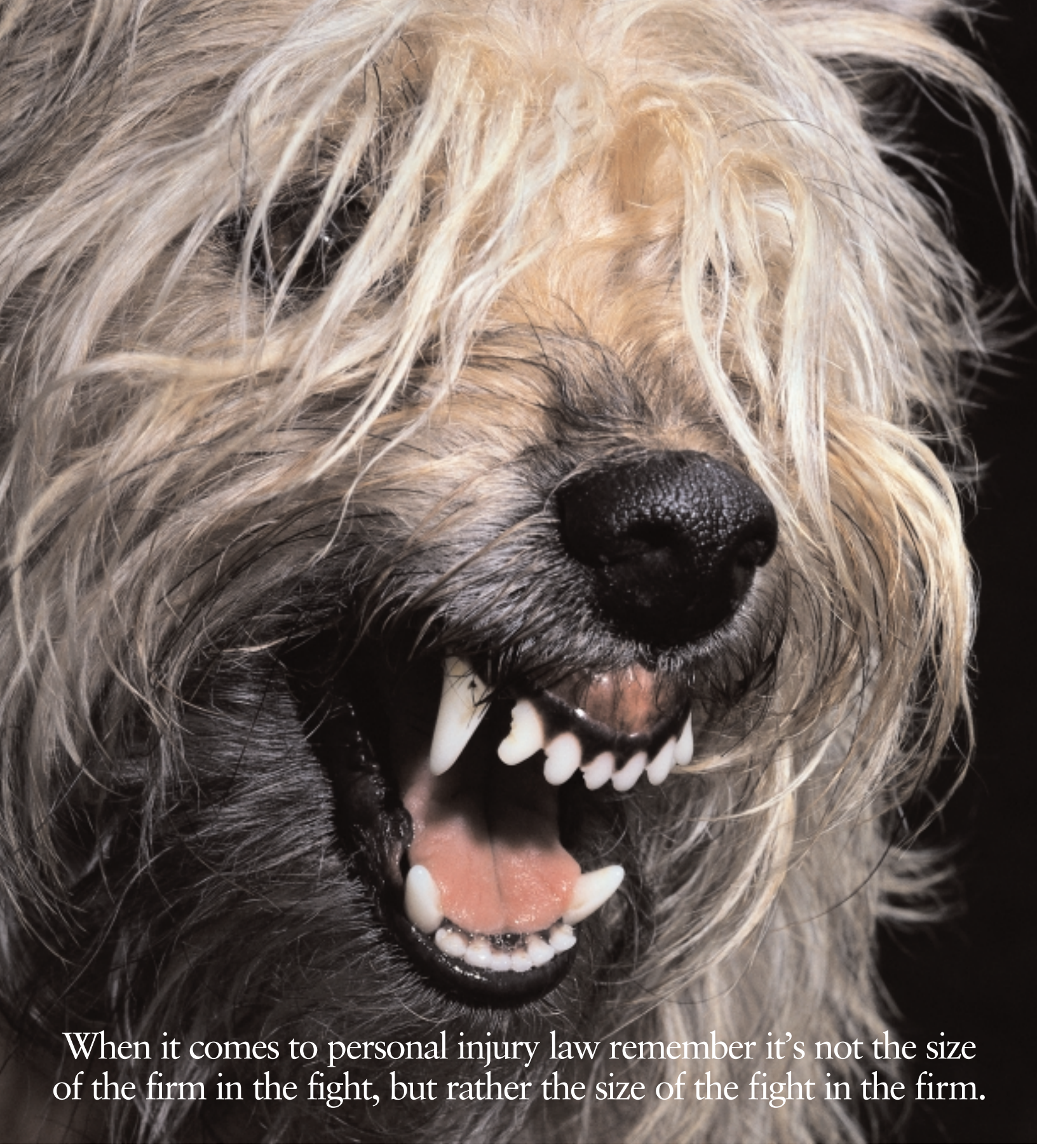
Utah Bar JOURNAL

Volume 18 No. 3
May/June 2005

2005 Annual Convention pull-out registration form inside



PARKER & McCONKIE

Parker & McConkie *Arguably, better.*
Attorneys at Law • (801) 264-1950

Utah's largest medical malpractice verdict
Utah's largest wrongful death verdict

Table of Contents

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

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

COVER: "The Wave," Paria River, near Kanab, Utah. Photo by first-time contributor, Walter F. Bugden, Jr. of Bugden & Isaacson, Salt Lake City.

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

Utah Bar JOURNAL

Volume 18 No. 3
May/June 2005

Letters Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published which (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published which advocates or opposes a particular candidacy for a political or judicial office or which contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

Cover Art

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

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

The Editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine.

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

Submission of Articles for the Utah Bar Journal

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

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

The Utah Bar Journal

Published by The Utah State Bar
645 South 200 East • Salt Lake City, Utah 84111 • Telephone (801) 531-9077 • www.utahbar.org

Letter to the Editor

Dear Editor:

I agree completely with the sentiments expressed by Gus Chin regarding the decline of professionalism, having been an involved observer for nearly three decades. The pit bull disposition he describes had its genesis in the "you only eat what you kill" mentality that was pervasive in the 1980s and was not limited to lawyers. Investment bankers contributed their fair share. Unfortunately, we seem not to have evolved much in the last twenty years. I won't speak for the investment bankers.

It would be nice if the *Utah Bar Journal* would contribute to professionalism by rejecting paid advertisements that perpetuate the image of lawyers as snarling dogs. How can we expect the public, TV and movie producers, or the news media to view us any differently than we portray ourselves?

R. Steven Chambers

EDITOR'S NOTE: *Point taken, but (without having made an extensive analysis) the editorial board expects that such advertising likely falls within the precedents protecting commercial speech by lawyers. In addition, in our experience these advertisements are usually somewhat tongue in rabid cheek. Alas, sincere civility and professionalism must ultimately come from the hearts of our members, as should expressions of approval or disapproval. Your letter sets an example of speaking up, civilly and professionally.*

Why Don't They Like Us? Why Don't They Respect Us?

by Keith E. Taylor

In the January 2000 issue of the *Utah Bar Journal,* I bid my fond farewell to a *noble profession.* Since then I have given some serious thought to why the general public does not recognize lawyers as being trusted representatives of a noble profession. After all, lawyers are responsible for our unprecedented freedom in this wonderful country. The difference between our society and those of such totalitarian states as the late USSR is not in the words of our respective constitutions but in the vigorous implementation, application and enforcement of those words, almost exclusively done by lawyers. Well then, why don't they like and respect us?

With some justification, some think that a major cause are those few self-aggrandizing buffoons frequently foisted upon us by the mass media. Others blame the media itself for creating circus – like trials such as the O. J. Simpson trial. However, I suggest that these are aberrations and simply can't be the sole cause of widespread disdain of the legal profession among members of the general public.

What then are other causes? Am I a part of the problem? Are you a part of the problem? Let's pretend to be a fly on a palm branch and listen to a hypothetical conversation between Mary Bell and Jeffrey Hall, two vacationers from Salt Lake City, sitting on a beach in Hawaii. Maybe that will give us a clue.

Mary and Jeff meet on the beach to admire the morning sunrise.

Jeff: "This place is wonderful, but I can't really enjoy it because one of my colleagues defrauded me and I've got to find a lawyer and sue as soon as I get home."

Mary: "What did he do?"

Jeff: "He falsely stated that he had an exclusive real estate listing on a $1 million property. His false statements resulted in a sale to my client and that (expletive deleted) received a very large sales commission which rightfully was mine."

Mary: "That's awful."

Jeff: "Do you know a good attorney in Salt Lake City?"

Mary: "I know a bad one."

Jeff: "Who is that?"

Mary: "John Arrogante."

Jeff: "Tell me about him. Why is he so bad?"

Mary: "Well, I guess the bottom line is that he was just full of surprises and I hate surprises."

Jeff: "Oh, what kind of surprises?"

Mary: "Don't get me started on that subject."

Jeff: "Name one."

Mary: "He was a bundle of surprises –

1. I was surprised when I cooled my heels for 52 minutes in his waiting room after I had taken great pains to be on time.
2. I was surprised when he finally was free that he did not come to the reception room and greet me. I was briskly ushered to the throne.
3. I was surprised that he showed so little interest in me as a person and in my most serious problem. He was an arrogant (expletive deleted).
4. I was surprised that he took several telephone calls from other clients while I was sitting at his desk. I sure wouldn't want

KEITH E. TAYLOR has been associated with Parsons Behle & Latimer since April 5, 1954, successively as law clerk, associate, partner, shareholder, president, chairman of the board, senior attorney, "of counsel," and now retired.

him talking to me on the telephone about my confidential matters while he had another client sitting at his desk. After all I was paying for his time and I should have had his undivided attention.

5. I was surprised that he did not explain to me the legal process and the availability of alternative dispute resolution, which I only learned about later.

6. I was surprised that he did not warn me about how terribly slow the litigation process is.

7. I was surprised that he did not explain to me the approximate cost of what my litigation would be.

8. After the case was filed, I was surprised that he did not keep me informed about what was going on and why.

9. I was surprised that he did not return my phone calls – never did.

10. I was surprised that I did not get regular billings that I could plan for. At the end of the case, three years down the road, I about had a heart attack when I received his bill.

11. I was so shocked at his bill and the fact that I had so seldom heard from him over a three-year period that I filed a complaint with the Bar Association."

Jeff: "Did that help?"

Mary: "Well, it did and it didn't. He showed up at the hearing with a file six inches thick showing that he had done a tremendous amount of work. I was really surprised about that. Why didn't he send me copies of all of those papers and keep me informed as to what he was doing?"

Jeff: "Did he win your case?"

Mary: "I think so. I got some money. Not as much as I expected, but when I saw how much work he'd done, maybe it was okay."

Jeff: "Well, I won't use John Arrogante. But that wasn't my question. I asked you if you knew a *good* lawyer."

Mary: "Sure, Jenny Icare."

Jeff: "Would you use her again if you have a legal problem?"

Mary: "Yeah – she was great."

Jeff: "Did she win your case?"

Mary: "Well, not really."

Jeff: "Then why would you use her again?"

Mary: "There were no surprises. She was really interested in me and in my problem. I could tell it was a very high priority with her. She never made me cool my heels in her waiting room. She never took calls from other clients while I was in her office. She explained all of the risks of litigation and the different legal processes available to settle disputes. My problem involved my job. She came to my office and learned all about the company – without the meter running. She billed me every month so that I could keep track of the costs and budget my cash flow. She returned my telephone calls. Several times she even called me at home in the evening when she was out of town or not available to return my call during office hours. She kept me informed of what she was doing. Whenever she wrote a letter or put anything in her file, she sent me a copy. My file at the end of the case was as big as hers. When nothing was happening, she would write to me or call me and explain to me why and what she expected to happen next. Do you know what? She even remembered my birthday!"

Jeff: "You said she did not win your case. What happened?"

Mary: "When negotiations for settlement failed, we filed a lawsuit in court. But when our motion for summary judgment was denied, we went to mediation. The mediator and Jenny persuaded me to settle for a small fraction of what I had originally thought I should get and the company changed some policies so that I wouldn't get shafted again. But it was fair."

Jeff: "Why didn't you tell me about Jenny when I first asked the question instead of going on this tirade about John Arrogante?"

Mary: "I wanted to make sure that you didn't go to that (expletive deleted)."

If this hypothetical conversation had actually taken place, would it have surprised you? It should not. Way back in the late sixties, the Economics Committee of the then Junior Bar Section of the American Bar Association conducted a motivational study in Missouri. Persons who had used lawyers in the past were selected at random and asked if they would use the same lawyer again. They were then asked to list the reasons why they would or would not use that attorney again.

The response to those questions was surprising at the time. Clients who would return to the same lawyer and recommend that lawyer to others responded with such answers as: "Friendliness." "Courtesy." "Promptness." "Kept me informed." "Billed me every month." "He was understanding."

Those clients who reported that they would not retain the same lawyer again and would not recommend him to others stated reasons such as: "His impersonal attitude." "Arrogance" "Bored with my problem." "He was rude and brusque." "He spent my interview time talking to other people on the telephone," "He had a superior attitude." "He failed to keep me informed." "He did not bill me regularly."

Interestingly, clients who would retain the same lawyer did not list as a reason: "He won my case." Likewise, those who would not retain the same lawyer did not list as a reason: "He lost my case."

Now, upon reflection, it occurs to me that when you or I exhibit any of the characteristics listed as "surprises" by Mary with respect to John Arrogante, we add fuel to the fire and contribute to a negative impression of lawyers generally. On the other hand, to the extent that we treat our client as the very most important person in our law practice and treat the client, as did Jenny Icare, we will convey to the public that we are trusted representatives of a truly noble profession.

Why was Mary so anxious to bad-mouth John Arrogante and had to be asked a second time to unearth for Jeff her good experience with Jenny Icare? It occurs to me that hurtful gossip and bad news is eagerly passed with gusto from person to person. It's simply a human characteristic. On the other hand, good things and good news all too frequently don't make news and aren't reported to the extent that bad experiences are.

I suggest to the reader that if you and I refrain from causing our clients the kinds of surprises Mary suffered with John Arrogante and if we recognize the client at our desk as the very most important person in our practice and treat him or her accordingly as did Jenny Icare, we will begin to earn the respect of all of our clients and of the general public. They will begin to understand that we indeed are practicing a great and noble profession.

When appellate litigation becomes necessary,
refer to our team of appellate advocates.

An appeal is a complicated process that requires experience and specialized knowledge. Refer your appellate cases to a seasoned team of advocates who offer a history of successful appeals before higher courts. Call for a free consultation and case assessment.

801.328.3600 www.kmclaw.com

KIRTON & McCONKIE

local roots, global reach

Standards for Standards' Sake: Questioning the Standards of Professionalism and Civility

by Eric K. Johnson

On October 16, 2003, the Utah Supreme Court approved Rule 23 of the Utah Supreme Court Rules of Judicial Administration (itself comprised of twenty new rules), entitled "Standards of Professionalism and Civility" "[t]o enhance the daily experience of lawyers and the reputation of the Bar as a whole." I am all for satisfying daily experiences and for burnishing the Bar's reputation, but I submit that the passage of twenty new rules over and above those that already apply to the profession do little to achieve either goal. This is not to state that the motives for Standards are somehow wrongheaded. The Preamble to the Standards of Professionalism and Civility, which has no normative force, is, for the most part, as sensible as it is aspirational. It reads, in part:

> In fulfilling a duty to represent a client vigorously as lawyers, we must be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner. We must remain committed to the rule of law as the foundation for a just and peaceful society.
>
> * * * * * *
>
> The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism.

No one can seriously argue with promoting courtesy, integrity, reason, peace, and efficiency; but in its aspirations lie the flaws in the Standards of Professionalism and Civility. First, the Standards are well meaning, but idealistic in the negative sense of the word (*i.e.,* inherently unattainable in the real world). Second, the Standards are undefined, ambiguous and duplicative of pre-existing rules. Third, while the Standards are intended as a shield, they can be just as much a sword for hacks to use offensively against the virtuous attorneys.

For example, Standard 1 provides in pertinent part that "lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner." Is it discourteous or undignified to express to opposing counsel your honest belief that his case is frivolous? Is it discourteous or undignified to tell opposing counsel that if he does not withdraw the false representations in his pleadings you will seek Rule 11 sanctions? Arguably, it is. If so, when did litigators, who chose a profession based on an adversarial system of conflict resolution, become so thin-skinned that arguing – even heated arguing – between them became unprofessional? Litigators are, after all, professional arguers (in a venerable tradition at that). How does one address the misconduct of the opposing side without either risking running afoul of Standard 1 or being a wimp? As experience quickly teaches lawyers (persons not generally known for humility or small egos), one man's honesty and candor is the other man's incivility and offensiveness, especially if the ostensibly "offended" party can make hay out of it. Standard 1 provides a fertile field ripe for harvest.

Along the same lines Standard 2 provides "civility, courtesy, and fair dealing . . . are tools for effective advocacy and not signs of weakness."

Sure, tell that to the attorney on the opposing side who delights in grandstanding for his client in front of civil, courteous, and fair doormats. I'm not advocating fighting fire with fire or the law of the jungle as a guiding principle, but come on; sometimes the *only* way to stop bad behavior is by giving the other guy a taste of his own medicine. Take that away (as Standard 2 appears to do) and it's open season on nice guys, period.

> Standard 3 provides: Lawyers should avoid hostile, demeaning, or humiliating words in written and oral

ERIC K. JOHNSON is a lawyer who practices principally in family law and criminal defense matters.

communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

So, if opposing counsel is, in your honest, (but merely) professional opinion, filing improper motions, delaying his responses in discovery, writing *you* unsolicited nastygrams, and generally misbehaving, what are you to do? If he accuses you of being unethical or unprofessional, can you no longer label him "the pot calling the kettle black" for fear of being labeled a Standard 3 violator? Can't you even blow off steam with a terse response for fear that you have "demeaned, humiliated, or disparaged" the guy who has demeaned, humiliated, and disparaged you? Now, where do you turn for relief? The judge? Please (see *infra*). Why can't we just do as we've done in the past and call or write to the opposing attorney and express yourself? An exchange of words does no real or lasting harm. If a lawyer goes too far in exercising his or her free speech rights, there are laws against harassment and defamation already on the books to provide protection.

There are effectively no rules if only one side to the dispute follows and/or is held to them. Why set standards that cannot be objectively met and that cannot be objectively enforced? Standards 1 through 3 neither raise the bar nor level the playing field and are neither a means nor an end. Sadly (though not unexpectedly), this is why the Standards generally are less an effective prescription for improved lawyer behavior than they are an inarticulate acknowledgment of the chronic bad behaviors of some lawyers. Surely I am not the only lawyer who sees that these twenty (20) new rules serve as much (if not more) to fetter the good guys and give the scalawags a new source of nuisance and guilt-mongering than to usher in a new era of good behavior.

> Standard 4 provides: Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

How can one ever effectively prove that opposing counsel *"knowingly"* attributed to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference? For you very young lawyers, just try to call opposing counsel on this during a hearing or in a memorandum and see how the judge reacts, you arrogant, whiney, upstart. And even if you were to prove such misconduct, what are the odds of that attorney being effectively sanctioned for it? After all, *you* now have Standards 3 and 5 to contend with yourself.

> Standard 5 provides: Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

It's hard enough to *earnestly* seek and obtain sanctions for any *proper* purpose without Standard 5 throwing up additional barriers. Now add to the sorry state of doormat attorneys the new rule of Standard 5 and you provide but more defenses for the hacks: "Your Honor, opposing counsel's request for sanctions on the ground that I counseled my client to lie under oath are lightly sought and for an improper purpose, in violation of Standard 5. Unless he can prove otherwise, I ask that the request for sanctions be dismissed and opposing counsel admonished for disparaging and humiliating me in violation of Standard 3." Heaven help us.

> Standard 9 provides: Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

No new rule or combination of rules will ever do away with this time-tested trick. No savvy attorney would suggest that an offer of settlement was used against him to hold up discovery or delay trial. If you did, can't you just hear that weasel on the other end of the phone now?:

> WEASEL: I am shocked that you'd see my making repeated settlement inquiries (every time you ask for the production of discovery responses or seek to certify the case for trial) as a delay tactic; after all, if we settle, we spare our client's time, money [voice cracks] *and trauma.* Why would I seek a *settlement,* of all things, to cause delays? It's ludicrous, and I've never been so offended in my 20 months of practice. I'd seek sanctions against you under the *Standards of Professionalism and Civility,* if I thought it would do any good.

The potential for a legitimate settlement – no matter how remote it may be – always exists. Thus, even in the most hotly contested matters it is virtually impossible to show whether a lawyer held out the potential of settlement for legitimate purposes or not. Standard 9, like the other Standards, is on a practical basis impossible to enforce.

> Standard 10 provides: Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

Can you find the "obvious" flaw in this rule that renders it all but completely impotent? Moreover, if you ever find yourself confronted with what you believe is an undisputed and indisputable fact, you've likely been in practice two years or less (and if you've been practicing longer, but still think there's such a thing as an indisputable fact, your practice must be limited to administrative law, representing the government).

> Standard 11 provides: Lawyers shall avoid impermissible *ex parte* communications.

As if having more rules about *ex parte* communications makes any difference in curtailing the problem. Did we need a new rule

to inform us that impermissible *ex parte* communications aren't permitted? Aside from Standard 11's utter lack of guidance as to what constitutes "impermissible *ex parte* communications," we already have a rule against impermissible *ex parte* communications, a definition of the term, and a means for sanctioning it (See Rules of Professional Conduct, Rule 3.5).

> Standard 12 provides: Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

Isn't this a problem whose most elegant solution is already in practice and is adequately functioning? If the judge wants to read such correspondence, she will. If she deems it inappropriate or potentially prejudicial, she will throw it out and may or may not admonish the offending lawyer. Some courts go so far as to tell counsel that they will not forward any correspondence between counsel to the court if it is not captioned or otherwise part of a pleading. Why did we need a rule for a problem that's not all that pervasive to codify what is already being adequately enforced at the receiving end?

> Standard 13 provides: Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

Attorneys should eschew sharp practices, but no one should be formally sanctioned for following the letter of the law. Even Thomas More, I submit, would agree with that. More importantly, how can one fairly be punished for following the letter of the law? Furthermore, if *compliance* with rules constitutes "incivility" there goes the rule of law. If you struggle with whether "maliciously" obeying the rules of court is worse than otherwise being uncivil in relationships with opposing counsel, become a mediator. Besides, it's not as though attorneys victimized by punctilious rule followers have no recourse. The odds are better than even that if you complain to the judge about being served with a proposed order that was hand-delivered to your office after 5:00 p.m. on the Wednesday prior to Thanksgiving, you'll get your extension. The system does generally work.

> Standards 14 and 15 provide: Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.
>
> Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately.

And throwing cigarette butts on the ground is littering. Which of these offenses is likely to be prosecuted and/or punished first? Don't starve making this Hobson's choice. People who don't know me may not believe this, but when an ethically-challenged attorney asked me for a continuance by claiming he had a conflicting engagement, I asked that attorney for the court and the case number so that I could confirm his story. He harrumphed and

refused to disclose what the supposed "conflict" was, but he didn't get his continuance. I manage to handle such situations to my satisfaction without the assistance of Standard 14 or 15. Besides, unless a lawyer is willing to ferret out false claims of need for extensions or schedule changes, Standards 14 and 15 are of no practical benefit anyway.

> Standard 16 provides: Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

To its credit, here's a rule that if violated has at least a better than even chance of being proven it was violated. Even so, what's so terribly wrong about defaulting a party worthy of default, and doing so without flagging the inattentive opposing attorney? Besides, Rule 4 of the Utah Rules of Procedure already provides, in Subparagraph (c)(1):

> The summons . . . shall state the time within which the defendant is required to answer the complaint in writing, and *shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant.*

(emphasis added).

Why, when Rule 4 already mandates notice to the defendant of the possibility of default, was it necessary to create essentially another notice requirement with Standard 16? We all know or should know that defaulting a fellow attorney without warning causes more trouble for the attorney seeking default than it's worth to him. Additionally, does Standard 16 create a possible conflict between it and Utah Rules of Civil Procedure, Rule 55, which contains no requirement that notice be given to opposing counsel in advance of seeking default? If so, why not repeal Standard 16 and amend Rule 55 to include a notice provision? Moreover, wouldn't obeying Standard 16 basically allow the opposing side to delay proceedings by failing to participate in the case and relying on the opposing attorney's Rule 16 obligation of "notifying other counsel," in advance, at which point the scheming "lazy" attorney finally files his responsive pleading so that the case is decided on the precious merits? Rule 55 is already honored in the breach. Did we really need to eviscerate it even more with Standard 16?

> Standard 17 provides: Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.
>
> Standard 18 provides: During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.
>
> Standard 19 provides: In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

With respect to Standards 17 through 19, lawyers are already subject to provisions of the Utah Rules of Civil Procedure and the Utah Rules of Evidence when engaging in the discovery process, and they already arguably prescribe the same conduct sought by Standards 17 through 19. Moreover, Standards 17 through 19, like the rules of civil procedure and evidence, are so vulnerable to self-serving interpretation and construction that promulgating even more subjective rules will do nothing more to curtail discovery abuses than the Rules of Civil Procedure and the Rules of Evidence already do (or don't, as the case may be).

Victor Cousin, the 19th century philosopher stated, "We need . . . art for art's sake."[1] W. Somerset Maugham who wrote, "Art for art's sake makes no more sense than gin for gin's sake." Standards for standards' sake are no more sensible. In reviewing the Standards of Professionalism and Civility, I see no pre-existing need that is filled by their passage, no flaw in the existing rules of professional conduct that the Standards remedy. The Standards are prone to subjective interpretation and construction to the point of being meaningless, thus, unenforceable, and thus irrelevant to a lawyer's daily practice. Most, if not all, of the Standards as currently constituted, do little to lead good lawyers or bad lawyers to be any better than they would have been in their absence. In this regard the Standards of Professionalism and Civility do little to address or cure any lack of professionalism and civility in the profession.

1. The full quotation is, "We need religion for religion's sake, morality for morality's sake, and art for art's sake." Surprisingly, the work of Cousin fell into obscurity.

Clients tell us that our most important numbers are twenty-four, seven and three-hundred-sixty-five.

ALPS

Attorneys Liability Protection Society

A Risk Retention Group

www.alpsnet.com

A Member of the ALPS Family of Professional Service Companies

1 (800) FOR-ALPS

Outsourcing – for Easy, Effective Data Protection

by David Saperstein

Attorneys' Data – and Practices – Are Vulnerable
Attorneys, whether solo practitioners, members of a small or large firms, or in-house counsel for corporations, need to consider these statistics:

- 40% of data loss arises from hardware failure and 29% from human error.[1]
- About 7 million laptops are lost, badly damaged, or stolen each year.[2]
- 47% of organizations surveyed by the Computer Security Institute experienced between 1 and 5 computer security breaches in the last 12 months.[3] 56% of disaster recovery professionals identified such issues (e.g., unauthorized access, viruses) as an extreme threat to business continuity.[4]
- The amount of stored data is growing at 125% per year.[5] This growth increases the data security, long-term recordkeeping, and/or auditing challenges of compliance with such laws as Gramm-Leach Bliley, the Health Insurance Portability and Accountability Act (HIPAA), Sec. Rule 17a-4, and Sarbanes-Oxley.
- Companies that cannot resume operations – including recovering key data – within 10 days of a disaster are not likely to survive.[6]

What do these statistics have to do with the practice of law? Answer these questions:

- Who performs data backup in the office (or branch offices) and how often? Is the backup reliable?
- Does the office maintain a copy of its data off-line – *and off-site in a secure location* – so that it is safe from natural disasters, technical malfunctions, and accidents at your site (as well as from a range of human risks such as deletion errors, viruses and hacking)?
- How fast can the office recover its data? How much of it can be recovered?

Depending on the answers, an attorney's entire practice may be vulnerable to a crippling, even lethal, data loss.

Since the adoption of imaging copiers in the workplace and the CM/ECF system (case management / electronic case filing) in the federal judiciary, as well as the developing state court imaging initiatives, more and more legal documents are electronic. That means the firm's critical documents and related emails need to be backed up – consistently and reliably – to protect its attorneys' practices and to provide ethical, leading-edge service to its clients.

What can attorneys do in the face of daunting limits?
Attorneys face limited budgets, limited time, and limited (or no) professional information technology (IT) staff. Many law firms and legal departments print electronic documents and store the paper. But with email, and electronic documents increasing, the time has come for effective, comprehensive records management programs that include electronic as well as printed documents.

Ensuring Data Protection, Disaster Recovery, and Business Continuity – with Electronic Vaulting Services
One of the most effective solutions to these data protection challenges is outsourcing data backup and recovery to an "electronic vaulting service." In fact, Enterprise Strategy Group, a leading storage industry research firm, recommends that small and medium organizations use electronic vaulting services to overcome hurdles like insufficient IT staff, IT costs, backup reliability issues, and technology complexity.[7]

This article describes what electronic vaulting services can do for law firms. It also describes how backup differs from "digital archiving," an important but different solution.

How Electronic Vaulting Services Work
Electronic vaulting services move data over the Internet from a law firm's servers and/or PCs to an off-site, secure electronic vault. Here, the information is stored on disks. Backups occur automatically and "transparently." In short, these services don't disrupt business or require your attention.

DAVID SAPERSTEIN is General Manager of Iron Mountain in Salt Lake City and is a veteran of 23 years in the records and information management industry.

After an initial full system backup, only file changes and new files are transmitted. This allows the service to run in near real time if desired (for optimal data protection and recovery) and minimizes bandwidth needs.

As a result, data – *up to the latest backup* – are available to be easily and quickly restored. Recovery occurs over the Internet through any Web browser as soon as it is initiated. (For large server restores, a network attached storage device containing the recovered data is delivered within 24 hours.)

Backup transmission of server data is monitored and managed 24x7x365 by IT professionals who ensure its success. However, the law firm's authorized personnel have control of all of the firm's backup data.

The law firm can often contract for different backup schedules at different price points. Backup schedules should be based on how critical each type of data is to the firm. Key points to consider in making these decisions are:

- The necessary recovery point or how much of a type of data the firm needs to recover to resume business.
- The necessary recovery time or how long those data can be unavailable to the firm's practice without damaging it (minutes, hours, days.)

Advantages of Electronic Vaulting Services

The benefits to electronic vaulting services are easy to see.

No backup burden. There are no data backup time and costs for the firm or its internal staff. Nor is there hardware or software infrastructure for the firm to buy, update, and maintain.

Instant off-site protection. For data that are backed up, there is up-to-the minute protection and recovery. Within the electronic vault, a copy of the firm's data is safe from technologic malfunctions, human errors, disasters, and hostile employees at the firm's location. Depending on the vault site, it is also protected from local or regional problems like power outages and natural disasters. Some electronic vaulting services go one step further to protect the firm's data by copying the online backup data to tape for storage elsewhere. Being off-line and out-of-reach, that tape backup is safe from cyber threats.

Fast, reliable recovery – any time, any place. The firm's data are available to be reliably recovered – up to the last backup. By comparison, backups and restores of traditional media can

be unreliable and time-consuming when performed by non-technical people.

Recovery time is critical for resuming business. Many electronic vaulting services offer an *easy-to-use* Web browser interface through which non-technical users can quickly restore data themselves with minimal intervention – as well as "granular" restores (i.e., of a few files) from the backup disk. These features reduce or eliminate the costs of IT help.

Professional management. For servers, trained IT professionals monitor backups and proactively contact the firm if backup is disrupted at the firm's site – for example, from a power or system failure. Those professionals work with the firm to complete backups and to restore data as quickly as possible.

Assessing Electronic Vaulting Service Providers

To maximize benefits and fine-tune the electronic vaulting services it needs, a law firm should look for these additional features.

Off-site and off-line, as well as online, data protection. Optimal data protection is off-site (safe from destruction at the law firm's site), off-line (safe from computer viruses and worms), and out-of-reach (safe from a law firm's hostile employee).

Top-quality security. To ensure lawyer-client confidentiality and meet legal privacy requirements, data security is critical for law firms and clients, especially in particular sectors. Firms need to ask service providers about security measures for the network, for the electronic vault and (if data are also backed up to tape) for the media vault.

24x7x365 monitoring and management. With electronic filing, the courts are open for business around-the-clock. If attorneys work or backup data after normal business hours, they need data protection then as well.

Vendor reliability. Look for financial stability and a history of reliable customer service.

Special expertise. Find out if a service handles Microsoft Exchange, open-source databases such as Oracle and SQL, and open files.

Flexibility and breadth of offerings. See if a service offers storage and retention options (e.g., for compliance), customization of backup schedules, different pricing structures and Service Level Agreements, and a variety of solutions – server and PC backup, as well as digital archiving

This brings us to another critical point: digital archiving.

Electronic Vaulting Services Versus Digital Archiving: What's the Difference?

Electronic Vaulting Services back up critical data on a regular basis and electronically and physically vault it off-site so that if the law firm experiences a natural or man-made disaster, it can recover its data quickly and securely.

Digital Archiving Services consolidate the firm's electronic records – emails, images, CM/ECF files (pdfs), electronic statements, and more – into a unified, browser – accessible archive, for fast and easy search, retrieval, and management. Unlike backups, which store information in a format that is designed to reduce storage volumes and speed recovery, digital archiving ensures that when the law firm or client needs access to a specific record (e.g., for litigation or auditing) it can be found quickly and easily.

The Next Step

As more legal processes go online, an effective, comprehensive records management program that protects law firms' practices should cover electronic as well as paper documents. Many lawyers have established sound, ethical paper records programs. But issues of technical complexity – plus limits on time and budgets – mean that attorneys' electronic records are often at risk.

Fortunately, alternatives exist today that can relieve the backup burdens on attorneys, their administrative personnel, and even over-extended IT staff. These alternatives include outsourced services for electronic vaulting and, when appropriate, digital archiving. These two solutions can protect attorneys' data, their practices, and their clients from a range of risks and disruptions that will only grow as the practice of law and the legal system become increasingly electronic.

1. Allan Rocek, "How Secure Is Your Storage, BankInfoSecurity.com, June 9, 2004. *See* http://207.234.191.209/?q=node/view/1285.
2. Drew Robb, "Who Needs Mobile Backup," Enterprise Storage Forum, September 2, 2003. *See* http://www.enterprisestorageforum.com/management/features/article.php/2245011
3. "2004 Computer Security Institute/FBI Crime and Security Survey." Computer Security Institute, 2004. Page 8.
4. "Top Business Continuity Priorities for 2004," Envoyworldwide, 2004. Page 1. This survey of the members of the New England Disaster Recovery Information X-Change is available at www.envoyworldwide.
5. Charlie Garry, senior program director, Meta Group Inc. cited in Neil Murvin, "ILM: Separating the Hype from the Reality," *Computerworld,* October 6, 2004.
6. Rocek, op.cit. *See* http://207.234.191.209/?q=node/view/1285
7. John McKnight, "The Changing Dynamics of Backup and Recovery in the Small land Medium Business (SMB) Market: New Requirements and Systemic Challenges Open the Door for Online Backup Service Providers," The Enterprise Strategy Group (formerly, the Enterprise Storage Group). 2004.

Planning to Win

Putting your case together based on what REALLY persuades judges & juries

Presented by
James W. McElhaney

June 16 & 17 – Sun Valley Idaho

Topics Include:

- The psychological theory of the case
- Why people use stories instead of rules to make decisions
- Learn why the other side's motives are one of the most important parts of your case
- The power of visualization – making the judge and jury eyewitnesses to your facts
- The keys to effective case organization
- The 7 qualities of a winning story
- Brainstorming the language of persuasion
- How to take advantage of the sense of injustice
- Using the destructive power of character evidence
- Putting the other side on trial – making your opponent the focus of judgment

James W. McElhaney

A trial strategy consultant, Jim McElhaney's opinions on evidence, procedure and trial techniques reach half a million lawyers and judges every month in his award-winning column, "Litigation," in the *American Bar Association Journal*. He also writes the popular "Trial Notebook" column in *Litigation Journal,* and is the author of three widely acclaimed books on trial advocacy – "Effective Litigation," "McElhaney's Trial Notebook," and "McElhaney's Litigation."

Jim is a gifted speaker who has given nearly 1,000 seminars, speeches and workshops on evidence, procedure and trial practice. Don't miss your chance to hear one of America's most popular speakers on the subject of trial advocacy.

7 Credit Hours Idaho CLE

Price: $150 per person

To register for a room at
Sun Valley Resort please call:

(208) 622-2151 • (800) 786-8259

For an application to register go to the Idaho State Bar website:

www2.state.id.us/isb/

Some Thoughts Concerning Trustee Selection

by Langdon T. Owen, Jr.

The selection of an appropriate trustee is of concern for anyone establishing a trust. A good trustee will provide real tangible benefits, and a bad trustee will provide nothing but nightmares. This article contains thoughts on the subject of trustee selection that counsel drafting trust instruments may find useful in dealing with clients.

GENERAL SELECTION CRITERIA

Any trustee of any trust should have certain fundamental characteristics. Does a trustee need to be a saint? No, but it would be a step in the right direction. Standards of trustee integrity and skill are quite a good deal higher than for the general business world with which most people are familiar.

Honor

The trustee should be absolutely honest. If there is any doubt on this matter, the inquiry should end – this is not the person who should be a trustee. In this context, honesty includes not just a lack of lying, stealing, and cheating, but goes further to include the ability to honorably meet the trustee's major duties to the trust: to be loyal and operate the trust for the benefit of the beneficiaries, to avoid any self-dealing or conflicts of interest, to accurately and unflinchingly account for the trust's and the trustee's performance, and to keep the beneficiaries informed of their rights relating to the trust. A trustee must have the unhesitating ability to withstand pressures, sometimes from surprising sources, including spouses or other family members, to compromise where appropriate and stand firm where appropriate on the numerous little things which alone or in the aggregate can destroy the trust of the beneficiaries, as well as on the fewer, bigger things which would be or could be abusive of the trustee's position. Everything a trustee does must be able to not only withstand, but to shine in, the light of day.

Financial Ability

The trustee should have money and property skills. This does not mean the trustee must have the investment expertise of a professional – the trustee can always hire a professional advisor. The key characteristic is the ability to understand financial matters and to make prudent financial and investment choices. The trustee must be proactive and cannot be neglectful; must be prudent and not easily swayed by sales pitches; must be practical and able to fit general financial concepts to the particular needs of the trust. The trustee will need to make investments over the life of the trust and will need to plan ahead to maintain some liquidity to meet the goals of the trust. The trustee will need to be able to foresee many of the needs of the beneficiaries and plan to meet those needs. The trustee will need to know what he or she doesn't know and seek cost-effective and sound advice. The trustee cannot blindly rely on advice, however, but must use the trustee's own sound judgment as to what makes sense for the trust.

People Skills

The trustee will need to be able to effectively deal with the beneficiaries, and with others, too. The trustee should have a good understanding of the family dynamics. This understanding may be obtained by talking with the family members and others. The need for such understanding in no way disqualifies a nonfamily member from being a trustee if he or she is willing to look into the relevant matters. However, the trustee should not be so personally involved in any controversial family matters that he or she has some axe to grind or is perceived as being biased for or against some family members. The trustee must not only be honorable, but he or she must be able to consistently command the respect of the beneficiaries for having such honor. Even a misperception by a beneficiary can create wasteful conflict.

The trustee needs to be able to listen well to the beneficiaries and have some empathy for their positions, yet have the backbone to say "no" clearly and emphatically in appropriate circumstances. A trustee may, by reason of his or her position, have great power and influence in the family, yet must be humble enough to realize that he or she cannot possibly have all the answers and that he

LANGDON T. OWEN, JR. is a member of the law firm of Parsons Kinghorn Harris in Salt Lake City.

or she will need a good deal of input from others in order to make sound decisions – and that even then can be mistaken. A trustee will need to have the strength of character to be able to patiently persevere through many a thankless task, even at times of personal pain; the trustee's people skills are not just external, but must be internal, too.

Longevity

Some trusts can last years, even whole lifetimes. It is of benefit to the trust and its beneficiaries to have continuous and consistent management. Thus, the health, age, and mobility of the trustee are factors to be considered. In the best situation, the trustee will be in top form and will perform throughout the term of the trust without any need for a replacement; but to get the benefit of mature judgment and experience, it may well be necessary to come to a balance on the expected length of service of a trustee. The trustee should keep records and otherwise act to make any future transition a smooth one.

Follow Trust Instrument and Law

The trustee must follow the trust instrument and comply with applicable law. Thus, the trustee must have the ability to understand legal concepts and apply them to the particular circumstances of the trust and its beneficiaries. The trustee should be able to recognize the need for legal and accounting help and be willing to seek out and follow appropriate advice.

Disability Trust Concerns

All the foregoing general matters relating to trustee selection apply even more emphatically to trusts for beneficiaries suffering from a disability. Disability trusts are more likely to run a whole lifetime than other sorts of trusts, and consistent treatment of the beneficiary over the long term will often be of greater importance to a disabled beneficiary than to fully-abled beneficiaries.

The main beneficiary, to an extent depending on the depth of the disability suffered, may well not be able to fully understand the functioning of the trust or to personally oversee and provide constructive criticism or input as to the performance of the trust and its trustee. The beneficiary is much more likely to be strongly, or even wholly, dependent on the proper functioning of the trust and the good faith and good judgment of the trustee for rather basic day-to-day needs or comforts. A failure of a disability trust to function properly can be very immediately and personally painful to a disabled beneficiary. Careful, consistent, and conservative trust management will be a primary concern for a trust for a

disabled person and risks which might be quite reasonable for other sorts of trusts may well be inappropriate for disability trusts.

Beneficiaries with the greatest needs can at times be, or at least seem, the most demanding, sometimes unreasonably so. The same can be true of those who provide care for and who love the disabled beneficiary – they may push the trustee well beyond the usual extent. This sort of push comes from the right emotional place but may not be balanced by a longer or broader view. The trustee's job is just harder when disabled persons are beneficiaries. Thus, unfortunately, it is also often harder to recruit the sort of trustees these beneficiaries so greatly need.

Furthermore, the nonsupport, special needs trusts used for disabled persons who are on government assistance, often tend to be of modest size. This can make it difficult to adequately compensate the trustee, again adversely affecting recruitment. Some people will have a tendency to see adequate compensation for a trustee as exploiting the disabled person because these people will not have a clear understanding of the trustee's efforts or responsibilities.

Most, perhaps the vast majority, of initial family trustees for disabled persons act as such from a personal emotional commitment to the disabled person and are willing to take on this tough job even without adequate, or sometimes without any, compensation. Such persons can prove to be exemplary trustees. However, as the initial trustees die, become disabled themselves, move away, or otherwise become unavailable to serve, it can be very hard to replace them. The precedent of low or no compensation for the initial trustee may then become a barbed wire fence of unrealistic expectations which can keep others off the job.

PROFESSIONAL TRUSTEES

Let's compare some of the more important factors concerning the use of individuals as trustees or professional trust companies as trustees. Let's remember the key characteristics a trustee should possess.

Honor

With individuals, honor is a personal attribute developed over a lifetime; where it exists it is often deep, strong, and inviolable. On the other hand, persons who appear honorable sometimes violate their honor when under financial or psychological pressure.

For a trust company, honor is an institutional mandate with

institutional constraints and protections. Trust companies have recruitment programs designed to attract good people and human resource programs designed to train and develop the sense of honor, service, and professionalism in these people and to weed out those who do not make the grade. Also, trust companies are regularly audited by various state and federal regulators. The regulatory process tends to prevent abuses.

If, however, an error or individual dishonesty occurs, the trust company can generally respond in damages, usually directly but sometimes through bond or insurance proceeds. Regulations require trust companies to maintain certain proportions of net capital which can fund such recoveries. Individual trustees may also be bonded against the worst sort of dishonest acts; but most trusts are drafted to require no such bond because it is an expense with little benefit. The sorts of dishonorable acts found among individual trustees tend to arise more from conflicts of interest and such than from outright theft. Thus recovery (if any) against a fiduciary bond is not always a clear-cut thing. The ability of an individual to respond in damages will vary with the financial situation of the individual and will probably change, for better or worse, over time.

Financial Ability

Trust companies are usually pretty good money managers. The best individual money managers can out-perform the trust companies from time to time, but such individuals are seldom available to serve as trustees. Also, high returns are almost always related to high risk, and the sorts of investments some individuals make for themselves will not be appropriate to make for a trust and its beneficiaries in many circumstances.

If an individual trustee has sufficient intelligence, prudence, willingness to work, and foresight to seek good advice, he or she can do just fine with the financial aspects of most less complicated trusts. On the other hand, some trust assets or some trust requirements can be quite complicated. If professional assistance is going to be a constant need, a trust company may be able to fill this need more cost effectively.

The recruitment, training, and retention policies, committee oversight, and management policies of a trust company along with the regulatory controls to which trust companies are subject, tend to assure that trust companies act prudently and do not make bad mistakes. If a trust company were to go badly wrong through imprudence, however, it will have the resources to make good the loss.

Individuals can and do make bad investment and financial decisions, and when these bad decisions are made in a trust context, they can be devastating where the trustee does not have the financial capacity to respond fully in damages for the harm done.

People Skills

Individuals known to and trusted by the beneficiaries may be able to best meet the trust's need for good people skills, at least as long as such individuals are available. On the other hand, these individuals are not always willing or able to take on the full burden of trusteeship or may not have all the other attributes necessary in a trustee to the full extent desirable. In such cases, these individuals may make good co-trustees with a trust company or with another individual.

Trust companies recruit and manage their trust officers to develop people skills and to assure the proper use of those skills. Seldom do trust companies keep trust officers who are unable to develop a good working relationship with beneficiaries; trust companies are selling a service and they use their management abilities to see that the services are provided at an acceptable level. However, the very checks and balances that assure integrity and financial responsibility can sometimes interfere with the personal touch as trust officers need to consult superiors or trust committees on significant issues. Also, trust companies, like other financial service businesses, have relatively high levels of employee turnover. Some beneficiaries complain that almost as soon as they have developed a relationship with a really good trust officer, that trust officer is promoted inside the company or leaves the company to work elsewhere. Nevertheless, trust companies almost never have the truly abysmal and adversarial relationship with beneficiaries which some individual trustees manage to develop and which cost the beneficiaries greatly in litigation expense and heartache.

Longevity

People die, become disabled, and retire; trust companies don't. Some trust companies have been around for over a century. Despite employee turnover, for long-term stability, trust companies will almost always have a significant edge over individual trustees. If a trust officer is promoted, he or she can still be consulted; if he or she quits, the trust company will have good records and will have trust committee members who will recall the major matters involved with the account, and there will be very little transitional disruption.

Follow Trust Instrument and Law

Well-advised individual trustees can follow the directives of the trust instrument and comply with the law, particularly when they seek the advice of counsel as needed. These matters may, however, go beyond the abilities of typical individual trustees when they raise especially complex and continuing issues.

Trust companies generally have a good deal of experience in following trust instruments and in legal compliance. They have built administrative systems over the years to help them do so. They may occasionally seek court guidance on legal points where an individual trustee might choose not to spend resources to seek such guidance, but generally trust companies don't go overboard on this and where guidance is sought, do obtain for the beneficiaries the court's determination which can be relied on by all interested persons.

Some individual trustees will occasionally take unrealistic or ill-advised or simply higher tax risks; trust companies almost never do so because they are unwilling to put beneficiaries at risk for a loss on the issue or for the cost to defend a challenge, or because they are in the game for the long term and are unwilling to weaken their reputations for probity.

Conclusion as to Professional Trustees

Individual trustees are capable of meeting and exceeding every expectation for a top-notch trustee. Individual trustees are also capable of the most incredible greed and stupidity which might be found in a bottom-of-the-barrel trustee. The top is very high, and the bottom is very low, but most individuals are somewhere in between and have no track record as a serving trustee by which to judge them. The grantor of the trust must judge based on knowledge of the individual formed under circumstances usually quite different from those which will face the individual as a trustee. If an individual trustee does damage, it may prove difficult to obtain an adequate response in damages unless the individual is wealthy.

Trust companies generally perform their services consistently and sufficiently well. They are managed and regulated so as not to fall below a certain standard; this is profitable for them, while truly top-end service generally is not, absent a premium price. (Promises of premium service for a premium price, however, should be viewed with healthy skepticism in the retail trust business.) Trust companies do not always reach the highest peaks of performance or service, but they also seldom fall below an acceptable standard and almost never reach the lowest depths of dereliction or abuse. They have track records by which they can be judged. When they cause damage, they are generally adequately financially responsible to make good the loss.

CO-TRUSTEES

For some trusts, co-trustees can provide an effective balance of skills and at the same time create some checks and balances which will prevent problems. However, there are negatives as well as positives to consider.

Avoid Unworkable Relationships

People who do not get along well with each other in particular or with others in general should not serve as co-trustees. There will be pressures and disagreements if the trustees take their job at all seriously. Yet the trustees must be able to disagree without being disagreeable, and must be able to use diversity of viewpoint as a constructive management tool.

Obtaining diverse points of view can be a good thing, but gridlock can destroy the benefits intended to be provided by the trust. Thus, if it is clear that the persons have such diametrically opposed views of the goals and methods of trust management, or of the benefits to be provided or not provided by the trust,

that common ground is unlikely to be achieved, these persons should not be co-trustees.

For any checks and balances system to work, the trustees must be equals in fact as well as theory. Thus, if one has a relatively strong tendency to defer to the other, they probably should not serve together as co-trustees. On the other hand, appropriate deference in certain areas born of honest respect may be a good thing where the respect is the result of independent judgment, and where the respect does not imply any blanket willingness to avoid the exercise of independent judgment or to avoid even appropriate disagreements.

Enhance Teamwork

Co-trustees should have sufficient mutual trust that they can effectively act as a team to accomplish the goals of the trust. No co-trustee should have reason to feel the other co-trustees either are shirking or are unilaterally usurping control.

Cross-checking and watching out for each other to prevent inadvertent errors are very good for improving and maintaining quality trust management. On the other hand, if a trustee feels he or she must constantly watch out for the incompetencies of another in order to prevent all co-trustees from being sued, there is serious trouble brewing.

A division of primary responsibility may obtain for the trust the benefits of appropriate specialization. However, each trustee must remain aware of what all other trustees are doing and be willing to help out in other than his or her primary area as needed and be willing to put a stop to inappropriate actions in other than his or her primary area. The law requires this level of co-responsibility as a general rule of fiduciary conduct, with personal liability as the sanction for failure to meet the co-responsibility.

Succession and Transition

Anytime co-trustees will serve together, the plan should include provisions dealing with succession and transition. If one co-trustee dies or resigns, is another co-trustee to be appointed to serve, or will the remaining co-trustees or co-trustee serve without an additional co-trustee? If a new co-trustee will be appointed, who will it be? Can the new co-trustee be integrated well into the co-trustee team?

RESTRUCTURING TRUSTEES

One ultimate check and balance tool which can be included in trust instruments is the power of removal or replacement or other restructuring of trustees. These powers provide strong medicine to those who hold them. A grantor whose main concern is having a trustee willing and able to put a stop to certain sorts of things may not want to give strong restructuring powers to the very persons (for example, extravagant beneficiaries) who may need to be stopped. In such cases, the grantor may be well satisfied with the power of a court to remove a trustee for cause.

General Successorship Provisions

Trusts generally contain provisions for the replacement of a trustee who dies, becomes incapacitated, or resigns. Successor trustees can be named in the order they are to serve, a third person could be given the power to appoint a successor, or the successor could, as a fallback, be named by a court on request of any interested party.

Special Provisions for Co-Trustees

Also, it may be appropriate in some cases where a co-trustee is lost to let the serving trustee or co-trustees decide whether a replacement co-trustee should serve or not. This ability of the serving trustees to choose can even be generalized so that they may at any time, not just on the loss of a co-trustee, add a new co-trustee to the roster (perhaps up to a maximum number) if they believe it would be helpful to do so.

Further, serving co-trustees could be given power to remove and replace a serving co-trustee by, for example, a two-thirds

majority. The removal power could be useful to smoothly eliminate a problem co-trustee, but it could also be used to just as smoothly eliminate a voice of caution and good counsel.

Beneficiary Powers of Removal

Similarly, the beneficiaries could be given the power to remove and replace a co-trustee (or even a sole trustee), for example, by action of a majority or super majority in number of the then current income beneficiaries.

Combined Action for Removal

Another alternative could be for removal on the combined action of, say, two-thirds of the trustees, and of a majority of the beneficiaries. The benefit of the combined action is to take into account the interests of those who may be entitled to the remainder interest. (Remainder beneficiaries generally will be contingent and unknown until trust termination.) Action by the income beneficiaries alone may tend to bias the trust toward the income beneficiaries and against the remainder beneficiaries. This is fine where the trust is intended to be so biased (as will often be the case with disability trusts), but it is not so fine where the trust is intended to provide the remainder beneficiaries something substantial. The vote of the trustees could help provide some voice for the unascertained remainder beneficiaries in the latter situation. Useful variations of the combined action approach could be to have a trust protector (an independent person, not a trustee, but with certain supervisory authority) act with the beneficiaries (especially where there is only one trustee) or to have one of two co-trustees act with the beneficiaries.

Limit Power to Particular Circumstances

It may sometimes be useful to limit powers to replace a trustee to certain specified circumstances less than legal cause. However, this inevitably invites disputes over whether the circumstances exist and may thus tend in some degree to prevent an easy transition. Still, by specifying circumstances, the scope of any such dispute may be narrowed and a full showing of legal cause for removal may be avoided. A trustee may steadfastly fight a removal for cause because the allegations leading to such a removal can be harmful to the trustee's reputation and the trustee may want some type of court finding of exoneration. A less harsh form of removal on specified circumstances may make it easier to get a trustee to leave without a major battle. The description of such circumstances would need to be carefully tailored to advance the most important of the particular goals and desires of the grantor of the trust.

Trust Protector

It is not too unusual in trusts, particularly those for a disabled beneficiary, to have a trust protector named to review accountings and with power alone or with the guardian of the disabled person to replace the trustee. Since the trust protector will be independent and will be neither a trustee nor a beneficiary, he or she can bring some objective perspective to what may otherwise be an even more difficult situation.

NUMBER OF TRUSTEES

The number of trustees serving can make a real difference in the management of the trust, and there are some important factors to consider.

Sole

A family member acting as sole trustee can act quite expeditiously, and this can be good. However, if the beneficiaries are unable (or unwilling) to watch out for their own interests, there will be a lack of institutional checks and balances to prevent potential abuses or good faith mistakes. Trust companies have internal checks and balances to prevent problems, but a trust company may tend to pay more attention to quality service if it knows it could be replaced in at least some circumstances without a showing of cause. Thus, even where a trust company is serving (with its internal checks and balances), some sort of trustee removal and replacement mechanism may be appropriate. The law allows for trustee removal for cause, and the grantor may want to consider if this is sufficient protection. The cost of a single trustee may be less than where multiple trustees are serving.

Two

Where two co-trustees serve, one can act as a check and balance on the other but there is also the potential for devastating deadlock. A deadlock breaking device may be appropriate. For example, a temporary third trustee to decide the single issue may be appointed by provisions of the trust instrument. However, in long-term trusts, such as disability trusts, the long-term availability of such a named deadlock breaker may be a problem. One or more persons could be named in order to act as a secondary deadlock breaker; this could be of help, but eventually it is possible that none of the named persons will be available. If the co-trustees cannot agree on the issue at hand, it is not too likely they will be able to agree on a mutually-acceptable, deadlock-breaking trustee. The alternative is to seek court guidance on the disputed issue or a court ordered removal of one of the co-trustees (depending on the nature of the problem). Two trustees serving may be less expensive than three but is likely to be more expensive than one.

Three or More

With three co-trustees, there is a built-in deadlock- breaking mechanism if, as will generally be the rule in Utah, two of the three can decide an issue. However, three trustees tend to cost more, and action by them tends to be more cumbersome. Third parties may want all three (or more) trustees to sign everything, even if this is not mandated by the trust instrument or by the law. Nevertheless, some administrative features can be provided in the trust to reduce inconvenience. For example, one trustee could sign checks less than a set dollar amount, while two would be required for greater amounts. It almost never makes sense to have more than three persons serving as co-trustees, due to the cost and inconvenience involved. If an even number were to serve, some deadlock-breaking mechanism will be useful. A removal and replacement mechanism can be useful with three or more trustees, but with more trustees who are less likely to deadlock or who can outvote a problem trustee, the need for such deadlock-breaking or trustee-removal mechanisms may not be as intense as where there are fewer trustees.

CONCLUSION

The single most important decision a grantor makes about a trust to be established may well be the choice of the trustee or trustees to serve. There are a number of factors to consider in making such an important decision. No family situation is the same as any other so there can be no single answer right for every family. The grantor's counsel should discuss with the grantor the major factors, outlined above, that may be relevant in that family's circumstances.

Bring some muscle to the tussle

Large contingency fee lawsuits require an experienced, trial tested, and well financed team of plaintiff attorneys. Otherwise, the defense will play hardball, hoping to wear your client down and force a lowball settlement.

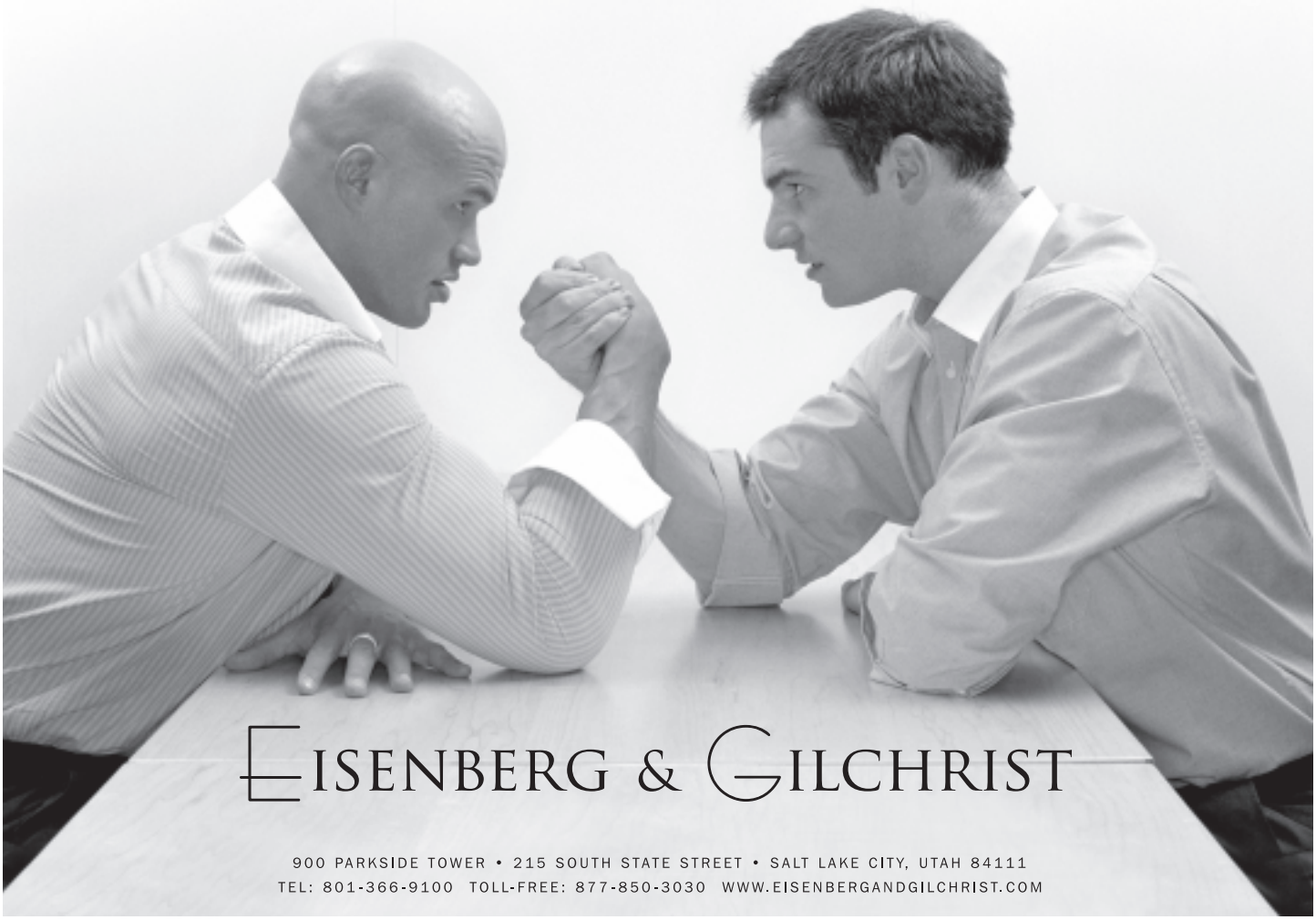
Eisenberg and Gilchrist has the winning track record and the experience that will help you and your client persevere and prevail. We are committed to a true team approach to litigation—the whole firm is involved in every one of our client's cases. Our practice is devoted to one goal—working with referral lawyers and co-counsel throughout Utah to get the most out of high value contingency fee cases. We are an independent Utah firm and are also associated with one of the nation's largest plaintiff litigation firms. When you bring us on board, you'll get small firm service with big firm resources.

Here are some of results we achieved for our clients in the last year, in additions to many other six figure recoveries we also helped lawyers and their clients obtain in 2004.

$4.50 million	trucking accident
$3.75 million	product liability
$3.75 million	insurance bad faith
$3.10 million	trucking accident
$1.50 million	wrongful termination
$1.00 million	wrongful death (adult heirs)
$1.00 million	medical malpractice

We'll work with your firm whether you need the entire case handled from start to finish or whether you are looking to co-counsel with us all the way through trial. Our fee is a portion of your contingency fee, and our contingency agreements are customized to fit your needs and our specific role in helping your client.

Please contact us to discuss how we may be able to work with you to make your next big case a smashing success.



EISENBERG & GILCHRIST

900 PARKSIDE TOWER • 215 SOUTH STATE STREET • SALT LAKE CITY, UTAH 84111
TEL: 801-366-9100 TOLL-FREE: 877-850-3030 WWW.EISENBERGANDGILCHRIST.COM

New Laws Every Lawyer Should Know

by Brent N. Bateman

This article highlights some important bills passed in the recently concluded 2005 Utah legislative session. The new laws discussed here are important to members of the State Bar, not because they are interesting or controversial, but because they include changes that attorneys should be aware of in practice. For example, some legislative changes may affect the advice an attorney gives to a client. Naturally, this article will not provide an exhaustive review of new legislation impacting the bar. Rather, it will briefly discuss a few selected laws, hoping to inspire members of the bar to undertake a more detailed review.

The newly enacted statutes are organized here into very general practice areas. Note, however, that a bill often impacts more than one practice area. For example **S.B. 47, Wrongful Lien Offenses,** discussed below in the criminal section, also raises issues of real property law, tort law, and estate planning.

Real Property and Land Use

This year's single legislative act receiving the most commentary, for both good and ill, may be **S.B. 184, Redevelopment Agency Amendments.** This law makes several changes to the Redevelopment Agency Act. The amendments place a moratorium upon new redevelopment agency projects for retail businesses until June 30, 2006. Apparently, this moratorium is a compromise – earlier versions of this bill aimed to permanently prevent the "Wal-Martification" of America. The Amendments also prohibit redevelopment agencies from using eminent domain to acquire property in the redevelopment area, unless acquiring property from a redevelopment agency board member or officer. Friends of this bill will certainly rejoice, and foes lament, that the Redevelopment Agency Act has thereby been effectively deprived of its teeth.

Conversely, **H.B. 11, Economic Development Incentives,** encourages commercial development by allowing local governments to create economic development zones. These zones provide tax incentives in order to attract commercial projects to certain areas. This act sets forth requirements for establishing these zones, and criteria for qualifying for tax rebates. The legislature also enacted **S.B. 60, Local Land Use Development and Management Amendments,** which generally modifies local land use and development laws. This bill streamlines development planning and review by making changes and clarifications to the laws regarding conditional use permits, exactions, vested rights, notice, spot zoning and non-conforming uses, development review, general plan preparation, land use ordinance adoption, and many other aspects of development law. Clients that own, develop, or govern land will benefit from our careful review the extensive changes made by this bill.

Other property related laws of which practitioners should be aware include **H.B. 26, Conveyances of Property.** This bill provides for conveyance of real estate by *Special Warranty Deed.* The Special Warranty Deed conveys to the grantee fee simple title to the property, with a covenant from the grantor that the grantor will forever warrant and defend the title of the property against any lawful claim and demand *of the grantor* and any person claiming by, through, or under the grantor. This bill also provides for conveyance of after-acquired title, permitting and validating a conveyance of an estate in land that does not presently exist in the grantor, but is expected to exist in the future. **H.B. 184, Crime Victims – Change of Locks on Rental Property,** will be important to clients that own or live in rental property. It permits renters who are victims of domestic violence, stalking, sexual offences, burglary, or other violent acts to require the property owner to install new locks at the renter's expense.

BRENT N. BATEMAN is an associate with Smith Hartvigsen, PLLC, where he focuses on real property and water law.

Water Law

A few important changes to the powers and duties of the state engineer, and the penalties for wrongfully taking water, have, hopefully, come too late for the drought. **H.B. 29, State Engineer's Powers and Duties Amendments**, and **H.B. 157, Water Enforcement Procedures and Penalties,** should be read together. These new laws authorize the state engineer to bring civil lawsuits – for unlawful use, appropriation or diversion of water – without first resorting to the administrative process. The state engineer may also now issue cease and desist orders, issue notices of violation, and impose administrative penalties. This bill also provides that the prevailing party in a suit brought by the state engineer may be awarded its costs and attorney fees.

In addition to the threat of civil action by the state engineer, water thieves may also face criminal prosecution. Under **H.B. 38, Water Law – Criminal Penalties Amendments,** knowing and intentional theft of water, if causing damage of a certain value, becomes a felony. In addition, each day of the violation is a separately chargeable offense.

Family Law

Much was to be said here of H.B. 42, popularly known as the Ritalin Bill, which would have prohibited educators from requiring that children be medicated before attending classes. However, a veto by the governor has pre-empted that discussion. Instead, the legislature has responded to a recent media clamor with **S.B. 83, Medical Decisions of a Parent or Guardian.** This new law provides that the decision of a parent regarding the health care of the child cannot be considered neglect of the child, unless it can be shown by clear and convincing evidence that the decision of the parent is not reasonable and informed. This bill also provides that when an informed parent refuses to consent to the child's recommended care, a malpractice action against the provider cannot be brought on the basis of the consequences.

Other new laws affecting family law include **H.B. 4, Divorce Mediation Program,** which makes mediation in divorce actions mandatory. **H.B. 280, Joint Custody Amendments** requires that a proposed parenting plan be submitted whenever a parent seeks to modify any type of shared parenting arrangement.

Criminal Law

Numerous new criminal offences were created or modified in the recent legislative session. Of interest to both civil and criminal practitioners is **S.B. 47, Wrongful Lien Offenses.** The bill

establishes felony-level criminal penalties for recording a wrongful lien or for fraudulent handling of a recordable writing. The client who does not have an objectively reasonable basis to believe she has a present and lawful interest in the property should be advised that filing a wrongful lien on that property could result in a felony conviction. Accordingly, falsifying, destroying, removing, or concealing any will, deed, mortgage, security instrument, lien, or other writing which may be recorded, with the intent to deceive or injure, may result in a felony conviction. Civil practitioners should also be aware that this bill provides for an *ex parte* injunction action against the person making the wrongful lien.

Other important changes to the Criminal Code include **H.B. 76, Habitual Violent Offenders Amendments,** which adds mayhem, stalking, terroristic threat, and child abuse to the definition of Violent Felony. It also changes elements required to prove that a defendant is a habitual violent offender. **H.B. 297, Aggravated Murder Amendments,** redefines aggravated murder to include situations where a defendant abuses or desecrates the body of the murder victim. **H.B. 221, Electronic Communication Harassment,** extends the current law regarding telephone harassment to electronic communications such as email. **H.B. 54, Criminal Appeal Amendments,** makes appeals regarding denial of bail, final judgment of conviction, certain orders made after judgment, pretrial dismissal of felony charge for double jeopardy, and certain other cases, appeals as of right. Finally, but not least significantly, **S.B. 177, Increase Statute of Limitations on Rape,** doubles the amount of time from 4 to 8 years that prosecutors have to bring an action against a defendant for rape, but only if the sexual assault was reported to law enforcement within four years after the assault is committed.

Miscellaneous

There are many other new laws that merit mention, but space limitations dictate the discussion of only a few. **S.B. 227, Public Safety Driving Privilege and Identification Card Amendments** created quite a brouhaha on Capitol Hill. This bill provides that individuals that meet all of the requirements for a driver's license, but do not have a social security number (read: non-citizens), may receive a card entitling that individual to drive, but not valid for identification purposes with any governmental agency.

H.B. 275, Business Entity Amendments, makes many changes to the laws regarding business organizations. The Utah Revised Business Corporation Act, the Utah Revised Uniform Limited Partnership Act, and the Utah Revised Limited Liability Company Act are amended in several respects, both significant and incidental. The changes should be carefully reviewed before advising the business client. Important changes include provisions affecting the liability of managers, and allowing corporate notice in some circumstances by electronic communications.

H.B. 186, Consumer Protection Amendments makes many changes to laws important to consumer law practitioners. Highlights include prohibiting telephone solicitations to a consumer who has requested not to receive calls from that solicitor, and removing the criminal penalty from the Telephone and Facsimile Solicitation Act. Additionally, if your client owns a health spa, familiarize yourself with this legislation without delay.

S.B. 173, Brownfields Revision, authorizes the DEQ to provide written assurance to purchasers, contiguous landowners, and innocent landowners, that they will not be subject to any enforcement or cost recovery for cleanup of the property. In addition, the bill provides that a party who incurs costs in excess of his liability under a voluntary clean-up agreement has a right of contribution, and may institute a court action to claim these excess costs.

Finally, **H.B. 104, Spyware Control Act Revisions,** and **H.B. 260, Amendments Related to Pornographic and Harmful Materials,** assure us that the Utah legislators have not forgotten their technophile constituents. The first addresses spyware, prohibiting certain pop-up advertisements, and forbidding liability for the removal of certain potentially harmful software. A civil action to enforce the act is authorized. The second bill requires Utah-based internet service providers to provide a mechanism for blocking harmful content. It also provides for the creation and dissemination of the Adult Content Registry, a listing of sites containing material harmful to minors. This act provides for criminal sanctions for those that violate it.

Conclusion

The brief discussion above does not represent a complete review of the multitude of new laws affecting members of the Utah State Bar, nor can this information replace personal review of the actual text of the new laws. Reading the text of the legislation discussed above is, of course, highly recommended. Moreover, there are many other new laws, not discussed here, that may impact your law practice. To review them, go to the Utah Legislature's website: http://www.le.state.ut.us.

Working together to take you where you want to go.

No matter where your practice takes you, the LexisNexis® Bar Association Member Benefit Program is always behind you to help smooth out the ride.

Go Beyond Cases & Codes

Manage Your Practice

Grow Your Practice

The changing demands of your practice take you in new directions every day.

Whether you're conducting legal research, managing your front and back office, or even identifying best client prospects, the LexisNexis® Total Research System has the expansive tools and content to help you quickly and confidently switch gears.

And with the **LexisNexis® Bar Association Member Benefit Program**, you can take advantage of a wide range of exclusive LexisNexis benefits through your sponsoring Bar or Association. These member benefits were created with the unique needs of small law firms and solo practitioners in mind.

To learn more about exclusive LexisNexis Bar Association Member Benefit Program offerings, call for details at 866.836.8116 and mention code 203592.

LexisNexis®
Bar Association
Member Benefit Program

A MEMBER BENEFIT OF

UTAH STATE BAR ORGANIZED 1931

AL7859

Utah Standards of Professionalism & Civility

By order dated October 16, 2003, the Utah Supreme Court accepted the report of its Advisory Committee on Professionalism and approved these Standards.

1 Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

2 Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

3 Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

4 Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

5 Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

6 Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

7 When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

8 When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

9 Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

10 Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

11 Lawyers shall avoid impermissible ex parte communications.

12 Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

13 Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

14 Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

15 Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

16 Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

17 Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

18 During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

19 In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

20 Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

Standard 11 – Ex Parte Communications

by Judge Gregory K. Orme

Editors' Note: *A member of the Supreme Court's Advisory Committee on Professionalism will discuss one of the new Standards of Professionalism and Civility with each issue of the* Bar Journal. *The opinions expressed are those of the member and not necessarily those of the Advisory Committee.*

"Lawyers shall avoid impermissible ex parte communications." There's nothing novel about this idea: Don't talk to a judge (or other adjudicator) about a case unless opposing counsel is in on the conversation. The same precept holds for conversations with the judge's law clerk or other members of the judge's staff. There are a few exceptions, mostly having to do with procedural things, like scheduling, but always err on the side of avoiding one-sided conversations about cases.

If you bump into a judge at a baseball game, it's OK to talk to him about the disappointing play of the shortstop, the weather, or how much you miss the old Chicago Dog concession. If you believe he would be an asset to that bench, it's OK to encourage the judge to apply for the pending vacancy on the Court of Appeals. It's not OK to ask the judge if he has read your memo in support of a motion for summary judgment – much less if he had any questions that you might be able to answer. You must hurry back to your seat without answering if the judge up and asks you such a question on his own.

If the judge's clerk calls to see if you are available to come for a hearing a half hour early, you are free to respond. If her secretary calls to check the spelling of a witness's name, the same is true. If the clerk calls to pass along some suggestions the judge has for the findings of fact you are working on, you need to insist that opposing counsel be joined in the conversation before it proceeds. If the clerk says the judge intended the input to be for "your ears only," you need to decline the proffered help and contact Colin Winchester, executive director of the Judicial Conduct Commission.

You may call a judge's law clerk to see if the judge is planning to attend a section meeting or is available for a speaking engagement. You may not call after oral argument to explain, "just between us chickens," that opposing counsel incorrectly represented that laches had been argued below when a review of the transcript makes clear it was only waiver.

This standard does not add some new burden to the profession. Lawyers are already subject to Rule 3.5(c) of the Rules of Professional Conduct, which directs lawyers not to "communicate, or cause another to communicate, as to the merits of the cause with a judge or other official before whom a matter is pending." Judges are subject to this apparently more expansive prohibition in Canon 3(B)(7) of the Code of Judicial Conduct: "Except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceeding."

What, then, does Standard 11 add to a lawyer's responsibility? Actually, nothing. "[I]mpermissible ex parte communications" are precisely those proscribed by the ethical requirements just mentioned. So why the redundancy of Standard 11? Just a good reminder? Perhaps, but on that rationale there are any number of ethical precepts that might have been repeated in the Standards of Professionalism and Civility.

The fact of the matter is that the Supreme Court's Advisory Committee on Professionalism had endeavored to expand just slightly the ex parte realm to be avoided by conscientious attorneys. Its recommended Standards included this version of Standard 11: "Lawyers shall avoid impermissible ex parte communications on any substantive matter and on any matter that could reasonably be perceived as a substantive matter." In its order adopting the Standards of Professionalism and Civility recommended by the committee, the Supreme Court adopted, verbatim, the language of the other nineteen proposed standards. Only Standard 11 was modified. The text after the word "communications" was deleted, leaving Standard 11 in its present form: "Lawyers shall avoid impermissible ex parte communications."

My advice is to stay clear of anything that might be an impermissible ex parte communication. Err on the side of avoidance. Lawyers, don't spend a lot of mental energy trying to figure out if something deals with "the merits of the cause." Judges, don't spend a lot of time figuring out where to draw the line between an "impending proceeding" and a possible proceeding that is not quite that immediately imminent. The fact is, a lawyer and a judge cannot get in trouble for a one-on-one conversation they never had.

JUDGE GREGORY K. ORME has served on the Utah Court of Appeals since 1987.

Commission Highlights

During its regularly scheduled meeting of March 10, 2005, which was held in St. George, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. George Daines reviewed the scheduled events for the Spring Convention beginning with the awards and keynote speaker Friday morning. He informed the Commissioners of the Law Day Luncheon on May 6th and the Commission retreat to be held in Deer Valley on June 3rd and 4th. The final Commission meeting will be held on July 13th in Sun Valley, Idaho at the Annual Convention.

2. David Bird announced that he will be resigning his Commission seat so there will be three openings (rather than two as previously thought)and the third person to fill the two-year unexpired term. There are several approved methods to use in selecting David's replacement. The motion was made and passed with no opposition to select the top three candidates filling the vacancies and the third person to fill the unexpired two-year term of David Bird. It was suggested to amend the motion so that all three individuals serve a three-year term. John Baldwin noted that the Bylaws provided for this modification so long as no more than five but at least four commissioners' terms expire in any one-year. The motion passed with no opposition.

3. Gus Chin, Rusty Vetter and Kim Wilson, candidates for the office of President-elect, each gave a short presentation. After voting it was determined that Rusty Vetter and Gus Chin would be running in the election as President-elect.

4. John Baldwin discussed the changes to the Bar's 401 (k) provider from Principal to John Hancock. The motion to make the change passed with no opposition.

5. Katherine Fox explained the minor revisions made to the Paralegal Division Affidavits. The motion to accept the changes to the affidavits passed with no opposition.

6. John Baldwin reported that the Casemaker research link is on the Bar's website and members will receive their pin numbers via e-mail. The Bar has received a number of positive comments and the members seem to be grateful to have a benefit that is quick, simple and inexpensive.

7. John Baldwin reported that Law and Justice Center security improvements are moving along. Options are being reviewed for additional motion sensors installed on windows and doors.

8. John Baldwin reported on Bar communications. Efforts are being focused on: (a) what is the message the Bar wants to convey and (b) regularly scheduled messages to specific groups. The e-mail bulletin seems to be the best way to disseminate information to the members on a regular basis for general information.

9. John Baldwin reported on the developments of LegalSpan. He noted that 150 bars need internal software of one kind or another and if the Bar assists in developing the prototype, then we can market the product to other bars and possibly make some money. We are currently working on getting other states to join us in a "Bar Alliance" to develop this prototype and to help share the cost.

10. David Bird gave a report on the Judicial Council meeting. It was noted that the Legislature granted a 6% salary increase to the judiciary.

11. John T. Nielsen reported on the Legislative session. He noted that the most significant accomplishments during the session were: (a) an increase in the judicial salaries and (b) legislators appointed to the Judicial Appropriations Committee.

12. Scott Sabey gave the Governmental Relations committee report. Scott reports that there are two areas of concern: (a) a shortage of participation and involvement from sections; and (b) the need for assistance at regular committee meetings. The shortage of participation and involvement by sections is becoming a major problem because while the committee is telling legislators that they can assist with the drafting of bills etc., they are not receiving help from members. George Daines noted that the Commission would prepare a letter for committee members informing them of their duty to follow certain requirements before speaking on behalf of the Bar (or the sections).

13. Rusty Vetter reported on the Lawyers Helping Lawyers Committee. A discussion followed the report and will continue in April.

14. John Baldwin reported that the Finance Committee would like to change the investment policy. He explained that the change is technical in nature but is designed to maintain invested funds for a longer period of time but for no longer than 18 months. The motion to approve the change passed with no opposition.

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

KIRTON & McCONKIE

congratulates the following individuals
on their recent election as shareholders and members of the firm:

KENNETH E. HORTON

ROBERT C. HYDE

ROBERT R. WALLACE

TIMOTHY M. WHEELWRIGHT

LOYAL C. HULME

in addition

DAX D. ANDERSON, has joined the firm's Intellectual Property section as an associate.

BRENT A. ANDREWSEN, has joined the firm's Corporate & Taxation section as an associate.

KENNETH W. BIRRELL, has received his L.L.M. from New York University in 2004, and has returned to the firm as an associate in the firm's Corporate and Taxation section.

DONALD F. CRANE, formerly General Counsel for Cytogen Corporation, has become of counsel to the firm and will practice in the International Law section.

KEVIN F. CUNNINGHAM, formerly Senior Counsel for Bristol-Meyers Squibb, has become of counsel to the firm and will practice with the firm's International Law section.

TERRY L. FUND, has joined the firm's International Law section as an associate.

SCOTT E. ISAACSON, is of counsel with the firm after six years as International Legal Counsel for The Church of Jesus Christ of Latter-day Saints. He will practice with the International Law section.

JAROD R. MARROTT, joined the firm in 2004 as an associate in the Intellectual Property section.

ERIC B. ROBINSON, practices as an associate in the firm's Real Property section.

NICHOLAS D. WELLS, practices as an associate in the firm's Intellectual Property section.

KIRTON & McCONKIE
ATTORNEYS AT LAW

1800 Eagle Gate Tower • 60 East South Temple • P.O. Box 45120 • Salt Lake City, Utah 84145-0120
Telephone (801) 328-3600 • Utah County (801) 223-9666 • Fax (801) 321-4893 • www.kmclaw.com

Mailing of Licensing Forms

The licensing forms for 2005-06 are scheduled to be mailed during the last week of May and the first week of June. Fees are due July 1, 2005; however, fees received or postmarked on or before August 1, 2005 will be processed without penalty.

It is the responsibility of each attorney to provide the Bar with current address information. This information must be submitted in writing. Failure to notify the Bar of an address change does not relieve an attorney from paying licensing fees or late fees. Failure to make timely payment will result in an administrative suspension for non-payment after the deadline. You may check the Bar's website to see what information is on file. The site is updated weekly and is located at www.utahbar.org.

If you need to update your address information, please submit the information to:

Arnold Birrell
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111-3834

You may also fax the information to (801)531-9537, or e-mail the corrections to arnold.birrell@utahbar.org.

NOTICE of Legislative Rebate

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

2005 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2005 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Tuesday, September16, 2005. The award categories include:

1. Distinguished Community Member Award
2. Pro Bono Lawyer of the Year
3. Professionalism Award

Notice Appointing Trustee to Protect the Interests of the Clients of the Late Melvin E. Leslie

On February 4, 2005, the Honorable Joseph C. Fratto, Jr., Third Judicial District Court, entered an Order Appointing Trustee to Protect the Interests of the Clients of Melvin E. Leslie. Pursuant to Rule 27 of the Rules of Lawyer Discipline and Disability, Gary Atkin is appointed as trustee to take control of client files and other property that was in Mr. Leslie's possession, and distribute them to the clients.

West Jordan Courthouse to Open Doors in June

A new West Jordan Courthouse is scheduled to open its doors for business at 8080 Redwood Road on Monday, June 20, 2005. The 112,000 sq. ft. courthouse will be the second largest courthouse in Utah – next to the Scott M. Matheson Courthouse – with a 12-courtroom configuration. The courthouse will administer cases from the south end of the Salt Lake valley and will expand operations to execute court functions that previously have not been available at the Sandy and West Valley City courthouses.

Since the ground breaking on the courthouse took place November 2003, work has been steady to build the $19.3 million facility. The courthouse will include six Third District courtrooms – including two unfinished courtrooms – and six Third District juvenile courtrooms – one of which will be unfinished. In addition, Alternative Dispute Resolution and mediation rooms will be located in the courthouse and are designed to minimize the formality of the courtroom setting. Offices for the District Attorney's office will also be located in the courthouse.

"The West Jordan Courthouse will allow the public from the south end of the valley convenient access to court services," said Dan Becker, Utah State Court administrator. "The West Jordan facility will offer all of the services available at the Matheson Courthouse, but not currently available at the Sandy or West Valley City courthouses."

Employees of the Sandy and West Valley City courthouses will move into the West Jordan Courthouse during the week of June 13. The Sandy Courthouse will close for business on June 10 at 5:00 p.m. and the West Valley City Courthouse is expected to completely close fall 2005. The West Jordan Courthouse phone numbers and additional information will be posted on the Utah State Courts' website at www.utcourts.gov when available.

GSBS Architects designed the West Jordan Courthouse. The firm also designed the Logan Courthouse. Okland Construction Company is the project contractor.

Discipline Corner

DISBARMENT

On February 1, 2005, the Honorable G. Rand Beacham, Fifth Judicial District Court, entered Findings of Fact, Conclusions of Law, Ruling and Order of Disbarment against Roy L. Bischoff disbarring Mr. Bischoff from the practice of law for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.5(b) (Fees), 1.15(b) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 3.2 (Expediting Litigation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4 (a), (c), and (d) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Bischoff was retained to represent a client in a bankruptcy matter. The client paid a fee to Mr. Bischoff. Mr. Bischoff did not file the necessary documents with the court and the case was dismissed. In the meantime, Mr. Bischoff had moved out of state and did not inform the client of his new address. The client located Mr. Bischoff and Mr. Bischoff promised to return the client's retainer fee and file. Mr. Bischoff did not return the client's property. In a second matter, Mr. Bischoff was retained to represent a client in an immigration matter. The client paid Mr. Bischoff a filing and retainer fee. Mr. Bischoff moved out of state. The client located Mr. Bischoff and requested proof of filing the immigration petition. In order to appease the client, Mr. Bischoff produced a fabricated letter to the client alleging it was from the former Immigration and Naturalization Service ("INS") (now U.S. Citizenship and Immigration Service). The client made inquiries with the INS and was told there was no record of the application. The client thereafter attempted to contact Mr. Bischoff without success. In a third matter, Mr. Bischoff was retained in debt collection matters. Despite attempts to contact Mr. Bischoff, Mr. Bischoff did not keep his clients reasonably informed of the progress of the cases. In a fourth matter, Mr. Bischoff was retained to represent a client in a lease agreement dispute. The client paid Mr. Bischoff a retainer fee and Mr. Bischoff had the client sign an agreement stating part of the fee was non-refundable. Mr. Bischoff prepared a bill and one letter for the client to review. Two months later, Mr. Bischoff moved out of state. The client attempted to contact Mr. Bischoff without success. Mr. Bischoff did not return the client's unearned retainer or file. In a fifth matter, Mr. Bischoff represented a client to establish visitation rights. The client paid Mr. Bischoff a retainer fee. Mr. Bischoff told the client that he had filed a foreign judgment in court, but the clients never received a copy of any documents. The last communication from Mr. Bischoff was a bill, which the client paid. No visitation was ever established. The Office of Professional Conduct ("OPC") sent Mr. Bischoff Notices of Informal Complaint in all five cases requesting that Mr. Bischoff respond in writing. Mr. Bischoff failed to respond to the OPC's lawful demands for information.

Aggravating factors include: dishonest or selfish motive; pattern of misconduct; multiple offenses; obstruction of disciplinary proceedings; refusal to acknowledge the wrongful nature of the misconduct involved; vulnerability of victim; lack of timely effort to make restitution in good faith; and illegal conduct.

INTERIM SUSPENSION

On March 4, 2005, the Honorable Leslie A. Lewis, Third Judicial District Court, entered an Order of Interim Suspension suspending Jay W. Taylor from the practice of law pending final disposition of Mr. Taylor's resignation with discipline pending filed with the Utah Supreme Court.

INTERIM SUSPENSION

On February 17, 2005, the Honorable Fred D. Howard, Fourth Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Interim Suspension, suspending Trevor L. Zabriskie from the practice of law pending final disposition of the Complaint filed against him.

In summary:

Mr. Zabriskie was convicted of endangerment of a child, a third degree felony, in violation of Utah Code Annotated § 76-5-112.5 and sexual battery, a class A misdemeanor, in violation of Utah Code Annotated § 76-9-702(3), which were later reduced to a class A misdemeanor and class B misdemeanor respectively. The interim suspension is based upon this conviction.

PUBLIC REPRIMAND

On February 24, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Bret Hicken for violation of Rules 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.16(a) (Declining or Terminating Representation), 5.3(a), (b), and (c) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Hicken was retained to pursue a collection action for an out of state client. Mr. Hicken sent demand letters to the debtors and the complaints were signed approximately five months later. The

client flew to Utah to attend court hearings, but Mr. Hicken told the client that the court dates had been postponed. The client contacted Mr. Hicken on numerous occasions, but Mr. Hicken did not return the telephone calls. The client continued to send monthly billings to the debtors, and as a result of these billings later found out that the complaints had not been served upon the debtors. When the client eventually contacted Mr. Hicken, Mr. Hicken reassured the client that the work had been completed. Mr. Hicken later indicated to the client that a favorable judgment had been obtained against the debtors and requested copies of costs of the client's trip to Utah. The client contacted Mr. Hicken to ascertain when the client would receive the money. Mr. Hicken required to withdraw from representation because of health reasons. The client contacted Mr. Hicken's paralegal, who gave the client court dates and status updates which were false and misleading. The client subsequently retained another attorney who told the client that there was no record of any filings or of any work done. Mr. Hicken reimbursed the client's retainer.

PUBLIC REPRIMAND

On May 24, 2004, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against David O. Drake for violation of Rules 5.3(a) and (b) (Responsibilities Regarding Nonlawyer Assistants) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Drake was retained to represent his employee in a lawsuit. Mr. Drake permitted his non-attorney employee to take a sworn statement of the defendant the employee was suing. In a second matter, Mr. Drake was retained to represent a client in a personal injury matter. Mr. Drake permitted his non-attorney employee to enter into and sign a contingent fee retainer agreement and prepare and submit a settlement demand letter to an insurance company on behalf of the client, which resulted in a substantial recovery for the client. In a third matter, Mr. Drake was retained to represent a client who was involved in an automobile accident. Mr. Drake permitted his non-attorney employee to sign a lien to

a medical provider, which required an attorney's signature. When the client's case settled, Mr. Drake's non-attorney employee deposited the settlement funds into an attorney trust account, which the employee had inappropriately opened without Mr. Drake's knowledge. The settlement was safely disbursed to the client. In the course of representing these three clients, Mr. Drake failed to properly supervise his employee, and failed to ensure that his employee's conduct was compatible with Mr. Drake's professional obligations as a lawyer.

ADMONITION

On March 6, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 8.1(b) (Bar Admission and Disciplinary Matters) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The Office of Professional Conduct ("OPC") received an informal complaint against an attorney. The OPC sent a Notice of Informal Complaint to the attorney requesting a written response. The attorney failed to respond to the OPC's lawful demand for information.

ADMONITION

On March 6, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.4(a) and (b) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to represent a husband and wife in a termination of parental rights and step-parent adoption matter. The attorney did not timely inform the clients about hearing dates or adequately communicate with the clients to explain the process to them. The attorney also failed to protect the clients' interests by not clearly communicating withdrawal from the representation, nor advising the clients of the consequences of withdrawal, nor cooperating with successor counsel to protect the clients.

Utah State Bar Request for 2005-2006 Committee Assignment

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

Name _____ Bar No. _____

Office Address _____ Telephone _____

Committee Request

1st Choice _____ 2nd Choice _____

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

_____

_____

_____

_____

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

Committees

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

Detach & Mail by June 30, 2005 to:
David R. Bird, President-Elect • 645 South 200 East • Salt Lake City, UT 84111-3834

Message from ABA President

As members of the legal profession, I know you share my concern over the public's misunderstanding of the judiciary's role and the politically motivated criticism of the judiciary stemming from the Terri Schiavo case, and are equally alarmed about the murders of Judge Lefkow's family members in Chicago and the attacks at the Fulton County Courthouse in Georgia. The circumstances of these tragic events require careful analysis, thoughtful leadership, and measured response. The American Bar Association has long held the preservation of judicial independence as one of the most important Association goals. These recent events have elevated the urgency of that commitment among the ABA's leadership. In the past several days, I have issued public statements condemning the violence against our judiciary and the gratuitous and vicious public attacks on the dedicated men and women who are our country's judges. During my speaking engagements, I have taken the opportunity to call for a change in tenor when the national discussion turns to our justice system.

Regardless of how one feels about the specific circumstances of the Schiavo – or any – situation, the role of the judiciary is clear. Federal and state judges are charged with weighing the facts of a case and following the remedies set forth in the law, responsibilities they carry out valiantly and with great dignity and sensitivity.

It is vital that the legal community address the current atmosphere in which our legal system operates, in what can only be called a decline in civility and respect toward our justice system. Too often judges are characterized as political tools and the justice system merely an offshoot of politics, and not the independent leg of our democracy that they are. Efforts to address the problems of courthouse security have been initiated by the Judicial Conference of the United States and the National Center for State Courts, and I have approached these organizations as well as a number of entities within the ABA to determine where and how we can best contribute to resolving problems faced by the nation's courts and judges.

The Association is committed to promoting the importance of judicial independence. The four entities that comprise the ABA Justice Center: the Judicial Division, the Standing Committee on Judicial Independence, the Standing Committee on Federal Judicial Improvements, and the Coalition for Justice work tirelessly to develop resources, initiatives, policies, and programs that support our justice system, our judges, and our courts. Information on each of these entities' initiatives can be accessed through the Justice Center's Web site at http://www.abanet.org/justicecenter/home.html

Thank you for your continued support of the ABA, the legal profession, and the judiciary. As the voice of the legal profession, we must not allow those among us who would do harm, in any form, to destroy the very freedoms our legal system is entrusted to protect.

Sincerely,

Robert J. Grey, Jr.
President, American Bar Association

Paperless? Hah! Less Paper – Absolutely Basic Records Management Concepts

by Heather Holland

If you have not considered records management as part of your business or firm plan, it can be time consuming and if done in-house it can be overwhelming, however it is absolutely necessary. Good recordkeeping and a good recordkeeping system are essential components and healthy for every business: ensuring compliance with state and federal employment laws, it can also play a defining role in litigation, arbitration or mediation or when the auditor comes knocking at your door. *(See Arias v. United States Service Industries, Inc., D.C. CA, No. 95-7158, 1996.)*

EASED – Evaluate, Annually, Systemize, Everyone, Destroy. This has become my mantra and every year I chant it louder and louder. This article should provide you with some basic concepts for records management and questions to ask yourself when getting started.

The very first question is: Do you want to do this in-house with your own employees or do you want to hire a records management facility? Considerations include company or firm size, amount of data, personal preference, and cost. Whatever the outcome, there are several essential concepts to consider in evaluating the first question:

Evaluate Your Records

Records management consists of managing records made up of data in a variety of forms, including the following: client information sheets, trial notebooks, contracts, invoices, checks, pay stubs, legal research, e-mail, microfiche, cds, magnetic database tapes, video, audio tapes and on and on. While the initial evaluation can be time-consuming, it is well worth the reward of knowing what you have.

Companies must look to federal and state law and in some cases municipal statutes. Additionally, there may be industry-specific (Sarbanes Oxley, HIPPA, OSHA, MSHA, FMLA, FLSA, etc.) considerations as to the types of records necessary to keep. If you have a large amount of data such as 5000 records storage boxes or banker boxes, you might want to consider a records management facility which can organize, manage, house and destroy for you. Depending on the type of box you utilize this can amount to approximately 6000+ cubic feet of storage, which can cost anywhere from $600.00 to $1000.00 a month in a storage facility. If you only have 50 to 100 boxes a year you might want to consider a storage unit which may cost $35.00 a month; where you are responsible for the organization, management, and destruction which you can do in your office with a document shredder.

Questions to ask about your records or data include the following: Why do I generate a record? What is the life cycle of this record? Where do I keep it while I need it? Where does it go when am I done with it? How long do I have to keep it after I am done with it? Do I even have to keep it after I am done with it, and, if so, where am I going to store it? When can I destroy it? How should I destroy it? All of these questions lead to different answers for different records. Generating a record matrix can be extremely helpful.

Annually Inspect Your Records and Your System

Making a yearly habit of this business practice ensures compliance with changing laws on recordkeeping requirements and retention. It also ensures destruction, which leads to cost containment.

Systemization of a Records Management Policy Allows for Consistency

If you write it down and practice it routinely, management of the data becomes easier and easier. There is simply too much information to remember to try and memorize it along with the changes that occur in the law each year. Always index what is in each box for ease of retrievability and index what you destroy so you know it has been destroyed. Records management facilities can do this for you.

Everyone Should Participate

While it is extremely important to include everyone, ultimately one

person should be responsible for the processes that guide records management. Meeting with managers and other department heads must be part of the evaluation process and everyone should be included, including partners and/or executive management. Everyone should participate at some level, even if only at the initial evaluation, to determine the types of records generated. This information gathering is essential to create the record matrix and understand the life cycle of the records generated by the company or firm. New employees can also learn valuable information about a business or firm section through understanding what types of records need to be kept together or which forms are used, which can lead to a better understanding of their job and increased performance.

Destroy, Destroy, and Destroy

All records management policies and procedures need to have a destruction of records section. Keeping too much information can be detrimental for several reasons – the more records and information you keep the more likely it is to fall into the wrong hands leading to confidentiality issues or identity theft. Endless paper can be costly for storage and can become non-manageable. Disposing of records too early can be against the law. You could also find that you need them again for a court case or if you are trying to respond to a request for records or a subpoena. Knowing what to destroy and when to destroy it helps your company or firm stay healthy. Always get a certificate of destruction from the company which destroys your records.

Having everyone systematically, evaluate their records annually and destroy unnecessary records is a vital part of each business or firm and if practiced regularly will have EASED you into a new year. When data becomes clutter and the clutter becomes unmanageable: files piled in office closets, under desks, and on top of credenzas, or three feet high on a desk it is time to organize and clear it out. I guarantee you will feel better about going to work and you will work better. Below are some reference books and website links for further detailed information:

NARA – U.S. National Archives & Records Association: http://www.archives.gov/records_management/index.html

ARMA – ARMA International – The Association of Information Management Professionals: http://www.arma.org/index.cfm

Ira A. Penn, Gail Pennix, and Jim Coulson. *Records Management Handbook – 2 Rev. ed.* Ashgate Publishing Company, Burlington, VT, 1994.

Alexander Hamilton Institutute, Inc. *Employer's Guide to Record Keeping Requirements.* AHI, Ramsey, NJ, 1998.

Annual Paralegal Day Celebration

Every third Thursday in May has been declared Paralegal Day in the State of Utah. We invite all attorneys and their paralegals to join us in celebrating this day and are pleased to have Lt. Governor Gary Herbert offering some opening remarks and U.S. District Court Judge Dale A. Kimball, presenting the keynote address. Please see the invitation below for complete details.

As paralegals in the State of Utah, we take great pride in our profession. The paralegal field is currently one of the fastest growing professions in the country and was ranked by the State of Utah, Department of Workforce Services as one of Utah's "five-star" jobs. The paralegal profession is projected to grow faster than average for all occupations through 2012.

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

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

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

The utilization of paralegals in rendering legal services has been recognized and promulgated by the American Bar Association and other professional societies. Attorneys who use paralegals have achieved unparalleled success in providing clients with high-quality service. Utilizing qualified paralegals helps attorneys deliver better service and more value while increasing law firm profits. As a result, paralegals have gained widespread acceptance and have become essential contributors in the delivery of legal services.

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

Your Attendance is Requested…

at a luncheon honoring Utah Paralegals and supervising attorneys
Hosted by the Paralegal Division of the Utah State Bar

Thursday, May 19, 2005 • 12:00–1:30 p.m.
Downtown Marriott Hotel • 75 South West Temple, Ballroom Salons G-J

Special Guest/Remarks ***Lt. Governor Gary Herbert***

Keynote Address: ***U.S. District Court Judge Dale A. Kimball***

1 hour of Ethics CLE Credit
Cost is $30 per person

Register online at www.utahbar.org or by phone at 297-7032 by May 16, 2005

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
05/12/05	**Annual Spring Business Law Seminar:** 8:30 am–12:00 pm. Section Members free, $40 others.	3
05/13/05	**Annual Spring Family Law Seminar:** 8:15 am–4:00 pm. $125 Members; $155 others. Topics include: Guardian Ad Litem in District Juvenile Court, Case Law and Statute Update, Fees and Fee Arbitration at the Bar, How Judges Handle Objections to Commissioners' Recommendations.	6 Hours CLE (includes 1 hr Ethics)
05/18–21/05	**NITA Trial Seminar.** 8:30 am– 5:30 pm daily. Salt Palace Convention Center. $800. Initial registration limited to Litigation Section Members – Limited to 48. Agenda TBA.	Approx. 24 (including 6 NLCLE)
05/19/05	**NLCLE: Basics on Intellectual Property.** 5:30–8:30 pm. $55 for YLD Members; $75 for all others. Introduction to Patent Law, Introduction to Trademark Law, Introduction to Copyright and Trade Secret Law.	3 CLE/NLCLE
05/19/05	**Annual Paralegal Day Seminar.** 12:00–1:30 pm. SLC Downtown Marriott, 75 South West Temple, SLC. $30. Navigating the Waters of Paralegalism. Keynote Speaker: Judge Dale A. Kimball–U.S. District Court, Special Guest/Remarks: Lt. Governor Gary Herbert.	1 Ethics
06/10/05	**New Lawyer Mandatory.** 8:30 am–12:00 pm. This Seminar fulfills the Mandatory Seminar Requirement. Cost is $55. Topics include: Introduction to the Bar and to the Practice, Current Issues for Today's Lawyer, What Does the Bar Have to Offer Me?, Avoiding Malpractice – Tips for a Successful Practice, Lawyer to Live – Live to Lawyer,	fulfills mandatory new lawyer requirement
06/16/05	**NLCLE: Basics on Personal Injury.** 5:30–8:30 pm. $55 for YLD Members; $75 for all others. Agenda TBA.	3 CLE/NLCLE
7/20/05	**OPC Ethics School.** 9:00 am–4:30 pm. $150 before July 8th, $175 after July 8th.	6 CLE/NLCLE
08/19–20/05	**28th Annual Securities Law Section Workshop:** Jackson Hole, Wyoming, Teton Lodge Resort. Agenda pending. Make your reservations early at 1-800-801-6615. Mention you are with the Utah State Bar Securities Law Section.	

To register for any of these seminars: Call 297-7033, 297-7032 or 297-7036, OR Fax to 531-0660, OR email cle@utahbar.org, OR on-line at www.utahbar.org/cle. Include your name, bar number and seminar title.

REGISTRATION FORM

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

Registration for (Seminar Title(s)):

(1) _____ (2) _____

(3) _____ (4) _____

Name: _____ Bar No.: _____

Phone No.: _____ Total $ _____

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

☐ AMEX Exp. Date _____

Classified Ads

RATES & DEADLINES

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

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

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

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

NOTICES

Immigration Law Conference: The American Immigration Lawyers Association's Annual Conference is June 22 – 25, 2005 in Salt Lake City. Registration includes admission to all CLE sessions and Exhibit Hall, Grand Opening Gala, Presidents Reception, Saturday Night Party, continental breakfast (Thurs. – Sat.), attendee list, and the *2005–06 Immigration & Nationality Law Handbook* (a $225 value!). Sessions cover family immigration, business immigration, removal, asylum, deportation, litigation, ethics, occupations, government agency updates, a 3-day fundamentals track and a Legal Brief Writing Seminar. Participants can earn up to 30 CLE credit hours. Visit www.aila.org/ac for complete conference details and online registration.

Layton attorney looking for the Last Will and Testament of SHIRLEY JO OLIVER. The will was probably prepared between November, 1996 and April, 2004, probably in Davis or Weber County. Please call Law Offices of Daniel G. Shumway at 801-546-1264 with any pertinent information.

FOR SALE

Beautiful 5BR/3.5 bath, custom home w/many extras in quiet wooded park w/creek, in 38 unit planned unit dev in Kaysville (Brookhaven) on private street w/friendly neighbors. Association does yard and snow removal. Near access to Hwy89/I15, express buses to SLC/Ogden. Steal at $249,900. (801) 589-3102 or www.utahrealestate.com.

Office furniture for sale. Cherrywood large table/desk, credenza, round table, client chairs, designer waiting room chairs, etc. Please call (801) 582-8635 and leave message.

NEW oversized attorney's desk. Walnut, 3 large, locking file drawers finished back. Retail $1995.00, asking $650.00. Call Eric @ 801-979-0304

POSITIONS AVAILABLE

DEPUTY DISTRICT ATTORNEY positions (Associate Attorney) are available in the Criminal Division of the Office of the Clark County District Attorney in Las Vegas, Nevada. Starting salary is $59,417 plus benefits. Candidates must be a member of the State Bar of Nevada in good standing. A complete job description may be found by visiting the Department of Human Resources on the Clark County web site at www.accessclarkcounty.com. Applications may be made on-line or by contacting the Clark County Department of Human Resources at (702) 455-4565. E.O.E.

Expanding bankruptcy firm seeking associate with bankruptcy experience. Salary plus percentage based on experience. Send resume to Law Firm PO Box 902161 Sandy UT 84090.

Long established Salt Lake firm seeks to expand its business and transactional practice by adding attorneys with established business transactional and commercial litigation practices. Please send resume to: Christine Critchley, Utah State Bar, Confidential Box #3, 645 South 200 East, Salt Lake City, UT 84111-3834 or e-mail ccritchley@utahbar.org.

OFFICE SPACE/SHARING

OFFICE SHARE SPACE: 1, 2, or 3 offices available downtown with receptionist area, conference room, break room, work room with photocopier, fax machine, high speed internet, and kitchenette. Starting at $300/month. Call Jon 599-0913.

STOCK EXCHANGE BUILDING has several available spaces, two office suites containing two to three offices, conference room and file room, as well as two individual offices and two executive suites with full services. Prices range from $400 to $1,600 per month. One-half block from state and federal courts. Contact Richard or Joanne at 534-0909.

"A" Office space: Looking for tenants to sublease 1600–2200 SF on 2nd floor of downtown office building at 30 E. Broadway, located close to courts and TRAX. New brick building with large glass windows, includes restaurants, art gallery, parking garage. 2nd floor space has kitchen, file room, offices, conference room, reception area. 1st floor has 1473 SF available, with kitchen, storage, cubicles and some furniture available. To view the space call Annabel, North Star Real Estate: (801) 322-3120, or (801) 879-5237.

JUST STEPS FROM STATE AND FEDERAL COURTS. Main level of #44 E. Exchange Place (355 South). Ideal legal/professional space at very competitive price. Noteworthy architectural design. Reception, conference room, offices, storage, expandable. Please call Van Dam & Associates at 943-4850.

BOUNTIFUL EXECUTIVE OFFICE SPACE IN PRIME LOCATION: In Colonial Square. Completely remodeled inside and out. Just 3 blocks from I-15. Less than ten minutes from Salt Lake courts. Common reception area with receptionist provided for screening calls/clients, receiving/sorting mail, and available for light secretarial services. Conference and break rooms. Includes phone system, use of copy/fax/mail-meter equipment, CAT 5 to each office, etc. Offices range from $250–$900/mos. Discount if leased for term. Sean/Janet 532-1717.

SERVICES

CHAPTER 11 BUSINESS REORGANIZATION. Attorney with 27 years experience in this area. 1/2 hour free consultation. Franklin L. Slaugh, (801) 572-4412.

Expert Witness: safety investigation, slip and falls, slip testing, construction, machinery, industrial, product safety, human factors. 30 years experience. www.fdavidpierce.com

Forensic Document Examiner, K-D Vacca, Inc. J. Donald Vacca, P.O. Box 6237, Battlement Mesa, CO 80636-6237, (970) 285-6787 Fax (970) 285-6788, E-mail jdvaccaqd@msn.com Specialization: Examination, comparison, identification of hand-writing, indented writing, typewriters, inks, documents, printed materials, photocopiers. Fully equipped laboratroy. Retired from Denver Police Crime Laboratory.

Lump Sums Cash Paid For Seller-Financed Real Estate Notes & Contracts, Divorce Notes, Business Notes, Structured Settlements, Lottery Winnings. Since 1992. www.cascadefunding.com. Cascade Funding, Inc. 1 (800) 476-9644.

Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics: Consultant and expert witness. Charles M. Bennett, 257 E. 200 South, Suite 800, Salt Lake City, UT 84111; (801) 578-3525. Fellow and Regent, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.

PROBATE MEDIATION AND ARBITRATION: Charles M. Bennett, 257 E. 200 South, Suite 800, Salt Lake City, UT 84111; (801) 578-3525. Graduate: Mediation Course, the American College of Trust & Estate Counsel.

California Probate? Has someone asked you to do a probate in California? Keep your case and let me help you. Walter C. Bornemeier, Farmington. 801-451-8400 (or: 1-888-348-3232). Licensed in Utah & California – 39 years experience.

WE HAVE THOUSANDS OF MEDICAL MALPRACTICE EXPERT WITNESSES. Fast, easy, affordable, flat-rate referrals to board certified, practicing doctors in all specialties. Your satisfaction GUARANTEED. Just need an analysis? Our veteran MD specialists can do that for you, quickly and easily, for a low flat fee. Med-mal EXPERTS, Inc. www.medmalEXPERTS.com 888-521-3601

Language – CTC Chinese Translations & Consulting Mandarin and Cantonese and other Asian languages. We have on staff highly qualified interpreters and translators in all civil and legal work. We interpret and/or translate all documents including: depositions, consultations, conferences, hearings, insurance documents, medical records, patent records, etc. with traditional and simplified Chinese. Tel: (801) 942-0961, Fax: (801) 942-0961. E-mail: eyctrans@hotmail.com

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