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SPECIAL ELDER LAW ISSUE

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

COVER: Mount Ogden, taken from Snow Basin Ski Resort, by Ronald G. Russell.

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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.

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Update on End-of-Life Issues in Utah

by Maureen Henry

Utahns have faced two cases in the last six years that have shaken and informed their views of end-of-life issues. The local case against psychiatrist Robert Weitzel led to news coverage that appeared to equate the use of morphine with murder – a problematic message for patients and physicians alike. Weitzel was charged with murdering five elderly patients under his care in a geriatric psychiatric ward in a Davis County hospital. Although he was ultimately acquitted of the charges in the second of two trials, the case raised concerns that it had become impossible for physicians to walk the line between quality pain management and the threat of charges of murder or malpractice.

The Terri Schiavo case took place in Florida, but was headline news in Utah for months. The dispute – whether to remove a feeding tube from a Florida woman who had been in a persistent vegetative state for 13 years – forced Utahns to think about their end-of-life preferences. A KSL/Deseret Morning News poll found that, among 413 Utahns surveyed, "51 percent believe Schiavo should not have a feeding tube, [and] 69 percent said if they were in Schiavo's position they would not want a feeding tube inserted . . . ." Rick Klein, *Schiavo Ruling is Pending,* Deseret Morning News, March 22, 2005.

Neither the Weitzel case nor the Schiavo case changed Utah law. Utah's Personal Choice and Living Will Act ("the Act"), which gives legal authority to advance care planning documents in the state, was enacted in 1985, updated in 1993, and amended to address emergency medical services in 1999. Utah Code §§75-2-1101 to 1119. Similarly, no changes have been made to Utah law that would affect the opioid-prescribing practices of physicians. The two cases have, however, forced Utahns to consider end-of-life decisionmaking and pain management.

In the intent statement of the Act, the legislature recognized "the dignity and privacy which all individuals are entitled to expect" and "the right to make binding written directives." This seems simple: under state law, Utahns can expect "dignity and privacy" and make binding written directives. The reality, however, is far more complex than the intent statement suggests, as cases like Weitzel and Schiavo reveal.

Advance Care Planning

End-of-life decisionmaking and advance care planning should be grounded in a process that evaluates the individual's wishes and weighs those wishes against medical interventions. The first step in the process is to identify the goals of care.

What does the individual want from medical care? The answer will be different from individual to individual, depending on factors such as stage in life, fears, and individual and social values. Goals of care are contextual and often change over time. Often, people accept more care than they initially thought they would want as their condition deteriorates. Setting goals of care involves an exploration of difficult subjects: death, disability, painful and difficult treatments, and an individual's place in society and family.

Consider an 80-year old who wants to see her first great-grandchild born. The baby is due in 5 months. The woman suffers from congestive heart failure (CHF). She has been hospitalized twice, and was successfully treated both times with diuretics and oxygen. During the previous hospital admissions, she requested a "do not resuscitate/do not attempt resuscitation" (DNR/DNAR) order and refused to be put on a ventilator because she did not want to risk ending up ventilator-dependent or, in her words, "on machines." One goal was to avoid aggressive care; the other competing goal was to be alive for the birth of her great-grandchild.

After identifying goals of care, the individual needs an understanding of prognosis. What are the relevant medical conditions, and what are foreseeable crises that the individual may face? For a young healthy person, the issue that is most likely to strike unexpectedly is a trauma or illness that damages the brain resulting in a condition similar to that of Terry Schiavo. For someone with a

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serious life-threatening or life-limiting condition, the physician can discuss the crises that may arise that would render the individual unable to make or communicate medical decisions.

Our hypothetical CHF patient knows that she will probably experience periodic crises that are likely to require hospitalization. Her physician has explained that she may not be able to direct her own care during these crises. Some of the decisions her loved ones might have to make for her are whether to put her on a ventilator, whether to use diuretics, and whether to consent to blood transfusions. The physician told her that it is likely that one of these crises will cause her death, but she cannot predict when that will happen.

Finally, before accepting or rejecting a medical intervention, an individual must understand the benefits and burdens of the intervention. In the case of the CHF patient, the physician explained that the use of a respirator and other interventions will increase the chance that she will survive a crisis, though probably at a diminished level of function. The physician also said that even with aggressive medical care, the next crisis could be fatal. She explains that the down side of agreeing to the use of a ventilator is that, once a respirator is started, it is sometimes hard for families and physicians to agree to withdrawal, even when it is clear that the patient will never recover. In other words, her family could find it difficult to honor her wish that she not be kept alive on machines.

Only after this process has been completed is it time to document wishes, whether on a Living Will, Medical Treatment Plan, or other document. It is unfortunately unusual, however, for an individual to be walked through the process outlined above as effectively as our hypothetical patient. Rather, individuals are handed a "Living Will Packet" by an admissions clerk or are asked to sign the statutory Living Will form by their attorney when they execute their estate planning documents.

To understand why the decisionmaking process sometimes does not take place, it is important to review the Personal Choice and Living Will Act.

Personal Choice and Living Will Act

The Personal Choice and Living Will Act is the Utah statute that creates legally-binding advance care planning documents for Utahns. Utah Code §§75-2-1101 to 1119. The Act creates four documents: a Living Will ("Directive to Physicians and Providers of Medical Services," 2-1104); a Medical Treatment Plan ("Directive for Medical Services After Injury or Illness is Incurred," 2-1105); a Special Power of Attorney (2-1106); and an Emergency Medical Services Do Not Resuscitate form. The first three of these documents

are discussed below. The last is rarely used and has largely been supplanted by the Physician Order for Life Sustaining Treatment ("POLST") form, which is discussed below.

Living Will

Utah law allows competent individuals over the age of 18 to complete and sign a Living Will, or as it is called in Utah, a "Directive to Physicians and Providers of Medical Services." Utah Code 2-1104. The law requires the use of the statutory form or a form that is "substantially similar." *Id.* The statutory form states that the individual desires that "life not be artificially prolonged by life-sustaining procedures." *Id.*

An individual who signs Utah's form directs medical providers to withhold or withdraw life-sustaining procedures and allow the individual's death to "occur naturally:"

(a) if the individual has an injury, disease, or illness, that is certified to be a terminal condition or persistent vegetative state both

  (i) in writing and

  (ii) by two physicians who have personally examined the patient, and

(b) in the opinion of [the] physicians, the application of the life-sustaining procedures would serve only to unnaturally prolong

  (i) the moment of my death and

  (ii) the dying process.

Id.

The statute defines "life-sustaining procedures" as "any medical procedure or intervention which would in the judgment of the attending physician serve only to prolong the dying process," including "artificial nutrition and hydration unless the declarant elects in the declaration to exclude artificially administered nutrition and hydration." Utah Code 2-1103. The definition of life-sustaining procedure "does not include the administration of medication or the performance of any medical procedure which is intended to provide comfort care or to alleviate pain." *Id.* The statute does not define "unnaturally."

The language in Utah law that addresses Living Wills is very different from the language and approach described in the Advance Care Planning section, above. Whether treatment will be withheld or withdrawn turns on a physician's interpretation of what it means to "unnaturally prolong the moment of . . . death" or "to unnaturally prolong the dying process," not on an assessment of whether the patient's goals of care will be furthered or hampered by the treatment. The language in Utah's law would not have added clarity to a case like Schiavo.

If individuals believe that they have done all they need to do to get their affairs in order by signing Utah's statutory forms, they may forego the more complicated – but necessary – process of advance healthcare planning outlined above. It is important for attorneys to realize that signing Utah's statutory form will do little, perhaps nothing, toward assuring that their clients' end-of-life care wishes will be honored.

While attorneys are not obligated to get the training necessary to engage in the advance planning process with clients, they should understand the process and reinforce the need for the client to seek advice on how to plan for the end of life. The Living Will is simply not enough. The Toolkit for Healthcare Advance Planning, developed by the ABA Commission on Law and Aging, and reprinted with Utah-specific content at www.carefordying.org, is a document that can help clients to begin an end-of-life planning process.

Medical Treatment Plan

A second advance directive established in Utah law is the "Directive for Medical Services After Injury or Illness is Incurred." Utah Code 2-1105. This document is commonly referred to as the "Medical Treatment Plan." While this document is flexible and has much potential, it is rarely used outside of nursing facilities, and will therefore not be discussed in further detail herein.

Although the Medical Treatment Plan is not often used, 2-1105 establishes two important elements of Utah end-of-life law. First, it allows an attorney-in-fact appointed under Utah law for the purpose of making end-of-life decisions to override a Living Will by completing a Medical Treatment Plan with different, conflicting, or contradictory directives. This will be discussed in greater detail below with the discussion of the Special Power of Attorney. Second it establishes a prioritized list of proxy decisionmakers who can sign the directive on behalf of an individual who is not competent to make medical decisions. This list can be very helpful to healthcare providers and family members, struggling with the question, "Who decides?" when a disagreement arises.

Special Power of Attorney

The single most important advance care planning document in Utah is the Special Power of Attorney, established in 2-1106. In this document, an individual can appoint another individual to make end-of-life decisions when the individual is incapacitated. Physicians prefer this document to the Living Will because they want an individual with whom they can communicate who can provide the context discussed above that is so central to making the end-of-life choices the patient would have made. The Living Will often does not answer the physician's questions about goals

of care or patient preference.

The law's prioritized list of proxy decisionmakers in 2-1105 reflects the importance that Utah law places on the individual's choice of a proxy decisionmaker: an attorney-in-fact named under 2-1106 has priority over a court-appointed guardian to make medical decisions for an incapacitated individual.

Two elements of 2-1106 are counterintuitive to many individuals and are often misunderstood.

Many individuals – attorneys included – think that the Living Will is etched in stone and cannot be reversed, changed, or revoked, except by the individual to whom it applies. But 2-1106 allows an attorney-in-fact appointed under 2-1106 to give directions that differ from or contradict those in the Living Will. This recognizes a fact that end-of-life decisionmaking is contextual and changes with the patient's preferences and circumstances. Attorneys should explain this provision to their clients.

A second misunderstood provision is the one that appoints an attorney-in-fact:

> with lawful authority to execute a directive on my behalf under Section 75-2-1105, governing the care and treatment to be administered to or withheld from me at any time after I incur an injury, disease, or illness which renders me unable to give current directions to attending physicians and other providers of medical services.

Utah Code 2-1106. In other words, the statutory form gives the attorney-in-fact the authority to complete a Medical Treatment Plan. Nothing more. It does not give the attorney-in-fact the authority to admit the principal to a nursing home or hospital, or to give oral or written consent to treatments outside the context of the Medical Treatment Plan.

The reality of medical practice in Utah, however, is that most providers use the statutory form as a blanket power of attorney for healthcare that authorizes the attorney-in-fact to make any and all medical decisions for the principal. There is a significant disconnect between what the document says and how it is used. This suggests that there is either a need to update the statute to reconcile practice with the legal form, or the need for education of providers who are interpreting the form more broadly than the narrow language of the document would justify.

Many questions – how an attorney-in-fact should make medical decisions for another person, the principal's obligation to inform a designated attorney-in-fact of her wishes, and how to reconcile conflicts among family members or between proxies and healthcare providers – are not addressed in this article. While they are important, an exploration of the issues could fill a book.

POLST Form

In 2002, the Utah Department of Health enacted a rule creating a Physician Order for Life-Sustaining Treatment (POLST) form. Utah Administrative Code, R432-031. The purpose of the rule is to "provide[ ] for the orderly communication and transfer of patient preferences for life-sustaining treatment when a patient transfers from one licensed health care facility to another." A separate rule, R426-100-6, allows emergency medical personnel to honor a patient's wishes for treatment when the wishes are documented on the POLST form.

The POLST form has some benefits over the Living Will form. For example, it asks whether the patient wants specific interventions such as resuscitation, antibiotics, and artificially administered fluids and foods. It is a very good way to document the results of an advance care planning process.

But the POLST form is not an advance directive. As a Department of Health rule, it lacks the force of law that the Living Will, Medical Treatment Plan, and Special Power of Attorney forms carry. It is also meant to document current preferences, not hypothetical future ones. It asks: "What do you want done *today?*" rather than "What would you want done in the event that the following criteria are met?"

The POLST form is most effective when it is used to document advance planning decisions made by individuals with serious or life-threatening conditions. It is less relevant to those who are healthy with no imminent risk of decline. Furthermore, the POLST form cannot be completed without access to good information about the individual's condition, prognosis, and benefits and burdens of treatments being accepted or rejected. It should not simply be handed to a patient or family to be completed without guidance, but often it is. Attorneys should encourage clients to go through the form with a healthcare professional and to get questions answered before signing the form.

Utah Post-Schiavo

During the final days of Terry Schiavo's life, and in the aftermath of her death, local papers published articles titled "A Living Will Would Have Prevented Schiavo Tragedy," (Deseret Morning News, March 25, 2005), "Schiavo Predicament has Utahns Planning Early," (Salt Lake Tribune, April 1, 2005), "Baby Boomers Flock to Lawyers for Financial, Health-Care Planning," (Deseret Morning News, April 17, 2005), and "Make Choices Before a Crisis," (Deseret Morning News, April 8, 2005) to name only a few. But would Utah's Personal Choice and Living Will Act have prevented a case like Schiavo?

The key role and need to interpret the phrase, "unnaturally

prolong the dying process," could undermine the law's ability to avoid disputes in a case like Schiavo. The proponents of leaving the feeding tube in place in the Schiavo case would argue that there was no dying process going on. In their view, she was living, and had been living for 13 years. The proponents of removing the feeding tube felt that the dying process had begun 13 years before, when a tragic event left her severely brain damaged. Even if Terry Schiavo had completed Utah's Living Will form, the dispute may have raged.

In addition, the Schiavo case is very unusual. Few people ever receive the diagnosis of "persistent vegetative state." Rather, most deaths in Utah occur after a decision to withhold or withdraw life-sustaining treatment that comes after a diagnosis with a serious life-threatening or life-limiting illness and a period of decline. Most deaths are therefore the predictable result of degenerative conditions such as cardiovascular disease, pulmonary disease, or cancer.

Most decisions to withdraw or withhold treatment do not meet the criteria set forth in Utah's statute, in contrast to the Schiavo case. Returning to our hypothetical CHF patient, a month after her grandchild was born, she had another crisis and was hospitalized. Although she was pleased to meet her great-grandson, she was tired and frustrated that she was unable to interact with the baby, due to her frail state of health. She told her daughter, "I'm done. When my time comes, let me go." When she was hospitalized, the daughter refused to consent to use of a ventilator, and her mother died. No doctor ever certified that her condition was terminal. The physician admits that the use of medical interventions would have had a substantial chance of returning her patient to her home, until the next crisis hit.

Nothing is inherently wrong with this very common scenario. The physician knows that her patient's wishes were honored. The daughter feels secure that she did what her mother wanted. Rarely would this trigger a dispute like the one that led to the Schiavo case. But what happened is not supported by Utah law and did not conform to the requirements of the Personal Choice and Living Will Act.

This disconnect will be examined by the Utah Commission on Aging. In 2005, Utah's legislature, in recognition that issues such as these will challenge our system as the baby boom generation ages, created the Commission look at how state laws support Utah's aging population. The Commission will work to assure that the Act encourages advance care planning, allows individual wishes to be honored, and remains relevant to how people die in Utah.

Utah Post-Weitzel

Utah laws concerning pain management have not changed since the Weitzel case, and the case itself had no precedential effect on Utah pain management law. The question of whether the case changed physician behavior is a different one. At the time of the trial, it was feared that the legal action against Weitzel would discourage physicians from using opioids (morphine, oxycodone, hydrocodone, etc.) to manage pain.

To prepare for this article, I asked a number of specialists in pain management if the quality of pain management care has changed since the Weitzel trials. Physicians on the Wasatch Front responded that things are somewhat better than they were when Weitzel was first charged. These physicians attribute the positive change to a number of factors.

Some cited the effectiveness of aggressive campaigns to educate professionals and the public about appropriate management of pain. They also cited the Department of Professional Licensing's efforts to reassure physicians that appropriate pain management will be supported, not punished. In addition, the physicians noted that the Utah Medical Association has passed resolutions supporting appropriate management of pain. All of the physicians questioned, however, emphasized that Utah does not have enough physicians who are knowledgeable about the treatment of pain and end-of-life symptom management.

A rural hospice administrator asked for comment had a different experience from the Wasatch Front physicians. She noted that physicians in her small community, where no educational efforts on pain management were directed, still expressed fear of prosecution. She perceived that physicians are less likely now to prescribe opioids for severe end-of-life pain than they were before the Weitzel case.

Conclusion

The Weitzel and Schiavo cases have raised awareness of pain management and end-of-life care issues in Utah. A review of the law in light of these cases, however, points out that law could better support advance care planning and could be updated in a manner that makes it more relevant to actual medical practice. The Utah Commission on Aging will consider the best way to update the statute. While the Commission addresses policy issues, attorneys who prepare advance directives for clients should educate themselves about the realities of end-of-life decision-making, and should encourage their clients to engage in an advance care planning process.

Though challenges remain, it appears that increased awareness has improved the opportunities for Utahns to engage in an advance care planning process and has increased the chance that Utahns will receive appropriate management of pain.

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The Estate Planner / Insurance Salesman and the Fiduciary Duty of Loyalty:

Why no amount of disclosure and consent should overcome the breach of the fiduciary duty of loyalty by the attorney who drafts an estate plan and then receives a sales commission for the financial products sold to fund the plan

by Scott M. McCullough

Introduction

Imagine a client comes to your office needing to plan his estate in anticipation of retirement from the family business and you recommend an irrevocable life insurance trust (ILIT) as the vehicle to transfer wealth and minimize taxes. To fund this plan you recommend he purchase a $2,000,000 life insurance policy, and you refer him to an old friend to purchase the policy. The commission on the sale of a $2,000,000 policy is 3% ($60,000). Now imagine that you repeat this for similar clients four times a year, your friend is making $240,000 from your referrals. Why not take a piece of the action? Why not get licensed (or have you spouse get licensed) to sell the insurance and keep those commissions for yourself?

This article will compare the traditional approach of the fiduciary duty of loyalty with the "new" modern approach, how the two approaches relate to the Rules of Professional Conduct, and how they apply to the estate planner who has a personal interest in the insurance products his clients purchase.

The Fiduciary Duty of Loyalty

"A [fiduciary] is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of honor the most sensitive, is the standard for behavior." This statement from Judge Cardozo has long been the recognized and repeated as the classic statement for the legal principle of fiduciary duties. The fiduciary duty of loyalty requires constant fidelity.

A fiduciary must put aside his private gain or personal interest whenever his interest conflicts with the interest of the one he is bound to protect. Judge Cardozo made it clear that uncompromising rigidity was the attitude of the courts when considering the rule of undivided loyalty and that the fiduciary's level of conduct must be higher than that "trodden by the crowd."

Now, however, some seem content to rely on the disintegrating "morals of the marketplace" for the standard by which fiduciary duties are met. The traditional rule, that the fiduciary is to act in the best interest of the beneficiary, is slowly being replaced by a new test that requires affirmative bad faith or intentional misconduct. This new test reduces the legal standard of the fiduciary to nothing more than avoiding unfair treatment. The traditional rule would say that if an attorney receives a commission from the sale of life insurance products with which to fund an estate plan he created, he has breached his fiduciary duty, regardless of damage to the client, and must disgorge all the profits made in the transaction. Modern trends, however, say that if the attorney discloses the self-dealing, gets the client's consent and the transaction is fair and reasonable, then no breach has occurred and it is acceptable for him to keep the profits.

Has the evolution of the fiduciary duty of loyalty led to a better method of serving the client's interests? Has the evolution exposed the attorney to any negative effects? What role do the Rules of Professional Conduct play in making these determinations?

The Rules of Professional Conduct

Utah Rule of Professional Conduct 1.7 asks the lawyer to evaluate whether a conflict exists between his interests and the interests of his client, and allow him to overcome the conflict if he reasonably believes that it will not adversely affect his representation of the client and he has disclosed the conflict and has received the client's consent.

Utah's Rule 1.8 says that a lawyer's participation in business transactions with his client should only be conducted when the lawyer's interest is fair and fully disclosed and consented to by the client after the client is given reasonable time to seek independent advice. Many of the difficult ethical problems lawyers face arise from a conflict between their duty to the client and their efforts to earn more money. The comments to Rule 1.7 mention the

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lawyer's need for income as an important factor in the lawyer's inability to give detached and disinterested advice. With the desire for more money being a key factor leading to ethical violations, lawyers getting into non-legal business ventures such as selling insurance may be starting down the "slippery slope" that leads to other ethical violations.

The professional rules in most states have adopted the "new" standard of fiduciary duties, stating that if the attorney discloses and the client consents then it is permissible to have a personal interest contrary to the client's, as long as the lawyer believes he can still adequately represent the client. The traditional view of the fiduciary duty of loyalty, in comparison, says that if the conflict exists the attorney is to act in a disinterested manner in the client's interest – and that conduct deviating from that standard results in liability, regardless of the fiduciary's motive or intent.

Why are standards for the fiduciary duty of loyalty being reduced? Why do the professional rules conform to the "new" standard and not the standard as defined by Judge Cardozo? It seems the "morals of the marketplace" have degraded the fiduciary duty of loyalty and the professional rules have adopted those same morals. Given the current distrust of lawyers and the litigious society we live in, however, would not the wise lawyer practice with a standard of undivided loyalty and conduct himself in a manner higher than that "trodden by the crowd"?

Most states have adopted a standard that if the transaction is fair and reasonable, and if the there is disclosure and consent, the practice of selling insurance is not unethical. Utah State Bar Ethics Advisory Opinion, No. 99-07, states "the lawyer should commence the analysis of these issues with a strong concern that the lawyer may exert undue influence over the client or that the duty of loyalty could be impeded. In addition, the lawyer must consider other relevant factors before determining that it is appropriate to receive a commission from an investment advisor to whom a referral is made." Utah, like most states, allows the attorney to determine if the conflict is of such magnitude that it cannot be overcome without affecting the representation of the client. Advisory Opinion No 99-07 says:

> It will be very difficult for a lawyer to maintain independence while taking a percentage of an investment broker's services due to a client referral. Individual lawyers involved in this type of situation are permitted to consider all of the facts and reach a determination whether a conflict of interest exists. As long as such a determination meets the specific requirements of Rules 1.7 and 1.8 and is objectively reasonable in view of concerns expressed in this Opinion, there will be no ethical violation.[1]

Most state, including Utah, acknowledge the practice of estate planners selling insurance as being in the "gray" area of ethics, associated with great risks and possibilities for self-dealing, but they allow the attorney discretion in the decision making as long as he conforms to the rules as stated above.

Despite its acceptance, the practice of serving in such a dual capacity is at its foundation a conflict of interest and a violation of the principles against self-dealing as long established in fiduciary law. Yet, only New York and Rhode Island have been identified by the author as agreeing with the traditional view of fiduciary duties and completely prohibiting estate planners from selling life insurance products to their clients. New York concluded that:

> A lawyer engaged in estate planning may not recommend or sell life insurance products to the lawyer's estate planning clients if the lawyer has a financial interest in the sale of the particular products. That is because the lawyer's financial interest would be reasonably likely to interfere with the lawyer's independent professional judgment in advising the client how best to satisfy his or her financial needs in the context of trust and estate planning. Although [the Rules of Professional Responsibility] would allow the lawyer to engage in business dealings with a client, subject to client consent, when it is "obvious" that doing so will not impair the lawyer's independent professional judgment on behalf of the client, we concluded that it would never be obvious that the lawyer's professional judgment would be unimpaired by his or her self-interest when the lawyer, in the role of lawyer, advises a client to purchase products from the lawyer, in the role of insurance broker.[2]

The New York opinion made it clear that there is a great possibility the "lawyer might give the client different or inferior legal advice due to [a personal] financial interest."

The committees in Rhode Island and New York agree that the conflict is too great to be adequately overcome through disclosure and client consent. The Rhode Island committee said:

> There could be no meaningful consent by the client where the estate-planning lawyer has a separate interest in selling insurance. The client is entitled to rely on, and the lawyer is obligated to provide, independent professional judgment. [Therefore], a lawyer may not solicit or accept a client's consent to such a direct and substantial conflict [of interest].[3]

The Role of Disclosure – Is it Enough?

New York and Rhode Island have safeguarded clients' interests by declaring that no amount of disclosure will overcome the seriousness of the conflict. Utah, like most other states, says that by disclosure and consent the attorney can overcome this conflict. So who is right?

Unfortunately, the requirement for disclosure is not regulated in any way to ensure that the client has a substantial understanding of the material facts. In the Illinois case of *In re Chernoff*,[4] an attorney arranged a real estate deal for his clients in which he had a personal interest. One of the documents the clients signed revealed that the attorney was an interested party in the transaction. Apparently the attorney felt that having one of the papers on the pile of closing documents disclosing that he was a party to the transaction was good enough to fulfill his disclosure requirement.

The clients maintained throughout the ordeal that they had no knowledge of their attorney's personal interest. They suffered a financial loss and disciplinary action was taken against the attorney in the form of a six-month suspension. The court said although one of the documents that the clients signed revealed the lawyer's interest, this revelation fell far short of the degree of disclosure required in a transaction between attorney and client.

Disclosure, if the only method used to protect the client's interests, must be safeguarded so that it is more than simply an informal passing of information. The client must be assured that he has been informed of every personal interest that the lawyer has in the transaction, the nature of the compensation and the possible ramifications of such a conflict of interest. Only then can the client's consent be considered informed.

Common Business Sense

Is it a good long-term business strategy to sell insurance to estate planning clients? Or, is the offering of insurance products a service which clients consent to because it benefits them? Truett Cathy, founder of Chick-Fil-A, now with over a thousand restaurants, talks about loyalty as one major key to business success. He says: "the Loyalty effect, the full range of economic and human benefits that accrue to [businessmen] who treat their customers in a manner worthy of their loyalty, is at the core of most of the truly successful growth companies in the world today."[5] The wise attorney will realize that good business sense tells us that complete loyalty to the client is the prudent course for successful business because if a client feels he is treated unfairly he can, and will, go elsewhere for his legal services.

An excellent example is the recent lawsuit filed against Jonathan Blattmachr, one of the nation's most influential estate planners, accusing him of breach of contract, negligent misrepresentation and violation of his duty of loyalty.[8] The suit brought by Charles Benenson, a New York Real estate mogul, accuses Mr. Blattmachr of approaching the Benensons with a estate planning technique that would require the purchase of a $60 million dollar insurance policy from a salesmen Mr. Blattmachr introduced to the clients. The purchase would eventually pay a sales commission of $4.4

million. The Benenson's say that commission is twice what they were told, and that they could have purchased a private placement policy with commissions of only $600,000. The suit accuses Mr. Blattmachr of not disclosing the conflict of interest with the insurance brokers. For relief, the suit seeks $1.5 million in damages, plus a return of the $970,000 paid in legal fees for Mr. Blattmachr's opinion letter, plus punitive damages. Mr. Blattmachr and his firm, Milbank Tweed Hadley & McCloy, call the lawsuit "patently absurd" because it characterizes Mr. Blattmachr as having played the role of an insurance salesman when he "had nothing to do with the Benenson's choice of insurance products."

The outcome of this lawsuit is undecided, but we do know that Mr. Blattmachr will have the burden to prove he was not involved in the purchase or recommendation of the life insurance product. That may be a hard burden to prove. We can also assume that it is a headache that could have been avoided by adherence to the traditional fiduciary duty of loyalty, regardless of what the professional rules may allow.

Malpractice Insurance Coverage

An attorney assuming this dual role of estate planner and insurance salesperson must also consider the possibility that his malpractice policy will not cover his investment advice. If an attorney if found liable for advising a client regarding the purchase of insurance, it is possible the malpractice insurer will argue that the attorney's responsibility was to draft the estate plan, not to fund it. Of course if the attorney is the licensed insurance broker and not just in a referral agreement with a broker, he could purchase additional insurance to cover any insurance mistakes; but if the attorney's conduct constitutes fraud, that insurance will not be available and the attorney might suffer the consequences of malpractice liability that is not covered by his insurance carrier.

Conclusion

Will attorneys conduct themselves in these types of business relationships with an honest, complete and unwavering loyalty to the interests of the client, or do we need to use the law to encourage and, if necessary, compel them to conform to a level above the morals of the marketplace?

Considering the factors mentioned above, including the slippery slope of ethical violations and malpractice liability, it seems the prudent lawyer will decide against serving in this dual capacity. A lawyer is in a position of great trust and advantage, a position that can influence serious decisions in the most subtle ways. If an attorney is giving advice based upon any personal interest, that advice must be viewed as self-serving because it is fraught with risk for undue influence. There is also a great risk that the desire for more money will begin with these sorts of transactions and lead to other, more serious, areas of ethical violations, loss of clients and possible lawsuits.

"Great care must be exercised to avoid irresponsible charlatans motivated primarily by a desire to increase income"[7] but, even more importantly, great care must be taken to protect the responsible lawyer who is enticed by money to risk his livelihood.

Great care should be exercised by each attorney, deciding to practice his or her profession with nothing less than "punctilio of honor the most sensitive" and morals above that of the "marketplace," because that is the duty owed to the client – regardless of what the professional rules may allow.

1. Utah State Bar, Ethics Advisory Opinion Committee, No. 99-07, 5 (1999).
2. New York Commission on Professional Ethics, Opinion 619 (1991) at 2.
3. Rhode Island Supreme Court Ethics Advisory Panel, Opinion 96-26 (Nov. 1996). *See also* the State Bar of Arizona, Opinion No. 99-09, 4-5, (Sept 1999).
4. *In re Chernoff,* 438 N.E. 2d 168 (Ill. 1982).
5. Professor Frederick Reichheld, *Cathy,* vi (2002). (*See also,* Dr. Richard E. Hattwick, *Profile on S. Truett Cathy: The Chick-Fil-A Story,* www.secretsofsuccess.com/people/cathy.html)
6. David C. Johnston, *Wealthy Family is Suing Lawyer Over Tax Plan,* The New York Times, Section C; Column 5; Business/Financial Desk; Pg. 1. (July 19, 2003).
7. Lyman W. Weltch, *Action is Needed in Response to Changes in Fiduciary Investment Duty*, 18 ACTEC Notes, 85 (1992).

The Road Ahead for the Practice of Elder Law[1]

by Jilenne Gunther and Alan K. Ormsby

I. Introduction

Utah's senior population is booming, and consequently, the demand for elder law attorneys is increasing. This demographic change will impact both private practitioners and Utah's non-profit community. Utah's legal community needs a clear vision of the legal problems seniors face to plan for the future.

To prepare for these challenges and opportunities, Jilenne Gunther from the Borchard Foundation on Law and Aging, and Alan Ormsby from Utah's Division of Aging and Adult Services collaborated on a pioneering study of the legal needs of Utah's aging population. This study has received positive national attention from the Administration on Aging, AARP, the American Bar Association, and the Center for Social Gerontology. Many states, including Iowa, Georgia and Florida, are now using Utah's study as a model to conduct similar studies of their own.

The study findings provide a clear picture of the legal needs of Utah's seniors, their perception of and experiences with attorneys, their awareness of current legal services, and the barriers to obtaining legal assistance.

Here are some of the key findings from that report:

- Eighty-six percent (86%) of Utah's seniors have experienced a legal difficulty within the last three years.
- Fifty percent (50%) of seniors have used an attorney's services in the past ten years, and of these, seventy-three percent (73%) found the attorney's service to be very helpful.
- Seniors who have used an attorney in the past are more likely to call an attorney they know for future legal needs (55%).
- The top legal issues seniors want help with are estate planning (44%), government benefits (43%), and advanced planning (40%).

II. How Elder Law is Changing

At present, about one in eight Americans is age 65 or older. However, because of the baby boom population, it is projected that by 2030 about one in five Americans will be age 65 or older. Utah will also experience explosive growth in its senior population. From 2000 to 2030, this population will increase by at least 155%, making Utah the sixth fastest-growing state for people age 65 and older.

This tremendous growth will impact Utah in many ways, including a greater demand for attorneys who practice elder law. It is also important for Utah's non-profit community to address the current needs of seniors and prepare for the upcoming changes. If these issues are not addressed, seniors may not only suffer legal difficulties but also financial, emotional and physical problems.

III. The Need for a Legal Assessment Survey

Utah's seniors need legal services, and many organizations do their best to provide those legal services. But what are the legal needs of Utah's seniors? How can Utah's practitioners provide more effective services, both in private practice and in the non-profit arena? What specific areas of practice and programs should be pursued to meet the legal needs of seniors?

There is very little state-specific data to answer these questions or suggest the types of legal problems that seniors face. No other state has ever specifically surveyed seniors' legal needs. Thus, the legal services provided by practitioners and non-profit agencies have been created based solely on interactions with past clients and stakeholders. Consequently, Utah's seniors are being served based on what attorneys think is needed, and services that seniors really need may be overlooked.

IV. Study Purposes and Design

The study assessed the following: (1) Utah's seniors' legal needs, (2) their awareness of available legal services, (3) their experiences with attorneys and perceptions of attorneys, (4) the barriers seniors have with using an attorney, (5) the legal issues that concern them, and (6) the legal services that would benefit them most.

This statewide, representative study involved the administration of self-completion mail questionnaires to 989 Utahns ages 60 and older. The questionnaire was drafted specifically to address seniors' legal needs. The response rate was a stunning sixty-seven percent (67%).

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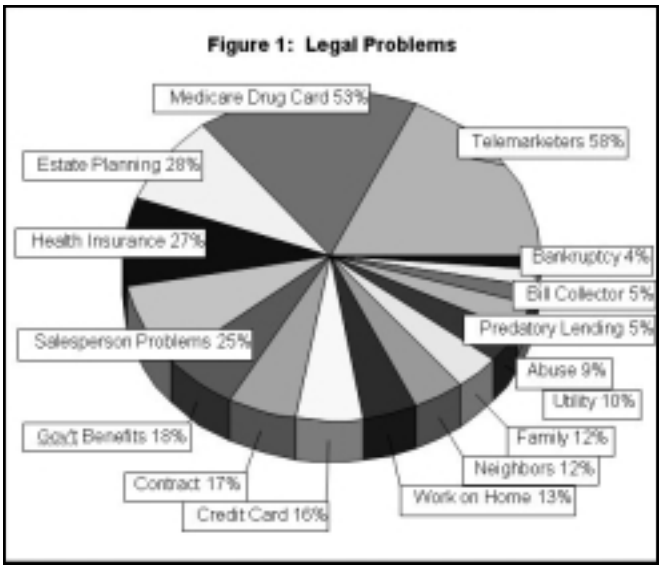
ALAN K. ORMSBY is the Director of the Division of Aging and Adult Services at the State of Utah. Before working as the Director, he was the Legal Services Developer for the State of Utah's Division of Aging and Adult Services. He has also worked as an attorney specializing in long-term health care law.

V. Legal Problems

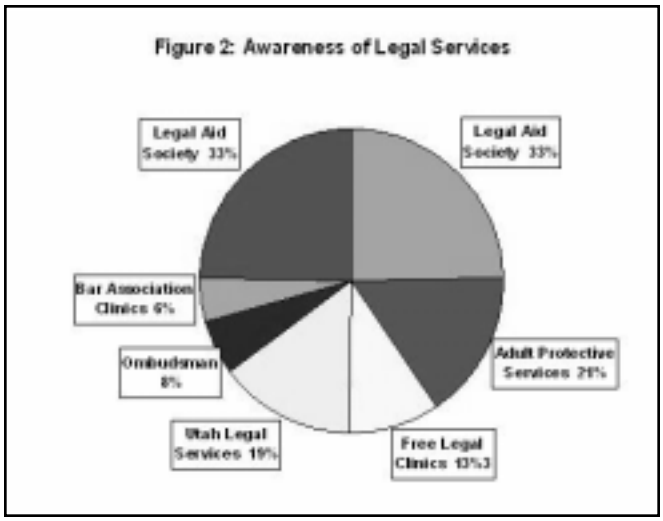
The survey addressed several areas of need; such as; health insurance, government benefits, housing problems, consumer issues, family problems, abuse issues, and estate planning. Survey respondents experienced a wide range of legal needs in the past three years.

The figure below details the percentage of seniors who reported a particular legal problem. Seniors' top legal problems are (from most-reported to least-reported): telemarketer problems (58%) and Medicare Drug Card Program questions (53%). However, note that estate and advance planning (28%), health insurance problems (27%), and salesperson problems (25%) are also cited very frequently. Other legal problems seniors have faced are conditions in the home (18%), government benefits (17%), contract problems (16%), credit card problems (13%), and unsatisfactory work on their homes (12%). In addition, problems with neighbors (12%), family problems (12%), utility issues (10%), abuse problems (9%), predatory lending (5%), bill collectors (5%), and bankruptcy (4%) were indicated.[2] See Figure 1.



VI. Awareness of Legal Organizations

Seniors were asked to indicate the legal services organizations they were aware of. Only 44% of seniors have heard of at least one legal services organization. This indicates a need for more advertisement of legal services available to seniors. A Bear River woman in her nineties said, "We need more articles concerning where legal services are available for folks who cannot afford them." Only 21% of seniors have heard of Adult Protective Services, 33% heard of Legal Aid Society, 19% heard of Utah Legal Services, 13% heard of free legal clinics, 8% heard of ombudsmen, and 6% heard of bar association legal clinics. See Figure 2.

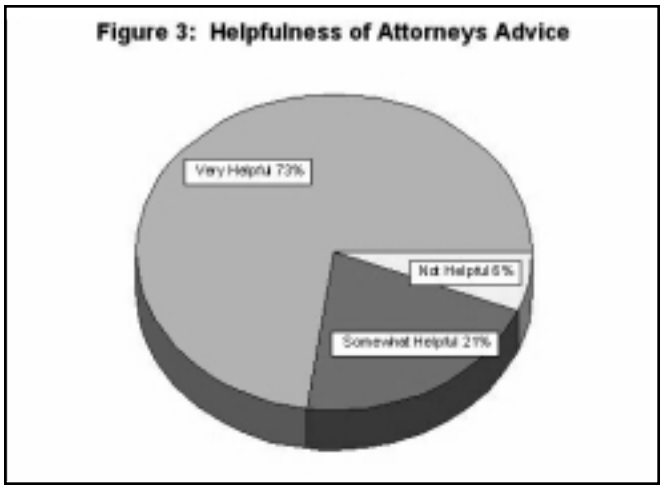


VII. Experience and Perception of Attorneys

A. Experience with Attorneys

A large number of seniors, 50%, have used an attorney within the last 10 years. The majority (64%) of those who used an attorney were charged a normal fee, 15% received a reduced rate, and 17% received the attorney's services for free.

Most seniors (73%) who have used an attorney found the attorney's service to be very helpful, and 21% found somewhat it helpful, while 6% said the attorney's service was not at all helpful. See Figure 3.



One Salt Lake County man commented that attorneys need better communication skills. A Six-County man in his eighties said, "Our experience with the legal profession has been very negative. We've seen large fees and nothing but legalese in return."

Trusting attorneys appears to be a concern for some seniors as well. A Weber man in his seventies said, "I wonder who seniors can trust. Sometimes, seniors are 'taken' by the very people that are supposed to help them."

B. Future Legal Help

If seniors need help in the future, they are most likely to call an attorney they know, get a referral from a friend or family member, and/or call Utah Legal Services. Interestingly, a number of seniors (12%) stated they would contact their church for a referral. Several seniors commented that they turn to their church for help with all kinds of problems, including legal problems.

Those who have used an attorney before are significantly more likely to call an attorney they know if they have a problem in the future (55%). Sixty-one percent of those who said they received helpful advice from an attorney are more likely to call an attorney they know.

C. Barriers to Legal Services

Seniors were asked if they had ever thought of using an attorney but did not, and if so, why. The most common answers are that they never thought about hiring an attorney (25%), and that they think attorneys are too expensive (39%).

VIII. Legal Issues of Concern

Seniors were asked to name the top three legal issues that were of concern to them. The top issues are Estate Planning (44%), Government Benefits (43%), Advance Planning (40%), Health Insurance Problems (30%), Where to Live Issues (28%) and Consumer Problems (25%). Lower responses include Family Matters (4%), Housing Issues (4%), and Abuse (5%).

IX. Most Needed Services

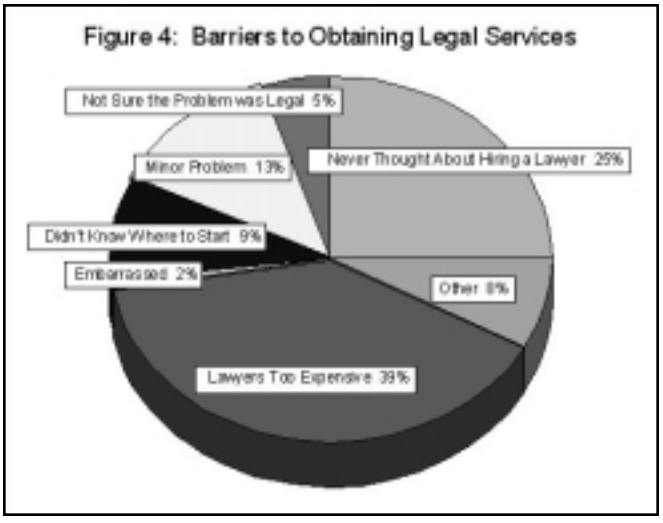
Seniors were asked to name the three services that would be most helpful. The three most-requested services are a hotline (69%), a legal guidebook for seniors (60%), and free or low-cost attorneys (44%).

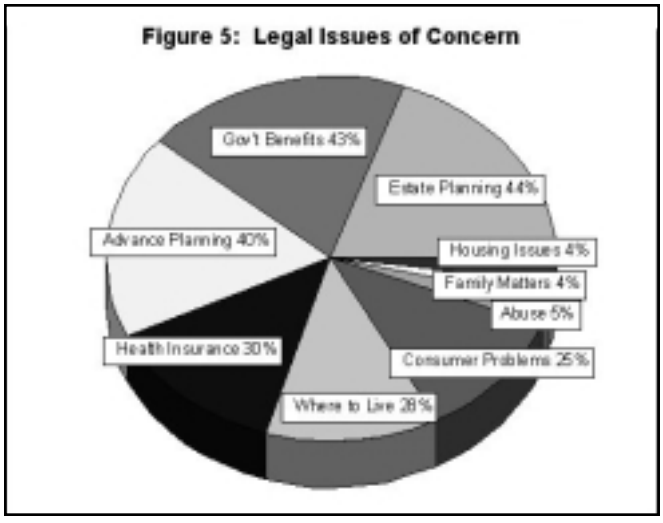
X. Key Recommendations and Conclusion

Utah's recent study provides a glimpse into the current state of seniors' legal needs. Utah's attorneys must now address and prepare for these needs. Here are some key recommendations to do just that:

1. More elder law attorneys are needed to assist seniors with their legal problems.
2. Seniors need attorneys who are trustworthy and affordable.
3. Senior legal services can be focused in the following ways:
   a. Estate and Advance Planning — Attorneys are needed to help with a variety of estate planning needs, especially the creation of a will and living will.
   b. Consumer law — More needs to be done to prevent abuses by unscrupulous telemarketers and salespersons.
   c. Health Insurance — More attorneys are needed to advocate for seniors in health insurance disputes.
4. Utah needs to create two new services for seniors.
   a. Hotline — Utah currently does not have a legal hotline for seniors. Seniors have overwhelmingly (69%) indicated that a legal hotline is the service they want most.
   b. Guidebook — 60% of seniors requested a legal guidebook.
5. More resources are needed to satisfy the legal needs of Utah's seniors. Long-term, ongoing funding will be necessary for a successful hotline. And getting the word out to seniors about the availability of legal services will be of no use if there are no services available due to a lack of funding. Seniors have clearly indicated that legal services are a priority for their happiness and well-being.

1. This article contains excerpts from the Final Report found at www.tcsg.org
2. For specifics on each of the legal problems please see the full report at http://www.hsdaas.utah.gov.





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Why a Private Conservator?

by Becky Allred

He drove an automobile dangerously – and without insurance. Their checking account held in excess of $100,000 and he adopted the habit of handing blank, signed checks to people to fill in as it was to difficult to write it out himself. He decided he no longer wanted to visit the doctor for medication refills and would cause disturbances at the pharmacy when demanding medications inappropriately. His wife was frightened of his driving and would not ride in the car with him but was equally as frightened to take away the car keys. Together they could not fill out an insurance form so they paid full price for prescriptions. When they did decide to cook, they often forgot that there was food in the oven. She needed help and assistance but he, being frugal, thought it would be too expensive. She became malnourished and dehydrated and had to be hospitalized. They both suffered. Clearly there was a need for a conservator and/or a guardian.

As the population grows older and technology and research makes for longer lives, the above scenario becomes more and more common. The problems are innumerable, the solutions equally so. Every case is different, every need is specific, every family unique.

This generation that is growing older is experiencing new and prolonged mental and physical health issues. The fastest growing segment of our population are those 85 years of age and older. In fact, the number of 85 year olds today is twice as many as in 1965. Every day in the United States in excess of 1000 people turn 85. Of that elderly population, only 5% reside in nursing homes. Whether in a nursing home or not, 39% of individuals over the age of 70 require one or more assistive devices. Studies report that 47% of people over age 85 suffer from some sort of dementia.

The numbers are staggering and growing, as are the costs of care and maintenance for the elderly and disabled. Many have been able to plan ahead as 70% of the wealth in the United States is held by those 50 years of age or older. Unfortunately, while the elderly may have the financial means to take care of themselves, they often no longer have the mental ability to do so and are without a support system to safeguard them and implement a functional plan.

When an adult can no longer manage his/her own affairs, the ideal solution would be a trusted family member getting involved and working in the best interest of their relative. Family would be familiar with patterns, life choices, and dynamics that exist and would, theoretically, be the most cautious and considerate caretaker. Unfortunately, there is not always a family member willing, or capable, to step in and address the issues. There are time constraints, financial issues, family dynamics, and logistics. Quite often the children are middle-aged adults themselves with all the inherent stress and responsibilities of their own families, careers, and jobs.

These are people that need their day to day affairs managed. As an attorney this type of service may not be the best use of your time. It is not necessarily appropriate, cost effective, or even desirable to get involved at that level. Bank trust departments often take on this responsibility if the estate is structured to allow their involvement and is sufficient to support their fees. Many banks have a benchmark in estate value that must be met before they will accept the assignment.

While a private conservator is not inexpensive, it may still be the most economical choice, if a family member cannot or will not serve in that capacity.

Conservators are problem solvers and facilitators. Daily money management is only the tip of the iceberg. A conservator will work closely with a guardian, if one is appointed, as well as with other of professionals to solve whatever problems arise with assets; attorneys, real estate agents, plumbers, electricians, estate sales organizers, appraisers, car dealerships, home health care, geriatric care managers, investment counselors, funeral homes, yard care teams, moving companies, even the Holocaust Museum in Washington DC. The list is limitless. The financial responsibility assigned with the appointment also necessitates filing accountings with the presiding authority and keeping related parties informed.

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All of these services take time, and therefore, have related fees. Generally, the more complicated the client's life and assets, the greater the fees.

Another factor to consider when deciding to retain a conservator is family dynamics. Families often disagree. There are multiple disputes that could be going on, for an infinite number of reasons. Sometimes these disputes are quiet and polite, often times they are loud, unpleasant, and very disruptive to the general well being of the senior family member.

The disputes are as varied as the people involved. Some children are concerned about protecting their inheritance, not understanding or wanting to acknowledge that Mom's assets should be used for Mom's care first, inheritance second. Often there is a history of enabling behavior of parent to child that, at this advanced age, has to be curtailed to allow the funds to be extended for as long as possible for Dad's care. Perhaps there are some different perceptions over ownership of personal property. Fear can play a large factor in behavior: fear of the unknown, fear of loss, fear of change. Sibling rivalry rears its head at times and causes heretofore rational children to behave inappropriately with Mom or Dad's assets. Another problem that may render the family unacceptable for the role of conservator is substance abuse.

After a conservator is appointed, if the family continues to raise road blocks, hamper the work of the conservator, create additional work, and unceasingly call and demand attention from the conservator, fees can become greater than expected. While the professional does have some control over these interruptions, they also have the responsibility to show common courtesy and respect to the extended family members.

Sometimes a family member is an obvious problem. According to Utah Adult Protective Services statistics, in 2002 68% of adult financial exploitation was perpetrated by a relative, with children being the largest group and grandchildren being 15% of the problem.

A conservator has the right and the responsibility to try and recover any misappropriated funds. This can be a delicate subject and raises the question of whether the cost of recovery will be greater than the recoverable amount? Sometimes the goal may be to remove an abusive person from the immediate situation, whether restitution is likely or not. Again, not a pleasant job and not one a lay person would relish pursuing.

The elderly are not the only segment of society that is vulnerable and may need a conservator: She was a 45 years old woman diagnosed with Multiple Sclerosis (MS) and had a 16 year old child at home. Her husband had long since departed and left the relationship. She was struggling to survive. The disease had taken its toll and she could no longer control her bodily functions, much less function in the world on a day to day basis. She had income and means to support her daughter and herself, if only someone could help her write the checks, manage the funds, and perform the day-to-day tasks of living.

Then another young woman entered her life and offered to do just that, "help" with everything. The second woman was added to the credit cards, added to the bank account and given the ability to control all assets. She moved in with this mother and daughter and "helped".

It wasn't until an attorney was called to create a new will, assigning all assets to the unrelated adult and leaving the minor child with no inheritance that someone thought to look into the situation. By then, all utilities and house payments were months behind, the home was in a shambles, the bank accounts depleted, the child at risk, and the $6000 per month income disappearing as fast as it came in.

With no family willing to step in and address the problem, a private conservator was appointed by the court. The changes began.

Of course, the conservator could not cure the MS or take away the disabilities. However, proper care could be established through the involvement of a professional care manager. The creditors were contacted and appeased until payments could be made. The home was secured and a plan implemented to repair damages, as funds allowed, so that the daughter would be safe and secure in her home environment. College was investigated and programs accessed to obtain tuition funds. Income was managed for immediate needs and savings for future. The improper will was negated through appropriate legal channels, competency being a critical issue in that resolution. While restitution was unlikely, documentation was submitted to the criminal authorities to prosecute the abuser. Conviction in this case would not only get the perpetrator off the streets, it would mean credit issues could be resolved and the home could be refinanced at a reasonable rate.

As our aged population increases, conservators and guardians will become more and more necessary to protect our frail, elderly, and vulnerable adults. Each year the numbers of exploitation cases of parents by family members are greater than the year before. The role of private conservator and guardian becomes harder, more complicated, and ever more critical.

Private Care Management – Professional Assistance for the Care of Elderly and/or Disabled Clients

by Margy Campbell

The Growing Challenge
The over-80 population is steadily increasing and creating a challenge to lawyers – older clients with problems in their decision-making capacity. It seems that more and more frequently lawyers are faced with the issue of mental capacity of their clients.

Rule 1.14, ABA's Model Rules of Professional Conduct, 2002 Revised, concerning the client with diminished capacity, provides some guidance. The rule triggers protective action when an attorney reasonably believes that a client has diminished capacity, there is a potential for harm to the client, or the client cannot act in his or her own interest.

The Questions Are
Whom can an attorney speak with about a client who may demonstrate diminished capacity? Who can assist the lawyer in determining whether a client has diminished capacity? Who can assist the client in finding private and community services to assist with the client's ongoing needs?

The Answer Is
A professional Private Care Manager.

Demographic Overview
A recently published MetLife study notes that Americans born in 1939 and earlier represent close to 35 million individuals. This represents 12.6% of the current total population, or about one in eight people. 42% is male, 58% female, with those 85+ representing 1.5% of the population in 2000. By 2050 this segment will represent almost 5% of the total U.S. population. Those age 85 and over are the most rapid growing elderly age group, growing 274% between 1960 and 1994. By 2030, the 65+ population will more than double to about 71.5 Million, and by 2050 to 86.7 Million.

What is Care Management (CM)?
CM is much broader than medical case management. The CM planning process includes the client's cognitive, medical, mental health, social, environment, financial, legal and spiritual needs. The process is a series of steps taken by a professional care manager (PCM) to help address an older or disabled individual's needs.

What is a Private Care Manager (PCM)?
PCM is a professional career niche that has been developing slowly over the past 15 years throughout the United States. Among the ranks of professional PCMs are social workers, nurses, accountants, lawyers and other professionals who address the needs of the aging and disabled population by offering very personalized services.

A PCM serves older and/or disabled persons, their family members and their professional care team by providing crisis management intervention and preventative services intended to increase the quality of life for the client. They can offer assurance and peace of mind to the client, their adult children, and other professionals who are on the client's care team. A PCM's mission is to allow an individual to "age in place" by providing the client with community and private supports that will allow them to live in the least restrictive setting while allowing quality of life and utmost safety.

PCMs are generally available 24 hours a day, 7 days a week, 365 days a year. They respond to the needs of the client at the convenience of the client. They consult with the client, care providers and others on the client's care team who need to understand, assess and manage the client's cognitive, medical, mental, social, environmental, financial, legal and spiritual needs.

PCMs are independent specialist in the aging and disability field who can assist when family members and other professionals have questions regarding capacity, medical care, family dynamics, housing options, community resources, end-of-life decisions, personal interests, and other topics specific to an individual's needs.

Overview of PCMs' Responsibilities
Assessing Clients – The assessment process is comprehensive and systematic. It includes assessing the person's functional and cognitive capacity and limitations, medical and mental health care needs, current living environment for safety and appropriateness,

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current social support system, financial position, ability to access community supports, legal and insurance information, and end-of-life wishes and spiritual care needs. The assessment also looks at other needs, strengths, abilities, and existing resources and supports that are currently being used.

Planning Care – A plan of care is developed by taking the findings of the assessment and developing a written plan that will address each area of concern, offer solutions to the problem and assign a date when that problem may be resolved. The plan takes into consideration the access of community supports and the client's ability to pay for private services.

Coordinating and Plan Implementation – The PCM reviews the plan with the client and other interested parties and begins to implement the care plan by coordinating care services in the most cost-effective and timely manner. The implementation takes into consideration the client and their family's desires regarding services, providers and the use of services.

Monitoring the Care Plan – The plan is then monitored by the PCM to make sure that it is working, the services are of the highest quality, and the services are implemented in a timely manner and to the satisfaction of the client and their family.

Are Private Care Managers Licensed?

Currently there is no licensing in any state for PCMs, although many care managers are licensed in their professional and academic careers such as social work, nursing, accounting and law. In 1985 the National Association of Private Geriatric Care Managers (NAPGCM) was founded to provide a network throughout the U.S. for professionals doing the work of PCMs. NAPGCM conducts research, offers national and regional conferences, peer support and publishes a GCM Journal. NAPGCM also encourages all PCMs to obtain a Certified Case Manager (CMC), certification through the Individual Case Management Association (ICMA), hold membership in NAPGCM and adhere to the code of ethics developed for the organization.

Issues of Diminished Capacity

The PCM is generally a trained clinician who can, along with the client's geriatrician, a psychiatrist, psychologist and other mental health professionals, assist with a determination of diminished capacity through an evaluation of the client and/or the review and summary of a capacity evaluation.

PCMs generally have an understanding of mental health diagnosis found in the Diagnostic and Statistical Manual of Mental Health Disorders – IV (DSM-IV). They should have an understanding of clinical medical information and use of medications and formal diagnostic testing. They also need to understand functional behavior as described by interested parties and detailed on capacity instruments and recognize subtle cues regarding an individual's capacity during interviews and fact gathering sessions.

PCMs also understand the formal clinical evaluation report. They are able to easily summarize the sections of information included in the report which contain demographic information; legal background of the client and the reason for initial referral; history of presenting illness – medical history and current symptoms; psychosocial history; informed consent from the client; behavioral observations; tests administered; validity statements noting the opinion of the extent that the tests results were valid; summary of test results; impression and a formal recommendation.

PCM as a Court Visitor or Expert Witness

In a guardianship and/or conservatorship case, a PCM acts as a court visitor to determine whether a proposed protected person has the capacity to attend a court hearing. The PCM visits with the client and interested parties and assesses the client's ability – emotionally and/or physically – to attend a hearing. The PCM then makes recommendations to the court through a formalized written document.

A PCM can be used as an investigator in determining whether or not a guardianship and/or conservatorship is in the proposed protected person's best interest. The PCM can also recommend a specific guardian/conservator to the court based on information gathered through the investigative process.

PCMs are also used as expert witnesses in court hearings in contested guardianship/conservatorship proceedings. The PCMs' experience in the field of gerontology, social work and/or nursing can be a valuable asset to the legal teams working for the benefit of their clients.

Why Use a PCM on the Legal Team?

As lawyers use accountants for information specific to a client's tax position and estate plans, private care managers can assist lawyers with issues concerning a specific client's capacity, by accessing community resources and through court visitor and expert witness testimony.

As a member of the client's legal team, a PCM can offer professional insight to the team, streamline the services offered, ensure continuity of care and help avoid duplication of services. The PCM can also assist with family meetings and help adult children in understanding that the client's needs and rights are paramount to the legal process.

As a member of the legal team, the PCM can offer assistance to the lawyer by providing insight that may not be readily seen by other team members, and when necessary, providing referrals to other professionals. A PCM can also assist with providing protective action, as outlined in the ABA's Model Rules of Professional Conduct, Rule 1.14, 2002 revised, in the event that a lawyer reasonably believes that a client is exhibiting diminished capacity.

Assisted Living in Utah: A Brief Overview for Consumers

by Mary Jane Ciccarello and Joanne Wetzler

What is Assisted Living?

The term "assisted living" describes a wide range of facilities that provide some type of long-term care to older or disabled persons who can no longer live independently. Assisted Living has become a very popular long-term care option in recent years, and assisted living facilities now provide a greater variety of services than ever before. In the past, assisted living residents generally needed no more than limited assistance with "activities of daily living," (ADLs), such as bathing, grooming, dressing, eating, toileting, and walking. Today, however, assisted living facilities provide or arrange for a significant amount of health care, from medication administration to physical therapy and wound care.

According to the National Center on Assisted Living, a provider association, in 2002 approximately 900,000 people lived in more than 36,000 assisted residences in this country. The majority of residents are between the ages of 78 and 85 and more than two-thirds are female. Approximately 25 percent need help with three or more ADLs (compared to 83 percent of nursing home residents), and 86 percent need or accept assistance with medication. At least half of residents have some degree of cognitive impairment. In Utah, there are currently approximately 4,000 residents in assisted living facilities throughout the state.

Federal laws do not address issues in assisted living to the same extent as in nursing homes, and there are few guidelines that states must follow when passing assisted living regulations. Assisted living rules vary from state to state, and even from facility to facility. Because of this lack of regulatory standards, it can be very confusing for potential residents and their family members to know what to expect when moving into an assisted living facility.

While the rights of nursing home residents are protected by federal law because nursing facilities certified to participate in the Medicare and Medicaid programs are required to comply with the provisions of the Nursing Home Reform Amendments of OBRA '87 (42 C.F.R. § 483.10), there is no equivalent federal legislation for assisted living facilities and no comparable national system of resident rights and protections.

Fortunately, Utah has fairly comprehensive rules that govern the operation of assisted living facilities in this state. These rules, found in the Utah Administrative Code R432-270 and R432-6, provide a framework for consumers in determining whether a facility is following the minimum standards for operation. However, residents and their family members are not necessarily content to accept a minimum standard of care and need more information to ensure that a resident receives the highest quality of care available.

Assisted Living Facilities in Utah

Utah assisted living facilities must be licensed by the Utah Department of Health if two or more people live in a place where they receive assistance with activities of daily living from an unrelated caregiver. The licensing rules govern what is expected of facilities and facilities must abide by these rules in order to stay in business.

Facilities are divided into two types of licensing categories – Type I and Type II – depending on the level of assistance needed by the residents. Facilities are further classified as large, small, and limited capacity, depending on how many residents live in the facility. Regardless of the licensing category, facilities can only admit and retain those residents who meet admissions criteria and whose needs can be met by the individual facility. The Administrative Rules governing assisted living facilities in Utah can be found online at: http://www.rules.utah.gov/publicat/code/r432/r432-270.htm.

A Type I assisted living facility is defined as a residential facility that provides assistance with activities of daily living and social care to two or more residents who require protected living arrangements and who are capable of achieving mobility sufficient to exit the facility without the assistance of another person

A Type II assisted living facility is defined as a residential facility with a home-like setting that provides an array of coordinated supportive personal and health care services available 24 hours

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per day to residents who have been assessed under Department rules to need any of these services. The staffing level and coordinated supportive health and social services must meet the needs of the resident. Type II facility residents require significant assistance from staff in more than two activities of daily living, may be independent or semi-independent, but not dependent; and they must be able to take life-saving action (including exiting the facility) in an emergency with only the limited assistance of one person.

Type I and Type II assisted living facilities cannot admit or retain a person who displays suicidal, sexually/socially inappropriate or assaultive behavior, poses a danger to self or others, has a chronic communicable disease (like active tuberculosis) if that disease can't be treated in the facility (or on an outpatient basis) or if the disease might be transmitted to other residents or guests through the normal course of activities, or requires inpatient hospital or long-term nursing care.

A Type II assisted living facility with approved secure units may admit residents with a diagnosis of Alzheimer's disease or dementia if the resident is able to exit the facility with limited assistance from one person, there is at least one staff member with documented training in Alzheimer's/dementia care in the secure unit at all times, the secure unit has an emergency evacuation plan that addresses the ability of the secure unit staff to evacuate the residents in case of emergency, and each resident admitted to a secure unit has an admission agreement that indicates placement in the secure unit. The secure unit admission agreement must document that an approved "wander risk management agreement" has been negotiated with the resident or resident's legally-recognized responsible person. The secure unit admission agreement must also identify discharge criteria that would initiate a transfer of the resident to a higher level of care than the assisted living facility is able to provide.

Assisted Living Staff

The number and type of staff in assisted-living facilities varies greatly. Staffing depends on many factors, including the number of residents and the types of services and amenities offered. The staff may be employed directly by the facility, or by agreements with outside agencies or private contractors. All personnel must be licensed, certified, or registered in accordance with Utah law.

Assisted living staff may include administrators, business and marketing directors, admissions coordinators, direct-care staff (including registered nurses, licensed practical nurses, and certified nursing assistants), food service personnel, activity directors, maintenance personnel and housekeepers. All direct care staff must be at least eighteen years old and have related experience. However, Utah rules allow personal care staff to receive "on the job" training. Regardless of the position, all assisted living staff must receive documented orientation to the

facility and the job for which they are hired. Orientation must include the following: job description; ethics, confidentiality, and residents' rights; fire and disaster plan; policy and procedures; and reporting responsibility for abuse, neglect and exploitation. In addition to orientation, each employee must receive ongoing documented in-service training. The training must be tailored to include all subjects that are relevant to the employee's job responsibilities.

Facilities must establish personnel health policies that protect the health and safety of both staff and residents. Each staff member must have a health evaluation to make sure that they can safely care for residents in assisted living. The health evaluation must document any history of communicable diseases (including testing for tuberculosis) and/or conditions that may prevent a staff member from doing their duties as assigned.

Facilities must keep accurate and complete personnel records that include the following: employee application; date of employment; termination date; reason for leaving; documentation of cardiopulmonary resuscitation and first aid training; health inventory; food-handler's permit; tuberculosis skin test documentation; and documentation of criminal background screening.

CONTRACTS AND AGREEMENTS

Admission Agreements

Upon admission to an assisted living facility, the resident and facility enter into an admission agreement. The admission agreement is a legally binding contract between the resident and the facility that sets forth terms and conditions that largely govern what rights and responsibilities the resident has, as well as the rights and responsibilities expected of the facility. Many assisted living providers believe that important issues should be left to the individual facility's contract rather than rules, regulations or laws. Residents and their advocates must be aware that there are few standards facilities must follow when designing the admission agreement.

In Utah, the resident (or the resident's legally-recognized responsible person) must sign a written admission agreement prior to admission. The admission agreement must be kept on file by the facility and must specify at least the following:

- room and board charges and charges for basic and optional services;
- provision for a 30-day notice prior to any change in established charges;
- admission, retention, transfer, discharge, and eviction policies; conditions under which the agreement may be terminated;
- the name of the legally-recognized responsible party;
- notice that Licensing has the authority to examine resident records to determine compliance with licensing requirements; and
- refund provisions that address the following: thirty-day notices for transfer or discharge given by the facility or by the resident, emergency transfers or discharges, transfers or discharges without notice, and the death of a resident.

Making the attempt to understand the contents of the admission agreement can be intimidating, and the resident may feel that the facility knows best what should or shouldn't be included in the contract. If the document is too difficult to read and understand, a resident may agree to certain terms and conditions that put the resident at great risk for many problems. Examples of these problems are: receiving a room that is not the type the resident wanted; receiving a different meal plan; or added costs and charges that were not clearly disclosed by the facility. The most serious problem associated with admission agreements arises when a resident requires more complex care than the facility can safely provide. The admission agreement may not fully address this situation, and the resident may be at risk for either an improper discharge or retention in the facility with inadequate supervision and care.

Negotiated Risk Agreements

Negotiated risk agreements release a facility from liability arising from its failure to meet at least one aspect of a resident's needs. While providers often assert that such agreements offer assisted living residents additional rights in the form of choice in their daily lives, they may be used as well by providers to waive resident rights. Many advocates argue that there are no good reasons for such agreements. Rather, good care planning can achieve the results a resident needs without waiving any rights a resident might have. Washington and Oregon now prohibit such agreements. In Utah, they are commonly used and a sample form is provided on the website of the Department of Health.

QUALITY OF LIFE

Living Units

There are several types and sizes of assisted living units, ranging from full-size one-bedroom apartments to studio apartments. Assisted living units tend to be smaller than average apartments. This space limitation can make for a difficult transition for a resident who is used to his or her own home. Some facilities allow residents to bring in their own furnishings, provided space permits.

Most assisted living units are rented, not owned. As with any rental property, the rent often depends on such factors as the size of the living area and the type of services and amenities provided. Some assisted living facilities charge fees in addition to rent. There may be a one-time non-refundable entrance fee, or additional fees for services not included in the basic rent. These services may range from extra meals or extra housekeeping to transportation costs from the facility to a doctor's office. In Utah, both Type I and Type II facilities must provide each resident

with a separate living unit. Two residents may share a unit if they make the request in writing and both residents agree to the living arrangement.

Meals and Mealtimes

Many times, what determines a resident's overall satisfaction with a facility is the resident's satisfaction with the quality of meals and meal service. In most states, the facility is responsible for menu planning and mealtimes. Facilities in Utah must provide three meals a day, seven days a week (plus snacks) to all residents and must keep a one-week supply of nonperishable food and a three day supply of perishable food to prepare the planned menus. There can be no more than a 14-hour interval between the evening meal and breakfast, unless a nutritious snack is available in the evening.

All menus must be approved and signed by a certified dietitian. Meals must be served in a designated dining area suitable for that purpose, or in resident rooms upon request by the resident. However, residents are encouraged to eat their meals in the dining room with other residents. The cost of meals may be included in the resident's rent, but some facilities may charge an extra fee for snacks or meal delivery service. Even though the facility is responsible for planning and preparation, the resident and his or her family must make sure that the facility is providing nutritionally adequate meals.

Recreation, Activities and Socialization

Though the main focus of assisted living is providing assistance with residents' activities of daily living, an important factor to consider is the availability of recreational and social programs and activities. The quality of group and individual activities can vary greatly among facilities. Ideally, the facility has a recreation therapist on staff to manage these programs and activities. These staff members may be specially trained in the development and implementation of programs geared towards the special needs of residents.

In Utah, residents are encouraged to maintain and develop their fullest potential for independent living through participation in activity and recreational programs. The facility must provide opportunities for the following: socialization activities; independent living activities to foster and maintain independent functioning; physical activities; and community activities to promote resident participation in activities away from the facility.

Pets

Upon approval of the administrator, family may bring residents' pets to visit. The facility may even allow residents to keep household pets such as dogs, cats, birds, fish, and hamsters if permitted by local ordinance and by facility policy.

Disaster and Emergency Preparedness
The facility is responsible for the safety and well-being of residents in the event of an emergency or disaster. The facility must develop and coordinate plans with state and local emergency disaster authorities to respond to potential emergencies and disasters. The plan must outline the protection or evacuation of all residents, and include arrangements for staff response or provisions of additional staff to ensure the safety of any resident with physical or mental limitations.

QUALITY OF CARE

Resident Assessments
Before accepting a resident, the facility must obtain sufficient information about the person's ability to function in the facility through the following: an interview with the resident and the resident's legally-recognized responsible person, and the completion of the resident assessment. A signed and dated assessment must be completed for each resident prior to admission and at least every six months thereafter. The facility must use a resident assessment form that is approved and reviewed by the Department to document the resident assessments. For these forms and other pertinent licensing information, see http://health.utah.gov/pcra.

The initial and six-month resident assessment must be completed and signed by a licensed health care professional who must state that the resident meets the admission and level of assistance criteria for the facility. The facility must revise and update each resident's assessment when there is a significant change in the resident's cognitive, medical, physical, or social condition and update the resident's service plan to reflect the change in condition. If the Licensing Department determines that the facility knowingly and willfully admits or retains residents who do not meet licensing criteria, then the Department may, for a time period specified, require that resident assessments be conducted by an individual who is independent from the facility.

Service Plans
The services provided or arranged by the facility must be in accordance with each resident's individualized service plan. The plan must be consistent with the resident's unique cognitive, medical, physical, and social needs, and be developed within seven calendar days of the day the facility admits the resident. The resident assessment is used to develop, review, and revise the service plan for each resident. The service plan must be prepared by the administrator or a designated facility service coordinator, and must be periodically revised as needed.

The service plan must include a written description of the following:

- services provided;
- who will provide the services, including the resident's significant others who may participate in the delivery of services;
- how the services are provided;
- the frequency of services; and
- changes in services and reasons for those changes.

Resident Records
Assisted living facilities must keep an accurate and complete record for each resident. The record must include the resident's personal information and important family and medical contact information. The record must also include the admission agreement, the resident assessment, and the resident service plan.

Medical Care
Regardless of the type of facility, each person admitted to an assisted living facility must have a personal physician or a licensed practitioner prior to admission. The facility must notify a physician or other health care professional when the resident requires immediate medical attention.

The facility must assist residents in arranging access for services for medically related care including physician, dentist, pharmacist, therapy, podiatry, hospice, home health, and other services necessary to support the resident.

The facility must arrange for care by notifying the resident's legally-recognized responsible person; for transportation to and from the practitioner's office; or for a home visit by a health care professional.

If needed, Type I residents can receive intermittent care or treatment in the facility from a licensed health care professional either through contract or by the facility, if permitted by facility policy. The facility must develop written policies and procedures defining the level of nursing services provided by the facility.

Type I and Type II assisted living facilities cannot provide skilled nursing care, but must assist the resident in obtaining required services. Whether a nursing service is skilled depends on the complexity or specialized nature of the prescribed service, and whether the service can be safely or effectively performed only by (or under the close supervision of) licensed health care professional personnel.

A Type I assisted living facility must employ or contract with a registered nurse to provide or delegate medication administration for any resident who is unable to self-medicate or self-direct medication management.

A Type II assisted living facility must employ or contract with a registered nurse to provide or supervise nursing services to include: a nursing assessment on each resident; general health monitoring on each resident; and routine nursing tasks, including those that may be delegated to unlicensed assistive personnel.

First Aid
There must be one staff person on duty at all times who has appropriate training in basic first aid, the Heimlich maneuver, certification in cardiopulmonary resuscitation and emergency

procedures to ensure that each resident receives prompt first aid as needed. The facility must have a first aid kit available at a specified location in the facility, as well as a current edition of a basic first aid manual approved by the American Red Cross, the American Medical Association, or a state or federal health agency.

Medications

In Utah, a licensed healthcare professional (usually a nurse) must assess each resident to determine what type of assistance (if any) is needed with medication administration. This assessment must be documented and must include the level and type of assistance required.

Many residents living in assisted living facilities are able to self-administer their own medications. Some residents are not able to take their own medications for one reason or another. They may need help with opening the medication bottles and taking out the medication, or they may need help figuring out what pills to take at what time. Facility staff can help if the resident is able to self-direct the medication administration. Usually, the resident must demonstrate that he or she can correctly identify the medications (for example, by color or shape) and have the ability to question changes in their own medication routines. The resident must be aware of what the medications look like and know when they should be taken, but the facility staff can assist by reminding the resident to take the medication, opening the bottles, or reminding the resident when the prescription needs to be refilled.

Some facilities may allow family members to help the resident with their medications. (The designated person cannot be a staff member.) The medication must be in a package set up by a health care practitioner, such as a doctor or a pharmacist. The family member must also document that the medication was given. Most importantly, the designated family member must sign a waiver indicating that they agree to assume all responsibility for administering the medications and refilling the prescriptions when needed. This is an especially important concern, and families should make sure that they understand the implications of the waiver.

If the resident is unable to self-administer or self-direct the medications, the assisted living facility staff may then be in charge of administering the medications. In some facilities, the person assisting the resident with their medications may not be a nurse or other trained, licensed health care professional. Utah rules allow facilities to hire a licensed healthcare professional to "delegate" the medication responsibilities to facility employees who are not nurses.

Hospice in Assisted Living

Hospice care provides medical, psychological, emotional, and spiritual care to people who are dying and their families. Hospice

care focuses less on treatment of illness and more on the resident's comfort and emotional health at the end of life. Although hospice care is generally thought of as something that is provided at home, hospice care also can be provided in an assisted living facility.

Paying for Hospice Care in Assisted Living
Hospice care may be covered under Medicare, Medicaid, private insurance plans, HMOs, and managed care organizations. A person may still be eligible for hospice services if she is still seeking curative care for a life-threatening condition, but it is likely that Medicaid, Medicare, and private insurers or HMOs will not pay for both curative and hospice care. When hospice care is provided in an assisted living facility, the hospice care should not replace anything that the facility otherwise is obligated to do. Instead, the hospice agency should provide services that supplement and improve the facility services.

Discharge From a Facility
In Utah, a resident can remain in an assisted living facility provided the facility's construction can meet the resident's needs, the resident's physical and mental needs are appropriate to the assisted living criteria, and the facility provides adequate staffing to meet the resident's needs.

A resident may be discharged, transferred, or evicted if the facility is no longer able to meet the resident's needs because the resident poses a threat to health or safety to self or others, or the facility is not able to provide required medical treatment.

A resident may also be discharged, transferred or evicted if the resident fails to pay for services as required by the admission agreement, the resident fails to comply with written policies or rules of the facility, the resident wishes to transfer, or the facility ceases to operate.

The facility has to notify the resident's legally-recognized responsible person within 24 hours of significant changes or deterioration of the resident's health, and ensure the resident's transfer to an appropriate health care facility if the resident requires services beyond the scope of the facility's license. No matter what the reason, the facility must provide sufficient preparation and orientation to a resident to ensure a safe and orderly transfer or discharge from the facility.

Notice of Transfer or Discharge
Prior to transferring or discharging a resident, the facility must give a transfer or discharge notice to the resident and the resident's legally-recognized responsible person. The notice of transfer or discharge must be in writing (with a copy placed in the resident file) and be phrased in a manner and in a language the resident can understand. The notice must be either hand-delivered or sent by certified mail, and made at least 30 days before the day on which the facility plans to transfer or discharge the resident. However, the notice may be made as soon as practicable before transfer or discharge if the safety or health of persons in the facility is endangered, or an immediate transfer or discharge is required by the resident's urgent medical needs.

The notice of transfer or discharge must:

- detail the reasons for transfer or discharge;
- state the effective date of transfer or discharge;
- state the location to which the resident will be transferred or discharged; and
- state that the resident may request a conference to discuss the transfer or discharge.

The notice must also contain the following information:

- for facility residents who are 60 years of age or older, the name, mailing address, and telephone number of the State Long Term Care Ombudsman;
- for facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled; and
- for facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals.

Contesting a Transfer or Discharge
The resident or the resident's legally-recognized responsible person may contest a transfer or discharge. If the transfer or discharge is contested, the facility must provide an informal conference, except where undue delay might jeopardize the health, safety, or well-being of the resident or others.

The resident or the resident's legally recognized responsible person must request the conference within five calendar days of the day of receipt of notice of discharge to determine if a satisfactory resolution can be reached. Participants in the conference include the facility representatives, the resident or the resident's legally-recognized responsible person, and any others requested by the resident or the resident's legally-recognized responsible person.

PAYING FOR ASSISTED LIVING

Facility Pricing Options
There are different ways that facilities can charge residents for the services they receive. One way is referred to as the "all-inclusive" method. This means that rent and any additional services are included in a set monthly fee.

Another method charges residents a flat rate for a certain set of basic services, and then charges an additional fee for extra services. With this " a la carte" type of pricing option, residents pay only for those services they receive. For example, in addition to the basic monthly rent, a facility may have a schedule of charges based on resident usage of services or facilities. These additional

charges may include personal laundry, television, transportation costs, and medical supplies, as well as assistance with personal care needs such as bathing, grooming, and dressing.

Other Charges

In addition to monthly rent and service charges, some facilities may charge a security deposit. Others may charge a non-refundable entrance or "community fee." Some deposits might not be refundable, even if the resident moves elsewhere, or never moves in at all. Many facilities charge an additional fee if payment for the services are received late. Fees may vary from a set fee to an additional charge for each day beyond the date payment was due. Some facilities charge an annual percentage rate assessed daily on unpaid rent.

Payment Options

Regardless of the source, the costs involved can make paying for assisted living prohibitively expensive for many people. Today, there are a few public assistance programs available for eligible residents, but the majority of residents in assisted living must continue to pay for services with their own private money.

Private Payment

Assisted living is largely a private-pay business. Residents pay for assisted living expenses from private money sources including income from pensions and retirement, as well as money from savings and investment accounts. Some families help with covering the costs associated with assisted living. In other cases, residents use the proceeds from the sale of real estate and personal property. In addition, the expenses of assisted living facility residents may be deductible as health-related expenditures for income tax purposes.

Long term care insurance may pay for at least some of the expenses if the facility qualifies as an institution under the policy and the policyholder needs some assistance with ADLs.

Medicare

Medicare may be a source of payment for certain expenses related to assisted living. Medicare is a federal health insurance program for people 65 and over and certain disabled people under 65. Generally, Medicare does not cover assisted living costs. However, Medicare may pay for short-term services contracted through a home health care or hospice agency and provided to the resident at the assisted living facility.

The Medicare home health care benefit generally requires a need for skilled nursing care, or physical or speech therapy. Nursing care is considered "skilled" if a nursing service requires the expertise of a licensed nurse. For example, treatment of a wound or administration of an injection are skilled nursing services that qualify for Medicare reimbursement. On the other hand, bathing a resident, or helping a resident get dressed, are services that do not qualify for Medicare reimbursement.

Medicaid Payment for Personal Care Services
Medicaid is a program where the federal and state governments work together to pay for healthcare services of eligible people. Traditional Medicaid does not pay for the "room and board" part of assisted living. However, states may offer reimbursement for personal care services provided in the assisted living facility as part of their Medicaid plan. This type of reimbursement plan is not currently available to assisted living residents in Utah. In early 2006, Utah Medicaid will be offering this type of Medicaid payment under a federally approved home and community based waiver program. To qualify for benefits under the Medicaid waiver program, a person must meet both the financial and medical eligibility requirements for nursing home Medicaid. Once eligible, Medicaid dollars will pay for the personal services part of a resident's assisted living costs, but the resident will still be personally responsible for payment of the room and board costs.

Utah's Current Long Term Care and Medical Case Management Program
Since 2000, Utah Medicaid has been offering a long term care and medical case management program in several counties. This demonstration project, known as Flexcare in Salt Lake, Tooele, and Davis Counties, Weber MACS Plan in Weber and Morgan Counties, and Molina Independent Care in Washington, Kane, Iron, Beaver, and Garfield Counties, has been a wonderful payment resource for approximately 700 people. Participants must be medically and financially eligible for nursing home Medicaid and must meet several other criteria. Once eligible, a participant may use the Medicaid dollars to pay an assisted living facility for room and board costs as well as other personal services. This program will be phased out in early 2006 once the Medicaid waiver program mentioned above goes into effect.

IF PROBLEMS ARISE
Ideally, a facility should strive to fulfill every obligation required by law. Many facilities provide excellent service and care but, even under the best circumstances, problems may arise. These problems can involve anything from payment issues to the quality of healthcare and services.

Resident Self-Advocacy
A resident first should talk to an employee on duty at the time the problem occurs – preferably the person or persons directly involved. If no one is available, or the resident is not comfortable talking directly to the persons involved, the resident should contact the facility administrator. Many times, the issue can be resolved at this level, and residents often find that prompt and direct communication can resolve issues in the simplest and most effective way.

Each facility should have a resident or family council that serves to advocate for the rights of all facility residents. These councils meet regularly to address questions and concerns about facility issues. Many of these councils are instrumental in making changes that directly improve the quality of life in the facility.

Unfortunately, sometimes problems cannot be resolved by talking to the facility staff or administrator. If a resident is not satisfied with a facility's response, the resident can turn to certain agencies and resources for help.

Long Term Care Ombudsman Program
Assistance may be available from the local Long Term Care Ombudsman program. An "ombudsman" is someone who investigates reported complaints and helps to achieve settlements. Federal law (the Older Americans Act) requires each state to have a Long Term Care Ombudsman program, although ombudsman programs vary greatly from state to state. However, all Ombudsman programs operate independently from the long-term care facilities in which they visit and work.

In Utah, the Long Term Care Ombudsman program provides advocates for residents sixty years of age and older in any facility licensed by the Department of Health. Although Ombudsman representatives are impartial in investigation, they take the resident's perspective when resolving problems. They seek to resolve situations on terms acceptable to the resident. Ombudsman representatives provide information to facilities and residents, investigate complaints, work with family and resident councils, and train facility staff as well as the local community about various issues in long term care.

For more information on the Long Term Care Ombudsman Program in Utah, see the web site of the Utah Division of Aging and Adult Services, www.hsdaas.utah.gov.

State Licensing
The Department of Licensing has the authority to investigate complaints about facilities. Residents always have the right to report problems or complaints to the state licensing department.

When a complaint is made, the licensing agency must investigate within a certain amount of time. If violations in licensing requirements are found, the agency may require the facility to fix the problem, or risk losing their license or pay penalties.

Usually the facility is notified of the deficiency and given some time to correct the problem. The facility must outline a plan of action for correcting the problem. If the facility does not correct the problem as outlined, the facility may be subject to sanctions, such as fines or limitations on the facility's operation.

Residents must be aware that state facility licensing requirements are minimum standards. They in no way reflect the best practice that residents and advocates should strive towards.

Professional Licensing Boards
States establish professional licensing boards that set standards for health care personnel including registered nurses, licensed

practical nurses, physical therapists, certified nursing assistants, social workers, physicians. These licensing agencies provide examinations and certifications to these groups, and also investigate complaints about individual healthcare workers. Residents can usually report complaints directly to their state's department of professional licensing. In Utah, the licensing of health care professionals is governed by the Department of Professional Licensing (DOPL).

Other Remedies

Other legal sources of protection for assisted living residents may include federal and state antidiscrimination laws, public housing laws and regulations, contract laws, consumer protection laws, and private rights of action. For more information, see Stephanie Edelstein, *Resident Rights in Assisted Living: Sources and Resources,* BIFOCAL, October 2005, Vol. 27, No. 1, 7-11.

CONCLUSION

Assisted living facilities offer a very attractive housing option for older and disabled adults in need of support with their ADLs but who are not in need of skilled nursing care. Assisted living facilities are often homey, friendly environments that provide meals, socialization, supportive care, and security. While Utah has administrative code rules that provide some general oversight, arrangements are to a great extent contractual between the resident and facility. As advocates for older clients, lawyers should advise clients on admission contracts, negotiated risk agreements, protective remedies, and the relationship between assisted living and public benefits like Medicaid. Assisted living is primarily paid for out of private funds-personal income, savings, investments, and long term care insurance, but some public benefits apply, like Medicare and Medicaid, and advocates must understand these issues to best advise their clients.

USEFUL INTERNET RESOURCES

AARP – www.aarp.org

ABA Commission on Law and Aging – www.abanet.org/aging

Assisted Living Federation of American – www.alfa.org

Center for Excellence in Assisted Living – http://www.theceal.org

Consumer Consortium on Assisted Living – www.ccal.org

National Center for Assisted Living – www.longtermcareliving.com/planning_ahead/assisted/assisted1.htm

National Senior Citizens Law Center – www.nsclc.org

Utah Department of Health/Bureau of Licensing – www.health.utah.gov/licensing

Utah Division of Aging and Adult Services – www.hsdaas.utah.gov

The Bible of Elder Law

by Just Learned Ham

I was puzzled when Sister Emily Latella asked me to write an article for the special *Bar Journal* elder law issue. I was, of course, flattered and eagerly agreed – you've always got to be thinking about the resume, and the exposure of a major legal periodical is intoxicating – but it seemed like such an unlikely subject. Missionaries don't typically face many legal issues. I have to confess that, at first, I couldn't think of enough elder law issues to fill an elder law issue. But the more I thought about it, an elder faces tough legal calls every day of the best two years of his life. And there really aren't any good treatises available. Even if there were, the "triple combination" is hefty enough as it is. I think we'll have to settle for some issue-spotting.

Maybe the most obvious elder law issue is trespass. Learn to recognize the phrase "Keep Out" in Spanish. It will help avoid a lot of misunderstandings. On the other hand, if you feel truly inspired, you can pretend your language skills are a little weak and ask for help reading the sign. You can meet lots of interesting people that way. It doesn't work as well, though, with "Beware of Dog" signs.

A related matter is the famous Green River Ordinance. I haven't seen one of those "Green River Ordinance Enforced" signs for a long time. I assume they're still out there. Green River Ordinances prohibit door-to-door solicitation as a public nuisance, subject to criminal penalties.[1] I first learned about them as a 10-year-old selling candy bars for my little league team. My Mom ended up buying all my candy bars. I know what you're thinking, elder. "That kind of ordinance only applies to salespeople. If they try to apply that to missionaries it's an unconstitutional abridgement of my free speech rights and I'll take it all the way to the Supreme Court!" You're right, but you're too late to be the hero. The Jehovah's Witnesses already slew that dragon for you (8-1, with the late Justice Rehnquist dissenting).[2] So knock away with impunity, at least in this country. Things might be different in Thailand or Bolivia, but I can't give you any guidance there – the opinion committee won't let me (actually, they won't let me do anything at all, at least not unless I have an affidavit from our malpractice carrier, or approach them under an assumed name, but that's another story).

And how about the local traffic code insofar as it relates to bicycles? Can you ride on the sidewalk? Can you park on the sidewalk? (I realize these may be moot points in countries whose languages don't include a word for 'sidewalk,' but if we aren't going to allow the discussion of moot points in the *Bar Journal,* then we might as well rename it the *Bar Pamphlet* and cut back to a single annual issue – let's face it, moot points are the staple of our profession, by the time the client picks up that August 1997 *Field and Stream* in your lobby for the first time, the damage has usually already been done.) Can you use the left turn lane, or do you have to stop, use two crosswalks, and only then proceed? Do the local alcohol and drug-related traffic offenses apply equally to bicycle riders (hopefully, another moot point)? Make sure you know the required hand signals (I mean the turn signals, not the ones that mean, loosely translated, "I'd prefer not to talk to you right now").

A little practical advice might be useful, too. The two pants suit at Mr. Mac is a good idea, but don't buy the dark blue Swedish knit. It can be a little slick and you'll have trouble staying on the bike when you hit a little bump. And speaking of slippery, get off and walk if it's a rainy day and you're facing a cobblestone street – unless you're looking for a creative way to approach emergency room personnel with the Golden Questions.

Do you remember the movie *Midnight Express?* Neither do I. It was the '70s. And I have trouble remembering 30 year old movies I didn't see in the first place. It was about an American trying to smuggle hashish through customs in Turkey. He ends up in a prison that makes the black hole of Calcutta seem like Federal Heights on Conference weekend. I understand you can find it at Hollywood Video. It's supposed to be good. Oliver Stone wrote the screenplay so you know every word is true. I'd rent it, but after 7:00 at night, 20 minutes on the sofa puts me to sleep faster than a Sarbanes-Oxley CLE. (Is it just me, or does hearing about enhanced audit committee responsibilities have the same effect as a tap behind the ear with a monkey wrench?)

A former companion of mine once compared our missions to *Midnight Express.* I thought that was a little extreme. Of course, he thought it was a little extreme when I compared our missions to *Mr. Rogers' Neighborhood.* Maybe a cross between the two. 'Cross' isn't the right word, though – it's the wrong symbol,

because we were always discouraged from being too ecumenical. Anyway, Elder B_____'s comparison was based on a night we spent in a Serbian police station. (My comparison was based on me being a smart aleck.)

The night we spent in the hospitality of Serbia's finest was our own stupid fault – no surprise there. Foreign spies are supposed to register with the local police wherever they intend to spend the night and conduct surveillance of local military installations. We forgot to register. They were actually very nice to us and nothing happened worth writing a screenplay about (one of the officers encouraged us to see the frescoes in a local church, pointing out that the renaissance actually began in Serbia – we heartily agreed). But my point, and it was a long time coming, is the importance of having at least a passing familiarity with local immigration law. If you're supposed to register someplace, do it. Otherwise you might develop a more intimate familiarity with third world criminal procedure.

One of the unspoken rules of the *Bar Journal* is that, somewhere in the issue, you have to run a piece about alternative dispute resolution (and it's usually between those ads with the rabid dogs and the guys arm wrestling – just before the bi-monthly civility lecture). So here we go. The biggest controversy of my mission dealt with the correct plural form of *The Book of Mormon.* There was a small, anal-retentive, justifiably ostracized group (yes, I was in that group), who insisted that we were passing out *Books of Mormon.* There was a much larger group (but mostly from Idaho) who distributed *Book of Mormons.* The ZL's appealed to the AP's, who stopped joy-riding in their Volkswagen Golf's long enough to certify the question to the Mission President, who responded with the Solomonic "copies of *The Book of Mormon.*" That soon became the shibboleth of a "good elder," and anyone saying anything other than "copies of *The Book of Mormon*" was outed as an apostate. There, now we can check off the ADR box for this issue. (I apologize for the "shibboleth" reference (*Judges* 12:4-6). It was pretentious and unnecessary (consistent with the rest of the article); but I can't resist Old Testament references – they sound cool when you have nothing to say, like Bob Dylan. Go listen to *Visions of Johanna* and just try to tell me what that's all about.)

And finally, know when to throw the rules out the window. I'm not talking about knocking over a liquor store to pay for bus tickets to the next zone conference. All I'm saying is you can't let the rules get in the way of doing the right thing. I know that sounds like heresy, but let me finish (that's a phrase I remember saying to my mission president more than once – to his eternal credit, he never did let me finish). I remember going to a district party of some kind in southern Austria.[3] Maybe I should explain. A district is like an adolescent stake. It isn't quite big enough, or it's still too spread out, or it doesn't have quite enough basketball hoops to be a stake. Today it's probably a stake. But it was a district then, and the missionaries were expected to attend all district functions – even parties where we would be prohibited from enjoying ourselves. The party degenerated into a dance. You can probably see this one coming. There was an elderly Slovenian woman in the district – Sister Gruden. She was a sweet lady, probably about 85 years old, and I had visited her regularly – kind of like a home teacher, except I never tried to sell her anything. Sister Gruden walked over to me and asked me to waltz. And because I have a hyperactive conscience where my spine is supposed to be, I told her the mission rules wouldn't allow us to dance. Given a free ride on a time machine, some people would go back and load up on Microsoft stock; others would find out how they stacked up those rocks at Stonehenge; I have a friend who wants a do-over of the eighth grade (he's in therapy). I would go back to Klagenfurt, Austria and waltz with Sister Gruden.

And speaking of sisters, an elder law issue is all well and good, but when are we going to see the sister law issue? It's the 21st century already, let's not be Neanderthal about this.

Oh, wait a minute – just got an email from the editors. "Elder law" as in Medicare, conservatorships, trusts and estates . . .

Never mind.

1. They are named for Green River, Wyoming (sorry, not Utah), where the ordinance was adopted so the local coal miners, trona miners, and railroad workers on the swing and graveyard shifts wouldn't have their sleep constantly interrupted by Fuller Brush salespeople knocking at the door. I have a similar rule for my office, but it doesn't seem to work very well. Speaking of public nuisances that will wake the neighbors, if you go to greenriverordinance.com you'll learn that Green River Ordinance is also the name of an "alternative rock" group in Fort Worth, Texas – and you can buy some cd's.
2. *Watchtower Bible and Tract Society v. Village of Stratton,* 536 US 150 (2002). Justice Rehnquist noted the "very grave risks associated with canvassing" and observed that with respect to door-to-door proselytizing "the possibilities of persuasion are slight compared with the certainties of annoyance" (not his own words; he was quoting, with approval, an earlier opinion of the Court). Leaning on the bell at the Rehnquist place would not have been advisable.
3. I know, I mentioned Serbia earlier, and for those who might be paying attention – I don't blame you if you're not – but if you're not, then what are you doing in the endnotes? – in any event, it probably sounds a little irregular for an elder to be border-hopping through central Europe. I wasn't breaking any rules, though. At least, not mission rules. I always . . . well usually . . . OK often, followed the mission rules. Anyway, this was back during the Cold War days and the mission home was still using pre-World War I maps which put Yugoslavia in the Austro-Hungarian empire, so logically it was all the same mission. This will make perfect sense to anyone who has lived through the dividing of wards, or been busted for wandering outside the boundaries of his district on P-day.

A Conservative View of the Originalist View of the Bill of Rights

by Boyd Kimball Dyer

The "Originalist" view of the Bill of Rights taken in Mr. David McKinney's article "The Tyranny of the Courts" in the last issue of the *Utah Bar Journal* is not historically accurate. A conservative view puts the Bill of Rights in its true historical context as the first step in its interpretation.

Mr. McKinney asserts that the Framers did not think there were any principles of law antecedent to the Constitution, that the rights it guarantees derive from "the will of the people." Actually, the Framers believed there were antecedent principles, fundamental rights that did not depend on the will of the people or the will of the king.

The premise that there are antecedent principles of law is why the Framers originally omitted any bill of rights from the text of the Constitution. The authors of "The Federalist Papers" defended the omission by arguing that the Constitution is a concession of powers by the people to the national government, and that any rights not expressly conceded are retained by them. Therefore, it is not necessary to expressly protect the retained rights by an express bill of rights. In fact, the Federalist's authors argued that an express bill of rights would be dangerous because it would imply that only the enumerated rights are protected. In short, they warned against the very position now advocated by the "Originalists."[1]

The premise that there are antecedent rights is also shown by the language of the Declaration of Independence. It uses the phrase "inalienable rights" for the antecedent rights. Inalienable rights do not depend on the will of the people or the will of the king. The Continental Congress was careful to avoid enumerating them. It wrote: "[Americans] are endowed by their Creator with certain Inalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness." "Life, Liberty and the Pursuit of Happiness" is pretty open-ended, but that was not open enough for the Continental Congress. It used the words "among these" to make it clear that even "Life, Liberty and the Pursuit of Happiness" do not enumerate all our inalienable rights.

When the first federal congress met in 1789, twelve and a half years after the Declaration of Independence, one of the first things it did was enact the Bill of Rights, the first ten amendments to the Constitution. The first Congress was careful to avoid any implication that the enumerated rights were all there are. The 9th Amendment expressly provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The historical reality is that in the 9th Amendment the Framers expressly rejected the Originalist view that the Constitution enumerates all the rights of individuals as against the federal government. In reality, the "Originalist" view that there are no rights antecedent to the Constitution and the Bill of Rights originates with the Originalists, not with the Framers.

A conservative position is based on the historic reality that the Framers understood that the Constitution and the Bill of Rights is not an enumeration of all the rights individuals have with respect to the national government. There are "others retained by the people" that the Framers left to the courts to articulate. The Framers intended the courts to have the power that the Originalists deny – the power to find new rights. Why?

The Framers did not trust the national government. In the Constitution and the Bill of Rights, they balanced the power of the national government as against the rights of the states and individual Americans. The great innovation of the Constitution was the creation of dual citizenship for Americans. An American was to be both an American and, for example, a Virginian, owing allegiance to both sovereigns. This dual allegiance could only work if the national government remained within its proper sphere. If the Constitution prohibited the courts from finding new rights, there would be no protection against a future national government enacting laws that technically stayed within the letter of its enumerated powers but upset the balance the Framers had struck.

Although a conservative view is based on the historic reality that the

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Constitution reflects a set of principles and does not enumerate all the rights or individuals as against the federal government, it rejects judicial activism in the sense of finding new rights that upset the Constitutional balance. For example, from a conservative viewpoint *Roe v. Wade*[2] was wrong. The decision struck down a state law regulating abortions on the basis of the 14th Amendment's due process clause. In effect the decision balances the right of the unborn child to life against the rights of the mother over her own person. From a conservative view, this balance is for each state to make, not for the national government. It was never the purpose of the post revolutionary war Framers of the Bill of Rights (or of the post civil war framers of the 14th Amendment) to shift authority over birth, marriage, the family, and the end of life to the federal judiciary through the due process clause.

From a conservative viewpoint, the flaw in *Roe v. Wade* is not that the new right is not expressed in the Constitution. Rather, the flaw is that the new right upsets the Constitutional balance. In effect, the federal judiciary enacted a law by judicial decision that the federal legislature could not enact by legislation. From a conservative viewpoint, only the preservation of the Constitutional balance justifies a court articulating a new Constitutional right. Or, perhaps it is not really a new right at all. It is a new protection for an old right.

The aftermath of *Roe v. Wade* shows the illegitimacy of the decision. The debate today is whether pro-life or pro-choice nominees should be appointed to the Supreme Court, as though they were candidates for political office. If the Supreme Court had upheld the right of the states to deal with the question of when life begins, the debate today would be in the state legislatures, *i.e.,* political debates over a political question in a political forum conducted by politicians.

A conservative view is not necessarily pro-life or pro-choice. The conservative criticism of *Roe v. Wade* is not based on the premise that a foetus is (or is not) a living person. It is based on the premise that the Constitution is a balance of powers and rights that the courts should respect and preserve.

A second case that illustrates the difference between a conservative and the Originalist position is pending in the Supreme Court today in *Gonzales v. Oregon*.[3] The issue is whether the federal executive can prevent Oregon doctors from prescribing drugs that are FDA approved for the treatment of pain for the purpose of helping patients commit suicide under Oregon's assisted suicide law. The basis of the federal executive's claim of authority is, of course, the Commerce Clause. From an Originalist viewpoint, the federal executive must prevail. There is no right enumerated in the Constitution to commit suicide or to prescribe drugs to commit suicide. But, from a conservative view, the Secretary is using the Commerce Clause to defeat the balance struck by the Framers that left matters of birth, marriage, family and ending of life to the states. What the federal government is doing in *Gonzales v. Oregon* is exactly what the Framers feared, exactly why they enacted the 9th Amendment. The Secretary is staying within the letter of the national government's enumerated powers but upsetting the Constitutional balance. From a conservative point of view, it would be proper judicial activism for the Supreme Court to hold for Oregon on the basis of an unenumerated right.

In any event, the challenge for the Originalists is to reconcile the words of the 9th Amendment that there are other rights "retained by the people" with their claim that the Framers "adopted certain language stating the form and limits of power of the new government, and enumerating certain rights of the people," to quote Mr. McKinney.

Perhaps it can be done. At the conclusion of the Gilbert and Sullivan operetta "Iolanthe," the female chorus, who are fairies, have fallen in love with the male chorus, who are wastrel lords who love the fairies and want to marry and reform. The impediment is the law that any fairy who marries a mortal must die. The Lord Chancellor asks for the text and says he will deal with it. "Every fairy shall die who doesn't marry a mortal." Final chorus. Curtain.

1. The Federalist, No. 84 (Hamilton).

2. 410 U.S. 113 (1973).

3. No. 04-823, opinion below 368 F.3d 1118 (9th Cir. 2004) *sub nom. Oregon v. Ashcroft.*

The Dangers of Overreacting to "Judicial Activism"

by Thomas L. Murphy

According to the guidelines for "Submission of Articles for the *Utah Bar Journal,*" the publication "seeks articles of practical interest to attorneys." For the most part, I find the articles in the *Utah Bar Journal* interesting and helpful. However, a recent article published, "The Tyranny of the Courts," by David R. McKinney, Esq., is, in my opinion, an expression of political belief.

That federal judicial nominations are political in nature is hardly news, although such nominations invariably raise the political issue of "judicial activism." Even in states where elected judges generally do not decide political questions, battles frequently occur over judicial office. The emergence of tort reform as a viable political issue proves that even the common-law system of civil justice is not immune from politics.

Mr. McKinney begins his article by using a non-legal phrase, "judicial activism," which clearly suffers from a lack of consensus as to its definition. However, he is quick to polarize the issue, by referring to "those in favor of judicial activism." Who are "those?" The authors decried by Judge Bork, Justice Scalia and other members of the Federalist Society? The failure of the author to define a critical phrase, "judicial activism," is fatal to his thesis because, as with any phrase, it can mean whatever the writer wants it to mean.

Contextually, the judicial activism outlined in Mr. McKinney's article appears to refer to judges who have interpreted the Constitution in a manner offensive to political conservatives. The purpose of this article is to illustrate the problems inherent in defining judicial activism, how amending the constitution in the manner suggested by Mr. McKinney is unworkable and will have potentially disastrous consequences, and the dangers of labeling judicial review as "tyranny."

Articulating the Problem and Defining "Judicial Activism"

One reasonable and quantifiable measure of a judge's activist tendencies was identified by Professor Paul Gewirtz of Yale Law School: How often has each justice on the Supreme Court of the United States voted to strike down a law passed by Congress? "So Who Are the Activists?" *New York Times,* July 6, 2005. After examining the sixty-four (64) Congressional provisions upheld or struck down, it was found that Justice Clarence Thomas, appointed by President George H.W. Bush, voted to invalidate 65.63% of those laws, more than any other justice. He was followed by Justices Kennedy (64.06%), Scalia (56.25%) and Rehnquist (46.88%).

Least likely to invalidate legislation were two appointees of President Bill Clinton – Justices Stephen Breyer (28.13%) and Ruth Bader Ginsburg (39.06%). Why is it, then, that the judges least likely to vote to overturn Congressional statutes are generally considered the most activist? By this objective measure, it appears that judges most would consider politically conservative are among the most activist.

Noticeably absent from Mr. McKinney's article is a specific analysis of the problem as articulated. Divorcing the language of the Constitution from "an idea, a set of principles, a penumbra or an emanation" was not intended by the framers of the Constitution and is contrary to the idea of a democratic society.

That this approach is politically motivated is obvious from the comment that the federal courts "expand these rights beyond the fair reach of the text." Who decides what is the fair reach? A study of decades of constitutional law illustrates that the Supreme Court is not "creating new rights," but enforcing those rights guaranteed by the Bill of Rights. As with use of the word tyranny, characterizing a well-reasoned body of jurisprudence as the "creation" of rights is pejorative, and is factually and legally incorrect.

The Constitution cannot be viewed in a vacuum and there are many rights we possessed when this country was founded that are older than the Bill of Rights. In the landmark case of *Griswold v. Connecticut,* 381 U.S. 479 (1965), for example, Justice Douglas wrote that "we deal with a right of privacy older than the Bill of Rights." 381 U.S. at 485 (emphasis added). Of a practice neither mentioned nor implied in the Constitution, Justice Warren wrote, "Marriage is one of the basic civil rights of man fundamental to our very existence and survival." *Loving*

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v. Virginia, 388 U.S. 1 (1967) (emphasis added).

Concluding his assessment of the condition, Mr. McKinney states that the Supreme Court has, "in selected areas of law," enforced a politicized interpretation of the Constitution. What areas? He refers to "astonishingly unsupported decisions." What decisions? I suppose if one is looking for a clearly astonishing and unsupported political case of judicial activism, she or he might consider *Bush v. Gore,* 531 U.S. 98 (2000).

I find it interesting and ironic that, while attempting to divorce the language of the Constitution from just about everything, Mr. McKinney can unilaterally label the Constitution as "positive law" and mandate a framework in which it is to be interpreted. If the framers of the Constitution had intended the document to be interpreted in a manner different than the common-law principles used at the time, then one would expect that they would have so stated in the document.

However, suggesting that the Constitution is to be interpreted in one rigid manner is also judicial activism of a different strain. It is the type of judicial activism guaranteed to perpetuate the denial of individual rights, as history has taught.

The Proposed "Constitutional Solution" is Unworkable and Turns Back the Clock on Years of Constitutional Progress

Mr. McKinney proposes a drastic remedy for this amorphous and ill-defined problem – amending the United States Constitution. Rather than a specific textual analysis of the proposed amendment, I would like to address how the amendment would work within the framework and context of decades of Supreme Court decisions and jurisprudence.

Our analysis begins with the plain language of the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

The "plain language" of the First Amendment is absolute: Congress may not make any law which abridges the "freedom of speech." Under Mr. McKinney's proposed constitutional amendment, speech which incites violence or published pornography would be completely unregulated.

Consider the holding of *Schenck v. United States,* 249 U.S. 47 (1919). In a what some might now argue was a blatant act of judicial activism, Justice Holmes wrote an opinion upholding a law which clearly violated the First Amendment's absolute and unambiguous guarantee of free speech and press. Without citation to any authority, Justice Holmes wrote:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.

249 U.S. at 52. Continuing this unabated activism, he wrote that the question in any given case was whether the words used were of such a nature as to "create a clear and present danger." *Id.*

In present days, however, we hear little about this ongoing aspect of judicial activism. Why? Because it is judicial activism with which many political conservatives would agree. The same

might be said for regulation of obscenity and broadcasting.

The Second Amendment contains similarly absolute language:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Notwithstanding any debate over the meaning of the first clause of this amendment, the plain language of the second clause, once again, is absolute. No conditions or qualifications are placed on the "right of the people to keep and bear arms." Thus, under the proposed constitutional amendment, a fifteen year old "Crips" gang member in southern California is permitted to possess and carry a fully automatic AK-47 assault weapon.

Regulation of interracial marriage would certainly be permitted. In *Loving v. Virginia, supra,* the State argued that, when the Fourteenth Amendment was adopted, any intent was not to make state miscegenation laws unconstitutional. 388 U.S. at 9. Rejecting this argument, the Court wrote that it did not pertain to the "broader, organic purpose of a constitutional amendment." *Id.* After a thorough review of the legislative intent of the Fourteenth Amendment, the Court found that the historical sources were, at best, inconclusive.

Under the proposed amendment, there would not be any constitutional limitation on state regulation of the right to marry, because the right is not mentioned in the plain language of the Constitution. The same is probably true of the right to travel. *See, e.g., Foster v. Dulles,* 357 U.S. 116 (1958) (recognizing right to travel as part of liberty interest recognized under Fifth Amendment).

The notion that these precedents are immune from immediate reach under the principle of *stare decisis* is hard to swallow, although it is ironic that, while decrying the use of common-law principles of statutory interpretation on the one hand, Mr. McKinney retreats to the common-law principle of *stare decisis* on the other. The Constitution does not contain any plain language requiring courts to follow precedent.

If any conclusions may be reached from an analysis of the Bill of Rights, it is perhaps that the framers of those broad statements intended the Constitution to be a living, breathing document designed to adapt to the ever-changing conditions in which we live. While the Constitution is, simply put, words, those words cannot be interpreted in the vacuum Mr. McKinney suggests. Application of the plain language doctrine to the Bill of Rights would have, and has had, exceptionally disastrous consequences.

Another blatant act of judicial activism is *Brown v. Board of Education,* 347 U.S. 483 (1954). Mr. McKinney's proposed constitutional amendment mandates that courts may not interpret laws "in any manner contrary to its plain meaning, *as generally understood at the time of enactment."* The Supreme Court expressly rejected this approach in Brown, with Justice Warren writing, "we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written." 347 U.S. at 492. Instead, the Court said:

> We must consider public education in the light of its full development and its present place in American life throughout the Nation.

347 U.S. at 492-93. As with Justice Holmes' opinion in *Schenck,* there was no citation to any authority to justify this analysis.

Are there any among us prepared to turn back the clock on basic constitutional issues, long decided, because of the current political tide? Probably not. *Brown* was a blatant and shameless act of judicial activism, for which all Americans should be thankful. *See, e.g.,* Colbert I. King, "Judicial Activism to Be Thankful For," *Washington Post,* Oct. 29, 2005, A23. Thanks to judicial activism, people of all colors can sit anywhere on the bus, people are free to marry without regard to race, evidence obtained as a result of police misconduct is inadmissible in court proceedings, persons accused of crimes are provided with a lawyer if they cannot afford one and citizens are guaranteed rights to the fullest extent possible.

If judicial power is restricted, any power removed will necessarily revert to the federal and state legislatures. Our constitutional rights, at that point, would depend upon elected politicians for their protection, as the courts would be mandated to uphold those laws. Instead of the consistency provided in our current scheme, our rights would necessarily depend, at any given time, on the majority ruling party. Indeed, I cannot recall hearing about the evils of judicial activism when the current majority party was the minority party.

The Dangers of Labeling Judicial Review as Tyranny

Finally, I am compelled to comment on the highly pejorative nature of Mr. McKinney's primary thesis. He immediately labels the judicial system as tyranny and makes the outrageous claims that "tyranny is eroding democracy" and replacing it with "judicial oligarchy." Apparently, that the judiciary does not meet a definition chosen from *Funk & Wagnall's* places it in the category of the tyrants of ancient Greece and the despots of the modern world.

The word tyrant comes from the Greek *tyrannos,* and means a

usurper of rightful power, possessing absolute power and ruling by tyranny. Instead of using this traditional definition, or a common definition, Mr. McKinney uses and misconstrues a particular definition to support his argument. The judiciary does not have "absolute power," as that term is used to define tyranny. And the "legal warrant" of which the definition speaks is clearly granted to the federal judiciary by Article III.

A better question is why Mr. McKinney and others choose to label our judges as tyrants.

The current connotation of a tyrant is that of a despot, such as Saddam Hussein, or a government ruled by a single leader with absolute authority. Tyranny suggests a government with absolute authority over its citizens. Defining the judiciary with these characteristics is quite telling; Mr. McKinney is not really making an argument, but seeking an emotional response.

Equivocating the judiciary with the political concept of tyranny is not only factually incorrect, but is a fear appeal designed to last long enough to permit the ruling party to effectuate an overly broad and restrictive response. Ironically, the use of such fear appeals is used to justify tyrannical rule. A quick Internet search of the term "judicial tyranny" quickly leads the reader to articles by Executive Director of the American Conservative Union, articles in the *New American,* the web site of Focus on the Family, and articles by Armstrong Williams and Ann Coulter, all very conservative political organizations and writers.

It is shocking to suggest that we live under tyrannical rule; we do not. Judicial activism is not a form of tyranny, but a pejorative label used to distinguish judges and judicial opinions with which we do not agree. It is neither a philosophical concept nor a legal concept, but a non-legal political concept that changes with the winds.

The suggestion that those who favor a "continually expanding Constitution simply do not like, or do not trust, democracy," is offensive and belies the political nature of Mr. McKinney's thesis. The clear implication is that those who favor the present system are, apparently, undemocractic. For the reasons outlined in this article, I decline to make the same conclusion.

In a democratic society, we cannot maintain a system which establishes and recognizes basic rights, but then allows certain rights to be discarded or altered based upon the whims of the ruling party. You cannot pick and choose fundamental rights in a free society. While the concept of judicial tyranny is not often seen in the literature, the concept of tyranny of the majority has long been recognized contrary to democracy.

Lessons from Kindergarten

by Justice Jill N. Parrish

EDITOR'S NOTE: *Justice Parrish delivered these remarks on October 12, 2005 at the Admissions Ceremony for new inductees to the Utah State Bar.*

Congratulations on passing the bar exam! You now have permission to practice what you've spent the last three years learning. You've proven that you can retain material not only long enough to pass a final exam, but long enough to convince the Bar Examiners (and all of us) that you are, in fact, qualified to practice law.

While your knowledge of the law has qualified you for admission to the bar, whether you will actually succeed in the legal profession may not depend on what you learned in law school. In his well-known book *All I Really Need to Know I Learned in Kindergarten,* Robert Fulghum writes that true wisdom is found, not "at the top of the graduate-school mountain," but rather in "the sandpile at Sunday School."[1] The book was first published almost two decades ago, about the time I was graduating from law school. Based on my observation over those two decades, I believe Mr. Fulghum is right.

You've all proven that you're capable of learning the law. What will determine whether you succeed in the practice will not be your knowledge of black-letter law, but rather those other characteristics and qualities that you bring to bear in your professional life – the really important things, the lessons you learned in Kindergarten. I've selected five of those lessons that I'd like to touch on.

Share:

One of the first things we learned in Kindergarten was to Share.[2] I can't overemphasize the importance of this principle. It's very easy to forget those who are not as fortunate as we are. But there are many in society who lack the gifts and opportunities that we have enjoyed. We need to remember that the purpose of law practice is not simply to make money, although that may be one of its pleasant side effects. Because we are trained to understand, interpret and apply the law, we have the opportunity, if not the obligation, to share those skills with others.

Unfortunately, the prevalence of the "billable hour" has led to an insidious desire for lawyers to wring every last dollar out of the legal profession. This desire infects lawyers not only in large firms where they are required to meet ever-increasing billable requirements, but also lawyers in other settings. I have a friend who left big-firm practice for the flexibility of his own small firm. When he complained that he was working harder than ever, I asked why. He explained that he was now too close to the dollar. Because every extra dollar that came into his firm made its way to his pocket, the pressure to keep billing was even more intense.

My colleague, Justice Matthew Durrant, observed in a recent speech that it is not the first dollar, but the last dollar, that is so insidious. How refreshing it is to see those in the profession who have decided that the last dollar is simply not worth its cost. As Justice Durrant noted, "there is much freedom that comes from being willing to walk away from that last dollar – freedom in the legal career we choose, in the clients we accept, in the advice we give" and in the ability that it gives us to assist those who are less fortunate.

Play Fair:

Another lesson we all learned in Kindergarten was to "play fair."[3] Playing fair requires integrity. And integrity is one of the most important qualities a lawyer can have. A lawyer with true integrity is one who avoids the pitfalls of rationalization and compartmentalization.

Rationalization should not be confused with rational decision-making. Ethicist Michael Josephson distinguishes rationalization from rational decision-making by focusing on when the reasoning takes place.

> With a rational decision, reasoning precedes and leads to a conclusion. With rationalization, we reason only to fabricate a good sounding justification for conclusions we've already reached or to excuse conduct that's already occurred.... Lawyers are often hired to rationalize on behalf of clients.

JUSTICE JILL N. PARRISH is a member of the Utah Supreme Court, having been appointed by Governor Michael O. Leavitt in 2003.

> And if we are not careful, we soon begin to lose our ability to distinguish between real reasons and fabrications. We begin to think that whatever works is right simply because it works.[4]

Don't fall into this trap. Avoid rationalization.

Falling prey to the temptation of compartmentalization is equally dangerous. The law is not a game where you should feel comfortable doing whatever you can get away with. There is no rule excusing immoral or unethical behavior just because it takes place in the context of law practice. "You can't have one set of ethics for your business life and another for your private life."[5] If you are a dishonest lawyer, you are a dishonest person. To have true integrity, you must be honest in all of your dealings.

Practice with Professionalism and Civility:
Our Kindergarten teachers taught us not to "hit people" and to "say you're sorry when you hurt somebody."[6] These lessons also apply to the practice of law. They dictate that we practice law with professionalism and civility.

Unfortunately, there are many lawyers who have yet to learn these lessons. Lawyers who practice in an uncivil manner lead many to believe that lawyers are skilled at generating, rather than resolving, disputes. No doubt, there are lawyers who are worthy of this criticism. But I believe that such lawyers comprise a small minority of our bar, a minority I hope none of you will join.

The most important decision you face at this juncture in your career is what kind of lawyer you want to be. And I'm not speaking in terms of selecting an area of practice, but rather, selecting your practice style. Some lawyers believe that to be effective, they can't be civil. They need to be the big bully on the playground. They engage in personal insults and are needlessly confrontational. Please don't buy into the myth that these characteristics make a lawyer successful.

Successful lawyers who engage in these unpleasant tactics succeed in spite of them – not because of them. And those lawyers who succeed on the highest level do not use these unpleasant tactics at all. I recently asked my colleagues to identify those lawyers whom they would classify as the giants of our bar. To a person, the lawyers they identified were men and women who are consummate professionals – lawyers who treat others with dignity, with courtesy and with respect. They maintain their self-control even in the face of undignified or unprofessional attacks. Lawyers who practice in this way are believed and respected. Other lawyers want to refer cases to them, and the judges they appear before trust and believe them. These are the lawyers whom I hope you will emulate.

Be Responsible and Work Hard:
Another important lesson we learned in Kindergarten was to "clean up [our] own mess."[7] When applied to the practice of law, this lesson suggests that we work hard and take responsibility for our own actions.

Successful lawyers are those who are well prepared and who take pride in their work. If you agree to take on a matter for a client, you owe it to that client to work hard and to present the client's case to the very best of your ability.

On the other hand, if you've adequately prepared and done your best, don't beat yourself up when you make a mistake. I use the term "when" advisedly because you *will* make mistakes. I certainly have, and I've been around long enough to know that all lawyers do. When you do make a mistake remember that it's always best to admit mistakes promptly, when it may be possible to repair or minimize any damage. This applies to your dealings with clients, opposing counsel, partners, your support staff and, yes, your dealings with the courts.

Acknowledge that while there are many things in life you can't control, you can always control your own attitude. While you may not be able to avoid unpleasant situations, you can choose your reaction to them. Choose to make them learning experiences. You will be a better lawyer and a stronger person as a result.

Maintain A Sense of Perspective:
The fifth thing we learned in Kindergarten was to "learn some and think some and draw and paint and sing and dance and play and work every day some."[8] The life lesson to be drawn from this experience is to keep a sense of perspective and find balance in your life.

Your life should involve more than the practice of law. I hope that you will find the practice of law to be rewarding. But there is more to life than your work. Life is short, and I would be willing to wager that none of you will ever regret time spent with family and friends. Unfortunately, I know all too many lawyers who are so engrossed in the practice of law that they miss out on the really important things in life – the family vacations, little league baseball games, family reunions and romantic evenings with a spouse.

Please don't neglect your families. Your children will grow up all too quickly. And once the opportunities to become involved in their lives have passed, they cannot be retrieved. If you find that you're associating with colleagues and clients who make it difficult for you to maintain balance in your life, I suggest that you take a good, hard look at your situation. Perhaps a change is in order.

Remember that "it's more important to be a good person than a good lawyer."[9] If there is ever a conflict between the two, "choose to be a good person."[10] I submit, however, that in virtually all instances, there will be no conflict because, in the end, good lawyers are basically good people.

Again, congratulations and welcome to the bar. We look forward to seeing great things from all of you.

1. Robert Fulghum, *All I Really Need to Know I Learned in Kindergarten* 6 (Villard Books 1989) (1986).
2. *Id.*
3. *Id.*
4. Michael Josephson, Josephson Institute of Ethics, *Eight Insights for New Lawyers* 3 (2001), *available at* http://www.josephsoninstitute.org/speeches-papers/MJ-Pepperdine-commencement-051801.htm.
5. *Id.* at 5.
6. Fulghum at 6.
7. *Id.*
8. *Id.* at 6-7.
9. Josephson at 5.
10. *Id.*

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Eisenberg, Gilchrist & Morton can help reduce the stress associated with handling large contingency fee cases. Our team approach gets cases closed faster than the traditional method of "one case, one lawyer," and we fund all of the costs associated with most cases. We also frequently achieve settlements or verdicts which substantially exceed the amounts originally demanded by referring lawyers.

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$737,500	Premises Liability
$315,000	Fiduciary Malpractice

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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 14 – Professional Courtesy

by Bonnie Mitchell

"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 right, 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."

As a veteran litigator recently told me, "it is the rare client who doesn't expect their lawyer to use every trick in the book on their behalf." While a lawyer's primary duty is to the client, most clients don't know, or overlook, that their lawyer's ability to represent them is contingent on obligations to play by certain rules of procedure and professional responsibility. Also, most clients and some attorneys don't know, or overlook, that lawyers belong to a profession that has a very long tradition of dignity, integrity and civility when members interact with one another.

When it approved Standard 14, the Utah Supreme Court made it clear that if it doesn't affect the merits of the case, lawyers don't need their client's permission to extend professional courtesy, and lawyers shall accommodate reasonable requests. In nearly all instances, a client's demand that you "play hardball" or "show 'em you're tough" or "make her sweat" is beyond the merits of the case. The same is true when lawyers choose to use procedure for tactical advantage or spurn reasonable requests for accommodation just to play "gotcha."

At both the "U" and the "Y" law schools, students are exposed right away to the Standards of Professionalism and Civility. Because most have never seen lawyering in the "real world," we tell students that it is a mistake to choose a model for good lawyering based on what they see on the plasma or big screen. Many students are surprised to learn that real judges hate it when lawyers engage in gamesmanship over undisputed facts, or play hide and seek if asked to grant an extension.

It is my experience that law students like to discuss traits of good lawyering and concepts of professionalism and civility. During those discussions, students not only talk about obvious instances of bad behavior, but also explore lines of conduct that aren't so bright. Students seem to understand pretty easily that there may be conflicting duties at times and tough decisions to make. They also accept that reasonable minds can differ when interpreting what might be a "reasonable request." We suggest that a good time for them to talk to clients about the issues in Standard 14 is when they are forming the attorney/client relationship and fee agreement. Right up front, attorneys should discuss their professional obligations and duties and let clients know who is in charge of what decisions. Students believe that most clients, when fully informed, would agree that they are not in the best position to understand the broader legal market, court scheduling, ongoing relationships that lawyers have with judges and other lawyers, and the downside – even to their own case – of incivility. If not, students agree that this would be the best time to discover that.

Nearly all law students say they will commit to incorporate high standards of professionalism and civility when they enter the "real world." Unfortunately, far too many report that once they enter that world, they find they are working for or interacting with an attorney whose interpersonal skills aren't so civil. Or maybe they are working for a lawyer whose standard of practice is to use every trick in the book. Confused and even afraid some times, these law clerks or newly minted lawyers often ask me what they should do. I often don't have a good answer.

BONNIE MITCHELL is a Clinical Professor of Law, S. J. Quinney College of Law at the University of Utah.

Commission Highlights

During its regularly scheduled meeting of October 7, 2005, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. Scott Sabey reminded Commissioners of the Leadership Conference to be held October 26, 2005 at the Little America. All those holding leadership positions in bar sections, committees and local bars are invited.
2. David Bird reminded the Commission of the Minority Bar "First 50" Dinner on October 15, 2005. David also reminded everyone about the ABA Mid Year Conference Feb 8-13, 2006 in Chicago and the ABA Annual Conference Aug. 3-8, 2006 in Hawaii.
3. David Bird reported that Lori Nelson will be the chair of the Governmental Relations sub-committee. It was noted that to make the committee more efficient, Lori will be using mostly Bar members and utilizing lawyer members of the Commission for consultations, resources, ideas, etc.
4. David Bird reported on the last Judicial Council meeting held on September 6, 2005. He said the Judicial Conduct Commission receives about 100 complaints a year and moves forward on approximately 15% of those complaints after investigated. Last year, one complaint resulted in a reprimand, 12 matters are ongoing and two resulted in dismissals with a warning. David reports that there is a requirement that a panel of judges hold hearings every three years in every judicial district to determine if a grand jury needs to be convened. He said that in the past 15 years, only three grand juries have convened. David also reported that Utah has led the way with regard to "problem solving court approval process" by holding drug courts, domestic violence courts, etc. He observed that these forums remove groups out of the judicial system and into forums where problems can be more efficiently resolved. David concluded by reporting on the judicial compensation issue. Two issues have been raised: (1) how much money do judges deserve; and (2) how much can they get? There is currently a commission that is analyzing and making recommendations with regards to judicial compensation.
5. David Hamilton gave a brief summary of the Client Security Fund Committee's work. He stated that claim amounts are limited to $20,000 per individual claim and $50,000 maximum paid out for any attorney per year. He said the fund has to remain above $100,000 so next year, the Bar may have to raise the licensing assessment. He noted that in reinstatement cases, paying restitution to the fund is generally a requirement for reinstatement. Claims totaling $43,200 were approved by the Commission, $119,800 in the fund.
6. Steve Owens reported on the Lawyers Assistance Program. Steve summarized the Commission's idea to evaluate LHL to determine whether the Bar should continue the present model or move in a different direction to help lawyers in crisis. Steve stated that the committee intends no criticism towards LHL nor will recommend how much to fund. The Committee narrowed the EAP entities to four and recommended that each should make a presentation to the Bar Commission. The LHL component would be an auxiliary provider and the EAP would be the primary provider. David Bird will appoint a committee to move forward with the focus on EAP and LHL as secondary.
7. The Commission reviewed the 2004-05 audit report. The motion to adopt the audit passed with none opposed.
8. The Commission approved the creation of a Law Student Division. The motion passed with none opposed.
9. The Hon. Richard C. Howe was selected to receive the 2005 Professionalism Award, the Reverend Mr. France A. Davis was selected to receive the Community Member award and Su J. Chon was selected for the Pro Bono Attorney of the Year award. These awards will be presented at the Fall Forum.
10. Discussion was held regarding the new bankruptcy reform laws. The motion to send a letter to Senator Hatch and Bennett on behalf of the Utah State Bar on this issue was unanimously approved by the Commission.
11. The motion to change the name of the "Needs of Elderly Committee" to the "Committee on Law and Aging" passed unanimously.
12. The motion to approve the new Bar admittees passed unanimous.
13. Katherine Fox discussed a current unauthorized practice of law complaint. The Commission approved pursuing formal action for a permanent injunction to enjoin the non-lawyer from further engaging in the practice of law.
14. Discussion was held on Commission travel reimbursement process.
15. Discussion was held on the ADR section proposed bylaw changes and name change. The motion passed unanimouly to adopt the bylaw changes and the name change to Dispute Resolution Section.

16. Paul Moxley reported on the ABA Summary Report.
17. Steve Waterman reported on the Admission's Committee House Counsel Rule. The Commission voted to approve the proposed advisory rule and file a petition with the Utah Supreme Court for final adoption.
18. The Commission discussed the criteria for the "Lifetime Service to Bar Award" in celebration of the 75th anniversary of the Bar in 2006.

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.

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.

2006 Annual Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2006 Annual Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Friday, April 21, 2006. The award categories include:

- Judge of the Year
- Distinguished Lawyer of the Year
- Distinguished Section/Committee of the year

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.

2005 Fall Forum Awards

REVEREND MR. FRANCE A. DAVIS
Distinguished Community Member of the Year

JAMES S. JARDINE
Distinguished Lawyer of the Year

SU J. CHON
Pro Bono Lawyer of the Year

HON. RICHARD C. HOWE
Professionalism

Pro Bono Honor Roll

Stanley Adams
Lauren Barros
James Blakesley
Robert Cosson
Jerald Engstrom
Angela Fonnesbeck
Nathan Hult
Chase Kimball
D. David Lambert
Michelle Lesue
Vinh Ly
Daniel McKay
Stephen Mayfield
Russell Minas
Stephen Oda
Candice Ragsdale-Pollock
Emily Smoak
Steven Stewart
Richard Armstrong
M. Paige Benjamin
Mary Brown
Martin Custen
Dana Farmer
Samuel Gardiner
Jonathan Jaussi
H. Ralph Klemm
Deanna Lasker-Warden
Robert Lovell
Ramona Mann
Suzanne Marychild
Sam Meziani
William Morrison
Lester Perry
Chen Shen
Kirsten Sparks
Sidney Unrau

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.

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

Utah State Lawyer Legislative Directory 57th Legislature 2006–2007

The Utah State Senate

Patrice Arent
Democrat – District 4

Education: B.S., University of Utah, 1978; J.D., Cornell Law School, 1981

Committee Assignments: Executive Office of Criminal Justice Appropriations Committee; Judiciary, Law Enforcement, and Criminal Justice Committee

Elected to House of Representatives, 1996; Elected to Senate, 2002

Area of Practice: Commercial Litigation

Gregory "S" Bell
Republican – District 22

Education: B.A., Weber State University; J.D., University of Utah Law School

Committee Assignments: Higher Education Appropriations Subcommittee; Health & Human Services Committee; Judiciary, Law Enforcement & Criminal Justice Committee; Revenue & Taxation Committee

Elected to Senate, 2002

Area of Practice: Real Estate Development

Lyle W. Hillyard
Republican – District 25

Education: B.S., Utah State University; J.D., University of Utah

Committee Assignments: Executive Appropriations Committee (Co-Chair); Judiciary, Law Enforcement & Criminal Justice Committee; Revenue & Taxation Committee

Elected to House, 1980; Elected to Senate, 1984

Areas of Practice: Criminal; Domestic; Personal Injury

Mark B. Madsen
Republican – District 13

Education: B.A., Spanish/American Studies, George Mason University, Fairfax, VA; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Commerce & Revenue Appropriations Committee (Co-Chair); Education Committee; Judiciary, Law Enforcement & Criminal Justice Committee; Workforce Services & Community and Economic Development Committee

Elected to Senate, 2004

Practice Area: General Counsel Office of Larry H. Miller

Scott D. McCoy
Democrat – District 2

Education: B.A., William Jewell College; M.A., George Washington University; J.D., Benjamin N. Cardozo School of Law of Yeshiva University

Committee Assignments: Health & Human Services; Natural Resources, Agriculture & Environment, Economic Development & Human Resources

Appointed to Senate, 2005

Dave L. Thomas
Republican – District 18

Education: B.S. Finance, Brigham Young University; J.D., College of William and Mary

Committee Assignments: Executive Offices & Criminal Justice Appropriations Committee (Co-Chair); Education Committee (Chair); Judiciary, Law Enforcement, & Criminal Justice Committee; Senate Rules Committee

Elected to Senate, 1988

John L. Valentine
SENATE PRESIDENT
Republican – District 14

Education: Savanna High School, Anaheim, CA; B.S., J.D., Brigham Young University

Committee Assignments: Executive Subcommittee; Capital Facilities & Administration Appropriations Committee; Public Education Appropriations Subcommittee; Health & Human Services Standing Committee; Revenue and Taxation Standing Committee

Elected to House, 1988; Appointed to Senate, 1998; Elected to Senate, 2000

Areas of Practice: Corporate; Estate Planning; Tax

The Utah State House of Representatives

Ralph Becker
MINORITY LEADER
Democrat – District 24

Education: B.A., American Civilization, University of Pennsylvania, 1973; J.D., University of Utah College of Law, 1977; Certificate in Planning, University of Utah 1977; M.S., Geography (Planning Emphasis), University of Utah, 1982

Legislative Assignments: Public Utilities & Technology Standing Committee; Executive Appropriation Committee; Capital Facilities & Administrative Services Standing Committee; Political Subdivisions Standing Committee

LaVar Christensen
Republican – District 48

Education: B.A., Brigham Young University, 1977; J.D., McGeorge School of Law, University of the Pacific, 1980

Legislative Assignments: Education Standing Committee (Vice Chair); Law Enforcement & Criminal Justice Standing Committee; Public Education Appropriations Committee

Areas of Practice: Business Transactions; Civil Litigation; Real Estate

Greg J. Curtis
SPEAKER OF THE HOUSE
Republican – District 49

Education: Brighton High School; B.S., Accounting, Brigham Young University, 1984; J.D., University of Utah College of Law, 1987

Elected: 1994

Legislative Assignment: Executive Appropriation Committee, Administrative Rules Review Committee, Legislative Managment Committee, Utah Constitutional Revision Commission

Practice Areas: Real Estate and Land Use and Development

Lorie D. Fowlke
Republican – District 59

Education: B.S., Law Enforcement, Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Legislative Assignment: Commerce & Revenue Appropriations Committee; Public Utilities & Technology Standing Committee; Judiciary Standing Committee

Ross I. Romero
Democrat – District 25

Education: B.S., University of Utah, 1993; J.D., University of Michigan Law School, 1996

Legislative Assignments: Judiciary Standing Committee; Revenue & Taxation Standing Committee; Commerce & Revenue Appropriations Subcommittee

Practice Areas: Civil Litigation; Labor & Employment; Intellectual Property/Information Technology; Government Relations & Insurance Tort

Stephen H. Urquhart
MAJORITY WHIP
Republican – District 75

Education: Williams College; J.D., J. Reuben Clark Law School, Brigham Young University

Legislative Assignments: Executive Appropriation Committee; Public Education Appropriations Subcommittee; Education Standing Committee; Law Enforcement & Criminal Justice Standing Committee

Scott L. Wyatt
Republican – District 5

Education: B.S., Utah State University; J.D., University of Utah School of Law

Legislative Assignments: Business & Labor Standing Committee; Judiciary Standing Committee; Higher Education Executive Appropriations Committee

Elected to House, 2004

Practice Areas: Municipal Law; Business Litigation; Family Law; Litigation

Discipline Corner

ADMONITION

On September 20, 2005, the Chair of the Ethics and Discipline Committee entered an Order of Discipline: Admonition against an attorney for violations of Rules 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), and 1.4(b) (Communication) of the Rules of Professional Conduct.

In summary:
The attorney failed to meet with the client prior to filing bankruptcy on behalf of the client. The attorney failed to review the petition and failed to correct the contact information for the client before filing it with the court. The attorney failed to communicate with the client and failed to explain the bankruptcy process to the client.

ADMONITION

On September 15, 2005, the Chair of the Ethics and Discipline Committee entered an Order of Discipline: Admonition against an attorney for violations of Rules 1.15(b) (Safekeeping Property) and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:
The attorney did not provide an accounting to another attorney representing a clinic after a lien had been placed on monies earned from a lawsuit. The attorney also failed to respond to the Office of Professional Conduct's Notice of Informal Complaint.

DISBARMENT

On October 21, 2005, the Honorable Robert K. Hilder, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Disbarment, disbarring David J. Burns from the practice of law for violations of Rules 1.15(a) (Safekeeping Property), 1.15(b) (Safekeeping Property), 1.15(c) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
While employed at a law firm, Mr. Burns directed two clients on three occasions to make payments directly to him. Once payment was received, Mr. Burns either wrote off the payment amount or issued a courtesy discount on the firm's billings for the clients. The firm discovered the missing funds based on information

from Mr. Burns's wife at the time. By diverting funds, Mr. Burns knowingly misappropriated law firm funds by depositing the money into his own personal account. This diversion of funds also resulted in commingling his funds with law firm funds. Mr. Burns failed to notify the firm of the receipt of the funds. At best, based on a claim by Mr. Burns that funds were disputed, he failed to keep the funds separate from his own while the funds were in dispute.

SUSPENSION

On October 13, 2005, the Honorable Lyle R. Anderson, Fifth Judicial District Court, entered an Order of Discipline: Suspension suspending Harold J. Dent from the practice of law for six months and one day for violations of Rules 1.5(b) (Fees), 1.7(b) (Conflict of Interest: General Rule), 1.8(a), (b), and (g) (Conflict of Interest: Prohibited Transactions), 1.9(b) (Conflict of Interest: Former Client), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Dent was hired to represent a couple in two different matters, a criminal matter and a juvenile court case that stemmed from the criminal matter. The representations were adverse to each other. One of the spouses subsequently hired Mr. Dent for a divorce action and information relating to the criminal matter was used to the detriment of the opposing spouse in the divorce. Mr. Dent did not consult with or obtain the opposing spouse's consent prior to his representation in the divorce action. Mr. Dent took over the operation of a small business owned by the spouse he represented in the divorce. Mr. Dent did not advise the client to seek independent counsel before turning over the business to him. The client eventually sought counsel and Mr. Dent entered into an agreement making him personally liable on a promissory note and the business debt. Mr. Dent defaulted on the note and the client sued him; the court awarded the client judgment on the note, possession of the collateral, and attorney's fees, but Mr. Dent filed for bankruptcy.

PUBLIC REPRIMAND

On November 4, 2005, the Chair of the Ethics and Discipline Committee entered an Order of Discipline: Public Reprimand against Edwin B. Parry for violations of Rules 3.1 (Meritorious Claims and Contentions), 3.3(a) (Candor Toward the Tribunal), 4.4 (Respect for Rights of Third Persons), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), 8.1(b) (Bar Admissions and Disciplinary Matters), and 8.4(a) (Misconduct).

In summary:
While negotiating a settlement with the opposing counsel, Mr. Parry obtained a default judgment. Mr. Parry later obtained a second default judgment when it was not warranted under the facts of the case. Mr. Parry filed an affidavit in support of the request for the second default judgment without making any inquiry into opposing counsel's direct communications to him which would have indicated that the statements in the affidavit were false. Mr. Parry completely ignored communications from opposing counsel not only before he filed the affidavit, but after filing it and before a hearing to set aside the default judgment. The affidavit that was filed was signed by another attorney although it listed Mr. Parry's name. Mr. Parry failed to review the factual basis of the affidavit that was prepared by a non-attorney and he failed to ensure that the signing attorney reviewed the factual basis and had personal knowledge of the affidavit. The affidavit gave the impression that it was based on Mr. Parry's personal knowledge when it was not. Mr. Parry failed to respond to the Office of Professional Conduct's requests for information. Mr. Parry made a false statement to a Screening Panel of the Ethics and Discipline Committee, although he corrected it, concerning whether he maintains a list of attorneys to whom he will speak. Mr. Parry has made no attempt to rectify the defendant's credit report regarding the two default judgments.

RESIGNATION WITH DISCIPLINE PENDING
On November 9, 2005, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Dale Hatch.

In summary:
Mr. Hatch, while serving as Deputy Executive Director of the Utah Education Savings Plan, withdrew funds from accounts that he controlled, and deposited those funds into a personal account. On March 18, 2005, Mr. Hatch pled guilty to a single charge of theft, second degree felony, in violation of Utah Code Title 76, Chapter 6, section 404.

INTERIM SUSPENSION
On October 26, 2005, the Honorable Deno G. Himonas, Third Judicial District Court, entered an Order of Interim Suspension, suspending Kevan C. Eyre from the practice of law pending final disposition of the Complaint filed against him.

In summary:
On June 3, 2005, Mr. Eyre was found guilty of six counts of failing to render a proper tax return, Utah Code section 76-8-1011(1)(c)(i), a third-degree felony; and six counts of intent to defeat the payment of a tax, Utah Code section 76-8-1101(1)(d)(i), a second degree felony. The interim suspension is based upon this conviction pursuant to Rule 19 of the Rules of Lawyer Discipline and Disability.

INTERIM SUSPENSION
On November 9, 2005, the Honorable Anthony B. Quinn, Third Judicial District Court, entered an Order of Interim Suspension, suspending Howard Johnson from the practice of law pending final disposition of the Complaint filed against him.

In summary:
On March 4, 2005, Mr. Johnson was convicted of one count of Unlawful Sexual Activity with a Minor, Utah Code section 76-5-401, a third-degree felony; and one count of Enticing a Minor Over the Internet, Utah Code section 76-4-401, a class-A misdemeanor. The interim suspension is based upon this conviction pursuant to Rule 19 of the Rules of Lawyer Discipline and Disability.

The Unauthorized Practice of Law

A Paralegal's Duty and Responsibility – Know the Limits

by Bonnie Hamp

UPL, the "unauthorized practice of law", we've all heard the phrase, but do we really know what it means? Simply put, the unauthorized practice of law occurs when a person who is not a licensed attorney engages in the practice of law.

Which brings us to ask, what is the practice of law? This is not an easy question to answer and you will find very contrasting viewpoints and opinions on this. Nonetheless, activities which constitute the practice of law and rules prohibiting the unauthorized practice of law are defined by each jurisdiction. In Utah, rules prohibiting the unauthorized practice of law are Rule 6(a) of the Rules of Lawyer Discipline and Disability (RLDD); and the Supreme Court's Rules of Professional Practice (Code of Judicial Administration) Provision III T of the Rules for Integration and Management.

A new rule recently approved by the Utah Supreme Court in June 2005, defines the practice of law as follows:

> . . .only persons who are active, licensed members of the Utah State Bar in good standing may engage in the practice of law in Utah.
>
> (b) For purposes of this Rule:
>
> (b)(1) 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.

Chapter 13A, Supreme Court Rules of Professional Practice, Rule 1.0 (Authorization to Practice Law).

There are numerous activities that constitute the practice of law, however, in general, the most common cited are giving legal advice; representing a party in court; and preparing legal documents; all of which a paralegal will inevitably become involved in one form or another. Here are just a few examples.

Giving Legal Advice

It happens to us all. As we become familiar in our practice areas, we gain the knowledge to answer many common questions a client may ask. It is tempting to simply respond to these inquiries, especially if the attorney is unavailable and the client is anxious for a response. This type of situation, however, could amount to providing legal advice and we should refrain from responding. Instead, we need to simply refer the client to discuss the matter with the attorney, which is often easier said than done. One solution would be to offer to relay the client's concerns to the attorney and get back to them with a response. Keep in mind that when a paralegal is merely acting as a medium between the lawyer and client, this does not constitute legal advice. Just be certain the client is completely aware that the lawyer is the source of the information. On the other hand, when a paralegal makes a legal conclusion based upon the facts and circumstances of a client's case and conveys that opinion, this now constitutes legal advice and unauthorized practice of law.

Preparing Legal Documents

The preparation of a legal document that ultimately affects a person's legal rights and responsibilities is an activity restricted solely for attorneys. However, in our role as paralegals, we are often given the assignment of preparing a number of legal documents. This is not considered the unauthorized practice of law. Why? The lawyer has a supervisory role to review and is ultimately accountable for its accuracy and effectiveness. It is the paralegal's duty to make certain that any work product he or she has prepared is reviewed and approved by the lawyer.

Canons of Ethics and Guidelines for the Utilization of Paralegals

Become familiar with the Canons of Ethics and Guidelines for the Utilization of Paralegals. These have been approved by the Paralegal Division and Board of Bar Commissioners of the Utah State Bar.

Canon 2 specifically sets forth what a paralegal *shall not* do:

> A paralegal shall not:
> a) establish an attorney-client relationship;
>
> b) establish the amount of a fee to be charged for legal services;
>
> c) give legal opinions or advice;
>
> d) represent a client before a court or agency unless so authorized by that court or agency;

BONNIE HAMP is a paralegal with the Litigation Practice Group at Holme Roberts & Owen LLP and member of the Utah State Bar's Unauthorized Practice of Law Committee.

e) engage in, encourage, or contribute to any act which would constitute the unauthorized practice of law; and

f) engage in any conduct or take any action, which would assist or involve the attorney in a violation of professional ethics or give the appearance of professional impropriety.

The Guidelines for the Utilization of Paralegals also serve to provide a standard for paralegals and attorneys and contain another very important consideration:

Paralegals shall:
(1) Disclose their status as paralegals at the outset of any professional relationship with a client, other attorneys, a court or administrative agency or personnel thereof, or members of the general public.

This is crucial. A paralegal must always disclose the fact that he or she is not an attorney when dealing with clients, other attorneys, the court and general public. Misrepresentation of one's status is a form of unauthorized practice of law. If a client is misled to believe that the paralegal is an attorney, the client would expect certain actions by this person to advance their case. Such misunderstandings, whether intentional or not, could result in harm to the client and damage to the firm. Additionally, correspondence prepared by a paralegal on firm letterhead can easily be assumed by the recipient that the person signing is an attorney. All correspondence prepared by a paralegal should always display their title or position with the firm. Failure to do so can also constitute misrepresentation of status, which could result in unauthorized practice of law.

Paralegals will encounter many instances to provide services that could constitute the practice of law. Know the limits. Prevention is the key to avoiding the unauthorized practice of law. If you are uncertain whether a task you have undertaken may constitute the practice of law, check the rules, become familiar with them, and most importantly, communicate with your attorney. This is an essential element. A paralegal's work must always be directly supervised by his or her attorney. As a result, services or work product prepared by the paralegal, under the direct supervision of an attorney, does not constitute the practice of law.

The definitions of the practice and unauthorized practice of law are very complex and can be interpreted in many ways. However, one main principle holds true, they do not apply solely to paralegals. They apply to many professions. It is our duty, as paralegals, to be aware of the provisions in our state and to stay within the boundaries of accepted practice. Do your research. Review case law and bar opinions regarding the unauthorized practice of law. Always keep the line of communication between you and your attorneys open. Get involved with local and national paralegal associations and take advantage of the opportunities these organizations can provide. It is through continued education and training that we can effectively and better assist the legal profession in the delivery of legal services.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
01/11/06	**Fifth Annual "AND JUSTICE FOR ALL" CLE Seminar – Penumbra in Peril in the Supreme Court: Privacy, Property & People.** 8:30 am–12:00 pm. (registration starts at 8:00 am). $95 pre-registration, $105 at the door. As the debate goes forward on President Bush's judicial nominees, this CLE takes a look at the controversy surrounding judicial activism and interpretation of constitutional rights that fall in the "penumbra" or between the lines of the constitution. Panelists will examine the history of judicial activism, the proper role of the judiciary and the repercussions of judges allowing their personal views to guide decisions on public policies. Presenters include: John J. Flynn–Moderator, Professor Emeritus, University of Utah Law School; Hon. Christine M. Durham, Chief Justice, Utah Supreme Court; Frederick M. Gedicks, Professor, Brigham Young University; Amy Wildermuth, Professor, University of Utah Law School; Robert Keiter, Professor, University of Utah Law School, James Clayton, Professor, University of Utah History Department. Proceeds of the event benefit "and Justice for all" civil legal aid programs.	3
01/18/06	**Office of Professional Conduct "Ethics School"** 9:00 am–4:00 pm. $150 before 01/06/06; $175 after. Mandatory for attorneys admitted on motion.	6 CLE/Ethics
01/19/06	**NLCLE: Real Property.** 5:30–8:45 pm. $55 YLD; $75 Others.	3 CLE/NLCLE
02/02/06	**ALI-ABA Satellite Broadcast: Choice of Entity – 2006.** 10:00 am–2:00 pm. $199. Newly admitted lawyers (within the past two years), full time government lawyers, and retired senior attorneys (65 and over) are eligible for a discounted fee of $99. Reg. at 1-800-CLENEWS or www.ali-aba.org/aliaba/vp0202.htm	4
02/09/06	**ALI-ABA Satellite Broadcast: Estate Planning Practice Update – 2006.** 10:00 am–1:15 pm. $199. Newly admitted lawyers (within the past two years), full time government lawyers, and retired senior attorneys (65 and over) are eligible for a discounted fee of $99. Reg. at 1-800-CLENEWS or www.ali-aba.org/aliaba/vp0209.htm	3
02/10/06	**Roger Dodd –** Downtown Marriott. TBA. Check on-line for details.	
02/16/06	**NLCLE: Secured Transactions.** 5:30–8:30 pm. $55 YLD; $75 Others.	3 CLE/NLCLE
04/20/06	**NLCLE: Water Law.** 5:30–8:30 pm. $55 YLD; $75 Others.	3CLE/NLCLE

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

REGISTRATION FORM

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

Registration for (Seminar Title(s)):

(1) _____ (2) _____

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Mid-sized, av-rated downtown firm seeks experienced associate level attorney to work in general litigation with a focus on family law and domestic practice. Send resume to: Christine Critchley, Confidential Box # 40, c/o Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111 or e-mail to ccritchley@utahbar.org.

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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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Thank you!

Food & Clothing Drive Participants & Volunteers

We would like to thank all participants and volunteers for their assistance and support in this year's Food and Clothing Drive. We delivered three truck loads of donated items and received almost $6,500 in cash donations to specific shelters.

We would also like to thank all of the individual contacts that we made this year and look forward to working with you next year.

This year, the firm of Richards, Brandt, Miller & Nelson came up with a great idea where the firm matched the contributions of those of the members of the firm and its staff. It was a resounding success, with Richards, Brandt, Miller & Nelson being first in cash and in-kind donations. We intend to adopt that approach next year and hope for another successful year.

Thank you all for your kindness and generosity. Yours very sincerely,

Leonard W. Burningham
Toby Brown
Sheryl Ross
Marjorie Green

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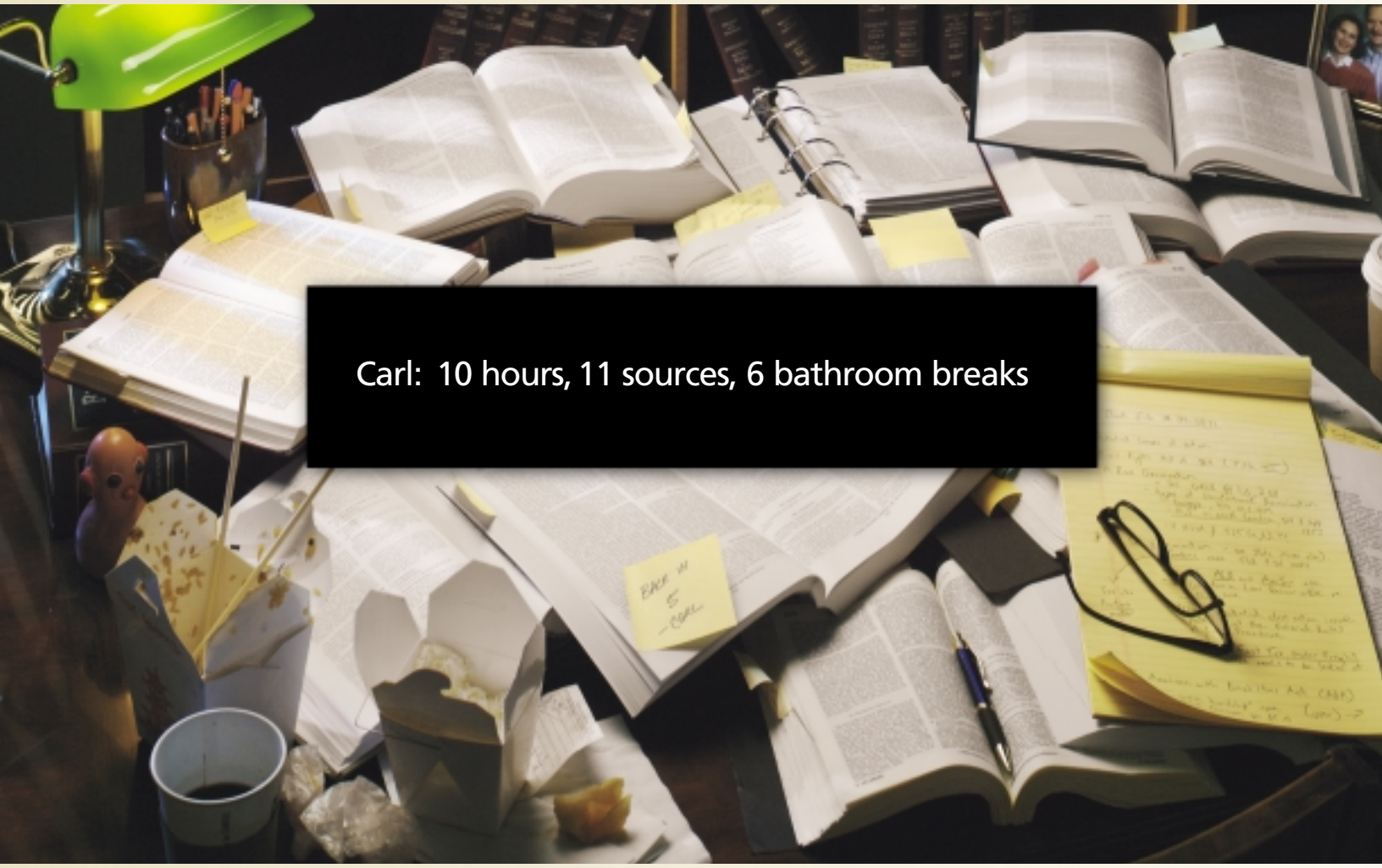

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