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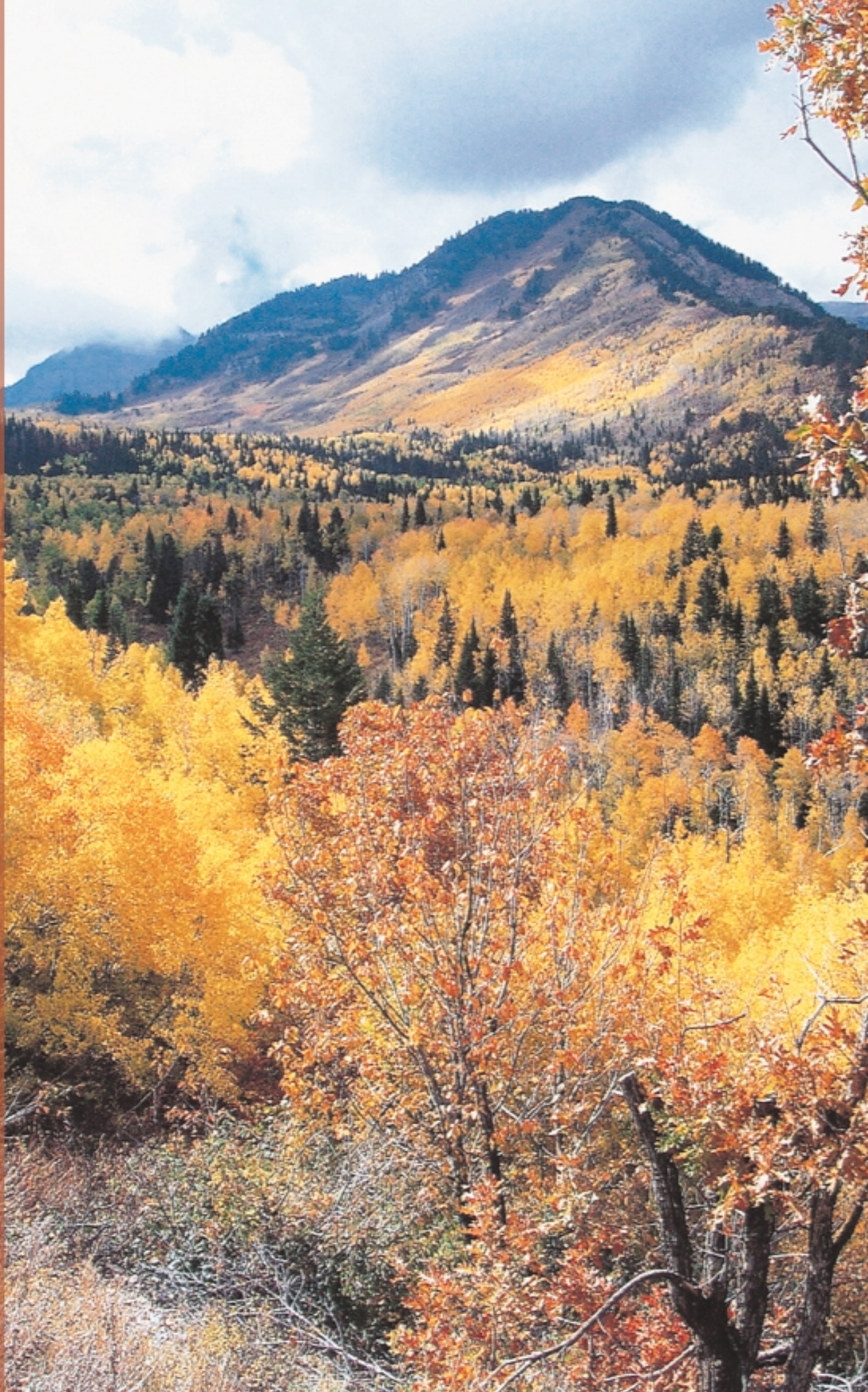

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VISION OF THE BAR: *To lead society in the creation of a justice system that is understood, valued, respected and accessible to all.*

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: Fall scene on the Alpine Loop above Sundance, Utah. Photo by Daniel J. Anderson of Kaysville.

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Letters Submission Guidelines:

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

Cover Art

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

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

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

Submission of Articles for the Utah Bar Journal

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

1. Length: The editorial staff prefers articles having no more than 3,000 words. If you cannot reduce your article to that length, consider dividing it into a "Part 1" and "Part 2" for publication in successive issues.
2. Format: Submit a hard copy and an electronic copy in Microsoft Word or WordPerfect format.
3. Endnotes: Articles may have endnotes, but the editorial staff discourages their use. The *Bar Journal* is not a Law Review, and the staff seeks articles of practical interest to attorneys and members of the bench. Subjects requiring substantial notes to convey their content may be more suitable for another publication.
4. Content: Articles should address the *Bar Journal* audience, which is composed primarily of licensed Bar members. The broader the appeal of your article, the better. Nevertheless, the editorial staff sometimes considers articles on narrower topics. If you are in doubt about the suitability of your article for publication, the editorial staff invites you to submit it for evaluation.
5. Editing: Any article submitted to the *Bar Journal* may be edited for citation style, length, grammar, and punctuation. Content is the author's responsibility–the editorial staff merely determines whether the article should be published.
6. Citation Format: All citations should follow *The Bluebook* format.
7. Authors: Submit a sentence identifying your place of employment. Photographs are encouraged and will be used depending on available space. You may submit your photo electronically on CD or by e-mail, minimum 300 dpi in jpg, eps, or tiff format.

The Utah Bar Journal

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Letter to the Editor

Dear Editor,

The ethical rules do not allow attorneys to collect interest on trust accounts because the property held in trust does not belong to the attorney. We should not take something that does not belong to us.

In 1983 the Supreme Court approved the IOLTA program. Endemic in the decision was the cankered logic that although the means to get the money was corrupt, the ends justified those means. After all, giving to charity is a noble virtue.

The IOLTA program is now mandatory. Whether we believe that the bar foundation makes the best use of the funds or not, we must contribute to that foundation. Much of those funds end up in attorney's pockets. I call on the bar commissioners to allow attorneys to designate charities we believe are most deserving.

While this may seem radical, deliberations may show that some of us are capable of making wise choices. Some might give to the United Way, others might give to the Red Cross.

As I meander down this path, it occurs to me that attorneys with disabilities should be allowed to keep the interest from their trust accounts. Surely, using the money to help the disabled would be good. As I think about it longer, my kid's college fund could use a charitable donation.

Well, maybe I do need someone smarter than me to help me understand when it is good to use client's money and when it is bad. I know I can't figure out how the IOLTA program draws that line.

Nelson Abbott

Practice Pointer: Ethical Considerations for Office Sharing

by Kate A. Toomey

If you're a solo practitioner an office sharing arrangement might be attractive for a number of reasons such as saving money while at the same time enjoying the advantages of collegial relationships without undertaking the responsibilities of a more complex business organization. From an ethical standpoint, there is no reason you shouldn't do it, but you need to be aware of the Rules of Professional Conduct and their ramifications for office-sharing. Here are a few things to keep in mind.

Your Letterhead and Other Indicia of Your Practice Must Accurately Portray You as a Sole Practitioner

You can identify your law firm using your own name, but you can't use the names of attorneys with whom you merely share space.[1] So "Kate Toomey, Attorney at Law" is acceptable, but "Law Offices of Toomey, Walker, and Akiyama" is not. If I were a solo practitioner, and identified all (or any) of the people with whom I share office space, this would create the misleading impression that I belong to a law firm having more than one member. The rules don't allow it.

Note that this applies to any means by which you identify yourself and communicate concerning your practice. The obvious examples include your letterhead, business cards, building directory, door signs, and any advertising.[2] It also includes some things that may not be so obvious, such as the transmission information at the top of a facsimile and a firm name embedded as part of an e-mail address.

Take Steps to Safeguard Your Clients' Confidentiality

The rules prohibit lawyers from revealing "information relating to representation of a client."[3] The Comment following the rule characterizes this as "[a] fundamental principle in the client-lawyer relationship," and it must be honored in setting up an office-sharing arrangement.

Maintain your client files in a space physically separate from that of other attorneys and ensure that you and your employees are the only ones with access. A locked file cabinet is sufficient; a separate locked file room is even better.

Make sure your verbal communications with clients are private. This means that you must have a separate office with a door; it also might mean closing your door when you're meeting with a client or talking on the phone. Likewise, don't allow anyone not directly under your employ and supervision to open your mail.

Be careful about telling war stories that reveal confidential client information. It's ok to talk in the abstract about legal questions you're working on, but be sure to scrupulously eliminate information about particular clients and their cases.

Be Careful About Sharing Employees

It may be all right to share a receptionist who directs calls and visitors to anyone using the office space and to share a runner or delivery person. Because sharing such employees could implicate Rule 1.6, the best practice would be to inform potential clients that their identities may be known to such employees, and obtain the prospective client's permission as part of the engagement process.

What you must be especially careful about is sharing employees such as paralegals and secretarial staff with access to client information. Under the rules, you must make reasonable efforts to ensure that non-lawyer employees conduct themselves in a manner compatible with your own professional obligations, as you may be responsible for conduct that would constitute a violation of the Rules of Professional Conduct.[4]

Avoiding conflicts of interest is a particular concern. An obvious

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

example is that you can't share a paralegal who works for separate attorneys on both sides of a divorce.[5]

The easiest way to avoid problems in this arena is to avoid sharing employees at all.

Whatever You Do, Don't Pass Along a Case Without Obtaining the Client's Permission

Attorneys sometimes transfer client files to attorneys with whom they share an office as a convenient way of dealing with their own scheduling conflicts. This is all right provided the attorney has obtained the client's advance permission after consultation, and provided that the attorney to whom the case is transferred has no impediments to accepting it, such as a conflict of interest, or an inability to provide competent representation under the circumstances. If these conditions haven't been met, you would be in violation of the rules governing communication[6] and confidentiality.[7]

Some Thoughts In Closing

There are ways to construct an office-sharing arrangement that don't conflict with your duties under the Rules of Professional Conduct. If you have specific questions about what is permissible, you can call the Ethics Hotline (801-531-9110) and one of the OPC's attorneys will provide you with informal guidance. And remember, you'll never regret exercising caution when it comes to managing your practice.

1. The Rules prohibit attorneys from stating or implying that they practice in a partnership or firm unless they really do. *See* Rule 7.5(d), R. Pro. Con. The Rules also prohibit an attorney from using "a firm name, letterhead or other professional designation that violates Rule 7.1." Rule 7.5(a), R. Pro. Con. In turn, Rule 7.1 states that "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Rule 7.1(a), R. Pro. Con.
2. This also goes for law firms renting space to attorneys who are not members of the firm. For example, it is not proper to list attorneys who are not members of the firm under the name of the firm in the building directory. Such attorneys should be listed using their own names, or the names of their firms so as to accurately communicate their status.
3. Rule 1.6(a), R. Pro. Con. Note that the rule governing confidentiality is different from, and much broader than, the evidentiary privilege. The rule provides some exceptions. *See id.* at (b).
4. *See* Rule 5.3(b), (c), R. Pro. Con.
5. Note that this is true even outside the office-sharing context. If you independently contract with a part-time paralegal who is employed elsewhere, you could encounter similar problems.
6. *See* Rule 1.4 (Communication), R. Pro. Con.
7. *See* Rule 1.6 (Confidentiality of Information), R. Pro. Con.

The Tyranny of the Courts

by David R. McKinney

The recurring political battles over federal judicial nominations demonstrate a continuing and disturbing development – the increasing politicization of the courts. These battles would not occur, but for the willingness of courts to decide political questions. The fighters on both sides implicitly recognize the courts as institutions through which policy preferences can be turned into law. The political leanings of judicial candidates therefore become all-important, as evidenced by the recent hearings on the nomination of John Roberts as Chief Justice.

Those in favor of judicial activism prefer courts, particularly the U.S. Supreme Court, leading, rather than following, the course of public opinion; ruling in accordance with what they deem to be "fundamental principles," even when the people do not generally assent to those principles.[1] They assert that it is the proper role of the courts to stretch the meaning of existing constitutional and statutory law in the quest for greater economic and social equality.[2] Accordingly, old restrictive notions of what the U.S. Constitution means must give way to new, expanding and inclusive interpretations. Otherwise, our supreme law becomes stale, hidebound, and unresponsive to changes in society.

Unfortunately, in a quest to resist the tyranny of the majority, creeping judicial activism has in fact produced a new form of tyranny – the tyranny of the courts. Bit by bit, this tyranny is eroding democracy and replacing it with something akin to judicial oligarchy. To prevent further erosion, there appears to be only one effective option – amend the U.S. Constitution.

Tyranny

The term "tyrant" includes anyone who exercises absolute power without legal warrant, whether ruling well or badly.[3] In the realm of constitutional interpretation, the Supreme Court has absolute power. Their word is law, and it is the final word. If the Court misconstrues a statute, Congress can presumably revise the statute; but when the Supreme Court declares that the Constitution means "X," there is no recourse.

Merely wielding this power is not the problem, however. Judicial review is a natural and inherent aspect of the judicial function, and was anticipated by the founders of our country.[4] Our constitutional system created, and reason and order demand, a court of last resort, empowered to make final determinations of legal cases and controversies. The real problem arises from the second element of tyranny – the question of legal warrant. This question requires a consideration of the scope and source of the Supreme Court's authority.

Constitutional Authority

The Constitution grants no legislative authority to the courts. The courts are given only "judicial power." Accordingly, when any federal court attempts to perform any legislative function, it steps outside its legally warranted realm of power. While it can be difficult to fully distinguish the legislative function from the judicial function, a basic distinction can be made: the legislative function is to select and establish public policy through the enactment of positive law while the judicial function is to enforce the policy choices of the legislature.

The judicial function also includes enforcement of the policy choices of the people as embodied in the Constitution and this is where most of the mischief begins. The Constitution declares itself to be the supreme law of the land; but that declaration only has weight because it was democratically accepted by the people. The authority of the Constitution does not lie in the beauty and majesty of the principles of liberty that support and sustain it, nor in any other lofty principle or philosophical ideal. *We the People* ratified the Constitution, by a supermajority, through our elected representatives. In fact, we did it twice – first at the federal level, and then again state by state. The Constitution therefore represents the will of the people.

The key question then is, what is the will of the people as declared in the Constitution? What did the people adopt? The only legitimate answer to that question is, that which is expressed in the language of the document itself. Despite the philosophical motivations behind the Constitution, the people did not adopt a philosophy as their law. They did not adopt an idea, a set of principles,a

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penumbra, or an emanation. They adopted certain language, stating the form and limits of power of the new government, and enumerating certain rights of the people. Each time the Court expands these rights beyond the fair reach of the text, and declares that the Constitution embodies this or that evolving notion, or discovers within the text new rights that are not actually mentioned, our democracy shrinks – because Constitutional rights trump any legislative enactment. This exercise, undertaken to establish any new public policy, is judicial activism, and is actually a usurpation of the legislative function.

The notion of a "living" or "evolving" Constitution was invented merely to support judicial activism. This notion is as ridiculous as that of an evolving contract or deed. As Justice Antonin Scalia recently pointed out, "[t]he Constitution is not a living organism . . .; it's a legal document and, like all legal documents, it says some things and it doesn't say others."[5] Indeed, the "evolving" Constitution metaphor contradicts the very principles of evolution. Individual organisms do not evolve. Evolution is a process through which individual organisms die and are replaced by offspring with different characteristics, this process happening repeatedly over time. The only way the Constitution could actually evolve would be through its death and replacement with a new constitution. This can only be accomplished through a constitutional convention, not by unilateral action of the Court.

The prospect of an evolving Constitution was one that some original critics of the plan feared. They feared that a politically insulated judicial branch would have "[t]he power of construing the laws according to the *spirit* of the Constitution, [so as to] enable that court to mould [sic] them into whatever shape it may think proper."[6] Alexander Hamilton responded to this criticism by pointing out that there is nothing in the Constitution that empowers the national courts to do that. Unfortunately, there is nothing in the Constitution that directly prevents it, either.

The condition feared in Hamilton's day has literally come to pass in ours. Rather than enforcing the terms of the Constitution itself, the Court has, in selected areas of law, enforced this or that abstract philosophical principle that it argues underlies and gives meaning to the Constitution. The result has been astonishingly unsupportable decisions where the outcome is entirely dependent upon the level of abstraction in stating the issue, and upon the particular political or moral philosophy that the Court holds at the time.

One source of this problem is the tendency of American courts to

apply principles of common law development when interpreting constitutional or statutory texts.[7] This presents a multitude of troubles. These two types of law are inherently different, and must be applied differently. Under the common law, a judge can distinguish past precedent to produce justice in a given case, even if that means applying current social and moral viewpoints that previously were not generally accepted. Judges, not the people, create the common law.

But judges do not create positive law. With respect to democratically-adopted positive law, the only political, social, or moral philosophy that legitimately can be acted upon by the courts is that embodied in the language of the law, because that is all that can be said that the people agreed upon. Anything else involves setting out upon an undifferentiated sea of moral philosophy, to be tossed about with every wind and wave of intellectual fashion. In this act the Court usurps a legislative role and thereby steps outside its legally warranted realm of authority.

A Constitutional Solution

Since the people are the source of constitutional authority in the first place, the people have the power to restrain the courts. But there is only one way to do it – by amending the Constitution. Any legislative attempts could simply be struck down or interpreted out of existence.

A constitutional amendment to restrict judicial power is both necessary and appropriate. It is necessary because the brevity of Article III cries out for clarification. Article III, at only 369 words, does not define the reach of the Court's power. The result has been that the Court, unlike any other branch of government, has been the arbiter of its own power for over 200 years. Moreover, the Constitution includes within itself no rules for its own interpretation and application. Without such rules, there are almost as many approaches to interpretation as there are judges.

A constitutional amendment is appropriate because this is a clear issue of constitutional stature. Unlike marriage or flag burning, the scope of power of the judiciary is of the highest constitutional importance. It is appropriate to constitutionally codify basic limits on judicial power, and standards for the interpretation of positive law.

There are a variety of proposals for amending the Constitution to tame the courts. Unfortunately, some of these, like creating a legislative veto power over Supreme Court decisions, or limiting the terms of federal judges, are wrongheaded because they hinder the independence of the judiciary and simply inject more politics into the courts, not less. The only solutions that have a chance of working without compromising the independence of the judiciary are those that affect what a court can do, and how it must do it.

There are a number of possible approaches for this. One approach is to try to clearly define the judicial role *vis a vis* the legislative role in terms of policy-making power. It also seems possible that a rule could be created to distinguish, at least in part, nonjusticiable political questions from proper judicial cases. Another approach is to enumerate a broader scope for rational basis adjudication. Another aspect of the problem may be solved by codifying some of the canons of statutory construction, such as the rule of silence: where positive law is silent, the courts are powerless to act, except under the common law.

Some of the above options are admittedly difficult to express in clear and broad terms, and an investigation of all of them is beyond the scope of this article. However, there is one additional option that seems to stand out above the rest. The fundamental importance of the text of the Constitution and laws as the source of meaning suggests a solution by codifying the plain meaning rule in a constitutional amendment. Language to accomplish this could read as follows:

> No court of the United States shall interpret or enforce any provision of positive law in any manner contrary to its plain meaning, as generally understood at the time of enactment, whether to enlarge or contract the scope thereof.

This language requires courts simply to enforce laws according to their terms. This is, in fact, what courts do most of the time. The temporal limitation points out the obvious fact that written words can legitimately be interpreted only according to their generally accepted meaning at the time they were written. This language also retains intact the courts' full control over the common law, but enforces a limitation on all interpretations of positive law. Finally, it assures that the scope of the language of laws cannot be expanded or contracted: laws mean what they say, no more, no less.

"Plain meaning" does not eliminate the need to interpret and apply broad and sometimes vague language. The task of determining the plain meaning of words is still a difficult one. There will still be a debate about what "freedom of speech" means, for example, and what constitutes its abridgement. Moreover, "plain meaning" is not mere literalism, or even strict constructionism. This is a textualist approach, like that favored by Justice Scalia and others. The plain meaning of words includes necessary implications beyond their literal definition. This meaning is further informed by context. Additionally, the courts will retain interstitial law-making power that is necessary to fill in the gaps when applying positive law

to new situations. Nevertheless, plain meaning is not unbounded. It does not allow the Constitution and laws to mean whatever the Court thinks they ought to mean at any given time. Requiring adherence to the plain meaning of words will help impose a measure of discipline on the Court, and simultaneously encourage legislative action at the boundaries of existing legal language.

Opponents will undoubtedly lament that a "plain meaning" amendment will necessarily reverse all sorts of past decisions that went outside the language of the Constitution, but have positive effects. This argument is entirely outcome-based. It amounts to saying that the legitimacy of the judicial process is irrelevant, so long as we like its results. But an illegitimate process is a two-edged sword. It can just as easily produce bad results and should be eliminated as a matter of principle.

What is more, the language is prospective only. There is no danger of a great cataclysmic upheaval of the legal landscape because *stare decisis* will tend to hinder rapid reversal. Past precedents that fail the plain meaning test, whether generally accepted or still controversial, will not disappear overnight. Furthermore, the only past precedents that would necessarily disappear under a "plain meaning" approach would be those that were illegitimate in the first place. Where the plain meaning of language is narrower than previous interpretations, but the effects of those interpretations have been generally accepted by the people, the *status quo ante* can easily be restored through the legislative process. But where the Court has gone well beyond the actual language of the Constitution or laws, and the people generally disagree or have not made up their minds on the issue, it is appropriate that such precedents should die.

Whatever its form, current conditions suggest that a Constitutional amendment clarifying the power of the Court is now both appropriate and desirable. The form and language of such an amendment will certainly be the subject of much debate. But this is a debate that is long overdue.

Conclusion

It may seem shocking to suggest that we live under tyrannical rule, but judicial activism of any stripe *is* a species of tyranny. The Supreme Court's power of constitutional interpretation is absolute, and the various abstract principles that the Court invokes to go outside its text were never agreed upon by the people, and therefore go outside the Court's legal warrant. Whether the Court performs this exercise well or badly is irrelevant: the exercise itself is illegitimate.

Those who favor a continually expanding Constitution simply do not like, or do not trust, democracy. But the conversion of selected policy preferences into law through the courts, rather than through the legislative process, thwarts democracy, and has no apparent limit. The only effective solution is to amend the Constitution to more clearly define and limit the scope of federal judicial power, and codify sound rules for the interpretation of positive law.

1. *See* Bickel, Alexander, The Least Dangerous Branch, 239 (Bobbs-Merrill, 1962) ("the Court should declare as law only such principles as will – in time…gain general assent.… The Court is a leader of opinion, not a mere register of it.")
2. *See* Lerner, Max, America as a Civilization, 449 (Henry Holt, 1957).
3. *See* Funk & Wagnall's Standard Desk Dictionary, 734 (Harper & Row, 1984).
4. *See* The Federalist No. 78, at 522-23 (Alexander Hamilton) (Easton Press, 1979) ("The interpretation of the laws is the proper province of the courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two . . . the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.").
5. Speaking at the Woodrow Wilson Center, March 23, 2005; *quoted in* Brennan, Philip V., *A Living Constitution vs. an Enduring One,* NewsMax, July 27, 2005.
6. The Federalist No. 81, at 541 (Alexander Hamilton) (Easton Press, 1979) (emphasis in original).
7. For a good general discussion of this topic, *see* Scalia, Antonin, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,* in A Matter of Interpretation: Federal Courts and the Law (Princeton University Press 1997).

An Analytic Approach to Defining the "Practice of Law" – Utah's New Definition

by Gary G. Sackett[1]

Introduction

Here's a test for lawyers who think they know what their profession is fundamentally about: Define the "practice of law." Is it what we lawyers do when we help clients or employers deal with legal issues? Is it what law school and studying for and passing a bar exam prepares us to do? Is it the application to the circumstances of another person of legal principles and judgment that require the knowledge and skill of a person trained in the law? More difficult yet, what is the *unauthorized* practice of law? Does that occur when a person who hasn't passed the Bar exam tries to do what we lawyers are licensed to do?

Although all of these "answers" can be found among the attempts to address the issue by various state legislatures, courts, bar associations and committees, none of them passes muster as a sound definition of an important concept that has major public policy ramifications. Without exception, these definitions are circular because they define a concept in terms of the very term "law" or its derivatives such as "lawyer" and "legal."

But, why do we even care? Shouldn't we just use the Justice Potter Stewart test: It's difficult to define, but we know it when we see it.[2] Actually, no; this approach may have been sufficient for a Supreme Court Justice writing a short concurrence about pornography 40 years ago, but we need something more concrete in today's dynamic environment where (a) something called "the law" pervades almost every aspect of modern human activity, (b) there is a need to recognize that there are areas of societal activity involving the law that require assistance but don't require the full training and background that a lawyer has, and (c) there is a need to protect the public from the charlatans and incompetents who roam the planet to "help" people with their legal problems.

As we were taught in law school, we might first turn to legislative statutes, appellate court case and the rules promulgated by the Utah Supreme Court. In so doing, we would come up nearly empty, although there have been a couple of Utah Supreme Court, cases that nibbled around the edges of this subject. As we discuss below, the 2003 Utah Legislature made a clumsy attempt to bring its forces to bear on the issue, but the 2004 Legislature repealed the attempt, leaving it – where it constitutionally belonged – in the hands of the Utah Supreme Court. Further, guidance from courts and legislatures in other jurisdictions produces only a collection of circular definitions, nebulous concepts and "definitions by example" – often, this latter category is characterized by the inadequate legalese crutch of "it includes, but is not limited to, the following."

In June of this year, the Utah Supreme Court adopted a new Chapter 13a of the Utah Code of Judicial Administration, with a single rule, Rule 1.0, "Authorization to Practice Law."[3] This action largely resolves the long-standing conundrum surrounding the companion questions of "what is the practice of law?" and "what is the unauthorized practice of law?"

And that's the point of this article: What is the story behind this action by the Court, and what does it mean for the legal community and society in general?

Background

In April 2003, the Utah Supreme Court requested its Advisory Committee on the Utah Rules of Professional Conduct (the "Committee") to develop a definition of the "practice of law."

It is likely that this request was in significant part a response to the attempt by the 2003 Utah Legislature to adopt its own definition of the practice of law. It was widely conjectured that a majority of the 2003 Legislature had concluded that the legal community was too parochial and over-protective of its professional turf in the pursuit and prosecution, through the Utah State Bar, of non-lawyers who were engaged in various legal and law-related activities.

In a reaction to what it may have perceived to be a societal problem, the Legislature took a meat-axe to the issue and, roughly speaking, attempted to define the practice of law to be strictly limited to the representation of a person in court: "The term 'practice law' means appearing as an advocate in any criminal

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proceeding or before any court of record in this state in a representative capacity on behalf of another person."[4]

This, of course, was pure rubbish. It would have had the effect of decreeing that the legal services rendered by all manner of lawyers would *not be* the practice of law (e.g., transactional lawyers; most tax and estate planning lawyers; "compliance lawyers," such as securities and environmental lawyers; and even administrative agency litigators). It would have, perforce, allowed the untrained, unregulated village idiot to perform these services for the unsuspecting citizen with no fear of prosecution or other legal or regulatory restraint.

As a sign that the Legislature recognized that its definition was pure eyewash, it made the statute effective one year hence, on May 3, 2004.[5] One can assume this was intended then as "message legislation" to the Utah Supreme Court, urging (threatening?) the Court to adopt a definition of the practice of law that would recognize that certain services related to legal fields might reasonably be provided by non-lawyers.

It is not clear if any legislator who supported and voted for House Bill 349 paid any attention to the fact that it was likely in violation of the Utah Constitution: "The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law."[6] It does not say, for example, "The Supreme Court shall share the governance of the practice of law with the Utah Legislature."

In any event, after the 2003 Legislature retired, the Supreme Court sought to adopt a definitive description of what should constitute the "practice of law" and the corollary of what would be the unauthorized practice of law.

The Court had earlier addressed the issue in a couple of decisions, but seemed to recognize that its discussion of the subject was incomplete or, in some way, not universally applicable. In *Utah State Bar v. Summerhayes & Hayden,* the Court cobbled together a reasonable description (but not a formal definition) of the practice of law:

> The practice of law, *although difficult to define precisely,* is generally acknowledged to involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent. It not only consists of performing services in the courts of justice throughout the various stages of a matter, but in a larger sense involves counseling, advising, and assisting others in connection with their legal rights, duties, and liabilities. It also includes the preparation of contracts

and other legal instruments by which legal rights and duties are fixed.[7]

Although this gave a good intuitive notion of what is typically involved in practicing law, the description is essentially circular – defining the practice of law as requiring "knowledge and application of legal principles." To overcome this logical shortcoming, the Court attempted to flesh out the idea with a series of examples,[8] but it did not carefully circumscribe either the extent of the "practice of law" or the "unauthorized practice of law."

The Court later muddied the waters of this issue by declaring in *Board of Commissioners of the Utah State Bar v. Petersen* that, "[t]he regulatory authority granted the Utah Supreme Court in article VIII, section 4 clearly refers to the *authorized* practice of law, not to the unauthorized practice of law."[9] This was almost surely a mistake, and the Court appears to have corrected this misstep by quietly amending subsection (a) to Rule 6 of the Utah Rules of Lawyer Discipline and Disability in December 2002, so that the rule now refers to "persons practicing law," instead of "lawyers admitted to practice."

> *Persons practicing law.* The persons subject to the disciplinary jurisdiction of the Supreme Court and the [Office of Professional Conduct] include any lawyer admitted to practice law in this state, any lawyer admitted but currently not properly licensed to practice in this state, any formerly admitted lawyer with respect to acts committed while admitted to practice in this state or with respect to acts subsequent thereto which amount to the practice of law or constitute a violation of any rule promulgated, adopted, or approved by the Supreme Court or any other disciplinary authority where the attorney was licensed to practice or was practicing law at the time of the alleged violation, any lawyer specially admitted by a court of this state for a particular proceeding, and *any other person not admitted in this state who practices law or who renders or offers to render any legal services in this state.*[10]

This is consistent with Article VIII, § 4, of the Utah Constitution, which gives the Supreme Court jurisdiction over all practice of law, no matter who is engaged in it. Thus, the Court's Rule 6(a) inherently recognizes there are non-lawyers who may be "practicing law."

In this context, the Court asked its Advisory Committee to provide a structure on which to base the distinction between authorized and unauthorized practice of law. The former may contain areas in which non-lawyers would be authorized; the latter may contain "lawyers" who are nevertheless not authorized to practice. Then, by definition, any individual who is not so authorized is engaged in the unauthorized practice of law.

The Committee formed an *ad hoc* subcommittee to research the issue and develop a proposal to respond to the Court's request. Over a period of about a year, a definition was developed, submitted to the Court and published for comment on the Court's website. Approximately 35-40 comments were received and carefully considered, and a final proposal was submitted to the Court in August 2004. The Court, *sua sponte,* made some modifications and formally adopted the current rule in June 2005.[11]

Fundamental Development[12]

A universal shortcoming of previous attempts to define the practice of law has been the failure to recognize that one of the two primary ingredients in the phrase is "the law," and that it is essential to define that term carefully as part of the exercise. Another common shortcoming of other attempts to define the practice of law is that they start with the notion that the definition should ultimately end up matching what licensed lawyers are permitted to do. This is definitional tail-chasing that is destined to be circular.

These problems can be avoided by: (1) defining what areas of human knowledge constitute "the law;" (2) defining what it means to "practice" law, without reference to who is doing it or whether the activity has been given a governmental blessing; and (3) specifying who may and may not legally engage in the practice of law.

The last element is perhaps the most difficult to conceptualize. The lawyer's instinct is to invoke the false syllogism: "Licensed lawyers are authorized to practice law; you are not a licensed lawyer; *ergo,* you are not authorized to practice law." This is the heart of many definitional attempts. First; this does not follow logically. More importantly, however, the pervasiveness of legal elements in almost every nook and cranny of American society renders this approach hopelessly impractical. A simple example: Certified public accountants routinely deal with myriad statutes, regulations and legal principles in the preparation of tax returns for their clients. Does this exhibit the characteristics of "practicing law" under any general interpretation of that term? Almost surely yes. But such activities in today's complex, tax-driven world have not been – and should not be – regarded as the *unauthorized* practice of law.

Thus, the idea that a careful definition of the "practice of law" must coincide with what lawyers are authorized to do must be abandoned. Rather, an axiomatic approach should start with a careful definition of what body of human knowledge constitutes "the law." The Committee could find no court, bar commission, or legislature that took this fundamental step in their various attempts to solve the practice-of-law problem.

Once there is agreement on a body of human knowledge and information that constitutes "the law," defining the "practice of law" involves the characterization of the *actions and situations* that are to be considered the "practice," without reference to the qualifications of those who might be engaged in that practice. That is, one of the most important concepts in approaching the definition in this way is that the definition of the "practice of law" must be independent of the training, background, titles or qualifications of a person who might be engaged in the practice. This avoids the unworkable, circular approach of defining the practice of law as "what lawyers do."

An ancillary step is to specify those persons who will be denominated lawyers and will be eligible to engage in all forms of the practice of law. But, a comprehensive set of qualifications that a person must demonstrate to become a Utah lawyer has long been in place.[13] Thus, the Committee took the definition of lawyer as a given – namely, a person who has successfully passed through the process administered by the Utah State Bar to be licensed to practice in Utah.

Finally, when a solid definition of "the law" and a designation of the actions and situations that make up "practice" of "the law" are established, the last element is to decide where lawyers and non-lawyers fit into the picture and how the dividing line between authorized practice of law and unauthorized practice should be drawn. In broad terms, the first part of the exercise – to give a formal definition of the "practice of law" – is a jurisprudential task, while the process of determining what areas of the law non-lawyers may legally be involved in is largely a public policy matter.

This last step is perhaps the most daunting part of the problem, but structuring the overall approach this way allows the "practice of law" to be a largely fixed concept, while the specification of various subsets of practice that may be open to non-lawyers under some circumstances may change from time to time to reflect society's ever-changing view of this landscape, without the necessity of tinkering with the basic definition of the practice of law.

Definition of the "Practice of Law"

Having concluded that a sound definition of the practice of law should not rely on the use of undefined terms, the Committee first undertook to define the breadth of "the law." To that end, because "the law" generally delineates what is and is not acceptable by society as set forth by legislatures and other governmental law-making bodies and then interpreted by a variety of tribunals, the Committee proposed and the Court adopted the following definition:

The "law" is the collective body of declarations by govern-

mental authorities that establish a person's rights, duties, constraints and freedoms and consists primarily of:

(A) constitutional provisions, treaties, statutes, ordinances, rules, regulations and similarly enacted declarations; and

(B) decisions, orders and deliberations of adjudicative, legislative and executive bodies of government that have authority to interpret, prescribe and determine a person's rights, duties, constraints and freedoms.[14]

This captures (A) the governing frameworks that are characterized by constitutions, legal codes, ordinances, regulations and the like-roughly speaking, affirmative statements and actions by government bodies of what behavior is and is not permitted in society, and (B) the common law or interpretational law that issues from judicial and quasi-judicial institutions – primarily the courts and administrative agencies.[15]

No matter how restrictive or expansive society decides to define the universe of persons who are permitted to "practice law," it is essential first to decide what *activities* constitute the practice – not the persons who might do it.

The general idea – even among lay persons – is that the practice of law involves two basic elements: (a) *application of the law* to particular facts and circumstances, and (b) the *representation of the interests of another person.* Representation here is not limited to advocacy representation. It is meant in the broader sense of rendering advice about rights and obligations to a person, including service in an advocacy role when appropriate.

The "application of the law" element, by itself, would not constitute the practice of law under any normal jurisprudential scheme. Legal scholars, for example, engage in this activity as a profession, but they are not considered practicing lawyers as long as they are not representing another person. Similarly, *pro se* representation may involve application of legal principles to one's own situation, but would not involve representation of another.

On the other hand, the representation of a person as an agent does not necessarily involve the application of legal principles and does not, in and of itself, constitute the practice of law. There are many examples: Some activities of real estate agents and escrow agents; voting proxies; a dueler's "second." Even so, some of these border on the application of legal principles, and that is what makes this area difficult to analyze.

In connection with the definition of "the law" above, the Committee defined the "practice of law" as:

> The "practice of law" is the representation of the interests of another person by informing, counseling, advising, assisting, advocating for [or drafting documents for] that person through application of the law and associated legal principles to that person's facts and circumstances.[16]

The Court added the bracketed phrase "and drafting documents for" to the Committee's recommendation. This may have been an unnecessary clarification, as the term "assisting" would include the preparation of documents.

This sets the stage for tackling the difficult cultural/societal issue of what is the *unauthorized* practice of law.

Unauthorized Practice of Law.

The foundational principle proposed by the Committee and adopted by the Court is: Except for certain carefully specified persons and activities that recognize today's societal demands that a number of areas of the practice of law may be undertaken by persons who are not lawyers, only "active, licensed members of the Utah State Bar in good standing may engage in the practice of law."[17]

This leaves a two-dimensional exercise: (a) a designation of practice areas in which it is not necessary to be a Utah lawyer; and (b) a description or specification of qualifications that enable the non-lawyer to practice in such a field.

With some modification, the Court adopted the Committee's recommended "carve-outs" – those activities that may be the practice of law, but which will not be considered unauthorized practice when engaged in by non-lawyers:[18]

- Making legal forms available to the general public or publishing legal self-help information.
- Providing general legal information, opinions or recommendations, but not specific advice related to another person's facts or circumstances.
- Providing clerical assistance to complete a court-provided form for protection from harassment or domestic violence or abuse (if no fee is charged).
- Assisting one's minor child or ward in a juvenile court proceeding, when found by the court to be in the child's or ward's best interests.
- Representing a natural person in small claims court, if there is no compensation and with the express approval of the court.
- Representing a legal entity as an employee representative in small claims court.
- Similar representation in an arbitration proceeding, where the amount in controversy does not exceed the jurisdictional limit of Utah small claims courts.
- Representing a party in any mediation proceeding.
- Acting as a representative before administrative tribunals or

agencies when authorized by that tribunal or agency.

- Serving as a mediator, arbitrator or conciliator.[19]
- Participating in certain labor negotiations, arbitrations or conciliations.
- Lobbying governmental bodies as an agent or representative of others.
- Advising others in certain, well-defined, law-related fields.

The list may seem lengthy and a little unwieldy, but it is inherently responsive to changes in the landscape and dynamics of the ever-changing integration of legal components into the interstices of everyday life. Areas of practice open to certain non-lawyers can be directly changed by the Court from time to time through its rule-making procedures without disturbing the underlying definitional structure.

This approach is also consistent with the Utah Constitutional framework for the regulation of the practice of law by the Supreme Court and the current formulation in Rule 6(a) of the Rules of Lawyer Discipline and Disability.

Practice in Legally-Related Areas

The most far-reaching and significant of the areas in which the Court has recognized that non-lawyers are authorized to engage in activities that might be considered the practice of law is specified in § (c)(12):

> Advising or preparing documents for others in the following described circumstances and by the following described persons:
>
> (A) a real estate agent or broker licensed by the State of Utah may complete State-approved forms including sales and associated contracts directly related to the sale of real estate and personal property for their customers.
>
> (B) an abstractor or title insurance agent licensed by the State of Utah may issue real estate title opinions and title reports and prepare deeds for customers.
>
> (C) financial institutions and securities brokers and dealers licensed by the State of Utah may inform customers with respect to their options for titles of securities, bank accounts, annuities and other investments.
>
> (D) insurance companies and agents licensed by the State of Utah may recommend coverage, inform customers with respect to their options for titling of ownership of insurance and annuity contracts, the naming of beneficiaries, and the adjustment of claims under the company's insurance coverage outside of litigation.
>
> (E) health care providers may provide clerical assistance to patients in completing and executing durable powers of attorney for health care and natural death declarations when no fee is charged to do so.
>
> (F) Certified Public Accountants, enrolled IRS agents, public accountants, public bookkeepers, and tax preparers may prepare tax returns.[20]

It is worthy of note that the Court's final adoption of § (c)(12) represents a somewhat more restrictive approach than the Committee's recommendation. Rather than try to describe the specific disciplines, professions and the particular functions that practitioners in those areas could perform without being

engaged in unlawful practice, the Committee had recommended a more generic, formulaic approach:

> (c) A person is not engaged in the unauthorized practice of law when . . . .
>
> (12) Advising or preparing documents for others by persons whose occupations (i) involve applications of one or more areas of the law and (ii) are regulated or subject to professional oversight by an administrative agency of the State of Utah or by a nationally recognized professional licensing or accreditation organization, if the advice or preparation of documents is directly related to the professional field in which the person is regulated or subject to professional oversight.

Interestingly, after the Committee originally submitted this version to the Court, a comment submitted to the Court prompted the Court to request that the Committee revisit what became known as the "(c)(12) exception." Upon the Committee's submission of an alternate formulation, the Court allowed that it preferred the original version submitted by the Committee.

It is difficult to balance the possible benefits to society of allowing non-lawyers to provide some legally related services with the potential for harm to that same public by persons who are uninformed, incompetent, careless, negligent or worse. On the other hand, the Court has taken a cautious approach to the question of how far to allow non-lawyers to operate in areas that involve the basic ingredients of the practice of law – namely, application of the law and legal principles in the representation of other persons.

Time will tell if the Court has reached the right balance, but I believe that the framework that it has adopted allows it to make necessary modifications to respond with a minimum of disruption to experience under the new rule and to changing circumstances in legal practice in Utah.

In summary, the Court's adoption of Chapter 13a of the Code of Judicial Administration comprises three components: (a) a careful definition of the fields of information and knowledge that make up "the law," (b) a definition of what it means to "practice" in these fields, and (c) a delineation of those activities that may be included in the practice of law, but which may be engaged in by non-lawyers without being considered the unauthorized practice of law.

This definitive action by the Court should end, or at least reduce to minor modifications, the long-simmering difficulties that have surrounded the practice-of-law issue.

1. This article is an outgrowth of a report prepared by an *ad hoc* subcommittee of the Utah Supreme Court's Advisory Committee on the Rules of Professional Conduct, which the author chaired. The other members of this subcommittee were Steven G. Johnson, Earl M. Wunderli and Nayer N. Honarvar, without whose contributions this article would not have been possible. The views expressed here are the views of the author and not necessarily those of the Advisory Committee on the Rules of Professional Conduct or its *ad hoc* subcommittee.
2. *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .").
3. Utah Code of Judicial Admin., ch. 13a, rule 1.0(a) (2005), http://www.utcourts.gov/resources/rules/ucja/index.htm.
4. 2003 Utah H.B. 349 (subst.), sponsored by Stephen H. Urquhart (a St. George attorney), *codified* at Utah Code Ann. § 79-9-102(b) (2003).
5. Utah Code Ann. § 78-9-102 (2003).
6. Utah Const. art. VIII, § 4.
7. 905 P.2d 867, 869-70 (emphasis added, citation omitted) (Utah 1995).
8. The mathematicians among us surely recoil at the idea of attempting to define a basic concept by merely providing examples and leaving it to the reader to imagine the exact boundaries.
9. 937 P.2d 1263, 1270 (Utah 1997) (emphasis in the original).
10. Utah Code of Judicial Admin., ch. 14, rule 6(a) (2005) (emphasis added), http://www.utcourts.gov/resources/rules/ucja/index.htm.
11. The Court also adopted the Committee's recommendation to include a set of "official" comments as part of the rule, in a manner analogous to the comments included as part of the Utah Rules of Professional Conduct.
12. Parts of the following discussion are modeled on portions of the Report on the Definition of "The Practice of Law," submitted to the Utah Supreme Court by the Advisory Committee on the Rules of Professional Conduct in August 2004. The author offers no apologies for "lifting" such material, as he was the primary author of the Committee report.
13. Utah Code of Judicial Admin., ch. 16, art. I, "Regulation of the Practice of Law in Utah" (2005).
14. Utah Code of Judicial Admin., ch. 13a, § 1.0(b)(2) (2005) (hereinafter "Chapter 13a"). "Person" includes the plural as well as the singular and legal entities as well as natural persons." *Id.* § 1.0(b)(3).
15. One of the more obvious problems in the 2003 Legislature's since-repealed enactment of § 78-9-101 of the Utah Code is the failure to recognize the panoply of administrative agencies in which persons' rights and obligations are decided on a regular basis. This is no less a sphere for rendering important legal judgments than is the civil or criminal litigation.
16. Utah Code of Judicial Admin, ch. 13a, § 1.0(b)(1) (2005).
17. *Id.* § 1.0(a). Just because a Utah lawyer is *authorized* to practice in any legal area does not mean he satisfies the criterion of competence as set forth, for example, in Utah Rules of Professional Conduct 1.1. This distinguishes *authorized* practice from *competent* practice.
18. Utah Code of Judicial Admin, ch. 13a, §§ 1.0(c)(1) – (12) (2005.
19. Strictly speaking, this exception need not be included, as it does not involve the representation of another person and is not the practice of law under § 1.0(b)(1).
20. Utah Code of Judicial Admin, ch. 13a, §§ 1.0(c)(12) (2005).

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Reflections on Poverty, Bankruptcy, and Heresy

by Paul Toscano

Introduction

In January and February of 2005, the *Salt Lake Tribune* published a series on bankruptcy in which Utah was reported to have the highest bankruptcy-filing rate in the country. The articles were extensive and informative. I was, however, disturbed by them because, while they discussed bankruptcy, they said so little about poverty. I decided to do some research on:

- How poverty is measured;
- The actual number of Utah households living in functional poverty;
- How much credit card debt Utahns carry;
- How much credit card companies earn annually in Utah;
- How Utah bankruptcy discharges affect those credit card companies; and
- How some new Bankruptcy Code amendments may affect Utahns seeking debt relief.

Moving down the chart from least gross income to greatest, these standards are: (1) the U.S. Department of Health and Human Services standard, (2) the Federal Poverty Level ("FPL") standard, (3) the Shelter Method, (4) the 200% of FPL standard, and (5) the Self-Sufficiency standard. These standards are generally presented for a household of four persons, as set forth in column 1. The average Utah household, however, consists of 3 persons – 3.12 persons to be exact, set forth in column 2. (*Utah At-A-Glance,* p. 10). This is a surprising statistic considering that Utahns are noted for large families.

The poverty income levels under these five standard measurements, adjusted for a household of 3 persons, vary between $14,680 and $40,443 a year. The lower income figures in rows 1 and 2 are not realistic: The Federal Poverty Level has not been adjusted since 1964, at the beginning of Lyndon Johnson's Great Society's "War On Poverty." The Shelter Method in row 3 sets the poverty line at three times the average housing cost, even though most of the poor spend more than one-third of their income on shelter. The cost of a two-bedroom apartment in Utah averages $671 per month. The standards in rows 1, 2, and 3 are really measures of *abject* poverty because, according to Utah Issues, these income levels are grossly inadequate to cover basic expenses such as food, clothing, shelter, transportation, and utilities. They would not begin to cover the costs of health care or education. For this reason, State welfare agencies report poverty at 200%

Utah Poverty Gross Income by Different Accepted Standards of Measurement

	Measurement Type	Income/Year HH of 4	Income/Year HH of 3	Per Capita Per Year	Per Capita Per Month	Per Capita Per Diem
1	U.S. Dept. of HHS	$18,810	$14,680	$4,893	$408	$13.60
2	Fed. Poverty Level	$18,850	$15,670	$5,223	$437	$14.60
3	Shelter ($671) x 3	$24,156	$24,156	$8,052	$671	$22.40
4	200% of FPL	$37,700	$31,340	$10,447	$871	$29.00
5	Self-Sufficiency'05	$48,182[2]	$40,443[3]	$13,481	$1,123	$37.40
	AVERAGES	**$29,540**	**$25,258**	**$8,419**	**$702**	**$23.40**

Poverty and Income

Poverty is a comparative term. We are all poor compared to Oprah Winfrey, who is poor compared to Bill Gates. Poverty is measured by statistics that usually compare the income levels of households, rather than individuals. There are five accepted standards employed to measure poverty, charted above. The incomes reported are gross incomes. The data in this chart come from the U.S. Department of Health and Human Resources by way of a local organization called Utah Issues that publishes an annual *Poverty Report.*[1]

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of the outdated FPL.

Applying the 200% of FPL measuring rod, a Utah household of 3 is poor if its combined annual income is $871 per person per month (or $29 per person per day). Using that standard, 10.6% of Utah's population (*i.e.,* 203,000 individual Utahns) lived in poverty in 2004 – up from 9.4% in 2003. (Utah Issues, *Poverty Report* 2004, p.10). As we shall see presently, 200% of the FPL represents an income that is only 77% of what a family of 3 needs to cover basic, necessary expenses. To put this in perspective, 203,000 Utahns live annually on less than a person with average income living in Poland, Hungary, the Czech Republic, Mexico, St. Kitts and Nevis, Trinidad and Tobago, the Seychelles, Palau, or Oman and less than one-half that of the average income of an individual living in Saudi Arabia, Antigua, Barbados, Malta, Slovenia, Portugal, Bahrain, Korea, or Greece.

The most realistic measure of poverty is the Self-Sufficiency standard, which employs income levels actually required to cover basic necessities, adjusted to account for inflation. Utah Issues reports that the average Utah household of 3 persons lives in poverty if its combined income is $40,443 or less – *i.e.,* $1,123 per person per month, or $37.40 per person per day. That income level represents 255% of the 1964 Federal Poverty Level. In year 2003, Utah Issues' *Poverty Report* (p.14) stated that 42% of Utah households lived on less than $37,919 a year, about $2,500 less than the Self-Sufficiency Standard's functional poverty level. *That means that, at 3.12 persons per household, an estimated 918,959 Utahns live in functional poverty.* Keep in mind, too, that an additional percentage of the population lives on the edge of this measurement, flirting with functional poverty.

In a May 25, 2005, front-page article entitled "Poverty Still On The Rise In Utah," the *Salt Lake Tribune* reported:

- Utah as first in the nation in personal bankruptcy filings;
- Utahns as carrying the 14th highest tax burden in the country;
- Nearly 7900 Utah children as being homeless in years 2003-2004;
- 80,000 Utah children as living without health care;
- 470,000 Utah students as qualifying for free or discounted school lunch; and
- The average wait for public housing in Davis County as being 36 months.

Poverty and Consumer Debt

Poverty in Utah must be understood in light of rising credit card debt, which for Utahns must be adduced in part from national statistics. Between 1989 and 2001, the nation's credit card debt increased from $238 billion to $692 billion.[4] During this period, the credit card industry instituted a number of innovative, sharp practices to generate additional revenues, including:

- Setting inadequate minimum payment amounts (between 2% and 3% of the principal balance) to allow card holders to borrow more money while extending the term that the debt will accrue interest;
- Assessing excessive late charges and penalty rates of between 29% and 34%;
- Eliminating grace periods;
- Triggering default interest rates and late charges within nanoseconds after the expiration of due date and time;
- Employing exploitive practices marketing to the young and uncreditworthy, including the mailing of 5 billion credit card solicitations in 2001 – about 21 solicitations for every living American;
- Aggressively soliciting unaffordable credit limits;
- Mounting a sustained, 10-year, multi-million dollar attack on the 1978 Bankruptcy Code to restrict access to bankruptcy relief for the poorest segments of society; and
- Automatically and without notice, raising interest rates on all credit cards held by an individual if a payment was late on just one card.[5]

In 1978, 37 states had usury laws to prevent the lending industry from overcharging for the use of borrowed money. These laws were rendered largely ineffective by two U.S. Supreme Court cases: *Marquette v. First Omaha Service Corporation,* 439 U.S. 299 (1978) and *Smiley v. Citibank,* 517 U.S. 735 (1996). *Marquette* held that national banks could charge the highest interest rate allowed in the bank's home state. The credit card industry relocated their home offices to states such as Delaware and South Dakota – states without usury laws – thereby rendering impotent the usury laws in the cardholders' states. *Smiley* upheld the same principal when applied to finance fees and charges, which thereafter jumped from an average of $16 to an average of $32 per account per year. One survey reports that about 60% of card users are charged late fees.[6] The effect of this change on credit card industry revenues was not insignificant. These companies earned in 1996 $1.7 billion in late fees, but in year

2001, $7.3 billion – a 430% increase. Annual fees have disappeared and been replaced by balance transfer fees, over-limit fees, cash advance fees, and foreign exchange fees. Credit card industry revenues from fees increased from $8.3 billion in 1995 to $24 billion in 2004 – a 282% increase.[7]

Let's bring this home. Utah Issues estimates that 55% of Utah households carried credit card debt in year 2001, and that that the average credit card debt for each such household was $4,126. (*Poverty Report,* p.9). In year 2001, Utahns carried approximately $1.6 billion in debt, which earned the credit card industry by year 2002 approximately $239 million in interest income (at an average APR interest rate of 15%).

Online Debt Smart, however, reporting higher estimates, states that in 2001 the average credit card debt for an American household was $7,500, while the Consumer Federation of America estimates that the average American household uses 6 credit cards and carries an average of $10,000 in debt.

Credit Card Debt Estimates for Utahns (Year 2002)	
UT HH	701,281
42% UT HH	294,538
Low Estimate	$4,126
High Estimate	$10,000
Middle Estimate	$7500
Debt Carried By 42% UT HH	$2.2 billion
Interest 15% APR	$331.36 million
Total Yearly Revenues	$400 million

Multiplying 42% of Utah households living in functional poverty times $7,500 of credit card debt per household, yields $2.2 billion in credit card debt probably carried by poor Utahns in 2001. At a 15% APR, this principal sum generated about $331 million in interest revenues alone. These figures are, consequently, greater for subsequent years because credit card debt principal is increasing on average at the rate of 4% per year based on the annual rate increase that occurred nationally between 1997 and 2002.[8]

These revenue figures do not include principal amounts owed on payday or overdraft loans or loans made against individual retirement accounts, nor revenue from late charges, default interest rates, various fees, account charges assessed against merchants, or interest earned on the investment of these revenues. The income earned by the credit card industry from citizens of Utah in interest, fees and charges could approach $400 million a year with net increases of 4% annually.

Estimated Annual Effect on Credit Card ROIs of Utah Chapter 7 Discharges in 2004	
Ch. 7 Filings	14,948
Individuals Filing	18,068
Average Debt	$7,500
% Of Poor Utah BK Filers	2.3%
Estimated Discharges 14,559 (97.4%)	$109,192,500
Estimated Annual ROI	$400,000,000
Annual Growth ROI	Unknown
% Net Loss in ROI	0%
Loss in Dollars	Unknown
Unaccounted Factors	Unknown

In Utah in year 2003, there were 14,948 Chapter 7 cases filed; of these, 6,240 were joint filings of husband and wife. This means that 18,068 individuals (that is, 14,948 + 6240/2) filed Chapter 7 cases that year. Of these 14,559 households (97.4%) received discharges of credit card debt of approximately $7500 each or $109,192,500. That estimated $109,192,500 represents a 27% decrease in the credit card industry's estimated annual revenues of $400,000,000 from interest alone at 15% APR.

These losses to the credit card industry are offset by interest earned on increased principal and other fees and charges thus reducing the credit card industry's losses due to discharges. These offsets are unknown. But, in my view, they are irrelevant for the reasons that the conservative 15%APR rate used to achieve these estimates of credit card industry earnings already includes a component intended to generate income to compensate the credit card company for its risk of loss on anticipated uncollectible accounts receivable, which include unpaid accounts due to bankruptcy discharges. It is arguable that the unknown net losses are, in fact, zero because the claims discharged in bankruptcy have been compensated by income generated by that portion of the interest percentage included to offset actual losses.

Chapter 7 discharges have some positive effect on the credit card industry. Chapter 7 discharges clear the open negatives balances on the credit reports of discharged debtors, thereby allowing those individuals to rebuild their credit scores to acceptable levels, often within 18 to 24 months. Discharges allow individuals to borrow again. The annual increase in the nation's credit card debt is due in part to the rehabilitative effect of Chapter 7 discharges on credit scores. Chapter 13 cases do not have this same effect. While Chapter 13 debtors are attempting

to repay creditors, their credit scores continue to decline. The credit industry does not recognize a confirmed Chapter 13 Plan as a contract novation; therefore, a Chapter 13 debtor's credit scores are docked throughout the term of the Chapter 13 plan because the trustee's payments to creditors continue to be treated as delinquent and inadequate. Only Chapter 13 debtors who consummate their 3 to 5 year plans can commence the 18 to 24 month process of rebuilding credit scores.

The cost of consumer debt borne by Utahns living in functional poverty is not reflected in the credit industry's profits or credit reporting tactics alone. The average credit card debt of $7,500 represents about 20% of the annual income of a Utah poverty household measured by the 200% FPL standard. The interest alone on that debt at 15% APR results is an annual cost of $1,125, which is the amount needed to sustain 1 person in the household for a month. This is a household that by the Self-Sufficiency standard is already $1003 per month short of covering its basic necessities – all in a state whose poverty rate is increasing, whose credit card debt is increasing, 43% of whose residents cannot afford fair market rent for a 2-bedroom apartment, which ranks 3rd in the nation in food insecurity, and where in year 2003 about 7900 children experienced homelessness. (*Poverty Report,* p.10).[9]

Bankruptcy

It is in this context that we must understand Utah's ranking as the number one bankruptcy filer in the nation. Will the new Bankruptcy Code amendments (effective October 17, 2005, the anniversary of the Bolshevik revolution) make it harder for Utahns to file? Yes, but perhaps not significantly once consumer bankruptcy lawyers in the state learn to read the charts that explain how the new eligibility rules, median income "safe harbor test," and "means test" work. Those new amendments are intended to make bankruptcy protection more difficult for debtors and to force debtors with "means" to repay debts under Chapter 13, rather than to discharge them under Chapter 7. What follows is only a sketch of some of the obstacles to debt relief Congress has mandated by way of the Bankruptcy Code amendments signed into law by President Bush on April 20, 2005.

The Median Income "Safe Harbor" Test

Under the new amendments, a Chapter 7 filing is not presumptively abusive if a Utah debtor's household income falls below Utah's median income for a household the size of the debtor's. The filing, however, may be abusive if the debtor's household income exceeds that median income, in which case the means test must be applied to determine if the filing under Chapter 7 by that debtor would be an abuse. Utah's median income figures are scheduled to be released before October 17, 2005, but are currently estimated as follows:

Utah Median Income Levels	
Persons In Household	**Median Income For Utah**
1 Person	$41,103
2 Persons	$45,374
3 Persons	$51,219
4 Persons	$57,916

For households of more than four, $6,300 annually, or $525 per month, must be added for each additional household member.

The New Bankruptcy Means Test

The means test is difficult and curious. It consists of two major parts: the "current monthly income" calculation and the formula for determining if a debtor has the means to repay unsecured creditors in a Chapter 13 case. In summary, here's how it works:

The debtor's CMI is determined by averaging the debtor's total income from all sources over the six months prior to bankruptcy filing (not including benefits under the Social Security Act or payments received as a victim of a war crime, of crime against humanity, or of international or domestic terrorism).

If the debtor's CMI is less that the state's median income for the debtor's household size, the filing of a Chapter 7 case by debtor eligible therefor is not presumptively abusive. If such a debtor must file a Chapter 13 case, the monthly expenses allowed to a less-than-median-income debtor are that debtor's actual expenses.

If the debtor's CMI is greater than the state's median income for the debtor's household size, the means test must be applied to determine if such debtor's Chapter 7 filing is abusive. If a greater-than-median-income debtor is otherwise eligible for and files a Chapter 13 case, the means test allows that debtor to deduct from the CMI the more generous monthly expenses set forth in Bankruptcy Code Section 707(b)(2)(A) & (B), namely:

> (i) The *estimated* allowable expenses established as IRS National Standards for food, clothing, household supplies, personal care, and miscellany *and* the IRS Local Standards (see www.usdoj.gov/ust) for housing and utilities and for transportation (with different amounts for different areas of the country, depending on the debtor's family size and the number of the debtor's vehicles);

(ii) Certain allowed *actual expenses, including* income taxes, FICA, Medicare, child care and medical expenses, certain insurance premiums, some education costs, expenses for the care of household members, repayments of retirement loans, and charitable contributions to tax-exempt charities up to 15% of the debtor's gross income; and

(iii) Deductions for monthly payments to secured and priority creditors over sixty months divided by 60.

The result is the monthly amount available to pay unsecured creditors.

From this available amount, Chapter 13 filers are also allowed to deduct any monthly income received as child support, foster care payments, and disability payments for a dependent child (11 U.S.C. Section 1325(b)(2)) in reaching the "net disposable income" to be paid under the debtor's Chapter 13 Plan.

If the resulting monthly amount (i.e., CMI minus allowed expenses and income deductions) exceeds $166.67, then the filing of a Chapter 7 case by a debtor with greater than applicable state median income is an abuse under the means test. If the resulting monthly amount is less than $100, then a Chapter 7 filing by such a debtor is not an abuse under the means test. If the resulting monthly amount for that debtor falls between $100 and $166.67, a Chapter 7 filing is not an abuse if that monthly amount multiplied by 60 totals a sum less than 25% of the debtor's scheduled unsecured debts. If such a monthly amount exceeds 25% of the debtor's scheduled unsecured debts, then a Chapter 7 filing for such a debtor is an abuse. Notwithstanding all this, a bankruptcy case may be still dismissed as abusive if it is not filed in good faith.

In Utah, given the low median incomes for households and the generous IRS standards for expenses in the cases of wealthier Chapter 13 debtors, the number of Chapter 7 case filings, though decreasing in the short run, may not drop off significantly over time. However, the additional potential liabilities placed by the amendments on consumer bankruptcy attorneys will undoubtedly alter processing procedures and probably result in increased fees.

Some Other Restrictive Provisions of the Bankruptcy Amendments

The new amendments contain additional obstacles to bankruptcy filing. For example, a discharge cannot be granted in a Chapter 7 case filed within 8 years of the Petition Date of a prior Chapter 11 or Chapter 7 case in which a discharge was granted or within 6 years of the Petition Date of a prior Chapter 12 or Chapter 13 case in which a discharge was granted. A discharge cannot be granted in a Chapter 13 case within 4 years of the Petition Date of a prior Chapter 7, Chapter 11, or Chapter12 case in which a discharge was granted or within 2 years of the Petition Date of a prior Chapter 13 case in which a discharge was granted.

The automatic stay provisions are more restrictive. Debtors who file a case but do not receive a discharge, but then file another case within a year of the original, will have the benefit of the automatic stay for only 30 days unless the court orders after a hearing that the current case was filed in good faith. I refer to this a the "semi-automatic stay." If a debtor files two cases within a year of the original case, no stay comes into effect in the third case unless within 30 days the court finds that the case was filed in good faith.

The amendments increase to 2 years the reach-back period for trustees to avoid fraudulent transfers, while at the same time further protecting creditors from trustees' powers to avoid preferential transfers.

The amendments require more thorough documentation prior to filing a new case and prior to appearing at a first meeting of creditors. Bankruptcy lawyers are required to certify at the time of filing that they have made a reasonable inquiry and know of nothing contrary to what the debtors report in bankruptcy schedules. As a result, conscientious lawyers will require complete documentation from clients, which will be difficult to acquire from clients not famous for their record keeping skills.

Under the amendments, documents evidencing the debtor's gross income and expenses for the prior 6-month period will have to be acquired and analyzed before a determination can be made (under the median income and means tests) whether a filing under Chapter 7 or Chapter 13 is or is not presumptively abusive. This process will greatly decrease the willingness of bankruptcy lawyers to file cases on an emergency basis.

The most draconian of the new provisions creates a class of untouchable debtors denominated "assisted persons." These are consumer debtors who own less than $150,000 of non-exempt property. There are no special restrictions placed on "assisted persons" themselves, but severe controls govern any non-creditor who assists them. Any party, including a lawyer, who provides help, legal counsel, or debt or bankruptcy services to an assisted person is automatically classified as a "debt relief agency" and falls under the disclosure and practice requirements of newly enacted Bankruptcy Code sections 526, 527, and 528, which greatly increase the liabilities and work load of those who assist

the poorest elements of the lower class.

Some of the new amendments also negatively affect some creditors. Chapter 13 debtors will have to pay the full replacement value of automobiles less than 2.5 years old (where under the old law they had only to pay 100% plus interest of the depreciated value of such collateral, leaving the unsecured portion of the claim to be paid a dividend in the unsecured class). Also, debtors may not be allowed to exceed the allowed IRS estimated housing expense on mortgages. If stipulations that relax these requirements are not agreed to by creditors and allowed by the courts, a great many automobiles and houses may be surrendered to the detriment of auto lenders and mortgagees.

The following appeared on line in an April 14, 2005, Bloomberg report:

> "The credit-card industry bought and paid for this legislation," said Massachusetts Democrat William Delahunt. "They spent north of $40 million to make sure they got what they wanted."
>
> "This bill seeks to squeeze even more money for credit-card companies from the most hard-pressed Americans" and turn bankrupt consumers into "modern-day indentured servants," said Democratic Leader Nancy Pelosi.[10]

In lobbying for the new amendments, however, the credit card industry gave short shrift to the law of unforeseen consequences. Just before it became law, the secured creditor industry hijacked the bill. The new amendments were tweaked so they now do not favor unsecured creditors. Instead, the "current monthly income," the means test deductions, the reductions of certain income under the disposable income test, and the collateral valuation rules favor secured over unsecured creditors, while the eligibility rules and pre-bankruptcy briefing and documentation requirements that make bankruptcy generally more inaccessible appear to favor unsecured creditors attempting to collect from debtors now rendered ineligible for bankruptcy protection. Debtors, of course, do not need to file bankruptcy to avoid debt. They can stop paying, abandon their equities, and settle down to a life at the bottom of the food chain. In extreme cases, they can just leave the country – an approach referred to as Chapter 747. Further discussion of the bankruptcy amendments is beyond the scope of this presentation, but it will be the subject of many CLE presentations planned for the near future.

Heresy

More disquieting to me than all the statistics on poverty and all the effective lobbying that resulted in a creditor-skewed bankruptcy law is the absence of opposition to the amendments from religious organizations. Where were all the Jewish leagues, the Christian coalitions, the Muslim committees, or even the secular action groups when it came to the defense of the nation's poor? The Lord may have given the word, but where was the company of the preachers? (Psalms 68:11).

The silence of the nation's spiritual leaders is particularly troubling in light of the admonitions of their scriptures: the Old Testament prophet Amos warned those who oppress the poor, who crush the needy and prayed that "justice roll down like waters and righteousness like an ever-flowing stream" (Amos 4:1; 5:21-24). St. Luke's gospel presents Jesus as telling his followers to invite to their tables not their friends who will repay them with return invitations, but "the poor, the maimed, the lame, the blind, and you will be blessed, because they cannot repay you. You will be repaid at the resurrection of the just." (Luke 14:12-14). The prophet of Allah taught Islam to "give away wealth out of love for Him to . . . the needy and the wayfarer and the beggars and (for the emancipation of) captives, and to keep up prayer and pay the poor-rate . . ." (Koran, "The Cow," 2:177).

And where were Utah's ethical guardians and moral opinion leaders? What would be the religious response here if 42% of the state were growing marijuana, were pro-choice Democrats, or were gay? Why don't Utahns see poverty as a threat to the family greater and more immediate than abortion, drug abuse, or same sex marriage? Where are the champions of family values? Where is the outrage?[11] Is it possible that Utahns see poverty as a consequence of ignorance, irresponsibility, or sin and, therefore, dismiss it as deserved, inevitable, or temporary?

And what about the secular concept of fundamental fairness? The promise implicit in the foundational documents of this country that power should be enumerated, limited, divided, and balanced, and that the playing fields of power and money should by law be rendered as level as possible? Or that governmental power to protect life, liberty and property should not be subverted to oppress, deceive, disenfranchise, or plunder? Is it not a form of constitutional heresy – a departure from the principles on which the nation is predicated – to legally relegate the least powerful and the poorest citizens of the nation to a class the assistance of which triggers increased liabilities and expenses for those who attempt to provide them with debt relief?

Certainly, there are affluent and faithful Utahns who give needed service and generous donations to the poor. But individual benevolence toward the have-nots can be and too often is subverted by institutional favoritism toward the haves. We can strain at gnats by doing good service to the few while swallowing camels by supporting policies that do harm to the many. We can allow ourselves to be offended more by sins of lust in plain sight than by sins of greed hidden from view. It is possible for the rich sometimes to ignore the poor, "to notice them not." (*Book of Mormon,* Mormon 8:39). And sometimes, when the have-nots become impossible to ignore (as they do when they file petitions in bankruptcy), it is possible for poverty to be dismissed as the fruit of irresponsibility, inefficiency, self-indulgence, laziness, stupidity, or sin. This, however, is prejudice, not unlike racism, misogyny, homophobia, or religious intolerance.

Prejudice is the mother of oppression. Coercion is its father. These are not phenomena of history or mere artifacts of the past, but current events menacing the present. They are in our midst. A society that entertains prejudice enables oppression. A state that ignores its poor is an army that abandons its wounded. This is true for America, whose pilgrim founders idealized it for the world as a City on the Hill. It true for Utah, whose Mormon founders envisioned it as the American Zion. But with 42% of its citizens in functional poverty and with the highest rate of bankruptcy filings in the nation, clearly Utah is not Zion for everyone.

1. *Poverty In Utah 2004: Annual report on Poverty, Economic Insecurity and Work* (Utah Issues: Center for Poverty Research & Action), Table 1.1: 2003 Poverty Thresholds, pp. 11-14.
2. *Id.* This figure is for a household of three with two adults and one child.
3. *Id.* This figure is for a household of three with one adult and two children.
4. Center For Responsible Lending, www.responsiblelending.org/practice/ccabuses.cfm
5. Demos, "Credit Card Industry Practices In Brief," http://www.demos-usa.org/pubs/IndustryPractices_WEB.pdf
6. Card Web. "Late Fee Bug," *Card Trak,* May 17 2002: Cad Web. "Free Revenues," *Card Trak,* July 9, 1999: Card Web. "Free Escalation," June 18, 2003. www.cardweb.com
7. Demos, "Credit Card Industry Practices In Brief," http://www.demos-usa.org/pubs/IndustryPractices_WEB.pdf
8. *Federal Reserve Bulletin,* July 2002
9. *Poverty Report 2004,* p. 10
10. http://www.bloomberg.com/apps/news?pid=10000103&sid=anhMOK9sGaUA&refer=us
11. Dr James Dobson, the founder of Focus on the Family, a conservative Christian action group in Denver, Colorado, opposed the original language of the bankruptcy amendments because it denied pro-life demonstrators relief from debts for damages resulting from pro-life demonstrations. http://www.family.org/welcome/press/a0023284.cfm; http://www.family.org/cforum/ feature/a0023281.cfm; Dr. Dobson attributed bankruptcy filing increases to gambling. http://www.family.org/cforum/fosi/gambling/facts/a0029159.cfm. At the time of writing, the Focus on the Family contained no statements opposing the Bankruptcy Abuse Prevention and Consumer Protect Act based on its effect on poor families or individuals – only its effect on pro-life demonstrators.

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Applying the Standards of Professionalism and Civility to the Practice of Criminal Law

by Sandi Johnson

Many attorneys criticize the Utah Standards of Professionalism and Civility, not because they are a bad idea, but because they are "unenforceable." Despite their external unenforceability, attorneys should support these Standards. If attorneys rely on external consequences to guide their behavior, they will always be at risk of compromising their professionalism and integrity as officers of the court. The purpose of the Standards should be to create higher expectations for ourselves and for each other as colleagues, regardless of the practical consequences. After all, it is better to aim for the stars and hit the moon. The Rules of Professional Conduct are the baseline, and most attorneys find those rules relatively easy to follow. This is a tumultuous time period when the judiciary and legal profession are under attack. As external validation and respect are waning, attorneys should exhibit pride in their own professionalism and integrity, and the Standards provide one means to reach that goal.

The courts and attorneys rarely witness a blatant violation of either the Rules of Professional Conduct or the Standards of Professionalism. However, it is not the extremes that the Standards of Professionalism are aimed to counteract. Instead, it is the threshold effects that create the problems. For example, one person, or even thirty, walking across the grass to take a shortcut is not going to make a noticeable difference. However, a thousand people doing it every day creates a grassless path.

Criminal attorneys, as a whole, interact within a small community and spend a lot of time in court. This familiarity cuts both ways with respect to civility towards each other. The familiarity between prosecutors and defense attorneys makes each side more accessible, and encourages civility because of the almost daily interactions that are required. However, attorneys are at risk of turning that familiarity into informality, such as referring to counsel by first name in open court. Attorneys also risk attaching their perception of counsel to their perception of the court process, thereby creating a personal aspect to any hearing, offer, or recommendation during the prosecution of a case. The Standards are useful to counteract this casualness.

Lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

During a recent ABA Conference, Supreme Court Justice Breyer was asked what action he would like attorneys to take to combat the vigorous attacks on the judiciary. He stated that he wanted all attorneys to go out and educate people wherever we can. As attorneys in criminal law, we are in a unique situation because we interact with so many people in the public, whether they are defendants or victims, witnesses or observers, or others affected in some way by crime. Exhibiting professionalism, courtesy, and respect to all participants is the most important thing we can do as attorneys to educate the public as to why the courts should be respected and revered.

One area every attorney can improve is promptness. Charles Simmons is quoted as saying, "Promptitude is not only a duty, but is also a part of good manners; it is favorable to fortune, reputation, influence, and usefulness; a little attention and energy will form the habit, so as to make it easy and delightful." Judges, attorneys, witnesses and defendants alike, all complain of the time they spend sitting in court waiting. Unfortunately, in our system we have high caseloads. Many times, attorneys are required to be in multiple courtrooms at the same time and hearings are all scheduled to start at the same time. The practical consequences are that the forty-plus cases on the calendar will not be heard right at 8:30, but instead will take hours before they are in front of the judge. Regrettably, this leads to a casualness regarding timeliness of appearances. Some attorneys do not even enter the courthouse until well after the calendar has started. While practically, this may not make a difference in terms of when the case will be called, it does make a difference to everyone involved. It makes a difference to the attorney who arrived on time and is waiting, often for just that one case, and it makes a difference to the defendant and witnesses, who have often taken time off of work and who must sit in the courtroom waiting to find out if the case is going to proceed. Attorneys and the courts should prioritize the cases involving the most people, especially civilian witnesses who are involved in the criminal justice system through no fault of their own.

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Another area attorneys should seek to improve is respect for those who are speaking in open court. Attorneys are often under the illusion that the more they talk, the better their point becomes. This manifests itself when the attorney or the judge is interrupted by another participant seeking to rebut or clarify a point. Interrupting another attorney while they are addressing the court is disrespectful to both opposing counsel and the court. Attorneys should make a concerted effort to remain silent until it is their opportunity to speak, and then when provided the opportunity, make their point.

Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness.

Criminal attorneys, especially those in the public sector, are in court most of the week. Like many areas of the law, the same actors appear regularly, and those involved develop a rapport that is essential with the high caseload. The most effective attorneys are those who are able to effectively advocate their position by conducting themselves in a manner that bolsters their respect and their integrity. In the area of criminal law, there are few surprises. The facts are what they are, and no matter the efforts of the attorneys, defendants' and witnesses' criminal histories do not change, memories do not get better, and statutes and legal precedent are rarely ambiguous. The effective defense attorneys are those who approach the prosecutor with a sound legal argument that they articulate. If the facts and law are not on their side, an effective defense attorney will approach the prosecutor with a real solution to address the concerns the State has regarding punishment and rehabilitation. Offers are frequently changed based on legitimate legal concerns or when both parties are able to structure a proposed plea agreement that helps all parties involved, and protects the community. However, the least effective strategy in plea negotiations is to yell at or ridicule the prosecutor or threaten to file a frivolous motion. Attorneys who threaten the prosecution personally or with a motion as a means of plea bargaining only discredit any future valid legal arguments they may make, and such posturing hurts their clients as the case proceeds. With the fast pace of the criminal system, defense attorneys frequently proffer facts either to the judge or the prosecutor. If attorneys have engaged in behavior that has undermined their credibility, such a proffer is unlikely to be accepted without further corroboration, which may cause delayed hearings or bench warrants to be issued.

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.
This is the standard most violated in the arena of criminal law. When dealing with laws that are embodiments of social norms, it is easy to become a zealot for either the prosecution or the defense. Such extremism, regardless of which position is taken, is a threat to professionalism. As Victor Hugo recognized, dividing society into two classes, "those who attack it and those who guard it," while "very simple and very good in themselves," are made "evil by [a person's] exaggeration of them." Victor Hugo, *Les Misérables* 148-9 (Charles E. Wilbour trans., Modern Library Ed. 1992).

Over time, prosecutors and defense attorneys risk becoming entrenched in an attitude that the other side, and those associated with it, are to some degree immoral. Whether it is the prosecutor believing all defendants are a scourge and can never change, or the defense attorney who believes all police officers are liars and prosecutors are actually persecutors, such assumptions preclude any recognition of the validity of another attorney's position. This internalized belief leads to an "anything goes" attitude wherein the ends always justify the means. Demonizing opposing counsel becomes an accepted tactic and any aversion to incivility is lost. Forgotten is the core concept that prosecutors and defense attorneys have the same primary responsibility – defending the constitutions – and only the means by which we seek to accomplish it are different.

Salt Lake County Deputy District Attorneys, when sworn in, promise "to support, obey, and defend the Constitution of the United States and the Constitution of the State of Utah and perform the duties of [their] position as Deputy District Attorney with fidelity." That is the first and foremost responsibility of every prosecutor. Prosecutors also must faithfully uphold the laws of the State of Utah whether they personally agree with them or not. Outside the courtroom, prosecutors perform their sworn duties by constantly training local police departments to enforce the laws within the bounds of the constitutions and declining to file cases in which there have been violations of constitutional protections. Inside the courthouse, prosecutors defend the constitutions by prosecuting cases according to the procedures set forth by the constitutions, courts, and statutes.

A prosecutor's job is not to enter into a plea agreement that is beneficial to a defendant at the expense of the community. It is the responsibility of a defense attorney to put the State to its procedural burden of prosecuting a case. A defense attorney may seek to work out a favorable outcome for their clients within this framework, and with the high volume of criminal cases, plea bargaining is essential. It is when attorneys remove the case from the procedural arena into the personal arena that incivility is at its worst. Some defense attorneys attack the prosecutor on a personal level because they do not receive a plea offer they want, or do not agree with a position taken by the State. Some of the more disparaging names used in open court (and that I can print in this article) by defense counsel to a prosecutor are "hateful, oppressive, heartless, and close-minded." On occasions, defense attorneys have even commented on the prosecutor's upbringing to "explain" why a specific prosecutor was being "hard" on a defendant. Such defense attorneys miss the obvious explanation that the prosecutor is doing their job. Bullying the prosecutor is not a means to defend the constitutions, and there is always a civil and legal alternative for defending the constitutions – it is called a trial.

On the other side, a defense attorney's primary obligation is also to defend the constitutions, only they do it through an individual client. As Justice Durham has stated,

> Defense counsel's obligation is to explain the evidence against the defendant, the nature of all defenses that might be provable, all the various options the defendant has in pleading guilty or not guilty and going to trial, and the possible or likely consequences of those options.. . . Certainly attorneys are bound to have private feelings about the clients they represent and their guilt or innocence, but it is their professional responsibility to set aside private feelings and judgments and vigorously argue the law and the facts in a light as favorable to the defendant as the law and facts permit.

State v. Holland, 876 P.2d 357, 362 (Utah 1994).

All of us in the criminal law have the same goal – to defend the constitutions of the United States and Utah. Prosecutors do that by filing cases that are supported by evidence, training law enforcement officers to enforce the law within the bounds of the constitutions, and by prosecuting those who violate the laws that the people of the State of Utah pass. Defense attorneys defend the constitutions by filing motions where they feel rules of procedure have been violated and by making the State prove its case. Keeping that responsibility at the forefront, and refusing to take extremist positions, will greatly improve civility between attorneys.

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.
In the area of criminal law, the most common area where oral agreements are committed to writing is in a plea affidavit. This

is an area in which both prosecutors and defense attorneys need to make a more concerted effort to ensure the written agreement contains all the conditions discussed. Often, as part of the plea, sentencing recommendations are discussed. Terms such as restitution, probation terms, treatment options, etc. are all items that should be written into the agreement. For example, as part of a plea negotiation, when charges are dismissed, it is a common understanding that the defendant is responsible to pay for any restitution on dismissed charges. However, too often that agreement does not make it into the record, either through the oral colloquy or the written plea affidavit. Prosecutors have an obligation to ensure restitution is addressed on any dismissed charges and defense attorneys should ensure their client is aware that restitution will still be ordered on dismissed charges.

Lawyers shall avoid impermissible ex parte communications.

Most attorneys avoid ex parte communications regarding specific cases; however, the more insidious incidents are those that have the appearance of impropriety. With the sheer volume of criminal cases and the frequency of court appearances, many attorneys become familiar with the judges. While it is proper for judges to associate with and be friends with attorneys, both judges and attorneys alike need to be conscious of when such interactions occur. For example, during a recent preliminary hearing the court was in recess, but the judge was still on the bench. While the prosecutors were outside, the defense attorney approached the bench and started speaking with the judge. The victim and family members of the victim were inside the courtroom and voiced their concerns to the prosecutor. While neither the judge nor the defense attorney were discussing anything regarding the case, the witnesses and the victims were upset; and despite the assurances of the prosecutor, left with the impression that it would be difficult to receive a fair hearing. As officers of the court, attorneys and judges must make every effort to avoid the appearance of impropriety.

Closing Thoughts

Although this was written from an attorney's perspective, a moment needs to be taken to address the judge's role in these Standards. Attorneys are the most civil in the courtrooms of judges who both command respect from and show respect to those who appear in their courtrooms. When judges expect attorneys to be on time and to be courteous, attorneys rise to meet those expectations. Judges need to be intolerant of the disparaging remarks that are made from the podium, no matter who is making them, and judges should not allow one party to interrupt another. When attorneys know they will receive their opportunity to respond and know that they will not be required to defend themselves on a personal level, it is easier to be courteous. Judges should set the benchmark, and attorneys should strive to reach it on a daily basis.

"Respect is the quality it takes to look at yourself with candor, your adversaries with kindness, and your setbacks with serenity." The longer I work in criminal law, the more profound respect I have for the entire judicial system, despite its flaws. Nowhere else can disputes be resolved in such a civil manner and have the citizens of our state represented by diligent, hard-working attorneys. It is up to us, as attorneys who work so closely with the public, to raise our own expectations for our behavior toward each other and the system as a whole by internalizing and exemplifying the Standards of Professionalism and Civility.

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Utah's Newest Anti-Spam Law: The Child Protection Registry

by Gregory M. Saylin & Leanne N. Webster

The Utah legislature is again attempting to curb certain email advertising. Effective August 15, 2005, email marketers, arguably those throughout the country and around the world,[1] must comply with the Child Protection Registry law, U.C.A. § 13-39-101, *et seq.* ("CPR"). Unlike Utah's previous legislative effort to battle spam (the Unsolicited Commercial Email Act), the CPR is aimed only at emails to minors, solicited or not, that promote the sale of goods or services that minors cannot legally purchase. While many presume the scope of the act addresses only pornography, it actually is much broader, including solicitations for alcohol, tobacco, and gambling. Emails advertising such products and services must not be sent to the email addresses contained in the registry. Violators may face both civil and criminal penalties. If the new law can pass constitutional muster (a significant hurdle), the CPR is worthy of notice by email marketers everywhere.

THE CHILD PROTECTION REGISTRY

The CPR creates a state registry wherein institutions, parents and guardians can register minors' emails addresses and other "contact points" (electronic identification belonging to a minor or to which a minor has access, such as email addresses, instant message identifiers, telephone numbers, and fax numbers). U.C.A. § 13-39-102(1). A contact point may also be the entire domain of a school or other institution serving minors. *Id.;* U.C.A. § 13-39-201(3). Registration is a quick process available over the internet at https://www.utahkidsregistry.com/. The Registry is maintained by the Division of Consumer Protection. Thirty days after the contact point is registered, marketers are prohibited from sending certain types of information to these contact points. U.C.A. § 13-39-202(1). Accordingly, marketers must scan their email address databases every 30 days to be compliant. To access the Registry, one must subscribe through the Division of Consumer Protection at https://www.registrycompliance.com/apply.html. The cost is $0.005 per contact point checked against the Registry.

The scope of the CPR is much broader than emails that advertise pornography. While "harmful to minors" as defined in § 76-10-1201 mostly covers "nudity, sexual conduct, sexual excitement, or sadomasochistic abuse," the Division of Consumer Protection has issued a policy statement stating the law also prohibits the advertisement to minors of: "an alcoholic beverage or product, any form of tobacco, pornographic materials, and any product or service that is illegal in Utah . . . such as illegal drugs, prostitution, and gambling." *See Francine A. Giani, Utah Division of Consumer Protection, Policy Statement Concerning Utah Code Ann.* § 13-39-202(1) (July 8, 2005).[2]

There is strict liability for sending prohibited emails to those on the list. Unlike other unsolicited email legislation around the country, the CPR expressly omits the defense of consent. U.C.A. § 13-39-202(2). In other words, even where a minor may give his or her email address for the purpose of obtaining the emails in question, the marketer still is arguably prohibited from sending the emails. While untested, this provision provides would-be plaintiffs with a possible way to select and entrap marketing companies (and their clients whose business is the subject of the advertisements) that are not aware of the law or have failed to comply. Challenges to the provision are likely.

Unlike the more well-known federal CAN-SPAM Act , the CPR allows for suits by private litigants. Users of registered email addresses, their parents or guardians, or an institution with a

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registered domain may bring suit under § 13-39-302 for the greater of actual damages or $1,000 per violation (basically, per email or communication). *Id.* Attorneys' fees are also available to the prevailing party. *Id.* The CPR also has criminal teeth and government enforcement mechanisms. Violators are generally subject to misdemeanor liability for offenses, and possible felony prosecution for misusing the registry for obtaining email addresses for marketing. U.C.A. § 13-39-301.

IS THE CPR CONSTITUTIONAL?

The CAN-SPAM ACT

The CPR likely faces significant challenges as plaintiffs and the government seek to enforce it. The first question is likely whether the CPR is preempted by the federal CAN-SPAM Act. The CAN-SPAM Act, enacted by Congress in 2003, took effect on January 1, 2004. PL 108-187 (S.877); 117 Stat. 2699 (2003). The Act regulates the transmission of unsolicited commercial and pornographic emails in attempts to protect consumers from misleading or fraudulent advertisements and to allow consumers to choose not to receive such emails. 117 Stat. 2699, § 2(b). The Act prohibits the initiation of false or misleading content or sender information, and requires that commercial emails contain conspicuous identification that the messages are advertisements, and that the recipient may decline receiving any further emails. *Id.*

The CAN-SPAM Act expressly supersedes any state statute regulating commercial emails. *Id.* at § 8(b).[3] The CPR arguably regulates commercial emails and is, thus, superceded by the Act, which does not allow for a private right of action for its violation, but instead allows only a state attorney general or internet service provider to bring a civil action for such violation. 117 Stat. 2699 at § 7(f)(1).

The Commerce Clause

Another likely challenge is whether the CPR violates the Commerce Clause, which provides that "Congress shall have power . . . [t]o regulate commerce . . . among the several states . . . ." U.S. Const., art. I, § 8, cl. 3. However, "this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Institute,* 491 U.S. 324, 326 (1989). As such, the "dormant commerce clause" prohibits some state regulation "even absent congressional action." *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 87 (1987).

The Supreme Court has presented two lines of analysis for determining dormant commerce clause violations. "[F]irst, whether the ordinance discriminates against interstate commerce . . . ; and second, whether the ordinance imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits,' . . . ." *C & A Carbone, Inc. v. Town of Clarkstown,* 511 U.S. 383, 390 (1994) (citations omitted). Success under either prong will result in a finding that the statute is unconstitutional.

The First Amendment

Although commercial speech is not entitled to the full protection of the First Amendment, the Supreme Court continues to recognize that "the free flow of commercial information is indispensable" to our society. *Thompson v. Western States Medical Center,* 535 U.S. 357, 122 S. Ct. 1497, 1504 (2002). As such, restrictions on commercial speech are subject to the challenging *Central Hudson* test. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557 (1980). To receive constitutional protection under the *Central Hudson* test, the regulated conduct must be "neither misleading nor related to unlawful activity." *Id.* at 566. If the commercial speech is protected, the governmental interest in regulation must be substantial, and the regulation must directly advance the governmental interest and not be more extensive than is necessary to serve that interest. *Id.* Failure to satisfy any one prong of the test invalidates the statute. *Central Hudson,* 447 U.S. at 564. The battle as to whether the First Amendment is applicable will likely turn on whether the CPR is regulating conduct "related to unlawful activity," since the statute itself does not specifically address misleading advertising.

COMPARISONS TO THE UNSOLICTED EMAIL ACT

It is natural to compare the CPR to Utah's ill-fated Unsolicited Commercial Email Act, U.C.A. § 13-36-101 *et. seq.* (repealed, 2004) ("Email Act"). From its effective date in 2002, the Act created a virtual playground for plaintiffs' counsel who brought hundreds and hundreds of class action lawsuits against companies based all over the country and throughout the world. In almost every case, these actions were based on the receipt of one email that was alleged to have been unsolicited. Eventually, plaintiffs dropped the class allegations and sought only the $10 statutory penalty and attorneys' fees. While the majority of these matters have settled, a significant number continue to be litigated. The CAN-SPAM Act has been found to have superceded the Email Act. *Amyx v. Verizon Wireless, LLC,* No. 040400090, Slip Op. (Utah Third Dist Ct, Sandy Dept, Mar. 31, 2004). Accordingly, new lawsuits cannot be filed thereunder.

It awaits to be seen whether the CPR will generate considerable litigation as did the Email Act. With the penalty set at $1,000 per violation, in addition to attorneys' fees, it may prove to be an attractive vehicle for plaintiffs - particularly since "consent" is not available as a defense.

1. Whether responsibility for an email sent to a Utah addressee is sufficient "minimum contacts" to allow for the exercise of personal jurisdiction by Utah courts is a question presently before the Utah Supreme Court. *Fenn v. Mleads,* 109 P.3d 804 (Utah Mar 17, 2005); 512 Utah Adv. Rep. 37, 2004 UT App 412 (Utah App. Nov 12, 2004)
2. The Policy Statement can be found at http://dcp.utah.gov/PolicyStatement.pdf
3. Section 8(b) of the Can Spam Act reads in relevant part: "This Act supersedes any statute, regulation, or rule of a State . . . that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception . . . ."

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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 3 – Baby Steps . . . Toward Civility

by Robert S. Clark

Insults, personal attacks, intimidation, verbal abuse. Too many, both inside and outside the legal profession, assume that such conduct has become so deeply rooted among lawyers that it can't be eradicated. No one seems to deny the erosion of civility among lawyers. To a degree, misbehavior by imperfect participants is inevitable in the rough and tumble of an adversarial process, but few would argue that incivility advances the fair administration of justice. I believe we must not stand idly by and allow corrosive behavior to thrive until it dominates our system of justice.

Behavior that impugns the personal motives of an adversary, or that demeans, humiliates, disparages, or insults others, goes to the core of the concern. Reported illustrations would be humorous if they were not so shocking. Imagine the misery of facing counsel who calls his opponent a "stooge;" a "puppet;" a "weak pussy-footing deadhead" who "had been dead mentally for ten years;" "incompetent;" "inept;" a "clunk;" "wasting endless hours;" "a starving slob;" and an "underling who graduated from a 29th-tier law school." *In Re First City Bancorporation,* 282 F.3d 864, 866 (5th Cir. 2002). Other examples include calling opposing counsel "a second rate loser." *Lee v. American Eagle Airlines, Inc.,* 93 F. Supp. 2d 1322, 2000 U.S. Dist. Lexis 4198 (S.D. Fla. 2000); use of a vulgar name followed by "You could gag a maggot off a meat wagon." *Paramount Communications, Inc. v. QVC Network, Inc.,* 637 A.2d 34, 52 (Del. 1994).

As a profession, we have a duty to decry behavior that interferes with a just and fair process. Utah's Standards of Professionalism and Civility address the issue clearly and directly. But they are not a cure-all. Some say the standards are flawed because they include subjective language. Others say they make the problem worse because no sanctions are attached, allowing the most egregious offenders to steamroll compliant lawyers at the expense of their clients.

What do standards accomplish in the absence of an enforcement mechanism? "Standard" is defined as: "something that is established by authority, custom, or general consent as a model or example to be followed." The dictionary further explains that the word "standard" "applies to any authoritative rule, principle, or measure used to determine the quantity, weight, or extent, or esp. the value, quality, level or degree of a thing." *Webster's Third New International Dictionary* 2223 (1986). The Professionalism Standards are an authoritative statement of expectations. They are a model or example of the quality of behavior to which lawyers should conform. They provide principles upon which the behavior of lawyers can be measured to determine the quality of professionalism.

Clear identification of ideals can change behavior. By the age of sixteen, George Washington had handwritten 110 "Rules of Civility and Decent Behavior," based on much older writings of French Jesuits. The first rule was: "Every action done in company, ought to be with some sign of respect, to those that are present." Number 49 states: "Use no reproachful language against anyone neither curse nor revile." The 58th rule was: "Let your conversation be without malice or envy . . . and in all cases of passion admit reason to govern." The last rule is a global reminder: "Labor to keep alive in your breast that little spark of celestial fire called conscience." Does identifying a subjective ideal have value? Recent scholarship suggests that Washington's character was the result of conscious effort on his part, not an accidental accomplishment or an inherited grace. *See, e.g.,* Joseph J. Ellis, *His Excellency: George Washington.*

But isn't there a problem with subjectivity and ambiguity in prohibiting, for example, "hostile or demeaning" behavior? How could such a standard ever be enforced? Some conduct is clearly over the line. For the closer questions, there is still value in stating a principle. These standards will not have a direct impact on a lawyer who views her or his role as merely instrumental to a client's objective, and who is unwilling to draw a boundary line regarding acceptable tactics or honesty. On the other hand, lawyers who have a genuine desire to conform to their own internal moral code will generally have the ability to draw internal limits regarding their own acceptable behavior. Even if individuals differ in application of a subjective standard, honest persons recognize when their behavior is intended to demean another

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human being. Individuals can apply even a subjective principle based on their own moral recognition of a duty – in this case, a duty not to harm or injure others. Law Professor Joseph Allegritti has written: "One of the great temptations for lawyers is to see ourselves in the third person, as the mere instrument of our client. If we do so, of course, moral issues disappear because we compartmentalize our lives and relegate our moral and religious values to the private realm of family and friends. There is never any risk of having to say 'no' to a client or the system because only a moral agent, an I, can stand for something – a lawyer in the third person has nothing to stand up for or against." *The Lawyer's Calling,* at 119.

Students of the law and young lawyers should be taught to model their professional behavior after these authoritative standards. Even though experienced mentors and exemplars are of enormous value, a clear statement of expectations provides a framework that could help shape behavior for generations to come. For lawyers who have already established habits of good behavior, there is still value in the standards. Even without express sanctions, they raise the bar of expectations and benefit all who participate in the system of justice. The very existence of standards provides an opportunity for individuals to make an internal decision to comply. The authoritative nature of these standards also allows external support for compliance and indirect consequences for noncompliance.

Experience suggests that most lawyers are well-intentioned and operate from a moral foundation that supersedes professional opportunism. Will some ignore the standards and refuse to conform? Of course. Will they be the subject of monetary sanctions or professional discipline solely because they refuse to conform? Probably not. However, gentle, firm reminders from the bench have already taken root in many Utah courtrooms and have already had an effect. When a judge begins a hearing or a trial by reminding counsel that the standards apply in that courtroom, it tends to change behavior. Over time, if the majority of lawyers and judges take the standards seriously, the incorrigibles will find that misbehavior erodes one's reputation and the respect of one's peers. In addition to educating the public about the content of the standards, the message can also be communicated that honorable behavior, restrained by limits outlined in the standards, is more effective advocacy than insulting, abusive behavior.

Eugene Scalia, father of Justice Antonin Scalia, taught his son that neither education nor intellect is the most important thing in life. "Brains are like muscles – you can hire them by the hour," he would say. "The only thing that's not for sale is character." *The New Yorker,* March 28, 2005, at 43. May lawyers everywhere recognize that civility reflects on one's character, and resolve to improve the system of justice by responding, without coercion, to the highest that is in us. And may we also use our influence to encourage that behavior among others.

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Life in the Law: Answering God's Interrogatories

Galen L. Fletcher and Jane H. Wise, editors

Reviewed by R. Lee Warthen

Every lawyer should read this book. This recent book of thoughts on being a Latter-day Saint lawyer is good meat for the souls of lawyers of any denomination.

You never know what is going on in some back room at BYU; what is being shared at some private little fireside or convocation that those of us outside the greater Provo area are not likely to notice. Now, many of the pearls of wisdom dropped at twenty-six such occasions have been gathered up by Galen LeGrande Fletcher and Jane H. Wise into this little volume entitled *Life in the Law: Answering God's Interrogatories.*

This is the kind of book you want to put on a shelf within easy reach so when the stress of the day becomes too much, you can reach out and put legal life into perspective by reading one of these insightful little pieces by such stellar L.D.S. legal lights as James Faust, Michael Mosman, Dallin Oaks, Bruce Hafen, Rex Lee, Constance Lundberg, Russell M. Nelson – whoops! they let a doctor in – and others. Organized around the lead essay by Marlin K. Jensen with the same name as the book, the topics are: "Adam, Where Art Thou? (Do we think about where we are and where we ought to be?)"; "What Is Property Unto Me? (Do we focus too much on material wealth?)"; "Unto What Were Ye Ordained (Do we share the gospel?)"; and "What Think Ye of Christ? (Are we truly Christians?)".

When I was a first year law student at BYU in 1981, the hot book to read was one published by BYU Press entitled, *On Being a Christian and a Lawyer,* by Thomas L. Shaffer. It has since become a classic. Oddly enough, Shaffer is not L.D.S., but a Catholic law professor with Notre Dame connections. My first job after law school was at Washington and Lee University, where Professor Shaffer was on the faculty. I had the privilege of getting to know him. He ran the youth group for Catholic students there in Lexington, but we Mormons were always welcome there.

For twenty years, I have never read a better book for Christians and Mormons alike on its topic than *On Being a Christian and a Lawyer* unless it would be the volume of thoughtful essays edited by Michael W. McConnell, Robert F. Cochran, Jr., and Angela C. Carmella entitled *Christian Perspectives on Legal Thought* (2001).

In the same ecumenical spirit that Tom Shaffer offers his wisdom to the world, BYU's law alumni organization, the J. Reuben Clark Law Society (which doesn't discriminate against lawyers and friends who didn't graduate from there) has made this book available in hardcover or paperback. You won't find it on Amazon; you can get it from Deseret Book or BYU Bookstore, or from the J. Reuben Clark Law Society directly. Call 801-422-5677 or order on the web at https://www.law.byu.edu/Accounting_Office/Order/JRCLS_Publications/. Price is $25.00 for the hardcover and $10.00 for the paperback edition, plus $3.00 for shipping and handling.

R. LEE WARTHEN is a librarian and adjunct professor of law at the S.J. Quinney Law Library. As assistant director and head of collection building and maintenance, he coordinates maintenance of the building, furnishings, and book collections.

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are pleased to announce their merger effective October 1, 2005. The firm will continue operating under the name Durham Jones & Pinegar.

DUANE H. GILLMAN formerly of McDowell & Gillman, has joined the firm as a shareholder in its Salt Lake City office, and will continue his practice in bankruptcy law and business reorganizations. He will also continue serving as a bankruptcy trustee, and representing bankruptcy trustees. (Mont McDowell has retired from the practice of law).

MICHAEL F. THOMSON formerly of McDowell & Gillman, has joined the firm as a senior associate in its Salt Lake City office, and will continue his practice in bankruptcy law and business reorganizations.

DURHAM JONES & PINEGAR *is also pleased to announce that*

MICHAEL A. DAY has become a shareholder in its St. George office and will continue his practice in corporate and real estate matters.

E. TROY BLANCHARD has become a shareholder in its St. George office and will continue his practice in tax, corporate, and real estate matters.

MATTHEW G. GRIMMER formerly of Susman Godfrey in Houston, Texas, has joined the firm as a senior associate in its Salt Lake City office, and will continue his practice in commercial litigation.

CRAIG L. WINDER formerly of Paine Hamblen Coffin Brooke & Miller in Spokane, Washington, has joined the firm as an associate in its Salt Lake City office, and will continue his practice in real estate law. (Admitted in Washington State only).

SEAN H. PETTEY formerly of Latham & Watkins in San Diego, California, has joined the firm as an associate in its Salt Lake City office, and will continue his practice in corporate and securities matters. (Admitted in California only).

DANIEL A. ROGERS former general counsel with Beamstat Inc., in San Antonio, Texas, has joined the firm as an associate in its St. George office, and will practice in the area of tax and estate planning. (Admitted in Texas only).

RILEY S. SNOW has joined the firm as an associate in its St. George office, and will practice in the areas of water law and litigation.

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1104 East Country Hills Drive, Suite 710
Ogden, Utah 84403
Telephone: 801.395.2424
Facsimile: 801.395.2430

St. George Office:
192 East 200 North, Third Floor
St. George, Utah 84770
Telephone: 435.674.0400
Facsimile: 435.628.1610

Commission Highlights

During its regularly scheduled meeting of August 26, 2005, which was held in Salt Lake City, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Scott Matheson reported that Judge McConnell had made arrangements for the entire 10th Circuit Court to come to Utah in March, 2006. The judges would like to hold panel arguments at different locations (e.g. both law schools, the federal court, etc.). The Bar should start planning now to participate in this event.

2. Steve Sullivan, Chair of the Bar Foundation Board was in attendance to explain the new IOLTA Rule. He reported that in June 2005, IOLTA changed from an opt-out system to a mandatory system and significant enforcement will begin in September 2006. He wanted to let the Commission know that the Bar is not responsible for these new changes and that staff should refer questions and problems to himself and/or Kim Paulding.

3. David Bird reported on the quarterly meeting with Chief Justice Christine Durham. David said the court would like to do an "operational review" of the Bar. The Court would like the audit to be more of a broad review of Bar operations. Once the audit is performed, the Court will review the proposed recommendations.

   David further reported that the Chief Justice was pleased with Bar efforts toward the legislature and encouraged the Bar's continuation with these efforts. David also reported to the Court that the Bar is gathering information from the licensing forms on the proposed malpractice insurance disclosure. The statistics reflected that currently about 50% of Utah lawyers assert they have insurance, (and about 20% of all licensed attorneys who received a licensing form did not respond).

   David reported that the Court is still awaiting the Law School Professor *Pro Bono* petition and the Law Student Division petitions. David said that the Court was pleased with how the Bar dealt with the issues on mediator practice and they were looking forward to seeing a petition.

4. John Baldwin reported on the year-end financials and the Actual YTD was $3,833,510 with the Budgeted YTD being $3,728,560. Mary Kay said that the Budget and Finance Committee will be meeting on September 26 and will be meeting with the auditors at that time.

5. David Bird announced that Lori Nelson and Scott Sabey were reappointed as chairs of the Governmental Relations Committee. Nate Alder explained the work of the Committee, he stated that the Committee generally sifts through 15-20 bills during a lunch meeting and usually settles on one issue that the Bar Commission should be interested in, e.g., judicial salaries, etc.

   David asked for Commissioners to get involved with this program. David said that in asking Commissioners to participate, he is not looking for a formal lobbyist but, was interested in generating ideas, programs and suggestions like the new legislator constitution training. David Bird would like the Commission to enable/empower sections and the Governmental Relations Committee to work together rather than the Commission taking over this function. The motion to form a Commission "working group" passed without dissent. The Commission group will include John T. Nielsen, John Baldwin, Nate Alder, Lori Nelson, Scott Sabey, Rob Jeffs, Rex Huang, Lowry Snow and Steve Owens.

6. On behalf of the Governmental Relations Committee, the "Committee of the Year" plaque was awarded to John T. Nielsen, who was proud and honored to receive the award.

7. Steve Owens said that newspapers have been reporting on the service tax issue which would impose a 5% tax on lawyer fees. He asked if this issue was on the Bar's radar screen. John Nielsen said Roger Tew is watching it closely but we're not clear what is going to happen in the future.

8. David Bird asked Rob Jeffs to chair a Commission committee to help determine the scope of the Bar Operations Review's focus. John Baldwin was asked to put together a packet of materials to give to Rob. Dan Becker (Court Administrator) volunteered to be on the committee. David asked for other volunteers to be on this committee. The committee will consist of the following members: Mary Kay Griffin, Felshaw King, Nate Alder, Julie Wray and Scott Sabey. George Daines suggested going back and picking up someone who was involved with Bar operations 15 years ago. The motion to create the Operations Review Committee passed unopposed.

9. David Bird reported that the Ethics Committee had been asked to revise opinion #05-03. After a long discussion the motion was made to adopt text/redline as official #05-03 without the first paragraph as the official opinion of the Commission and when the opinion is published, include at the end of text a reference to the full text as originally drafted for purposes of research/history. The motion passed with Felshaw King opposed. The motion was made to ask the Rules Committee of the Court to amend the URPC or ADR rules to ascertain if there are

ways to accommodate this need in domestic law cases. The motion passed.

10. Four nominees to the 7th District Nominating Commission were selected to be sent to the Governor's office: Sam Bailey, Craig Halls, Carol A. Castleberry and Ryan L. Thomas.

11. There were no new committee chair appointments, so all chair appointments as set forth were duly ratified.

12. The Commission approved the Committee liaison appointments.

13. Charles R. Brown reported on the recent ABA meetings. He noted that the ABA gave Supreme Court nominee John Roberts a highly qualified rating. Charles also noted that the *Bar Journal* will have articles prepared by Yvette Diaz and Rod Snow regarding the mandatory insurance disclosure rule.

14. Steve Owens reported on the status of the Lawyers Assistance Program review.

15. Discussion was held on a proposal for a "Lifetime Service to Utah State Bar" award and it was suggested giving the first award at the Bar's 75th Anniversary event.

16. John Baldwin reported on the problems with new Commissioners being elected immediately preceding the June Commission retreat. He believes new Commissioners should be elected earlier to permit them to plan to attend the retreat if they are elected. John noted that when the *Bar Journal* was reduced to six issues from nine, this change also affected the officer notice deadlines. If all election deadlines are pushed up a month, candidate statements can be included in the *Bar Journal.* The motion to adopt the necessary changes to facilitate earlier notices, timely publishing of candidates' statements, and to allow for newly elected Commissioner attendance at the retreat passed unopposed.

17. Discussion was held on the status of the Task Force on Racial and Ethic Fairness. A group consisting of Sean Reyes, Debra Griffiths, Rex Huang and Gus Chin was formed to brainstorm on this issue.

18. Felshaw King reported that the 2006 Annual Convention site looked great.

19. David Bird reported on the recent Judicial Council meeting. A priority list at the meeting was discussed including: (1) the need for additional law clerks; (2) the need for a new Fourth District judge, (3) the need for a new Third District juvenile judge; (4) the need for new Third District family law commissioners (primarily in summit and Tooele Counties), (5) the need for a child welfare mediator; and (6) increasing funds for the Supreme Court law Library for pro se litigants.

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.

Notice of Election of Bar Commissioners

Third, Fourth & Fifth Divisions

Pursuant to the Rules of Integration and Management of the Utah State Bar, nominations to the office of Bar Commission are hereby solicited for two members from the Third Division, one member from the Fourth Division and one member from the Fifth Division, each to serve a three-year term. To be eligible for the office of Commissioner from a division, the nominee's mailing address must be in that division as shown by the records of the Bar.

Applicants must be nominated by a written petition of ten or more members of the Bar in good standing and residing in their respective Division. Nominating petitions may be obtained from the Bar office on or after December 1, and **completed petitions must be received no later than February 10.** Ballots will be mailed on or about April 1 with balloting to be completed and ballots received by the Bar office by 5:00 p.m. May 1. Ballots will be counted on May 2.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost.

1) Space for up to a 200-word campaign message plus a photograph in the March/April issue of the *Utah Bar Journal.* The space may be used for biographical information, platform or other election promotion. Campaign messages for the March/April *Bar Journal* publications are due along with completed petitions, two photographs, and a short biographical sketch **no later than February 10.**

2) A set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division.

3) The Bar will insert a one-page letter from the candidates into the ballot mailer. Candidates would be responsible for delivering to the Bar **no later than March 15** enough copies of letters for all attorneys in their division. (Call Bar office for count in your respective division.)

If you have any questions concerning this procedure, please contact John C. Baldwin at the Bar Office, 531-9077.

NOTE: According to the Rules of Integration and Management, residence is interpreted to be the mailing address according to the Bar's records.

Notice of Direct Election of Bar President

In response to the task force on Bar governance the Utah Supreme Court has amended the Bar's election rules to permit all active Bar members in good standing to submit their names to the Bar Commission to be nominated to run for President-Elect in a popular election and to succeed to the office of President. The Bar Commission will interview all potential candidates and select two final candidates who will run on a ballot submitted to all active Bar members and voted upon by the active Bar membership. Final candidates may include sitting Bar Commissioners who have indicated interest.

Letters indicating an interest in being nominated to run are due at the Bar offices, 645 South 200 East, Salt Lake City, Utah, 84111 by 5:00 P.M. on January 2, 2006. Potential candidates will be invited to meet with the Bar Commission in the morning of January 27, 2006 at the commission meeting in Salt Lake. At that time the Commission will select the finalist candidates for the election.

Ballots will be mailed on or about April 1st with balloting to be completed and ballots received by the Bar office by 5:00 p.m. May 1. The President-Elect will be seated July 12, 2006 at the Bar's Annual Convention and will serve one year as president-elect prior to succeeding to president. The president and president-elect need not be sitting Bar commissioners.

In order to reduce campaigning costs, the Bar will print a one page campaign statement from the final candidates in the *Utah Bar Journal* and will include a one page statement from the candidates with the election ballot mailing. For further information, call John C. Baldwin, Executive Director, 297-7028, or e-mail jbaldwin@utahbar.org.

Notice of Approved Amendments to Utah Court Rules

To view a list of amendments to Utah Court rules recently approved by the Supreme Court and Judicial Council go to http://www.utcourts.gov/ resources/rules/approved/ , then click on the rule number to see the text of the amendments. All amendments are effective November 1, 2005 unless otherwise indicated.

Appointments

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

	Term Ends
ABA House of Delegates Representative	
Charles R. Brown	July 1, 2006
Ethics Advisory Opinion Committee	
Robert A. Burton	July 1, 2005
John D. Day	July 1, 2005
Linda F. Smith	July 1, 2005
Keith A. Call	July 1, 2006
Craig R. Mariger	July 1, 2006
Gary G. Sackett	July 1, 2006
Allen Sims	July 1, 2006
Deception Detection Examiners Board	
Brent Bullock	July 1, 2006
Utah Legal Services Board of Directors	
Stephen E. W. Hale	July 1, 2006
Catherine F. Labatte	July 1, 2006
A. Howard Lundgren	July 1, 2006
Craig T. Peterson	July 1, 2006
Francis M. Wikstrom	July 1, 2006
Michael D. Zimmerman	July 1, 2006

2006 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2006 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession. Award applications must be submitted in writing to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, January 16, 2006.

1. **Dorathy Merrill Brothers Award –** For the Advancement of Women in the Legal Profession.
2. **Raymond S. Uno Award –** For the Advancement of Minorities in the Legal Profession.

Ethics Advisory Opinion Committee Seeks Members

The Utah State Bar's Ethics Advisory Opinion Committee is seeking a volunteer member of the Utah State Bar to fill a vacancy on the Committee. The Committee responds to requests for opinions concerning ethics matters. The Committee is particularly interested in applicants who practice outside of Salt Lake County. Committee appointments are for a term of three years. Meetings are held at 4:00 p.m. on the second Tuesday of each month at the Utah Law & Justice Center, Salt Lake City, Utah. Members undertake individual research and writing assignments. Please send your resume to Craig Mariger, Chair of the Ethics Advisory Opinion Committee, Jones Waldo Holbrook & McDonough PC, 170 S. Main Street, Suite 1500, Salt Lake City, Utah 84101 no later than November 30, 2005.

NOTICE

The Judicial Council's Standing Committee on Court Interpreters requests applications for membership from criminal defense attorneys. The Court Interpreter Committee is charged with (a) researching, developing, and recommending policies and procedures for interpretation and translation; (b) certifying court interpreters who meet minimum qualifications; (c) issuing opinions to questions regarding the Code of Professional Responsibility; and (d) disciplining court interpreters. While not a requisite, bilingualism and experience in working with court interpreters are preferred abilities for members of this Committee. Please send a letter of interest and a brief resume to the following address by November 30, 2005:

Mary Boudreau, Program Manager
Public Access to the Courts
Administrative Office of the Courts
P.O. Box 140241
Salt Lake City, UT 84114-0241

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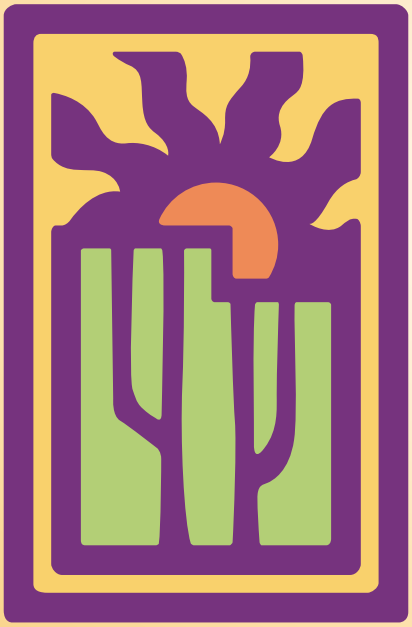
UTAH STATE BAR

2006 Spring Convention

in St. George



March 9-11

DIXIE CENTER at St. George

Full online Brochure/Registration
will be available January 16, 2006.
ACCOMMODATIONS: www.utahbar.org

Brochure/Registration materials available in the
January/February 2006 edition of the Utah Bar Journal

UTAH STATE BAR

2006 Annual Convention

July 12–15

Newport Beach
Marriott
Hotel & Spa

Newport Beach,
California

ACCOMMODATIONS: www.utahbar.org

Pro Bono Honor Roll

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.

Joseph Bean
Gary Bell
Stephen Buhler
Lauralyn Cabanilla
Brent Chipman
Mary J. Ciccarello
Reha Deal
Peter Donaldson
Dennis Flynn
Angela Fonnesbeck
Chadron Gladstone
Richard Gray
Richard Grealish
Anthony Grover
Steven Gunn
J. Keith Henderson
Lyle Hillyard
Matthew Hughes
James Jenkins
S. Austin Johnson
Jay Kessler
Louise Knauer
D. David Lambert
Dan Larsen
Chris Laurence
Sarah Matthews
Richard Medsker
Colin McMullin
Christina Micken
Scott A. Moore
Albert Pranno
Don Redd
Linda F. Smith
Kimberly Washburn
Tracey Watson
Kent O.Willis

Supplementation to Local Rules/ U.S. Bankruptcy Court/Utah

Pursuant to Standing Order #1: Effective for all cases filed and also for existing cases converted to Chapter 13 after July 2005, new requirements for Local Rules 2003-1; 2083-1; 5005-1 and 6070-1 are available at: www.utb.uscourts.gov.

New Interim Rules and Forms/ U.S. Bankruptcy Court/Utah

Pursuant to Standing Order # 2: Effective for all cases filed on or after the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, newly approved official forms and approved rules designed to implement the substantive and procedural changes mandated by the Act are available at: www.utb.uscourts.gov.

KIRTON & McCONKIE

Congratulates

ANTONIO A. MEJIA,
a member of the firm's Corporate and Taxation Section,
on his recent election as a shareholder.

and

GREGORY S. MOESINGER,
ALLISON POULSEN &
L. JEFFREY POULTON
for passing the Utah Bar Examination.

Mr. Moesinger has joined the firm's Business Litigation Section as an associate.
Ms. Poulsen and Mr. Poulton have joined the firm's Real Property Section as associates.

in addition

JAMES M. DESTER,
formerly International Legal Counsel for The Church of Jesus Christ of Latter-day Saints
in Africa and South America, has joined the firm's Corporate and Taxation Section.

RYAN B. FRAZIER,
formerly of Bendinger, Crockett, Peterson, Greenwood & Casey,
has joined the firm's Business Litigation Section as an associate.

MICHAEL L. JENSEN,
has joined the firm's International Section as of counsel.

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Discipline Corner

PUBLIC REPRIMAND

On July 28, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against John Sorge for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.5(a) and (b) (Fees), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Sorge failed to properly file a Complaint and Summons for his client. Mr. Sorge did not timely respond to a Motion to Dismiss. Mr. Sorge lacked an understanding of jurisdictional requirements. Mr. Sorge did not communicate to his client the basis or rate of his fee in writing. Mr. Sorge did not earn the fees collected and did not return the unearned fees.

SUSPENSION

On June 29, 2005, the Honorable Pamela G. Heffernan, Second Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Discipline: Suspension suspending M. Karlynn Hinman for a period of three years, effective June 29, 2005, for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5(b) (Fees), 1.16(d) (Declining or Terminating Representation), 3.2 (Expediting Litigation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4 (a) and (c) (Misconduct) of the Rules of Professional Conduct.

In summary:

In one matter, Ms. Hinman failed to provide competent and diligent representation to a client by failing to meet requirements and deadlines on appeal, failing to attend hearings, and failing to file motions. Ms. Hinman also failed to provide adequate communication with the client, failed to keep the client reasonably informed about the status of the case, and did not promptly comply with the client's reasonable requests for information. Ms. Hinman did not communicate in writing the basis or rate of her fee to the client despite requests from the client to do so. Ms. Hinman failed to reply to the Office of Professional Conduct's ("OPC") Notice of Informal Complaint ("NOIC").

In a second matter, Ms. Hinman prepared a Verified Complaint on behalf of a client to be filed in United States District Court. Ms. Hinman did not file it when the client believed that it had been filed and Ms. Hinman did not tell the client otherwise. Ms. Hinman then filed a state court action on behalf of the client. The complaint was not served on the opposing party until almost six months later. After the answer was filed, Ms. Hinman took no steps to further prosecute the matter. Ms. Hinman failed to keep the client reasonably informed about the case status and did not promptly comply with the client's reasonable requests for information. Four years after being retained, Ms. Hinman resigned from the case. The client requested her documents and file. Ms. Hinman never provided these to the client. Ms. Hinman failed to reply to the OPC's NOIC.

DISBARMENT

On May 18, 2005, the Honorable Scott M. Hadley, Second Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Disbarment against Rodney Gilmore disbarring Mr. Gilmore from the practice of law for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.15(a) (Safekeeping Property), 1.15(c) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 5.5(a) (Unauthorized Practice of Law), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a), (c), and (d) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Gilmore had numerous overdrafts on his client trust account. The Office of Professional Conduct ("OPC") requested, in writing, that Mr. Gilmore explain why the overdrafts occurred. Mr. Gilmore never replied. The OPC issued Notices of Informal Complaints ("NOIC") and Mr. Gilmore failed to respond in writing to the NOICs.

In a separate matter, Mr. Gilmore was hired by a client who lived out of state. Mr. Gilmore never discussed the fee arrangement with the client, never sent a bill, and never requested an advance payment of the retainer fee. Mr. Gilmore failed to appear for hearings, delaying the case. Mr. Gilmore did not file a withdrawal in the case. The client was unable to reach Mr. Gilmore and often was unable to leave messages. Mr. Gilmore did not respond to the client's calls and did not keep the client informed of the case status. Mr. Gilmore's failure to represent the client caused a judgment to be entered against the client, which caused injury when the court found the client in contempt and issued a warrant for the client's arrest, and may have caused a disadvantage to the client in negotiations in the case. Mr. Gilmore also failed to respond to the OPC's written requests for information and to the NOIC.

ADMONITION

On August 1, 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), 1.15(c) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney was given a check, written by the client, to be held in the attorney's client trust account. The attorney withdrew the funds from the client trust account and held those funds in the attorney's office for an extended period of time thus subjecting the funds to theft, loss, or misuse. The attorney had a dispute with the client concerning the ownership of the funds and the attorney failed to hold the disputed funds in a client trust account until the dispute was resolved.

PUBLIC REPRIMAND
On August 3, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Brenda L. Flanders for violation of Rules 1.5(a) (Fees), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Ms. Flanders charged an excess fee for a chapter 7 bankruptcy case given the number of assets and the non-complex income involved, along with her years of experience in bankruptcy law. Ms. Flanders failed to respond to requests for a response to the informal complaint.

PUBLIC REPRIMAND
On August 1, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against J. Bryan Jackson for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Jackson was retained to represent a client in an employment action. Mr. Jackson did not follow up with the client regarding the specifics of the case. Mr. Jackson did not file a complaint in the action until two and a half years after the client hired him. Mr. Jackson failed to communicate with the client for almost 18 months until after the client filed the complaint with the Office of Professional Conduct.

INTERIM SUSPENSION
On July 21, 2005, the Honorable William W. Barrett, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Interim Suspension, suspending Gregory P. Cohen from the practice of law pending final disposition of the Complaint filed against him.

In summary:
The Third District Court entered a Judgment in a criminal case against Mr. Cohen for the crime of enticing a minor over the Internet, a third degree felony, pursuant to Utah Code Annotated section 76-4-401. The interim suspension is based upon this conviction pursuant to Rule 19 of the Rules of Lawyer Discipline and Disability.

SUSPENSION
On July 6, 2005, the Honorable Derek Pullan, Fourth Judicial District Court, entered an Order of Discipline: Suspension, suspending Bruce A. Embry for a period of one year, effective July 6, 2005, for violation of Rules 1.1 (Competence), 1.3 (Diligence) 1.4(a) and (b) (Communication), 1.6(a) (Confidentiality of Information), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In one matter, Mr. Embry was retained to represent a husband and wife in a bankruptcy matter. Mr. Embry filed two actions on behalf of the clients, both of which were dismissed. The second bankruptcy was dismissed because Mr. Embry failed to attend the creditors' meeting and file the necessary paperwork. Mr. Embry transferred the clients' file without their knowledge or permission to another attorney.

In a second matter, Mr. Embry represented a husband and wife in a bankruptcy action. Mr. Embry closed his practice without informing the clients and transferred the clients' file to another attorney without obtaining their consent.

SUSPENSION
On July 26, 2005, the Honorable Fred D. Howard, Fourth Judicial District Court, entered an Order of Discipline: Suspension, suspending Richard S. Clark II for a period of six months and one day, effective February 25, 2004, for violations of Rules 8.4(a) and (b) (Misconduct) of the Rules of Professional Conduct. Upon reinstatement, Mr. Clark shall be on unsupervised probation for a period of three years.

In summary:
Mr. Clark was convicted of Driving Under the Influence of Alcohol or Drugs ("DUI") on January 24, 2001. Mr. Clark had been convicted on two previous occasions of DUI, and also appeared in court when he was impaired.

In the event that Mr. Clark is reinstated from the suspension, he will

be placed on unsupervised probation for a period of three years.

SUSPENSION

On July 19, 2005, the Honorable John R. Morris, Second Judicial District Court, entered an Order of Discipline: Suspension of Six Months and One Day, suspending E. Kent Winward, effective July 19, 2005, for violations of Rules 1.1 (Competence), 1.2 (Scope of Representation), 1.3 (Diligence), 1.4(b) (Communication), 3.3(a)(1) (Candor Toward the Tribunal), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In one matter, Mr. Winward was hired to defend his clients against a credit union. The credit union obtained an order and judgment against the clients. A lien was placed against the clients' property. Mr. Winward filed a bankruptcy on behalf of the clients in order to remove the lien. The lien was not removed.

In a second matter, Mr. Winward was retained to file a bankruptcy. The client filed a complaint with the Office of Professional Conduct. Mr. Winward failed to respond to the Notice of Informal Complaint.

In a third matter, Mr. Winward was retained to file a bankruptcy action. Due to an administrative error, the clients' case was converted and notice of a meeting of creditors was sent to the clients. The case was dismissed. Mr. Winward filed another bankruptcy action on behalf of the clients. The bankruptcy court directed that the clients needed to prepare, file and provide their tax returns to Mr. Winward; the clients delivered the necessary documents to Mr. Winward. Mr. Winward did not file the tax returns and the case was dismissed.

In a fourth matter, Mr. Winward was retained to file a bankruptcy action. The case was dismissed. Mr. Winward refiled the bankruptcy action and the case was discharged. After the second bankruptcy was filed an attempt was made to repossess the clients' vehicle but it was stopped because of the automatic stay. Mr. Winward informed the clients that he would pursue the damaged vehicle case. Mr. Winward did not keep the clients informed of the case

status, would not return the clients' phone calls and the clients had to go to Mr. Winward's office to contact him.

ADMONITION

On September 7, 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), 7.1(b) (Communications Concerning a Lawyer's Services), 7.5(a) (Firm Names and Letterhead), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was hired to repair the client's credit. There was inadequate communication between the client and the attorney. The attorney failed to provide the client with the client's file or any evidence that the attorney did any work. The attorney's website was misleading as to the results that could be achieved. The website also led potential clients to believe that the attorney's firm was a firm, when it was not.

DISBARMENT

On August 26, 2005, the Honorable J. Dennis Frederick, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Discipline: Disbarment, disbarring James H. Tily, effective August 26, 2005, for violations of Rules 8.4(a), (b), and (c) (Misconduct) of the Rules of Professional Conduct.

In summary:

On March 9, 2004, Mr. Tily pled guilty to robbery, a second-degree felony, pursuant to Utah Code § 76-6-301. On or about July 3, 2003 at a grocery store in Salt Lake County, Mr. Tily took property in the presence of another by force or fear. The property did not belong to Mr. Tily.

RECIPROCAL DISCIPLINE

On August 22, 2005, the Honorable John Paul Kennedy, Third Judicial District Court, entered an Order of Reciprocal Discipline: Public Reprimand against Jorge Galvez for violations of Rules 1.1 (Competence), 1.3 (Diligence), 3.4(c) (Fairness to Opposing Party and Counsel), and 8.4(a) and (d) (Misconduct) of the Rules of Professional Conduct. In addition to the public reprimand, the District Court limited Mr. Galvez's practice in the following respects: Mr. Galvez shall not practice in United States District Court for two years, and shall not practice in Utah appellate courts for a period of eighteen months.

In summary:

On August 4, 2004, the United States Court of Appeals for the Tenth Circuit disbarred Mr. Galvez and fined him. Mr. Galvez was counsel of record for three cases before the Tenth Circuit Court of Appeals.

In one case, Mr. Galvez filed the notice of appeal, but nothing else.

In a second case, a direct criminal appeal, Mr. Galvez was retained as counsel in district court. Mr. Galvez made no filings and did not respond to deficiency letters. Mr. Galvez was struck from the appeal and substitute counsel was appointed. A disciplinary order to show cause was issued and he did not respond. Mr. Galvez was sanctioned and fined.

In a third case, a direct criminal appeal, Mr. Galvez filed a deficient motion to dismiss, and a deficient motion to withdraw. Both were denied. Mr. Galvez also filed deficient Anders briefs. The Court sent deficiency letters regarding the briefs and he never replied.

ADMONITION

On September 14, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Admonition against an attorney for violations of Rules 1.4 (Communication), 1.5(b) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In three separate matters, the attorney believed that the attorney wrote the hourly fee on a piece of paper and showed it to the clients, but the clients stated the attorney did not do this. One client believed the representation was on a contingency basis and not an hourly rate. The other clients believed the attorney quoted them a flat fee. The attorney did not send billings on a regular basis, or did not send billings for extended periods.

PUBLIC REPRIMAND

On September 1, 2005, the Honorable Timothy Hanson, Third Judicial District Court, entered an Order of Discipline: Public Reprimand against Dolores Branin for violations of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct), of the Rules of Professional Conduct.

In summary:

Ms. Branin was hired to file a bankruptcy and failed to do so and failed to return the client's calls. Ms. Branin also failed to respond to the Office of Professional Conduct's request for information and the Notice of Informal Complaint.

RECIPROCAL DISCIPLINE

On September 13, 2005, the Honorable Anthony Quinn, Third Judicial District Court, entered an Order of Discipline: Public Reprimand against Gary Burnett for violations of Rules 8.1 (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct), of the Rules of Professional Conduct.

In summary:

On June 13, 2002 the Nevada State Bar publicly reprimanded Mr. Burnett. Mr. Burnett's misconduct in Nevada involved providing inaccurate information on his Application for Admission to Practice Law in the State of Nevada and failing to update the application. Mr. Burnett contended that the omissions were an oversight and not intended to mislead the Bar or the Nevada Supreme Court, but acknowledged that he had a responsibility to give accurate and updated information.

PUBLIC REPRIMAND

On September 14, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against David C. VanCampen for violations of Rules 1.3 (Diligence), 1.15(b) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

Mr. VanCampen failed to appear for at least one scheduled court hearing on behalf of his client, failed to promptly provide an accounting of retainer funds as well as information concerning how those funds were used, failed to promptly return or refund the unused portion of the retainer after his services were terminated and failed to respond to the Office of Professional Conduct's request for information. Mr. VanCampen also attributes to his office manager/ paralegal his lack of communication and failure to respond to his client. Mr. VanCampen failed to supervise his office manager/ paralegal to ensure the assistant's conduct

was compatible with Mr. VanCampen's ethical obligation.

ADMONITION

On September 19, 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 1.3 (Diligence), 1.4(a) (Communication), and 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), of the Rules of Professional Conduct.

In summary:

The attorney was hired to file a lawsuit. The attorney did not communicate the status of the investigation of the merits of the case to the client. The attorney did not communicate in writing the basis or rate of the attorney's fee and the fee exceeded $750.00. The attorney did not promptly return the files when requested and failed to supervise a paralegal in communications with the client.

PUBLIC REPRIMAND

On August 8, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Daniel Irvin for violations of Rules 1.3 (Diligence), 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. Irvin, in representing a client in post divorce matters, failed to discuss the matter with his client. During a review hearing, the parties reached a stipulated settlement. The court ordered Mr. Irvin to finalize the proposed order to be submitted to the court. He failed to finalize the order. Mr. Irvin also failed to respond to the Office of Professional Conduct's Notice of Informal Complaint.

PUBLIC REPRIMAND

On August 8, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Daniel Irvin for violations of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(c) (Fees), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct), of the Rules of Professional Conduct.

In summary:

Mr. Irvin represented a client in four separate matters. Mr. Irvin had inadequate knowledge concerning how to obtain and execute a lien and failed to pursue the cases on behalf of the client. Mr. Irvin failed to respond timely to phone calls and e-mails from his client to keep the client informed about the cases and enable the client to make informed decisions regarding the representation. There was no written contingency fee agreement. When the representation terminated, Mr. Irvin did not take steps to ensure that the client's interests were protected, by failing to give proper notice to the client, failing to withdraw from a pending case, failing to discuss termination with the client, and failing to forward files to the client. Mr. Irvin also failed to respond to the Office of Professional Conduct's Notice of Informal Complaint.

RESIGNATION WITH DISCIPLINE PENDING

On October 12, 2005, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Jorge H. Galvez. On September 6, 2005, the Honorable Tyrone E. Medley, Third Judicial District Court, entered an Order of Interim Suspension, immediately suspending Mr. Galvez from the practice of law pending final disposition of the complaint filed against him.

In summary:

The Office of Professional Conduct ("OPC") received nine complaints against Mr. Galvez which were the basis of a Complaint filed against him in District Court. Mr. Galvez submitted a Petition for Resignation with Discipline Pending to the Utah Supreme Court on September 2, 2005 in which he admitted misconduct in the nine matters along with twelve additional matters. Although the facts were not adjudicated, Mr. Galvez's default was entered in the matters that were the basis of the Complaint, and the case was set for a sanctions hearing because of Mr. Galvez's failure to cooperate with discovery in violation of a court order compelling his cooperation. Mr. Galvez's petition admits that these facts along with the facts in the twelve additional matters constitute grounds for discipline. The facts established by default and admitted to by Mr. Galvez in the Petition for Resignation with Discipline Pending are that Mr. Galvez failed to diligently and competently pursue his clients' cases and missed court hearings; failed to communicate with clients; verbally accepted a settlement for two clients without first consulting with them; failed to communicate in writing contingency fees and fees exceeding $750; charged and collected excessive fees given the work performed; failed to return clients' files and refund unearned fees; misled two clients about the status of their child's case; practiced law while administratively suspended for non-payment of fees; and failed to respond to the OPC's requests for information.

Results of the Beta Test of the Utilization/Salary Survey – 2005

by J. Robyn Dotterer

At long last the data have been compiled on the first web-based utilization/salary survey for the Utah State Bar Paralegal Division with the assistance and cooperation of the Legal Assistant's Association of Utah (LAAU). A joint committee was formed to undertake the drafting of a utilization/salary survey that could be established on the Utah State Bar Paralegal Division's web page and could then be taken by paralegals or their supervising attorneys online.

I was the Committee Chair (by default) since I was the Utilization Chair of the Paralegal Division of the Utah State Bar at the time the request was made. Serving on the committee were Heather Holland, Records Manager and Paralegal for SOS Staffing Services, Inc., Staci Robison, Paralegal for Hill, Johnson & Schmutz, LC, and the representative of the Legal Assistants Association of Utah, Diane Samudio, Senior Paralegal for Symantec Corporation. We had input and support from three Division Chairs over the life of this committee's work. Initially, the assignment to form the committee was made by Chair Sanda Flint, past-Chair Tally Burke oversaw most of our work, and current Chair Danielle Price is assisting in the modifications for future surveys and ongoing committee work to keep the data base at the Bar updated and functioning into the future. We had technical support from the excellent staff of the Utah State Bar and worked closely with Lincoln Meade, Toby Brown and Brooke Bruno and anticipate (and hope) that their technological support of the web site will carry into future surveys.

In our first survey the committee tried to cover the areas that we believe to be of the most importance to paralegals working in Utah and since this is the first survey and was basically a Beta test of the site and the survey, we do not have data for comparison purposes or correlations. We have identified a number of questions and categories of questions that we want to reformat so future survey responses will allow for correlation of the data.

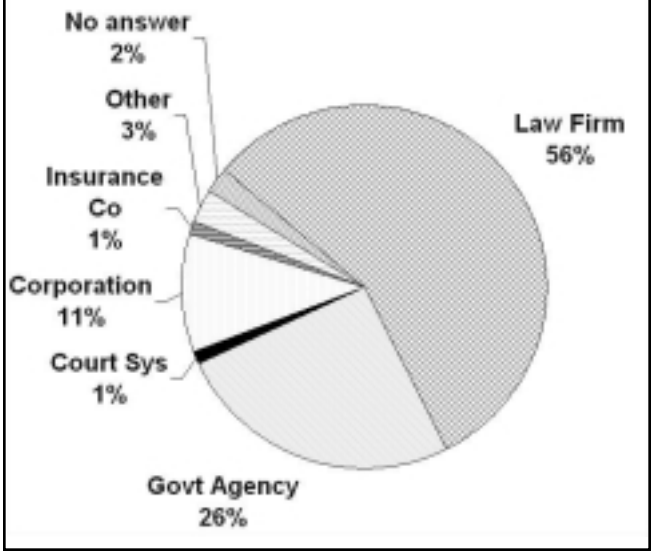
At this point, our data is relatively straightforward in terms of having had a limited number of responses (94) and no history to draw comparisons to. About 20% of the responses were from attorneys rather than paralegals. We found that having the same survey available to both attorneys and paralegals caused some interpretation issues, and a number of our questions had fewer responses than non-responses. That created a problem for purposes of correlation. We are looking at having the survey being responded to only by paralegals to eliminate the number of non-answers by persons who may not know the specifics of the particular questions being asked.

We are posting the Executive Summary of the responses at the Utah State Bar Paralegal Division website. We also will have some graphic representations of some of the responses that lend themselves to visual representation.

The demographics of the responses were interesting. Of those who responded, 85% were female. More than half of our respondents work in law firms, 25% work in governmental agencies and about 10% work for corporations. The areas of practice are varied but the highest percentage work in litigation. The next high categories are in contracts, family law, bankruptcy and regulatory practice. We are planning in the future to be able to do some correlations based on the organizational employment and will reformat some of the questions to allow for those correlations. (See Graphic identified as Question #2.)

Only 3% of the respondents are part time employees and 2% are independent. It appears that the paralegals in Utah are by and large engaged in full-time work. We will also do some reformating of questions to separate out the part-time data and independent contractor data from the full-time paralegal data to allow for correlations in those separate areas. Most of the paralegals work in organizations with five paralegals or fewer, and the next highest percentage (20%) work in organizations with 6-10 paralegals. Only three of our respondents work in organizations with more than 50 paralegals.

QUESTION #2 – Job Location



The majority of paralegals work in small organizations with five or fewer attorneys. The next largest group (20%) work in organizations with 6-10 attorneys. It is interesting to note the next highest percentage in this category is a leap in the size of firms from 6-10 to 80+ attorneys where 13% of the paralegals work. Most of the respondents have worked in their current employment between 1-3 years and the next largest group is 4-6 years. We have one hardy paralegal who has worked for the same employer for 31+ years!! Kudos to them and their employer.

There doesn't appear to be a correlation we can draw between years as a paralegal and years with a particular employer. We have approximately the same number of paralegals between 1-5 years as we do at 16+ years. Those us in the middle (about 45% of the respondents) have worked between 6 – 15 years. The experience of the paralegals in Utah is very impressive.

It was interesting to note that the largest percentage of those who responded to the question regarding education had at least a Bachelor's degree or Associates degree. (See Graphic identified as Question #15.) Although not all respondents had a paralegal degree, the majority of our respondents had either a paralegal degree or a paralegal certificate.

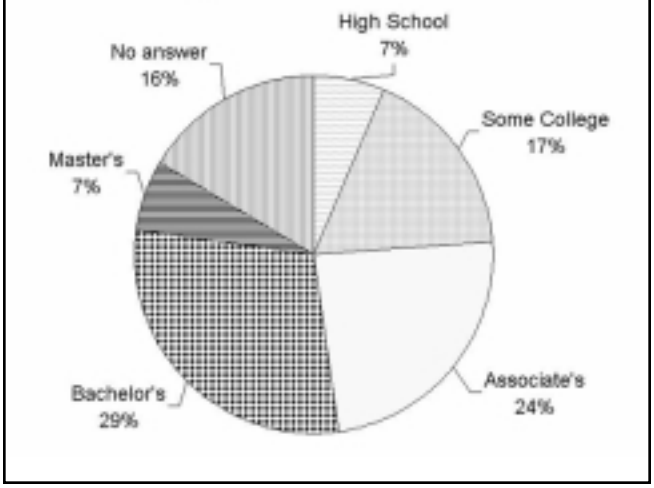
Salary information is varied and due to the input of part-time and free-lance paralegals and the numbers of non-responses, we are unable to draw a correlation between the various areas of employment. We will be able to do that more fully after our next survey where we separate out those various categories. The Executive Summary provides the responses of those who responded to the salary/raise/bonus questions. It was interesting to note of those who responded to the survey, the majority did receive a bonus last year. (See Graphic identified as Question #24.)

Though most of the respondents identified themselves as exempt, it is likely that due to the Department of Labor changes last year, this number will change significantly by the next survey. Almost half of the respondents are compensated financially for overtime work, but about a quarter of them are compensated with time off. Most of the respondents work less than 10 hours in overtime per week, but the next largest group work between 10-20 hours of overtime per week.

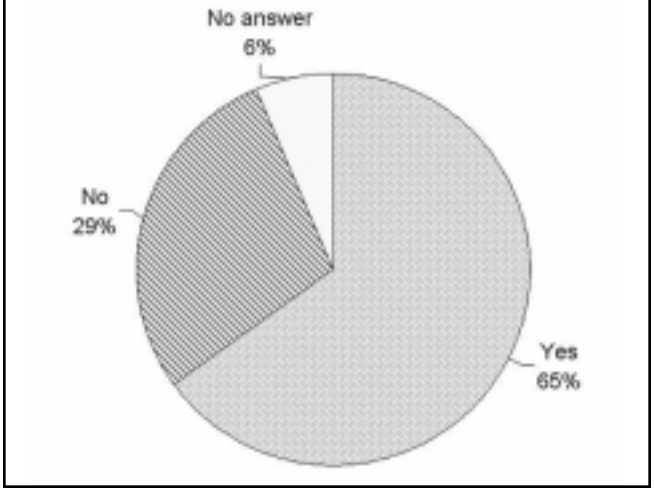
Many organizations support membership in a variety of activities and almost half have membership in the Paralegal Division of the Utah State Bar. We need to work to increase our numbers in that area and will be looking to the members of the Utah State Bar to encourage their paralegals to become members of the Paralegal Division.

Benefits and compensation packages also vary but the majority

QUESTION #15 – Education Level

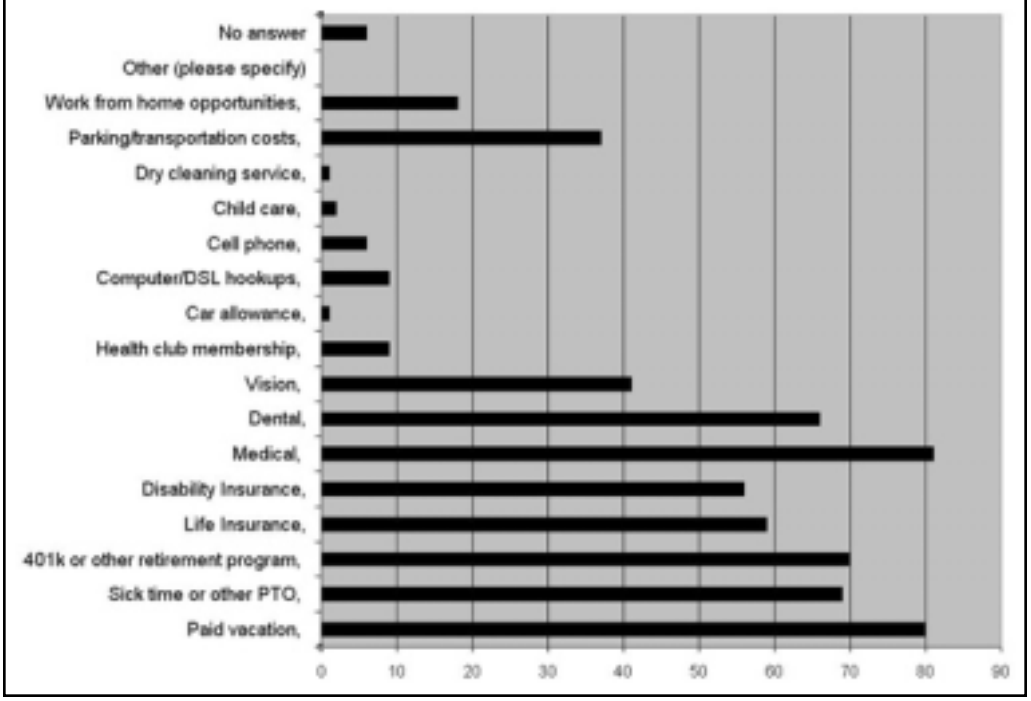


QUESTION #24 – Bonus in last 12 months



of the respondents receive paid vacation, sick leave, 401k plans and a variety of medical coverages. The number of vacation days is largely based on length of time with employer. The largest number of respondents received 7-10+ paid holidays. (See Graphic identified as Question #31.)

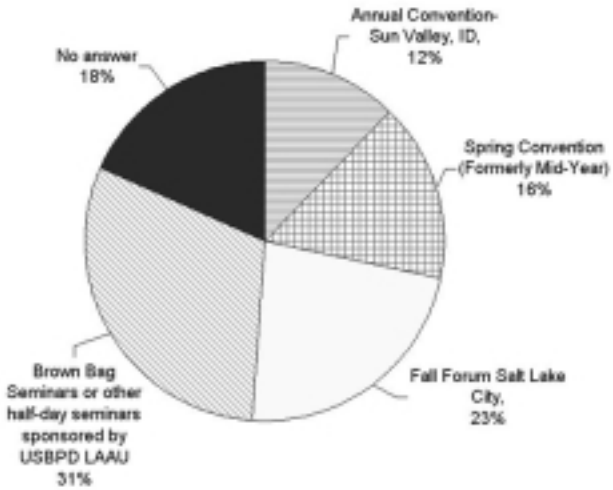
QUESTION #31 – Benefits



Our questions on paralegals who bill their time and related questions had as many non-responses as responses to some of the questions. That tells us that a large segment of the persons answering these questions do not bill their time and we need to separate this category of questions so it is responded to only by persons who bill their time, which will allow us to draw correlations regarding how that time is billed.

The survey results also provide information on areas of interest for CLE to allow the organizations to provide support to their members. (See Graphic identified as Question #45.) Please feel free to call our CLE Chair and suggest topics for CLE brown bags – or even more effective, call and volunteer yourself – paralegal or attorney – to present at a CLE! You can contact either of the Continuing Legal Education Co-Chairs to make requests or volunteer to make a presentation. Contact Sanda R. Flint, CP, Director-at-Large, Continuing Legal Education Co-Chair at sflint@strongandhanni.com or Sharon Andersen, Director-at-Large, Continuing Legal Education Co-Chair at Sharon.andersen@slcgov.com.

QUESTION #45 – Interest Areas for CLE



Though we were not able to draw as much correlative data from the survey responses as we had anticipated, we have identified how challenging developing a utilization/ salary data base can be. We are attempting to correct the format of the questions and the division of categories to allow for future correlations and will build on the results from this survey to chart the growth, changes and trends in the paralegal field in the future.

We believe that over the next several years we will be able to compile a data base of information that will allow the paralegals in Utah, as well as their attorneys, to be able to establish a competitive and fair compensation package based on experience, education and client base information.

If you become aware of future surveys through the *Bar Journal* or e-mail announcements through the Utah State Bar, the Paralegal Division or LAAU, please tell other paralegals you know about the survey and ask them to participate.

The data we compile will only be as good as the participation of the paralegals in Utah make it.

The Paralegal Division Board is always available to answer questions or provide assistance regarding the utilization of paralegals. The current Utilization Chair of the Paralegal Division is Meg Chesley. Meg can be contacted at : mchesley@pblu.com.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
11/04/05	**Annual Southern Utah Bar Conference**	
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
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. $90, with proceeds going to the LHL Program.	3 hrs. Ethics
12/19/05	**NLCLE Workshop: Bankruptcy.** 5:30–8:45 pm. $55 YLD, $75 others.	3 CLE/NLCLE
01/11/06	**"AND JUSTICE FOR ALL"** program TBA.	
01/18/06	**Office of Professional Conduct "Ethics School"** 9:00 am–4:00 pm.	6 CLE/Ethics

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

REGISTRATION FORM

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

Registration for (Seminar Title(s)):

(1) _____ (2) _____

(3) _____ (4) _____

Name: _____ Bar No.: _____

Phone No.: _____ Total $ _____

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

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POSITIONS AVAILABLE

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Merit Medical Systems, Inc. is seeking an attorney with at least 6 years of experience in SEC rules and filings, commercial law and general corporate law. Please send a resume to: Merit Medical Systems, Inc., Office of General Counsel, 1600 West Merit Parkway, South Jordan, Utah 84095.

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Attorney/Mediator 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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Utah Law and Justice Center – rear dock
645 South 200 East • Salt Lake City, Utah 84111

Volunteers will meet you as you drive up.
If you are unable to drop your donations prior to 6:00 p.m., please leave them on the dock, near the building, as we will be checking again later in the evening and early Saturday morning.

Volunteers Needed

Volunteers are needed at each firm to coordinate the distribution of e-mails and flyers to the firm members as a reminder of the drop date and to coordinate the collection for the drop; names and telephone numbers of persons you may call if you are interested in helping are as follows:

Leonard W. Burningham, Branden T. Burningham, Bradley C. Burnigham, Sheryl Ross, Marjorie Green or Brittany Kovatch . . . . . .(801) 363-7411
Frank J. Carney . . . . . .(801) 534-1700
Toby Brown . . . . . .(801) 297-7027

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Thank You!

What is Needed?

All Types of Food

- oranges, apples & grapefruit
- baby food & formula
- canned juices, meats & vegetables
- crackers
- dry rice, beans & pasta
- peanut butter
- powdered milk
- tuna

Please note that all donated food must be commercially packaged and should be non-perishable.

New & Used Winter & Other Clothing

- boots
- gloves
- coats
- sweaters
- trousers
- hats
- scarves
- suits
- shirts

New or Used Misc. for Children

- bunkbeds & mattresses
- cribs, blankets & sheets
- children's videos
- books
- stuffed animals

Personal Care Kits

- toothpaste
- toothbrush
- combs
- soap
- shampoo
- conditioner
- lotion
- tissue
- barrettes
- ponytail holders
- towels
- washcloths

DIRECTORY OF BAR COMMISSIONERS AND STAFF

BAR COMMISSIONERS

David R. Bird, *President*
Tel: 532-1234

Gus Chin, *President-Elect*
Tel: 535-7992

Nate Alder
Tel: 323-5000

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Tel: 322-2516

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***Ex Officio**

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State Bar Delegate to ABA
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Immediate Past President
Tel: 435-716-8380

***Debra Griffiths**
President, Young Lawyers Division
Tel: 521-6383

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Dean, Law School,
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***Julie A. Wray**
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Executive Secretary
Tel: 297-7031

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Tel: 297-7057

Ronna Leyba
Utah Law & Justice Center Coordinator
Tel: 297-7030

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Deputy General Counsel
in charge of Admissions
Tel: 297-7024

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Tel: 297-7025

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Bar Programs Coordinator
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Tel: 297-7033

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Toby Brown
Tel: 297-7027

Consumer Assistance Coordinator
Jeannine Timothy
Tel: 297-7056

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Financial Administrator
Tel: 297-7020

Joyce N. Seeley
Financial Assistant
Tel: 297-7021

Lawyers Helping Lawyers
Tel: 579-0404
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Pro Bono Department
Brooke Bruno
Pro Bono Coordinator
Tel: 297-7049

Technology Services
Lincoln Mead
Manager Information Systems
Tel: 297-7050

Brooke Bruno
Web Content Coordinator
Tel: 297-7049

Receptionist
Edith DeCow
Tel: 531-9077

Other Telephone Numbers &
E-mail Addresses Not Listed Above

Bar Information Line: 297-7055
Web Site: www.utahbar.org

Supreme Court MCLE Board
Sydnie W. Kuhre
MCLE Administrator
297-7035

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Amy Sorenson
Paralegal
Tel: 297-7045

Angela Fisher
Assistant. to Counsel
Tel: 297-7048

Alisa Webb
Assistant. to Counsel
Tel: 297-7043

Certificate of Compliance

UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION

Utah State Bar
645 South 200 East
Salt Lake City, Utah, United States, 84111
Telephone (801) 531-9077 / Fax (801) 531-0660

For Years_____ through _____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

_____

_____

Date of Activity	Program Sponsor	Program Title	Activity Type	Regular Hours	Ethics Hours	NLCLE Hours	Total Hours
			Total Hours				

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Regulation 5-103(1)

Date: _____ Signature: _____

EXPLANATION OF TYPE OF ACTIVITY

A. **Audio/Video, Interactive Telephonic and On-Line CLE Programs, Self-Study**
No more than twelve hours of credit may be obtained through study with audio/video, interactive telephonic and on-line cle programs. Regulation 4(d)-101(a)

B. **Writing and Publishing an Article, Self-Study**
Three credit hours are allowed for each 3,000 words in a Board approved article published in a legal periodical. No more than twelve hours of credit may be obtained through writing and publishing an article or articles. Regulation 4(d)-101(b)

C. **Lecturing, Self-Study**
Lecturers in an accredited continuing legal education program and part-time teaching by a practitioner in an ABA approved law school may receive three hours of credit for each hour spent lecturing or teaching. No more than twelve hours of credit may be obtained through lecturing or part time teaching. **No lecturing or teaching credit is available for participation in a panel discussion.** Regulation 4(d)-101(c)

D. **Live CLE Program**
There is no restriction on the percentage of the credit hour requirement, which may be obtained through attendance at an accredited legal education program. **However, a minimum of Twelve (12) hours must be obtained through attendance at live continuing legal education programs.** Regulation 4(d)-101(e)

The total of all hours allowable under sub-sections (a), (b) and (c) of this Regulation 4(d)-101 may not exceed twelve (12) hours during a reporting period.

THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION, SEE REGULATION 4(d)-101 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Regulation 5-101 – Each licensed attorney subject to these continuing legal education requirements shall file with the Board, by January 31 following the year for which the report is due, a statement of compliance listing continuing legal education which the attorney has completed during the applicable reporting period.

Regulation 5-102 – In accordance with Rule 8, each attorney shall pay a filing fee of $5.00 at the time of filing the statement of compliance. **Any attorney who fails to complete the CLE requirement by the December 31 deadline shall be assessed a $50.00 late fee. In addition, attorneys who fail to file within a reasonable time after the late fee has been assessed may be subject to suspension and a $100.00 reinstatement fee.**

Regulation 5-103(1) – Each attorney shall keep and maintain proof to substantiate the claims made on any statement of compliance filed with the Board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders or materials claimed to provide credit. The attorney shall retain this proof for a period of four years from the end of the period for which the statement of compliance is filed, and shall be submitted to the Board upon written request.

Make checks payable to Utah State Board of Continuing Legal Education or complete credit card information below. There will be a $20 charge for returned checks

Please Note: Your credit card statement will reflect a charge from "BarAlliance."

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It makes sense to compare companies, costs, and coverage when reviewing your Professional Liability Insurance needs.

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801-533-3675 or
denise.forsman@marshpm.com.

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PROGRAM HIGHLIGHTS:

- Carrier that insures law firms nationwide and with financial rating of "Excellent" by A.M. Best.
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