Utah Bar JOURNAL

Volume 18 No. 5
Sep/Oct 2005

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

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

COVER: Small stream and wetlands up American Fork Canyon on the trail to the top of Mt. Timpanogos. Photo by first-time contributor Laramie D. Merritt, Bluffdale, Utah.

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, $30; single copies, $5. For information on advertising rates and space reservations visit www.utahbarjournal.com or call Laniece Roberts at (801) 538-0526. For classified advertising rates and information please call Christine Critchley at (801) 297-7022.

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Submission of Articles for the Utah Bar Journal

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

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

Cover Art

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

Interested in writing an article for the Bar Journal?

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

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

The Utah Bar Journal

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Letter to the Editor

Dear Editor:

It seems that with numbing regularity your *Journal* addresses the issue of lawyer civility and such a constant theme in the publication suggests that the Bar there has simply never learned good manners from any source. However, the article by Mr. Johnson I read with particular amusement. Were I in court trying the issue of whether new standards promulgated by the Utah Supreme Court for civility among lawyers should be adopted and Mr. Johnson were the witness for the proposition that such standards are unnecessary, and assuming that he testified in the same vein as his article, the court's offer of cross-examination would be met by the following heartfelt response: "No questions, your Honor. The witness has adequately proved our point."

Michael T. Lowe,
Orange, California

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.

Many Hands Make Light Work

by David R. Bird

"Many hands make light work" was a favorite saying of my grandmother. This has never been truer than it is at the Utah State Bar. I wish to begin my term as President by thanking each of you who give freely of your time and talents to further the Bar and improve our profession. Without you the organization could do little. If each one of us will help where we can, great results will occur.

There are many important things happening in our Bar. As I write, we have just concluded a very successful Annual Meeting at Sun Valley under the direction of Lauren Scholnick and Michael Petrogeorge and their committee. Elaina Maragakis and Christian Clinger and their committee are hard at work planning next year's meeting to be held July 12-15 in Newport Beach. Mark your calendars and plan to attend it as well as the Fall Forum on November 11, 2005 in Salt Lake City and the Spring Convention, March 9-11, 2006 in St. George.

Three hundred and seventeen people recently took the Bar exam; the largest number ever. The admissions process could not work without the Admissions, Character and Fitness, and Bar Examiners Committees and the staff led by Joni Seko. Much of the work of the Bar is done by standing voluntary committees.

We have twenty such committees and over 550 participating members appointed by the Bar Commission:

> Admissions; Annual Meeting; Bar Exam Administration; Bar Examiners; Bar Journal; Character and Fitness; CLE Advisory Board; Client Security Fund; Courts And Judges; Ethics Advisory Opinion; Fee Arbitration; Governmental Relations; Law Related Education and Law Day; Law and Technology; Lawyer Benefits; Lawyers Helping Lawyers; Needs of the Elderly; NLCLE; Spring Convention; and Unauthorized Practice of Law.

If you would like to participate in one of these committees please let me know.

In addition there are 32 different Bar Sections covering most areas of practice. Each Section elects its own officers, collects dues and arranges activities for its members. A list of the Sections, their officers and links to their websites can be found on the Bar's web site: www.utahbar.org under "Utah Bar Directories." Section participation exceeds 6500 Bar members. There is no better way to interact informally with colleagues in your practice area. Contact the Bar office if you desire information about joining a Section.

Regional and Specialty Bars also provide opportunities for service and personal satisfaction. Please take note of the Utah Minority Bar Association event scheduled for October 15th to honor the first 50 minority members of the Utah Bar. I hope you will plan to attend as the profession honors these trailblazers.

The Bar Commission comprised of 12 elected, 2 Supreme Court appointed, and 10 ex officio members direct the Bar. These men and women spend countless hours in service to the profession. All do so at considerable monetary sacrifice, but great personal satisfaction. I encourage any Bar member to consider running for the Commission.

Lastly, I would like to express my appreciation for our professional staff led by John Baldwin and Richard Dibblee. These 33 people are dedicated individuals who work each day to make sure our Bar functions smoothly.

Please consider my Grandmother's saying. Share your hands. The personal and professional rewards will be incalculable.

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Why the Bar Might Mandate Disclosure of Uninsured Practice

by Yvette Donosso Diaz

Introduction

The Utah State Bar Commission is considering amendments to Rule 1.4 of the Rules of Professional Conduct (Rule 1.4) that would require lawyers to disclose to their clients if they do not have professional liability insurance with at least $100,000 coverage. Why are we doing this? Is it to make life more difficult for solo practitioners or new lawyers? To increase the price of legal fees and malpractice suits against our colleagues? The answer is that disclosure of lack of minimum insurance coverage will have a positive impact on our profession: it will increase our "professionalism," protect the interests of our members, protect the interests of clients and serve the public.

On August 10, 2004, the American Bar Association's (ABA) House of Delegates adopted a Model Court Rule (the Rule) recommended by the ABA's Standing Committee on Client Protection that requires lawyers to disclose on their annual registration forms whether they maintain professional liability insurance.[1] The Rule does not provide minimum coverage limits nor does it require direct disclosure of insurance information to the public. However, the Rule does require lawyers who report being covered by professional liability insurance to notify their state's highest court whenever their coverage lapses or terminates for any reason. The Rule allows the information submitted pursuant to the disclosure requirement to be made available to the public by means designated appropriate by the state's highest court. Finally, the Rule allows the state's highest court to suspend a lawyer who fails or refuses to comply with the disclosure requirement, or who provides false information in response to the same. Lawyers who represent organizational clients full time, such as in-house counsel and government lawyers, as well as those not engaged in the active practice of law, are excluded from the disclosure requirement.

Lay of the Land

Delaware, Illinois, Kansas, Michigan, Nebraska, New Mexico, North Carolina and Virginia require lawyers to disclose whether they maintain professional liability insurance on their annual registration form. Of the latter, Delaware, Michigan and New Mexico do not provide any of the disclosed information to the public. Alaska, New Hampshire, Ohio and South Dakota require lawyers to directly disclose to their clients, in writing, if they are uninsured or underinsured. However, they also do not require disclosure of insurance information to the public. Alaska, for example, requires disclosure directly to a client through a written fee agreement. *See,* Alaska Rules of Professional Conduct 1.4 (c). If an attorney does not maintain insurance with limits of at least $100,000 per claim and $300,000 annual aggregate, if coverage drops below these limits, or if coverage is terminated, attorneys in Alaska are under the duty to inform their clients in writing of the same. *Id.*

In comparison, South Dakota, requires attorneys who do not have professional liability insurance with limits of at least $100,000 to disclose this fact to their clients on their letterhead using the specific following language: "This lawyer is not covered by professional liability insurance;" or "This firm is not covered by professional liability insurance." *See,* South Dakota Rules of Professional Conduct, Rule 1.4 (c)(1) and (2). This disclosure must be included in every communication with a client. *Id.* 1.4(d). In effect, certain lawyers in South Dakota need two sets of letterhead, one for communications with clients and another for all other letters.

None of these states require professional liability insurance in order to be licensed – they only require some form of disclosure. In fact, Oregon is the only state that requires lawyers to carry professional liability insurance for licensing purposes. In 1978 it formed its own Professional

Liability Fund (Fund) that is a mandatory provider of primary malpractice coverage for lawyers who practice in Oregon. The Fund affords minimal levels of $300,000 coverage per occurrence at a premium of about $2,000 per year.

This past year several states reviewed proposals and undertook studies to consider professional liability insurance disclosure requirements for their bar members. These include Colorado, Georgia, Massachusetts, Pennsylvania, Utah and Washington.

Utah

The Utah Bar Commission is reviewing a proposal that would require lawyers who do not carry professional liability insurance for at least $100,000 to disclose this fact to the Utah State Bar and their prospective clients. The proposed Rule 1.4 adds three subsections, (c) through (e), and reads as follows:

Rule 1.4. Communication.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation.

(c) If a lawyer does not have professional liability insurance with limits of at least $100,000, a lawyer shall disclose this in writing to clients in the written fee disclosure provided to the client pursuant to Rule 1.5 and to the Utah State Bar in the annual licensing form.

(d) If, during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly notify clients and the Utah State Bar in writing.

(e) This disclosure requirement does not apply to lawyers who are on inactive status, in-house counsel or government lawyers, who do not represent clients outside their official capacity or in-house employment.

It is estimated that the cost to attorneys for coverage of $100,000 ranges from $500 to $1,000 per year, depending on years of experience, practice areas, claims history, etc.

In Favor of Disclosure

It is estimated that one-third or more of attorneys in private practice in this country are uninsured. *See,* Towery, James, *Should Disclosure of Malpractice Insurance be Mandatory?*

ABA General Practice, Solo and Small Firm Section, as posted on the ABA website, www.abanet.org. This is an embarrassing statistic. Promoting means to increase the members of our profession who carry professional liability insurance can only be viewed as a positive thing. Anecdotally, after the adoption of disclosure rules in Alaska and South Dakota, a significant number of lawyers who had previously been uninsured obtained insurance shortly before the effective date. We are privileged to be a self-regulating profession – we should hold ourselves to a higher standard. It is ironic that we need to have proof of insurance to register our vehicles, but not to practice law. Potential clients seek our assistance in what they consider to be very stressful situations. Encouraging our colleagues, as other professions do, to carry minimum coverage will make us more "professional."

It is in the best interest of our members to be insured. Today, to be successful in our profession we must possess not only solid lawyering skills, but also savvy business skills. What responsible business person would not insure his or her business? Unfortunately no lawyer or law firm, regardless of size, is insulated against lawsuits. Having liability insurance is necessary to avoid the risk of jeopardizing personal assets, as well as the future of our associates, ourselves and our loved ones.

We need to respect and protect clients. The purpose of a rule promoting insurance disclosure is to provide potential clients with access to relevant information they can use to make an informed decision about whether to hire a particular attorney. Many clients presume that attorneys have professional liability insurance since they draw analogies from other professions, e.g. doctors, general contractors, etc. Whether a lawyer maintains professional liability insurance is a material fact that potential clients have the right to know. While clients have the right to hire lawyers who do not carry liability insurance, they should know that by doing so they will likely have no avenue of financial redress if the lawyer commits an act of negligence. To obtain any restitution from client security funds, clients must show that their lawyer misappropriated their funds.

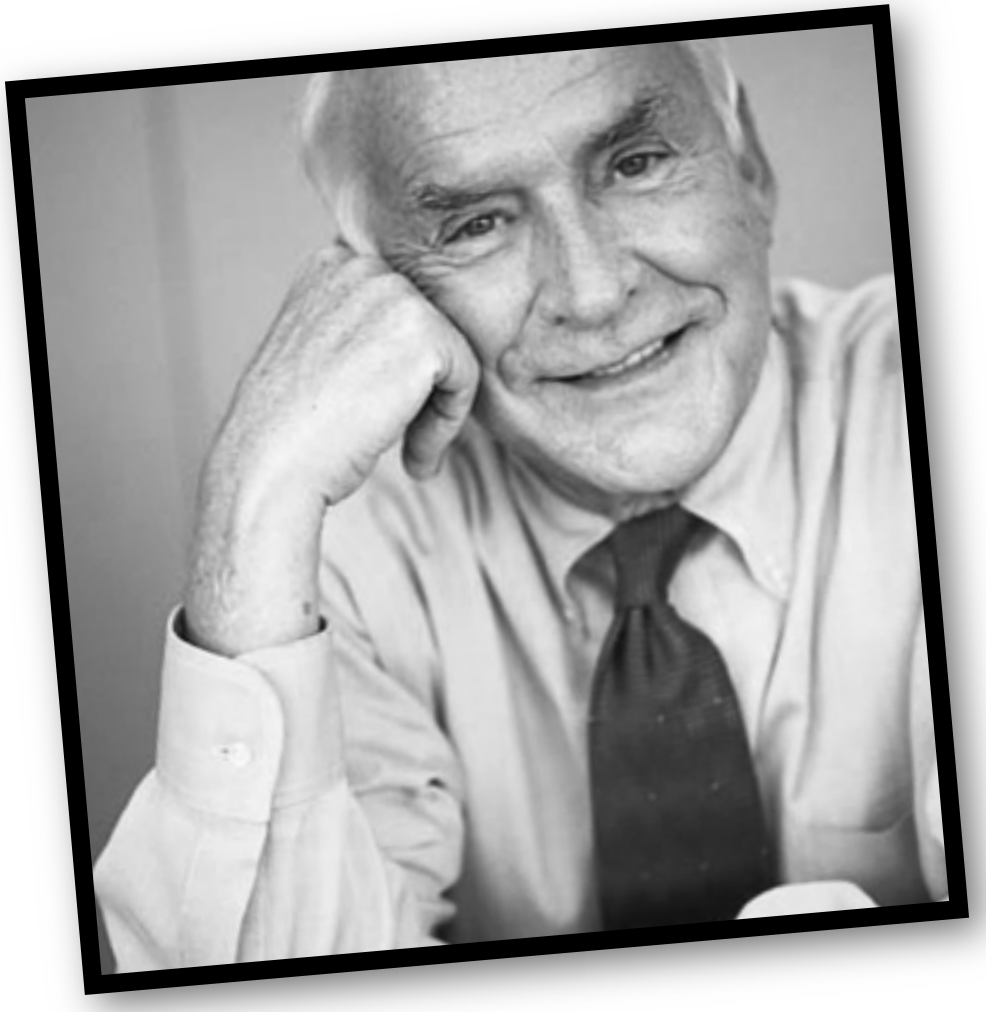
Finally, as a profession, we should strive to be open to disclosure for the interest of the public. One of the key components of the mission of the Utah State Bar is "to serve the public . . . by promoting justice, professional excellence, civility, ethics, respect for and understanding of the Law." In regards to professional liability insurance, under-served populations in particular, such as the elderly, those of low-income and recent immigrants, are not sophisticated enough to ask the right questions before retaining counsel. If we are serious about serving them we should err on the side of openness. Although changing the status quo is never easy, establishing a minimum threshold for disclosure of liability insurance may prove to be far less of a hassle and more of a win-win situation.

1. The ABA Model Court Rule reads in its entirety as follows:

   Each lawyer admitted to the active practice of law shall certify to the [highest court of the jurisdiction] on or before [December 31 of each year]: 1) whether the lawyer is engaged in the private practice of law; 2) if engaged in the private practice of law, whether the lawyer is covered by professional liability insurance; 3) whether the lawyer intends to maintain insurance during the period of time the lawyer is exempt from the provision of this Rule because the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients outside that capacity. Each lawyer admitted to the practice of law in this jurisdiction who reports being covered by professional liability insurance shall notify [the highest court in the jurisdiction] in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect or terminates for any reason.

   The foregoing shall be certified by each lawyer admitted to the active practice of law in this jurisdiction in such form as may be prescribed by the [highest court of the jurisdiction]. The information submitted pursuant to this Rule will be made available to the public by such means as may be designated by the [highest court of the jurisdiction].

   Any lawyer admitted to the active practice of law who fails to comply with this Rule in a timely fashion, as defined by the [highest court in the jurisdiction], may be suspended from the practice of law until such time as the lawyer complies. Supplying false information in response to this Rule shall subject the lawyer to appropriate disciplinary action.



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Is Mandating Disclosure in Your Fee Letter That You Do Not Carry Malpractice Insurance a Sound Idea?

by Rodney Snow

The Utah Bar Commission meeting was progressing quite nicely. It was my first experience. George Daines was professional, pleasant and organized as he kept the meeting moving through the agenda. While there was discussion, there was little controversy until the new proposed amendment to Rule 1.4 was disseminated, requiring attorneys who carry less than $100,000 in malpractice insurance (hereafter MPI) to disclose that fact in their fee letters. To say that a lively debate ensued is an understatement. I was impressed at the breadth of the Bar Commission's work and the professional manner in which it was being accomplished. I also noted that all points of view were presented and well argued. Based on the discussion, it became clear that the policy behind the proposed change is to encourage all attorneys to carry MPI. As part of the discussion, I voiced some concern regarding the proposed change to Rule 1.4. I have now been "invited" to present the loyal opposition to the proposed amendment.

I have defended a number of attorneys who have been sued for professional negligence in the last several years. A few of those cases have involved millions of dollars in alleged damages. I am convinced that lawyers engaged in the private practice of law should carry malpractice insurance. It is not only that we might make a costly mistake, it is also that we may get sued even though we did not commit an "error or omission." Lawyers get dragged into litigation as defendants in a variety of surprising ways. When the onslaught of attorney malpractice suits began in earnest some twenty years ago, a representative of the insurance industry remarked, "the lawyers are eating themselves." Whether sued for good cause or otherwise, your clients, the public and you will be well-served if you have the protection of MPI. The debate surrounding the proposed change to Rule 1.4 is not about whether it is a good idea to carry MPI. It is definitely a good idea. Rather the debate is about the need and efficacy of requiring, as an ethics rule, disclosure in a fee letter that you do not carry MPI.

The ABA Standing Committee on Client Protection has been wrestling with this concept for several years. A proposal similar to the Utah Bar's current suggested amendment was made by the Client Protection Committee in 2002, but was never brought before the House of Delegates because it received such a tepid response from state and local bar associations. See, Nicole D. Mignone, *The Emperor's New Clothes?: Cloaking Client Protection Under the New Model Court Rule on Insurance Disclosure,* 36 St. Mary's L. J. 1069, 1075 (2005). However, in 2004, the ABA House of Delegates did adopt "The Modern Court Rule on Insurance Disclosure." This rule is generally referred to as the Modern Insurance Rule. This rule requires that members of the Bar report to the highest court in their respective state whether they carry MPI and/or if such insurance has been terminated. The Court (presumably in conjunction with the Bar) is to then determine how this information is made available to the public. This year the Utah Bar requested this information as part of the licensing procedure, on a voluntary basis. Some have suggested that perhaps as many as 50% of private practitioners in Utah do not carry MPI. We should await the outcome of a survey of the current licensing applications to see if this figure appears accurate, otherwise we have a proposed solution chasing a problem that may not exist.

Interestingly, the ABA Professional Liability Committee and ABA Tort Trial and Insurance Practice Section criticized the Modern Insurance Rule. Their claim is that advising a client or the public that an attorney has insurance could well be misleading. Insurance and coverage, they point out, are two entirely different concepts. Id. at 1084-1085. This rationale also has some application to the pending proposal in Utah. Allowing a client to presume an attorney is insured because lack of insurance has not been detailed in the fee letter or agreement may mislead the client into a false sense of security. Most policies today are "claims made" contracts; that is, coverage exists for the year in which the claim is made. This does not mean there will be coverage in a later year for a mistake made in a earlier year. Moreover, some attorneys (let alone clients) do not fully understand the extent of their coverage. The existence of MPI does not necessarily mean a client has coverage for a particular claim. Thus, disclosing that you do not carry MPI may

be an unfair and useless exercise since "coverage" for an insured attorney may be inadequate under a variety of circumstances.

Other reasons have been advanced for and against a disclosure requirement by several commentators. See, James E. Towery, *The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance,* 29-Fall Vt. B.J. 35 (2003) and authorities cited therein. Edward C. Mendrzycki, who chairs the ABA Standing Committee on Lawyers' Professional Liability, writes against mandatory disclosure as part of the Towery article referenced above. Mr. Mendrzycki argues, as noted above, that clients will be misled in the first instance by just the concept of MPI. An early discussion with clients as to what your coverage may include and what appears to be excluded, and whether your insurance company will file a declaratory judgment action to attempt to avoid coverage, hardly seems practical or productive. As one of our colleagues joked, "maybe we should just attach a copy of the policy to the fee letter." Disclosure of your experience and knowledge of the area for which you have been engaged seems more productive and would be consistent with the requirements of the existing rules.

Of course some clients may ask about MPI. When that happens we would be well advised to make adequate disclosure of our coverage, in writing. A caveat that you make no warranty as to whether the carrier will acknowledge the validity of any particular claim might also be considered.

Mr. Mendryzycki also postulates that our ethics rules exist as guidelines to protect clients from potential abuse by lawyers. The abuse prohibited by the ethics rules is generally not insurable negligence. Using the ethics rules to force disclosure of a lack of MPI is at least arguably not addressing an ethics problem.

Mr. Mendryzycki argues that a disclosure rule will work a distinct disadvantage to those lawyers whose practices function on a limited budget or on a part-time or restricted basis. The rule could impair attorneys (and therefore their clients) who offer services to underserved segments of our society because they can do so inexpensively. While one might argue that those in our society who can not afford counsel are certainly entitled to an insured lawyer, generally such people are not looking for an attorney who carries insurance. They are happy to hook up with any attorney who is willing to help provide some assistance.

Other concerns articulated by the commentators and bar members opposing mandatory disclosure of not carrying MPI include:

1. The cost may be prohibitive or will result in an increase of fees to clients who can least afford the increase.
2. Such a disclosure could potentially impose unfair negative connotations regarding an attorney's competence. We are not aware of any empirical data that suggests that insured attorneys are more competent than those who are not insured, although most insurance companies require law firms to establish polices and procedures that tend to minimize claims.
3. The slippery slope of compelled disclosure could result in additional restrictions on the ability to practice. Once the Bar starts requiring written revelations, where will it end? "I have insurance but I did get sued last year." Or, "I have a good track record but I did lose my last two cases." Or, "we dropped the amount of coverage we carry because we could not afford higher limits." The rules as they now exist require a candid appraisal and perhaps disclosure of our expertise and experience in the area for which our advice or services have been sought. No objection. Mandating MPI insurance and related written disclosures may open the door to a future regulatory morass.
4. Some have expressed the concern that if MPI becomes a *de facto* ethical requirement, the insurance industry will become the regulators of our noble profession.
5. There does not appear to be any empirical data on unrecoverable losses from uninsured attorneys to support the arguments of the proponents of the amendment.
6. Finally, disclosure of insurance or a lack thereof may encourage clients to seek out insured attorneys, which may result in an increase of litigation.

We have mandatory CLE. Our Rules require that we represent clients competently, diligently and free from conflict of interest. They require communication with the client and disclosure regarding fees, confidentiality and expertise. They have served us well. I would prefer to adopt the ABA Modern Insurance Rule, with clarification as to how this information will be available to the public. While we need to find better ways to encourage all attorneys in private practice to carry MPI, it is my view that the disclosure rule may not be the best approach. It deserves at a minimum more discussion and thought, if not a slow death.

Considerations in Purchasing and Using Malpractice Insurance

by Michael Skolnick

A couple of months ago, members of the Utah State Bar received a letter from Salt Lake attorney Grant Clayton. When he's not out driving his vintage TR-6 or writing patents, Grant serves as chairperson of the Bar's Lawyers Benefits Committee. His recent letter urged members of the Utah Bar to support our Bar-endorsed malpractice insurance program. That program is administered by Marsh Affinity and underwritten by Liberty Mutual. This article is intended for those who take the next step; either in obtaining malpractice insurance for the first time, or carefully reviewing their existing policy to ensure it meets their needs. The article will briefly address key considerations in obtaining and using malpractice insurance, with the goal of helping the reader become a wiser consumer of this professionally-invaluable commodity.

Selecting an Agent or Broker

Your first step in purchasing professional malpractice insurance is to select an agent or broker. Select an insurance agent or broker who thoroughly understands professional malpractice insurance. Lawyers' malpractice insurance is very different from most forms of insurance. Special policy considerations include the "claims-made" nature of a lawyer's malpractice policy, obtaining appropriate tail coverage and prior acts coverage. These unique characteristics may be unfamiliar to non-specialist insurance agents or brokers. They'll be discussed later in this article.

Look for an insurance agent or broker who tends to show up year after year at Bar- sponsored events, such as the summer Bar meeting at Sun Valley. This indicates a commitment to the market and a degree of specialization. An agent or broker experienced in lawyers' professional insurance is going to be in an excellent position to tell you exactly what is available in terms of service and what the various insurance companies' reputations are for claims handling.

Selecting an Insurer and Policy

Be a smart consumer in shopping for everything relating to your attorney malpractice policy, such as price, service (including risk management services), and financial size of the insurer. Your insurer should have at least an "A" rating from A.M. Best. You want to be sure the company you select will be able to pay its claims, particularly if an unexpectedly large number of claims occur in a relatively short period of time.

Ask the agent or broker you select to give you a quote for different types of coverage, for instance, limits of $1,000,000, $2,000,000 or $3,000,000. Bear in mind that lawyers' professional insurance is written on a per occurrence and aggregate basis. There are separate limits for each incident and an aggregate limit. If you buy insurance with a million dollar limit and one claim uses up that entire limit, you'll be in trouble if another claim hits. Try to anticipate the risk of multiple claims within any one year. A high volume litigation practice, for example, may bear a higher risk of multiple claims during the same policy period.

You should also compare quotes at different deductible levels. Generally speaking, the higher the deductible, the lower the premium. You may also want to consider a "loss-only" deductible. With a regular deductible you'll usually need to pay defense costs of a claim until your deductible is satisfied. A loss-only deductible only becomes payable in the event the insurer has to pay something to settle the claim or satisfy a judgment. One advantage to a loss-only deductible is that in the event of a

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frivolous claim which gets dismissed by motion practice or otherwise, you're not stuck paying any deductible amount. The downside of a loss-only deductible: it's usually more expensive in terms of premium.

Study the policy language of the policy your agent or broker recommends. Make sure you understand what's covered and what's not covered. For instance, is coverage provided for defense of disciplinary actions? If so, how much? Do defense costs diminish the limits of the policy? If so, you may need higher limits. Lawyers' professional insurance policies vary. It makes sense to shop aggressively for everything.

Find out whether the claims representatives who will be handling your case are attorneys as opposed to non-lawyers. Non-lawyer insurance adjusters (as opposed to claims counsel) may have a more difficult time understanding the defense of a complex malpractice case. A non-lawyer is more likely to make claims handling decisions based upon purely economic considerations, as opposed to encompassing the lawyer defendant's professional concerns.

Find out how long your prospective insurer has been in the lawyers' professional insurance market. Part of what you're buying is the ability of an insurance company through their claims handling procedures to keep you in practice and keep your business working. That makes it particularly relevant to find out how long a carrier has been involved in insuring this type of claim.

Benefit of Building a Relationship with a Carrier

Insurance carriers come and go in the lawyers' professional insurance business. Continuity and the benefit of building a long-term relationship with a carrier become especially important if a larger claim hits. This can be a simple matter of mathematics – the longer a firm has been with a particular carrier, the more premiums they have paid over the years. Additionally, there will be a greater familiarity between the broker or agent and underwriter, and sometimes even the law firm and the underwriter. The better and stronger these relationships, the better chance that an insurer will continue to insure your law firm even if a difficult claim hits. In other words, if claims experience has been stable, acceptable and enduring, a carrier will be more likely to keep a particular insured on the books, notwithstanding one very difficult loss.

The Application Process

After you have selected an insurance agent or broker and an insurer, you will begin the process of applying for insurance. This entails in the first instance a fairly detailed written application. The application is a critical part of establishing your contract of insurance. Once signed, the application will become part of any insurance contract that eventually issues. Accordingly, it is imperative to be absolutely forthcoming and truthful on the application. Material omissions in the application can result in non-coverage of a particular claim or even recision of an entire policy. There may be some inclination to shade answers in the application in a favorable way in order to portray the attorney or law firm in a better light. There may also be a tendency to take a "shortcut" approach because preparation of the application doesn't generate income. Both approaches are ultimately short-sighted. It's best to carefully prepare an application so that it discloses all possible underwriting concerns.

Pay particular attention to the application questions pertaining to law office management. Lawyer malpractice insurers have found that a significant number of claims arise because of failure to use appropriate retainer or engagement letters, as well as from poor docketing and conflict of interest controls. The underwriter reviewing your application will want to know what safeguards your firm takes in those regards. In this sense, the application process is an excellent opportunity for an attorney or law firm to "clean house" and make sure that appropriate policies are in place regarding retainer/engagement letters, docketing controls (the insurer will almost certainly prefer a dual diary system) and set procedures for checking conflicts of interest.

The most important question on the application relates to knowledge of any circumstance, act, error, or omission that could result in a professional liability claim. If the prospective insured represents that he or she is unaware of any circumstance, act, error, or omission, but a claim later arises which the insured arguably should have disclosed, the insurer may seek to exclude coverage for that claim or even rescind the policy based on non-disclosure. It's best to err on the side of over-disclosure with respect to claims or potential claims, and avoid the risk of non-coverage when you need it most. Carefully poll every lawyer in your firm about the existence of a claim or a potential claim *prior* to signing and submitting your application.

Underwriting "Red Flags" in the Application

Underwriters may be particularly concerned by applications which reveal the following:

- Significant equity interests in a client. This can lead to conflict of interest claims.
- Excessive suits to collect unpaid fees from clients. Statistically, these often result in malpractice counterclaims.
- Inadequate client intake procedures, with respect to client retention agreements and conflict checking protocols.
- Existence of practice areas considered by the insurer to pose a higher degree of risk. These include, without limitation,

securities work, intellectual property law, and plaintiff personal injury work. Lawyers or firms practicing in these areas will likely be subject to heightened scrutiny.

- Extensive claims history or history of bar complaints. Again, these lawyers or firms will be subject to a higher degree of scrutiny. They will need to satisfy the underwriter that the prior claims/complaints don't pose an inordinate ongoing risk.

Reporting a Claim

After a policy is issued, reporting a claim or potential claim continues to be the most important duty you have as an insured under a claims-made policy. If you fail to timely report a claim or potential claim you place your coverage for that claim in jeopardy. Unlike the form of most other insurance, which provides coverage on an occurrence basis, professional malpractice insurance is provided on a claims-made basis. With occurrence type insurance, your policy responds to any claim arising from a covered occurrence during the effective period of the policy. Claims-made insurance differs in that in order to provide coverage, a policy of insurance must be in effect at the time the claim is made. The act of making the claim triggers the insurer's duties under the policy, rather than the occurrence itself.

Typical claim reporting language (taken from Liberty Mutual's policy) states "you must give us written notice of any claim(s) or potential claim(s) made against you as soon as practicable, but not later than sixty (60) days after expiration of the policy period or an extended reporting period, if applicable." The same policy defines "claim" as "a demand received by you for money or services, including the service of suit or institution of arbitration proceedings against you, or a disciplinary proceeding." Note that under this definition a disgruntled client's demand for free work halfway through a nasty case will likely be considered a claim.

Attorney malpractice policies typically exclude known claims or circumstances which predate the policy. A known claim or circumstance may be defined as a situation in which the lawyer has a "reasonable basis" to believe that he or she breached a professional duty, committed a wrongful act as defined under the policy, violated a disciplinary rule, engaged in professional misconduct or foresaw that a legal malpractice claim would be made. Reporting claims and potential claims is critical not only during the policy period, but also when reapplying for insurance. If you are unsure about whether you have a claim or a potential claim, contact your agent or broker, who can put you in touch

with coverage counsel. You can then discuss what to do about the potential claim and whether it needs to be reported. In summary, you should report claims and potential claims as soon as you have knowledge of facts which indicate a claim is possible, not just when a claim is imminent.

Sometimes attorneys avoid reporting a claim or potential claim out of fear that it will cause an increase in their premium. This head-in-the-sand approach can prove costly. Failing to report a claim or potential claim could have a far greater impact on future insurability than an increased premium due to reporting that claim or potential claim. A coverage denial or policy recision based on failure to timely report a claim will not look impressive to a future underwriter.

Obtaining Appropriate Tail and Prior Acts Coverage

Attorneys who retire or otherwise become inactive in the practice of law should investigate whether they need to obtain tail coverage. As discussed, claims made policies do not provide coverage after the policy expires. To avoid coverage gaps an attorney must maintain coverage year after year, or purchase tail coverage for claims which may be brought after the attorney becomes inactive. Tail coverage (also called an extended reporting endorsement) can be purchased for various time frames. The longer the time frame, the more expensive the coverage. Keep in mind that a four year limitation period pertains in negligence-based malpractice claims.

In addition to liability tail coverage, a standard form lawyers' professional policy will likely restrict coverage – at least to some extent – for acts which occurred prior to policy inception. For instance, Liberty Mutual's policy does not apply to any claim for which an insured gave notice to a prior insurer or one which the insured had reasonable basis to believe existed prior to policy inception. Additional prior act coverage may be available through supplemental endorsement, usually for an increased premium. Determine your firm's need for such additional prior acts coverage by consulting an experienced agent or broker.

Adding New Employees or Practice Areas

Once your insurance is in place, don't forget to contact your insurer and add new attorneys who join your practice. Coverage for newly added attorney employees may be conditioned upon written notice. You may also need to obtain specific underwriting approval for the new attorney. In some cases an additional premium may be charged. In any event, you need to make sure that new attorneys who pose the greatest "unknown" in terms of malpractice risk are covered under your existing policy. The same reporting requirement may pertain to new practice areas. If you're in an insurance defense firm which suddenly decides to start advertising on television for plaintiff's personal injury work, your insurer will probably want to know.

Why Subject Yourself to All This?

If you've made it this far in the article and are still wondering why you need insurance, or why you need to spend some time reading your policy, the answer is simple: peace of mind. I've defended malpractice actions against insured attorneys and uninsured attorneys. The ones who are insured and who understand what their policies cover seem to sleep better.

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ERISA Standards of Review and the Administrator's Conflict of Interest

by Scott Hagen

The Tenth Circuit Court of Appeals recently provided helpful guidance for district courts evaluating claims of wrongful denial of employee benefits under ERISA. In particular, the court clarified the standard of review to be applied where the plan administrator of the employee benefit plan had a potential conflict of interest at the time the benefits were denied.

The Employee Retirement Income Security Act (ERISA), enacted by Congress in 1974, governs the provision by employers of most benefits to employees, whether pension benefits, medical benefits, or any other kind of employee benefit. So long as the benefits are provided by a private employer pursuant to an "employee benefit plan," it is governed by ERISA. ERISA also provides the mechanism for challenging the plan administrator's denial of medical or other employee benefits. An employee who is a "participant" in an employee benefit plan, or a dependent who is a "beneficiary" of such a plan, has the right to file suit in state or federal court against the employee benefit plan or its administrator for the purpose of obtaining judicial review of the administrator's decision to deny a claim. Such claims may be filed in either state or federal court, but are almost without exception filed in federal court or removed to federal court if filed in state court.

In such cases, the district court judge sits as a quasi-appellate court. The judge determines whether the administrator of the employee benefit plan properly denied the benefit at issue. However, ERISA does not specify the standard of review the district court should apply in reviewing such denials. Accordingly, until 1989, the federal Circuit Courts of Appeals usually relied on pre-ERISA labor cases involving the review of decisions of boards of trustees of joint union-management employee benefit plans. In those cases, such trustee decisions were overturned only where the plaintiff showed that the decisions were arbitrary and capricious. *See generally* Kathryn J. Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases,* 50 Am. U.L. Rev. 1083, 1102-04 (June 2001).

In 1989, the Supreme Court decided the seminal case of *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989), which held that benefit denial claims should be evaluated according to principles of trust law, and that under applicable trust law, the decision of a plan administrator to deny a claim is subject to de novo review, unless the plan documents provide that the plan administrator is given "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. If the plan documents provide such discretion, then the decision should be upheld unless it was arbitrary and capricious.[1] The Court added, however, that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion.'" *Id.* (quoting Restatement (Second) of Trusts § 187, Comment d (1959)) (internal quotes and brackets omitted).

Following the issuance of the Court's decision in *Firestone,* the Circuit Courts of Appeals dealt with several issues not resolved in *Firestone*. For example, *Firestone* did not indicate what language in the documents establishing and describing the plan would be sufficient to trigger deferential review, and the Circuits have since decided many cases evaluating the sufficiency of various formulations. More importantly for purposes of this article, *Firestone* did not shed any light on the issue of conflict of interest in cases applying the deferential standard of review – how it is established and what effect it should have on the review process, other than constituting a "factor" in the analysis. Conflict of interest is a common issue because the administrator of an employee benefit plan is often a company employee, such as the company's director of human resources or benefits administrator, and has a potential conflict of interest in deciding claims that would be paid from the company's assets. Additionally, medical benefits or disability benefits are usually insured, and the plan

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administrator in such cases is usually an employee of the insurance company, which also has an obvious financial interest in denying claims that would be paid from its assets.

The Tenth Circuit initially held with regard to conflicts of interest that it would apply a "sliding scale" approach. *Chambers v. Family Health Plan Corp.,* 100 F.3d 818, 825 (10th Cir. 1996). The court stated in *Chambers* that "[u]nder this approach, the reviewing court will always apply an arbitrary and capricious standard, but the court must decrease the level of deference given to the conflicted administrator's decision in proportion to the seriousness of the conflict." *Id.* Although the sliding scale approach had the virtue of flexibility, it provided little guidance to lower courts in determining the extent to which the level of deference should be decreased when a conflict has been identified.

The Tenth Circuit therefore addressed the issue again in the recent case of *Fought v. UNUM Life Insurance Company,* 379 F.3d 997 (10th Cir. 2004). In *Fought,* the plaintiff had been denied long term disability benefits by UNUM on the ground that her health problems were caused by a pre-existing condition, and that benefits were therefore barred by an exclusion in the long-term disability policy. After UNUM's final denial of benefits, the plaintiff filed suit in the U.S. District Court for the District of New Mexico, alleging that the denial was in violation of 29 U.S.C. § 1132, the ERISA enforcement statute. At the district court level, UNUM admitted that it had a conflict of interest because it administered and paid the claims under the long-term disability plan. However, the magistrate judge denied the plaintiff's request to conduct discovery regarding the extent of the conflict of interest. UNUM then moved for summary judgment, which the district court granted on grounds that UNUM's denial was not arbitrary and capricious.

In reviewing the lower court judgment, the Tenth Circuit first upheld the district court's determination, which neither party contested, that the plan documents vested UNUM with discretion, and that the proper standard of review was therefore arbitrary and capricious. The court then clarified that when the standard of review was arbitrary and capricious, the district court should uphold it if it was arrived at:

> (a) as a result of [a] reasoned and principled process (b) consistent with any prior interpretations by the plan administrator (c) reasonable in light of any external standards and (d) consistent with the purposes of the plan.

Fought, 379 F.3d at 1003 (quoting Kennedy, *Judicial Standard of Review in ERISA Benefit Claim Cases, supra,* 50 Am. U.L. Rev. 1083, 1135, 1172 (2001)). The Tenth Circuit also noted that in cases applying the arbitrary and capricious standard of review, the district court was limited to the "administrative record," *i.e.,* "the materials compiled by the administrator in the course of making his decision." *Id.*

The Tenth Circuit then addressed the effect of a conflict of interest. The court first noted that there are two types of conflict of interest: (a) a "standard" conflict of interest and (b) an "inherent" conflict of interest. The court stated specifically that an inherent conflict of interest exists when an insurance company both decides claims and pays them from its own assets. That situation usually arises when the plan is fully insured, as is often the case in employee health plans, and almost always the case in employee long-term disability plans.

The same reasoning might suggest that the Tenth Circuit would find an inherent conflict of interest in the context of a self-funded plan where the final denial decision is made by the "company" acting through its board of directors or executive officers. *See Chambers v. Family Health Plan Corp.,* 100 F.3d 818. 825 (10th Cir. 1996) (court found conflict of interest where final decision was made by defendant's board of directors). However, it is more likely that the Tenth Circuit would classify such a conflict as "standard" based on the distinction it has drawn between insurance companies and companies administering self-funded plans:

> More importantly, unlike the self-funded company in *Kimber [v. Thiokol Corp.,* 196 F.3d 1092 (10th Cir. 1999)] where the company's profit is not derived solely from its administration of the health benefits plan, Blue Cross is in the business of insurance. Thus, it can only remain economically viable through its insurance transactions. By contrast, self-funded companies typically have other means of generating profit and income. Thus, in Blue Cross' situation, there is an inherent conflict of interest between its discretion in paying claims and its need to stay financially sound.

Pitman v. Blue Cross and Blue Shield, 217 F.3d 1291, 1296 n.4 (10th Cir. 2000) (finding inherent conflict of interest in context of fully-insured plan). In essence, a standard conflict of interest is every conflict that is not an inherent conflict of interest.

The court went on to state in *Fought* that where there is a standard conflict of interest, "the plaintiff is required to prove the existence of the conflict." *Fought,* 379 F.3d at 1005. Although the *existence* of the conflict seems to be a given whenever the decision-maker is affiliated with the payer, the court later clarified that the plaintiff must prove that this standard conflict of interest is "serious." *Id.* In doing so, the plaintiff must prove "that the plan administrator's dual role jeopardized his impartiality." *Id.* (internal quotes omitted). The court explained this inquiry as follows:

> The mere fact that the plan administrator was a [company] employee is not enough per se to demonstrate a conflict. Rather, a court should consider various factors including whether: (1) the plan is self-funded; (2) the company funding the plan appointed and compensated the plan administrator; (3) the plan administrator's performance reviews or level of compensation were linked to the denial of benefits; and (4) the provision of benefits had a significant economic impact on the company administering the plan.

Fought, 379 F.3d at 1005 (quoting *Cirulis v. UNUM Corp.,* 321 F.3d 1010, 1017 n.6 (10th Cir. 2003) (internal quotes omitted). The court then explained that where this inquiry does not show that there is a serious conflict of interest, the standard conflict of interest will be considered as a factor in determining whether there has been an abuse of discretion. *Id.*

However, the Tenth Circuit made clear that "an additional reduction in deference is appropriate" where (1) the conflict of interest is inherent, (2) the standard conflict of interest has been shown to be serious, or (3) there has been a serious procedural irregularity. 379 F.3d at 1006. The court described this additional reduction in deference as follows:

> Under this less deferential standard, the plan administrator bears the burden of proving the reasonableness of its decision pursuant to this court's traditional arbitrary and capricious standard. In such instances, the plan administrator must demonstrate that its interpretation of the terms of the plan is reasonable and that its application of those terms to the claimant is supported by substantial evidence. The district court must take a hard look at the evidence and arguments presented to the plan administrator to ensure that the decision was a reasoned application of the terms of the plan to the particular case, untainted by the conflict of interest.

Id. (citation omitted). The court did not define "serious procedural irregularity," but found that one existed in *Fought* because UNUM had not sought review from an independent medical

source in a "complicated" medical situation and, although UNUM admitted its conflict of interest, it resisted discovery into the extent of that conflict.

Having concluded that UNUM had an inherent conflict of interest, the court held that the district court should have "considerably" reduced the deference accorded under the arbitrary and capricious standard of review. This modified arbitrary and capricious standard of review, which the court described as "searching," required the court to "take a hard look and determine whether UNUM established by substantial evidence that Ms. Fought's claim was not covered by the plan." Applying this standard of review, the court first found that UNUM's interpretation of the pre-existing condition exclusion was overbroad. It then determined that UNUM's denial of benefits was not supported by substantial evidence. While the specifics of the court's reasoning are not important for purposes of this article, the fact that the court engaged in an extended analysis and ultimately overturned the denial of benefits demonstrates that by "hard look" the court means that it will grant relatively little deference to the plan administrator decision where the conflict is inherent or serious, or in cases involving a "serious procedural irregularity."

The Tenth Circuit opinion in *Fought* clarifies the standard of review to be applied in ERISA cases by district courts where the plan language provides the administrator with discretion but the administrator operates under a conflict of interest. In a standard conflict of interest case, the district court should consider the conflict as a factor in determining whether the denial of benefits was arbitrary and capricious. However, when the conflict is inherent, when the plaintiff demonstrates that the conflict is "serious," or when there is a "serious procedural irregularity," the burden shifts to the plan administrator to demonstrate that its decision was reasonable. In such cases, the district court is to take a "hard look" at the administrator's evidence and rationale. This new statement of the standard to be applied in the Tenth Circuit makes it clear that the arbitrary and capricious standard, at least in cases where the administrator has a conflict of interest, will not automatically result in affirming the plan administrator's decision.

1. The Court also used the term "abuse of discretion" to refer to the same standard of review. The Tenth Circuit has determined that the standards of abuse of discretion and arbitrary and capricious are equivalent when used in the context of ERISA claims. *Chambers v. Family Health Plan Corp.*, 100 F.3d 818, 825 n.1 (10th Cir. 1996).

Migrating the Utah State Bar to VoIP: Motivations and Lessons Learned

by Lincoln Mead

VoIP Who?

VoIP stands for Voice over Internet Protocol and it should be the only acronym in this article. In a nutshell, VoIP or broadband telephony, is a technology based on the same type of communications standards that drive our Internet connections. The phones connect to the existing data network and the conversations become just another digital stream running through the network wiring. Calls placed to numbers outside the office are routed over the Internet or a service provider's private network. The calls can link up with traditional phone systems, so someone on a regular landline or cellular service and another using VoIP can talk to each other.

I started watching VoIP development in the mid-1990s when the Baby Bells started screaming that early adopters were using headsets connected to PCs to place free calls across the Internet to avoid pricey long-distance and overseas toll calls. I also started using it, but there were issues with the connection quality. Calls either broke up or suffered lags that made conversation difficult. In the past 5 years, however, VoIP has quickly matured to the point that Baby Bells are starting to provide it as a default phone service option in certain metro areas and a number of companies, such as Vonage and AT&T CallVantage, are rapidly expanding their subscriber base.

Why VoIP?

As a technical person, the appeal of VoIP was the consolidation of voice and data into a single framework that would be easier to manage than the two separate systems. Another attraction was the ability to create applications that would allow the ability to tie data to the phone system. (For example, when a member's record is called up in the membership management application, a staff person could tap on it to either call or send a fax to the numbers on file.) VoIP is better suited to provide unified messaging where the voicemail and email are accessed via an integrated mail client such as Outlook, GroupWise or Lotus Notes.

All that geek-love aside, the primary appeals of VoIP are practical and economic. In my professional life, I have managed a dozen transitions to new phone systems. In terms of logistical requirements, the VoIP solutions seem to have the fewest numbers of hurdles and potholes in terms of installation, programming and maintenance, thereby making for a relatively low cost implementation. In the long term planning view VoIP and related technologies are where the equipment makers and service providers are heading, and while I am comfortable buying 'behind' the curve on business computer equipment and software, doing it with a phone system is an ugly gamble.

The Utah State Bar Goes Shopping

The first issue we looked at in considering a new phone system was at our existing phone and communications bills. With the Internet connection, phone lines, conference services, and long distance, the Bar averaged a monthly phone bill of $2,000. A major goal was to find a solution that would consolidate and reduce phone service costs.

Our first call was to the provider of our phone lines to see what could be done to expand the level of service while reducing overall costs. Once we had a bid in hand from the phone company detailing what types of phone lines would yield the best combination of service and costs, we went looking for gear to match it.

The Bar and the Utah Law & Justice Center had several fundamental requirements going into the hardware search:

1. Reliability in phone and voice mail services
2. Supportability
3. Low cost per user
4. Ease of use
5. Local and Long Distance call accounting
6. Staff access to training and documentation

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The Bar staff also had an extensive list of features that were on a wish list:

1. Receptionist Station that could quickly determine staff status and route calls to either individuals or departments
2. Caller ID
3. Call recording
4. Secure fax to desktop
5. Conference calling
6. Forward to offsite extension
7. Telecommuting
8. Headsets instead of handsets
9. Improved call management

Bar management had its own set of requirements for a new phone system:

1. Low lease cost
2. A minimum lifespan of 10 years
3. Productivity tools to assist the Bar in maintaining its low staff to member ratio
4. The ability to quickly expand AND contract services as staffing or requirements changed
5. The ability to generate usage reports down to the phone level for time management and records purposes

With these goals and costs in hand, we contacted several vendors of local phone equipment and a company that provided phone service outsourcing. After receiving bids from the phone equipment re-sellers, the average phone equipment hard cost of maintenance and lease in a 60 month term was $1,000, which would sit on top of that phone service cost of $2,000. The upside to these proposed solutions would be that at the end of the 5 year term we would eliminate the equipment cost and continue to operate under a maintenance contract that would be about $350/month and would have the gear in-house allowing us to change maintenance providers if the need arose.

The outsourcing vendor provided a bid that was a radical departure from these traditional hardware bids in that they would provide access to a centralized switch with the phone lines, long distance and fire-walled Internet access. The cost would be variable since long-distance was included but the target average monthly bill would be $2,500 with a base minimum of $2,100 per month over a 60 month contract term. The downside to

this was a certain loss of control as the primary phone gear would not be in our building. However, this risk could be moderated by selecting an equipment option that would allow us to plug in standard phone lines and provide basic phone service to the building should the need arise. As our confidence in the system grows we could remove this option and further reduce our monthly costs. Another downside is the risk associated with uncertainty. This is a new service and a new way of using phone service and this change is not without challenges in dealing with the existing culture and experience with the old phone system.

The upsides in this migration to an outsourced solution were enough to make the jump worthwhile. From an accounting standpoint, the system exists in our GL as a slightly higher but predictable utility payment, making our CFO happy. From a capacity standpoint, we have gone from being able to handle sixteen active calls to being able to handle up to 45 with little strain on the system. The system has excellent support for telecommuting, making it possible for a staff person to take home a phone, plug it into their broadband internet access and operate the phone as if they were in the office. (A warning note for telecommuters is that VoIP phones do not work well, or at all, with a standard dial-up internet connection.) This system provides better disaster recovery/business continuation options in the case of our lines being cut. If the worst should happen, the calls are immediately routed to the service provider's switchboard and their receptionist service answers the call as the Utah State Bar and then can route calls to either the voicemail located in their building or to a pre-programmed set of cell phones.

This difference in service delivery, rather than just the purchase of phone equipment, was recognized by the companies selling equipment. Each vendor I spoke to told me that they were moving forward to developing partnerships and implementing their own outsourcing solutions. The timelines ranged from 3 months to 18 months before implementation. As I had mentioned at the beginning of this article, the Baby Bells were unhappy with the appearance of VoIP, but they are now working to deliver VoIP as a standard service offering that harkens back to the old Centrex services.

Some Lessons Learned in Investigating VoIP

Whether you are planning on purchasing the equipment or accessing it as an outsourced service, there are some things to look for in making the selection of a VoIP solution. The major difference in evaluating a VoIP solution is not the equipment, but the software and applications that the system uses. Some sample applications that can be found in a VoIP solution are these:

1. Web based configuration of user phones, allowing for greater personalization of the phone.
2. Support for telecommuting. Whether this is taking a phone home and plugging it in or forwarding calls to a remote location or cell phone, this application determines how much of the phone's functionality can be accessed and used by the remote user.
3. A soft phone application. This option will remove the handset equipment from a desk and turn the PC into the phone. This is a great application as it frees up desk space and generally will

integrate with contact management software making the PC operate more like a cell phone than like a typical desk phone

4. Conditional messaging in Voice Mail. This is the ability to program the phone to provide a different message based on what the user is currently doing.

5. Presence Management. This is the ten-dollar term for knowing who is in the office and what they are doing. A good presence management application will allow a user to see the same type of display as the front desk receptionist does.

Questions for VoIP Vendors

1. How many VoIP installations have they done and for whom? Referrals become extremely important when making the switch. Being able to talk with, and make site visits to, other clients is crucial to evaluating a solution. Referrals should be able to answer questions on how the change over went, the degree and quality of the training, and what hiccups took place during the change. I also recommend asking for one negative referral source such as a client who left or a potential client who chose not to purchase the service. Part of this is entertainment because sales people really squirm when you hit them with this, but the main part is to see if there was something that was missed in terms of price or performance that killed the relationship or sale.

2. Can they provide a service contract for review? This service contract should spell out maintenance response times, levels of service and performance of the equipment, disaster recovery procedures and remedies for failure to meet these commitments. Once we had selected the vendor, the biggest time hit came to ironing out the contract. Our general counsel put in a lot of hours to ensure that the contract took care of us.

3. What is their financial standing? The telecommunications industry has gone through massive upheaval and consolidation in the past few years, so it is a fair question to find out the financial status of the company proposing the equipment and/or service.

4. How large is the local install base for the proposed equipment? In our case, three of the proposals were for the same piece of equipment, with key differences in implementation. If you have settled on a particular brand of phone equipment, call the manufacturer and find out how many service organizations in your area can support the gear. It's comforting knowing you can jump if you need to.

Evaluating the Proposals

Vendor and equipment selection is a team effort. You should have the largest consumers of your phone service be the ones to help evaluate a proposed phone system. Demonstrations should be done at the vendor's location and onsite at a customer's place of business. I kept this team to about five, consisting of the building receptionist, two paralegals, the office manager, and a department head. After each demonstration, I had them fill out a two page evaluation sheet that rated the company's performance at the demo, their satisfaction with the answers they received to their questions and their impression of the system's performance.

The Initial Implementation

One of the great things about a VoIP system is that you can install it before pulling the plug on your old system. This allows for extensive testing prior to change over. We had our staff training completed and the system installed with phones on the desk for a week prior to the migration of our phone numbers which allowed the staff the opportunity to play with the phone and to get comfortable with its operations. We were able to sit down and determine the best default programming for the buttons and to provide the staff with a list of alternative button options so that they could customize the phones to meet their needs.

The one big snag that we hit was in the porting over of the phone numbers to the new service provider. After signing with the company, we signed a Letter of Authorization that would allow the phone company to move our existing numbers to the new provider. Friday was to be the day of the scheduled change over, but the Bar's provider denied the port due to a perceived number mismatch. They wanted to do the port on a Monday morning, which would have been a disaster, so we negotiated to have the port take place on a Monday night one week later. Number port orders are a large variable, with the port generally taking place from 10 to 21 days after the order is received. Number port requests should be based on the current phone bill, which should have a complete listing of the phone lines and numbers in your office.

Once the system was installed we went through and called each number from a cell phone to ensure that the calls were being routed properly and that the unanswered calls wound up in the correct voice mail box. At each staff location we left a quick start guide, the phone user manual, and the voicemail user manual. We also sent an email reminding the staff of the key differences from the old system and the key facts of the system that were delivered during the training. The system does provide fax to desktop and unified messaging but we chose to focus the installation on basic phone system and plan on returning to the other applications with a follow up training session 30 days later.

There were also some costs that were not covered with the initial service. Headsets were not popular with the old system as they required a separate module that went between the set and the phone. The new system offered direct integration for headsets, so their use went up. We also had requests for longer phone cords and neck rests, which are not cheap but are worth it in curbing neck ache complaints.

The Aftermath

We have now been on the new phone system for a few weeks and as phone migrations have gone, this was the smoothest by far. We have found little hitches that were quickly solved and the staff has been very aggressive in learning what the system is capable of and requesting programming changes to take advantage of them. (Fortunately programming changes are covered by the maintenance agreement.) One thing I would recommend in light of this is to schedule some follow up training 2 to 3 weeks after installation to allow the staff to ask new questions once they have had a good opportunity to learn the system.

The staff has been impressed with the voice quality and the ease of operation and the receptionist is delirious with the PC based receptionist software. Already her average call time has dropped from 90 seconds to 50 seconds (Which is long in the receptionist business.) Members have commented that it is faster to get to a live person with fewer instances of winding up in 'voice mail hell'. From a financial standpoint, the projected monthly costs are inline with the initial estimates and have been flat across the board. In terms of long-distance, the bills are coming in under the average costs from previous years, so the CFO's outlook is still cheery. I plan on logging phone system events for the next year and will create a follow up article then. If you have any questions or comments on our migration experiences please feel free to send an email to webmaster@utahbar.org.

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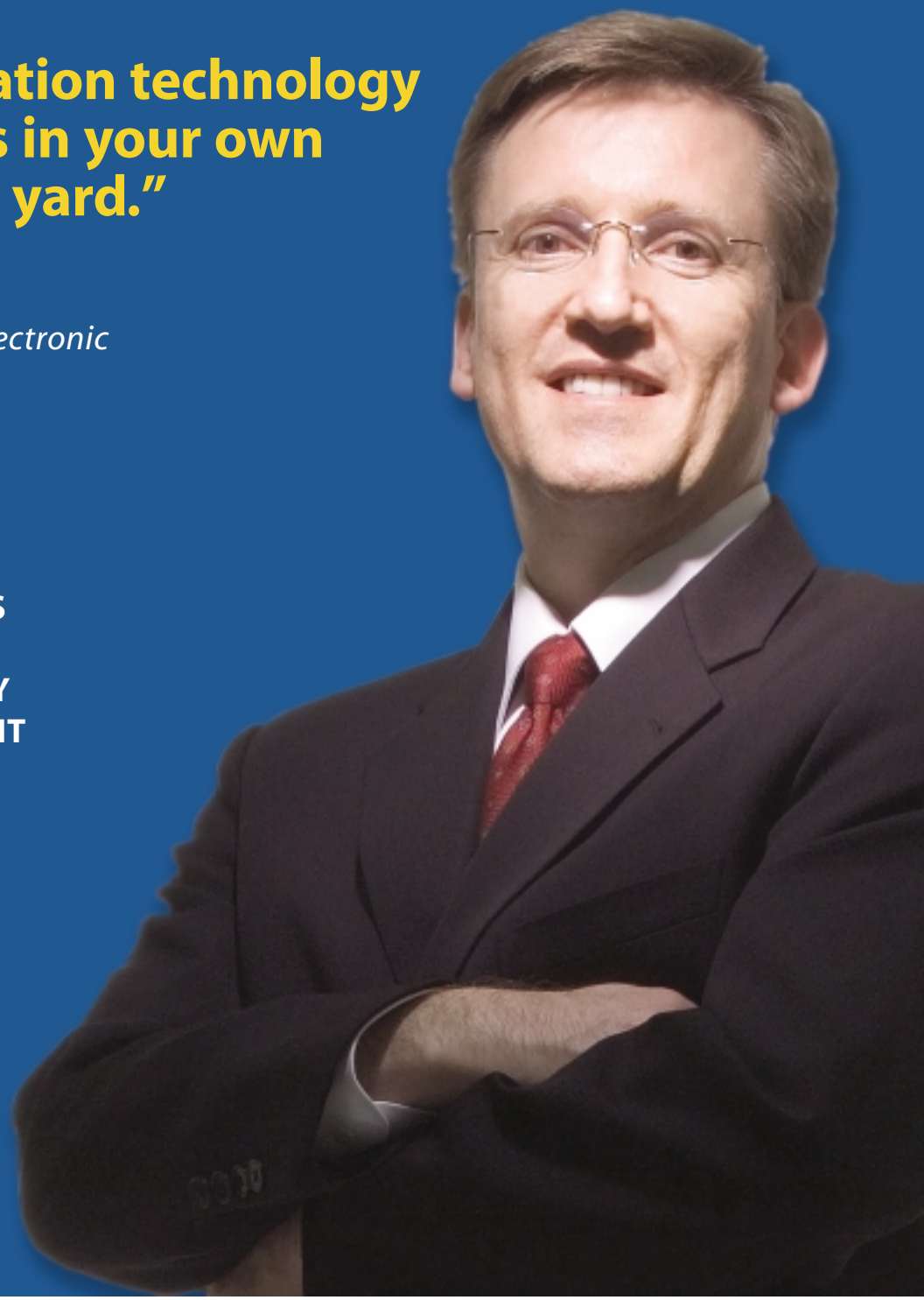

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Maneuvering Through Mediation: The Tricks, Twists and Turns of Finding Untracked Powder – Resolution

by Michele Mattsson and Kent B. Scott

Anyone who has ever experienced the joy of skiing through Utah's dry, untracked powder has felt euphoria – the bliss of floating, effortlessly. But like mediation, getting there takes lots of work and creativity. Do you hike up to your favorite backcountry spot before anyone else does? Do you hire a helicopter? Do you dash up to the nearest resort and try to be the first person on the lift? How do you avoid the dangers? In this article, we'll discuss the tricks, twists, and turns of getting to the untracked powder – getting to a settlement.

Getting Ready: pick the day, pick the gear, prepare yourself, and coordinate work with your companions. Preparing the client for mediation is an important task. Plan on who will attend the mediation. Determine who the decision maker is – your client or someone else? Bring the important players along. Leave the difficult players behind (unless it's your client).

Talk to your client about the process, about what to expect, about how the client can help make the process a success, about how much it will cost and how much can be saved by settling. Talk about how you'll act – differently from court appearances. Brace your client for the ups and downs of the process. Stress the "ups." Have your client help with mediation preparation. Involve your client in the process of selecting a mediator. Let him or her review and comment on mediation position statements. Inform your client how the opening session works and who will and will not be present. Listen to your client's concerns about the process and act on them. For example, if your client is fearful of meeting in joint session, ask the mediator to shorten or dispense with that portion of the mediation.

Arming the Mediator: decide where to go, how to get there. While the attorney's role in the mediation process may not be as dominant as in a traditional court setting, the time and effort given to preparation is nonetheless critical. Prior to the mediation, legal counsel can work with the mediator in determining how much information should be available in order to give the mediation its best chance to succeed. Think about whether you want to exchange position statements or furnish confidential memoranda to the mediator only. If possible and advisable, involve opposing counsel in the preparation process. Talk about the personality traits of the parties and discuss trouble spots. Suggest ideas for settlement so the mediator, counsel, and the parties can begin to embrace the possibility of resolution.

Getting Together: meet up; begin the trek. The joint session begins the overt portion of the mediation process. The parties, their counsel, and the mediator typically meet in a room together to discuss the mediation framework and the parties' respective positions. The mediator introduces the session – outlines the process, the ground rules, and the benefits of mediation. Counsel should then be prepared to make an opening statement outlining pertinent facts and his/her legal position. Think through your opening statement. Brevity is often warranted. Rehearse and fine tune it like you would for oral argument. But remember the focus is different. You are not making an argument like you would in court. You are setting the stage for fruitful negotiations. It is never helpful for an attorney to be too critical of the opposing party or opposing attorney in an opening statement. It is always helpful for an attorney to express

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a willingness to work towards resolution and to express his/her optimism that a mutually acceptable agreement can be achieved.

An important strategic consideration is whether to have your client speak in the opening session. Many attorneys are afraid to have their clients speak in the opening session and rightfully so. Balance the need of your client to vent with the negative impact it may have on the negotiation process. Some clients have trouble staying focused and do more harm than good. Others are well-spoken and can set the stage for an open, productive discussion. (If it won't be productive for your client to speak in the group session, give him/her the chance to vent when you're alone with the mediator.)

Consider how much time should be spent in the joint session. In many mediations, it's more productive to keep the joint session short. In other cases, most of the mediation can be conducted in the group session.

Splitting Up: chose your own way to the top.
In the typical scenario, the joint session concludes, and the parties and their attorneys separate into different rooms. The caucusing process then begins in earnest. The mediator will often decide who to start with first, but if you believe it would be more productive to start with one side or the other, suggest it to the mediator.

What do you do when you're alone with your client?
We talk a lot about what happens when you are in caucus with the mediator, but not about what happens when you are alone with your client. Although this may be an awkward and antsy time, much can be accomplished. Here are some suggestions:

1. Let your client vent about what has gone on so far in the mediation. Do necessary damage control after the joint session. (If your client is concerned by what the mediator has said, discuss it with the mediator when he/she returns.)
2. Evaluate the strengths and weaknesses of the issues raised by each side.
3. Talk about your client's short and long term business and personal goals.
4. Discuss a case budget. How much will it cost to proceed – money, manpower, and time?
5. Let your client know there are no "have to's" in mediation, but discuss the value of resolution and finality from an economic and emotional perspective.
6. Listen to your client's underlying concerns; then help your client focus on his/her real interests.
7. Try new ideas for creating settlement options.
8. As the mediation goes on, review the progress that has been made. Reiterate the positive concessions made by the other side. Commend your client for his/her efforts.
9. Go for a walk with your client. Let your client go for a walk. Let your client take a "smoke break."
10. Be sociable. When you get bogged down, change the subject. Learn more about your client. Discuss topics of common interest.

When the mediator comes to the caucus room, how much do you let your client talk?
It depends. It depends on the need of your client to have his/her feelings validated and understood. Lawyers get nervous when their clients talk too freely, but it is important to let the mediator and client open up a dialogue. Avoid the temptation to cut your client off too early. Both counsel and the mediator can gather important information from a "rambling" client. At a point, however, counsel should intervene and help get the client back on focus.

What happens if you get along with opposing counsel? What if you don't?

Clients rarely like each other and sometimes counsel don't like each other either, but it helps if counsel can be cordial professionally. The more people who are able to cooperate in mediation, the better. When counsel get along and trust each other, much can be accomplished. They can talk with the mediator in advance of the mediation to discuss personality traits of clients, "hot spots," "hot buttons" to avoid, earlier settlement discussions, past and recent interactions between the clients, and new settlement strategies. During the mediation, counsel can talk together with the mediator to discuss difficulties their clients are having and to iron out lingering legal issues. Such a meeting is most productive if counsel are respectful of one another. If you do not get along with opposing counsel, avoid elevating tensions. Limit yourself in the joint session. Suggest going directly to caucus. Rely more on the mediator to dilute your emotion and to be your mouthpiece.

What can you do if the opposing party dislikes you?

It is rare that an opposing party will have much affection for you as counsel, particularly if you have filed suit and litigation has proceeded. During the mediation, do not give the opposing party more to dislike about you. Make the necessary points to advocate on behalf of your client, but don't be unduly critical or accusatory of the other party. Don't come on too strong. Make overtures to improve the relationship. Be sympathetic.

How to prepare offers and counteroffers

At a point, the mediation moves from information gathering to negotiation. Knowing what you know, how can the case be settled? There is a skill associated with making offers and counteroffers. Rapport and timing are crucial. It is always a back-and-forth process that can't be rushed or forced. Begin with the end in mind. Be goal oriented, not advocacy minded. Don't start too low or too high with your opening offers. A first offer should never be a final offer. Leave yourself room to negotiate, but don't discourage the other side from continuing with the negotiations by being unreasonable, unrealistic.

Don't be discouraged from continuing negotiations when the opening offer is too high or too low. They always are. It's not where you start, but where you end that counts.

Encourage your client to make concessions that are important to the other side, but are of limited impact to your client. Involve your client in the process. Don't overlook your client's concerns. Address them early. Include all the issues you want resolved in your offer. It's counterproductive to add new demands late in the negotiation process. Don't backtrack.

Factor in what you know of the personalities in the other room when crafting an offer. Stay flexible. Avoid taking the "bottom line" approach.

Work with the mediator in side caucuses with opposing counsel to get a sense of where things are going; how much flexibility the other side has; how to keep the ball rolling. Ask the mediator's advice. The mediator is the only person who knows the chemistry of the moment in both caucus rooms.

Have something in reserve to sweeten the pot and to complete the deal. Agree to pay for settlement document preparation, to pay the mediator's fee, to write a letter of apology, to do future work, to trade a service.

Be willing to make the last move, even if it's a small one.

What to do when the client draws a line in the sand

When a client draws a line in the sand, it either means he or she is frustrated or that negotiations have reached an impasse. Counsel and the mediator need to determine which it is and avoid the latter, if at all possible. Here are some tips. Review the progress that has been made up to that point. Ask to talk to your client alone. Take a lunch break. Go for a walk with your client. Discuss what will happen if the case doesn't settle. Indicate how much it will cost to proceed and discuss likely outcomes. Talk about risk. Get creative. Throw out new ideas. Add a new twist to an old idea. Keep your independence. Keep a sense of humor. Tell your client what you think is a "good deal" and what is not. The client is always the boss, but the attorney is the professional and must remain objective.

Conclusion: the untracked powder.

There are a lot of ways to get to resolution, but all take effort, creativity, and agility. Pick the day. Pick the gear. Decide where to go, how to get there. Meet up, split up. Keep up. Work together. Catch your breath. Come together. Though the way up may be exhausting, the ride down – having resolved the dispute – is liberating.

The genesis of this article was a breakout session at the Mid-Year Convention in St. George in 2004. Panelists were V. Lowry Snow, Terry L. Wade, and Kent B. Scott; Michele Mattsson was the moderator.

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$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

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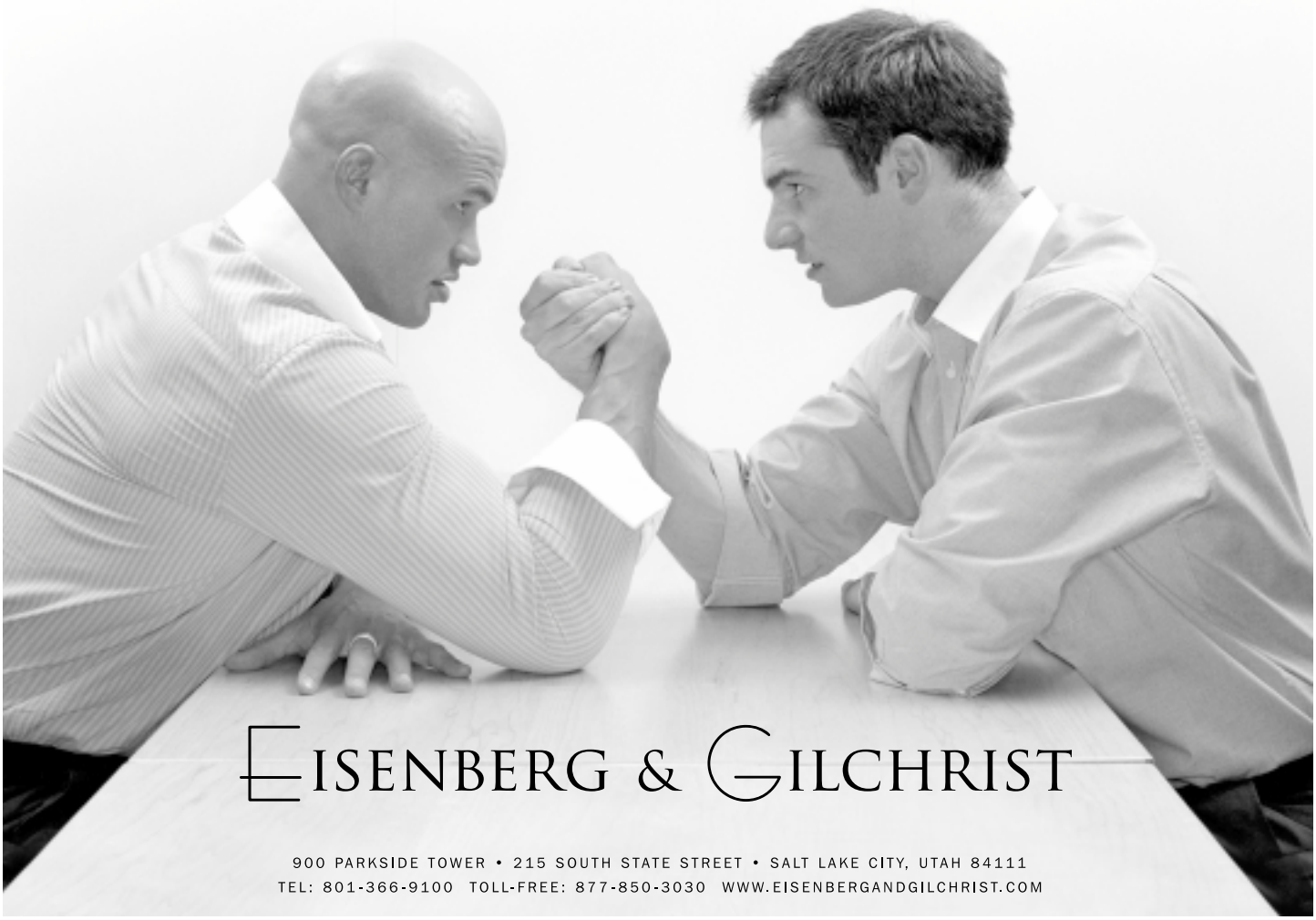

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Utah Standards of Professionalism & Civility

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 6 – Adherence to Promises & Commitments

by V. Lowry Snow

It is late Friday afternoon after a harried week of work. You are tired and want to get out of the office early. Just as you think you are finally free to leave the demands of your clients and enjoy your weekend, a return telephone call comes in from opposing counsel on one of your cases, dealing with an important issue. The attorney on the other end of the line makes one or more of the following representations to you:

"Don't worry, I will agree to…

1. grant you additional time to respond on behalf of your client."
2. stipulate to the admission of that document you want to introduce at trial without requiring you to put on additional foundation testimony."
3. not submit the proposed findings or order to the court until we have a chance to work through our differences."
4. produce documents for you in advance of your taking my client's deposition."
5. represent to the court that you are unavailable for the hearing and that it should be rescheduled."

Do you believe him? Can you fully rely on his representation and enjoy your weekend without worry, or do you need to prepare a letter or file something quickly to protect yourself? The response of most experienced attorneys would probably be, "Well, that depends on which lawyer is making the promise." I am pleased to report that with few exceptions, I personally feel comfortable relying on the representations of the lawyers I deal with on a regular basis. Nevertheless, our profession suffers from the general perception of the public that we are, as group, wholly untrustworthy and dishonest. As it turns out, this lowly perception of lawyers has been around for a few years.

Mark Twain said over 100 years ago, "What chance has the ignorant, uncultivated liar against the educated expert? What chance have I … against a lawyer?"[1] In the brief and humorous style that made him famous, Twain expressed a perception of lawyers that has been shared by generations of Americans. Indeed, decades before Twain made this statement, Benjamin Franklin gave the following observation about the legal profession: "God works wonders now and then. Behold: a lawyer, an honest man."[2]

Why have the public, and even attorneys themselves, maintained such a low perception of honesty among members of the legal profession? Doctors, accountants, engineers and librarians have no such general reputation. We do not hear comments about school teachers being unscrupulous and self serving, of bankers being ambulance chasers, or of architects being liars or deceivers. It is supremely ironic that a profession devoted to preserving law and order in society should be maligned as untrustworthy and suspect. Just what is it about the legal profession that makes its members so mistrusted?

The answer lies within the structure of society itself, or in other words, within the environment where attorneys ply their trade. Our society is constructed of laws intended to safeguard fairness and equality, laws which lawyers use as the tools of their trade. Doctors do not try to portray laws in the best light to favor their patients, but lawyers do. Electricians do not argue about how poorly their customers have been treated and about how they should be protected by the law, but lawyers do. Bakers do not prepare documents for public consumption that portray their fellow bakers as misguided or dead wrong about the law, but lawyers do. In short, lawyers are called upon to tinker with fundamental principles of law and justice in society, and in doing so are expected to portray "truth" from the narrow perspective of their client alone.

A profession that calls upon its members to use such powerful weapons must necessarily be held to a higher standard of integrity

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and honor. In the heart and mind of each lawyer there should rest a fundamental respect for moral integrity and the willingness to sacrifice for it. As our own Court stated over 60 years ago in *Ruckenbrod v. Mullens,* 102 Utah 548, 133 P.2d 325 (Utah 1943),

> The present status of the attorney in our judicial system has been a result of historical development which dates back for some seven centuries … While doctors, plumbers, electricians, barbers, etc., may sell their time and skill to the public by virtue of their license from the state, the attorney alone has the right to set the judicial machinery in motion in behalf of another and to thus participate as an officer of the court in a judicial proceeding.

Id. at 558. However, "'[m]embership in the bar is a privilege burdened with conditions' … [Lawyers are] received into that ancient fellowship for something more than private gain. [They] became an officer of the court, and like the court itself, an instrument or agency to advance the ends of justice." *Id.* at 558 quoting *People v. Culkin,* 248 N.Y. 465, 162 N.E. 487 (1928) (opinion by Justice Cardozo).

Standard Six of the twenty Standards of Professionalism and Civility adopted by the Utah Supreme Court embodies these principles in respect to how attorneys are to interact with each other and with the public at large. It states: "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."

While the words are simple, the intent of this standard (as with the other nineteen as well) relates to something far deeper. Standards of integrity and professionalism should be internalized and maintained by and between practitioners in the law, in order for such standards to be respected by all members of society who are governed by the law. The standards must mean more than mere words on paper. If lawyers cannot be honest with each other, they will not likely be honest with anyone else.

The concept of an internalized commitment to integrity as being fundamental to the stability of society is portrayed by Joseph J. Ellis in his Pulitzer Prize winning book, "Founding Brothers."[3] In the first chapter, Ellis discusses the duel between Aaron Burr and Alexander Hamilton, a duel that ended in tragedy for Hamilton and sealed the political doom of Burr. After discussing at length the details of what happened at Weehawken, New Jersey that fateful day of July 11, 1804, Ellis questions why two respected American statesmen would be led to such an impasse. Why, he asks, did Hamilton hate Burr – a member of his own party, from his own state of New York – so much more than his arch rival Thomas Jefferson, who espoused political principles against which Hamilton was diametrically opposed? The answer is found in the degree to which each man maintained principles of integrity and commitment to the rule of law laid out in the new American Republic. Hamilton acknowledged that Jefferson, while holding political beliefs that Hamilton strongly disavowed, was still "'by far not so dangerous a man,' who possessed 'solid pretensions to character.'" As for Burr, however, "his private character is not defended by his most partial friends … His public principles have no other spring or aim than his own aggrandizement … If he can he will certainly disturb our institutions to secure himself permanent power and with it wealth."[4]

Hamilton recognized that Burr was dangerous not because he took a strong stand for what he believed in, but precisely because he took no stand and believed in nothing but himself. In words that could be applied equally to today's lawyers, Ellis portrayed this concept in these words: "Honor mattered because character mattered. And character mattered because the fate of the American experiment with republican government still required virtuous leaders to survive."[5]

Hence, Standard Six, as with all twenty standards, embodies a concept far more meaningful than the need for attorneys to keep their word to each other. First and foremost, they must keep their word to themselves. Their own internal commitment to integrity must outweigh any temptation to justify an untrue

statement that advances the interests of their client. They must hold inviolate simple concepts of honesty and trustability in their relationships with their fellow lawyers and as officers of the court, not only because that is the right thing to do, but because that is the only thing to do when dealing with principles of law and justice.

One may ask, is the sixth standard really necessary? Do we really need to be reminded of the things we learned in kindergarten – to always tell the truth and keep our promises? In the case of *Topik v. Thurber,* 739 P.2d 1101 (Utah 1987), the Supreme Court found an attorney liable for his failure to honor his promises. In this case, the attorney and his client both promised that if the client received an expected settlement from a personal injury award, a portion of the proceeds would be forwarded to the bank in satisfaction of the client's debt. However, when the money came in, the attorney failed to fulfill his promise. The court found that "the evidence at trial established that defendant made verbal and written promises to honor [his client's] assignment as the funds passed through defendant's hands." *Id.* at 1103. The attorney's defense that his client and the client's partner should be solely liable "in no way negate[s] defendant's own obligations and liabilities affirmatively undertaken and resulting from his verbal and written representations." *Id.* In short, the attorney was required to keep his promise. Character matters to the Court.

Recently, an attorney drafting a lease for a South Florida shopping center took some creative liberties in including an "end of the world" clause that required the payment of rent to his client even if the world came to an end. The clause included the following statement: "For remedial purposes, Landlord will be deemed aligned with the forces of light, and Tenant with forces of darkness, regardless of the parties' actual ultimate destinations, unless and until Landlord elects otherwise in writing."[6]

Notwithstanding the questionable alignments and motives we see in our clients from time to time, a good lawyer will always find a way to illuminate the process with his own light and truth. And in the end, not only is the client better served, but the whole underpinning principles of law and justice that maintain our society are strengthened and preserved. May the force be with you.

1. *Lawyer's Wit and Wisdom: Quotations on the Legal Profession, in Brief,* page 43 (Bruce Nash & Allan Zullo, ed.'s, Running Press, 1995).
2. *Id.* at 48.
3. *Founding Brothers: the Revolutionary Generation,* Joseph J. Ellis (Alfred A. Knopf, New York, 2002).
4. *Id.* at 42.
5. *Id.* at 47.
6. *Lawyer's Wit and Wisdom, supra,* at 35.

Commission Highlights

During its regularly scheduled meeting of July 13, 2005, which was held in Sun Valley, Idaho, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. George Daines reviewed the convention schedule and announced that Hod Greeley (ABA Area Representative) Jim Smith (Arizona Bar) and Dennis Jonz (President of New Mexico Bar) would be attending the convention as visiting dignitaries. He also introduced Stephen Burt as the new public member recently appointed by the Supreme Court.
2. George announced that he would make a short presentation at the opening session of the convention regarding the proposed mandatory insurance disclosure rule. John Baldwin informed Commissioners that a notice of the proposal was placed in a recent E-Bulletin and the Bar had so far received four or five responses, all of which were opposed.
3. George reported that he received a letter of response from the Supreme Court on the CPI Index petition. While the Court would like to see details each time we request a fee increase, they will expedite requests. He further reported that because the Bar is in sound financial condition, there was no real harm in the Court's denial of the petition. He also reported that the Court recently issued an order defining the practice of law and an order permitting non-lawyer representation in small claims court under certain conditions. New IOLTA rules also were recently approved by the Court. These rules require mandatory IOLTA participation, but allow for approved exemptions.
4. George reported that the Admissions Committee had finalized the proposed Law School Faculty Rule which provided limited admission for in-state law school faculty member to perform *pro bono* legal services without being a member of the Bar. The motion to approve the rule passed with Steve Burt opposed.
5. George stated that the Appellate Section wished to amend their bylaws. Discussion followed, the amendments were approved and it was suggested to revisit the issue of section/committee participation in the Governmental Relations Committee in the fall during the section/committee leadership workshop.
6. The motion to reappoint Lisa Hurtado Armstrong, Jody K. Burnett, Thom B. Roberts, Lauren I. Scholnick, Erik Strindberg and Roland F. Uresk to the Legal Services Board passed unopposed.
7. Steve Owens had been asked to chair a LAP sub-committee and the sub-committee members were announced: Gus Chin, George Daines, Leslie Francis (Professor at University of Utah), Felshaw King, Robert Part (AOC's Human Resource Director)

and Julie Wray. The motion to approve the sub-committee membership passed with none opposed. George would like the sub-committee to evaluate RFP's and come back with a report and recommendations. David Bird reminded the sub-committee members that they are to evaluate the proposals rather than actually designate a provider.

8. John Baldwin reported on the 2005-06 budget and stated that the admissions department has the largest ever July exam pending. General discussion ensued about the admissions budget. As the Commission voted last year to ensure the admissions department pay for itself (via a Bar resolution), this issue needs to be closely monitored and revisited in December.

   George provided background information on the Bar's budget to new Commissioners. He characterized the budget as well run and observed the commission receives quarterly financial reports. The 2005-06 budget was approved with no opposition.

   Scott Sabey stated that in view of the tremendous benefit that UDR provides in reducing the number of small claims cases, he supported approving the grant request. Gus Chin observed that UDR helps fulfill the Bar's basic mission and other Commissioners concurred. The motion to approve the UDR grant request passed with David Bird opposed.

9. Craig Mariger (Chair of the Ethics Advisory Opinion Committee), Mary Corporon and Gary Sackett (both members of the Ethics Advisory Opinion Committee) were in attendance for the discussion of the Ethics Advisory Opinion #05-03. After a lengthy discussion, a vote was taken to approve majority opinion with portions modified as amended. Ten Commissioners voted in favor while David Bird and Felshaw King were opposed.

10. George welcomed new Commission members Rod Snow, Lori Nelson, Herm Olsen and Steve Burt.

    George announced that Ex-Officio Commission positions for the upcoming year would be: the Young Lawyers Division, Women Lawyers of Utah, UMBA, the Paralegal Division, the Deans of the two Utah law schools, and the two ABA positions as well as a Past President position. The motion to approve the positions passed with none opposed.

11. David Bird announced that the Executive Committee members would be: Gus Chin, Nate Alder, Lowry Snow and Scott Sabey. The motion to approve the Executive Committee membership passed unopposed.

    David Bird made a motion to allow the new Executive Committee members to sign Bar checks. The motion passed unopposed.

12. George reviewed the Commission meeting schedule for 2005-06. He noted that the October meeting may be held in Logan rather than Salt Lake.

13. Steve Owens, Rusty Vetter, David Bird and George Daines were duly recognized for their valuable service as Bar Commissioners.

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.

The Utah Minority Bar Association Presents:

"Celebrating Diversity in the Law"

Banquet and Program Honoring the First 50 Minority Attorneys in Utah
October 15, 2005 at 6:00 p.m.
Grand America Hotel • Salt Lake City, Utah

Since the Utah Minority Bar Association ("UMBA") first announced its upcoming "First 50" event, excitement has been building rapidly. If you have not already heard, UMBA is hosting a celebration to honor and recognize the First 50 minority lawyers admitted to practice law in the State of Utah. This will be a gala event and everyone is invited. Many firms, organizations, and individuals have already committed to attend. I hope you do too.

The "First 50" is a distinguished group, consisting of African-American, Asian-American, Hispanic-American, and Native American lawyers who are pioneers in the Utah legal field. Each of the First 50 overcame obstacles and prejudice to become a lawyer. Each has a unique story. The first minority attorney in Utah was an African-American gentleman named Lawrence Marsh who was admitted to practice law in 1909. From then, it took more than fifty years to arrive at ten minority lawyers admitted in Utah (in 1961, Kenneth M. Hisatake became the 10th minority attorney in Utah). Only one minority attorney, Kent T. Yano, was admitted in the 1960s (1968). The rest of the First 50 were admitted during the 1970s and the year 1980.

In spite of the barriers they faced, the First 50 have made an impressive mark on the Utah legal field. Members of the First 50 include eight Utah State Court Judges (Judge Raymond S. Uno (Ret.), Judge Glenn K. Iwasaki, Judge Howard H. Maetani, Judge Sheila K. McCleve, Judge Andrew A. Valdez, Judge William A. Thorne, Jr., Judge Tyrone Medley, and Judge Paul F. Iwasaki), as well as a United States Magistrate Judge (Judge Samuel Alba), a Federal Administrative Law Judge (Judge Gilbert A. Martinez), and a Navajo Supreme Court Justice (Justice Herbert Yazzie). Two of the First 50 are presently Professors of Law (Professor Larry J. EchoHawk at Brigham Young University and Professor Jimmy Gurulé at Notre Dame). Others serve in government positions and many have started their own practices in a variety of fields. Some have held elected office, some have served our country in the military, some have held prestigious positions appointed by Presidents of the United States (among others, Michael N. Martinez served as Deputy General Counsel to the Equal Employment Opportunity Commission and Jimmy Gurulé as Undersecretary of the U.S. Treasury).

Regardless of the path they took, all of the First 50 have contributed to bettering society through their service and efforts to create opportunities for others. Many have advocated for the civil rights and legal protections of the indigent and disadvantaged, and all have served as examples for those following in their footsteps. Many have volunteered their time and energy to various Boards and organizations to provide service to the community. Their accomplishments are too numerous to name here, but will be highlighted the night of the First 50 banquet.

Those of us in the legal field who are persons of color, in addition to all others in our state who benefit from the richness of diversity in the legal profession, owe much to the First 50. Please join us in honoring them. Your support will enable UMBA to pay tribute to the First 50 and to continue UMBA's important work in furthering diversity in the legal profession and advocating for legal services and education to minority communities. Some of UMBA's ongoing programs include: scholarships to minority law students, mentoring and educational programs for minority law students and attorneys, networking and business development for minority attorneys and others, furthering the "Diversity Pledge" among legal employers, and promoting the provision of legal services and education to underserved minority populations.

UMBA would also like to thank the sponsors whose generous support will allow us to recognize the stories of these inspiring individuals. We hope that you will join us on October 15.

ERRATA

The list of First 50 attorneys published in the July/August issue of the *Utah Bar Journal* has been modified based on continued research by UMBA and information provided by Utah State Bar members. The following revisions have been made: (1) Lawrence Marsh (African American) was the first minority lawyer admitted in Utah (1909); (2) Thomas W. EchoHawk (Native American) (1978) has been added to the list; and (3) Jimmy Gurulé's date of admission is 10/09/1980.

Please go to UMBA's website at www.umbalaw.com for further information and to see an updated list of the First 50.

FIRST 50 SPONSORS

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Pro Bono Honor Roll

Clark Allred
Michael Anderson
Deb Badger
Judy Barking
Justin Bond
David Broadbent
David Connors
Tracy Cowdell
Roberto Culas
Keith Eddington
Ronald Elton
James Farmer
John Gothard
David Hamilton
M. Darin Hammond
Milton Harmon
D. Rand Henderson
Angela Hendricks
Timothy Houpt
Brent Johns
Michael R. Johnson
Jason Jones
Jan Malmberg
Ramona Mann
David Marx
William Ormond
Lester Perry
Leslie Randolph
J. Bruce Savage
Jeremy Sink
Kevin P. Sullivan
Benjamin Thomas
Thomas Thompson
Todd Turnblom
Leslie Van Frank
Gregory B. Wall
Kimberly Washburn
Carolyn Zeuthen

Utah Legal Services and the Utah State Bar wish to thank these attorneys for their time and willingness to help those in need. Call Brenda Teig at (801) 924-3376 to volunteer.

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

Grant Program Seeks Requests

"AND JUSTICE FOR ALL" annual grant program seeks requests to support civil legal aid programs in Utah. Grants are made to non-profit organizations in Utah providing direct legal aid, especially those who face barriers due to income, disability, age, geography, race or ethnicity. The agency expects to award three to six grants totaling approximately $25,000. Grants are due September 30, 2005. For an application please contact kaiwilson@lasslc.org.

Notice of Stay of Suspension

By Order of the Third Judicial District Court in *In the Matter of the Discipline of Marsha M. Lang,* Case No. 010910847, the Honorable Robert K. Hilder presiding, Marsha Lang's twelve-month suspension beginning May 1, 2005 has been stayed, as of August 1, 2005. For a period of nine months, Ms. Lang's practice of law is under the supervision of attorney Gary R. Howe.

Utah Attorney Swims English Channel

Richard Barnes, a Utah attorney, has accomplished something no other Utahn has done before. On August 6, 2005 he swam the English Channel. The swim from England to France was completed in sixteen hours and forty-three minutes.

Known as the "Mount Everest" of swimming because of its difficulty, the English Channel is 21 miles straight across, but because of the very strong currents, tides, and weather conditions, swimmers must swim much further than that. Richard Barnes' swim was approximately 36 miles.

Richard Barnesand his wife, Darcee, overlooking the white cliffs at Dover and the English Channel.

Richard entered an elite group of swimmers who have successfully made the crossing. Out of thousands of attempts, only approximately 680 people have completed the swim, less than half of the number of people who have climbed Mr. Everest.

The English Channel is known as the most difficult open water swim because of the extreme cold water, averaging only 60 degrees at its warmest season. Other obstacles are jellyfish stings, strong currents, and six-foot swells, not to mention the occasional passing freighter creating even larger waves. It is one of the busiest shipping lanes in the world with 600 tankers passing through and 200 ferries and other vessels going across daily.

In order to be officially recognized by the Channel Swimming Association, swimmers are not allowed to wear a wet suit or anything that will aid in buoyancy or thermal protection. The only exception is that swimmers are allowed to apply "Channel Grease" (a mixture of Vaseline and lanolin) before the swim.

Mr. Barnes has been practicing law for five years and works as an insurance defense attorney for Paul H. Matthews & Associates, P.C.

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Utah State Bar Presents Awards At 2005 Annual Convention

The Annual Awards of the Utah State Bar were presented at the Bar's 75th Annual Convention by the Board of Bar Commissioners, on behalf of the entire Bar membership. Recipients are selected on the basis of achievement; professional service to clients, the public, courts and the Bar; and exemplification of the highest standards of professionalism to which all judges and lawyers aspire.

JUDGE OF THE YEAR
HON. ANDREW A. VALDEZ

Judge Andrew A. Valdez was appointed to the Third District Juvenile Court in June of 1993 by Gov. Michael O. Leavitt. He serves Salt Lake, Summit and Tooele counties. He graduated from the University of Utah College of Law in 1977.

Prior to his appointment, Judge Valdez was a commissioned captain in the U.S. Army J.A.G. Corp and trial counsel with the Legal Defenders Association Felony/Homicide Division.

Awards include Board of Youth Corrections Distinguished Service Award; American Red Cross Lifesaver Award; Minority Bar Association Leadership Award; Lillian Smith "Youth Advocate of the Year" Award; "Peace in the Streets" Award given by the Salt Lake Area Gang Project; U.C.L.R. Leadership Award; Catholic Community Service Award; and Honorary Doctorate Degree of Humane Letters, Salt Lake Community College.

Judge Valdez has developed a court-based mentoring program, partnerships with community education schools, and opportunities for female juvenile offenders to work off restitution obligations.

Judge Valdez has served as chair of the statewide Youth Parole Authority, and has served on the Utah Sentencing Commission, Board of Trustees for Primary Children's Medical Center, Juvenile Justice Task Force, Board of Juvenile Court Judges, and the Judicial Council. He is currently a member of the National Youth Gang Center and was honored January 2003 with the Martin Luther King Civil Rights Award by the N.A.A.C.P. Judge Valdez was awarded the Footprinter's Association Law Enforcement Officer of the Year award and the Utah Children Child Advocate of the Year award in May 2005.

DISTINGUISHED COMMITTEE OF THE YEAR
GOVERNMENTAL RELATIONS
Lori W. Nelson & Scott R. Sabey, Co-Chairs

The Bar's Governmental Relations Committee assists the members of the Bar by monitoring activity at the offices of the Governor, Senate and the House of Representatives. Pursuant to Article VIII, Section 4 of the Utah Constitution, and as set out in Rule III, Section O of the Supreme Court Rules of Professional Practice and State Bar Integration and Management, the Utah Supreme Court has directed the Governmental Relations Committee to study and provide assistance on public policy issues, and advise the Bar Commission on positions to adopt on public policy issues and pending legislation. This includes issues involving: the courts of this state; rules of procedure and evidence in the courts; the administration of justice; the practice of law; and matters of substantive law on which the collective expertise of lawyers has special relevance and/or which may affect an individual's ability to access legal services or the legal system as defined by the Utah Supreme Court.

The Committee also uses the broad participation of the Bar by seeking participation in the Governmental Relations Committee by each of the other Sections and Committees of the Bar. The Committee's members also review and analyze pending or proposed legislation and provide technical assistance to the Legislature, the Governor, the Judicial Council and other public bodies upon request.

The greatest challenge the Governmental Relations Committee has faced over the last few years has been to improve the Bar's relationship with the Legislature. A better working relationship is necessary to assist in improving the quality and clarity of laws that are passed. To that end Constitutional Law classes by professors of both law schools have been offered for new legislators, presentations on the available services of the Governmental Relations Committee have been made to the caucuses of both parties, and meetings have been held with key members of the House and Senate. The Committee has also assisted the Bar Commission in the effort to ensure the Bar's representations to the Legislature are consistent with the views of its members.

The degree of success enjoyed to date in Governmental Relations Committee's overall goals of improving the practice of law for lawyers and the impact of the laws on the public could not be accomplished without the tremendous contributions of Bar member John T. Nielsen, to whom we all owed a debt of thanks.

DISTINGUISHED SECTION OF THE YEAR
ALTERNATIVE DISPUTE RESOLUTION
Michelle M. Roybal, Chair

At 136 members, the ADR Section may well be one of the smallest of our Bar. We have found, however, that the membership is vocal, strong, and committed to supporting events advocating for dispute resolution throughout our community.

The Alternative Dispute Resolution Section of the Utah State Bar is pleased to welcome attorneys and non-attorneys as its members. We are one of the few Sections of the State Bar authorized to allow non-attorney members to join. We believe this is indicative of the collaborative work that we do as conflict resolution practitioners and we hope that the professional diversity represented in our Section improves the quality of the education programs we offer as a Section.

Some of the accomplishments of the ADR Section over this past year include the establishment of the ADR Academy as our flagship event, co-sponsoring the Utah ADR Symposium Seeking Just Resolutions with the Utah Council on Conflict Resolution, and holding sessions at the Midyear Conference, Annual Convention and Fall Forum. As well, annually, the Section honors a community member who has significantly contributed to the field of dispute resolution with the Peter W. Billings, Sr. Outstanding Service Award.

In addition to these CLE and professional development programs, our members have become increasingly involved in outreach and education efforts regarding conflict resolution. We have been involved with the review of legislation mandating mediation in domestic law disputes in Utah, as well as the in the establishment of a volunteer mediation program at the Sandy Division of the Third District Court. One of the primary goals of the Section leadership over the coming years is to increase the exposure of students in public schools to the ADR process and to their own abilities to resolve conflicts in an effective manner.

We are honored by this award from the Board of Bar Commissioners and are pleased to be involved in the recognition of the importance of the role of lawyer as problem solver.

Antitrust & Unfair Competition Law Section: An Introduction

The Antitrust & Unfair Competition Law Section of the Utah State Bar was established in January 2005. Our membership currently includes lawyers on both the plaintiff and defense sides of the Bar, academics, government prosecutors and economists. In that regard, we would like to invite all Utah lawyers whose practices involve antitrust and unfair competition matters to join our Section and add their expertise to our group. We believe we will form an effective network of lawyers in Utah whose knowledge and expertise allow us to support each others' practices.

Why "Antitrust & Unfair Competition Law"?

Twenty years ago, lawyers were frequently heard commenting that "antitrust law" was dead (or, at least, dying) and that antitrust practitioners were searching to re-establish themselves in new, "growing" areas of the law. In reality, antitrust law, like many things, is somewhat cyclical. While federal antitrust enforcement activities often vary based on the current administration's economic policies, antitrust law itself has remained quite vibrant and continues to evolve. This should come as little surprise. As the U.S. and global markets change and grow with the "new economy," the market participants' power and influence in those markets can wax and wane at an astounding rate. These dynamic markets often require new understandings of the exercise of market power, the relationships between the participants, and other competition-related matters. In addition, following the collapse of Enron (and others) and the rise of Sarbanes-Oxley, corporate legal compliance, including antitrust compliance, has also taken on a new importance.

In short, times have changed. Both national and state antitrust practice has taken on a new importance and, correspondingly, the national and state bar associations reflect that change. The Antitrust Section of the American Bar Association is one of the best organized and most respected sections of the ABA. Likewise, many state bar organizations (particularly those in states with significant economies) have antitrust sections for their practitioners. We believe the time has come for the Utah State Bar to join the ranks of those states. The development of Utah's economy and increasing sophistication of Utah business will bring greater scrutiny to commercial activity in Utah and a corresponding demand for sound legal advice from Utah lawyers.

We have also sought to broaden the scope of the Section beyond "antitrust" issues by including "unfair competition." More and more frequently, persons and businesses seeking to improperly consolidate market power will engage in a variety of conduct that runs afoul of much more than traditional antitrust laws like the Sherman Act and Clayton Act. Thus, by "unfair competition," we intend to include related areas of the law, such as false or deceptive advertising, employee raiding, unfair import competition, RICO, commercial bribery, economic espionage, and various common law torts. To some degree, we believe we will have some interesting opportunities to involve other sections of the Bar, including the Intellectual Property Section and Cyberlaw Section where unfair competition law crosses paths with these areas.

Antitrust? What is that about?

Unfortunately, antitrust law has the tendency to frighten away many lawyers simply by its complex legal and economic framework. However, given the fact that virtually every business faces antitrust issues, it is an area of law with which all lawyers should have at least basic familiarity. Federal and state antitrust laws involve a variety of aspects of your clients' businesses. By way of background, antitrust law (hopefully) protects competition in the marketplace and prevents the improper consolidation of market power. Antitrust law, therefore, is concerned with conduct among competitors and, to a lesser degree, among suppliers, distributors and customers. It also regulates the competitive behavior of companies who hold dominant positions in their respective markets. Antitrust law even addresses pricing and marketing programs, generally requiring that customers be treated equally and that companies engage in accurate advertising campaigns.

Most lawyers know that it is illegal for competitors to agree to fix prices, allocate markets and customers, boycott other businesses, or collude during bidding. However, federal and state antitrust laws impact a variety of other commercial behavior. For example, when are exclusive territories and distributorships illegal? When is it appropriate to talk to your competitors and what subjects are off-limits? What are the guidelines for participating in an industry "benchmarking" program? Can a company offer its competing customers different pricing and marketing support? What types of comparisons can a company make with its competitor's products? Helping clients navigate these frequently subtle and difficult issues can be critical to avoid criminal penalties and potentially massive civil liability.

With the passage of Sarbanes-Oxley, officers and directors of publicly-traded corporation have found themselves facing new requirements in overseeing the ethical and legal operations of their businesses. Indeed, even many non-profit and privately-held businesses have adopted "quasi-Sarbanes" compliance programs

as part of a "best practices" program. Recent amendments to the Federal Sentencing Guidelines, though now merely "advisory," imposed specific requirements for businesses to create "effective" corporate compliance programs. Most scholars and commentators believe that an antitrust compliance program, while not yet a "certifiable" requirement under Sarbanes, is essential for any business. Many antitrust practitioners have found themselves frequently facing questions from clients interested in the creation, adoption and maintenance of an effective antitrust compliance program. Once again, the shifting economic and business landscape has imposed new demands on antitrust lawyers.

Antitrust Enforcement

Both federal and state enforcement authorities closely scrutinize the behavior on market participants for competition-related misconduct. On the federal level, the U.S. Department of Justice (DOJ) and the Federal Trade Commission enforce federal antitrust laws. The DOJ has also obtained the involvement of market participants in its surveillance by creating an "amnesty" program that encourages corporations to come forward with evidence of anticompetitive activity (even when the corporation itself is involved) for greatly reduced fines and avoidance of jail time. According to the DOJ, a majority of its current investigations originate from the "amnesty" program. By way of example, the DOJ is currently prosecuting a number of multi-national corporations and executives for price-fixing in synthetic rubber chemical markets. To date, the DOJ has netted over $200,000,000 in fines and key executives from several defendants have pled guilty and are awaiting sentencing.

On the state level, the Utah Attorney General's office has enforcement authority over Utah's antitrust laws. We have seen, over the past ten years, increasing enforcement activity by state regulators. A quick survey of Utah consent decrees and prosecutions reveals that the Utah Attorney General's Office actively enforces and oversees the conduct of business in Utah from an antitrust perspective.

Of course, the antitrust laws are also enforced by civil litigants as well. The federal Clayton Act (and Utah state law) allows private parties to sue each other for violations of the antitrust laws. These cases usually originate with frustrated competitors, terminated distributors, or customers who have not received the "best price" for their purchases. While these cases lack the criminal aspects of a government prosecution, they are notoriously time-consuming, expensive and unpredictable in their outcomes.

Agenda for 2005-2006

We have some fairly modest, but important, goals for our first year. We have established a web page through the Utah State Bar at http://www.utahbar.org/sections/antitrustlaw/Welcome.html. We hope to make this a helpful clearinghouse of information and resources for antitrust lawyers in Utah. In addition, we intend to hold regular seminars and continuing legal education programs to build our network of lawyers and economists to share ideas on antitrust issues in Utah. We will also prepare a primer on Utah antitrust and unfair competition statutes and case law to be made available on our website. We will embark on creating a network of state bar antitrust sections from surrounding states to provide additional referrals and resources.

For the 2005-2006 year, the Section's officers are as follows:

Justin Toth, Ray Quinney & Nebeker – Chair

Ronald Ockey, Utah Attorney General's Office – Vice Chair

Peggy Tomsic, Tomsic Law Firm – Treasurer

John Mackay, Ray Quinney & Nebeker – Secretary

John Bogart, Bendinger, Crockett, Peterson, Greenwood & Casey – Legislative Committee Liaison

Please feel free to contact any of the officers, or the Bar, if you would like to join, or become actively involved, in the Section. We welcome your participation.

Discipline Corner

PUBLIC REPRIMAND

On June 10, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Richard L. Musick for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Musick was retained to represent a client in a real estate contract dispute. The Court directed Mr. Musick to prepare the findings and judgment as well as the necessary paperwork needed to show closure to the Court of Appeals. Mr. Musick failed to file a final order which would have allowed his client to enforce the Court's order or get the appeal dismissed in the case. Mr. Musick also failed to communicate the basis of his fee in writing and failed to promptly withdraw from the case when the client requested that he do so.

PUBLIC REPRIMAND

On June 8, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Robert J. Barron for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.14(a) (Client Under a Disability), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Barron was hired to assist a sibling of a U.S. citizen apply for an immigration visa. At the time, there was about a twelve year waiting period for the immigrant visa and a petition needed to be filed to place the visa applicant on the waiting list. Mr. Barron incorrectly instructed the client regarding the proper forms to be filed and the filing process. Mr. Barron informed the client he was checking to obtain the correct filing information but he failed to promptly comply with the client's written requests for status updates or provide further information. Mr. Barron did not communicate by telephone with the client due to a language barrier with the client and Mr. Barron's bilingual secretary did not return the client's calls. Mr. Barron's inability to communicate with the client due to the language barrier interfered with the representation. Mr. Barron also failed to diligently pursue the filing information needed to enable Mr. Barron to file the petition and start the visa application process.

PUBLIC REPRIMAND

On June 8, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Robert J. Barron for violation of Rules 1.1 (Competence), 1.4(a) and (b) (Communication), 1.5(a) (Fees), 1.14(a) (Client Under a Disability), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Barron was hired for an immigration matter. Due to a language barrier he was unable to adequately explain matters to the client. Mr. Barron provided the client with incorrect advice and he failed to review the necessary supporting documentation before filing the immigration forms. Mr. Barron failed to keep the client adequately informed about the case status and he failed to explain how the lack of substantiating evidence could affect the case. The client terminated the representation. Mr. Barron partially refunded the retainer but he charged and collected a fee for work that was not performed or performed incorrectly. Mr. Barron failed to refund the advanced payment for fees that were not earned.

ADMONITION

June 10, 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 1.15(a) (Safekeeping Property) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney failed to promptly remove fees that the attorney earned from the attorney's trust account thereby commingling the earned fees with funds belonging to clients in the attorney's trust account. The attorney also incurred an ATM transaction fee for withdrawing funds which caused an overdraft of the attorney's trust account.

RECIPROCAL DISCIPLINE

On May 26, 2005, the Honorable Joseph Fratto, Third Judicial District Court, entered an Order of Discipline: Disbarment disbarring Alan Barber from the practice of law in Utah.

In summary:

On February 13, 2004, the Supreme Court of Idaho entered an

order disbarring Mr. Barber from the practice of law in Idaho. Mr. Barber's misconduct in Idaho included knowingly converting clients' property, abandoning his practice or knowingly failing to perform services for clients or engaging in a pattern of neglect with respect to clients' matters, knowingly deceiving clients with the intent to benefit himself, knowingly violating duties owed to the profession with an intent to obtain a benefit for himself, causing serious or potentially serious injury to clients, the public and the legal system.

RECIPROCAL DISCIPLINE

On May 19, 2005, the Honorable Pamela G. Heffernan, Second Judicial District Court, entered an Order of Discipline: Public Reprimand, publicly reprimanding Kent Snider.

In summary:

On September 1, 2004, the United States Court of Appeals for the Tenth Circuit entered an order publicly reprimanding Mr. Snider. Mr. Snider's misconduct included failing to respond to the court's orders and directives and failing to follow the court's rules.

ADMONITION

On May 31, 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) (Communication), 1.15(b) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was hired to pursue a malpractice claim for a client. Since the client had filed for bankruptcy, any recovery could first be claimed by the trustee in the bankruptcy case. A small settlement was offered by the defendants to the trustee that would not give the attorney's client any recovery. The trustee filed a motion to approve the settlement and a hearing was held. The attorney did not communicate with the client concerning the settlement, failed to respond to the client's telephone calls and letters, and did not inform the client about the hearing. When

the court approved the settlement, the attorney did not send a copy of the court's disposition to the client. After the case ended, the client requested a refund of the unearned retainer. It took six months for the attorney to mail the refund to the client.

ADMONITION

On May 31, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violations of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was hired to recover monies owed to the client. The attorney did not demonstrate the requisite skill and preparation that was necessary to adequately represent the client. The attorney did not diligently pursue the case. For almost a five month period, the attorney failed to timely communicate and respond to the client. The attorney also failed to notify the client of the attorney's need to withdraw from the representation.

PUBLIC REPRIMAND

On May 24, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Thuan V. Tran for violations of Rules 1.1 (Competence), 1.3 (Diligence), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Tran was hired to represent a client's spouse to prevent the deportation of the spouse. Immigration had already issued an order of deportation for removal of the spouse. Mr. Tran received a call from immigration concerning the readiness of the spouse's work permit for collection. Mr. Tran informed the client's spouse that the spouse could pick up the work permit at the immigration office without counsel, even though the spouse was still subject to the deportation order. The client's spouse attended the immigration office and was detained and subsequently deported.

PUBLIC REPRIMAND

On May 24, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Clayne Corey for violations of Rules 8.4(b) (Misconduct) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Corey pled guilty to driving under the influence of alcohol and entered an Alford plea. Mr. Corey committed criminal acts that reflect adversely on his fitness as a lawyer.

ADMONITION

On July 8, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violations of Rules 1.7(a) (Conflict of Interest), 1.16(a)(1) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was appointed to represent a party in a divorce action. In a separate divorce action, the attorney was appointed to represent a party that had adverse interests to the first party the attorney was appointed to represent. The attorney failed to withdraw.

PUBLIC REPRIMAND

On July 8, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Nathan N. Jardine for violations of Rules 1.5 (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Jardine was paid to represent a client. The fee agreement stated the retainer would not be refunded for any reason and provided no terms for disgorgement. The client terminated the representation and requested a refund. Mr. Jardine collected an excessive fee by refusing to offer any kind of refund although he admitted that there was only 2 to 3 hours of work done on the case.

ADMONITION

On July 8, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violations of Rules 1.15(a) (Safekeeping Property), 5.3(a) and (b) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The Office of Professional Conduct ("OPC") received an overdraft notice on an attorney's client trust account. The overdraft was created by a check written to a client as a refund. Before the

check was presented for payment, the attorney mistakenly withdrew more money from the trust account as earned than the client had in the trust account based on the attorney's accounts person's advice. The attorney also failed to ensure that the attorney's staff kept adequate accounting records and implemented accounting procedures to ensure that the practices of the staff were consistent with the attorney's obligations.

ADMONITION

On June 20, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violations of Rules 1.1 (Competence), 1.3 (Diligence), 1.5(a) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was hired to represent a client in bankruptcy proceedings. The attorney missed a hearing but another attorney stood in for the hearing and did not have the necessary paperwork. At the hearing, the Utah State Tax Commission indicated that they had not received the copies of the client's tax returns. The client had already given the attorney's office the returns and when the client inquired about the tax returns the attorney's office could not find the returns. The client received notice that the case was going to be dismissed because of the failure to provide the tax returns. The attorney advised that the returns just needed to be filed and would do so. The case was dismissed because of the attorney's failure to file the returns. After the dismissal, the attorney told the client that the case could be reopened. The attorney eventually filed a new bankruptcy after the client's car was repossessed. The client subsequently hired another attorney to get the car back. The attorney also filed a financial statement in the new bankruptcy that the client did not review or sign.

PUBLIC REPRIMAND

On July 8, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Earl B. Taylor for violations of Rules 1.1 (Competence), 1.3 (Diligence), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Taylor was hired to represent a client in a bankruptcy. The case was dismissed because of Mr. Taylor's failure to respond to the trustee's motion.

ADMONITION

On June 21, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violations of Rules 1.4(a) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney was hired to represent a client in immigration matters. The attorney failed to inform the client that a petition was rejected by immigration, failed to explain the situation or options to the client, failed to respond to status requests, and failed to provide copies of filings or a copy of the file to the client.

ADMONITION

On June 22, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violations of Rules 8.4(a) and (c) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was convicted of a Class A misdemeanor for attempting to deliver Oxycontin tablets to the attorney's spouse, an inmate at the Adult Detention Center.

PUBLIC REPRIMAND

On June 21, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Joseph Goodman for violations of Rule 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Goodman was hired to represent a client in divorce proceedings. Mr. Goodman failed to file all of the necessary documents to request a default judgment on behalf of his client. Mr. Goodman was not diligent in pursuing his client's case and permitted the case to be dismissed. Mr. Goodman failed to communicate with his client. Mr. Goodman failed to provide requested documents to his client. Mr. Goodman failed to inform his client of an Order to Show Cause hearing and failed to explain the court's ruling from that hearing. Mr. Goodman failed to respond to the Office of Professional Conduct's requests for information.

New Rules governing IOLTA program adopted by the Utah Supreme Court

by Steve Sullivan, Utah Bar Foundation President and Kim Paulding, Utah Bar Foundation Executive Director

On June 27, 2005, the Utah Supreme Court executed an Order setting out new rules to govern the IOLTA (Interest on Lawyers' Trust Accounts) Program. The Order is effective upon signing and the new set of rules clarifies many of the questions that have arisen during the 22-year history of the program.

The new IOLTA rule no longer allows attorneys to opt-out of the IOLTA program and still maintain a non-interest bearing trust account. It now states that all client trust accounts must be interest bearing with the attorney making one of two choices of where the interest should be directed. The first option is that the interest be generated for the benefit of the client if it is a large enough sum of funds or is being held for a long enough period of time to generate net interest on behalf of the client. (Net interest would be the remaining funds left after the bank has taken their service fees and other charges associated with administering the account). If the first option is not viable, the second option is to direct the interest to the IOLTA program. The Utah Bar Foundation enjoys a good relationship with the Utah Banker's Association and at this time, most of the participating banks in the IOLTA program waive all services fees associated with the IOLTA accounts helping to generate even more funds for legal services for the poor and law related education.

The IOLTA program was created in 1983 by the Utah Supreme Court Opinion *In The Matter of Interest on Lawyers' Trust Accounts,* 672 P.2d 406 (Utah 1983). It allowed attorneys to pool client funds that were to be held for a minimal amount of time or were of small amount in an interest-bearing client trust account. The interest from this account is directed to the IOLTA Program.

Over the past 22 years, the Utah Bar Foundation has donated more than $4.1 million dollars for charitable purposes that:

- Promote legal education and increase the knowledge and awareness of the law in the community.
- Assist in providing legal services to the disadvantaged.
- Improve the administration of justice.
- Serve other worthwhile law-related public purposes.

Past recipients of funds have included agencies such as Utah Law Related Education Center, Legal Aid Society of Salt Lake, Utah Legal Services, Disability Law Center, DNA People's Legal Services, International Rescue Committee, Community Mediation Center, Multi Cultural Legal Center, as well as many others.

It is worth noting that the Utah Bar Foundation is a completely separate non-profit organization from the Utah State Bar. While there is a long-standing good relationship between the two organizations, they are completely separate from one another.

The Foundation has been organized as a member organization in which every licensed attorney in Utah in good standing is a member. The general membership elects seven members from the membership to serve on the Board of Directors to govern the operations of the Foundation. If you are interested in serving on the Board or becoming more involved, please contact the Foundation offices.

To see a complete copy of the petition, new rule or Order from the Court, please visit our website at http://www.utahbarfoundation.org/html/downloadable_forms.html. For questions about the IOLTA program or help with bringing your account in to compliance with the new rule, please contact the Foundation offices at (801)297-7046.

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Overcoming The 6-Minute Life: How And Why The Legal Profession Should Free Itself From Billable Hours

by Bentley J. Tolk

Reviewed by Russell A. Cline

Most lawyers earn their living by billing clients for services rendered, and most lawyers bill their clients based on the number of "billable hours" spent on the client's case. In *Overcoming the 6-Minute Life,* Utah lawyer Bentley J. Tolk makes a persuasive case for the argument that the "billable hour" system is responsible for much of the current dissatisfaction experienced by lawyers. Tolk also presents a number of ways to mitigate the negative effects of the "billable hours" system, as well as alternatives thereto.

In discussing his topic, Tolk integrates an impressive amount of research, including literature from both the legal and popular press. For example, Tolk cites a number of empirical studies demonstrating the increasing problem of lawyer "burn out," the recent increases in the "minimum billable hours" required at large and medium law firms, and how the two are related. One informal study, on "why graduates of the Harvard Law School Class of 1990 were quitting the practice of law in droves," observed that by the year 2000, one-half of that class was no longer working in law firms, and twenty-five percent were no longer practicing law. Another commentator noted that "many new lawyers view themselves as being in a rat race where they are moving ahead without an end in sight. The work of billable hours becomes a monotonous, never-ending reality with no inherent meaning and with no opportunity to be free. . . . Many lawyers have arguably forgotten what it means to play or to experience joy."

Tolk cites one commentator who stated that "for each 100 hours that a lawyer bills over 1,500 hours in a given year, 10 percent of the lawyer's soul dies." When a lawyer routinely leaves the office at 8:00 p.m. instead of 6:00 p.m., his or her time with children, a spouse, or recreation becomes almost non-existent. Billing demands often become so all consuming that pro bono work, community service and other activities within the law firm cease to exist. Lawyers rarely have a lunch "hour," but will frequently "wolf down" a sandwich in their office so as to "make up" for missed billable time. Social outings and holidays seem like items on a checklist that need to be completed so that the lawyer can get back to work. When a friend or family member calls a lawyer during the day, the lawyer resents the intrusion since the missed billable time will have to be made up later. The lawyer begins to value himself or herself based on the number of billable hours he or she produces. He or she constantly has to justify his or her existence in terms of feeding the firm's bottom line through billable hours.

Tolk also discusses how billing by the hour often provides the wrong incentives. The system rewards inefficiency since the longer it takes to complete a task, the more the lawyer is paid,

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irrespective of the value of the work performed to the client. However, "[a] law firm is a business, and the lifeblood of that business has generally been the billable hour." Tolk has a number of suggestions for how the interests of the firm and the client can be harmonized. Interestingly, Tolk makes a strong case for not under billing clients, arguing that such a practice usually does a disservice to both the client and the attorney.

Tolk also includes a section addressed to law students. As Tolk correctly notes, many law students have a "rose-colored" view of working in a large law firm. He relates the story of a lawyer who left a large law firm for an academic position, only to find that most of his students wanted to join the same law firm that he and his former colleagues were so anxious to escape. Some law firms are also less than honest during the "wining and dining" process of recruiting law students. As a result, some new lawyers are shocked by the demands that are suddenly placed upon their time.

In recent years, the starting salaries for new associates have increased dramatically at many large law firms. Tolk notes the irony in this trend, since each time that the salaries of starting associates in a law firm are raised, lawyers at all levels must bill more hours, since increases in billing rates have not been able to keep up with the increases in compensation for new associates. Tolk also dispels the popular myth that lawyers in large firms simply need to work hard for 7-10 years, and then they can live a balanced, affluent lifestyle for the rest of their careers. In fact, the "treadmill" continues and is not diminished for senior lawyers and partners. Furthermore, many lawyers often spend most of what they make, and do not save much. This keeps many lawyers on the billing "treadmill" well into their late 60's to make ends meet.

Tolk suggests a number of ways to control the negative effects of the "6-Minute Life." These include setting specific hours to arrive at work and leave work, and other rules as to when work will be allowed to infringe on personal time. Once set, however, boundaries need to be strictly observed to prevent the demands of billable hours from engulfing other aspects of the lawyer's life. Similarly, the lawyer must abandon the concept that there can never be too many billable hours, and he or she must view billable hours as "putting money in the bank." Once the "billable hours" account is built up (i.e., the lawyer is ahead of schedule), the lawyer has more flexibility in structuring his or her life.

Lawyers who focus on "niche" practices (such as tax law, employment law, securities, or environmental law) are relatively more content than lawyers who are less specialized. Specialization provides the intrinsic satisfaction that comes from mastering an area of the law that one loves, and developing a reputation and client basis in a specialized area. "Niche" practices also often lend themselves to "value billing," where the lawyer can bill a flat fee for a particular procedure, irrespective of how many "billable hours" may be required. A lawyer's fee for services becomes tied more closely to the value produced, rather than the number of hours worked, which is inherently more satisfying. Tolk also addresses a number of alternatives to "hourly billing," including "contingency billing," "value billing," "flat fees" and bonuses for success.

Overcoming The 6-Minute Life provides a thorough and well-written discussion of its topic. The audience includes any lawyer who bills clients for services rendered on an hourly basis, as well as every law student. Tolk's writing style is brisk and clear and makes for a very easy read. The book is also well organized, and lends itself well to readers who like to "jump around."

Tolk has also been unusually candid as to his personal struggles in balancing the "6-Minute Life" with personal and family demands. For example, Tolk discusses having to leave the events surrounding two family funerals early because of the pressures of billing time. His personal comments are a welcome addition that serves to illustrate and personalize many of the concepts he discusses.

Most importantly, the book addresses a very important topic to the legal profession. It serves as a cautionary tale to newer and more seasoned attorneys as to the physical and emotional toll that the "billable hour" system can extract. It also provides insights and suggestions that are practical, useful and well worth considering. Tolk has set up a website at www.6minutelife.com, which provides additional information, for those interested in the topic. The book is currently available at that website or through e-mailing Tolk directly at "bentleytolk@6minutelife.com."

Why Paralegal Certification Counts

by Debra J. Monke

Designation as a Certified Legal Assistant (CLA), or Certified Paralegal (CP) is more than the pinnacle of professional achievement for individual paralegals. It is also a sound indication of proficiency to the attorneys, firms, and organizations that hire them.

Since the CLA program was launched by the National Association of Legal Assistants (NALA) in 1976, it has become widely recognized as the definitive credential for paralegals. More than 25,000 individuals have participated in the program, and some 12,500 paralegals are on the certification rolls today.

How Certification Helps

Voluntary certification programs are an esteemed tradition in most professions, and have been described as the single most important movement in the area of human resources.[1] Usually established and administered by a profession's association, certification programs help individuals proceed from education and training into the real-world challenges of paralegal work. Certification programs influence career preparation as continuing career development.

These programs affirm the knowledge, skills, and expertise to perform at a high professional level. Paralegal certification also speaks volumes about individual dedication and commitment to stay abreast of developments in the legal field.

Certification programs are valuable to employers at all levels, whether large or small businesses, corporations, or sole proprietorships. Three important ways that certification programs help those who hire paralegals are:

1. **Assisting hiring decisions –** No interview or single assessment tool can predict performance on the job with complete reliability, but certification is a compelling indication of strong commitment to a chosen career and the ability to meet real-world standards.
2. **Verifying educational background and experience –** Certification programs provide the professional education and experience documentation that many employers need, but do not have time to check.
3. **Helping develop recognition and incentive programs –** As models for employee training plans, certification programs build confidence and competence in all employees, and they help employers provide greater service to clients. Certification programs are easily adaptable for employee training and development programs designed by employers.

Differences

Certification programs are unique to the professions they serve, and they are different from other qualification programs. They differ from licensing programs, for example, on several important levels. Licensing is the means by which a government permits a person to do something. The purpose of licensing programs is to protect the public from incompetent practice by requiring a valid license to work. This is unrelated to the purposes of certification programs.

Certification programs recognize high standards of knowledge and skills. There are many certification programs in professions that are not licensed, such as the paralegal profession. Other certification programs in occupations that are licensed serve as a valuable and needed way for licensed professionals to distinguish themselves from others.

Professional certification programs are not the same as "Certificates of Completion" which are awarded to graduates of paralegal programs. This is often a point of confusion, and it is important for prospective employers to verify what the "Certified" on a resumé actually means.

DEBRA J. MONKE is a Certified Legal Assistant Specialist and Intellectual Property Administrator for State Farm Insurance Companies in Bloomington, IL. She also serves as President of the National Association of Legal Assistants.

Benefits for Paralegals and Firms

Because of the benefits of certification and the opportunities provided for professional development, creating a paralegal certification program was a top priority of NALA[2] when the association was founded in 1975. A program was sought which would help employers identify proficient paralegals, would assist paralegal curricula development, and would provide an ongoing professional development program for paralegals. With the ensuing 30 years of research and development, the CLA/CP program has met and exceeded these goals.

In many markets, CLA/CP certification is crucial to securing a paralegal job and to career advancement. Many law firms require professional staff to have the CLA/CP credential, as do large corporations such as Wal-Mart.

For employers, certification means that the employee's educational background has been checked and verified – an increasingly important detail – and that standards developed by those in the profession have been met. Certification gives employers more options in developing opportunities for growth. For private law firms, certification allows higher billing rates.

Initial certification may take many years to achieve, and keeping it requires continuing effort. To maintain CLA/CP certification, paralegals must participate in at least 50 hours of approved continuing legal education every five years.

Throughout its 30-year history, the CLA/CP certification program has garnered respect and recognition as a sound process of professional development. For example, the program is approved by the U.S. Department of Defense as a GI benefit so that veterans, or those still in uniform, may have their CLA/CP examination costs reimbursed by the government.

There also is widespread use of the CLA/CP credential by paralegals in law firms and corporations to make clear the expertise of a professional staff. This is allowed by bar associations throughout the nation, provided that the paralegal's nonlawyer status is clearly indicated – the CLA/CP initials alone are not sufficient.[3]

The Program

The CLA/CP certification program is available to those who have completed formal training in ABA approved paralegal instruction programs, and who have either a bachelor's degree plus paralegal training, or extensive experience. A rigorous eight-hour examination, administered over a two-day period, also must be passed. The exam is offered each March, July, and December at testing centers located throughout the United States.

Paralegal • Legal Assistant

Just as "attorney" and "lawyer" are synonymous, so are the terms "legal assistant" and "paralegal." Throughout the United States, state supreme court rules, statutes, ethical opinions, bar association guidelines and similar documents have definitively established the terms as identical. These same documents recognize the paralegal profession as a *bona fide* legal occupation and encourage the use of legal assistants in delivering legal services.

There is, however, a preference of terms in various circumstances. Some geographic areas, for example, prefer one term to the other. NALA has responded by securing the certification mark "CP" from the U.S. Patent and Trademark Office (July 20, 2004), and the venerable *CLA Certificate,* granted to qualified legal assistants since 1976, has been redesigned to encourage recipients to use either "CLA" or "CP" as their professional credential. Many prefer to use "CLA" because of its long-standing recognition in the legal community, but the term "Certified Paralegal" now may be used as well.

Verifying Credentials

It is easy to determine whether the terms "Certified Paralegal" or "Certified Legal Assistant" represent professional certification by NALA, or are used to indicate graduation from an academic paralegal program. The CLA, CP and CLAS credentials are registered certification marks of NALA and should only be used by those authorized by the association.

To confirm whether the CLA, CP, or CLAS on a resumé is a correct use of the NALA credential, contact NALA Headquarters at (918) 587-6828 or nalanet@nala.org for an immediate confirmation, or write:

NALA Headquarters
1516 S. Boston Avenue, Suite 200
Tulsa, Oklahoma 74119

The test includes objective questions and two written essays that are part of the Written Communications and Judgment and Legal Analysis sections. The exam covers the following:

- Communications
- Ethics
- Legal Research
- Judgment & Legal Analysis
- Substantive Law, consisting of five mini-examinations covering the American Legal System and four of the following areas as elected by examinees:
  - Administrative Law
  - Bankruptcy
  - Business Organizations/Corporations
  - Contracts
  - Family Law
  - Criminal Law and Procedure
  - Litigation
  - Probate and Estate Planning
  - Real Estate

Advanced Certification

Paralegals with the CLA/CP credential who wish to demonstrate advanced knowledge in particular practice areas, may pursue the CLAS credential. Since the CLAS program was introduced in 1982, more than 1,100 paralegals have achieved this advanced certification by passing a four-hour written examination.

Newly Certified Paralegals Bring Utah Total to 118

Utah has three newly certified paralegals who have passed the rigorous CLA/CP examination given by NALA. This brings the total of paralegals in the state with the CLA/CP to 118. The newly certified paralegals are:

- Mary A. Hancock, Bountiful;
- Jacqueline Mecham, Kearns; and
- Carol S. Wilson-Watts, Salt Lake City.

Advanced certification is available in the following areas:

- Bankruptcy
- Civil Litigation
- Corporate/Business Law
- Criminal Law & Procedure
- Intellectual Property
- Probate & Estates
- Real Estate
- California Advanced Specialty (advanced certification on a state specific law and procedure in the areas of Civil Litigation, Business Organizations – Business Law, Real Estate, Estates and Trusts, and Family Law).

Something New

Work began in 2002 on a restructured advanced certification program slated to begin late in 2005. The new program will be curriculum based and offered exclusively by way of the Internet. A CLA/CP certified paralegal will be able to participate in a Web-based training program and be awarded advanced certification credentials by demonstrating mastery of the material in a battery of tests.

There are advantages to this model of certification beyond the convenience of a Web-based program. Paralegals will no longer have to wait several months to seek advanced certification, and the clearly defined subject matter in a curriculum-based program makes better sense to employers.

In the former CLAS program, it was difficult to explain what advanced certification in an area as broad as civil litigation actually meant. When certified paralegals complete the advanced program under the new model, their employers will receive a list of specific areas that were mastered, offering a much better understanding of the preparation required and the depth of the material.

This curriculum-based model of advanced certification for paralegals may be new to the legal profession, but it is a well-established approach for certification in many other professions. It lends itself well to the NALA program because those who achieve this certification already have the CLA/CP credential; they have already demonstrated that they have met the standards of general knowledge and skills required of all paralegals. The new advanced curriculum-based certification is a boon to paralegals wanting recognition of their advanced knowledge and experience, and it is advantageous to employers seeking ways to further develop

and train employees.

Courses for the advanced curricula are written by experts in training and development programs and in sequential learning. They are guided by an outline developed by a task force of experienced legal assistants, paralegal educators, attorneys, and paralegal managers. The new programs meet the same high standards of certification and educational programs long sponsored by NALA. They may be relied upon by employers and paralegals alike.

The benefits of voluntary professional certification programs such as the CLA/CP and CLAS programs extend to the entire legal profession – educators, attorneys, and managers as well as paralegals. These programs encourage paralegals to participate in local study groups, and they promote inclusion of CLA/CP review programs in paralegal school curricula. A number of exam review publications, as well as on-line seminars and workshops, have been developed by NALA that benefit all paralegals.

Through the certification program, paralegals take charge of their professional and career development, and demonstrate a commitment to professional growth that rivals that of any profession. Firms and organizations which employ paralegals with CLA/CP or CLAS credentials can be confident that their interests are being well served.

1. These comments are based on *The Guide to National Professional Certification Programs,* by Phillip A. Barnhart (HRD Press, Inc., Amherst, MA, 1997). The following also offer useful information: *Certification and Accreditation Law Handbook,* by Jerald A. Jacobs (American Society of Association Executives, Washington, DC, 1992), and *Certification: A NOCA Handbook,* by Anne H. Browning, Alan C. Burbee, Jr., and Meredith A. Mullins (National Organization for Competency Assurance, 1996)
2. A non-profit professional association with headquarters in Tulsa, OK. The association, with more than 6,000 members, provides continuing education and professional development programs for paralegals nation wide, and publishes the award winning quarterly magazine, *Facts & Findings.*
3. See *Mississippi Bar Ethics Committee Opinion* 223 (1/19/95), and *New York State Bar Association Opinion 695* (8/25/97). The U.S. Supreme Court has addressed the issue concerning utilization of professional credentials awarded by private organizations in *Peel v. Attorney Registration and Disciplinary Committee of Illinois* (110 SC 2281 (1990). The Court suggested that a claim of certification is truthful and not misleading if the claim itself is true, the bases on which certification was awarded are factual and verifiable, the certification in question is available to all professionals in the field who meet relevant, objective and consistently applied standards, and the certification claim does not suggest any greater degree of professional qualification than reasonably may be inferred from an evaluation of the certification program's requirements. The Court further advised that there must be a qualified organization to stand behind the certification process.

Message from the Chair

by Danielle S. Price

For those of you looking for a good CLE opportunity, please consider the Utah State Bar Fall Forum. The Paralegal Division is supporting the Forum this year as our last full day CLE offered through the Bar for 2005. If you have attended the Fall Forum in years past, you know that it is a great day of CLE. If you have not yet attended, this is the year to do it. The Bar has put together some great tracks and speakers at a great cost for paralegals. Tracks include: litigation, transactional, general, ADR and practice management/ technology. Please be on the look out for registration materials or go to the Bar's website for additional information and to register. I look forward to seeing you there.

Date: **Friday, November 11, 2005**

Time: **8:00 a.m. - 6:00 p.m.**

Location: **Little America Hotel**

Cost: **$60 for paralegals**

Paralegal Salary Survey Results

The Utah State Bar Paralegal Division Board of Directors is pleased to announce the completion of our first survey regarding Utah Paralegals' salary and employment. An executive summary will be published in the upcoming Nov/Dec issue of the *Utah Bar Journal.* Complete survey results will also be made available on the division's web page. Take a look and see where you or your firm fit in our profession!

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
09/16/05	**Oral Advocacy for the Appellate Attorney –** Speaker: David C. Frederick, partner at Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., in Washington, D.C. 12:00–2:00 pm. $35 Appellate and Litigation section members, $50 others.	1.5
09/26/05	**The 13th Annual Estate & Charitable Gift Planning Institute –** 8:00 am–2:00 pm. Wells Fargo Center, 23rd Floor 299 South Main Street, SLC. FREE. Please RSVP by September 16, 2005 to: Kim Ford at (801) 246-1366 or kim.k.ford@wellsfargo.com.	5 (includes 1 hr Ethics)
09/30/05	**The Law of the New Bankruptcy Legislation –** 8:30 am–5:00 pm. Downtown Marriott (W. Temple). FREE to current members of Utah Bankruptcy Lawyers Forum & Bankrupcty Law Section (as of 7/31/05). Registration limited to UBF and BLS members until 08/30/05. Others may register after 08/30/05 for $175.	7
10/04–05/05	**Property Rights Conference.** 6 hrs CLE on the 4th, 7 hrs on the 5th. Price: Both days – $160 before Sept 23, $180 after; Tues morning only – $60/$65; Tues only – $85/$95; Wed only – $95/$105. Cost includes two books: *The Complete Guide to Zoning* by Dwight Merriam and *Utah Land Use Regulation* by Craig Call. Full agenda on the web.	13
10/14/05	**Professionalism: Improving Your Practice.** Associate Chief Justice Michael J. Wilkins. $90.	3 Ethics
10/20/05	**NLCLE: Securities Law –** 5:30–8:30 pm. $55 YLD, $75 others.	3 CLE/NLCLE
10/21/05	**CLE & Golf: Recent Developments in Litigating Land Use, Zoning, Governmental Liability and Eminent Domain Issues in Utah.** 8:30 am – 12:00 pm. Golf immediately after Sunbrook Golf Course, St. George, Utah. Presenters: Craig Call, Utah Property Rights Ombudsman and David Church, Blaisdell & Church. CLE only: Litigation Section & Southern Utah Bar members FREE, all others $25. Golf & CLE: Litigation Section & Southern Utah Bar members $45, all others $85. Golf only $105.	3
10/28/05	**Evidence Issues Involving Experts –** 9:00 am–5:00 pm. $137 if you already have the Utah Evidence 2004 (Benson & Mangrum) $210 if you don't have the book.	6
11/04/05	**New Lawyer Mandatory –** 8:30 am–12:30 pm. $55. Attendees must arrive on time. Anyone who arrives after 8:45 am will be transferred to the next new lawyer mandatory.	Fulfills New Lawyer Requirement
11/11/05	**2005 Fall Forum –** A full day of networking, CLE, and business opportunities. 7:45 registration & continental breakfast. Little America Hotel, 500 South Main Street, SLC. $120 by 11/01/05, bring your non-lawyer asst. for $60. After 11/01/05 all prices $150.	7 CLE/NLCLE
11/15/05	**An Evening with the 3rd District Court –** 5:30 pm reception, 6:00–8:00 pm CLE. $15 YLD, $25 Lit. Section, $50 Others.	2 CLE/NLCLE
11/17/05	**Using an Expert in Litigation Rule 26(A) – Depositions.** 5:30–7:45 pm. $40 YLD, $60 others.	2 CLE/NLCLE
11/18/05	**Elder Law Seminar:** TBA	TBA
12/14/05	**Best of Series –** $25 per session. 9:00–10:00 am – Casemaker (free if registering for the full day). 10:00–11:00 am – Document Automation, 11:15 am – Forensic Technology, 12:30 pm – Ethics, 1:45 pm – TBA, 3:00 pm – 60 Tips in 60 Minutes.	6 (1 Ethics)
12/15/05	**2nd Annual Benson and Mangrum on Utah Evidence –** Hon. Dee V. Benson and Prof. Collin Mangrum. 9:00 am–5:00 pm. $185 Litigation Section, $200 others. Incl. new Utah Evidence 2005.	6
12/16/05	**Annual Lawyers Helping Lawyers CLE Program.** 9:00 am–12:00 pm.	3 hrs. Ethics
12/19/05	**NLCLE Workshop: Bankruptcy.** 5:30–8:45 pm. $55 YLD, $75 others.	3 CLE/NLCLE

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.

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Nayer H. Honarvar is a solo practitioner lawyer and mediator with more than 15 years of experience in the practice of law. Over the years, she has represented clients in personal injury, legal malpractice, medical malpractice, contract, domestic, juvenile, and attorney discipline matters. She has a J. D. degree from Brigham Young University. She is fluent in Farsi and Azari languages and has a working knowledge of Spanish language. She is a member of the Utah State Bar, the Utah Council on Conflict Resolution and the Family Mediation Section. She practices in Judicial Districts 1 through 8. Fees: Mediation, $120.00/hr; Travel, $75.00/hr. Call (801)680-9943 or write: nayerhonarvar@hotmail.com

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