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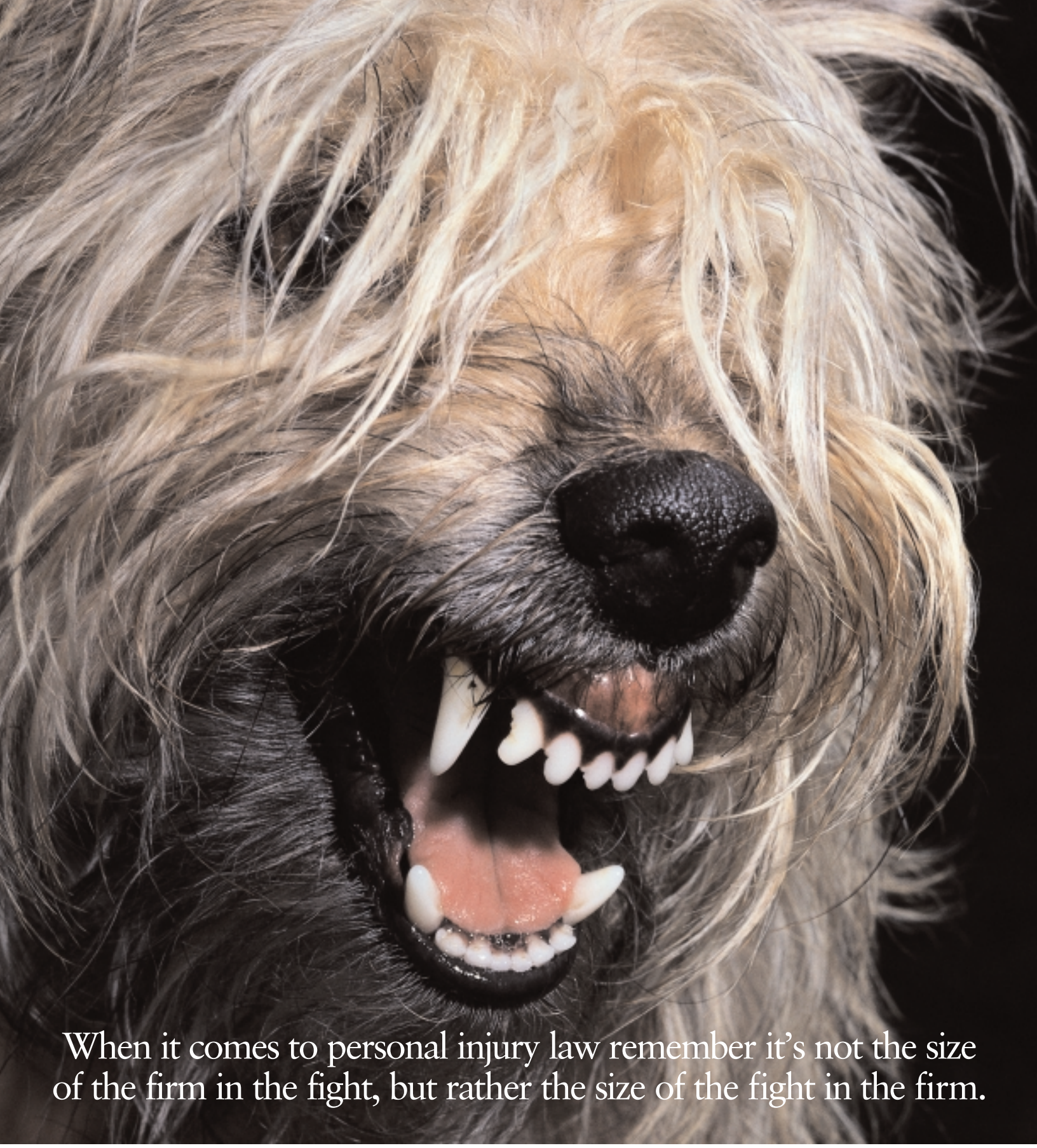

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Table of Contents

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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.*

COVER: "Tendrills" of Virginia Creeper vines struggle to survive October by exploding with color. Taken in Holladay, Utah by Dana Sohm.

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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.
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The Utah Bar Journal

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

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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.
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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.

Practice Pointer: Neither a Borrower Nor a Lender Be

by Kate A. Toomey

You've known her for years, and in many respects the two of you have a great deal in common; she regards you as a friend. You've been around her young children a few times, and you like them a lot. She's a wonderful mother and she works hard, but she struggles to provide for the kids because she's been on her own since her husband died overseas. You've been helping her with a wrongful death action, but it's going to be awhile before the money comes through, and she may have to file a lawsuit to get everything she's entitled to. She hits a financial rough patch but doesn't qualify for a loan and can't borrow money from her extended family. Meantime, she's so behind on paying her bills that she could lose her house, and if she loses her car, too, she could lose her job as well. Then one of the boys gets sick. She can't stay at home to care for him, but she can't afford a babysitter, either. Finally, she asks you for a small loan, just until her money comes through. You're a generous person who cares about others, and besides, you know she'll do anything she can to pay you back. What can you do to help her?

The short answer is that she's your client, and you can't loan her money or provide financial assistance. Even under the compelling circumstances in this sad story, you can't cover her living expenses with the thought that she'll eventually try to pay you back. This strikes many attorneys as heartless nonsense, but the rule is explicit, and considering its rich historical roots and the policy reasons that spawned it, it is also sound.

Rule of Professional Conduct 1.8 governs prohibited transactions, such as the general proscription in 1.8(a) against attorneys and clients entering business transactions.[1] Rule 1.8 also includes this subsection:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except:

> (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

This language has been characterized as "unambiguous." *See e.g. In re K.A.H.,* 967 P.2d 91, 93 (Alaska 1998). It has also survived challenges to its constitutionality. *Id.* at 94-96. (subsection doesn't unconstitutionally infringe upon access to courts); *Oklahoma Bar Ass'n v. Smolen,* 17 P.3d 456, 463-64 (Okla. 2000) (subsection doesn't violate equal protection).

If you're like me, you've wondered what possible good can come of prohibiting attorneys from providing humanitarian aid to their clients. After all, we're encouraged to provide pro bono or reduced fee services and to contribute financially to organizations providing legal services for people of limited means. It's even codified in the Rules of Professional Conduct. *See* Rule 6.1, R. *Pro. Con.* So what's the big deal here?

Pro bono work and professional service donations are, essentially, gifts. In the former case, you have no expectation of being paid, and whereas this may stimulate you to work efficiently, you have no stake in the outcome. In the latter case, you provide financial assistance for legal services, but the clients aren't individually known to you.

Remember all those years ago in law school when we studied as though we were trying to learn a foreign language, including archaic terms such as "champerty," and "maintenance?" These are the conceptual predecessors of today's rule against providing financial assistance to a client. *See e.g.* Comment, Rule 1.8 (rule against attorney acquiring proprietary interest in litigation has basis in common law champerty and maintenance). As the Comment following Rule 1.8 notes, however, the rules provide for a few exceptions – most notably for reasonable contingent fees and for advances of costs of litigation as provided in Rule 1.8(e).

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Does the amount of the loan matter? The Supreme Court of Alaska considered a disciplinary case that started with the lawyer loaning several hundred dollars over a six-month period. *See In re K.A.H.,* 967 P.2d 91 (Alaska 1998). The client and her two daughters were evicted, homeless, and living in their car during the first summer. Eventually they moved to the lower forty-eight to be near family, but when pre-litigation negotiations failed, her presence in Alaska necessitated airfare and living expenses. Eventually the loan reached several thousand dollars, but the analysis would be the same regardless of the amount.

What if you provide a tangible thing, rather than money? The answer is still no. *See e.g. Rubinstein v. Statewide Grievance Committee,* 2003 Comm. Super. LEXIS 1727 (attorney sanctioned *inter alia* for providing bus tokens to client for transportation to medical appointments)

What about paying for medical costs, prescriptions, and medical supplies? Again, the answer is no, even if the client can't afford continuing treatment. Although Rule 1.8 doesn't define what counts as "court costs and expenses of litigation," medical treatment isn't included. *See e.g., Rubinstein v. Statewide Grievance Committee,* 2003 Comm. Super. LEXIS 1727, 28-29 (payment of ongoing medical treatment is closer to advancement of living expenses than it is to out-of-pocket court costs and litigation expenses). Note that the cases distinguish between advancing money for treatment and advancing it for diagnosis. *See e.g. Attorney Grievance Comm'n v. Kandel,* 563 A.2d 387, 389-90 (Md. 1989)

What if you don't charge interest? It's still not allowed. *See e.g. Smolen,* 17 P.3d at 457 (interest-free loan without penalty or cost violated rule). Does the timing of the loan matter? The rules "prevent lawyers from enticing clients with the promise of monetary advances." *Rubinstein,* 2003 Comm. Super. LEXIS 1727, 15 (quoting Lawyer's Manual). But it also applies to loans made after the representation starts. What if you loan the client money after settlement? The Maryland Court of Appeals concluded that this is permitted. *See Kandel,* 563 A.2d at 280-81. What if there's no pending litigation? Rule 1.8(a) still forbids business transactions between lawyers and clients, which would apply to loans, unless the conditions set forth in the rule are met.

The rule protects attorneys by subduing competition among lawyers willing to provide financial help as a means of enticing clients. *See Rubinstein,* 2003 Comm. Super. LEXIS 1727, 15. As the Mississippi Supreme Court put it, "Our concern is that unregulated lending to clients would generate unseemly bidding wars for cases and inevitably lead to further denigration of our civil justice system." *Mississippi Bar v. Attorney HH,* 671 So.2d 1293, 1298 (Miss. 1995). This echoes the view of courts such as the Maryland Court of Appeals, which wrote that, "An important public policy interest is to avoid unfair competition among lawyers on the basis of their expenditures to clients. Clients should not be influenced to seek representation based on the ease with which monies can be obtained, in the form of advancements, from certain law firms or attorneys." *Kandel,* 563 A.2d at 390. Arguably, the rule protects you, too, because it's so much easier to refuse a client's request for assistance by explaining that your ethical responsibilities forbid it. *See Rubinstein,* 2003 Comm. Super. LEXIS 1727, 15.

Some jurisdictions have relaxed the rules when it comes to loaning clients money. These include Alabama, California, Minnesota, Montana, North Dakota, Texas, and Vermont. *See In re Maxwell,* 783 So.2d 1244, 1249 n.6 (La. 2001) (e.g., permitting an attorney to guarantee a loan "for the sole purpose of providing basic living expenses" if it is "reasonably needed to enable the client to withstand delay in litigation"); *In re: Ex Parte Application of G.M. for Approval of Payment of Personal Living Expenses and Reasonable and Necessary Medical. Expenses,* 797 So.2d 931, 934 (Miss. 2001) (advances may be made 60 days after retention if attorney uses due diligence to determine client's financial position, provided attorney doesn't promise future payments and doesn't make willingness known to public). This is a minority position, however. *See Smolen,* 17 P.2d at 460 & n.13.

So, what if you have a hard luck client, there's no pending or contemplated litigation, and you've been asked to make a loan? You can loan the money if the transaction and terms are fair and reasonable to the client, transmitted in writing in terms the client can understand, and the client has a reasonable opportunity to seek the advice of independent counsel. *See* Rule 1.8(a)(1) & (2). Additionally, the client must consent in writing. Rule 1.8(a)(3). You can also make your humanitarian gesture in the form of a gift. Otherwise, the appropriate thing to do is decline the request.

1. *See* Rule 1.8(a), R. Pro. Con.

Cracking the Computer Forensics Mystery

by Christopher Wall and Jason Paroff

Only a few short years ago, the term "computer forensics" was a mystery to most attorneys. In the digital age, however, attorneys are discovering that a basic understanding of "computer forensics" and computer forensic protocol is crucial in both civil and criminal lawsuits. Without a doubt, most information generated today is stored electronically. In 2002, approximately 5 exabytes of new information was stored in print, film, magnetic, and optical storage media. 92% of that information was stored on magnetic media, mostly in hard disk drives.[2] Because of the increasing trend toward creating and using electronic documents, the computer is becoming a vital point of investigation in almost every case. Computer forensics can be essential in uncovering twenty-first century evidence.

A recent Minnesota sexual harassment and whistleblower case is a good example of how computer forensics technology can be used to solve a discovery mystery.[3] In *Anderson v. Crossroads Capital Partners, L.L.C.,* the court ordered the plaintiff to furnish the defendant with copies of all relevant documents that existed on the plaintiff's personal computer, including deleted or corrupted files. Pursuant to the judge's order, the defendant's computer forensic expert examined the plaintiff's hard drive and discovered that a data wiping software application had been installed after plaintiff had agreed not to "delete any existing documents." The court noted that the plaintiff's "exceedingly tedious and disingenuous claim of naiveté regarding her failure to produce the requested discovery…defies the bounds of reason" and issued an adverse inference jury instruction because the plaintiff intentionally destroyed evidence and attempted to suppress the truth. *Anderson* is just one example of the ever growing host of cases in which a computer forensic examination and expert have helped decipher electronic evidence enigmas.[4]

Computer Forensics 101: What is Computer Forensics?

A. Defining Computer Forensics

Computer forensics is the "who, what, when, and how" of electronic evidence. Typically narrow in scope, it attempts to reconstruct events, focusing on the computer-based conduct of an individual or group of individuals. The types of cases involving computer forensics are numerous and varied – from the personal (i.e. locating hidden assets in a messy divorce case), to the political (i.e. investigating alleged misuse of government computers for political gain), to the dramatic (i.e. "What was your client's former employee downloading from the Internet before he was fired and brought suit for wrongful termination?").

According to the Sedona Conference, a legal and political think tank founded for the purpose of establishing reasonable standards and principles for handling electronic evidence, "computer forensics is the use of specialized techniques for recovery, authentication, and analysis of electronic data when a case involves issues relating to reconstruction of computer usage, examination of residual data, authentication of data by technical analysis or explanation of technical features of data and computer usage. Computer forensics requires specialized expertise that goes beyond normal data collection and preservation techniques available to end-users or system support personnel."[5]

At the heart of computer forensics is the idea that within the electronic realm of evidence, delete does not really mean delete. The investigations into Enron's accounting irregularities illustrate how persistent deleted information can be. Weeks before Enron filed for bankruptcy, it became apparent that several major financial institutions had helped Enron manipulate its numbers and mislead investors with secret loans. During the subsequent

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investigations, one piece of evidence that received broad attention was an internal e-mail at JP Morgan Chase that described one of these secret loans called a "prepay." The email chain began, "Enron loves these deals as they are able to hide funded debt from their equity analysts because they (at the very least) book it as deferred [revenue] or (better yet) bury it in their trading liabilities." Another internal e-mail expressed concern: "Five [billion] in prepays!!!!!!!!!!!!!!!" The reply? "Shut up and delete this email."[6] JP Morgan's employees apparently were not aware of what some courts have said about deleted email. According to one court, "Technically, email messages are permanently recorded since 'most email programs keep copies of every message a user ever wrote, every message the user ever received, and every message the user deleted.'...'A deleted file is really not a deleted file, it is merely organized differently.'"[7]

Indeed, where relevant information can be expected to be located, deleted data can be recovered and the results of the forensic analysis can often yield a potential treasure trove of information. Regardless of whether the information is beneficial or detrimental, counsel can best assess the merits of the case the earlier he or she knows about it.

B. The Computer Forensics Process

Given the wealth of electronic information available to individuals and corporations today, laptop and desktop hard drives or networked servers and backups are often the best place to begin collecting potential evidence. An investigation involving computer forensics typically begins by making a bit-by-bit image or copy of the hard drive or electronic media in question, thereby preserving the integrity of the original media. This image of the data includes all of the unused and partially overwritten spaces on the electronic media where important evidence may reside. When properly done, a forensically sound image does not alter the information on the original hard drive or electronic media.

Once the forensic image has been made, a computer forensic expert can search for active data (data that was immediately accessible to an individual using the computer when the image was made), recovered data (files and directories that were recovered after they had been deleted), and unused space (portions of the media that are either "free" because they have never been used or because the information contained there has been deleted, and the computer has marked that space as available for use by new information).

II. Computer Forensics Case Law: Civil and Criminal Crackdowns

In the twenty-first century, the legal community is recognizing the significant evidentiary role that computers play in civil and criminal cases. Because of rapid advances in technology, case law and legislation dealing with computer forensics is changing daily. Some of the important computer forensic case law in both criminal and civil cases includes cases dealing with cyber sabotage, email investigations, deleted data, Internet activity, and spoliation.

A. Cyber Sabotage

Because computer crimes are increasing at alarming rates, law enforcement officers, investigators, lawyers and judges are increasingly barraged with technical issues. Accordingly, an understanding of current computer forensics law is vital in offering accurate and thorough computer expert testimony. In a 2001 case, *U.S. v. Lloyd,* testimony by computer experts led to the conviction of an individual charged with a modern "cyber-crime."[8] Without testimony from the computer experts, evidence of the computer "time bomb" that sabotaged operations at an engineering company would not have been recovered.

B. Email Investigations

Perhaps more than any other technological innovation, email has become an integral part of daily activity and electronic discovery. As such, computer forensic engineers are regularly called upon to investigate and analyze email communication. *United States v. Bach,* a child pornography case, illustrates precisely how computer forensics can be used where email is at issue.[9] Pursuant to a search warrant, Yahoo! computer experts retrieved all of the information contained in the defendant's email account. Because police were not present when the defendant's email account was searched, the lower court ruled that the seizure of the emails by Yahoo! was unlawful. The appellate court reversed the lower court decision, finding that Yahoo!'s search of the defendant's email account without a police officer present was reasonable under the Fourth Amendment and did not violate the defendant's privacy rights.

C. Deleted Data

Unless steps are taken to hide or remove deleted data more permanently, computer forensic engineers can recover and examine deleted information. And lest counsel think that the deleted information is not subject to discovery, significant case law suggests the opposite.[10] The case law, both at the State and Federal level, is full of civil and criminal decisions where the individual quite clearly failed to understand that the "delete" key on the keyboard is not the equivalent of a paper shredder.

For example, in *United States v. Tucker,* Utah District Court Judge Campbell found Jeffrey Tucker guilty of knowingly possessing child pornography.[11] Computer forensic evidence gathered from deleted Internet cache files that still resided on Tucker's hard drive, even after being deleted, were an integral part of the case against him. The cache files were stored on his hard drive when he visited various websites containing child pornography. Even though the files had been deleted, they were still recoverable by a computer forensics expert. Cases like *Tucker* illustrate how critical computer forensics can be in finding seemingly deleted data.[12]

D. Internet Activity

Computer forensics can also play a vital role in criminal investigations. *State v. Guthrie,* a case dealing with a criminal prosecution for murder, is a good example.[13] In *Guthrie,* a preacher's wife was found dead in the bathtub, a victim of an apparent suicide. Suspicious of the apparent suicide, investigators began looking into the case. Shortly thereafter, a suicide note appeared. Investigators enlisted the aid of a computer forensics expert, who discovered that Guthrie's computers at home and at church had been used to conduct numerous Internet searches on subjects related to bathroom deaths. Additionally, the forensic analysis revealed that the computer-printed suicide note, offered to exculpate the defendant, was created several months after the victim's death. Needless to say, Mr. Guthrie now finds himself preaching to a congregation of a different stripe.

E. Spoliation of E-Evidence

Courts will not hesitate to admonish or sanction parties for bad faith maneuvering, rule violations, and negligent or intentional spoliation. Sanctions for such conduct have included adverse inferences or presumptions, preclusion of evidence, monetary sanctions, and dismissal or default. *Procter & Gamble Co. v. Haugen* demonstrates that Utah courts are not hesitant to impose sanctions for electronic discovery violations.[14] *Procter & Gamble* was an unfair competition case in which the defendant moved for sanctions, alleging that the plaintiff violated its duty to preserve relevant email communications of five key employees. Finding that the plaintiff breached its duty to preserve, the court sanctioned the plaintiff $2,000 – $10,000 for each of the five employees. The court also granted the defendant's motion to dismiss the case without prejudice, since the plaintiff failed to preserve relevant electronic data that it knew was critical to the case. The court determined that the plaintiff's violation of four separate discovery orders made defending the case "basically impossible" since the crucial electronic evidence was apparently no longer available.

An Illinois federal district court also imposed sanctions for deleting electronic evidence in a recent patent infringement case, *Kucala Enters. Ltd. v. Auto Wax Co.*[15] Based on digital clues left on the hard drive, computer forensic experts were able to determine that the plaintiff used "Evidence Eliminator,"

a software wiping utility, to delete and overwrite over 12,000 electronic files. An expert further determined that 3,000 additional files had been deleted and overwritten three days earlier. Although there was no clear indication that relevant evidence existed among the destroyed files, the court described the plaintiff's actions as "egregious conduct" and emphasized the plaintiff's apparent intent to destroy evidence that it had a duty to maintain. The magistrate judge recommended to the district court that the plaintiff's case be dismissed with prejudice and that the plaintiff be ordered to pay the defendant's attorney fees and costs incurred in defending the motion.

As *Procter & Gamble* and *Kucala* illustrate, courts will not hesitate to impose sanctions for intentional or negligent spoliation of electronic documents. Spoliation cases dealing with electronic evidence are legion, and the cases cited here are but a sampling of how some courts are dealing with the issue.[16]

III. Computer Forensics Best Practices: Decoding the Computer Forensics Mystery

When it comes to gathering and searching computer data for relevant information, many attorneys may feel inexperienced. Multiple computer systems may be involved, each of which may contain hundreds of gigabytes of data or more. Complicating matters, many different *types* of computers may also be involved, and each can contain a different operating system (i.e. Windows, Macintosh, Linux, etc.) or serve unique functions (i.e. email, database, file/print/antivirus server, etc.). Each may require different handling methods in order to effectively retrieve, copy, and search the data they possess. Listed below are three basic guidelines that counsel and their clients should follow when facing a computer forensics issue in litigation.

A. Clueing in on the Computer Forensics Process

When retrieving electronic data, the following steps should be taken: (1) consultation with clients and computer forensic experts, (2) data preservation, (3) data collection, (4) data recovery and analysis, and (5) expert testimony and reporting.

First, an attorney should consult with the client and a computer forensic expert to create a strategy for collecting, analyzing, and processing the data. The strategy may include analysis of where the critical information could exist as well as the identification of properly qualified individuals to perform the work.

Next, attorneys should take proper precautions to preserve data.

In many cases, a computer forensics expert using industry best practices will first make a mirror image, which is a bit-by-bit copy of a hard drive that ensures the computer system is not altered during the imaging process. Additionally, the expert will ensure that no possible evidence is damaged and that no computer viruses are introduced. Techniques that are generally understood within the industry and are considered to be reliable must be established for the handling of data. Though not an exhaustive list by any means, examples include chain-of-custody control, protection from magnetic fields and other dangers that can damage data, mirror imaging, and duplication techniques that do not alter the data and can verify that an exact copy was obtained, and analysis tools that accurately convey the information being reviewed.

Once the relevant data has been identified, a computer forensic expert can retrieve data from virtually all storage media and operating systems, including legacy and obsolete hardware systems. During the data recovery process, the expert will recover active data, deleted data, and/or email and access inactive and unused data storage areas. Finally, a computer forensic expert can help win a client's case by offering expert testimony and reporting. The expert can customize reports about the data collected and produced to support the case, provide data for affidavits or other pleadings, and provide expert testimony at a trial or hearing.

B. Hiring a Cybersleuth

Computer forensic investigators must have advanced computer knowledge, with specialized data recovery and computer investigation analysis skills. Ideally, such experts should have some formalized training such as law enforcement training courses offered by large departments and agencies and certification courses offered by recognized private sector companies. Not every computer forensics specialist has deep systems knowledge, and most information technology specialists know little about computer forensics procedures. The needs of a client can be broad, and often a team of individuals with different skill sets may be required to effectively handle a case heading for, or involving, litigation.

Reliable techniques and protocols may include:

- Recreating a specific chain of events or user activity, including Internet activity, email communication, file deletion, etc.;
- Searching for key words and dates and determining what resulting data is relevant;
- Searching for copies of previous document drafts;
- Searching for potentially privileged information;
- Searching for the existence of certain programs such as file wiping programs; or
- Authenticating data files and the date and time stamps of those files.

A forensic expert's job does not necessarily end with recovering a lost or deleted "smoking gun" document. Often, the expert can also determine whether an electronic file has been tampered with, altered, damaged or removed. In essence, the expert can help recreate a course of events relating to the primary user of the computer in question as if the hard drive itself were the scene of a crime or event. Once that analysis is complete, the computer forensic expert can provide expert reporting and testimony to assist the court, counsel, or the fact finder in resolving a case.

C. Solving the Computer Forensics Mystery in Court

People have been known to falsify evidence, alter it, or attribute it as something other than what it really is. As a result, courts have a right (and an obligation) to question the validity of electronic evidence. Maintaining a "chain of custody" on pieces of relevant media is the best way to proactively ensure admission of the data into evidence at trial. A proper chain of custody ensures the reliability of evidence and minimizes any risk that evidence was changed, altered, or modified from its original form on the hard drive.

When called to testify, a computer forensics expert might be asked the following questions and provide the following hypothetical responses:

1. What is the evidence, or what does it purport to be?
Forensics Expert: "This is a printout of data that I recovered on 1/1/04 from the hard disk drive primarily used by John Doe of the Acme Corporation."

2. Where did it allegedly come from?
Forensics Expert: "The hard drive was taken from the office of John Doe on 12/15/03. It was contained within a Generic PC bearing model XXXX and S/N YYYY."

3. Who created, discovered, or recovered it?
Forensics Expert: "The data appears to have been created by John Doe. I discovered and recovered it from his hard disk

drive using computer forensic techniques."

4. How was it created, discovered, or recovered?
Forensics Expert: "I made an image of the hard disk drive using a forensic imaging device. This device is designed to make a perfect copy of a disk and does not alter the data on the disk being copied."

5. Were there any material changes, alterations, or modifications during the recovery of the evidence such that it may no longer be what it once was?
Forensics Expert: "No. Our processes as well as the tools that we use are designed to ensure that no changes whatsoever occur to the original media and data we work on. We use write-blocking devices as an extra precaution in this regard. We test our tools, both software and hardware in order to validate that no changes are made to the original media, and to insure that a perfect image is made of that media."

6. What has happened to it since the time it was created, discovered, or recovered? Is there any chance that the evidence was changed, altered, or modified between the time you imaged the drive and today?
Forensics Expert: "Here is our 'chain of custody' documentation which indicates where the media has been, whose possession it has been in, and the reason for that possession. There is no chance that during that time any of the evidence was changed/altered/modified from the form in which it existed on the drive that we imaged on 12/15/03.

After a computer expert is able to verify the authenticity and reliability of the evidence, a court is well within its province to admit the evidence for consideration by a jury. Accordingly, an attorney will be in the best position to argue to the judge or jury the weight that should be given to the evidence. Just as the computer has become essential in modern times, computer forensic evidence is becoming a crucial aspect of many investigations and legal matters. A solid understanding of electronic evidence concepts will help attorneys solve any computer forensics mystery.

1. The authors gratefully acknowledge the assistance of Charity J. Delich, Kroll Ontrack Electronic Evidence Law Clerk and second year law student at William Mitchell College of Law.

2. Ninety-two percent of new information is stored on magnetic media, primarily hard disks. Film represents 7% of the total, paper 0.01%, and optical media 0.002%. http://www.sims.berkeley.edu/ research/projects/how-much-info-2003/execsum.htm#summary

3. *Anderson v. Crossroads Capital Partners, L.L.C.,* 2004 WL 256512 (D.Minn. Feb. 10, 2004).

4. *See, e.g., In re Lorazepam and Clorazepate Antitrust Litig. v. Mylan Lab., Inc.,* 300 F.Supp.2d 43 (D.D.C. 2004) (requiring Plaintiff to take CD-ROMs to a computer forensic expert); *Physicians Interactive v. Lathian Sys., Inc.,* 2003 WL 23018270 (E.D.Va. Dec. 5, 2003) (directing that discovery must be done with the assistance of a computer forensic expert); *Playboy Enters., Inc. v. Welles,* 60 F. Supp.2d 1050 (S.D. Cal. 1999) (appointing a computer expert who specialized in the field of electronic discovery to create a "mirror image" of Defendant's hard drive).

5. *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery* (Sedona ConferenceSM Working Group Series 2004). http://www.thesedonaconference.org

6. Brown, Gary M. "Senate Investigator to Enron's Lawyers: It's Not Over." *Corporate Board Magazine,* Special Legal Issue, 2003. http://www.boardmember.com/issues/archive.pl?article_id=11523

7. *State v. Townsend,* 57 P.3d 255 (Wash. 2002) (Bridge, J. concurring).

8. *United States v. Lloyd,* 269 F.3d 228 (3rd Cir. 2001).

9. *United States v. Bach,* 310 F.3d 1063 (8th Cir. 2002).

10. *See, e.g., Dodge, Warren, & Peters Ins. Servs. v. Riley,* 130 Cal.Rptr.2d 385 (Cal. Ct. App. 2003) (ordering Defendants to allow a court-appointed expert to copy the data, recover lost or deleted files, and perform automated searches of the evidence under guidelines agreed to by the parties or established by the court); *Simon Property Group v.mySimon, Inc.,* 194 F.R.D. 639 (S.D. Ind. 2000) (requesting party should have access to active and deleted data alike); *Caldera, Inc. v. Microsoft Corp.,* 72 F. Supp. 2d 1295 (D. Utah 1999) (finding that a series of intra-company emails offered "direct evidence" that the corporation was actively trying to destroy a competitor).

11. *United States v. Tucker,* 150 F. Supp. 2d 1263 (D. Utah 2001). *See also, United States v. Tucker,* 305 F.3d 1193 (10th Cir. 2002).

12. *See, e.g., State v. Townsend,* 57 P.3d 255 (Wash. 2002) (Bridge, J. concurring) (court affirmed that deleted information is fully discoverable if relevant).

13. *State v. Guthrie,* 654 N.W.2d 201 (S.D. 2002).

14. *Procter & Gamble Co. v. Haugen,* 179 F.R.D. 622 (D.Utah 1998), *rev'd on other grounds,* 222 F.3d 1262 (10th Cir. 2000). *See also, Procter & Gamble Co. v. Haugen,* 2003 WL 22080734 (D.Utah Aug. 19, 2003).

15. *Kucala Enters. Ltd. v. Auto Wax Co.,* 2003 WL 22433095 (N.D.Ill. Oct. 27, 2003). *See also, Kucala Enters., Ltd. v. Auto Wax Co.,* 2003 WL 21230605 (N.D.Ill. May 27, 2003).

16. *Procter & Gamble Co. v. Haugen,* 179 F.R.D. 622 (D.Utah 1998), *rev'd on other grounds,* 222 F.3d 1262 (10th Cir. 2000) (where Plaintiff's breached its discovery duties, court imposed $10,000 in sanctions – $2,000 for each of the five custodians); *see also Procter & Gamble Co. v. Haugen,* 2003 WL 22080734 (D.Utah Aug. 19, 2003) (granting Defendant's motion to dismiss with prejudice where the Plaintiff failed to preserve relevant electronic data that Plaintiff knew was critical to the case, violating four separate discovery orders requiring production of the data); *Anderson v. Crossroads Capital Partners, L.L.C.,* 2004 WL 256512 (D.Minn. Feb. 10, 2004) (granting adverse inference jury instruction because the Plaintiff intentionally destroyed potentially damaging evidence); *Zubulake v. UBS Warburg,* 2003 WL 22410619 (S.D.N.Y. Oct. 22, 2003) (ordering Defendant to bear the Plaintiff's costs for re-deposing certain witnesses for the limited purpose of inquiring into the destruction of electronic evidence and any newly discovered emails); *Landmark Legal Foundation v. Environmental Protection Agency,* 272 F.Supp.2d 70 (D.D.C. 2003) (finding the EPA in contempt and concluding that the appropriate sanction was Plaintiff's attorney's fees and costs incurred as a result of the EPA's conduct); *RKI, Inc. v. Grimes,* 177 F.Supp.2d 859 (N.D. Ill. 2001) (ordering Defendant to pay $100,000 in compensatory damages, $150,000 in punitive damages, attorneys' fees, and court costs).

Judicial Disqualification in Utah

by Steve Averett

The purpose of this article is to summarize Utah law regarding disqualification of judges.

Judges are generally not allowed to hear cases in which they: (1) are interested parties, (2) are closely related to a party, or (3) have served as an attorney for one of the parties. Utah Code Ann. § 78-7-1 (2002).

Rule 63(b) of the Utah Rules of Civil Procedure says that a party (or their attorney) can file a motion to disqualify a judge. The motion needs to be "accompanied by a certificate that the motion is filed in good faith and shall be supported by an affidavit stating facts sufficient to show bias, prejudice or conflict of interest." Utah R. Civ. P. 63(b)(1)(A). The motion is to be filed after the action has begun, but no later than 20 days after: (1) assignment of the case to the judge, (2) appearance of the party or attorney, or (3) the time that the party learned or should have learned of the grounds for disqualification. Utah R. Civ. P. 63(b)(1)(B). The judge is to either grant the motion (resulting in transfer of the case to a different judge) or the judge is to certify the motion and affidavit to a reviewing judge. Utah R. Civ. P. 63(b)(2). If the reviewing judge finds that the motion and affidavit are timely, filed in good faith, and legally sufficient, the reviewing judge is to see that the case is assigned to a different judge. Utah R. Civ. P. 63(b)(3).

Impartiality

A judge is to "enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned." Utah Code Jud. Conduct Canon 3(E)(1). A number of cases have dealt with recusal and disqualification of judges, under a question of impartiality.

In *In re Inquiry Concerning a Judge,* 81 P.3d 758, 759 (Utah 2003), a juvenile court judge, who was involved in a disciplinary action, sought disqualification of a supreme court justice who was to review the proceedings of the Judicial Conduct Commission. The Utah Supreme Court found that recusal was unnecessary. The Court ruled that no bias was shown by the justice's prior rulings or by the fact that the justice was related to an attorney who was representing the juvenile judge. (The juvenile judge was ultimately removed from office because of an ongoing situation where his impartiality might reasonably be questioned due to his "intemperate" remarks concerning government attorneys who routinely appeared in his court. *In re Inquiry Concerning Judge Anderson,* 82 P.3d 1134, 1152 (Utah 2004)).

In *State v. West,* 34 P.3d 234 (Utah Ct. App. 2001), the State of Utah requested an extraordinary writ that would require one judge to disqualify another judge from hearing a certain case. The Utah Court of Appeals granted the petition only to the extent of requiring the judge to reconsider an affidavit of bias for the possibility that a "judge's impartiality might reasonably be questioned" even if no actual bias was shown. *Id.* at 234.

In *In re Inquiry Concerning a Judge,* 984 P.2d 997 (Utah 1999), a public reprimand was imposed against a judge because of his ex parte communication with a party. In addition, the judge's disqualification was requested because the judge's impartiality had been questioned. The court found disqualification unnecessary, because the judge did not have personal bias toward a party. The judge had merely expressed anger toward one of the parties.

In *State ex rel. M.L.,* 965 P.2d 551, 555-57 (Utah Ct. App. 1998), a mother requested that a juvenile judge recuse himself from hearing a termination of parental rights case, because he had presided over prior hearings regarding the child and had issued rulings that were adverse to the mother. The court found it unnecessary for a judge to recuse himself. The court said that Rule 63(b) of the Utah Rules of Civil Procedure sets forth the procedures for alleging judicial bias and that nothing indicated that the judge acted improperly or with actual bias.

In *Gardner v. Madsen,* 949 P.2d 785, 791-92 (Utah Ct. App. 1997), the court found that a judge did not have to recuse himself from a case involving a corporation in which the judge's nephew had served as an incorporator and board member. The court said that, even if he was a shareholder in the company, it appeared that he stood to gain nothing from the court case, such that the judge could still hear the case. The court noted that judges should "disclose a family relationship whenever it

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arises." *Id.* at 792 n.5.

In *V-1 Oil Co. v. Department of Environmental Quality,* 939 P.2d 1192, 1193-94 (Utah 1997), an administrative adjudicator served as a part-time staff attorney with the same administrative agency whose dispute he was to adjudicate. The trial court saw no conflict and the Utah Supreme Court agreed, reversing the decision of the Court of Appeals. The Utah Supreme Court said that recusal of the administrative adjudicator was not necessary because his work as a staff attorney was adequately segregated from his adjudicatory responsibilities. *Id.* at 1203-04.

State v. Ontiveros, 835 P.2d 201 (Utah Ct. App. 1992) was a manslaughter case. The defendant said that the trial judge had committed error by failing to recuse himself where the judge had recently granted an early release of the same defendant (on an unrelated conviction). The court said that "trial judges should recuse themselves when their 'impartiality' might reasonably be questioned." *Id.* at 203 (citing *State v. Neeley,* 748 P.2d 1091, 1094 (Utah 1988)). The trial judge's failure to recuse himself in this case was determined not to be reversible error because the judge "precisely" followed the legal requirements of Rule 29 of the Utah Rules of Criminal Procedure and because no substantial rights of the defendant were affected (*i.e.,* there was no reasonable likelihood of a more favorable result since the conviction was determined by a jury and no actual bias was shown on the part of the judge.)

In *Regional Sales Agency, Inc. v. Reichert,* 830 P.2d 252, 254-57 (Utah 1992), the court disqualified a Court of Appeals judge who was related by marriage to two members of the law firm that represented one of the parties (one was the judge's father-in-law and the other was the judge's brother-in-law). The court considered the relatives' financial interest to be one that would be affected by the outcome of the litigation.

In *State v. Petersen,* 810 P.2d 421, 423 (Utah 1991), a defendant "moved to disqualify the trial judge on the ground that the judge had previously, as a district attorney, prosecuted [the] defendant and had recused himself from presiding over [an earlier] trial of defendant." The trial court summarily denied the motion to disqualify, on the ground that it was not timely. The Utah Supreme Court said that the appearance of bias in the case could have been avoided by recusal. The defendant's convictions were reversed and charges dismissed without prejudice, for other reasons (*i.e.,* delay in bringing the case to trial). *Id.* at 427-28.

In *State v. Gardner,* 789 P.2d 273, 278 (Utah 1989), it was alleged that the trial judge should have recused himself. The judge had worked at the courthouse where the criminal defendant had shot and killed an attorney during an escape attempt. The court said that if a reasonable person would doubt the judge's impartiality he should have recused himself. However, since there was no showing of actual prejudice to the defendant, any error was harmless.

In *Madsen v. Prudential Federal Savings & Loan Ass'n,* 767 P.2d 538, 543-44, 547 (Utah 1988), the Utah Supreme Court overturned an order which had disqualified another judge, following trial, saying that: (1) the motion to disqualify was not timely, (2) remarks made by the judge did not sufficiently show prejudice, and (3) the judge did not have a financial interest in the outcome of the case. The court said that, in order to be timely, a motion to disqualify (under Rule 63(b) of the Utah Rules of Civil Procedure) must be filed at the first opportunity after learning of the facts supporting a disqualification and as soon as practicable.

In *State v. Neeley,* 748 P.2d 1091, 1093-95 (Utah 1988), a trial judge was not required to recuse himself since he determined that he had no actual bias against the criminal defendant merely by being involved in the prosecution of the case 20 years earlier.

Bias or Personal Knowledge

A judge is to enter a disqualification in instances where the judge has: personal bias concerning a party or attorney, strong personal bias about an issue in the case, or "personal knowledge of disputed evidentiary facts concerning the proceeding." Utah Code Jud. Conduct Canon 3(E)(1)(a). A number of cases have considered bias and personal knowledge of judges.

In *Campbell , Maack & Sessions v. Debry,* 38 P.3d 984, 992-93 (Utah Ct. App. 2001), the court found no reversible bias or prejudice where a judge's comments (during the proceeding) did not indicate any extra-judicial prejudice and where the party alleging prejudice failed to file a supporting affidavit.

In *In re Inquiry Concerning a Judge,* 984 P.2d 997, 1005-07 (Utah 1999), the court said that bias or prejudice usually needs to come from an "extrajudicial source, not from occurrences in the proceedings before the judge." The court found disqualification unnecessary, where the judge had merely expressed anger toward one of the parties, during the proceedings.

In *In re Affidavit of Bias,* 947 P.2d 1152, 1153, 1156-57 (Utah 1997), the court held that an allegation of bias was made in a timely fashion, even after the Utah Supreme Court opinion had been issued, because the party alleging bias didn't know of a potential conflict of interest until that time. One of the justices who had sat on the case had been a member of a predecessor of the opposing party's firm thirteen years earlier. However, the court concluded that an inference of bias could not reasonably be raised.

In *Kleinert v. Kimball Elevator Co.,* 905 P.2d 297, 301 (Utah Ct. App. 1995), the plaintiff alleged, for the first time on appeal, that the case should be heard by a different judge because the judge had developed a bias regarding her claim. The court held that an allegation of bias should have been brought up, by affidavit, in the trial court and could not be brought up for the first time on appeal.

Sukin v. Sukin, 842 P.2d 922, 926-27 (Utah Ct. App. 1992) was a custody case in which the case was to be remanded, following appeal, to the judge who had awarded custody to the mother. The father was concerned about the possibility of bias. The court refused to address the issue of bias or prejudice when it was raised for the first time on appeal and without first filing the appropriate affidavit in the trial court.

In *Madsen v. Prudential Federal Savings & Loan Ass'n,* 767 P.2d 538, 545 (Utah 1988), the court found that a judge had no personal knowledge of disputed evidentiary facts in a case involving profits made by a savings and loan company on its budget payment accounts.

Prior Service

A judge is to enter a disqualification where the judge has served as an attorney in the matter, where the judge practiced law with a lawyer who served in the matter during the time of their association, or where the judge or lawyer served as a material witness concerning the matter. Utah Code Jud. Conduct Canon 3(E)(1)(b).

Economic Interest

A judge is to enter a disqualification where the judge knows that the judge or a member of the judge's family has an economic interest in a party or in the subject matter of the controversy or has more than a "de minimis interest that could be substantially affected by the proceeding." Utah Code Jud. Conduct Canon 3(E)(1)(c).

Close Relationship to the Case

A judge is to enter a disqualification in situations where the "judge, the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person" is a party; officer, director, or trustee of a party; a lawyer in the proceeding; a person with more than a "de minimis interest that could be substantially affected by the proceeding;" or is likely to be a material witness in the proceeding. Utah Code Jud. Conduct Canon 3(E)(1)(d).

Staying Informed

A judge is to "keep informed about the judge's personal and fiduciary economic interests, and should make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household." Utah Code Jud. Conduct Canon 3(E)(2).

Waiver of Disqualification

If a judge is disqualified, the judge can tell the parties and their lawyers the reason for the disqualification and ask them to consider, out of the presence of the judge, whether to waive the disqualification. Utah Code Jud. Conduct Canon 3(F). If all of the parties and attorneys agree that the judge does not need to be disqualified, the judge may participate in the proceeding. Utah Code Jud. Conduct Canon 3(F). The agreement to waive the judge's disqualification is to be entered on the record, or if written, filed in the court file. Utah Code Jud. Conduct Canon 3(F).

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An Overview of State Sovereign Immunity in the Federal System

by Bless Young and Kurt Gurka

I. State Sovereign Immunity and the Eleventh Amendment

A. Historical Perspective

Sovereign immunity shields states from having to defend themselves against suits in law or at equity in the federal system. Although not explicitly incorporated into the constitutional text, it seemed apparent that sovereign immunity, as it had existed up to ratification, would remain in place. However, this assumption was destroyed by the 1793 case of *Chisholm v. Georgia,* 2 Dall. 419 (1793), where the Supreme Court, in a 4-1 vote, upheld its jurisdiction over an action in assumpsit brought by a South Carolina citizen against the State of Georgia.

Reaction was fast and furious. Congress immediately began work on the Eleventh Amendment, and within five years it was ratified. It reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." When read in light of *Chisholm,* the amendment is easily understood as the constitutional overturning of that decision. However, this language, much like that of Article III, offers little assistance in determining the true scope of State sovereign immunity.

The Supreme Court again reviewed State sovereign immunity and the Eleventh Amendment in *Hans v. Louisiana,* 134 U.S. 1 (1890). There the court addressed the issue of whether a citizen can sue his own state. The unanimous decision was no. Justice Harlan concurred in the result, noting the holding of the case was simply that "a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued." *Id.* at 21.

Currently there is a fair amount of confusion concerning what the relationship is between State sovereign immunity and what is often referred to as "Eleventh Amendment immunity." The confusion can be cleared up by bearing in mind the following: (a) the States retained their immunity as sovereigns even after the adoption of the Constitution, and (b) the Eleventh Amendment was passed simply to overrule the Supreme Court's decision in *Chisholm;* so (c) while the Eleventh Amendment only addresses the holding of *Chisholm,* it stands for the proposition that States retained their sovereign immunity after their adoption of the Constitution.[1]

The current rule for sovereign immunity is that no action may proceed against a State unless:

1. The plaintiff is also a State;
2. The State has waived immunity by:
   a. expressly so stating;
   b. removing an action in state court to federal court; or
   c. accepting Congressional gift (generally in the form of federal funds) on the condition that the State waive its Eleventh Amendment immunity;
3. Congress, acting pursuant to §5 of the Fourteenth Amendment, abrogates State sovereign immunity by unequivocally stating its intention to abrogate that immunity; or
4. The judicially created *Ex Parte Young* exception applies: *i.e.,* where the plaintiff seeks only prospective injunctive relief from

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an individual acting in his official capacity in order to end a continuing violation of federal law, and Congress's intent is to allow for such an action, unless special sovereignty issues are implicated.[2]

B. Recent Developments in State Sovereignty and the Eleventh Amendment

Recent questions involving State sovereign immunity have arisen in three areas:

1. When has a State waived its immunity?
2. When is Congress constitutionally exercising its valid Fourteenth Amendment powers? and
3. When does the *Ex Parte Young* exception apply?

1. When has a State waived immunity?

The Supreme Court

a. In *Lapides v. Board of Regents of the University System of Georgia,* 535 U.S. 613 (2002), the Supreme Court overturned the Eleventh Circuit's finding that the State had not waived its Eleventh Amendment immunity when it removed a case to federal court. Justice Breyer, speaking for a unanimous Court, found it "anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the 'Judicial power of the United States' extends to the case at hand." *Id.* at 619. Thus, the Supreme Court reaffirmed its holding in *Gunter v. Atlantic Coast Line R. Co.,* 200 U.S. 273 (1906), that "where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Lapides,* 535 U.S. at 619.

b. The Supreme Court has also had occasion to address the question of whether "constructive waiver" may ever be applicable. In *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666 (1999), the Court answered no. Plaintiff, College Savings Bank, sued an arm of the State of Florida, Florida Prepaid ("Board"), alleging unfair competition under the Lanham Act, as amended by the Trademark Remedy Clarification Act ("TRCA"), based on the Board's alleged false advertising. The District Court dismissed the claim on Eleventh Amendment grounds, and the Court of Appeals affirmed. The Supreme Court, per Justice Scalia, held that although the State of Florida was a participant in interstate commerce, Congress could not abrogate State immunity by legislating pursuant to its Article I powers. Even though the State had voluntarily entered into competition with College Savings Bank and others, this is one of those few cases where the precise text of the Constitution resolves the matter at hand, *i.e.,* the prohibition against a foreign citizen suing a State. Most importantly, the Board, by participating in the market for savings, did not waive its immunity to suit, and Congress's attempts under the TRCA to abrogate the Eleventh Amendment were unconstitutional.

Several recent cases indicate that the circuit courts have been in

relative agreement as to when waiver has occurred.

The Eighth Circuit

In *Union Electric Company v. Missouri Department of Conservation,* 2004 WL 912258 (unpublished 2004), the Court upheld the trial court's dismissal of an action against the Missouri Department of Conservation ("MDOC") as barred by the Eleventh Amendment. The plaintiff, Union Electric Co., was licensed by FERC to operate the Bagnell Dam on the Osage River. In the spring of 2002, the river experienced a significant fish kill below the dam. Plaintiff and defendant entered into negotiations for a settlement of the cost of the fish kill. When negotiations broke down, plaintiff sought declaratory and injunctive relief in federal court to prevent MDOC from suing it in State court. After the trial court determination in favor of MDOC, plaintiff appealed. The Eighth Circuit held that MDOC had not waived its Eleventh Amendment immunity by making a general appearance and defending against the action and that the State Attorney General did not waive immunity by seeking to intervene in the suit. *Id.* at ¶5.

The Tenth Circuit

The Tenth Circuit examined immunity and waiver in the context of the Family and Medical Leave Act and the Rehabilitation Act in *Brockman v. Wyoming Department of Family Services,* 342 F.3d 1159 (10th Cir. 2003). The plaintiff, Brockman, filed suit alleging that the Defendant department had violated the self-care provision of the FMLA and relevant portions of the Rehabilitation Act. The department asserted sovereign immunity to both actions. In considering the FMLA action first, the Court held that the self-care provisions were not applicable to States because they did not implicate any of the gender-based aspects of *Hibbs* (discussed, *infra*) and therefore sovereign immunity barred the claim. Secondly, the Court found that while enforcement of the Rehabilitation Act against the State was barred by sovereign immunity, "by accepting federal financial assistance [the State and its] entities waive[d] sovereign immunity from suit." *Id.* at 1168; citing *Robinson v. Kansas,* 295 F.3d 1183, 1189-90 (10th Cir. 2002).

2. When Is Congress Constitutionally Exercising Its Valid Fourteenth Amendment Powers?

The Supreme Court

a. Perhaps the most important case of the last year is *Nevada Department of Human Resources v. Hibbs,* 538 U.S. 721 (2003). Plaintiff Hibbs was an employee in the Defendant department's Welfare Division when, in April and May of 1997, he sought leave under the Family and Medical Leave Act of 1993 ("FMLA") to care for his wife, who was recovering from a car accident that had left her with a neck injury. The department granted plaintiff 12 full weeks of leave, to be used as needed between May and December of that year. By October plaintiff had exhausted his leave and was informed by the department that he must return to work. Plaintiff failed to do so and was fired. He then filed suit in "U.S. District Court seeking damages and injunctive and declaratory relief for, *inter alia,* violations of 29 U.S.C. §2612(a)(1)(C)." *Id.* The Supreme Court "granted certiorari to resolve a split among the Courts of Appeals on the question whether an individual may sue a State for money damages in violation of §2612(a)(1)(C)." *Id.* at 725.

The Supreme Court first reviewed its prior case law and stated "we have made clear that the Constitution does not provide for federal jurisdiction over nonconsenting States." It then approached the exception that "Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under §5 of the Fourteenth Amendment." *Id.* at 726. The Court wasted no time finding that Congress clearly intended to abrogate State immunity; the issue was whether the FMLA was a valid exercise of that power.

First, the Court considered the relevant portions of the Fourteenth Amendment, finding that:

> Two provisions of the Fourteenth Amendment are relevant here: §5 grants Congress the power 'to enforce' the substantive guarantees of §1 – among them, equal protection of the laws – by enacting 'appropriate legislation.' Congress may, in the exercise of its §5 power, do more than simply proscribe conduct that we have held unconstitutional. "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356, 363 (2001). . . In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and

deter unconstitutional conduct.

Id, at 727-28.

The Court then noted that it was emphatically within its province, however, to define the substance of Constitutional guarantees, and that in determining whether Congress was enacting appropriate prophylactic legislation or substantively redefining the Fourteenth Amendment right at issue it would apply the test it formulated in *City of Boerne v. Flores,* 521 U.S. 507 (1997). Specifically, "valid §5 legislation must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520.

The Court found that the FMLA met the requirements of the test set forth in *City of Boerne,* and held that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the Act. *Hibbs,* 538 U.S. at 724. In reaching its decision, the majority opinion relied heavily on several Congressional findings: (1) that despite repeated attempts by Congress, sex-based discrimination was still pervasive in the workplace; (2) that there was significant evidence that States discriminatorily granted maternity leave in excess of paternity leave; (3) that parental leave for fathers is rare; and (4) in instances where leave was granted on a discretionary basis, it was often discriminatorily granted. *Id.* at 730-32.

Additionally, the Court found that previous Congressional attempts to address the problem of sex-based discrimination through Title VII and its subsequent amendment (the Pregnancy Discrimination Act) were unsuccessful. The 12 week floor mandated by the FMLA for leave, however, ensured men were provided equal leave and would not encourage employers to hire men instead of women, thus satisfying the congruency leg of *City of Boerne.* In satisfying the proportionality leg of *City of Boerne,* the Court found several provisions of the Act persuasive: (1) the FMLA only requires unpaid leave; (2) it only applies to employees who worked for the employer for at least one year and worked 1,250 hours in the last 12 months; (3) employees in high-ranking positions are ineligible for FMLA leave; (4) State-elected officials, their staffs, and appointed policy makers are exempt; (5) employees must give advance notice of their leave; and (6) employers may require certification by a health care provider for the leave. *Id.* at 737-40.

Of particular importance was the effect of the ruling in *Hibbs.* As Justice Scalia wrote in his dissent, this case involved guilt by association. At no point was it proven that Nevada had acted in violation of the Fourteenth Amendment, only that some private

employers had engaged in sex-based discrimination in the past. In Justice Kennedy's dissent, he noted that:

> The Court is unable to show that States have engaged in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits. The inability to adduce evidence of alleged discrimination, coupled with the inescapable fact that the federal scheme is not a remedy but a benefit program, demonstrate the lack of requisite link between any problem Congress has identified and the program it mandated.

Id. at 745.

The net result: even had Nevada allowed for gender-neutral leave to care for an ill family member, it would still have been liable for money damages under the FMLA's abrogation of Eleventh Amendment immunity because the Supreme Court did not consider whether the State's past history was good or bad on this issue. This is especially noteworthy because, as Justice Kennedy points out, it seems to contradict the Court's holding in *Garrett* that "Congress's §5 authority is appropriately exercised only in response to State transgressions." *Garrett,* 531 U.S. at 368.

3. When does the Ex parte Young exception apply?

In *Young,* the Supreme Court found a remedy "that the parties interested may resort to, by going into a federal court of equity, in a case involving a violation of the Federal Constitution, and obtaining a judicial investigation of the problem, and, pending its solution, obtain freedom from suits, civil or criminal, by a temporary injunction, and if the question be finally decided favorable to the contention of the company, a permanent injunction restraining all such actions or proceedings." *Ex parte Young,* 209 U.S. 123, 149 (1908).

The Supreme Court

a. The baseline for these cases is the general rule set forth in the landmark case of *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996). In *Seminole Tribe,* the Supreme Court overruled its prior holding in *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989), and held that Congress could not abrogate State sovereign immunity under any exercise of its Article I powers. That decision, although decided by only a 5-4 vote, effectively closes the door to any suits seeking damages for State transgressions of federal law enacted pursuant to Congress's Article I powers. The exception is the *Ex parte Young* doctrine, where the plaintiff seeks only prospective injunctive relief from an individual acting in his official capacity in order to end a continuing violation of federal law, and Congress's intent is to allow for such an action.

Seminole Tribe of Florida, the plaintiff in the action, sued alleging a continuing violation of federal law by the Governor in failing to bring the State into compliance with the Indian Gaming Regulatory Act ("IGRA"). The Court found, however, that in passing the IGRA, Congress had included a "carefully crafted and intricate remedial scheme" for plaintiffs to follow. *Id.* at 73-74. The Court then reiterated the limitation on *Ex parte Young:* "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against the State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a State officer based on *Ex parte Young." Id.* at 74. Applying the rule in the current action, the Court held "that *Ex Parte Young* was inapplicable to [plaintiff's] suit against the Governor of Florida, and therefore that suit is barred by the Eleventh Amendment and must be dismissed[.]" *Id.* at 76.

b. The Supreme Court again revisited *Ex parte Young* in *Verizon Maryland, Inc. v. Public Service Commission of Maryland,* 535 U.S. 635 (2002). Verizon filed suit seeking injunctive relief from the Commission, claiming that the commissioners, in their official capacities, had violated the Telecommunications Act of 1996 ("Act"). The commissioners had required reciprocal compensation for Internet Service Provider ("ISP") bound calls, which Verizon claimed was in violation of the Act. The Supreme Court, after first determining that it had jurisdiction, next found it irrelevant whether the Commission had waived its immunity, because the case could proceed under *Ex parte Young.* "In determining whether the doctrine of *Ex parte Young* avoids Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* at 645 (citing *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 296 (1997)). Finding *Ex parte Young* permitted Verizon to go forward in its suit against the State commissioners in their official capacities, the Court vacated the Fourth Circuit's determination and remanded.

The Eighth Circuit

In *Union Electric Company,* discussed *supra,* the Court held that plaintiff's action was barred by the Eleventh Amendment. The

Court went on to find *Ex parte Young* inapplicable. "We conclude that the Federal Power Act unmistakably evidences an intent to exclude licensees such as Amurense from maintaining an *Ex parte Young* action seeking to prevent a State from recovering damages to its property resulting from the licensee's negligence in the operation of the licensed power project." *Union Electric Company,* 2004 WL 912258 at ¶2.

The Tenth Circuit

a. The Tenth Circuit recently revisited *Ex parte Young* in the case of *Ruiz v. McDonnell* 299 F.3d 1173 (10th Circ. 2002). There, the Court clarified its interpretation of the doctrine and recent Supreme Court holdings:

> "Under the *Ex parte Young* legal fiction, when an official of a State agency is sued in his official capacity for prospective equitable relief, he is generally not regarded as 'the state' for purposes of the Eleventh Amendment and the case may proceed in federal court." *ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1188 (10th Cir.1998). The *Ex parte Young* exception, however, is a narrow one. *Elephant Butte Irrigation Dist. v. Dep't of Interior,* 160 F.3d 602, 607 (10th Cir.1998). "[It 'has no application against the States *and their agencies,* which are [immune from suit] regardless of the relief sought.' " *Buchwald v. Univ. of N.M. Sch. of Med.,* 159 F.3d 487, 495 (10th Cir. 1998) (emphasis added) (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 146, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993)); *see also Elephant Butte,* 160 F.3d at 607 (*Ex parte Young* doctrine applies only when "lawsuit involves an action against State officials, not against the State"); *ANR Pipeline,* 150 F.3d at 1187 (any form of relief against State agency, even solely prospective injunctive relief, is barred).

In *Will v. Michigan Department of State Police,* the United States Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under §1983." 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Although the district court declined to address the State Defendants' argument that the CDHS and Ms. McDonnell, acting in her "official capacity," did not qualify as "persons" under §1983, "we may affirm on any grounds supported by the record." *Duncan v. Gunter,*

> 15 F.3d 989, 991 (10th Cir.1994) (citation omitted). "Because the Supreme Court's precedent in *Will* mandates that we conclude that neither the CDHS nor Ms. McDonnell, acting in her 'official capacity,' qualify as 'persons' under §1983, we affirm the district court's dismissal of those parties on that ground."

Id. at 1182.

b. In *Ruiz,* the Court only had occasion to determine whether State officials were persons for purposes of §1983, but did not have the opportunity to review its *Ex parte Young* framework. That opportunity arose in *Chaffin v. Kansas State Fair Board,* 348 F.3d 850 (10th Cir. 2003). Chaffin and several other disabled plaintiffs filed suit alleging "intentional discrimination in violation of Title II of the Americans with Disabilities Act ("ADA"), by defendants the State of Kansas, the Kansas State Fair Board, its members, and the general manager of the Fair. Plaintiffs sought injunctive relief against the Kansas State Fair for alleged failure to comply with the ADA and various regulations promulgated thereunder, including the ADA Accessibility Guidelines. On cross motions for summary judgment, the district court granted plaintiff's motion for partial summary judgment directing all defendants except the State of Kansas to [come into compliance with Title II.] *Id.* at 853-54.

The defendants appealed and asserted, *inter alia,* that Title II was not a valid abrogation of the State's Immunity and that *Ex parte Young* was inapplicable. The Tenth Circuit disagreed. The Court first listed the four-part framework for determining whether *Ex parte Young* governs a case:

> First, we determine whether the action is against State officials or the State itself. *Second,* we look at whether the alleged conduct of the State officials constitutes a violation of federal law. *Third,* we assess whether the relief sought is permissible prospective relief or analogous to a retroactive award of damages impacting the State treasury. *Finally,* we analyze whether the suit rises to the level of implicating "special sovereignty interests."

Id. at 866 (citing *Robinson v. Kansas,* 295 F.3d 1183, 1191 (10th Cir. 2002)).

The court found plaintiffs met all the criteria to proceed under *Ex parte Young* and affirmed the District Court's holding.

II. Qualified Immunity for State Officials

Generally, States as sovereigns are immune from suit. However, where sovereign immunity has been constructively avoided by suing a State official, the defense of qualified immunity can be raised. Qualified immunity may relieve the official from defending the suit, or, where there are questions of fact that preclude a determination prior to trial, shield him from damages.

Government officials who perform discretionary functions are entitled to qualified immunity from civil damages, provided their conduct does not violate clearly established rights which a reasonable government official would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Under the shifting burden framework now in place, when a government official raises qualified immunity, the burden shifts back to the plaintiff to establish that (a) defendant's conduct violated a federal constitutional or statutory right and (b) the right was clearly established at the time of the conduct. *Saucier v. Katz,* 533 U.S. 194, 201 (2001). Most issues now litigated concern whether the right in question is clearly established.

The Supreme Court

a. *In Groh v. Ramirez,* 124 S.Ct. 1284 (2004), the Supreme Court examined a claim for qualified immunity asserted by an ATF agent who executed a facially invalid warrant. The Court followed the two part analysis that has become standard: (1) was there a constitutional violation; and (2) was the right transgressed clearly established?

> Having concluded that a constitutional violation occurred, we turn to the question whether petitioner is entitled to qualified immunity despite that violation. *See Wilson v. Layne,* 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). The answer depends on whether the right that was transgressed was "clearly established" – that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).
>
> Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818-19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) ("If

the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct").

Id. at 1293.

b. A second case that illustrates one of the problems for State officials defending §1983 claims is *Bunting v. Mellen,* 2004 WL 875266 (unpublished 2004). The Petitioner, Superintendent at the Virginia Military Institute ("VMI"), filed for a writ of certiorari to review the Fourth Circuit's finding that VMI's before-dinner prayer was unconstitutional. Plaintiffs sought monetary, declaratory, and injunctive relief, under §1983, but the District Court granted summary judgment only on the prospective relief, finding defendants were entitled to qualified immunity. The Fourth Circuit upheld that determination, finding that under the two-part test, a constitutional violation had occurred, but it was not clearly established.

Justice Stevens, joined by Justices Ginsburg and Breyer, issued an opinion respecting the Court's denial of certiorari. The problem, he thought, was the "byproduct of an unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation *before* addressing the question whether the defendant State actor is entitled to qualified immunity." *Id.* at 1. But that problem aside, the three-justice block would have denied certiorari for two other reasons.

Justice Scalia, joined by the Chief Justice, saw the issue before the Court as worthy of certiorari and echoed the concerns of lower courts. "Two Circuits have noticed that if the constitutional determination remains locked inside a §1983 suit in which the defendant received a favorable judgment on qualified immunity grounds, then 'government defendants, as prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in higher courts.' *Id.* at 4 (citing *Horne v. Coughlin,* 191 F.3d 244, 247 (2nd Cir. 1999) (quoted in *Kalka v. Hawk,* 215 F.3d 90, 96 (DC Cir. 2000). As Scalia points out, and Stevens and Breyer had in previous dissents, once a court makes the part-one determination, the right is subsequently "clearly established," effectively forcing the defendant to either (1) refrain from infringing the (possibly erroneously decided) "clearly established" right or (2) challenge that behavior on the hope that the case will be accepted on appeal, but at the risk of losing its claim of "good-faith" qualified immunity.

c. A third case of relative importance is *Hope v. Pelzer,* 536 U.S. 730 (2002), where the Court considered a prisoner's §1983 action alleging violation of his Eighth and Fourteenth Amendment rights against two prisoner guards. The inmate was allegedly handcuffed to a hitching post on two occasions (once for seven hours) without access to water or an opportunity to use the bathroom. The district court held that the guards were entitled to qualified immunity and the Eleventh Circuit affirmed. The Supreme Court, by a 6-3 decision, reversed and held that the qualified immunity defense was precluded. Most importantly, the Supreme Court found that the Court of Appeals had applied an erroneous standard in determining whether a right was "clearly established." The Circuit Court had stated that "the federal law by which the government official's conduct should be evaluated must be preexisting, obvious and mandatory," and established not by "abstractions," but by cases that are "materially similar" to the facts in the current case. *Hope v. Pelzer,* 240 F.3d 975, 981 (11th Cir. 2001). The Court continued that though the facts in the two cases on which plaintiff relied were "analogous," they were not "materially similar." *Id.*

The Supreme Court flatly rejected this standard and stated "the salient question that the Court of Appeals ought to have asked is whether the state of the law in 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional." *Pelzer,* 536 U.S. at 741. The Supreme Court, applying the "fair warning" test, then found that the prison guards did have fair warning so as to preclude a defense of qualified immunity. *Id.* at 746.

The Tenth Circuit

In *Axson-Flynn v. Johnson,* 356 F.3d 1277 (10th Cir. 2004), the Court reviewed the purpose and criteria for qualified immunity in the context of a plaintiff's claim of First Amendment violations. Plaintiff Axson-Flynn, a Mormon, was enrolled in the University of Utah's Actors Training Program ("ATP"). She steadfastly refused to utter "fuck" or take God's name in vain. The defendants, University professors, apprised plaintiff that her refusal to utter either word would stunt her growth as an actor. Plaintiff maintained her position, and during her second semester she was advised that if she continued to do so, she would be asked to leave the program. Plaintiff then filed suit under §1983 alleging violations of both the free speech and free exercise clauses of the First Amendment. The defendants asserted they were entitled to qualified immunity. The Court disagreed.

> When a defendant makes a qualified immunity claim on summary judgment, the plaintiff has the burden initially to make a twofold showing: *First,* the plaintiff must show that the defendant's alleged conduct violated the law. *Second,* the plaintiff must show that the law was clearly established when the alleged violation occurred. In order to satisfy his or her burden to show that the law was clearly established, the plaintiff need not produce a factually identical case, but may instead show that there is a Supreme Court or Tenth Circuit opinion on point, or that his or her proposition is supported by the weight of authority from other courts. This analysis "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)
>
> Once the plaintiff makes this showing, the defendant bears the usual burden of a party moving for summary judgment to show that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. "More specifically, the defendant must show that there are no material factual disputes as to whether his or her actions were objectively reasonable in light of the law and the information he or she possessed at the time."

Id. at 1299-1300 (several internal citations omitted for clarity).

Applying these criteria, the Court found that the defendants were not entitled to qualified immunity on either plaintiff's free speech claim or her free exercise claim, because there were genuine issues of material fact concerning the objective reasonableness of the defendants' actions on both claims.

1. For a much more detailed and precise discussion, see Justice Kennedy's majority opinion in *Alden v. Maine,* 527 U.S. 706 (1999).
2. Even where a plaintiff seeks only prospective relief against a State for a continuing violation of federal law, the action may nevertheless be dismissed where relief against the State "implicates special sovereignty issues" and is the "functional equivalent" of relief that would otherwise be barred by the Eleventh Amendment. *E.g, Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261 (1997) (Court denied relief under *Ex parte Young* because the plaintiff's suit was "the functional equivalent of a quiet title action which implicates special sovereignty interests.") and *ANR Pipeline Co. v. Lafaver,* 150 F.3d 1178, 1186 (10th Cir. 1998) (special sovereignty issues exist when a plaintiff seeks an injunction against a State property-tax system because "it is impossible to imagine that a State government could continue to exist without the power to tax").

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Casemaker Coming Soon

by Toby Brown

Imagine a Bar benefit that provides online legal research of Utah law for free. That's Casemaker and it's coming soon to Utah State Bar members.

What is Casemaker?

Casemaker is an online legal research service provided through state bar associations. It is easily accessed via the Internet and requires no special software. The content of each state bar library focuses on primary law for that jurisdiction. This normally includes applicable state case law, codes, court rules and some administrative law. There is a federal law library, as well, consisting of case law for the US Supreme Court back to 1935 and all Federal Circuits, at least back to 1995.

Casemaker was pioneered by the Ohio State Bar Association in 1998 as a response to member requests for a simple, convenient and affordable research tool.

How Does Casemaker Work?

Casemaker is very simple to use. The user interface is easily understandable and is matched with a very powerful search engine. This makes it very easy to learn, and very useful for legal research.

There are two basic ways to search Casemaker content: browse mode and search mode.

Browse Mode

In browse mode you can easily drill down into the content. For example, when browsing a state code, you can start at the highest level of Title, then drill down into Chapter, then Section and back again. References to other sections of the code are highlighted with links, such that a single click will take you to the corresponding code section.

Search Mode

Search mode offers basic or advanced options. In the basic method you have a simple search window where you can input any terms you want to search. The commonly used Boolean search connectors apply, such as "and" and "or." You can input simple terms or even phrases, by utilizing quotation marks around the phrase.

The advanced mode allows you to combine the basic search window with specific field searches and other criteria. Sample fields include the case name, court number, attorneys involved and judges. Limiting criteria include date ranges, rank by date and word proximity restrictions. These tools allow lawyers to focus their searches on the most useful results.

Search Results

Search Results are listed by ranking; thus the case or code that most closely meets the search terms is listed first. The list shows the case name and cite along with the ranking. Merely clicking on a case will bring the entire text up for review. In addition to the full text, the right side of the screen shows the casecheck™ results. This is a listing of all other cases that include a cite to the case under review. This is a convenient way to easily find all other cases related to the one you are viewing.

Printing Options

Casemaker includes a quick tool for printing cases. While viewing a case, click on the Print icon on the toolbar. You will then see just the case text, with all of the Internet information removed. This allows easy case printing, which will include the official pagination.

As you can see from the toolbar on the next page, Casemaker is quite easy to use and will provide you with a valuable research tool that you can use anytime you need with no cost to you or your clients.

The Casemaker Consortium

If having free access to Utah law is not enough, Casemaker provides extended value through the Consortium. Currently 20 states are included in the Consortium. This means that the content from these 19 other states will be available within the system for Utah lawyers as well – for free. And this number is growing.

TOBY BROWN is the Director of Communications for the Utah State Bar.

The Consortium started in the east with Ohio, but recently has been gaining ground in the west. A very recent addition to the group is Colorado, which will bring valuable content to Utah lawyers. The list of states in the Consortium as of September 2004 includes: Alabama, Colorado, Connecticut, Georgia, Idaho, Indiana, Maine, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah and Vermont.

Growing Content Approach

The Utah State Bar plans to start out with a solid grouping of content for our library. From that starting point, we will work to add more content over time. The content chosen will depend on feedback from members and the affordability of the content itself. Information that is already in electronic format is generally most affordable. The long-range goal is to increase the value of Casemaker to Utah Bar members over time. For a complete listing of the Utah Library content go to www.utahbar.org/casemaker.

Hands-on Casemaker

If you want to learn more about Casemaker and see a more complete demonstration of the system, the Utah Bar is offering free CLE courses. These sessions will provide a more complete review of the system, and live demonstrations when Internet access is available. To find available program times and dates, check the Bar's CLE calendar at www.utahbar.org/cle/events/. If your law firm, law department, local bar or any other type of group would like to schedule a class, please contact the Bar at Casemaker@utahbar.org or at 801.297.7027.

Timeline

The last question you might have is: when? The Utah State Bar contracted for Casemaker in April of this year. We are currently in a 6 to 9 month implementation window. We are working towards a late 2004 implementation; however, we may not be live until some time in January 2005. As the date draws nearer we will post more information on the Bar's web site at www.utahbar.org/casemaker.

The Utah State Bar is excited to bring you this new member benefit. Casemaker will have a positive impact on your practice for a number of reasons. First, since it is free, you will be able to stay current on the law without concerns about cost or which client will have to pay; which also means your clients will benefit. In the states that are already live with the Casemaker system, the feedback from lawyers has been extremely positive. Time and again, the response from lawyers has been how valuable Casemaker has been to their practices. The Utah State Bar looks forward to bringing this same value to our own members.

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Commission Highlights

During its regularly scheduled meeting of June 4, 2004, which was held at the Pete Suazo Building, Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Debra Moore welcomed Kevin Worthen, Dean Hansen's replacement at the BYU Law School.

2. Richard Uday, Director of Lawyers Helping Lawyers distributed copies of the 2003-04 budget he had prepared. Rich noted that he had contact with 40 individuals last year and so far this year had contact with 25. Many of the issues with which he deals are self-reported but approximately half of the calls are referrals from other lawyers, paralegals and spouses. Other lawyers are volunteering to help with impaired lawyers' caseloads and towards that end, there will be a seminar held next week in conjunction with OPC to train mentor volunteers on the protocol of taking calls, etc. Rich related that OPC reports that 50% of their complaints are with attorneys who have issues with substance abuse (alcohol, drugs, etc.) or mental health problems.

3. Robert Flores, a member of the Board of Directors of Salt Lake Legal Aid, appeared to request a licensing fee waiver for all legal aid related groups as they are currently looking at ways to cut costs and improve services. These groups would like waivers and/or discounted fees offered in the areas of bar dues, conventions and CLE events. Offering some sort of financial aid or scholarships would also help to offset the low salaries these individuals have. Bob reported that Legal Aid is no longer providing divorce assistance as they only have just enough funding for domestic violence cases. No other entity is providing divorce assistance to the indigent.

4. Kai Wilson (Director of "and Justice for all"), Ann Milne and Stewart Ralphs thanked the Commission for supporting and helping to fund the new building. In the first year alone they have saved $450,000 in overhead by consolidating the physical areas and combining resources. The organization served over 34,000 people last year (which is a 60% increase of clients over last year) with no additional funding.

5. Debra Moore discussed the 2004-05 budget and reviewed grant requests. The motion was made and seconded to form a new committee to address the overall grants issue. D'Arcy (as Chair), Yvette, Rusty, Nate, Mary Kay and Karin will be members of the committee. John Baldwin reviewed the budget with those present.

6. Annual Convention Awards were selected. After much discussion and several ballots, George Handy was nominated for Distinguished Lawyer of the Year, Judge of the Year went to Judge Bohling and Distinguished Committee/Section of the Year Award went to the Young Lawyers Division.

7. Charles R. Brown was re-appointed as the Bar's ABA Delegate. John T. Nielsen was re- appointed to the Executive and Judicial Compensation Committee and Eric A. Mittelstadt was re-appointed to the Online Court Assistance Program. Scott Daniels was appointed to the Utah Sentencing Commission.

8. Christian Clinger reported on the success of the *Brown v. Board of Education* activities and John Adams said the project may have come in under budget. Toby Brown was recognized for his efforts with the project.

9. David Bird reported that the Judicial Council has requested information on the racial ethnic make up of the Bar's membership. David asked that this self-reported information (without other identifiable information such as names or place of business) from the annual licensing form be provided.

During its regularly scheduled meeting of July 14, 2004 which was held in Sun Valley, Idaho, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Debra Moore reviewed the calendar of events of the annual convention. It was noted that Dan O'Brien, the New Mexico Bar President, was a guest and David Bird was his host.

2. John Baldwin and George Daines reviewed the budget resolution and a long discussion ensued.

3. Debra Moore led a discussion on grant policy and fund disbursement. This will be continued at the next commission meeting.

4. Katherine Fox reviewed the Client Security Fund Committee's report and recommendations. The total amount requested was $38,845. The motion passed to approve the disbursements.

5. Debra Moore opened the discussion to review the OPC request to modify Ethics Advisory Opinion 04-01. It was determined to postpone further discussion until next meeting.

6. Yvette Diaz reported on the Insurance Disclosure Committee. She reported that the committee wanted broader representation, so in addition to Rob Jeffs and Charles Brown, they had invited John Florez (as a non-lawyer public member), Mike Petro (Utah County attorney), and John Morgan and Greg Skordas (as small firm representatives) to join. The Committee also wants a large firm representative who has yet to be determined. The Committee plans to publicize the issue of insurance disclosure to the membership in order to gain feedback.

7. D'Arcy Dixon Pignanelli reported on the work of the Grant Policy Committee. The report is 95% complete and will be ready for the next Commission meeting. D'Arcy has asked that Karin Hobbs stay on the Committee until that time (because officially, she no longer will be a Commissioner at the conclusion of the Annual Convention).

8. Debra Moore reported on Access to Justice Planning Council. Debra believes it is important for the Council to have a voting member from the Commission and reminded everyone that as past president, she will no longer have a voting right. Debra also apprised the Commission of Justice Nehring's valuable contributions on the Council as a persuasive policy voice.

9. David Bird gave the Judicial Council report. He noted that the Council requested a Bar Commissioner representative on a newly created standing committee on self-representative litigation. Dave observed that for the first time in 30 years, Utah will have a new governor, a new president of the senate and a new speaker of the house.

10. The Commission was reorganized, new members were welcomed and the Executive Committee members are: George Daines, David Bird, Lowry Snow, Nate Alder and Yvette Diaz. Ex-officio Commissioners are: (a) Kevin Worthen (Dean, J. Reuben Clark Law School); (b) Debora Threedy (acting Dean, S.J. Quinney College of Law); (c) Bar's Delegate to ABA House Charles R. Brown; (d) Utah's ABA Delegate to House Paul Moxley; (e) Candice Vogel (Young Lawyer's Division); (f) Jennifer Byde (Women Lawyers); (g) Danielle Davis (Paralegal Division); and (h) Ross Romero (Minority Bar). Debra Moore now transitions to past president.

During its regularly scheduled meeting of August 27, 2004 which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. George Daines reported on the ABA meetings held recently in Atlanta. George circulated a handout concerning Delaware's Supreme Court Rule 52, which according to this Rule, new lawyers must not only pass the Bar Exam, but then they must complete a "satisfactory clerkship" by meeting various requirements under the supervision of an attorney ("Preceptor") who has at least 5 years experience. Once the clerkship is completed both the Preceptor and new lawyer must certify to the Board that the clerkship requirements have been met. George also noted that retired Chief Judge Thomas Zlackett, of the Arizona Supreme Court, has been involved in civility issues for several years. It has been his experience that too many civility initiatives focus on the superficial aspects rather than the core values (e.g., honesty and integrity).

2. Danielle Davis reported that the Paralegal Division Committee needs more members. The Committee is currently discussing the issue of whether or not paralegals who are not directly supervised by an attorney can become members of the Paralegal Division. George wants an update from the Committee on this issue at October's Commission Meeting.

3. D'Arcy Dixon Pignanelli is chair of the Commission's Racial & Ethnic Fairness Implementation Committee, with Gus Chin, Debra Moore and John Adams. George Daines would like a status report from this committee at October's Commission meeting.

4. George Daines reported that the Commission's Mandatory Insurance Disclosure Committee is finally constituted. Charles Brown said there was a lengthy debate at the ABA meeting but it was finally approved. George would like a report of how to study the issue and a timeline at October's Commission meeting.

5. John Baldwin reported that the Family Law Section would like to take a position on Constitutional Amendment #3. After discussion, the motion was made and seconded that the Bar take no position on this issue.

6. George Daines noted that he has been serving on the Judicial Nomination Commission and would like to resign. He asks those Commissioners who are interested in filling the vacancy to contact him.

7. John Baldwin reported that the Bar is looking for alternate sites for the 2006 Annual Convention as the Hotel Del Coronado wants extra fees in guaranteed food and beverage purchases. Some possibilities may include the large convention site in Monterey or the one in Carmel. There is not enough interest

in the Anaheim area and Jackson Hole can not accommodate the large number of people who attend the annual convention. John stated that the 2006 convention may need to be held in Sun Valley and alternative sites will be looked into for 2007.

8. John Baldwin discussed staff changes which have taken place at the Bar in recent months. Diané Clark, who ran Lawyer Referral Service, retired the end of May. In July, Samantha Lindsey, who updated the Bar's website and helped in the CLE Department, moved to Las Vegas. Also in July, Charles Stewart, Pro Bono Director, left to attend law school. Brooke Bruno was hired to update the website and handle minimal pro bono projects. The Bar has asked the ABA to conduct a review of the Bar's pro bono efforts to determine what role the Bar should play.

9. John Baldwin reviewed the monthly financial reports. A current cash loss was noted, although this was an unaudited figure.

10. John Baldwin reported that the Fall Forum would be held on October 22nd. There has been an effort to combine networking and vendor opportunities for solo/small firm practitioners. The Professionalism Award, ADR, Pro Bono Attorney of the Year, and Outstanding Community Member awards will be presented at the Forum.

11. Sarah Lynne Stone, Kenneth R. Wallentine and Tracey M. Watson were appointed as Trustees to Utah Legal Services.

12. Justin Toth appeared before the Commission to present reasons to create a new section entitled Antitrust and Competition Law Section. He stated that by creating this section it would provide an opportunity to meet with other lawyers who practice in this area of law to "discuss developments in the law" and "build a network of Utah lawyers who have developed expertise in this area". The motion to create a new section passed unopposed.

13. Lowry Snow updated the Commission on the recent activities of the Ethics Advisory Committee. On July 1, 2004, Craig Mariger became the new chair of the committee.

14. George Daines discussed Commission liaison assignments. A discussion followed and this item will be reviewed at the next Commission meeting.

15. There was a review/update of the Commission's Grants Committee's questions and recommendations after which a long discussion followed. The motion to not establish a line item for donations and grants in the budget passed.

16. George Daines discussed Commission and Executive Committee Procedures. George stated more items will be discussed at the Executive Committee meetings so regular Commission meetings aren't so lengthy. Yvette Diaz will handle member relationships initiatives, David Bird will handle Courts initiatives, Lowry Snow will handle public relation initiatives, and Nate Alder will handle legislative item initiatives.

A full text of minutes of these and other meetings of the Bar Commission are available for inspection at the office of the Executive Director.

Utah State Bar Ethics Advisory Opinions

Opinion No. 04-04
Issued August 25, 2004

Issue: In litigation to enforce an oral contract allegedly made by a corporate defendant's former employee on behalf of the corporation, where the former employee was not a member of the control group, may the plaintiff's attorney contact the ex-employee without the consent of the corporate defendant's attorney?

Answer: The contact with the former employee is not unethical. Utah Rules of Professional Conduct 4.2 (2004) does not bar a lawyer's unauthorized contact with former employees of a represented corporate defendant except in very limited circumstances not applicable to this opinion.

Facts: A corporate defendant is represented by a lawyer in the defense of a claim based on an oral agreement allegedly made by a former employee of the corporate defendant while employed by the corporate defendant. The former employee was not a member of the "control group" as this term is defined in Utah Rules of Professional Conduct 4.2(c) (2) (2004), but the former employee did have authority to enter into contracts. The former employee is not separately represented by legal counsel with respect to the matter. We are asked whether the lawyer representing the corporate defendant represents the former employee with respect to the matter under Rule 4.2(c)(1)(B)(iii), thereby precluding plaintiff's counsel from communicating with the former employee with respect to the matter without complying with Rule 4.2(a).

Analysis: In 1991, the ABA's Committee on Ethics and Professional Responsibility addressed whether Model Rule 4.2 limits contacts with former employees. In ABA Formal Opinion 91-359 (1991), the ABA Committee concluded it does not. In pertinent part, the opinion provides:

> While the Committee recognizes that persuasive policy arguments can be and have been made for extending the ambit of Model Rule 4.2 to cover some former corporate employers [sic], the fact remains that the text of the Rule does not do so and the comment gives no basis for concluding that such coverage was intended. Especially where, as here, the effect of the Rule is to inhibit the acquisition of information about one's case, the Committee is loath, given the text of Model Rule 4.2 and its Comment, to expand its coverage to former employees by means of liberal interpretation.
>
> Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.

The only Utah court to have carefully considered this issue followed the ABA's interpretation of Model Rule 4.2 at a time when Utah Rules of Professional Conduct 4.2 mirrored the Model Rule. In *Shearson Lehman Bros., Inc. v. Wasatch Bank,* 139 F.R.D. 412 (D. Utah 1991), plaintiff's counsel sought to interview 24 former bank tellers regarding bank practices during the time an employee allegedly fraudulently endorsed checks. The court held:

> Today this court joins the ranks of those which have construed Rule 4.2 consistently with the position taken by the ABA Committee on Ethics and Professional Responsibility. Under this court's rules of practice, Utah Rule of Professional Conduct 4.2 as well as ABA Model Rule 4.2 do not prohibit ex parte contact with the former employees of an organizational party that is represented by counsel.

Utah Rules of Professional Conduct 4.2 was amended in 1996 and 1999 and now differs considerably from Model Rule 4.2. The only remaining issue, then, is whether Utah's substantial revision of Rule 4.2 affects the foregoing interpretation.

The 1999 revisions to Rule 4.2 included the addition of Rule 4.2(c), which provides in relevant part as follows:

> **Organizations as Represented Persons**
> When the represented "person" is an organization, an individual is "represented" by counsel for the organization if the individual is not separately represented with respect to the subject matter of the communication, and…
>
> (B) with respect to a communication by a lawyer in any other matter [a matter not involving a communication by a government lawyer in a civil or criminal law enforcement matter], is known by the lawyer to be
>
> (i) a current member of the control group of the represented organization; or
>
> (ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.

Rule 4.2 (c) provides that counsel for an organization represents members of the "control group" of the organization[1] and under specified limited circumstances "a representative of an organization", if such persons are not separately represented in the matter.

The language of Rule 4.2 (c)(1)(B)(i) specifically pertains only to a "*current* member of the control group" (emphasis added). While Rules 4.2 (c)(1)(B)(ii) and 4.2 (c)(1)(B)(iii) do not specifically reference a *current* "representative of the organization", the Committee concludes that this is the proper interpretation of Rule 4.2. The Comment to Rule 4.2 removes any doubt about the intent of the revision on this issue. The Comment provides:

"The purpose of this Rule is to foster and protect legitimate attorney-client relationships. It seeks to guard against inequities that exist when a lawyer speaks to an untrained lay person. The Rule should not, however, be used as a vehicle to thwart appropriate contact between lawyers and lay persons."

"In general, however, a lawyer may, consistent with this Rule, interview a former employee of an organization without consent of the organization."[2]

The Comments to the Rules of Professional Conduct carry considerable weight. The Utah Supreme Court adopted the Comment when it adopted Rule 4.2, most recently when Rule 4.2 was amended on September 3, 1999. Further, the Preamble to the Rules states: "The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. . . . The Comments are intended as guides to interpretation, but the text of the Rule is authoritative."

The "control group" for purposes of Rule 4.2.(c)(1)(B)(i) includes any "*current* employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter" (emphasis added). The Comment to Rule 4.2 explains that "current employee" in the context of Rule 4.2(c)(1)(B)(i) includes those "who return to the company's payroll or are specifically retained for compensation by the organization to participate as principal decisionmakers for a particular matter."[3] The Committee finds this Comment to be equally applicable to Rules 4.2(c)(1)(B)(ii) and 4.2(c)(1)(B)(iii). The former employee described in the request for opinion does not fall within this interpretative guide.

Accordingly, we conclude that Rule 4.2 does not bar the unauthorized contact by plaintiff's counsel with the former employee. Of course, nothing in this opinion relieves an attorney of the duty to comply with other ethical rules governing contact with unrepresented persons and potential witnesses. *See, e.g.,* Rules 3.4 (fairness to opposing party and counsel); 4.1 (truthfulness in statements to others); Rule 4.3 (dealing with unrepresented person); Rule 4.4 (respect for rights of third persons); Rule 8.4 (misconduct).

1. The "control group" is defined in Utah Rules of Professional Conduct 4.2 (c)(2), as follows:

   The term "control group" means the following persons: (A) the chief executive officer, chief operating officer, chief financial officer, and chief legal officer of the organization; and (B) to the extent not encompassed by the following, the chair of the organization's governing body, president, treasurer, and secretary, and a vice-president or vice-chair who is in charge of a principle business unit, division, or function (such as sales administration, or finance) or performs a major policy-making function for the organization and (C) any other current employee or officer who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.

2. It bears noting that although Rule 4.2 was substantially amended in 1999, this sentence limiting the Rule's general application to current employees was not.

3. Utah Rules of Professional Conduct 4.2 Comment.

Notice Appointing Trustee to Protect the Interests of the Clients of the Late D. Richard Smith

On August 3, 2004, the Honorable Frank G. Noel, Third Judicial District Court, entered an Order Appointing Trustee to Protect the Interests of the Clients of D. Richard Smith. Pursuant to Rule 27 of the Rules of Lawyer Discipline and Disability, Roy D. Cole is appointed as trustee to take control of client files and other property that was in Mr. Smith's possession, and distribute them to the clients.

UPL Notice

On August 2, 2004, pursuant to the Utah State Bar's complaint, the Third District Court entered a civil injunction against Michael S. Salveson for engaging in the unauthorized practice of law. The permanent injunction recites, in part, that Mr. Salveson, who is not licensed to practice law in the State of Utah, "represented another in the presentation of a legal claim," that his representation "included legal opinions and legal conclusions concerning the liability of the product manufacturer," and that a "document titled 'Personal Injury Works' constitutes the presentation of a legal claim in a representative capacity of another and that the form of the document connotes that [Salveson] is engaged in the work of an attorney." The injunction also recites that "the use of the title of 'Esq.' in connection with the presentation of the personal injury claims for another connotes that [Salveson] is an attorney as does the use of the term 'client' in the written presentation made."

PLEASE NOTE . . . *A recent telephone system update caused some Utah State Bar telephone numbers to be changed. For the most recent Bar staff telephone numbers please see our updated directory in the back of this* **Journal.**

Discipline Corner

PUBLIC REPRIMAND

On August 10, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court publicly reprimanded Brent R. Chipman for violation of Rules 1.3 (Diligence), 1.5(b) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Chipman was retained to represent a client in a divorce case. Mr. Chipman did not communicate the rate or basis of his fee in writing to the client. Mr. Chipman agreed to prepare a Qualified Domestic Relations Order ("QDRO") for the client. Mr. Chipman failed to complete the QDRO despite numerous requests from the client over a two year period to complete the work.

SUSPENSION

On August 10, 2004, the Honorable Anthony Quinn, Third Judicial District Court entered an Order of Suspension: Six Months and One Day Suspension, suspending Sheryl L. Gardner Bunker from the practice of law for violation of Rules 1.1 (Competence), 1.7(a) (Conflict of Interest: General Rule), 3.3(d) (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), 3.7 (Lawyer as a Witness), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct.

In summary:

Ms. Bunker answered questions about divorce, court procedures, and the legal process posed by both parties in a divorce proceeding. She also gave both parties copies of Utah laws dealing with divorce. After the divorce case had been initiated, the district court disqualified Ms. Bunker from appearing as counsel for one of the parties because Ms. Bunker was a witness on substantive issues. Ms. Bunker continued to assist one of the parties by helping type pleadings, lending forms and sample pleadings, and discussing legal options and procedures.

In the same case, Ms. Bunker later filed a Motion for Protective Order and for Attorney Fees on behalf of two officers of one of her corporate clients. Ms. Bunker did not consult with and obtain a written waiver of conflicts of interest from the relevant parties. The Motion for Protective Order concerned depositions sought by one of the parties to the divorce. In connection with the motion, Ms. Bunker assisted one of the officers in blacking out relevant portions of documentary evidence and filed it with an affidavit in support of the motion. Although Ms. Bunker attempted to serve notice of the motion on opposing counsel, service was not successful. The presiding judge for the district court heard Ms. Bunker's Motion for Protective Order in the absence of the judge assigned to the case. Ms. Bunker did not inform the presiding judge what information had been blacked out in the redacted documentary evidence when she obtained an ex parte order from the judge vacating the witnesses' scheduled deposition.

PROBATION

On August 3, 2004, the Honorable J. Dennis Frederick, Third Judicial District Court entered an Order of Discipline: Probation, placing Annalisa A. Steggell on probation for a period of one year. The Office of Professional Conduct ("OPC") alleged violations of Rules 4.3(b) (Dealing with Unrepresented Party), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Ms. Steggell represented a client in a divorce case. The client's spouse claimed that Ms. Steggell represented that she was a neutral party who would act as a mediator during the divorce proceedings and made no effort to correct the spouse's misunderstanding. The spouse was unrepresented. Ms. Steggell failed to respond to the OPC's reasonable requests for information or attend the Utah Supreme Court's Ethics and Discipline Committee's Screening Panel Hearing.

Utilization and Salary Survey to be Unveiled This Fall

by Robyn Dotterer, Utilization Chair – Paralegal Division

The Paralegal Division of the Utah State Bar is pleased to announce an exciting upcoming event. We are producing the first on-line Utilization and Salary Survey under the auspices of the Utah State Bar web site!

What this means is that the survey can be filled out by attorneys, paralegals or your office legal administrators on line on the Bar web site at any time – day or night. Anyone who has access to the Utah State Bar web site can fill out the survey for themselves or their paralegals. We are hoping to reach as many of you as we reasonably can to make the survey as comprehensive as possible.

If you have a paralegal in your office who is not a member of the Paralegal Division, please pass this information along to them to fill out the survey. If you want to fill it out yourself on behalf of your paralegal, that's fine too. Or, if you want your office legal administrator to fill it out for your firm, you can do that. We will also notify the Association of Legal Administrators members as well as members of the Legal Assistants Association of Utah of the on-line survey and request their participation.

Our goal is to be able to respond to the requests we get from attorneys and paralegals alike on questions such as: how much should I pay my paralegal; what benefits do other paralegals have; should I pay my paralegal bonuses; do other law firms pay bonuses; what can I ask my paralegal to do that is billable to my client; do other paralegals get a raise every year; do other law firms pay for paralegals to attend CLE functions. That gives you an idea of what we are trying to accomplish.

We will be able to compile the information to answer a number of questions on what types of benefits are being paid to Utah paralegals as well as what types of functions paralegals are being used for in other law firms in Utah.

We are optimistic that we can then have a usable database to do a utilization and salary survey as deemed to be needed by the Division or as our profession changes and requires updated information. We believe that a survey every two years would be adequate to meet the needs of our members as well as the needs of the Utah State Bar members.

Please watch for your e-news announcement on when the survey is available on line and please help us put together a useful and effective database of information – respond to the survey. It is anticipated that it will take less than 15 minutes to respond and the information will be hugely valuable to us all!

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
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
10/07/04	**Annual Elder Law Seminar:** Housing Options for the Older Client From Staying at Home to Skilled Nursing Home Care Facilities. 9:00 am–1:00 pm, registration 8:30 am. St. George Senior Center, 245 North 200 West, St. George. $85 or $20 for Pro Bono volunteers.	3.5
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	**The Basics to Practice Water in Utah:** 5:30–6:30 pm: Introduction to Water Law. Presenter – Jody Williams, Holme Roberts and Owen. 6:30–7:30 pm: Updating the Water Right Title. Presenter – Steve Vuyovich, Holme Roberts and Owen. 7:30–8:30 pm: Handing appeals from the State Engineer's Office. $55 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. 8:45 am–5:30 pm. $95 before 10/8, $125 after.	6.5 CLE/NLCLE up to 3 Ethics
10/29/04	**Southern Utah Bar Fall Annual CLE –** This seminar covers both Transaction and Litigation subjects. Gardner Ballroom, Dixie State College. Cost TBA.	6

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) _____

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Name: _____ Bar No.: _____

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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.

INFORMATION SOUGHT

Looking for will or codicil of Marlin (Morley) Sanford Horton, died Sept. 2004. Heir who was written out may have destroyed original. Anytime from 1996 to present. Call Will Hadley at 277-4292 with information.

FOR SALE

The personal law library of Joseph H. Burns (deceased). The collection includes, but is not limited to, leather bound editions circa late 1800's early 1900's, Utah Reports California Reports, Notes on California Reports, Encyclopedia of Forms, Damages, etc. Many other volumes on various topics for sale. Must see to appreciate. If interested please contact: Jim Burns 905 Three Fountains Drive, Cedar City, Utah 84720. Phone: (435) 586-1213, (208) 731-5188, ask for Jim. (435) 283-4698 ask for Connie.

POSITIONS AVAILABLE

Applicant for Criminal Conflict of Interest Contract. The Salt Lake Legal Defender Association is currently accepting applications for several trial and appellate conflict of interest contracts to be awarded for the fiscal year 2005. To qualify, each application must consist of two or more individuals. Should you and your associate have extensive experience in criminal law and wish to submit an application, please contact F. John Hill, Director of Salt Lake Legal Defender Association, 532-5444.

Temporary Legal Work – Are you looking for part time, contract or per diem legal work? T3 Legal Solutions is looking for attorneys and paralegals of all experience levels interested in temporary or temporary to permanent positions. If interested, please submit a resume to Staffing@T3LegalSolutions.com

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Seeking Attorney for position with Kern River Gas Transmission Company. Primary duties include preparation and review of contracts and permits involving construction, operations, purchases, real property and easements, insurance, etc. Requirements include two+ years private/corporate legal experience and license to practice law in Utah (or ability to become licensed in Utah within one year). Knowledge of utility industry, construction, rights-of-way and/or environmental law highly desirable. Salary: $59,900–$78,100. For more information go to: kernrivergas.com. E-mail resume to: Linda.Stimpson@kernrivergas.com or mail to Linda Stimpson, Kern River Gas Transmission Company, P.O. Box 71400, SLC, UT 84171-0400.

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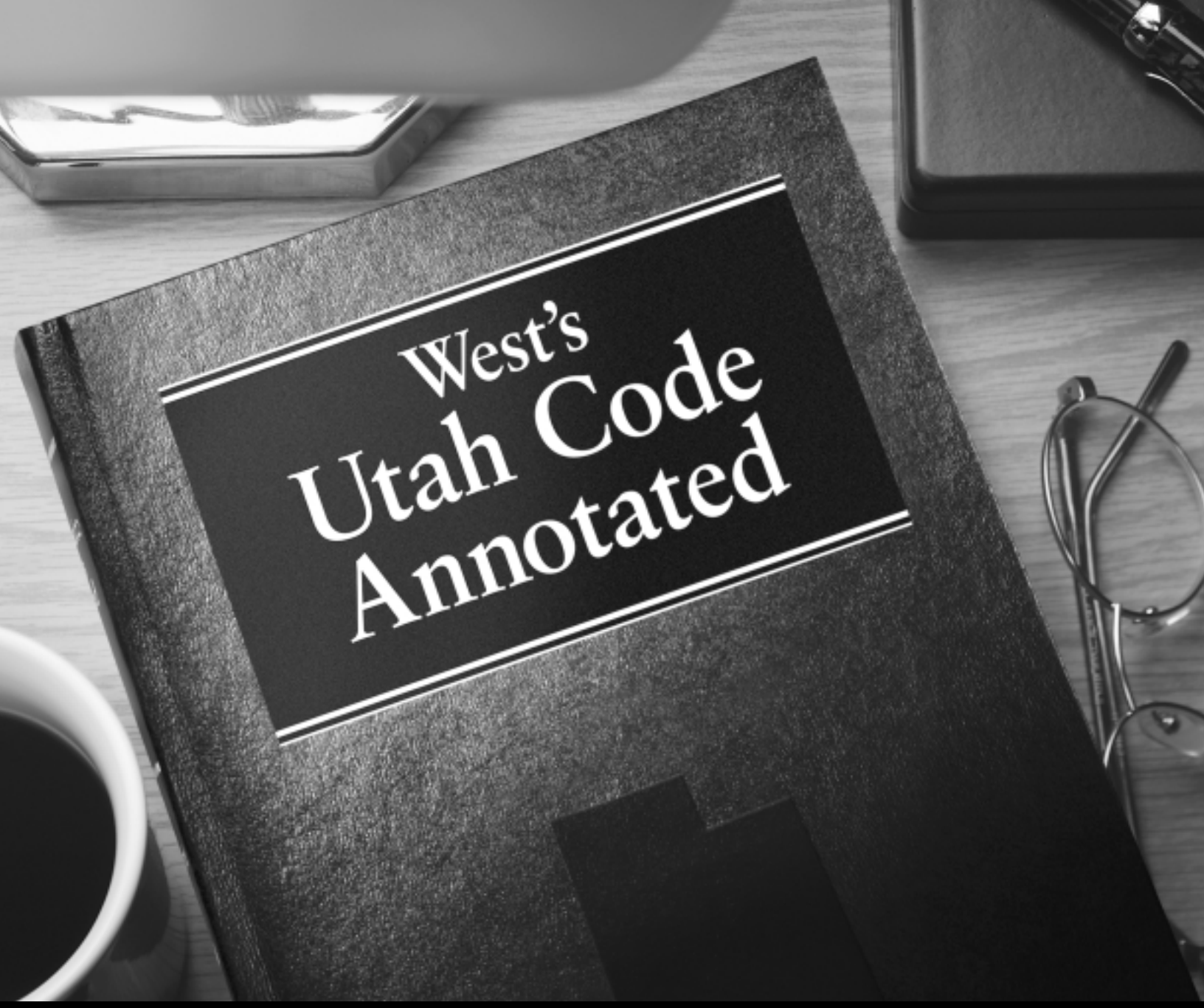

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