case is nearing conclusion and the attorney wants to ensure payment; other times it's because the attorney substitutes her judgment for that of the client. Either way, it's a violation of the rules unless a court orders the attorney to stay in the case. *See* Rule 1.16(c), R. Pro. Con. In the first instance, you may still assert a claim for the reasonable value of your fees,[5] and in the second, however pure your motives, you still have to get out.[6] Moreover, you can't contract around the client's right to discharge you.[7]

If the Criteria for Mandatory Withdrawal Aren't Present, Are You Stuck For Life In a Bad Attorney-Client Relationship?
No. But let the bad attorney-client relationships educate you about how to evaluate future potential clients and cases because it's always easier to avoid them than to extricate yourself when the relationship or the case goes south. As the Comment following the rule notes, "A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without conflict of interest." As one court put it,

> [A]n attorney has certain obligations and duties to a client once representation is undertaken. These obligations do not evaporate because the case becomes more complicated or the work more arduous or the retainer not as profitable as first contemplated or imagined. . . . Attorneys must never lose sight of the fact that 'the profession is a branch of the administration of justice and not a mere money-getting trade.' . . . 'The lawyer should not throw up the unfinished task to the detriment of his client.'

KATE A. TOOMEY is the Deputy Counsel of the Utah State Bar's Office of Professional Conduct. The views expressed in this article are not necessarily those of the OPC or of the Utah State Bar.

Kriegsman v. Kriegsman, 375 A.2d 1253, 1256 (N.J. Super. 1977) (citations omitted).

You may withdraw if doing so "can be accomplished without material adverse effect on the interests of the client." Rule 1.16(b)(1), R. Pro. Con. If your client took out a loan or used all their savings to pay you a flat fee for the representation and you're not prepared to disgorge most if not all of it so that the client can obtain substitute counsel, then you may not be able to withdraw without material adverse effect on the client. But if, for example, you have a contingency fee matter that other attorneys would be happy to complete, and you're not so far into it that your share of the fees is so sizable that no other attorney will touch the case, you're free to withdraw. Check out subsection (d) and the pertinent portion of the Comment following the rule for an overview of what you must do to protect the client's interests.

You may also withdraw if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent," or if "the client has used the lawyer's services to perpetrate a crime or fraud."[8] Rule 1.16(b)(2), (3), R. Pro. Con. Although these subsections appear similar, one involves your reasonable beliefs about ongoing activities,[9] and the other implies your knowledge that your services were used in the past to perpetrate a crime or a fraud. In each case, you *may* withdraw, but are not required to do so.

The rule also covers situations in which "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." Rule 1.16(b)(4), R. Pro. Con. A common example of this is a client who accepts the death penalty and a defense attorney who can't countenance that decision.[10] But, for example, a client's decision, against your considered recommendation, to exercise his right to testify by itself isn't necessarily sufficient reason for your mid-trial withdrawal.[11]

You may also withdraw if your client doesn't pay you, but there are a few caveats. *See* Rule 1.16(b)(5), R. Pro. Con. The failure must be "substantial,"[12] and the attorney must give the client reasonable warning before withdrawing.[13] These caveats are intended to prevent coercive tactics on the lawyer's part.[14] Ideally, you would disclose this in your retainer agreement,[15] and would provide further notice in writing as soon as payments become overdue. This will at least help you address a Bar complaint to the effect

that you dumped the client just when the going got rough. With clients whom you suspect are financially compromised, consider collecting a flat fee up front, but keep in mind that if the relationship is over before its ends are achieved, you'll have to refund whatever you haven't earned. *See* Rules 1.16(d), 1.5(a), 1.15(c), R. Pro. Con.

Suppose you're financially in over your head with costs you agreed to advance, and you've reached the point where you just can't keep going and pay your rent and overhead, too. What then? You're allowed to withdraw if "the representation will result in an unreasonable financial burden on the lawyer." Rule 1.16(b)(6), R. Pro. Con. Let this circumstance be a cautionary tale about carefully evaluating what you're getting into before you undertake the representation. I remember a case in which a fairly green attorney undertook representing a client in a serious criminal matter, only to realize that the time required for the representation, coupled with the out-of-pocket expenses the attorney assumed, would engulf the attorney's entire practice. Unfortunately, the attorney realized this so late that the withdrawal injured the client, and the attorney wound up with a Bar complaint, and ultimately some discipline. This might have been avoided with research and a careful assessment of what's involved in representing a client in this situation.

What if you've got a client who won't communicate and doesn't cooperate in getting you materials and information necessary to the representation? This, too, is a situation with an out: an attorney may withdraw if the representation "has been rendered unreasonably difficult by the client." Rule 1.16(b)(5), R. Pro. Con.[16] Again, I urge you to document the client's lack of cooperation with reminder letters, followed by letters cautioning that your withdrawal is imminent unless the client immediately provides you with the necessary assistance.

A client's persistent obnoxiousness to you and your staff might also invoke the provision allowing withdrawal if the conduct makes continuing unreasonably difficult. For example, a client's threats, accusations, and refusal to accept advice can render the representation unreasonably difficult.[17]

Another means of exit would be the catch-all provision that permits an attorney to withdraw when "other good cause for withdrawal exists." Rule 1.16(b)(7), R. Pro. Con. Bear in mind that "good

cause" doesn't encompass, without more, a client's refusal to accept settlement.[18] But it could include your discovery of facts that might have made you avoid the representation in the first place.[19]

Note that under subsection (b)(1), you need not have any reason at all for withdrawing provided you can do so "without material adverse effect." The other subsections offer reasons for withdrawing that are so significant they aren't expressly conditioned on lack of material adverse effect on the client. You're not entirely off the hook, though, because subsection (c) requires attorneys to "comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." Rule 1.16(c), R. Pro. Con.[20] This safeguards clients from abandonment when precious rights may be in issue, and it protects court schedules from the havoc of last-minute withdrawals, even when they are prompted by legitimate concerns. In other words, if you stick with the representation long enough, you may be stuck for good: as the Comment notes, "Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded."

From a practical ethical standpoint, a court's refusal to release you will not result in a violation of the disciplinary rules even if your client has used your services "to perpetrate a crime or fraud." This is because "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Rule 1.16(c), R. Pro. Con. From a practical financial perspective, though, it may pose some problems. Which is why, if your client's financial situation will result in an unreasonable financial burden for you, it's best to decline in the first place, or to withdraw before the case has progressed so far that a court will not grant you permission to withdraw.

Conclusion

Take a careful look before you agree to represent someone. Avoiding problem clients is the best way to avoid difficulties in terminating the relationship. But don't assume there's no way out if the relationship sours. There are a host of legitimate reasons for an attorney to end a representation, and provided you follow applicable rules of the tribunal and take reasonable steps to protect the client's interests, you may be able to ethically extricate yourself. And remember, you can call the Office of Professional Conduct's Ethics Hotline (531-9110) to discuss your own contemplated conduct in these situations.

1. *See e.g. People of the State of Colorado v. Riddle,* 35 P.3d 146, 150 (Colo. 1999) (lawyer violated rule by failing to withdraw when there was conflict of interest); *In re Hunter,* 734 A.2d 654, 654 (D.C. 1999) (attorney should have withdrawn given conflict of interest and other rule violations); *In re Hoffman,* 700 N.E.2d 1138, 1139 (Ind. 1998) (attorney must withdraw if continuing representation conflicts with attorney's own interests).
2. *See e.g. Mulkey v. Meridian,* 143 F.R.D. 257, 260-251 (W.D. Okla. 1992) (advertising for new clients when attorneys had physical and mental impairments at odds with Rule 1.16); *In re Barnes,* 691 N.E.2d 1225, 1226 (Ind. 1998) (rule violated by attorney's failure to withdraw once it became apparent that his depression prevented completing the representation); *In re Francis,* 4 P.3d 579, 580 (Kan. 2000) (attorney should have realized he or she could not effectively represent client and withdraw).
3. The rule may not apply to government lawyers. *See e.g. Coyle v. Board of Chosen Freeholders,* 787 A.2d 881, 885 (N.J. 2002) (statutes control grounds for discharge of government attorneys).
4. *See e.g. Oklahoma Bar Ass'n v. Israel,* 25 P.3d 909, 915 (Okla. 2001) (attorney violated rule by continuing after discharge, no matter how sincere his belief that he could do so to protect his lien rights). You might also be surprised to know that many clients don't realize they are allowed to fire their counsel.
5. *See e.g.* Comment, Rule 1.16 ("A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services."); *Campbell v. Bozeman Investors,* 964 P.2d 41, 45 (Mont. 1998).
6. As the Comment notes, however, you "may take reasonably necessary protective action as provided in Rule 1.14."
7. *See e.g. Crabtree v. Academy Life Ins. Co.,* 878 F. Supp. 727, 730-731 (E.D. Penn. 1995) (client has absolute right to terminate representation regardless of contractual arrangement).
8. *See State v. Jones,* 78 Mont. 121, 126-130, 923 P.2d 560 (Mont. 1996) (client's lack of persistence in announcing intent to commit perjury could vitiate counsel's reasonable belief).
9. *See e.g. Jones, supra* n.8 (initial duty when faced with client's stated intent to perjure is attempt to dissuade).
10. *See e.g. Red Dog v. State,* 625 A.2d 245, 247 (Del. 1993) (attorney who could not in good conscience represent client who accepted death penalty may seek leave to withdraw).
11. *See e.g. Nichols v. Butler,* 953 F.2d 1550, 1553 (11th Cir. Ct. App. 1992).
12. *Fidelity Nat'l Title Ins. Co. v. Intercounty Nat'l Title Ins. Co.,* 310 F.3d 537, 540-541 (7th Cir. 2002) ($470,000 counts as substantial); *Cherokee Nation v. United States,* 42 Fed. Cl. 15, 17 (Fed. Cl. 1998) ($285,000 is substantial).
13. *See Cherokee Nation, supra* n.12 (repeatedly telling client verbally and in writing that failure to pay would result in withdrawal constituted reasonable warning).
14. *See Fidelity, supra* n.12.
15. The Comment notes that "it may be advisable to prepare a written statement reciting the circumstances" of withdrawal.
16. *See e.g. Ambrose v. Detroit Edison Co.,* 237 N.W.2d 520, 522-523 (Mich. 1975) ("total breakdown of communications" and resulting failure to cooperate might justify withdrawal).
17. *See Ashker v. International Bus. Machs., Corp.,* 607 N.Y.S.2d 488, 489 (N.Y. 1994).
18. *See e.g. May v. Siebert,* 264 S.E.2d 643, 679 (W.V. 1980); see also Rule 1.2(a), R. Pro. Con.
19. *WSF, Inc. v. Carter,* 803 So.2d 445, 448-449 (La. Ct. App. 2001) (attorney's discovery of client's criminal background constituted good cause for withdrawal).
20. *See e.g. In re Fuller,* 621 N.W.2d 460, 466 (Minn. 2001) (even if required to withdraw, attorney must still follow tribunal's procedural requirements).

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Possible Defense Responses to Plaintiff's "Experts"

by Gordon Strachan

This article clarifies differences between the testimonial latitude permitted for defendants' and plaintiffs' expert witnesses in negligence-based personal injury litigation and clarifies Utah law regarding granting increased discretion to defense experts. This should help curtail the proliferation of plaintiffs' motions *in limine* designed to reallocate – impermissibly – the burden of proof.

In two recent cases we litigated – one in the Federal District Court, District of Utah and one in the Third Judicial District Court for Summit County – the plaintiffs tried to bar defense expert "causation" opinions because the defense experts did not testify in terms of "probabilities." In moving *in limine,* the plaintiffs cited several Utah state court opinions excluding expert testimony where the expert only testified as to "possible" causes of injury. However, in both recent cases, Federal District Court Judge David Sam and Utah State Judge Robert Hilder declined respectively to apply those prior Utah opinions and denied plaintiffs' motions *in limine.* These judges noted that every case cited by plaintiffs, while barring the expert's testimony, involved a *plaintiff's* expert, not a defense expert. This distinction controlled, according to Judges Sam and Hilder, because the defendant, of course, does not have the "burden of proof." Therefore, defense experts do not have to testify in terms of "probabilities"; only plaintiffs' experts do. *See Nelson v. Salt Lake City, et al.,* 919 P.2d 568, 574 (Utah 1996) ("plaintiff in general has the burden of proof [not defendant] . . . and must introduce evidence which affords a reasonable basis for the conclusion that [whatever plaintiff is alleging] is more likely than not [true]").

Although Utah courts are clear that plaintiffs' experts must testify in terms of "probabilities" rather than "possibilities," there is no *published* Utah opinion specifically addressing defense experts' testimonial obligations. However, other courts in the United States, both federal and state, hold consistently that requiring defense experts to testify only in terms of "probabilities" would result in an impermissible shifting of the burden of proof from plaintiff to defendant. Although each case cited below involves medical malpractice claims, courts here in Utah are now willing to apply the reasoning of these cases generally to other negligence-based claims.

In *Wilder v. Warren Eberhart, M.D.,* 977 F.2d 673, 676-677 (1st Cir. 1992), the First Circuit Court of Appeals, quoting from *Tzimas v. Coiffures By Michael,* 606 A.2d 1082, 1084 (N.H. 1992), agreed that:

> [T]he plaintiff in a negligence action bears the burden of producing evidence 'to prove that it is more likely than not that [plaintiff's] injury was' caused by the defendant's negligence. Defendant need not prove another cause, he only has to convince the trier of fact that the alleged negligence was not the legal cause of the injury. In proving such a case, a defendant may produce other "possible" causes of the plaintiff's injury. These other possible causes need not be proved with certainty or more probably than not. To fashion such a rule would unduly tie a defendant's hands in rebutting a plaintiff's case, where as here, plaintiff's expert testifies that no other cause could have caused plaintiff's injury. The burden would then shift and defendant would then bear the burden of positively proving that another specific cause, not the negligence established by plaintiff's expert, caused the injury.
>
> Certainly, this is much more than what should be required of a defendant in rebutting a plaintiff's evidence.

See also Salker v. Anesthesiology Associates, et al., 50 S.W.3d 210, 214 (Ky. Ct. App. 2001) ("[D]efendant need not disprove causation. Rather, he must produce credible evidence which tends to discredit or rebut the plaintiff's evidence").

Similarly, in *the Estate of Lawrence Hunter v. Jay Michael Ura, et al.,* 2003 Tenn. App. LEXIS 755, *75, the Tennessee Court of Appeals vacated a plaintiff's jury award, citing the trial court's erroneous decision to bar defense expert testimony concerning "alternative [possible] causes of [decedent's] death". The

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Hunter Court explained its decision by quoting the First Circuit's hypothetical example given in *Wilder, see infra:*

> Were we to accept plaintiff's argument that once a plaintiff puts on a prima facie case, a defendant cannot rebut it without proving another cause, the resulting inequities would abound. For example, if ninety-nine out of one hundred medical experts agreed that there were four equally possible causes of a certain injury, A, B, C and D, and plaintiff produces the one expert who conclusively states that A was the certain cause of injury, defendant would be precluded from presenting the testimony of any of the other ninety-nine experts, unless they would testify that B, C, or D was the cause of the injury. Even if all of defendant's experts were prepared to testify that any of the possible causes A, B, C, or D, could have equally caused plaintiff's injury, so long as none would be prepared to state that one particular cause, other than that professed by plaintiff more probably than not caused plaintiff's injury, then defendant's experts would not be able to testify at all as to causation.

Id. at *65. *See also Haas v. Zaccaria,* 659 So.2d 1130, 1133 (Fla. 1995) ("even assuming that 'reasonable medical probability' is part of a claimant's burden of proving a claim of medical negligence, we do not agree that such a burden logically compels the conclusion that the *defendant* doctor is precluded from offering evidence of *possible* explanations other than his own individual or joint negligence"). (Italics in original).

In both of our cases, Judge Sam's and Judge Hilder's respective rulings relying on the reasoning of these out-of-state opinions were critical because they allowed us as defense counsel to present alternative, "possible" causation theories for the plaintiffs' injuries sustained while skiing. In one case, we asserted at trial, through our expert orthopedic witness, that based on Plaintiff's own MRI films, plaintiff might have sustained her injury *prior* to the subject incident. In the other case (also a ski resort defense case), our expert ski patrol witness was permitted by Judge Sam to testify concerning the "possible" reason for decedent's (a skier) unconscious condition prior to sliding into a stationary object allegedly causing his death. Thus, while defense experts certainly can testify in terms of "probabilities," they are not required to do so, and may instead offer other, alternative "possibilities" to establish doubt in the jurors' minds about plaintiffs' claims.

Mental Illness, Addiction and Attorneys

by Jack M. Morgan, Jr.

Mental illness and addiction are devastating to lives, careers, relationships, families, and communities. In any given year, 9.5% of the population, approximately 18 million Americans, suffers from a depressive illness, generally defined to include major depression, dysthymia and bipolar disorder.[1] Nearly 1 in 13 adults abuse alcohol or are alcoholic.[2] A 1999 study by the Substance Abuse and Mental Health Services Administration concluded that an estimated 4 million people – about 2% of the population – were using prescription medication non-medically,[3] and the same study a year earlier found that 1.7 million – about 0.8% – were using cocaine.

The National Institute on Health estimates that 2% of those ever treated for depression in an outpatient setting will commit suicide;[4] for those suffering from bipolar disorder, the figures are even more grim – between 10% and 20% of those with the disorder will commit suicide and approximately one-third will attempt.[5] A 2000 survey of 466 hospitals in 21 metropolitan areas found 601,776 drug related emergency room episodes,[6] undoubtedly only a fraction of the total admissions nationally. Morbidity statistics for alcoholism are harder to categorize, but we all know someone whose life has been inexorably altered, or taken, by alcohol.

As these statistics bear out, mental illness and addiction kill people. These statistics are troubling indeed, but they do not reflect the less obvious damage of lost jobs, destroyed marriages, alienated families and friends, financial troubles, and for attorneys, malpractice and disciplinary problems.

As attorneys, we are not immune from mental illness and addiction. We are not, to use a trite expression, "above the law." And yet, because we expect perfection from ourselves and our colleagues, we are reluctant to acknowledge our susceptibility to these human afflictions. If the statistics cited above are true for our group – and I suggest that they are – then about 570 Utah attorneys suffer from a depressive illness; 460 of us abuse alcohol or are alcoholic; 120 of us abuse some type of prescription medication; and about 50 of us have a cocaine habit.[7] Mental illness and addiction take a huge toll on the lives of those afflicted, as well as other people in their lives – and we as attorneys are no exception. We have a duty to ourselves, our colleagues and our profession to address these issues.

Lawyers Helping Lawyers' ("LHL") mission is to assist attorneys in dealing with these very real problems. Toward that end, LHL is forming support groups focused on (1) substance abuse and (2) mental health issues. These groups are not counseling sessions, nor are they intended to be a substitute for professional counseling. They can, however, provide valuable peer and mentoring support for lawyers struggling with these issues in their personal and professional lives. Participation in these groups is strictly confidential. If you think you or a colleague may benefit from such a group, or to obtain more information, please call LHL. Also, if you are willing to join the support group as someone who has valuable experience to offer others beginning their journey seeking assistance, please contact LHL at 579-0404 or toll free in state at (800) 530-3743.

1. National Institute of Mental Health (NIMH), www.nimh.gov/publicat/depression.
2. Narconon Southern California, Inc., www.alcoholaddiction.info/statistics.
3. Substance Abuse and Mental Health Services Administration (SAMHSA), 1999 National Household Survey on Drug Abuse (NHSDA), Main Report. For further information see www.samhsa.gov.
4. National Institute of Mental Health, www.nimh.nih.gov. The suicide rate for patients treated in an in-patient setting is twice as high.
5. Comment, Lancet, 2002, May 11; 359(9318):1702.
6. Substance Abuse and Mental Health Services Administration, 2000 Drug Abuse Warning Network Report, www.nida.nih.gov.
7. Currently, there are approximately 6000 active attorneys licensed to practice in Utah.

JACK M. MORGAN, JR. is a criminal defense attorney at the law firm of Skordas, Kaston and Morgan, LLC. He also serves on the Board of Lawyers Helping Lawyers.

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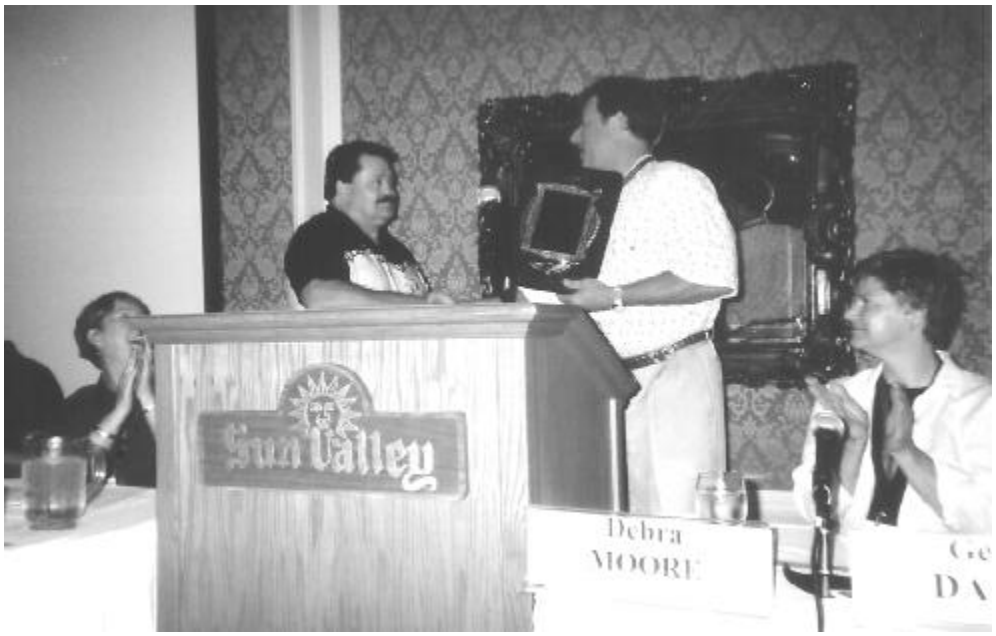

Tim D. Dunn receives the 2004 Utah Trial Lawyer of the Year from Colin King with Chief Justice Christine Durham and Utah Bar President Debra Moore looking on at the 2004 Annual Bar Convention in Sun Valley.

ABOTA would like to formally thank the Utah State Bar and Bar President Debra Moore for their support.

Facsimile Advertising and the Requirement to Get Signed, Written Consents

by Berk W. Washburn

Recently, much attention has been focused in the media on new rules and regulations issued by the Federal Communications Commission (the "FCC") and the Federal Trade Commission (the "FTC") in connection with a national Do-Not-Call Registry. For the most part, the media has not noticed that there are included within the same new FCC rules substantial changes in the statutory guidelines for the legal requirements in facsimile advertising. These new facsimile advertising rules apply to both residential phone lines (consumer transactions) and business phone lines (commercial transactions). In the last decade, facsimile advertisements have become a cheap and pervasive form of advertising. Many businesses quickly embraced facsimile advertising in order to capitalize on the minimal cost and time required to reach a very large audience. On the other hand, because much of the cost and wasted time is shifted to the recipient, "fax ads" have become the bane of many dedicated facsimile lines, both for business and residential users. In Utah, many businesses have been at different times both a sender and a receiver of fax ads. Since the FCC has now substantially reversed its position on the legal rules for fax ads, both senders and receivers of fax ads in Utah will be interested in the new rules.

A. THE TELEPHONE CONSUMER PROTECTION ACT OF 1991

The FCC rules on fax ads arise out of the Telephone Consumer Protection Act of 1991, 47 U.S.C. Section 227, (the "TCPA"). The TCPA was enacted in an effort to address concerns about the growing number of telephone and facsimile telemarketing practices that were thought to be an invasion of consumer privacy and even a risk to public safety. While the principal focus of the TCPA is on telemarketing practices (e.g., restricting the use of automatic telephone dialing systems and artificial or prerecorded messages), the TCPA also prohibited the use of telephone facsimile machines, computers and other devices in sending unsolicited advertisements to another facsimile machine. The TCPA further directs the FCC to prescribe the rules and regulations necessary to implement the TCPA's statutory restrictions.

The FCC initially published rules implementing the TCPA on December 20, 1992. Later, on two subsequent occasions, August 7, 1995, and April 10, 1997, additional rules for the TCPA were published by the FCC. Most recently, as of July 25, 2003, the FCC has published new rules for facsimile advertisements changing the requirements for what constitutes legal compliance with the TCPA. The new fax ad rules specifically address the following provision of the TCPA, 47 USC Section 227(b)(1)(C):

> "It shall be unlawful for any person within the United States to use any telephone, facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."

Existing Business Relationships ("EBR")

The term "unsolicited advertisement" is defined in the TCPA as "any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person *without that person's prior express invitation or permission.*" Initially, in 1992, the FCC issued rules specifying that an existing business relationship ("EBR") implied consent or permission for purposes of the TCPA facsimile advertising requirements. For the last 11 years, the FCC standard of an EBR "implied consent" was used as an important defense against private, state and federal actions under the TCPA. The FCC's "EBR exception" has allowed for the continued wide spread use of fax ads, even in the face of some very large class-action judgments.

Enforcement Actions

One of the important aspects of the TCPA is that it specifically allows for enforcement by state and/or private actions. First, the TCPA allows for enforcement by the state attorney general or other state official, and allows the states to enact and enforce more

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stringent restrictions than provided under the TCPA. Second, the TCPA provides a right of private action to consumers who receive illegal facsimiles. Any action by a consumer under the TCPA may be for $500.00 in damages for each violation, or for the actual monetary loss, which ever is greater. However, if the court finds that the facsimile transmitter "willfully or knowingly" violated the TCPA, the court is directed to award an amount equal to not more than three times the amount available in actual or statutory damages.

Recently, in a number of class action law suits, litigators have been able to obtain judgments or settlements for many millions of dollars using the TCPA statutory damage formula. On March 21, 2001, a jury found that Hooters of Augusta, part of a national chain of restaurants, had "willfully or knowingly" faxed unsolicited advertisements to Sam G. Nicholson, a Georgia attorney, and to thousands of other recipients. Judgment for damages in the amount of $11.9 million was granted against Hooters. In another case, the Dallas Cowboys agreed to pay a settlement of $1.73 million in a class action law suit under the TCPA for an advertising campaign that was handled by a third-party facsimile broadcaster, American Blast Fax. In a very recent case, AMF, which runs a chain of bowling alleys, agreed to pay a settlement of up to $1 million cash and $1.5 million in coupons for sending out as many as 352,000 unsolicited faxes. Even before the new FCC rules of last July, the "fax blast" law suits have been so successful in some cases that TCPA litigation is starting to become a cottage industry. This trend will now probably accelerate as the "EBR exception" is eventually abolished by the FCC.

Transmitter Identification

Before going on to the new FCC rules, it is important to point out that the TCPA also required the clear identification of the facsimile transmitter on the faxed materials. In part the TCPA states that "it shall be unlawful for any person within the United States to use a computer or any other electronic device, to send any messages, via a telephone facsimile machine, unless such person clearly marks in a margin at the top or bottom of each transmitted page of the message or on the first page on the transmission, the date and time it is sent and an identification of the business or other entity or individual sending the message and the telephone number of the sending machine or of such business or other entity or individual." Telephone facsimile machines manufactured on or after December 20, 1992, must clearly mark such identifying information on each transmitted page.

B. THE NEW FCC FACSIMILE ADVERTISING RULES

Now, having established the basis of the FCC fax ad rules under the TCPA, let's look at the new fax ad rules published by the FCC on July 25, 2003 (CG Docket No. 02-278). The new fax-ad rules were originally scheduled to become effective as of August 24, 2003, thirty days after publication, but because of certain business concerns, the effective date has now been postponed until January 1, 2005 (CG Docket No. 02-278, ORDER ON RECONSIDERATION, Adopted and Released: August 18, 2003.) While the primary purpose of these new FCC rules was to establish with the FTC a national Do-Not-Call Registry for consumers who wish to avoid unwanted telemarketing calls, the FCC also revised its earlier determination that an established business relationship or EBR

constituted by implication the "express invitation or permission to receive an unsolicited fax." In addition, the FCC went on to clarify certain other points in connection with facsimile equipment and fax broadcasters.

Addressing Perceived Abuses

This latest ruling under the TCPA comes now more than ten years after the original set of rules. Over the last decade, the telemarketing industry has undergone significant changes in technologies and methods. Despite a general ban on unsolicited fax advertising, fax advertisements have proliferated as have facsimile service providers (or "fax broadcasters"), enabling sellers to send advertisements to thousands, even millions, of destinations with relatively little time or money invested by the sender. However, these unsolicited faxes impose costs on the recipients and tie up receiving fax machines, resulting in substantial inconvenience and disruption, and in some cases involving hospitals, police departments and other sensitive private and public service lines, unsolicited faxes may have serious implications for public health and safety. After a period of public review and comment, the FCC has now published new rules under the TCPA for fax advertising. In regards to such rules, the FCC states:

> "The Commission has determined that the TCPA requires a person or entity to obtain the prior express invitation or commission of the recipient before transmitting an unsolicited fax advertisement. This express invitation or permission must be in writing and include the recipient's signature. The recipient must clearly indicate that he or she consents to receiving such faxed advertisements from the company to which permission is given, and provide the individual or business's fax number to which faxes may be sent." CG Docket No. 02-278, paragraph 187.

In addition the FCC states:

> "We now reverse our prior conclusion that an established business relationship provides companies with the necessary express permission to send faxes to their customers. As of the effective date of these rules (now January 1, 2005), the EBR (established business relationship) will no longer be sufficient to show that an individual or business has given their express permission to receive unsolicited facsimile advertisements." CG Docket No. 02-278, paragraph 189.

Express Written Authorization

In order for a fax advertiser to meet the new requirements, the advertiser must obtain the following "express consent" from each recipient of any fax advertisements:

1. Written authorization,
2. With recipient's signature, and
3. Including specific fax numbers to which advertisements can be sent.

The permission cannot be given in the form of a "negative option." Instructing recipients, by mail or by fax, that they can be dropped from the fax advertising list by contacting the sender at a toll-free telephone number or fax number, is a "negative option" and is not an acceptable means of obtaining permission. In addition, membership in a trade association or the mere distribution or publication of a telephone facsimile number is not the equivalent of prior express permission to receive fax advertisements. An example of an acceptable method for obtaining "express consent" would be for the fax advertiser to request a fax number on an application form with clear instructions that advertisements will be sent to such number and that the individual or business agrees to receive facsimile advertisements at such number. As long as the application is signed by the recipient, it would constitute the necessary prior express permission needed to send fax advertisements to that individual or business.

Miscellaneous New Rules

For identification and liability purposes, the latest FCC rules have expanded the coverage of the TCPA to "**fax broadcasters**" to the extent that they are involved to a high degree (defined below), or have actual notice of the illegal use and fail to take appropriate steps to comply with the TCPA. A fax broadcaster is defined as any

entity which for a fee assists any other entity in advertising to a large number of telephone facsimile machines. In connection with **"common carriers,"** the same rule applies. Common carriers, defined as the entity providing the transmission lines or network, are not liable except to the extent there is a high degree of involvement or actual notice of illegal transmissions together with failure to take appropriate steps to prevent such illegal transmissions.

In clarifying the "high involvement" cases, the FCC states: "...that if a fax broadcaster is responsible for the content of the message or for determining the destination of the message (i.e., supplying the list of facsimile numbers to which the faxes are sent), it should be identified on the facsimile, along with the entity whose products are advertised." CG Docket No. 02-278, paragraph 203. This means that in high-involvement cases both the entity advertising as well as its fax broadcaster must be identified in the margins of the facsimile transmission materials. If any entity is identified with a "d/b/a" ("doing business as") name, it must also somewhere indicate its official legal name as filed with state corporate registration offices or comparable regulatory entities.

In addition, the FCC has issued a ruling clarifying the definition of what is a telephone facsimile machine. The FCC states: " We conclude that faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA's prohibition on unsolicited faxes." CG Docket No. 02-278, paragraph 200. However, one important exception to the TCPA requirements is that, while it does apply to facsimile transmissions from or to a computer terminal, the TCPA does not apply to messages sent via e-mail or on the Internet. However, effective January 1, 2004, emails are now regulated and restricted by the new CAN-SPAM Act of 2003, which is beyond the scope of this article.

In Conclusion

The FCC believes that given the cost shifting and interference caused by unsolicited faxes, protecting the interests of those who would otherwise be forced to bear the burdens of unwanted faxes outweighs the need to protect the interests of the companies that wish to advertise via fax. As long as public opinion continues to support the FCC in this balancing of priorities, fax advertisers must be prepared, by January 1, 2005, to get signed, written consents, before sending the fax ads, from each potential recipient of any fax ads or risk potentially serious liability under the TCPA.

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The Utah Marshaling Requirement: An Overview

by Ryan D. Tenney[1]

Rule 24(a)(9) of the Utah Rules of Appellate Procedure states that "[a] party challenging a fact finding must first marshal all record evidence that supports the challenged finding." At first glance, this rule may appear misguided. After all, ours is a profession that stresses zealous advocacy on behalf of a client. It may sometimes be difficult for an appellate litigator to imagine why he or she should have to make the opponent's case for them; it may be even more difficult for the attorney to then imagine having to explain that particular portion of the brief to their client. As the reported cases suggest, however, the appellate courts can and do regard a failure to marshal as a fatal defect.

In an effort to aid the inexperienced appellate litigator in his or her efforts to understand and comply with the marshaling requirement, this article will briefly discuss (i) the purpose of the marshaling requirement, (ii) the steps that a party must take to comply with the marshaling requirement, and (iii) the types of appeals for which marshaling is required.

I. Purpose of the Marshaling Requirement

As indicated in the reported cases, the marshaling requirement has two chief purposes. First, because appellate courts are only deemed competent to overturn findings of fact under certain limited circumstances, our appellate system has incorporated several procedural mechanisms that are expressly designed to protect the fact-finding prerogative of the trial courts. One mechanism is the strict standard of review that is used in evaluating a challenge to a finding of fact.[2] Another mechanism is the marshaling requirement. In *State v. Moore,* the Utah Court of Appeals noted that "[t]he process of marshaling the evidence serves the important function of reminding litigants and appellate courts of the broad deference owed to the fact finder at trial."[3] By requiring an appellant to catalogue the evidence supporting the trial court's decision, the marshaling requirement thus acts as a clear reminder that appellants should not try to persuade the appellate court that their theory of the case was stronger than that which was advanced by the other side, or that their evidence and witnesses were more compelling; instead, the marshaling requirement reminds us that appellate review of a factual determination is strictly confined to an analysis as to whether there was sufficient evidence to support the particular factual conclusion that was actually reached below.[4]

The second purpose of the marshaling requirement is a more practical one. Trial courts are gradually exposed to the facts of a case through both the pretrial motion process and through the presentation of the parties' evidence and witnesses at trial. In contrast, an appellate court's exposure to the facts of a case only comes through reference to the record. Absent effective briefing, an appellate court that is reviewing a factual challenge would be forced to wade through hundreds and perhaps thousands of pages in the record in order to gain an accurate sense of how much evidence supported a particular finding. Such a process would not only be inefficient, but it would create the very real risk that an appellate court, starting from scratch, might inadvertently overlook a piece of relevant evidence. To help avoid such a result, the marshaling requirement places the onerous burden of conducting this research on the party who should by disposition be most familiar with the quantum of evidence (or putative lack thereof) that supports the challenged finding. "Thus, an appellate court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." The marshaling requirement provides the appellate court the basis from which to conduct a meaningful review of facts challenged on appeal.[5]

II. Satisfying the Marshaling Requirement

There are two chief requirements that must be satisfied in order to properly fulfill the marshaling requirement. First, the marshaling should be correctly located, and second, the marshaling should be thorough.

Location: The Utah Rules of Appellate Procedure are explicit as to the proper placement of the marshaled facts. Rule 24(a) states that

> [t]he brief of the appellant shall contain under appropriate

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headings *and in the order indicated:*

(a)(9) *An argument.* The argument shall contain the contentions and reasons of the appellant with respect to the issues presented . . . . A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.[6]

The courts have repeatedly stressed that this placement rule should be observed. Among the reported cases discussing this requirement are those in which appellate courts have rejected a party's attempt to place the marshaled evidence in the fact section of the brief[7] or in an appendix,[8] or where the party has instead attempted to comply with the requirement by scattering the marshaled evidence throughout the entirety of the brief.[9] In order to ensure that the requirement is properly satisfied, a party challenging a fact finding should therefore always place the marshaled evidence in the argument section of his or her brief.

Thoroughness: As noted above, Rule 24(a)(9) states that a party challenging a fact finding "must first marshal *all record evidence* that supports the challenged finding."[10] Though many overly zealous advocates may be tempted to read this requirement less than literally, the reported cases clearly indicate that the courts are serious about enforcing the requirement under its express terms. In one oft-quoted passage, the Utah Court of Appeals set forth the requirement as follows:

> [t]he marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.[11]

All too often, it seems, appellants attempt to evade the strictures of this requirement by either selectively omitting particularly unfavorable pieces of evidence from their marshaling or by instead mischaracterizing the unfavorable pieces of evidence that have been included. Neither strategy is acceptable.[12] Similarly, it is also not acceptable to attempt to evade the requirement by complaining of its effect on a brief's page-length,[13] or by instead arguing that marshaling should not be required due to the paucity of evidence that supports the trial court's finding.[14]

In short, a proper satisfaction of the marshaling requirement entails a "listing [of] all the evidence *supporting* the finding that is challenged. Once the evidence is listed . . . with appropriate citation to the record, the appellant must then show that the marshaled evidence is legally insufficient to support the findings . . . ."[15] If a party fails to fully comply with the requirement, the appellate court is required to assume that the findings are correct,[16] and the appeal will thus necessarily fail.

III. Circumstances Under Which Marshaling is Required

Rule 24(a)(9) states that marshaling is required for parties who are "challenging a fact finding." In addition to the requirement's applicability to straightforward factual challenges, there is also a line of cases applying the requirement to certain legal questions. Specifically, appellate courts have held that the requirement is applicable to appeals from: (i) a trial court's denial of a motion for a directed verdict;[17] (ii) a trial court's denial of a motion for a judgment notwithstanding the verdict (JNOV);[18] and (iii) a trial court's denial of a motion for a new trial.[19] The common link between these three motions is that appellate review of their denials involves the sufficiency of the evidence standard of review.[20] As such, there is a certain degree of consistency in requiring an appellant who must establish that the collected evidence was insufficient to first marshal the evidence that actually supports

the challenged ruling. On a broader scale, it is worth noting that these examples seem to indicate that the precise contours of the marshaling requirement are still open to interpretation. It thus remains to be seen whether the appellate courts will further expand the requirement's applicability to other ostensibly legal questions that also involve evidentiary reviews.

IV. Conclusion

In short, the marshaling requirement is a procedural mechanism that is designed to protect the trial court's fact-finding prerogative and to promote the efficiency and quality of an appellate court's review. Under the terms of the requirement, a party who is challenging a trial court's finding of fact is required to include a listing of all pieces of evidence that support the trial court's finding in the argument section of the opening brief. Failure to comply with this rule will result in dismissal of the party's claim. Finally, there is authority for the proposition that marshaling is not only required on straightforward challenges to findings of fact, but that it is also required on any challenge that involves a sufficiency of the evidence review.

1. The author wishes to thank both Judge Norman H. Jackson of the Utah Court of Appeals and Andrew Petersen for their helpful comments and suggestions in preparation of this article. Any views or errors that are contained herein, however, are solely the responsibility of the author.

2. *See, e.g.,* Utah Rules of Civil Procedure 52(a) ("Findings of Fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.")

3. 802 P.2d 732, 739 (Utah Ct. App. 1990).

4. *See, e.g., State v. Goddard,* 871 P.2d 540, 543 (Utah 1994) ("We will not sit as a second fact finder, nor will we determine the credibility of witnesses. That is the prerogative of the jury."); *ProMax Dev. Corp. v. Mattson,* 943 P.2d 247, 255, 257 (Utah Ct. App. 1997) ("[I]t is the trial court's role to assess witness credibility, given its advantaged position to observe testimony firsthand, and normally, we will not second guess the trial court's findings in this regard. . . . We emphasize, . . . that this court does not sit as a fact finder.").

5. *State v. Larsen,* 828 P.2d 487, 491 (Utah Ct. App. 1992); *see also, Wright v. Westside Nursery,* 787 P.2d 508, 512 n.2 (Utah Ct. App. 1990) ("Wright beseeches us to make a thorough review of the whole record, which fills a box the size of an orange crate. We do not apologize for declining Wright's invitation. The very purpose of such devices as the 'marshaling' doctrine and R. Utah Ct. App. 24(a)(7), requiring that all references in briefs to factual matters 'be supported by citations to the record,' is to spare appellate courts such an onerous burden. Absent exceptional circumstances, our review of the record is limited to those specific portions of the record which have been drawn to our attention by the parties and which are relevant to the legal questions properly before us.").

   While accepting that the appellate court should be spared the initial burden of research that accompanies factual challenges, some have argued that the burden would be better carried by the appellee, rather than the appellant. Though there may be some merit to this argument, it is again worth noting that, because of the stringent standard of review, a party seeking to overturn a factual determination clearly faces an uphill battle. Given the long odds against reversal in these circumstances, there is a certain sense of logic and fairness involved in ensuring that the party initiating such an appeal be the one to initially carry the burden and expense that is involved in setting the stage for meaningful appellate review. *See, e.g., Crookston v. Fire Ins. Exch.,* 817 P.2d 789, 799-800 (Utah 1991) (stating "the marshalling [sic] burden" is one that must be carried by "the one challenging the verdict").

6. Emphasis added.

7. *See Fitzgerald v. Critchfield,* 744 P.2d 301, 304 (Utah Ct. App. 1987) ("[Appellant's] brief contains a heading 'FACTS' under which appellant has set forth both parties' 'versions' of the facts. This does not constitute a sufficient marshaling of the evidence in support of the findings made by the court below. The requisite presentation of supporting evidence is also not found in the argument portion of appellant's brief. Appellant has, therefore, failed to meet his threshold burden on appeal, one that is neither elective nor optional.").

8. *See Debry v. Cascade Enters.,* 879 P.2d 1353, 1360 n.3 (Utah 1994) ("The DeBrys purport to marshal the evidence in support of the verdict in an appendix to their brief which, together with the pages in the brief, exceeds the page limitation allowed by Rule 24(g) of the Rules of Appellate Procedure. This does not comply with the requirement to marshal evidence. It is improper for counsel to attempt to enlarge the page limit of the brief by placing critical facts in appendices.").

9. *See Roderick v. Ricks,* 2002 UT 84,¶47 n.11, 54 P.3d 1119 ("Though Castleton did mention some evidence favorable to the court's finding, he generally dispersed this evidence throughout his appellate brief. To comply with the marshaling requirement, appellants must marshal all the favorable evidence at the point at which they challenge the factual finding.") (Emphasis added.)

10. Emphasis added.

11. *West Valley City v. Majestic Inv. Co.,* 818 P.2d 1311, 1315 (Utah Ct. App. 1991) (emphasis in original).

12. *See Crookston,* 817 P.2d at 800 ("Here, Fire Insurance has made no attempt to marshal the evidence in support of the jury finding of fraud. In fact, all Fire Insurance has done is argue selected evidence favorable to . . . its position. That does not begin to meet the marshaling burden it must carry. . . . This failure alone is grounds to reject Fire Insurance's attack on the fraud finding."); *State v. Pilling,* 875 P.2d 604, 608 (Utah Ct. App. 1994).

13. *See Larsen,* 828 P.2d at 491 ("Larsen challenges several factual findings of the trial court concerning the nature or extent of their professional relationship, but admits he 'may have fallen somewhat short' in marshaling the evidence. Larsen even goes so far as to suggest that he was prevented from doing so because of page limitations imposed upon him. Our insistence on compliance with the marshaling requirement is not a case of exalting hypertechnical adherence to form over substance. . . . Because Larsen failed to marshal evidence in support of the trial court's findings . . . , we affirm . . . .").

14. *See Brown v. Richards,* 840 P.2d 143, 149 n.2 (Utah Ct. App. 1992). However, it is worth noting that there is some authority for the proposition that marshaling may be deemed futile in certain circumstances. *See, e.g., Campbell v. Campbell,* 896 P.2d 635, 638 (Utah Ct. App. 1995). In such circumstances, "appellants are advised to marshal the evidence to the degree possible and then explain the reason for any deficiency. Appellants should not merely ignore the marshaling requirement." Judge Norman H. Jackson, "Utah Standards of Appellate Review: Revised," 12 *Utah Bar J.* 8, 13 n.8 (1999) (citing and discussing the authority relevant to circumstances in which marshaling might otherwise be deemed "futile").

15. Jackson, *id.* at 8 at 13 (emphasis in original).

16. *See Valcarce v. Fitzgerald,* 961 P.2d 305, 312 (Utah 1998); *Johnson v. Higley,* 1999 UT App 278,¶37, 989 P.2d 61.

17. *See Water & Energy Sys Tech., Inc. v. Keil,* 2002 UT 32,¶¶14-15, 48 P.3d 888; *Neely v. Bennett,* 2002 UT App 189,¶11, 51 P.3d 724.

18. *See Debry,* 879 P.2d at 1359-60; *Crookston,* 817 P.2d at 799-800.

19. *See Child v. Gonda,* 972 P.2d 425, 433 (Utah 1998); *Neely,* 2002 UT App 189 at ¶11.

20. *See Child,* 972 P.2d at 433; *Crookston,* 817 P.2d at 799.

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9:00–10:30	**Plenary Session – Fear Factor, The 22nd Century Paperless Office.** Where is your comfort level? What does technology provide? Ease of Use. Let's talk dollars and cents. Jim Calloway					1.5 CLE
10:30–10:45	**NETWORKING BREAK**					
10:45–11:45	25% paperless Fam. Law/Crim. Law (basics… just the basics)	50% paperless Personal Injury/Litigation (I'm ready for more)	70% paperless Transactional/Corp. Counsel (My practice wants paper-less)	85% paperless Bankruptcy & Securities (My practice area mandates paper-less)		1 CLE
11:45–1:00	Lunch • State of the Bar • Trends in Technology Aaron Graham Lexis/Nexis • Panel Discussion – dollars and cents from the industry, Jim Calloway, John Harrington, OTR Research, Hon. David Nuffer U.S. Federal District Court for Utah, Dave Saperstein, Iron Mtn., Tim Nelson, Tompson West, Kent Lewis, Aros.net					1 CLE
1:00–1:30	**NETWORKING BREAK**					
Session 1	**BREAKOUT SESSIONS – 3 HRS. CLE**					
1:30–2:30	**Track 1** Scanning and Storing paper. Backing up files – co-location. Everything for paperless storage and use.	**Track 2** Standard of Care Ethics	**Track 3** Mobile and Remote Computing. Paperless through wireless, connecting home to office.	**Track 4** The top most frustrating formatting issues, underused tools that save time.	**Track 5** Basic Technology for your Law Office/Cost Analysis of Technology (what do I really need?) buy – lease – outsourcing.	**Track 6** Lawyers Helping Lawyers. Mission Possible: Creating a Mission for Work and Life. Ethics	1 CLE
2:30–2:45	**NETWORKING BREAK**						
Session 2 2:45–3:45	**Track 1 – Repeat** Scanning and Storing paper. Backing up files – co-location. Everything for paperless storage and use.	**Track 2** Banks, trust accounts, credit card and transfer transactions, on-line client billing	**Track 3 – Repeat** Mobile and Remote Computing. Paperless through wireless, connecting home to office.	**Track 4** CaseMaker	**Track 5 – Repeat** Basic Technology for your Law Office/Cost Analysis of Technology (what do I really need?) buy – lease – outsourcing.	**Track 6 – Repeat** Lawyers Helping Lawyers. What's the Rush? Creating Work–Life Balance. Ethics	1 CLE
3:45–4:00	**NETWORKING BREAK**						
Session 3 4:00–5:00	**Track 1 – Repeat** Scanning and Storing paper. Backing up files – co-location. Everything for paperless storage and use.	**Track 2** Tech. Audit: auditing a law office's technology & procedure	**Track 3** Networking for dollars/website presence: Advertising on the web, creating a website. Maintaining the site. What to expect with what you spend.	**Track 4 – Repeat** The top most frustrating formatting issues, underused tools that save time.	**Track 5** Supreme Court: Task Force on Professionalism. Ethics	**Track 6** eFiling Update	1 CLE
5:00–5:30	**WRAPUP – PRIZE DRAWINGS AND CLOSING RECEPTION**						

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Objectives of Revocable Trusts

by Langdon T. Owen, Jr.

Why use a revocable trust? Revocable trusts can be a good tool to help clients achieve their objectives; but they are only a tool. Let's review some key objectives:

Tax Savings

Clients sometimes ask how trusts can save them transfer taxes. Let's look at the long and the short of the matter, starting with the short. The short answer is that trusts have no magic to reduce taxes. The long answer, however, is more interesting: certain transaction structures can reduce taxes, and trusts are marvelous tools for creating such structures.

The transfer taxes which are of concern are the federal estate, gift, and generation-skipping taxes. These taxes can apply to estates in excess of $1.5 Million. The estate tax threshold will rise to $2 Million in 2006 and eventually, by the year 2009, to $3.5 Million – but the thresholds for gift and generation-skipping taxes will not increase over $1 Million. The tax rates for estates over $2 Million can reach 48%. So the ability to save on these taxes can be very important to families with more than moderate wealth. The property taxed essentially includes all forms of property owned or controlled by the person, including life insurance, investments, retirement funds, real estate, etc. – and, in particular, it includes all property held in a revocable trust.

Some trusts are useful because they can cut off the types of ownership and control of property which will otherwise cause the property to be taxed to the person or estate. The result can be that the property is no longer subject to these taxes. For example, a life insurance policy can be given away at low value during life but restricted under the terms of the trust. Another example would be using a trust to retain certain benefits during life but have the contributed property pass to charity on death. These uses are not appropriate for revocable trusts, however. A trust would need to be irrevocable and without any retained control "strings" to cut off taxable ownership and control. Irrevocable trusts are strong medicine but their terms can be made flexible enough to allow for various future events.

This leads us to the key reason trusts are so useful – they are very flexible. They can coordinate a plan designed to take advantage of the available credits, exclusions, and deductions to minimize taxes yet still accomplish the goals of the family. The primary reason for planning is, after all, to benefit the family, and trusts can accomplish many things which would be very difficult using any other tool in the legal toolbox.

This flexibility can be of great benefit for tax planning even in a revocable trust, the kind most often used in estate planning. Such trusts, for example, often contain formula provisions to maximize the tax savings from the use of the unified credit and the marital deduction. The property held in such a trust will be included in the person's taxable estate but will be covered by credits and deductions to the family's best advantage.

Thus, although trusts alone do not save taxes, they are such useful tools that just about any tax-saving plan will at some point likely use one or more trusts. However, the tax results will be substantially the same whether the trusts are revocable or are testamentary. But if a trust is needed in any event, a revocable trust may provide some additional benefits and will often be used in plans for larger taxable estates.

Probate Avoidance

Clients sometimes are very concerned to avoid probate and want to use trusts as will substitutes. The truth is that trusts provide a mixed blessing compared to wills which need to be probated. The true costs of probate, as opposed to costs of administration and property transfers, which are incurred in any event, are relatively low and there is no substantial delay inherent in the Utah probate system in the ability to accomplish administrative tasks. Also, revocable trust costs are incurred up front in additional fees for drafting and providing for the transfers for funding the trust. At least the transfer costs can be postponed under a will which is subject to no substantial lifetime hassle factor. There is no reason, absent a dispute, that a testamentary trust, once funded, will be subject to any continuing probate court supervision.

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Thus, probate avoidance is probably overrated as the sole or main reason to use a revocable trust. On the other hand, if there are other reasons to use a trust, probate avoidance is an extra benefit of at least some value.

Also, avoiding more than one probate; for example, avoiding ancillary probate where there is real property in jurisdictions outside of Utah, is generally a good reason to use a trust even if there are no other specific reasons.

Privacy

Some clients have heard that trusts protect the privacy of family affairs from the prying eyes of the public because trusts need not be filed as a public document. On the other hand, wills are probated in the public courts. Again, this is a mixed matter. First of all, most people simply don't care about this because they know the public simply doesn't care about them.

Trusts are not routinely subject to probate court proceedings, but where there is a dispute, exactly the sort of dirty laundry families (or at least many members of families) would rather not see in the public records will end up in the same courts where probates occur.

Also, to transfer property or transact business, copies of the trust, or at least portions of the trust, will need to be filed in county recorder's records or made available for review by banks or businesses. Without too much trouble, the amount of trust information made public in recorder's offices can be limited to certain administrative clauses and the identity of the trustee by the use of certifications rather than full trust instruments for recording. Banks, in particular, but other businesses too, generally keep their client's affairs reasonably confidential. Thus, although not perfect, trusts can provide those who care about such matters with some level of privacy protection as to strangers.

The same is not always true as to other family members. A revocable trust is generally operational when created, and any provisions of it are relevant later in any review of its operations, including after the trustor's death. Some trustors would loathe to have beneficiaries see how benefits have been changed from time to time under the trust as it is amended as family circumstances change. A revoked will can be destroyed without problem because it would only speak at death. A change in a trust and the provision changed are effective during life and subject to being discovered by the family. Nevertheless, some protective provisions to prevent this can be added to a trust amendment with at least some hope of success where the trustor is the only lifetime beneficiary and trustee.

Management

Most revocable trusts do not provide outside management, but they can do so, and where desired, this can be very important. It becomes very important, for example, when the trustor becomes incapacitated. Then having a successor trustee ready to step in to manage a fully funded trust will provide a protection for the trustor at very little cost and without a conservatorship or guardianship proceeding.

On the other hand, a good durable power of attorney could provide rather similar benefits. A durable power should be recommended, even where a trust is used, in case there is a need to transfer assets into the trust for a disabled trustor. Trusts, however, put legal title in the name of the trustee and are more widely respected and recognized than durable powers of attorney. Although durable powers are becoming very common, the power holder still needs to convince the bank or other party to a transaction to rely on it. Some other parties can be remarkably intransigent about the "risk" of reliance where, as in Utah, the applicable statutes do not provide the same clear protection for persons relying on the power of an attorney-in-fact as they do for persons relying on the power of a trustee.

Where the family has a member for whom long-term management will be needed; for example, a disabled person or a spendthrift, it may be most advisable to use a revocable trust rather than a testamentary trust. For healthy minors, however, a contingent trust (to be set up if needed pursuant to a will if both parents should die) will generally be sufficient, and a full-blown revocable trust may be overkill except where a great deal of property will be distributed in stages over many years.

Organization

Not all clients have the self-discipline to use a trust as a vehicle to organize their affairs, but for those who do, trusts are a good organizational tool. Funding the trust requires going through assets (perhaps culling some assets in the process) and making transfers at a time when the trustor is still alive and (at least usually) able to help clean up any messy situations which may exist. Trusts are certainly not the only way to organize and clean up title to assets. Nevertheless, where there is some other need for them, this organizational process is an added attraction for trust usage.

Not all assets are amenable to being held in trust, however, so some problem assets such as business interests or other property with transfer restrictions, qualified retirement plans, tangible items, etc., may need to be handled separately. A trust may not

be the first choice to have named as a qualified plan beneficiary, but it may be good as a backup. Tangibles may be transferred easily by a written statement if there is a will which refers to such a statement. There is no similar trust rule; however, the trustee can be granted under the trust the discretion to follow such a statement without the need to probate the will.

Asset Protection

Some clients are under the mistaken belief that a revocable trust will somehow provide protection against creditors. This is clearly in error. Some irrevocable trusts can be of help; but revocable trusts provide no better protection than was provided by the underlying asset without being held in trust. If life insurance payable to a revocable trust gets any protection from creditors (and this is no sure thing in Utah) the protection is the same as if the policy were payable directly to beneficiaries.

Where a trust serves the functional equivalent of a probate estate, it would not be wise to rely in any serious way on more protection being available than in the situation where the proceeds of insurance (or any other contractual beneficiary designation) were payable to a probate estate. There is a "substance over form" argument, bolstered by fraud on creditors principles, which can be made in such a situation where the estate would otherwise be insolvent. This argument is strongest as to the cash or investment value in the policy, but could be made as to all other proceeds as well. Absent some strong case law in Utah, if protection of insurance proceeds is desired, some method other than having them payable to a revocable trust should be used.

Revocable trusts generally will, under Utah's trust statutes, be subject to claims against the settlor of the trust and for estate administration and funeral expenses and for statutory allowances to the surviving spouse and children to the extent the settlor's probate estate is inadequate to cover these things. However, property which passes to the trust as the result of the settlor's death, which property was otherwise exempt from creditors' claims, does not become subject to such claims but remains exempt. *See* UCA § 75-7-505(1)(c). It is not yet clear how far the "otherwise exempt" concept extends.

Conclusion

Trusts are perhaps the most useful tool in the estate planner's toolbox. However, they should not be automatically used in every case. Rather, the estate planning attorney should analyze, client by client, the various factors which make trusts useful in the planning process.

Can You Amend That Revocable Trust? Utah Estate Planning Lawyers Face a Trap for the Unwary

by Charles M. Bennett

Revocable living trusts have become a ubiquitous estate planning tool in Utah. Thousands of Utahns have such trusts, most prepared by Utah lawyers. One of the benefits of revocable living trusts is the ability to easily amend them prior to the death of the trustor. Several recent Utah Supreme Court decisions, however, require revocation rather than amendment under certain circumstances. As such an amendment will likely not be questioned until after the death of the trustor – when it is too late to go back and repair anything – attorneys who have prepared revocable trusts or who represent those who have such trusts need to carefully review these trusts in light of the recent rulings.

In *Banks v. Means,* ¶¶ 9-16, 52 P.3d 1190, 452 Utah Adv. Rep. 10, 2002 UT 65 (2002), the Utah Supreme Court had to determine whether a trustor was entitled to amend her revocable living trust agreement to change the remainder beneficiaries. Shortly before the trustor's death, she amended her trust, removed her children as primary beneficiaries upon her death, named her sister as the primary beneficiary, and named her children as contingent beneficiaries. *Id.* at ¶5. Although the circumstances surrounding the amendment were unusual,[1] the court assumed the amendment was properly executed. The issue before the Court was whether the trustor had the power under the trust agreement to amend the trust and divest the beneficiaries' interest. The relevant part of the trust agreement provided:

> 3.1 Rights of the Undersigned. As long as the Undersigned is alive, the Undersigned reserves the right to amend, modify or revoke this Trust in whole or in part, including the principal, and the present or past undisbursed income from such principal. Such revocation or amendment of this Trust may be in whole or in part by written instrument. Amendment, modification or revocation of this instrument shall be effective only when such change is delivered in writing to the then acting Trustee. On the revocation of this instrument in its entirety, the Trustee shall deliver to the Undersigned, as the Undersigned may direct in the instrument of revocation, all of the Trust property.
>
> 3.2 Interests of the Beneficiaries. *The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is revoked or terminated other than by death.* As long as this Trust subsists, the Trust properties and all the rights and privileges hereunder shall be controlled and exercised by the Trustee named herein in their fiduciary capacity.

(Emphasis added.) The Supreme Court ruled that the italicized language in the second paragraph authorized the trustor to divest the beneficiary's interest *only if* the trustor revoked the trust in its entirety. *Banks v. Means* at ¶16. "[A] trust that specified revocation of a vested beneficiary interest through divestiture could only divest those beneficiary interests through a complete revocation of the trust." *In re Estate of Flake,* ¶16, 71 P.3d 589, 472 Utah Adv. Rep. 18, 2003 UT 17 (2003) (interpreting *Banks v. Means*). Although the trustor in *Banks* expressly reserved the right "to amend, modify or revoke this Trust," the Court ruled that an amendment could not divest a beneficiary's interest. Thus, the purported amendment was void.

The Court's ruling in *Banks* might be construed to limit the trustor's otherwise plenary reservation of the right to amend the Trust to amendments that did not modify the beneficial interests of

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a beneficiary, such as changing trustees, increasing or decreasing trustee powers, and other administrative issues. Any amendment that changed beneficial interests would necessarily divest a beneficiary's interest, at least in part. However, as discussed below, in the 2003 *Flake* decision, the Supreme Court approved an amendment to a trust with substantially identical language to that in *Banks* where the amendment reduced, but did not eliminate, the unhappy beneficiary's interest in the trust.

In *Flake,* ¶17, the Supreme Court recognized that the purpose of the vesting language in the paragraph entitled "Interests of the Beneficiaries" was to insure that the revocable living trust was not deemed to be an illusory trust. Historically, lawyers creating revocable living trusts were concerned that the trust could be voided if the trustor had the power to revoke the trust. *See e.g. MacGregor v. Fox,* 114 N.Y.S.2d 286, 280 A.D. 435 (N.Y. App. 1952) (holding trust illusory and "void in its entirety"); *but see In re Estate of Groesbeck,* 935 P.2d 1255, 1257-58 (Utah 1997) (holding a revocable trust with either contingent or vested remainder beneficiaries was not illusory). Thus, the purpose of the language was not to protect the beneficiary's interest from being deleted by an amendment, as seems to be the perception in *Banks,* but rather to insure that the revocable living trust was not deemed illusory.

The *Banks* analysis is thus revealed to be seriously flawed. It is illogical to believe that a trustor reserves the power "to amend, modify or revoke" only to restrict the right to amend, but not the right to revoke. Such a reading truly exalts form over substance. Under general contract law, "an interpretation that will produce an inequitable result will be adopted only where the contract so expressly and unequivocally so provides that there is no other reasonable interpretation to be given it." *Peirce v. Peirce,* ¶19, 994 P.2d 193, 386 Utah Adv. Rep. 38, 2000 UT 7 (2000) (citations omitted). Far from requiring an unreasonable interpretation, the *Banks* trust language supports the opposite conclusion. The trustor in *Banks* did not retain just the power "to amend, modify or revoke." Instead, she retained the right "to amend, modify or revoke this Trust in whole or *in part.*" Indeed, the trust document reiterated that the revocation could be in whole on in part in the very next sentence: "Such revocation or amendment of this Trust may be in whole or in part by written instrument." The Court should have recognized that an amendment that deletes one beneficiary and adds another is a revocation of the Trust "in part" as to the deleted beneficiary's rights in the trust.

The harshness of the holding in *Banks,* however, is somewhat ameliorated by the Supreme Court's 2003 *Flake* decision, 2003 UT 17 at ¶¶16-22. There, the Supreme Court held that the language in the *Flake* trust permitted an amendment *partially* divesting a beneficiary's interest in the Trust. The relevant language of the trust agreement in *Flake* was:

> **Revocation and Amendment**
> As long as the Undersigned is alive, he reserves the right, without the consent or approval of any other, *to amend, modify, revoke, or remove from this Trust* the property that he has contributed, in whole or in part, including the

principal and the present or past undisbursed income from such principal. (Emphasis [in Court's opinion]).

Id. at ¶5.

Vested Interest of Beneficiaries
The interest of the beneficiaries is a present vested interest which shall continue until the Trust is revoked or terminated other than by death.

Id. at ¶17. Interpreting this language, the Supreme Court held:

This language at issue [in *Flake*] lacks any reference to a *complete* divestiture. The beneficial interest of Mrs. Flake was merely amended, and not completely divested as was the case in *Banks*. The dispositive issue in the present case is whether there was a complete divestiture of a beneficial interest as in *Banks,* or whether there was simply a change in the quality, or scope, of the beneficial interest. We held in *Banks* that revocation was required when terminating a vested beneficial interest. Here, we find that there is no requirement of revocation where the beneficial interest is simply modified or amended but not terminated. Therefore, Mrs. Flake's beneficial interest, as amended, was completely outlined in the 1998 Restatement, inasmuch as the 1998 Restatement contained all of the operative provisions of the Almon J. Flake Family Trust. The purpose and primary effect of Article XIV in the 1987 Trust Agreement is to save the Trust from the doctrine of merger and to prove that the Trust is not illusory.[1]

Id. at ¶¶22 (emphasis in Court's opinion). The Court's declaration that "[t]he dispositive issue in the present case is whether there was a complete divestiture of a beneficial interest as in *Banks,* or whether there was simply a change in the quality, or scope, of the beneficial interest" would seem to indicate that a trustor can amend a trust with the *Banks* language if the amendment only modifies, rather than eliminating, a beneficiary's beneficial interest. On the other hand, the Court noted that the language *"subject to divestment"* was not present in *Flake,* nor was there any "reference to a *complete* divestment." It was the Supreme Court that italicized these terms in its opinion.

While the language of the trusts regarding the vesting of beneficial interests is different, there is no logical distinction to be drawn between the language of the two trusts. In *Flake,* an amendment terminating a beneficiary's interest in the trust would constitute a complete divestment whether or not the trust said the beneficiary's interest was "subject to divestment" as in *Banks.* Nevertheless, by noting that "subject to divestment" was present in *Banks* but not in *Flake,* the Court appears to believe this distinction meaningful. In any event, it remains unclear whether the trustor of a trust with language identical to *Banks* could modify, but not delete, a beneficiary's beneficial interest in the trust.

What prompted this article, and makes this more than just a mere academic analysis of two Supreme Court rulings, was a concern that there may be tens of thousands of trusts extant in Utah with language identical to that found in *Banks*. During a period of over ten years, spanning the 1990's, one Utah lawyer created several thousand trusts using language identical to that interpreted by the Supreme Court in the *Banks*. This lawyer has since retired from the practice of law. Thus, when this lawyer's clients seek to update their trusts, another Utah lawyer will need to deal with trust language identical to that found in the *Banks* trust. Knowing how to revise a trust with language identical to that in *Banks,* without running afoul of that decision, is a key purpose of this article.

Moreover, not only are there numerous trusts containing the precise language of the *Banks* trust, there are perhaps thousands more that contain very similar language. The form used in *Banks* was one that had been developed with input from a

number of Utah lawyers. To the extent other lawyers used that same form language, or even to the extent they used language slightly different, such as the trust language in *Flake,* these two cases could torpedo amendments to those trusts as well.

The lesson all estate planning lawyers must learn is thus twofold. First, each lawyer should take a careful look at his or her own forms. Note that the Court in *Banks* probably would have allowed the amendment had the trust used the following language:

> Interests of the Beneficiaries. The interests of the beneficiaries are presently vested interests subject to divestment which shall continue until this Trust is *amended,* revoked or terminated other than by death. As long as this Trust subsists, the Trust properties and all the rights and privileges hereunder shall be controlled and exercised by the Trustee named herein in their fiduciary capacity.

The addition of the word "amended" will specifically allow divestment through amendments and would apparently resolve the problem the Supreme Court found with the *Banks* trust provisions. Whether the estate planning lawyer solves this problem as suggested or in some other way, however, it is an issue that demands careful attention.

The second lesson for the estate planning lawyer is to be careful when amending someone else's trust (and perhaps even when amending one's own older trusts). In the case of the *Banks* trust, the reservation of the right to amend or revoke and the vesting of the interests of the beneficiaries were in two adjoining paragraphs of the trust agreement. In *Flake,* the revocation language was in Article XIII while the vesting language was in Article XIV. Since both the revocation and vesting provisions are common boilerplate provisions, they may show up together, as in *Banks;* closely connected, as in *Flake;* or separated by several pages, articles, sections, or paragraphs. Thus, if a lawyer is asked to amend another lawyer's trust agreement, the revising lawyer should carefully review the entire trust agreement. Simply determining that the trust is subject to a power to amend or revoke is no longer sufficient after *Banks* and, to a lesser extent, after *Flake*. For Utah estate planning lawyers, it is an unfortunate trap for the unwary, but the trap can be avoided by careful attention to detail.

1. The amendment was made by removing certain pages from the trust agreement and replacing those pages with new pages stating the trustor's revised plan. *Id.* at ¶5.

Remember, for Every Case Won at Oral Argument, the Other Side Loses

by Justice Michael J. Wilkins

As I sat through another oral argument before the Utah Supreme Court last month, I began to wonder if I could list the characteristics that differentiate the most successful advocates before our court from the least successful. I smiled to myself, and thought, "Well, the first characteristic is that they don't let me drift off mentally when they are at the podium." After the calendar concluded, I jotted down a few thoughts for my own amusement. As the list developed on paper, I realized that these were suggestions that I wish someone had given me when I was still on the other side of the bench. They apply nearly as well to the trial courts, and seem only common sense to me now that I have been privileged to participate in the court's side of appellate arguments for ten years. I offer them to you for what use you may be able to make of them.

Suggestion 1. Remember why you are here.
Before our court, the single most important purpose of oral argument is to answer questions the justices have about the case and the impact our decision will have on the law. The second most important purpose is to remind us of the important and most compelling elements of your argument that you have already carefully detailed in your brief. The third purpose, time permitting, is to explain any apparent confusion that may have arisen from the contrast of your brief and that of your opponent, or in the course of oral argument.

On the other hand, we are not judging a debate, and you get no points for destroying either your opponent, or your opponent's argument. Oral argument is not a contest. Oral argument is not a chance for you to muse, or lecture, or argue, with the justices. It is also not a good idea to plan on showing off for your client, the audience, or the press. None of them have a vote on the outcome of your case. Only we do.

Suggestion 2. Assume we are well prepared.
Don't waste your time, or ours, repeating the facts of the case unless the facts are both confusing and central to the success of your case. Be prepared to address the legal issues not only as they apply to your case, but as they may impact others if we decide in your favor. You may safely assume that we have read the briefs, are thoroughly familiar with the facts and issues, and want you to assist us in understanding how the case should be resolved. We don't "do" facts. Even challenges to factual findings or sufficiency of the evidence claims are questions of law to us.

Suggestion 3. Treat questions as an insight into our individual thinking.
If we ask no questions, that doesn't mean you were brilliant. You should be able to tell how engaged we are in your argument. If you're doing well, we may let you develop the case in your own way. We recognize that you certainly have more insight, and sheer time into the case than we do. On the other hand, questions from us are not necessarily a sign that your argument or briefing are somehow deficient, at least, not necessarily. We ask questions for any one of a number of reasons. We may simply need an answer. We may want to eliminate some idea or contention from our personal consideration. We may want to prod you toward something we consider more important to the outcome of the case. We may want your thoughts on how a rule of law you propose will impact others. We may want to offer an alternative way of looking at an issue to both you and a colleague on the bench.

Sometimes, I ask questions because I'm bored. I doubt my colleagues ever do that, but I do. Please forgive me if I do it to you. Oh, and if you want to score points with our law clerks, in response to any question I ask, say, "That's a good question, your honor." I habitually reply, "I know. That's why I asked it." The law clerks get a good chuckle out of it, although you have probably wasted a few precious seconds.

MICHAEL J. WILKINS serves as Associate Chief Justice of the Utah Supreme Court.

Finally, recognize that if one of us asks a question, we probably want an answer. Do your best. If you don't know, say so and move on. If you know, answer it. Occasionally a lawyer will put the question off, planning to address it later. That is usually a mistake. Putting the judge off means the judge is sitting there still thinking about it while you go on. Also, often a question put off never comes back. You run out of time, or other questions intervene. I once began a question with an apology for interrupting counsel's argument. He turned to me and said that he was happy to answer it, since whatever interested the court interested him. That is a winning attitude.

Suggestion 4. Check your attitude at the door.
I cannot understand the logic that compels some advocates before us to use the few minutes they have to advance the interests of their client to instead continue some personal dispute or contest with the opposing party or counsel. It doesn't help. It usually hurts.

The only thing worse than carrying on some perceived battle with opposing parties during oral argument, is to treat a member of the court with anything less than complete respect. Of course, we know that the positions we hold are the reason for the treatment afforded us. Of course we know that not all of our opinions or other utterances are greeted with universal acclaim. And of course we know that you may be perfectly justified in your unhappiness with one or more of us. But, don't be misled into thinking that an affront to the court as an institution goes unnoticed by any of us. We try to respect the roles we temporarily occupy, and expect officers of the court to do the same.

Civility and professionalism are the rule, not the exception, in our court. We have become more and more likely to remind you from the bench of any lapse – in front of your client, the press, and anyone else who happens to be in the room. Don't risk it.

Suggestion 5. Make our jobs easier.
As you plan and prepare your brief, and your argument, realize that we have other cases before us. We cannot develop the same degree of familiarity with your case as you. In oral argument, as in the briefs, try to follow a logical, predictable, simple pattern of organization. Realize that you may not get to your second point because of our questions. Start with the most case-determinative elements of your argument. Don't make arguments that you know are dead on arrival. If the law generally goes against you, realize that we already know that. Deal with it up front. Try to build an oral presentation that leads as directly and logically to the result you believe is most appropriate. Think of yourself as the teacher of an AP History class; think of us as very smart 12th graders taking the class.

Suggestion 6. The time you waste is ours.
We allow 20 minutes per side in oral argument. The court of appeals allows 15. Other matters are waiting. If you can fully make your case in five or ten minutes, do it and sit down. If you don't understand our time keeping system, ask the clerk before court begins. If our clock reads "00" you are done, unless one of us is asking a question. We may not cut you off in mid- sentence,

but we all have access to the time clock, and we notice. Plan for 15 minutes, not 20. Don't sum up again after the time is gone. We also have jobs to do, and the time you use beyond your own allotment has to come from someone else. It is usually ours, so why would you want to do that to the five (or three) people who are about to retire to the conference room down the hall and decide the fate of your case and your client?

Suggestion 7. Read the rules.
Unless you appear before us very regularly, you will avoid unnecessary problems by reading our rules each time you appear before, or submit something to, us. We try to express in them the way we actually do our business. Your observance of the rules makes our lives easier. Trust me, you want us to smile inwardly when we see your name on the brief.

Suggestion 8. PowerPoint and other risks generally should be avoided.
We are an old fashioned court. Although we are all computer literate, and most of our work is now done electronically, our courtroom is probably not the place to demonstrate your technological skills. If you insist, be prepared to be interrupted during slide 5 with a question you thought you would address in slide 65. The same goes for charts and exhibits. Our bench is long, and curved. It is very difficult to use a board or easel in a way that all of us can see what you are pointing at. Copies for the bench are fine, but submit them in advance. Don't expect us to review them and listen to you at the same time. Moreover, you usually don't have the time for us to absorb a new document at that late hour. Surely you can figure out what we need to see in advance and put it in your brief.

Suggestion 9. Argue your case, not your opponent's.
The best advocates usually focus on their own arguments, and their own view of how we should resolve the case. If you spend all of your time, initially or on rebuttal, addressing your opponent's case, that is where you direct our attention, and where we will be focused.

Suggestion 10. Come prepared to enjoy yourself.
Come prepared, and you are much more likely to be able to enjoy the experience. We don't expect you to entertain us, but we do expect you to act like an officer of the court to the degree that we can see you are trying to assist us in understanding and resolving the issues of consequence. Believe me, we want you to succeed. We want to understand what your argument is. We want to benefit from your thoughtful exploration of the law, as it applies to your case and to others that will reap the consequences of our decision. If you do your job well, our jobs become much easier.

Keep your sense of humor. We know that the cases we hear and decide are important to you and your client. We know that the other side feels the same way. You may rely on our commitment to treat every case with the dignity all cases before the court of last resort deserve. At the same time, don't let the little things throw you off. Trust that the advocacy system really does work, and that with your help, and that of your opponent, we will get it as right as we are able.

Reading Lolita in Tehran

by Azar Nafisi

The Last Summer of Reason

by Tahar Djaout

Reviewed by Betsy Ross

What role does literature play in a repressive theocracy? That is a topic each of these novels, one by an Iranian-born professor of English literature and the other by an Algerian writer, addresses. In the process, each gives a glimpse into the Muslim world, giving us a chance to see behind the veils and the homogenous images Islam invokes in Western society. It also provides us a chance to take stock of our own inching toward theocracy – the merging of religious beliefs and political ideology – telling a cautionary tale if we are willing to hear it.

Azar Nafisi, now a professor at Johns Hopkins University, taught in Tehran during the rise of the Islamic Republic of Iran. Her book is a memoir about leading a clandestine book group of Iranian women in her home to study Nabokov (thus the title *Reading Lolita in Tehran*), F. Scott Fitzgerald, Henry James, and Jane Austen. Because of their Western (and thus dissolute) ancestry, these books were forbidden reading in the Islamic Republic. Furthermore, as Nafisi points out: "We lived in a culture that denied any merit to literary works, considering them important only when they were handmaidens to something seemingly more urgent – namely ideology."

According to Nafisi, these books not only provided escape from a harsh society of unyielding rules, but also provided these women a way to understand their lives: "What Nabokov captured was the texture of life in a totalitarian society, where you are completely alone in an illusory world full of false promises, where you can no longer differentiate between your savior and your executioner." That confusion dominated society in Iran. It was a confusion born of a politic of rules that was supposed to free you, yet more often annihilated you (both figuratively and in reality).

The Islamic Republic intended to erase the individual, nowhere more obviously than in the dress of its women, in which stray hairs extruding from a veil, disrupting the landscape of sameness, could be cause for beatings by the government "vice squads." Thus do we, Westerners, play into the hands of Islamic fundamentalists when we see all Muslims as monochrome. And, indeed, it is this view that allows us to depict an entire society as "evil;" Ms. Nafisi forces us to see the individual. *Reading Lolita in Tehran* feeds, with details about individuals, our natural instinct towards empathy. And empathy, Nafisi reminds us, is the natural enemy of "evil": "Evil… lies in the inability to 'see' others, hence to empathize with them.… We are all capable of becoming the blind censor, of imposing our visions and desires on others." More on that later.

Tahar Djaout wrote the novel, *The Last Summer of Reason,* shortly before his assassination by Islamic fundamentalists because he "wielded a fearsome pen that could have an effect on Islamic sectors." It is about a man who doubts, who owns a bookstore, who is an outsider in his society, like Djaout himself was. The conflict between the fundamentalists and others is captured in the following dialogue between a young hitchhiker and Boualem:

> "Excuse me, Uncle, but to me you seem beleaguered by the confusion of those who are lacking in faith. I apologize in advance, for I hope that I am wrong."
>
> "Son, it is a risky business to set oneself up as the judge of others, for one is mistaken more often than should be allowed."
>
> "He who preaches truth is not mistaken; he often encounters

BETSY ROSS works for the Office of the Utah State Auditor.

> adversity, but error does not lie on his path."
>
> This rock-driven certainty, having become the basis for all reasoning today, brings back the memory of some of the last discussions he had with his son. Kamel, worked over by his school and neighborhood, had finally yielded to the pressure. With head down, he joined the group cooped up in the meadow of certitude.... He had made it very clear that he did not need a father whose target of sarcasm and pillory he would be. ..."

Literature in the world of Boualem (as in the world of Djaout) is a threat to the established order, and so Boualem, as owner of a bookstore, is stoned in the following incident:

> The first stone that hit him was thrown by a girl. Twelve years old, maybe, no more. But a girl already ripe, a person of the present time, settled into the limpid logic of exclusion and stoning. At the bottom of her little heart, she is completely blameless. She is on the side of the new right: the side that allows you, without remorse, to exclude those who do not share your convictions.

Both Nafisi's memoir and Djaout's novel execrate the societies from which they come, that have so erased from the landscape literature in favor of ideology; empathy in favor of certitude; vibrancy in favor of uniformity. Yet in providing details of daily life and of individuals, Nafisi and Djaout introduce us to hues of Islamic society; and from these hues we are invited towards empathy.

Which leads me back to Nafisi's statement that: "We are all capable of becoming the blind censor, of imposing our visions and desires on others." To what extent have we, as a nation, turned "blind censor" toward "evil" nations? It is not that I do not believe in evil, it is that the declaration of it seems to absolve us from any responsibility of empathy. Thus, pronouncements about "evil empires" and "axes of evil" cause me to gulp just a bit. Are we not, as a society, kinder when we are more prone to empathy than certainty? Nafisi wrote that what frightened her about Iran most was "this persistent lack of kindness," promulgated by a theocracy "that constantly intruded into the most private corners of our lives." Djaout meant the same when he wrote about a culture that "allows you, without remorse, to exclude those who do not share your convictions."

If books really do play the role of adding depth and contour to our experience of our world, may we read *The Last Summer of Reason* and *Reading Lolita in Tehran,* and consider each a cautionary tale about the dangers of mixing religious beliefs and political ideology.

Utah State Bar Presents Awards At 2004 Annual Convention

The Annual Awards of the Utah State Bar were presented at the Bar's 74th Annual Convention by the Board of Bar Commissioners, on behalf of the entire Bar membership. Recipients are selected on the basis of achievement; professional service to clients, the public, courts and the Bar; and exemplification of the highest standards of professionalism to which all judges and lawyers aspire.

Judge of the Year –
Hon. William B. Bohling

Judge Bohling was appointed to the Third District Court by Gov. Michael O. Leavitt. He received his JD degree from the University of Utah and an LLM degree from the University of Michigan School of Law. While in practice he chaired the Bar's Litigation Section and Courts and Judges Committee. In 1993 He was named the Bar's Distinguished Lawyer of the Year. Judge Bohling served as a member of the Judicial Conduct Commission from 2000 to 2002, and has served as the chair of the Judicial Council's Alternative Dispute Resolution Committee from 1994 to the present. He is also a member of the Board of Directors of Alliance House and serves as the judge of the Salt Lake County Mental Health Court.

Distinguished Lawyer of the Year –
George B. Handy

Upon graduation from law school at the University of Utah, George B. Handy began a general practice of law in Ogden where he continues today after 55 years. Now at 83 years old, he arrives at the office early each morning, maintaining an active practice. He attends court and is in trial regularly. Mr. Handy was the chief prosecutor for the Weber Country Attorney's Office from 1967 to 1969. He served on the Utah Board of Corrections as Vice-Chairman from 1957 to 1973. Mr. Handy taught business law at Weber State University for a number of years. He was the President of the Weber County Bar Association in 1981. Throughout his career, Mr. Handy has practiced in virtually every area of the law and has mentored countless numbers of lawyers, many of whom are now judges, and he has done countless hours of pro bono work.

Distinguished Committee of the Year –
Unauthorized Practice of Law Committee

The Unauthorized Practice of Law (UPL) Committee, chaired by Victoria K. Kidman, assists the Bar in protecting the interest of the public by ensuring that legal services are provided only by licensed legal professionals. The UPL Committee is comprised of 11 lawyers and 4 legal assistants committed to the elimination of unauthorized practice of law in Utah. This committee conducts the initial investigation of complaints regarding those thought to be engaging in the unauthorized practice of law. In the last three years the committee has investigated over 165 alleged unauthorized practice of law violations. Generally, those victimized by the unauthorized practice of law are immigrants, the elderly, and the impoverished.

Distinguished Section of the Year –
Young Lawyers Division

Under the leadership of President Christian W. Clinger, the 2,000 member Young Lawyers Division is one of the largest most active sections of the Bar. Some of the Young Lawyers Division's highlights this past year included raising over $30,000.00 for "and Justice for all" which funds community legal service programs throughout Utah; serving nearly 1,500 people through Tuesday Night Bar; hosting "Jackie Robinson Appreciation Weekend", May 14-15 2004 in conjunction with the 50th anniversary of Brown vs. Board of Education; holding a clothing drive to provide low income individuals with professional clothing for interviews and employment; and landscaping the South Valley Children's Justice Center.

2004 Annual Convention Golf Tournament – Sun Valley, Idaho

Richard Bird, right, posing with his son, David Bird during the 2004 Annual Convention Golf Tournament in Sun Valley, Idaho. Richard and David practice law with the firm of Richards, Bird & Kump. Richard Bird, a graduate of Harvard Law School, has been a member of the Utah State Bar since 1933. Upon returning to Utah in 1939, Richard has been a regular attendee at the Bar's Annual Conventions. At 97 years young, Richard was the oldest participant at this year's golf tournament. Congratulations

Discipline Corner

ADMONITION

On June 23, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court admonished an attorney for violation of Rules 5.3(a) (Responsibilities Regarding Nonlawyer Assistants) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

A client asked the attorney's law firm to prepare and file the paperwork required to establish a charitable 501(c)(3) organization. The attorney did not make reasonable efforts to ensure that the attorney's law firm had in effect measures which would give reasonable assurances that the attorney's paralegals' conduct was compatible with the attorney's professional obligations. The attorney's paralegals accepted payment on behalf of the firm for the client's legal work. The work performed by the attorney's paralegals for the client was not directed or supervised by counsel. As part of the work performed for the client, the attorney's paralegals generated and signed correspondence to the client on firm letterhead in the attorney's name, which was not authorized by supervising attorneys.

PUBLIC REPRIMAND

On July 8, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court publicly reprimanded William J. Middleton for violation of Rules 1.1 (Competence) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Middleton was retained to represent a client with respect to a civil lawsuit. After foreclosure proceedings were initiated against the client, Mr. Middleton advised the client to file for Chapter 7 bankruptcy. Mr. Middleton prepared the petition for Chapter 7 bankruptcy. The client's bankruptcy was filed incorrectly because the pending civil lawsuit and counterclaim were omitted. Several months later Mr. Middleton withdrew from representation with regard to the civil litigation.

DISBARMENT

On June 11, 2004, the Honorable Frank G. Noel, Third Judicial District Court Judge entered Findings of Fact, Conclusions of Law, and Order of Disbarment disbarring Francis Angley from the practice of law.

In summary:

During 2001-2002, the Office of Professional Conduct ("OPC") received four insufficient funds notices from Mr. Angley's bank concerning his trust account. The OPC sent Notices of Informal Complaint ("NOIC") in each of the matters to Mr. Angley. Mr. Angley responded to the NOICs, but did not fully explain the overdraft or provide documents requested by the OPC.

In another matter, Mr. Angley was retained to represent a client in a criminal matter. Mr. Angley provided to the client a nonrefundable flat-rate contract, but failed to inform the client that the client would be entitled to a disgorgement of all or part of the nonrefundable flat fee. The client entered into a plea in abeyance upon condition that the client provide a psychiatric evaluation. Mr. Angley obtained the evaluation, but failed to submit it on his client's behalf to the prosecutor. Mr. Angley thereafter failed to communicate with the client. In a second matter, Mr. Angley represented a client in a civil matter while he was on an administrative suspension. In a third matter, Mr. Angley was retained to represent a client in a divorce matter. Mr. Angley failed to inform the client of hearings, he failed to forward discovery requests to the client in a timely manner, he failed to attend two hearings, and he failed to provide the client with an accounting of fees earned.

Mr. Angley failed to comply with an Order of Interim Suspension. Specifically, he failed to comply with Rule 26 of the Rules of Lawyer Discipline and Disability ("RLDD"), which required that Mr. Angley inform clients of his interim suspension and file an affidavit of compliance of Rule 26 RLDD with the OPC. Also, in his application for admission to the Utah State Bar, Mr. Angley failed to disclose that he was cited in two criminal traffic complaints.

Aggravating factors include: Dishonest or selfish motive; pattern of misconduct, including misuse of funds held in trust; multiple offenses; obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary authority, engaging in deceptive practices during the disciplinary process when he made misrepresentations to the Court concerning winding down his practice; refusing to acknowledge the wrongful nature of the misconduct involved; failing to make any effort to rectify the consequences of his misconduct; engaging in illegal conduct in connection with misuse of his trust account; and unsatisfied tax lien against him.

Mitigating factors include: no prior record of discipline; inexperience in the practice of law; and some honest conduct in specific cases.

RESIGNATION WITH DISCIPLINE PENDING

On July 19, 2004, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Michael N. Behunin.

In summary:

On June 6, 2000, Mr. Behunin entered a guilty plea to Conspiracy to Defraud the Government/Conspiracy to Commit Mail Fraud, Wire Fraud and Conspiracy to Defraud the United States. Mr. Behunin submitted a Petition for Resignation with Discipline Pending to the Utah Supreme Court on June 15, 2004. Mr. Behunin's petition admits that the facts constitute grounds for discipline.

INTERIM SUSPENSION

On July 2, 2004, the Honorable J. Dennis Frederick, Third Judicial District Court entered an Order of Interim Suspension, suspending James H. Tily from the practice of law pending final disposition of the Complaint pending against him.

In summary:

On March 9, 2004, Tily entered a plea of guilty to robbery, Utah Code § 76-6-301, a second-degree felony. The interim suspension is based upon this conviction.

Division Officers & Directors 2004–2005

by Tally A. Burke, Chair

Back row: *Nicole Smith, Kathryn Shelton, Danielle Davis, Robyn Dotterer, Talley Burke, Cynthia Mendenhall, & Sanda Kirham.* ***Front Row:*** *George Ann Probert, Heather Holland & Denise Mendelkow*

As incoming Chair of the Division, I am proud to introduce to you the newly-elected officers and directors of the Paralegal Division for 2004-2005. These talented professionals will continue the tradition of service to its members, to the Bar and to the Community. I am very excited to begin my term as Chair. I look forward to making the Division even more beneficial to its members and our legal community.

Denise Adkins

Region I Director, Denise Adkins – This is Denise's second term as Region I Director. Denise has been working as a paralegal for Jensen & Sullivan, LLC since February of 2004. Denise has been a paralegal in collection law for eight years and has been in the collection business for 18 years.

Region II Director, Kathryn K. Shelton – Kathryn is a Paralegal with the law firm of Durham, Jones & Pinegar where she has been employed since May of 1998. Mrs. Shelton works in the Corporate & Securities Section of her firm as well as in Intellectual Property and Business Immigration law. Prior to joining Durham Jones & Pinegar, Mrs. Shelton worked as a Legal Secretary/Assistant in the General Counsel's office for the Huntsman Group of Companies in Salt Lake City beginning in June of 1987 and became a full-time Paralegal there in July of 1995. Previous to her employment with Huntsman, Mrs. Shelton was a Legal Secretary at Van Cott, Bagley, Cornwall & McCarthy from July of 1983 to April of 1987. Mrs. Shelton is a 1982 graduate of Ricks College where she was President of the Phi Chapter of Lambda Delta Sigma and listed in Who's Who in American Junior Colleges.

Region III Director, George Ann Probert – George Ann has worked for the Millard County Attorney's Office for 23 years and has survived 4 different county attorneys. Because she works in a small office setting, she has done about every criminal procedure possible with the exception of international extradition. Her position and experience allow her the opportunity to attend court with her attorney for all law and motion/role call calendars. She is a member of the Utah Prosecutorial Assistants Association with successful completion of their qualifying examination. Her husband is a retired biology teacher and coach. They have 3 boys and live on a ranch in Scipio. George Ann has been a member of the Paralegal Division for several years and has served as the representative for her region once before during Ann Bubert's tenure as Chair.

Shawnah Guthrie

Region IV Director, Shawnah Guthrie – Shawnah currently works for Clifford Dunn in St. George. Shawnah has worked for Mr. Dunn for over 10 years. Her primary duties include managing all civil litigation cases including discovery, drafting motions and orders, trial preparation, witness interviews, deposition scheduling, etc. She also prepares various, complex, business tax returns and assists with IRS audits. Before moving to St. George, Shawnah worked in Las Vegas, Nevada for a criminal defense law firm, where she worked on all capital murder cases gathering evidence for trial and gathering mitigating evidence for the penalty phase. She also handled a large caseload of personal injury cases. She has worked in the legal field for 17 years.

Director-at-Large, Heather Holland – Heather currently works for SOS Staffing Services, Inc., a Utah corporation based in Salt Lake City. She is currently Legal Assistant to General Counsel and Assistant General Counsel for the corporation as well as the Records Manager for the company. Her focus is business and corporate law. She has been with SOS since February of 2000.

Prior to working for SOS Heather worked for the Salt Lake City Police Department for the Victims' Advocate Program which she helped to develop just after its inception in 1994. During her time there she worked with many different legal and law enforcement organizations including the Salt Lake City Prosecutor's Office, Office of the Attorney General, Utah's Prosecution Council and many judges in the 3rd District Courts developing and participating in the domestic violence court. She graduated from the University of Utah in 1993 with Bachelors' Degrees in Anthropology and Behavioral Sciences and Health.

Director-at-Large, Danielle Davis – Danielle is a paralegal with the law firm of Strong & Hanni where she works with Stuart Schultz and specializes in insurance defense litigation. She has worked as a paralegal for 12 years and has experience in numerous practice areas. She received her paralegal certificate from Westminster College. Ms. Davis is a former President, Education Chair, Parliamentarian, and Newsletter Editor for the Legal Assistants Association of Utah (LAAU). She is a member of LAAU as well as the National Association of Legal Assistants. She has served on the Governmental Relations and Licensing committees for the Utah State Bar and the education committee for the Paralegal Division. She is currently serving as the *Bar Journal* Committee Representative and is the ex-officio member of the Bar Commission for the Paralegal Division. Danielle is getting married the end of September and will be changing her name at that time to Danielle Price.

Director-at-Large, Cynthia Mendenhall – Cynthia is a displaced southerner and describes herself as a "slightly cracked belle." She graduated from the ABA accredited paralegal program at Louisiana State University in 1990. Cynthia was the first LSU student to do an internship within the court system in Baton Rouge as a clerk for Family Court Judge Jennifer Luce, firmly establishing that internship resource for future students. Cynthia formerly worked for David Dolowitz and Dena Sarandos at Cohne, Rappaport & Segal, PC in the area of family law. She is currently working at Jones Waldo Holbrook & McDonough.

Director-at-Large, Robyn Dotterer, CP – Robyn worked for Dunn & Dunn in the area of insurance defense prior to her taking a position with Strong & Hanni where she works with Paul Belnap. Robyn works primarily in the areas of insurance defense and bad faith litigation. Robyn achieved her CP in 1994 and is a Past President of LAAU. This is her second term as a Director at Large for the Paralegal Division of the Utah State Bar and she chairs the Division's Utilization Committee and serves as liaison to the Young Lawyer's Division.

Director-at-Large, Denise Mendelkow – Denise is currently assigned to the Investigations Division of the Salt Lake County District Attorneys Office. In that capacity, she conducts follow-up investigations in criminal cases by ensuring that all police reports, evidence and certified court convictions are in files so that appropriate charges can be filed. She screens cases for the Special Investigations Unit, some high-profile cases and assists in screening numerous other routine cases for the office as a whole. Additionally, she interfaces with the police agencies throughout the county and provides investigative subpoenas and subpoenas duces tecum.

Director-at-Large, Nicole Smith – Nicole is originally from Denver Colorado and a graduate of the Denver Paralegal Institute in 2001. She has a BS degree in Technical Communications. Ms. Smith works in the areas of personal injury, construction, contracts, corporate and federal prosecutorial law. Ms. Smith has been a paralegal for three and half years, and currently works at Strong and Hanni law firm.

Director-at-Large, Sanda Kirkham, CP – Sanda is a paralegal with the law firm of Strong & Hanni working primarily in the areas of insurance defense, personal injury, construction litigation and products liability. She received her paralegal certification from the School of Paralegal Studies, Professional Career Development Institute with a specialty in litigation. She achieved her CLA designation in 1998 from the National Association of Legal Assistants. She is the past Chair of the Paralegal Division of the Utah State Bar 2003-2004. She served as the Division's first Bar Liaison, sitting as an ex officio member of the Board of Bar Commissioners of the Utah State Bar from 1996 to 2000. She also served as Bar Liaison to the Legal Assistants Association of Utah from 1995 to 2000. Sanda currently serves as the Division's Parliamentarian and sits on the Unauthorized Practice of Law Committee, the Non-Supervised Membership Section Committee, and the Licensing/Delivery of Legal Services Committee. She has presented seminars for HalfMoon LLC regarding civil litigation practice for paralegals and teaches preparatory courses for the Certified Legal Assistant (CLA) certifying examination. She was Co-Chair for the committee of the First 100 CLA's in Utah reception and celebration.

Chair, Tally A. Burke – Tally works for Kruse Landa Maycock & Ricks, LLC, in the area of corporate and securities law. In 1996, Tally received her Legal Assistant Certificate. In 1997, she earned her Associate of Applied Science, with a major in Paralegal Studies, from the Salt Lake Community College. She is teaching Paralegal Procedures at the Salt Lake Community College, and looks forward to the challenge and opportunity of working with excited new paralegal students. She is also currently enrolled at Weber State University to obtain her Criminal Justice Bachelors' with an emphasis in Paralegal Studies. Ms. Burke was the former Finance Officer of the Paralegal Division and she also chaired the Long-Term Planning Committee. She is a member of the National Association of Legal Assistants, Inc. and the Legal Assistant's Association of Utah, where she has served on their board as Second Vice President for Education.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
08/20&21/04	**Annual Securities Law Workshop.** Sun Valley Resort – Sun Valley, Idaho. 8:00 am–1:00 pm each day. $195 Section Members, $225 Non-Section Members, Golf $118.	8.75
09/16/04	**NLCLE – Family Law:** 5:30–8:45 pm. Agenda TBA. $50 New Lawyers, $75 others.	3 CLE/NLCLE
10/05&06/04	**Tuesday October 5:** Eminent Domain, New Rules and Strategies from the 2004 Utah Legislature, **Wed, October 6:** Utah Land Use Institute, Latest Developments in Utah Planning, Zoning and Land Use law. Two Full Day seminars. $85 each day, $140 for both, plus MCLE fees – $12 each day or $15 for both. Red Lion Hotel, 161 West 600 South.	8 each day
Environmental Law – Live Webcasts! 3 to Choose From		
Viewed from your computer • Event Cost TBA • CLE Credit Up to 7 hours (see below for credit hours)		
10/15/04	**Effective Litigation Techniques for an Industrial Pollution Case:** 8:30 am–12:45 pm.	4
	Clean Air Act Case: 12:00–2:15 pm.	2
	Ethical Challenges for Lawyers in Environmental Litigation: 2:30–3:30 pm	1
10/21/04	**NLCLE – Water Law:** 5:30–8:45 pm. Introduction and the Basics of Water Law, Water Right Title Update, Water Right Appeals from the Administrative Decision of the Office of Engineer. $50 New Lawyers, $75 others.	3 CLE/NLCLE
10/22/04	**FALL FORUM – Law Practice Management Through Technology:** This seminar starts where the 2003 seminar left off. What do the courts require? Be ahead of the curve. University Park Marriott. $95 before 10/8, $125 after.	6.5 CLE/NLCLE up to 3 Ethics
11/17/04	**Negotiation – Reaching Agreement on YOUR Terms:** 9:00 am–4:30 pm.	6 CLE/NLCLE may change

To register for any of these seminars: Call 297-7033, 297-7032 or 297-7036, 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.

REGISTRATION FORM

Pre-registration recommended for all seminars. Cancellations must be received in writing 48 hours prior to seminar for refund, unless otherwise indicated. Door registrations are accepted on a first come, first served basis.

Registration for (Seminar Title(s)):

(1) _____ (2) _____

(3) _____ (4) _____

Name: _____ Bar No.: _____

Phone No.: _____ Total $ _____

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

☐ AMEX Exp. Date _____

Classified Ads

RATES & DEADLINES

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

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

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

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

NOTICE

St. George couple with 11 year old daughter wanting to adopt another child. Please respond to H.J.D. at P.O. Box 160, St. George, Utah 84770. Inquiries will of course be confidential.

POSITIONS AVAILABLE

Burbidge & Mitchell seeks an associate with 1-2 years litigation experience. Superior academic record and writing skills necessary. Send responses to 215 South State Street, #920, SLC, UT 84111 or fax to (801) 355-2341. No phone calls.

Small established AV Salt Lake firm seeking a lateral transfer with 10+ years experience to work with existing litigation team focusing on commercial and construction litigation. Send inquiries to Christine Critchley, Utah State Bar, Confidential Box #25, 645 South 200 East, Salt Lake City, Utah 84111-3834.

IVINS CITY SEEKS CITY ATTORNEY – Ivins City, located in Southern Utah, is seeking applications from qualified individuals (minimum 4 years employment in the practice of law) for the position of City Attorney. This full-time position performs duties related to legal processes of city government, and requires knowledge of civil law including municipal law, judicial procedures, and rules of evidence. Other functions include representation in civil proceedings, preparation of ordinances, resolutions, contracts, leases, and memoranda for city officials. Job description and application available at ivins.com. Please send application and resume to Ivins City, Attn: City Recorder, 55 N Main, Ivins, UT, 84738 or e-mail to terri@ivins.com.

Myriad Genetics, Inc. Patent Paralegal/Administrative Assistant (PT, Temp) Support two patent attorneys, patent agents, law clerk. Prepare documents for submission to United States Patent and Trademark Office; patent applications, supporting transmittal forms, petitions, cover letters, responses to Office actions, amendments, information disclosure statements, etc. Docketing patent prosecution information using IP Master docketing system, preparing "actions due", remind staff of prosecution deadlines, monitoring a deposit account at USPTO, overseeing annuities and patent maintenance fees being made by contract agency. Temporary position may lead to permanent placement. Myriad Genetics, Inc. 320 Wakara Way, Salt Lake City, UT 84108, jobs@myriad.com. EOE

Local non-profit seeking pro-bono help on potential precedent-setting case dealing with Salt Lake County ordinances and zoning. Case involves variances to ordinances granted by the County Board of Adjustments to approve building of a road at the mouth of Big Cottonwood Canyon. Third District decision being appealed by Save Our Canyons and members of the public. Our current attorney has worked above and beyond but is unable to continue due to finances. Please contact Save Our Canyons at 539-5333 or e-mail to: info@saveourcanyons.org.

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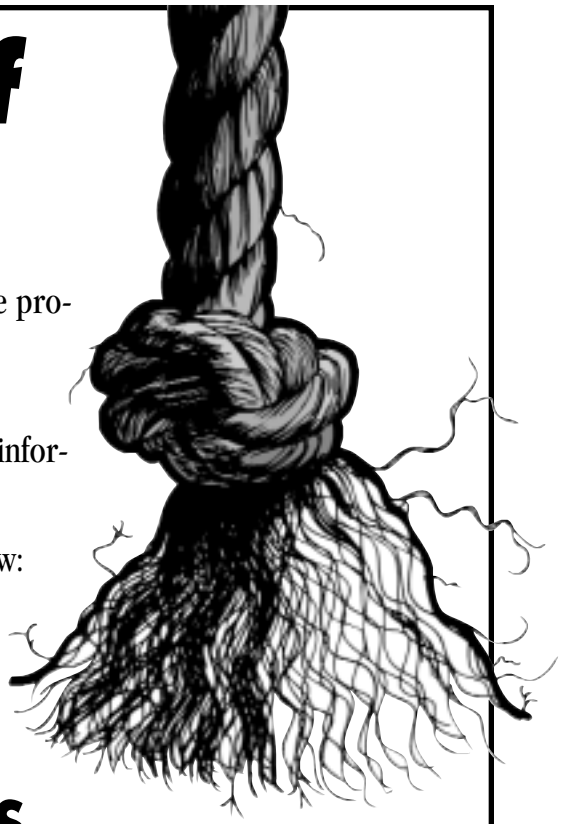

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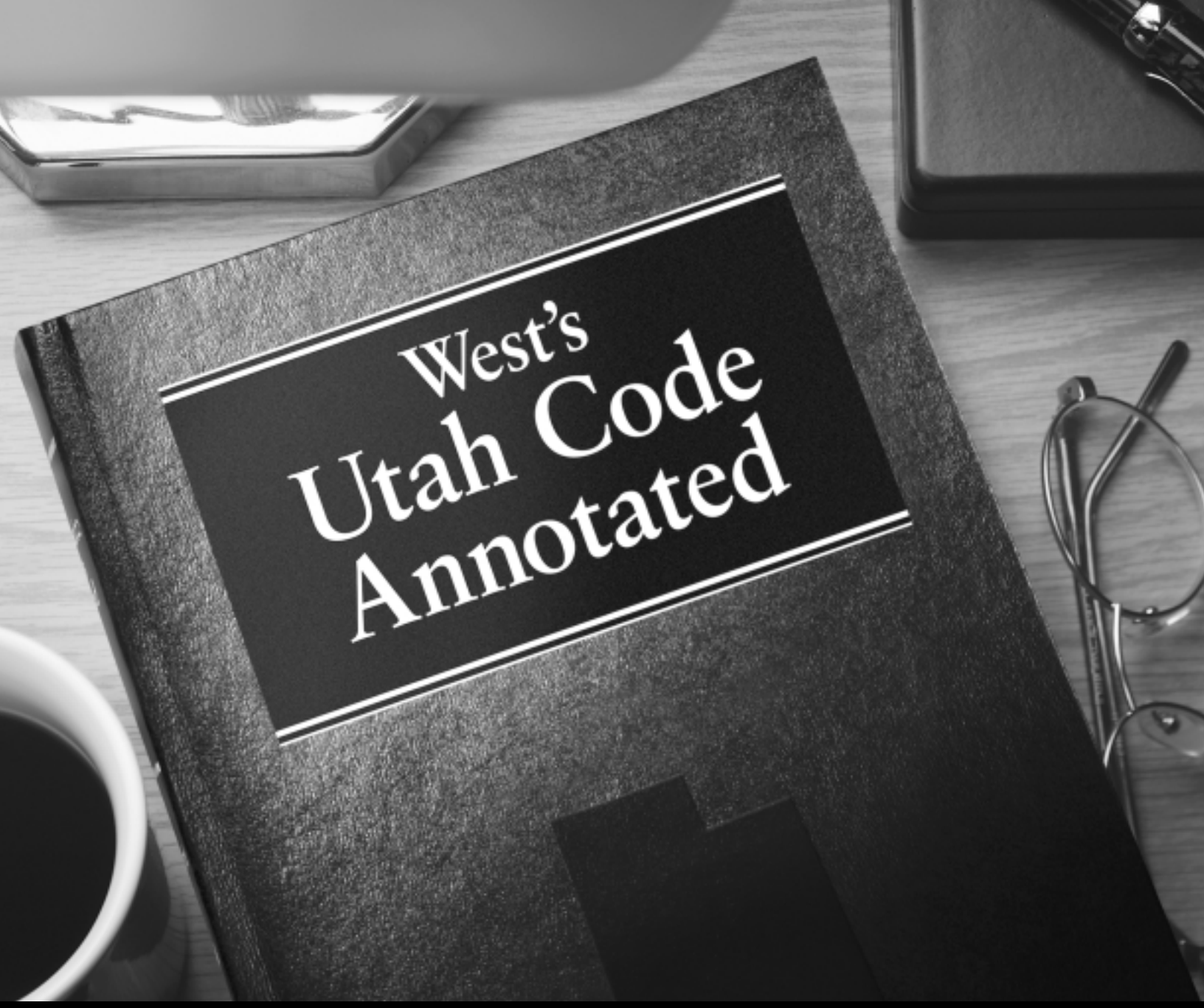

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