


Utah Bar Journal



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A large dog, possibly a Rottweiler, is shown in profile on the right side of the frame, looking down. A smaller, brown dog is lying on the grass in the foreground on the left, looking up at the larger dog. The background is a bright, sunny day with a blue sky and white clouds, and a green grassy field.

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COVER: Downstream entrance to the Subway, Zions National Park. By first time contributor George Sutton, Callister, Nebeker & McCullough, Salt Lake City.

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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.
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1. Length: The editorial staff prefers articles having no more than 3,000 words. If you cannot reduce your article to that length, consider dividing it into a "Part 1" and "Part 2" for publication in successive issues.
2. Format: Submit a hard copy and an electronic copy in Microsoft Word or WordPerfect format.
3. Endnotes: Articles may have endnotes, but the editorial staff discourages their use. The *Bar Journal* is not a Law Review, and the staff seeks articles of practical interest to attorneys and members of the bench. Subjects requiring substantial notes to convey their content may be more suitable for another publication.
4. Content: Articles should address the *Bar Journal* audience, which is composed primarily of licensed Bar members. The broader the appeal of your article, the better. Nevertheless, the editorial staff sometimes considers articles on narrower topics. If you are in doubt about the suitability of your article for publication, the editorial staff invites you to submit it for evaluation.
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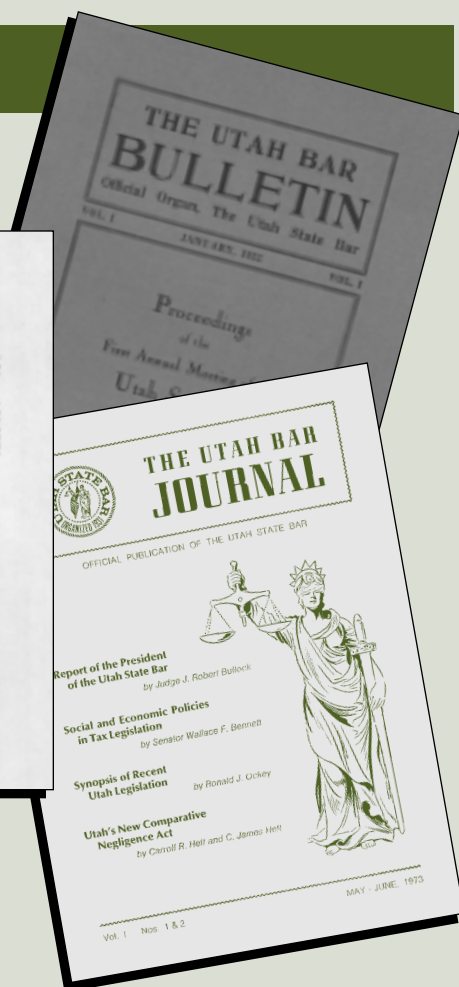
Call for Historical Bar Photos

In celebration of the 75th Anniversary of the Utah State Bar, the *Bar Journal* board is considering placing a montage of historical Utah Bar photos on the *Bar Journal* cover for a special issue scheduled for publication in the fall. Examples of old photos we have in mind would be early group photos of bar members, judges, and photos of bar offices, court houses, and the like.

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Along for the Ride?: Warrant Checks and the Status of Passengers During Traffic Stops in Utah

by Lance Starr

Utah law recognizes three levels of encounter between police and a civilian. For the purposes of this essay, only the first two levels are of interest. A level one encounter occurs when a citizen voluntarily elects to respond to non-coercive questioning by a law enforcement officer. The law assumes that since the encounter is consensual, the person is free to leave or terminate the encounter at anytime and therefore no Fourth Amendment seizure occurs. *State v. Hansen*, 63 P.3d 650, 661 (Utah 2002). A level two encounter involves an investigative detention that is brief and non-intrusive. It is a Fourth Amendment seizure but probable cause is not required. Rather, the officer need only have “specific and articulable facts and rational inferences which give rise to a reasonable suspicion a person has or is committing a crime, in order to initiate an investigative detention without consent.” *Id.*

Utah law recognizes that during a traffic stop the driver of the vehicle is subject to a level two encounter because the driver is seized; however, such a detention is usually minimally intrusive or lengthy. *United States v. Melendez Garcia*, 28 F.3d 1046, 1052 (10th Cir.1994). Moreover, the officer is precluded from questioning the driver beyond the scope of the reason for the stop. *Hansen*, P.3d 650 at 661.

However, what is the status of a passenger who might also be in the vehicle and what restrictions are placed on officers in connection with such passenger? Based on Utah case law, the answer is unclear. This essay will argue that the encounter with the passenger is a level one, voluntary encounter.

I. Three Options for Passenger Status

There are three distinct views that a court could adopt when determining the status of a passenger during a traffic stop. The first option is that a court may view the seizure as a level two detention based on reasonable suspicion as to the driver, but a level one encounter as to any passengers. The second option is that a level two detention occurs and is reasonable as to both the driver and any passengers. The third option is that the seizure

may be viewed as a level two detention based on reasonable suspicion as to the driver and also a level two detention as to the passenger but unsupported by reasonable suspicion as to the passenger.

The third option appears untenable, as it would result in a situation where anytime a police officer initiates a traffic stop that involves a vehicle with passengers, he would per se violate the passengers’ Fourth Amendment rights. Such a result is absurd, there is no case law to support this view, and it does not merit discussion.

The second option, however, has received some attention in Utah courts. Specifically, in *State v. Higgins*, 884 P.2d 1242 (Utah, 1994), the defendant, Patricia Higgins, was the passenger in a vehicle that was reported as having stolen gas from a local convenience station. When the car was stopped by a police officer, the driver claimed that he had merely forgotten and offered to return and pay for the gas. Subsequently, officers ran a license and warrants check and discovered that there was an outstanding warrant for his arrest. The driver was immediately arrested but to avoid impounding the vehicle the officers offered to allow the passenger, Higgins, to drive the vehicle home. Higgins agreed to take possession of the car, but could not produce a valid driver’s license. The officer asked for her name and date of birth and then ran a license and warrants check on Higgins to determine if she had a valid license. That check revealed an outstanding warrant for Higgins and she was also arrested. A search of the vehicle incident to arrest revealed narcotics in a gym bag belonging to Higgins. Higgins moved to suppress the cocaine on the ground that she had been unreasonably seized when the car was first stopped. The trial court ruled that Higgins was not seized for Fourth Amendment purposes and denied the motion.

On appeal, Higgins argued that “she was seized when the car was initially stopped and that she remained continuously seized

LANCE STARR is a 2004 graduate of the J. Reuben Clark School of Law at Brigham Young University. He currently works as a clerk for the Utah County Attorney’s Office.

for all practical purposes until her formal arrest.” *Id.* at 1244. The Utah Supreme Court did not address the question of whether a passenger in a car that is stopped is “seized” for purposes of the Fourth Amendment. Rather, the court merely assumed for purposes of the defendant’s argument that Higgins was seized. Taking her argument as true, the court then held that if she was seized, the seizure had to be reasonable because the vehicle in which she was traveling was validly stopped. Thus, the court found that the fact that the police ran a license and warrant check on Higgins was not unreasonable.

II. *Johnson* and the Status of Passengers

The problem, however, is that the court’s view in *Higgins* has never been officially adopted by Utah courts. In fact, Utah Supreme Court decisions appear to contradict this view. In *State v. Johnson*, 805 P.2d 761 (Utah 1991), the defendant, Johnson, was a passenger in a vehicle that was stopped pursuant to a traffic violation. Similar to *Higgins*, the officer learned that the driver was ineligible to operate the vehicle and therefore requested Johnson’s information. Unbeknownst to the defendant, the officer had an unarticulated suspicion that the vehicle was possibly stolen. However, the officer never inquired of either passenger or driver regarding his suspicions. The officer then proceeded to conduct a warrants check on the passenger which revealed an outstanding arrest warrant. She was arrested and a search incident to arrest revealed narcotics. As in *Higgins*, the defendant challenged the stop indicating that she had been detained illegally. The Court agreed, stating that she was “reasonably justified in her belief that she was not free to go.” *Id.* at 763.


Not stated, but clearly implicit in the court’s ruling in *Johnson*, is the fact that the officer must have, in some way, conveyed to the passenger the idea that she was not free to leave. This assumption is crucial to our understanding *Johnson*; otherwise, the case is in direct contradiction to other Utah precedents.¹ Utah law states that: “[T]he subjective intention of the [officer] is irrelevant except insofar as that may have been conveyed to the respondent.” *Salt Lake City v. Ray*, 998 P.2d 274 n.2 (Utah App.2000). The test for whether or not a level two seizure has occurred does not focus upon the subjective beliefs of the police officer; rather, it focuses only upon the objective belief of the person who is claiming to have been detained. *State v. Patefield*, 927P.2d 655, 659 (Utah App.1996) (“Regardless of the circumstances, the test for when a seizure occurs is objective and depends on when the person reasonably feels detained, not on when the police officer thinks the person is no longer free to leave.”) (quoting *State v. Ramirez*, 817 P.2d774, 786 (Utah 1991))(emphasis added). The problem with the *Johnson* decision is that it never clearly spells out how the officer conveyed to the passenger that

she was not free to leave. Thus, unless we posit that the officer in *Johnson* somehow conveyed to the passenger of the vehicle that she was not free to leave, the case becomes an aberration in Utah case law.

There are two points of law that arise from the *Johnson* ruling. First, although in *Higgins* the court assumed for purposes of that case that the passenger (Higgins) was seized when the car was stopped, but that the seizure was reasonable because the stop was justified, the court did not make the same assumption in *Johnson*. Otherwise, the license and warrants check would also have been reasonable, just as they were in *Higgins*. Rather, the court appears to have assumed in *Johnson* that the stop was a level two encounter and a reasonable and valid seizure as to the driver, but as to the passenger it was merely a level one encounter which escalated at some point to a level two seizure.

The second point that must be gleaned from the *Johnson* case is that the court must have determined that the officer clearly communicated to the passenger that she was not free to leave. Otherwise, it could not have found that an illegal seizure had occurred. However, if we accept this implicit understanding of *Johnson*, the case falls nicely in line with other Utah precedents.²

Unfortunately, it is possible that some have misunderstood *Johnson* to stand for the proposition that merely asking a passenger for

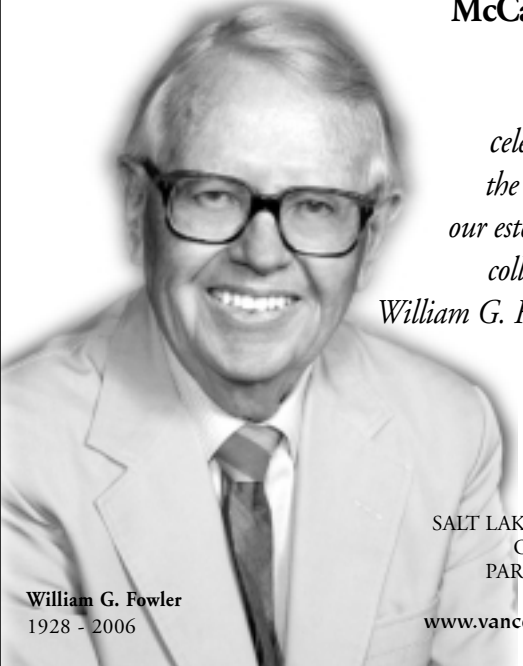


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her name and date of birth without reasonable suspicion results in an illegal extension of the scope of the stop.³ This, however, cannot be the case. If the officer's interactions with the passenger are considered to be a level one voluntary encounter, as *Johnson* clearly implies, then merely asking a passenger for name and date of birth cannot be an illegal extension of the scope of the stop because the passenger has the right to refuse to answer or even leave the vehicle. See *State v. Hansen*, 857 P.2d 978 (Utah App.1993).

III. Ray and Police Officer Freedom in Regards to Passengers

As explained above, the officer must do more than merely ask for a name and date of birth before the encounter escalates. "[A] request for identification cannot constitute a show of authority sufficient to convert an innocent encounter into a seizure." *State v. Bean*, 869 P.2d 984, 987 (Utah App.1994). "Only when police have in some way restrained the liberty of an individual, either by force or a show of authority, is there a 'seizure' within the meaning of the fourth amendment." However, if the officer asks for, receives, and then holds onto the passenger's driver's license or other documentation, this would certainly escalate the encounter to a level two. *State v. Godina Luna*, 826 P.2d 652, 655 (Utah App.1992). All of this indicates that, in *Johnson*, the court must have found some overt action or expression by the officer that clearly indicated to the defendant that she was not free to leave.

Moreover, if the officer asks for and receives the passenger's name and date of birth and then runs a warrant check based on this information, this also does not escalate the encounter to a level two detention. The salient case in this regard is the Ray case cited above.

Ray is not directly on point because rather than dealing with a passenger in a vehicle, it dealt with a case where the officers responded to a call about a suspicious individual loitering in front of a convenience store. Officers responded and questioned the individual, eventually requesting to see her ID, which the suspect provided. The officer then took the ID with him as he ran a warrant check. *Ray*, 998 P.2d at 277.

Referring to the officer's request for identification, the court held that "it is well settled that [an officer's] request for identification alone [does] not constitute a level two stop." *Id.* Furthermore, the fact that an officer runs a warrant check on the defendant does not establish the existence of a level two encounter either. As the court in *Ray* noted, "A warrant check will not per se escalate the encounter into a level two stop." *Ray*, 998 P.2d at 278 n. 2. (citing *Higgins*, 884 P.2d at 1245 n. 2 (Utah 1994)). The court in *Ray* found that the seizure occurred when the

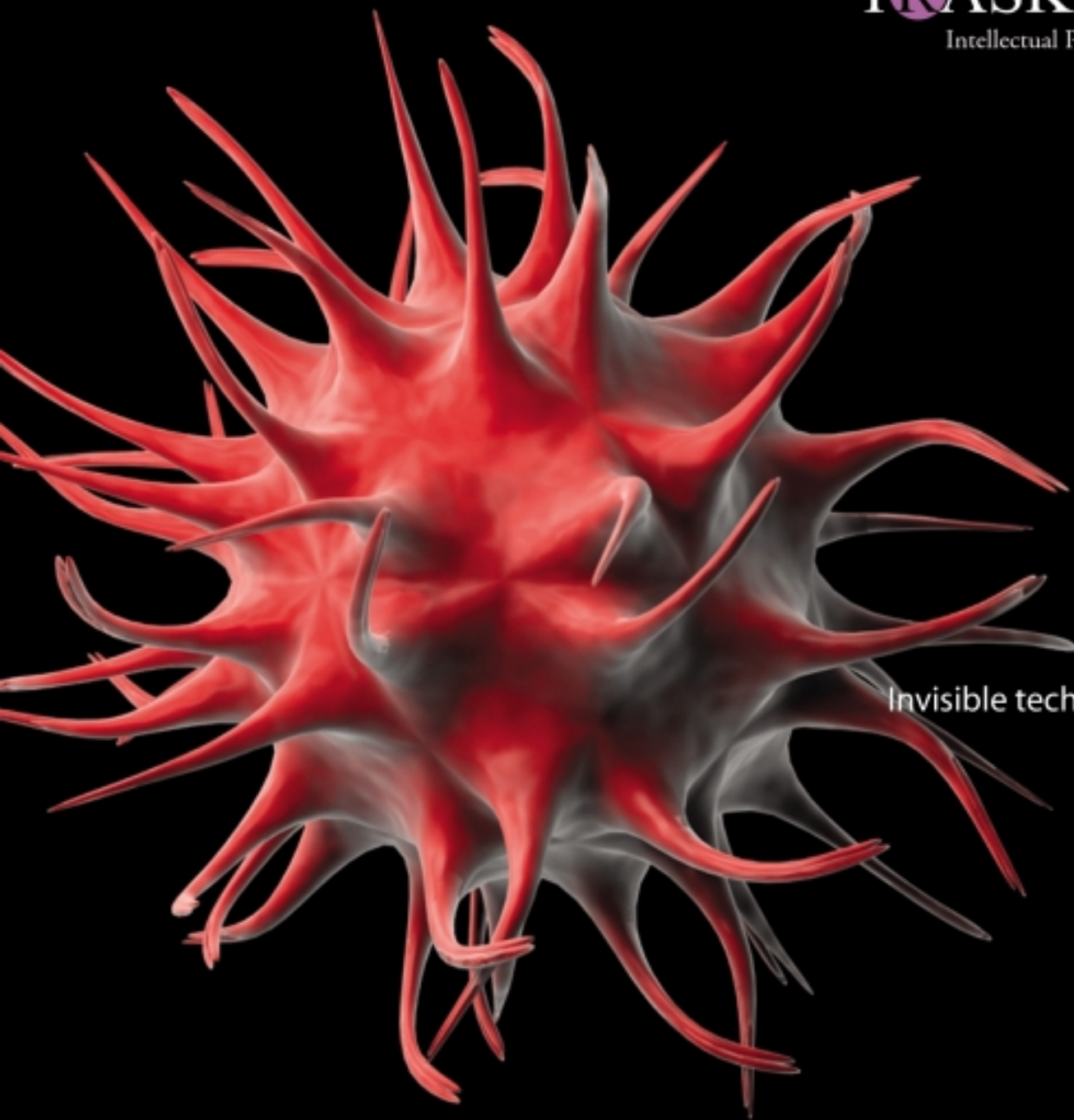
officers took the suspect's documents and did not immediately give them back. Since a person in such an instance would not feel free to leave, the court held that a level two encounter occurred. However, the court noted that an officer may request identification and if he promptly returns it, he may then run a warrant check on the information obtained from the license without fear of creating a level two encounter. If requesting identification from a pedestrian does not automatically create a level two detention, there is no legal reason why requesting such information from the passenger of a vehicle would create such a situation.

CONCLUSION

While the law is not entirely clear, it seems logical that when an officer in Utah conducts a traffic stop on a vehicle in which passengers are involved, the stop is a level two seizure with respect to the driver, but a level one encounter with respect to any passengers. Therefore, an officer is entitled to ask any questions of the passengers that he wishes, regardless of whether or not they exceed the scope of the initial stop, because the passengers, unlike the driver, have the right to either leave the vehicle or refuse to answer should they wish to do so. Only when the officer specifically communicates to the passenger that she is not free to leave, either through words or actions, does the encounter escalate to a level two seizure.

Moreover, neither asking the passenger for her name and birth date to run a warrants check nor asking to see the defendant's ID and then immediately returning the ID converts the encounter to a level two stop. In short, it appears that officers have much more freedom in regards to a passenger than they do to the driver of a detained vehicle. The conclusion appears to be a more consistent reading of the Utah case law in regards to cases involving interactions between law enforcement and vehicle passengers.

1. This understanding must also be implicit in the case of *State v. Hansen*, 837 P.2d 987 (Utah 1982) where the officer demanded the passenger's ID, but the passenger had none. He then requested her name and birth date and, using that information, ran a warrant check which showed an outstanding warrant. The *Hansen* opinion is quite short (only 2 pages) and contains very little analysis or explanation regarding why the passenger in that case was considered to be unreasonably seized while the defendant in a case such as *Higgins* was not.
2. Thus, in *State v. Chism*, 107 P.3d 706 (Utah App. 2005), the court found that an illegal seizure did occur when the officer, rather than just asking for the passenger's information, actually took his ID with him back to his cruiser to run a license and warrant check. The act of taking the ID and not returning it has long been recognized as creating a seizure, as no reasonable person would feel free to leave in such scenario. See also *State v. Markland*, 112 P.3d 507 (Utah 2005).
3. See e.g. B. Kent Morgan, *Traffic Stops: A Bubble Around the Passenger*, UPLINK, Vol 2, Issue 1, July 2000, pgs. 1-2, wherein the author argues that Utah law prohibits even asking a passenger their name during a routine traffic stop absent articulable suspicion that the passenger is engaged in criminal activity.



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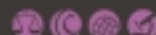
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Preserving State Constitutional Issues in the Trial Court

by Ralph Dellapiana

This article is about *when*, *why* and *how* attorneys may and should be using Article I, Section 14 of the Utah Constitution, instead of the Fourth Amendment, as a basis for motions to suppress evidence. Although this article is directed at the criminal defense bar, it should be of general interest to all attorneys involved in protecting clients against the abrogation of their state constitutional rights.

When case law supports an argument under the Fourth Amendment, it is frankly much simpler and easier to use it than to attempt to persuade a trial court judge to create a new rule of law. Thus, attorneys should use the Utah Constitution *when* the Fourth Amendment case law directly opposes their argument, and perhaps also when there is no Fourth Amendment case directly on point.

The list of potential state constitutional arguments on search and seizure would be as long as the number of issues that have been litigated under the Fourth Amendment. Below is an example of a challenge to *State v. Krukowski*, 100 P.3d 1222 (Utah 2004), filed on behalf of a client of Salt Lake Legal Defenders. In that case, the Utah Supreme Court held that police may make a forcible, warrantless entry into a residence provided that they *later* obtain a warrant based on some independent source.

The primary reason *why* attorneys should look to the Utah Constitution is to help the client. Attorneys must defend their clients' right to privacy and require the police, as state actors, to obey the rule of law. By protecting the rights of their clients, attorneys protect everyone's rights. Without the aid of competent counsel, clients face the danger of conviction, even though they may have a perfect defense. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

Another, related, reason attorneys should use the Utah Constitution is that it is probably malpractice not to do so. The Utah Supreme Court has described the defense counsel's duty to brief relevant state constitutional questions as "imperative." *State v. Earl*, 716 P.2d 803, 806 (Utah 1986). The Utah Court of Appeals has added that, "Until such time as attorneys heed the call of the appellate courts of this state to more fully brief and argue the applicability of the state constitution, we cannot meaningfully play our part in the judicial laboratory of autonomous state constitutional law development." *State v. Bobo*, 803 P.2d 1268 (Utah App. 1990).

Finally, this article then describes, in substantial detail, exactly *how*

to create an argument for a more protective rule under Article I, Section 14 than is available under the Fourth Amendment. Specifically, this article argues that the Utah Supreme Court should reject *Krukowski* and establish a bright-line rule that under the Utah Constitution, police should not be allowed to forcibly enter a house without a warrant.

SUMMARY OF FACTS

Following is a very brief summary of the facts of a case challenging *Krukowski*, with the names of the parties excluded. In addition, for the purpose of focusing on the facts that related to *Krukowski*, certain disputed or unrelated facts are omitted.

A city detective obtained information from "concerned citizens who wished to remain anonymous" that a robbery suspect named "Billy" was using John Smith's house to store stolen guns. Soon thereafter, officers went to Smith's house and communicated their concerns to him. Eventually, the officers drew their weapons, entered Smith's house, and told him not to move. At least a half-dozen officers then entered the house and conducted a protective sweep. During the sweep the officers observed guns, suspected drugs and drug paraphernalia. The officers then secured the premises while one of the detectives went to obtain a search warrant. After the warrant was obtained, several items were seized as evidence.

ANALYTICAL FRAMEWORK

There is no unique approach to briefing a state constitutional law claim. However, the Utah Supreme Court has remarked favorably on the analytical framework employed in *State v. Jewett*, 500 A.2d 233 (Vt. 1985). See *Earl*, 711 P.2d at 806. In *Jewett*, the following analytical approaches are described:

1. reviewing the **history** of the state constitution, to examine "the controversies, attitudes, and decisions of the period

RALPH DELLAPIANA has been a trial attorney for the Salt Lake Legal Defenders Association for the last eleven years.



- during which the constitutional provision at issue was proposed and ratified;"
2. analyzing the **textual** construction of the provision, which "considers the present sense of the words of the provision;"
 3. comparing the decisions of **other states' courts** construing their states' constitutional provisions of similar or identical language;
 4. reviewing **sociological** materials;
 5. doing a **doctrinal** analysis which "asserts principles derived from precedent;"
 6. using a **prudential** analysis, which "advances a particular doctrine according to the practical wisdom of the courts;"
 7. employing a **structural** analysis, claiming that "a particular principle or practical result is implicit in the structure of government and the relationships that are created by the constitution among citizens and government;"
 8. making an **ethical** argument, which relies on "a characterization of American institutions and the role within them of the American people in attempting to legitimize judicial review of the constitutional provisions;" and
 9. using "**any other approach** that an imaginative lawyer might offer."

Jewett, 500 A.2d at 225-227, 236-37 & n.14

ARGUMENT

In challenging *Krukowski*, the defendant in the described case may make the following arguments:

A. History of the Utah State Constitution

Utah pioneers suffered persecution at the hands of murderous mobs in Ohio and Illinois, fled the extermination order of Missouri's Governor Boggs, and suffered more persecution in the Utah Territory from federal marshals engaged in warrantless raids of their homes in search of polygamy-law offenders. Kenneth R. Wallentine, *Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14*, 17 J. Contemporary Law 267, 276 (1991). The *Deseret News* recounted the warrantless Utah raids as "outrages," "carried out without even a warrant giving the perpetrators the authority [to search]." Tracey E. Panek, *Search and Seizure in Utah: Recounting the Antipolygamy Raids*, 62 Utah Historical Quarterly 316, 327 (1994).

This early Utah problem with searches conducted without proper warrants was noted by the Utah Supreme Court in *State v. DeBooy* 996 P.2d 546 (Utah 2000), wherein it stated the following:

This state's early settlers were themselves no strangers to

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the abuses of general warrants. Underlying the abuse of the general warrant was the perversion of the prosecutorial function from investigating known crimes to investigating individuals for the purpose of finding criminal behavior. A free society cannot tolerate such a practice.

Id. at 552.

Justice Stewart believed that history of the Utah Constitution provided a basis for a heightened expectation of privacy. In his concurring opinion in *State v. Anderson*, 910 P.2d 1229 (Utah 1996), he indicated that because the framers of the Utah Constitution modified certain provisions in the Bill of Rights before they were placed in the Utah Constitution's Declaration of Rights, and even added certain provisions not found in the United States Constitution, the Utah Supreme Court should not be bound to construe Utah Constitutional provisions in light of federal law. *Id.* at 1240.

Thus, the unique history of the Utah Constitution provides a basis for reaching different, more protective decisions than would a federal court construing the Fourth Amendment.

B. Textual Construction

On its face, Article I, Section 14 of the Utah Constitution is nearly identical to the Fourth Amendment to the United States Constitution. The only textual difference between the two constitutional provisions

is one of punctuation and grammar. Because of the close textual similarity between the two constitutional provisions, the Utah Supreme Court will not draw a distinction between the constitutional provisions based merely upon a textual analysis. *See State v. Watts*, 750 P.2d 1219, 1221 (Utah 1988).

Notwithstanding the textual similarity of the state and federal provisions, on more than one occasion, the Utah Supreme Court has held that Article I, Section 14 provides a greater expectation of privacy than the Fourth Amendment as interpreted by the United States Supreme Court. For example, in *State v. DeBooy*, 996 P.2d 546 (Utah 2000) the Utah Supreme Court held a traffic checkpoint to be unlawful under Article I, Section 14 of the Utah Constitution. The court distinguished a suspicionless roadblock upheld by the United States Supreme Court in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) and stated that Fourth Amendment precedent is persuasive, but not binding, when Utah courts are construing the Utah Constitution. *DeBooy*, 996 P.2d at 551 & n.7. The court noted that although the Utah Constitution's and United States Constitution's search and seizure provisions "contain identical language," . . . the court "**will not hesitate to give the Utah Constitution a different construction where doing so will more appropriately protect the rights of this state's citizens.**" *Id.* at 549 (emphasis added). Justice Durham stated that "multi-purpose, general warrant-like intrusions on the privacy of persons using the highways are unacceptable" and therefore violate the Utah Constitution. *Id.* at 554.

Another case in which the Utah Supreme Court decided not to follow the federal standard is *State v. Thompson*, 810 P.2d 415 (Utah 1991). In *Thompson*, the court ruled that defendants have the right to be free from unreasonable searches and seizures of their bank statements. This decision directly contradicted the United States Supreme Court's holding in *United States v. Miller*, 425 U.S. 435, 442 (1976), in which the Court held that the government may seize bank records without a Fourth Amendment violation because a bank depositor has no reasonable expectation of privacy. The Utah Supreme Court justified its holding on the grounds that several commentators had heavily criticized *Miller* and other states that had faced the issue had also rejected the *Miller* holding based upon their state constitutions. *Thompson*, 810 P.2d at 416-18.

In sum, despite the similarity of the language between the Fourth Amendment and Article I, Section 14, the Utah Constitution has been construed as providing more protection against unreasonable search and seizure to the citizens of Utah than does the United States Constitution.

C. Doctrinal Principles

Article I, Section 27, states: "Frequent recurrence to fundamental principles is essential to the security of individual rights. . . ."

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Section 26 of Article I is also important; stating: “The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.” Section 26 was relied on by the court in *State v. Thompson* for finding protection of bank depositor’s records. *Thompson*, 810 P.2d at 416-18.

Among the most fundamental principles is the sanctity of the home. *See Payton v. New York*, 445 U.S. 573 (1980). Particularly important in the instant case is that the warrantless entry into a person’s home is presumptively unreasonable. *Id.* at 586. “Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *United States v. United States District Court*, 407 U.S. 297, 313 (1972).

The *Krukowski* decision violates these fundamental principles when it relies on *Murray v. United States*, 487 U.S. 533 (1988) (4-3 plurality opinion). The *Murray* decision has itself been the subject of much criticism. *Murray* contains principles that create an incentive for police to violate the warrant clause because there are no consequences to engaging in unconstitutional violations of the privacy of the home. For example, in *Murray*, Justice Marshall, with whom Justice Stevens and Justice O’Connor joined in dissent, wrote:

The Court today holds that the “independent source” exception to the exclusionary rule may justify admitting

evidence discovered during an illegal warrantless search that is later “rediscovered” by the same team of investigators during a search pursuant to a warrant obtained immediately after the illegal search. I believe the Court’s decision . . . emasculates the Warrant Clause and undermines the deterrence function of the exclusionary rule. I therefore dissent.

Indeed, admission in these cases affirmatively encourages illegal searches. . . . When, as here, the same team of investigators is involved in both the first and second search, there is a significant danger that the “independence” of the source will in fact be illusory, and that the initial search will have affected the decision to obtain a warrant notwithstanding the officers’ subsequent assertions to the contrary.

The Court’s . . . holding lends itself to easy abuse, and offers an incentive to bypass the constitutional requirement that probable cause be assessed by a neutral and detached magistrate before the police invade an individual’s privacy.

Murray, 487 U.S. at 544-47.

In sum, Utah courts should reject the plurality opinion in *Murray* that it followed in *Krukowski* because it violates the long-recognized, fundamental principle of the sanctity of the home.



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Blake D. Miller
miller@mmglegal.com

Paxton R. Guymon
guymon@mmglegal.com

Bill R. Gray
gray@mmglegal.com

Shayne R. Kohler
kohler@mmglegal.com

Joel T. Zenger
zenger@mmglegal.com

James W. Anderson
anderson@mmglegal.com

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Instead, under the Utah Constitution, the forcible, warrantless, entry by police into a person's home should not be judicially protected conduct.

D. Statutory Analysis

Another reason that the rule in *Krukowski* should be rejected under the Utah Constitution is that it permits searches made in violation of state statute. Utah courts have held that searches conducted in violation of state statute are unreasonable. For example, by statute, police serving a search warrant may enter a house without notice of their authority and purpose *only if the warrant specifically authorizes them to do so*. Utah Code Ann. § 77-23-210. In *State v. Ribe*, 876 P.2d 403 (Utah App. 1994), the Utah Court of Appeals held that, where police violated this “knock-and-announce” statute by failing to knock on the apartment door and announce their presence and authority, the marijuana found in the defendant's apartment should have been suppressed. *Id.* at 407, 412.

Similarly, the successful appellant in *State v. DeBooy*, 996 P.2d 546 (Utah 2000) relied on § 77-7-15 and other state statutory analysis as grounds for urging the court to reject the roadblock exception set forth in federal case *Martinez-Fuerte*. The court held unconstitutional, under Article I, Section 14, the roadblock scheme at issue in that case, largely because the plan failed to provide guidelines as to what such a search should entail or how it should be conducted, thus violating the very statute authorizing roadblocks, Utah Code. Ann. § 77-23-104(2)(b). *Debooy*, 996 P.2d at 551-52.

More apropos to the case described in this article, numerous statutes govern entry by police into a person's residence. *See generally*, Utah Code Ann. § 77-23-201 et. seq. (2004). For example, Utah Code Ann. § 77-23-202 describes the grounds for issuance of a warrant, § 77-23-203 lists conditions precedent to issuance, § 77-23-204 provides for the convenience of a telephonic warrant, § 77-23-205 directs the time warrants must be served, and § 77-23-210 describes when police may enter after obtaining a warrant, but without giving prior notice of their authority before entering by force.

In the described case, when officers entered the defendant's home by force without even attempting to obtain a warrant, they violated all these statutory provisions. Thus, their entry was unreasonable and unconstitutional. Failure to employ the exclusionary rule to such a blatant violation would reduce Article I, Section 14's prohibition against unreasonable searches and seizures to nothing more than a form of words. *See DeBooy*, 996 P.2d at 554. Moreover, failure to employ the exclusionary rule in such a case actually creates a perverse guarantee that protects all such future violent encroachments by police. A free society cannot tolerate such practice. *See DeBooy*, 996 P.2d at 552.

E. Prudential Arguments

A prudential argument advances a particular doctrine according to the practical wisdom of the courts. *Bobbit, supra*, at 7. The Utah Supreme Court has chosen to depart from federal Fourth Amendment interpretations on occasion **for the purpose of establishing a more workable rule** for police and trial courts than exists under confusing federal case law. For example, in *State v. Brake*, 103 P.3d 699 (Utah 2004), the court took issue with the usefulness of federal Fourth Amendment jurisprudence concerning the police officer safety justification for warrantless automobile searches, finding that the federal authority, *i.e.*, *New York v. Class*, 475 U.S. 106 (1986), “subverts the workable principles found in Utah law . . .” *Id.* at 703-04. Similarly, in *State v. Watts*, 750 P.2d 1219 (Utah 1988), the court said, “Choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts.” *Id.* at 1221 & n.8.

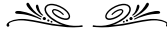
The *Murray* case, on which *Krukowski* was based, is complex in application. *See Note and Comment: The Inevitable Discovery Doctrine Today: The Demands of the Fourth Amendment, Nix, and Murray, and the Disagreement Among the Federal Circuits*, 13 BYU J. Pub. L. 97 (1998) (discussing the ambiguity of the inevitable discovery and independent source doctrines, and opining that the split in the circuits over whether the doctrines apply to primary evidence, derivative evidence, or both creates confusion and injustice in American criminal procedure law).

One way to improve predictability would be to make “clear cut rules . . . for example, a flat requirement that a warrant must be obtained before *any* nonconsensual search of property.” *State v. Hygh*, 711 P.2d 264, 272 (Utah 1985). Requiring police to obtain a warrant before entering a home “would present little impediment to police investigations, especially in light of the ease with which warrants can be obtained under Utah's telephonic warrant statute.” *Id.*

Such a bright-line rule is workable and simpler in application than the vagaries of the federal rule, which often requires determinations about which evidentiary items were seen on the first illegal entry or the second entry by warrant, and the weighing of various factors to determine whether the investigation on which the warrant was based was sufficiently independent of the investigation that led to the illegal entry.

Moreover, the federal rule actually guarantees the right of police to make warrantless intrusions in every case. What once was the “chief evil” becomes judicially protected conduct. As the dissenting justices in *Murray* indicated, the rule is subject to easy abuse and creates an intolerable incentive for abuse. The rule should be clear that, in Utah, warrantless entries require suppression.

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Special Masters, Receivers, and the Duty to Marshal Evidence

Chen v. Stewart

by Jessica G. Peterson

I. INTRODUCTION

During the summer of 2004, the Utah Supreme Court was invited to revisit special master law, receiver law, and Utah's duty of marshaling the evidence, in a case of family corporate contention of overwhelming proportions. The defendants contended that the trial court's appointment of an individual to act as an interim CEO, vested with the judicial immunity of a special master, was unconstitutional. The court refused to place form over substance, and did not allow choice of words and technical meaning to outweigh what it believed was in substance a just result. The unique facts in *Chen v. Stewart* probably will not serve as useful precedent for another close corporation's falling out. However, the case has already been cited to explain Utah's strict marshaling standard, and *Chen v. Stewart* is a valuable primer on Utah special master, receiver, and marshaling law.

II. CHEN V. STEWART

A. Facts of the Dispute¹

On January 10, 2001, Jau-Fei Chen ("Dr. Chen"), the youngest of five siblings, filed a lawsuit against her sister, Jau-Hwa Stewart ("Ms. Stewart") bringing to the Court what Chief Justice Christine Durham later characterized as a "particularly vicious dispute." *Chen v. Stewart*, 2004 UT 82 ¶5 100 P.3d 1177. Dr. Chen amended the complaint and added E. Excel International, Inc. as a defendant on January 18, 2001. She claimed breach of fiduciary duties, corporate waste, and corporate wrongdoing. The Utah Supreme Court explained, "[o]ver 200 pages of findings of fact and conclusions of law entered by the trial court narrate a tale of intrigue, deceit, and family strife of surprising proportions." *Chen v. Stewart*, 2004 UT 82, ¶2.

Dr. Chen was President of E. Excel, a manufacturer of nutritional supplements and skin care products sold both nationally and internationally. In 1995, Dr. Chen transferred her interest in E. Excel to her three minor children and to her sister, Ms. Stewart. Ms. Stewart, alleging to control 100% of the shares of E. Excel, voted Dr. Chen off the board of directors and replaced her with their mother, Hwan Lan Chen ("Madam Chen"). The new board removed Dr. Chen as president of E. Excel and installed Ms. Stewart

as President. Ms. Stewart and Madam Chen required all of E. Excel's distributors to sign new contracts with E. Excel forbidding any business activity with Dr. Chen. Ms. Stewart also began establishing new distributors to compete with and replace existing distributors, still loyal to Dr. Chen, in violation of the Contracts E. Excel had with existing distributors providing exclusive territories.

At the trial level Fourth District Judge Fred D. Howard issued Dr. Chen's requested temporary restraining order on June 10, 2001, prohibiting Ms. Stewart from creating new competition for E. Excel or taking away any of its current business. While the temporary restraining order was in place, Ms. Stewart and third party defendants allegedly tried to sabotage E. Excel in violation of the order.² Judge Howard removed Ms. Stewart as President of E. Excel.

Judge Howard subsequently appointed Mr. Larry Holman as interim CEO of E. Excel. The order said the CEO could not participate in the case as an active party litigant. When Dr. Chen's counsel noted that their suggested candidates for interim CEO wanted to avoid personal liability for their acts as CEO, the trial court agreed to also designate Mr. Holman as a "special master" so he could have judicial immunity in the proceedings. The court appointed Mr. Holman to be the manager of E. Excel and gave him the judicial immunities and title of special master: "Mr. Holman is given complete executive authority in his role as chief executive officer and special master." In this role, Mr. Holman was authorized to engage in *ex parte* communications with both parties and witnesses.

B. Mr. Holman's Acts as Special Master and Interim CEO

On May 11, 2001, CEO Holman requested powers of a party litigant and "master claims settler." Judge Howard again expanded

JESSICA PETERSON graduated in May 2006 from the University of Utah S.J. Quinney College of Law. She works for Berman & Savage, the firm who represented the Appellant in the Chen case. The views in this piece are those of the author, and in no way represent the views of Berman & Savage or any of its attorneys.



the powers of the Special Master and authorized him to act as an active party litigant. Judge Howard authorized him to direct and control E. Excel's litigation and possible settlement. Mr. Holman retained litigation counsel to help him as an active party litigant. On June 1, 2001, Judge Howard approved Mr. Holman's decision to enter a Master Settlement Agreement with Dr. Chen and other third party allies, and Judge Howard gave Mr. Holman authority to execute the agreement. The agreement settled all litigation between E. Excel and Dr. Chen. It further settled all of E. Excel's other litigation.³ It also restructured E. Excel, forcing Ms. Stewart, the sister, and Madam Chen, the mother, out of any type of ownership or control. The agreement changed the relationship with the territorial owners, allowing them to manufacture and obtain E. Excel products using their own manufacturer. There was no disinterested party to approve the agreement. Mr. Holman recommended Judge Howard approve the report because Mr. Holman submitted it in his capacity as special master. The trial judge did approve the actions of Mr. Holman, stating "this Court accepts the conclusion of the business judgment made by the Special Master."

Mr. Holman proceeded to authorize E. Excel to file an Amended Cross-Claim/Third Party Complaint and Motion for Preliminary

Injunction against Ms. Stewart and Madam Chen. This was the first time Madam Chen was named as a party to the case.

Judge Howard granted a Preliminary Injunction in favor of E. Excel based on 110 pages of Preliminary Injunction findings adopted from the Special Master's findings. Ms. Stewart and Madam Chen were enjoined from worldwide competition in the dietary supplement, herbal, personal care, cosmetic, and hygiene products industries.

The special master participated as an active party litigant and invoked the use of Rule 53, Utah Rules of Civil Procedure, in his filings and paperwork. Mr. Holman's attorneys filed summonses, discovery requests, and trial subpoenas expressly as the special master for E. Excel.

C. The Party's Arguments

Before the Utah Supreme Court, Madam Chen and Ms. Stewart argued that a special master with Rule 53 powers could not act as a party litigant. Dr. Chen and E. Excel countered that Madam Chen and Ms. Stewart failed to marshal the evidence. Dr. Chen and E. Excel also argued that the trial judge did not appoint Mr. Holman as a special master, but that his appointment was really that of a receiver. E. Excel and Dr. Chen argued that the appointment of

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Mr. Holman was first and primarily the appointment of an interim CEO. They argued that the special master language was added only as a means to insure Mr. Holman had judicial immunity, because he needed protection from being sued. Dr. Chen's counsel argued Mr. Holman was the equivalent of a court-appointed receiver. Madam Chen's counsel in its rebuttal explained that "civil litigation, master settlement agreements, and corporate restructuring under the law are left to private parties and not *pendente lite* officers of the court." Madam Chen argued that if Mr. Holman had been appointed as a receiver, he would have been a receiver *pendente lite*, and still unable legally to take the actions he took.

III. SUPREME COURT'S DECISION

The Utah Supreme Court was not impressed with Madam Chen's arguments regarding the special master, receiver, and interim CEO law. The court explained, "We reject defendants' attempts to use this ambiguity to undermine the entire substance of the trial court's rulings." The court then held Madam Chen's counsel failed to adequately marshal the evidence.

A. A New Position: Court Appointed Interim-CEO

Although it is a "relatively novel use of a court-appointed officer," the court believed Madam Chen's objection to the appointment of an interim CEO had been waived and the court had power to appoint Mr. Holman as interim CEO. "[T]he trial court had equitable authority to appoint an interim CEO with judicial immunity." The court stated that the parties stipulated in a phone conversation on March 5, 2001, that the CEO would be granted judicial immunity. The court acknowledged Madam Chen was not a party at that time, but Madam Chen waived any objections by her behavior.

Mr. Holman's participation in the litigation with judicial immunity was also favorably received by the Supreme Court for two reasons. First, it was similar to the powers of a receiver, and second, he played an integral role in the furtherance of the trial court's ability to adjudicate the case.

The court held, "the powers of the interim CEO appointed in the present case are largely identical to those of a receiver..." In the past, courts have appointed receivers to preserve assets when misappropriation of corporate assets by insiders is asserted, to comply with a request from stockholders of a corporation, or to solve dissent among a corporation's managers. An interim CEO with the same powers as of a receiver has been appointed in a bankruptcy proceeding. The court held receivers are allowed to bring lawsuits.

The court made no effort to determine what appointment Mr.

Holman possessed. The court did not differentiate between a receiver *pendente lite* and a receiver. The court explained:

Defendants contend that even had the trial court appointed Mr. Holman as a receiver, he would have been a 'pendente lite' receiver, with none of the powers allocated to Mr. Holman as interim CEO. We need not decide today whether defendants' distinctions between 'pendente lite' receivers and other types of receivers merits the attention defendants give it. Nor do we need to decide today whether a 'pendente lite' receiver has the powers to run the company in a 'biased fashion' and bring suit. As heretofore stated, the trial court did not appoint a receiver, or even a 'pendente lite' receiver.

Chen, 2004 UT 82, n.11. The court did not reach the question of special master, and instead focused on judicial immunity: "While the term 'judicial immunity' historically refers to the immunity extended to judges for their official acts, we use it in this unique context as extending to those appointed to act under the court's direction." *Id.* at n. 12. ("[W]e need not consider at this time whether a rule 53 special master could be so empowered.") The court stated, "it is quite clear" there was no overlap of the quasi-judicial function and the court-appointed CEO or receiver function. The court ignored any references Mr. Holman or his counsel made to his being a special master, or invoking rule 53.

B. Marshaling the Evidence

Prior to *Chen*, legal questions were outside Utah's marshaling requirement. However, that standard has now changed. As the Court explained, "if a determination of the correctness of a court's application of a legal standard is extremely fact sensitive, the defendants also have a duty to marshal the evidence." *Chen*, 2004 UT 82, ¶20.

The court in *Chen* took the opportunity to reiterate the standard for marshaling the evidence, explaining that "the requirements of marshaling still do not appear to be understood with the sense of clarity and urgency we desire." The test includes presenting "every scrap of competent evidence introduced at trial which supports the very findings the appellant resists." "In sum, to properly marshal the evidence the challenging party must demonstrate how the court found the facts from the evidence and then explain why those findings contradict the clear weight of the evidence." Even if there is no evidence the trial court could have used to reach its conclusion, the court explained that "an appellee need only point to a scintilla of evidence that supports a court's findings in order to refute an appellant's claim of no evidence." In this case, "[d]efendants have merely ignored damaging findings and avoided confronting problematic facts by claiming there is no evidence."

This new standard requires appellants to marshal the entire record, not just the topics on appeal.

Observations and Suggestions

The additional language in the opinion regarding special masters, receivers, and interim CEOs may prove to be confusing and unhelpful for future cases. The court's ruling creates a precedent allowing judges to appoint interim CEOs, receivers, or special masters to act as party litigants, with expansive powers, mixed roles and full judicial immunity. This is an extension of judicial power allowing direct access to and control of the day-to-day operations of any ongoing business. Power to appoint interim CEOs is nearly without precedent throughout the nation.

The failure to marshal properly continues to be a millstone around appellants' necks. The Utah Supreme Court should identify briefs where evidence was correctly marshaled. Not only is this a requirement unique to Utah, but many experienced attorneys and well known and respected firms have been found to have failed to properly marshal. Attorneys will not be able to understand the requirement of correct marshaling without having examples of such marshaling properly done.

Utah attorneys should be extremely careful in any claim of "no

evidence" for an opposing party's proposition. A mere scintilla of evidence, particularly in a voluminous and complicated case, is an easy standard for an appellee to meet.

IV. APPENDIX: LAW REGARDING SPECIAL MASTERS, RECEIVERS, COURT APPOINTED CEO'S AND DUTY TO MARSHAL

A. SPECIAL MASTERS

Special masters are appointed under Rule 53 of the Utah Rules of Civil Procedure. Special masters are appointed by judges to act for the court in conducting hearings, creating findings of fact, and reports. Often they are appointed when litigation is complex and the judge needs someone to help with fact finding. See *In re Worthen*, 926 P.2d 853, 859-60 (Utah 1996). Special masters originated from common law rules of equity authorizing the use of masters in courts of chancery. See *De Clements v. De Clements*, 662 So.2d 1276, 1279 (Fla. Ct. App. 1995). Utah courts have used special masters since the nineteenth century in territorial courts. See *Nephi Irr. Co. v. Jenkins*, 31 P. 986, 987 (1893). These special masters are not allowed to replace the court, but are to assist in judicial functions. See Utah R. Civ. P. 53(a)-(b); *Plumb v. State*, 809 P.2d 734, 742-43 (Utah 1990); *Webster Eisenlohr, Inc. v. Kalodner*, 145 F.2d 316, 319 (3d Cir. 1944).

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The language of the federal rule is similar to the Utah rule, and Utah can look to federal precedent in determining special master law. See *Plumb*, 809 P.2d at 740 n.9. A pendente lite special master, meaning one appointed during the pendency of the litigation, can only be empowered with and exercise judicial power. See Utah R. Civ. P. 53; *Webster Eisenlohr*, 145 F.2d at 319; *Plumb*, 809 P.2d at 742-43. The simple rule is to inquire whether or not a judge would be authorized to take the action, and if not, the special master cannot take action. See *Plumb*, 809 P.2d at 743. According to Rules 53(b), the appointment of a special master should be the exception and not the rule. Special masters are only appointed under Rule 53. See *Turner v. Orr*, 722 F.2d 661, 664 (11th Cir. 1984). The term is a technical one. A special master's immunity is intertwined with his appointment as a special master; he cannot have the immunity without the position. See *Parker v. Dodgion*, 971 P.2d 496, 498 (Utah 1998).

Special masters have the duty to raise issues of unlawful empowerment and pendente conflicts of interest. See *Regional Sales Agency, Inc. v. Reichert*, 830 P.2d 252, 257 n.7 (Utah 1992). The judge's intent in appointing a special master is controlling. See *Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 132 (4th Cir. 1992); *Lefkowitz v. Fair*, 816 F.2d 17, 22-23 (1st Cir. 1987). The powers of special masters are specifically limited to judicial

powers. See *Plumb*, 809 P.2d at 742-44; *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957). *Plumb* rejected *LaBuy's* ultimate holding, but confirmed *LaBuy's* rule that a special master is a subordinate judicial officer. As such, special masters are not authorized to participate in litigation as parties, or to participate in ex parte communications. See *Webster Eisenlohr*, 145 F.2d at 319. Additionally, it is improper for a special master to have any loyalties to any of the parties. See *Plumb*, 809 P.2d at 743.

B. THE ROLE OF THE RECEIVER

There are four main types of receivers: 1) a "pendente lite receiver" appointed during the course of litigation, 2) a receiver appointed to hold and preserve assets, 3) a receiver appointed for an insolvent company or to dissolve a corporation, and 4) a statutory receiver or custodian appointed under UTAH CODE ANN. § 16-10a-1432.⁴ Receivers are governed under Rule 66 of the Utah Rules of Civil Procedure. The primary purpose of a receiver is to protect the assets and status quo of the property or entity. See *Savageau v. Savageau*, 285 P.2d 810, 813 (Colo. 1955). Utah law allows a court to appoint a receiver "in cases where misappropriation of corporate assets by corporate insiders is asserted." See *Richardson v. Arizona Fuels Corp.*, 614 P.2d 636, 638 (Utah 1980).



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A receiver is appointed based on the court's discretion. See *Waag v. Hamm*, 10 F. Supp. 2d 1191, 1193 (D. Colo. 1998); *Richardson*, 614 P.2d at 638 ("In determining whether a receiver should be appointed, the district court should consider the pleadings as a whole."). Where a corporation is solvent, a receiver serves the interests of and owes a fiduciary duty to all parties in interest of the corporation. See *Geyser Min. Co. v. Bank of Salt Lake*, 51 P. 151, 152 (Utah 1897). In such a scenario, a receiver is appointed under the catch-all statement providing for a receiver, "[i]n all other cases where receivers have heretofore been appointed by the usages of court in equity." Utah R. Civ. P. 66(a)(6). The appointment of a receiver should be used as a last resort because it is a drastic remedy. (See *Rosen v. Siegel*, 106 F.3d 28, 34 (2d Cir. 1997).

According to Rule 66(d), a receiver is allowed to participate in lawsuits if he brings the action in his own name. However, the receiver is not an agent of the parties, but of the court, and must be disinterested, impartial, and neutral.⁵ The receiver has an interest that prevents him from acting as a special master because his responsibility is to preserve assets. *United States v. Conner*, 291 F.2d 520, 526 (2d Cir. 1961).

Before a pendente lite receiver may initiate a separate action

under Rule 66(e), he must petition the court and be specifically authorized by the court to bring a specific action, and he cannot be given discretion whom to sue. (See *Morand v. Superior Court*, 113 Cal. Rptr. 281, 284 (Cal. Ct. App. 1974); *Kist v. Coughlin*, 57 N.E.2d 199, 205 (Ind. 1944). He may not be lawfully empowered to act as a litigation receiver when he is appointed as a pendente lite receiver, because his purpose is to assist the court in securing the parties' rights, not to destroy such rights. See *Case v. Murdock*, 528 N.W.2d 386, 388-89 (S.D. 1995).

A receiver cannot increase or decrease the number of parties to a main action. *Kist*, 57 N.E.2d at 205. Additionally, parties may not stipulate to the appointment of a receiver where a receiver may not be lawfully appointed. *Gatch, Tennant & Co. v. Mobil & O.R. Co.*, 59 F.2d 217, 217-18 (D. Ala. 1932); *Armour Fertilizer Works v. First Nat'l Bank*, 100 So. 362, 365 (Fla. 1927); *Davis v. Hayden*, 238 F. 734, 739-40 (4th Cir. 1916); *Elliot v. Superior Court*, 145 P. 101, 103 (Cal. 1914). The purpose of a receiver is to manage the affairs of the corporation to preserve the parties' rights and maintain the status quo. (*Davis v. Gray*, 83 U.S. 203, 217-18 (1872); *Geyser Mining Co.*, 51 P. at 152. "The receiver is an officer and arm of the court and acts under the direction and supervision of the court." *Interlake Co. v. Von Hake*, 697 P.2d 238, 239-49 (Utah 1985). Under these policies, a receiver

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“cannot be used simply as a tool for one faction to wrest control of a corporation away from another faction.” *Syphers v. Scardino*, 1985 U.S. Dist. LEXIS 13161, *21 (E.D. Pa. Dec. 5, 1985).

A receiver is supposed to take an oath or post a bond to faithfully execute the duties of a receiver. See Utah R. Civ. P. 66(d); *Fed. Trade Comm’n v. World Wide Factors, Ltd.*, 882 F.2d 344, 348 (9th Cir. 1989). The requirement to take an oath or post a bond can be waived. *Neilson v. Dennett*, 450 P.2d 93, 94-95 (Utah 1969); *Travelers Ins. Co. v. Broadway West Str. Assoc.*, 164 F.R.D. 154, 163 (S.D.N.Y. 1995). The business judgment rule also applies to receivers. *Assoc. of Commonwealth v. Hake*, 507 N.W.2d 665, 671 (Neb. Ct. App. 1993); *Golden Pacific Bancorp v. FDIC*, 2002 U.S. Dist. LEXIS 24961 (S.D.N.Y. Dec. 26, 2002).

If the court uses the title of special master, but the appointment is in truth for a receiver, the confusion does not necessarily lead to reversible error. *World Wide Factors*, 882 F.2d at 348.

“[W]hatever the title, the court’s equitable power to appoint an agent to supervise the implementation of its decrees is not terminated or modified by rule 53.” *Chen v. Stewart*, 2004 UT 82 ¶ 54 fn.12, (citing *Jenkins v. Missouri*, 890 F.2d 65, 67 (8th Cir. 1989)).

C. INTERIM CHIEF EXECUTIVE OFFICERS

Bankruptcy proceedings provide the only forum where courts have appointed interim CEOs to serve in overseeing the reorganization of the company. 11 U.S.C. § 1107; *In re Prop. Co. of Am. Joint Venture*, 110 B.R. 244, 245-46 (Bankr. N.D. Tex. 1990); *Cooke v. United States*, 796 F. Supp. 1298, 1300-01 (N.D. Cal. 1992). Relevant statutory provisions define a CEO’s scope of authority. In Utah, the Utah Business Corporations Act defines the scope of a CEO’s authority. See Utah Code Ann. § 16-10a-831. It requires that each officer perform duties set forth in the bylaws of the corporation. If a CEO wants to take a certain action, a CEO may do so if it is not in conflict with the bylaws and the directors authorize the CEO to so act.

Chief Executive Officers lack standing to bring claims for injuries to the corporation in their own names. (See *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F. Supp. 1365, 1380 (D. Haw. 1995); *Willis v. Lipton*, 947 F.2d 998, 1000-02 (1st Cir. 1991); *Hite v. Bell Atlantic Corp.*, No. CV-98-0981, 2000 U.S. Dist. LEXIS 5310, at 8 (M.D. Pa. 2000).) This is because a CEO is only indirectly injured when a corporation is injured.

As of January 2005, there was only one case found where a CEO was appointed by the court in a proceeding not involving bankruptcy. See *Brooks v. United States*, No. 92-3295 1994 U.S. App. LEXIS 20616 at 4-5 (10th Cir. 1994). In that case, the

court acceded to the requests of the corporation who wanted a CEO rather than a receiver to prevent the loss of oil and gas concessions, which would have been cancelled upon the appointment of a receiver.

D. THE DUTY TO MARSHAL

Utah puts the burden on the appellant to marshal the evidence. See *Chen*, 2004 UT 76; Justice Michael J. Wilkins, A Primer in Utah State Appellate Practice, 2000 UTAH L. REV. 111, 127-28. By marshaling, the appellant is required to “list all the evidence supporting the findings and then demonstrate that the evidence is inadequate to sustain the findings” Justice Wilkins, A Primer in Utah State Appellate Practice, 2000 UTAH L. REV. at 127. Marshaling the evidence requires “[t]he challenger to present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.” *Neely v. Bennett*, 2002 UT App 189, ¶ 11, 51 P.3d 724. Justice Wilkins of the Utah Supreme Court likens the process to becoming a “devil’s advocate” by presenting all the evidence upon which the trial court relied. Additionally, if the problem arises that the findings of fact are not there, counsel should argue that the findings are legally insufficient. See Justice Wilkins, Utah Appellate Practice, 2000 UTAH L. REV. at 128.

Justice Wilkins provides three policy reasons why marshaling the evidence is good. First, it reminds appellate courts that the trial court, as fact finder, deserves deference. Second, it increases the appellate court’s efficiency in writing and deciding cases, because the appellant provides all the material necessary for the court to see the potential flaws. Third, marshaling is the duty of the appellant because he or she bears the burden of not deferring to the trial court.

1. These facts are taken from the Brief of Appellant Madam Chen, the Brief of Appellant Jau Hwa Stewart, the Opposition Brief of Appellee E. Excel, the Reply Brief of Madam Chen, and the Reply Brief of Jau Hwa Stewart.
2. Brief of Appellee E. Excel at 13. A story is told that Ms. Stewart and third party defendants destroyed tons of E. Excel product, then bought mice from pet stores and released them into the factories, claiming because of the mice infestation the product was gone.
3. See Brief of Appellant Madam Chen at 18. This settlement included a Hong Kong derivative action filed against Dr. Chen and her allies, alleging they embezzled \$75 million of E. Excel revenue.
4. See Reply Brief of Hwan Lan Chen at 11, *Chen v. Stewart*, 2004 UT 82, 100 P.3d 1177 (citing *Stokes v. Hoffman*, 46 A.D. 120, 128, 132-33 (N.Y. App. Div. 1899)); *Valley View State Bank v. Owen*, 737 P.2d 35, 38-39 (Kan. 1987).
5. See Utah R. Civ. P. 66(b); *Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147, 150 (4th Cir. 1944); *Booth v. Clark*, 15 L. Ed. 164, 168 (1854); *Geyser Mining Co. v. Bank of Salt Lake*, 61 P. 151, 152 (Utah 1897); *Norwest Bank Nebraska v. Bellevue Bridge Comm’n*, 607 N.W.2d 207, 210 (Neb. Ct. App. 2000).

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Henriod, Dissenting

by Bryan J. Pattison

The Honorable F. Henri Henriod served on the Utah Supreme Court from 1951-1976. In that time he became well known as one of the court's most frequently dissenting justices.¹ On this subject, he stated, "There are very few of these controversies that are so one-sided that a plausible opinion cannot be written to show that there is also merit on the other side."² That's putting it mildly for this jurist. In showing there was merit to the other side he crafted opinions that ranged from scholarly, to humorous, to condescending and accusatory.

For example, in *Maxfield v. Denver & Rio Grande Western R.R. Co.*,³ a case involving federal law, Justice Henriod took the position that the majority was simply guessing at how the United States Supreme Court might rule if eventually faced with the question presented in that case. He accused the majority of merely picking and choosing from the opinions of six different U.S. Supreme Court justices in several different cases to come up with enough of them who "supported" the majority's opinion on the issue at hand. Justice Henriod opined: "I dissent, suggesting that the main opinion has given us a new and novel principle, that of anticipatory stare decisis."⁴ He then cautioned, "[t]he reasoning of the majority opinion wholly fails to take into account the fact that time often stills the voices of Justices of the Supreme Court."⁵

Though time would find it difficult to still Justice Henriod's voice, to ensure it does not remain buried within the pages of the Utah Reports, the following are excerpts from a few of the opinions in his substantial body of work. While each is unique, they all have one thing common – they reflect the writing of a jurist untethered by any strings of doubt, supremely confident in his analysis of law and fact and, ultimately, the correctness of his conclusions.

Driving Under the Influence

In *State v. Twitchell*,⁶ a defendant appealed his conviction for automobile homicide asserting that the statute under which he was convicted was unconstitutional because it unlawfully discriminated between those who were driving under the influence and "happened" to kill someone – which he had done – and those who did so but were not under the influence by making the former a felony. The majority affirmed his conviction. Coming to the defense of the seemingly indefensible, Justice Henriod dissented, offering the following comments on the statute in question:

The injustice of the statute could be illustrated by the fact

that under its terms a person running a red light at 90 m.p.h., who had not had a drink, but who kills another, faces but a misdemeanor and a year in jail, while one who may not have thought of voluntary intoxication, at 10 m.p.h. may kill some one after leaving his doctor's office and after having had administered to him a drug for some ailment or other which actually but unwittingly made it unsafe for him to drive, would face a felony and a maximum of 10 years, – the statute not requiring any intentional or voluntary self-administration of drink or drug.

* * *

In my opinion, the statute obviously strikes at but one type of misdemeanant. A drunk or drugged driver becomes a felon while all his fellow misdemeanants, – the speeders, the reckless ones, the willful and malicious ones, the hot-rodders, the daredevils, the wrong side of the roaders, the drivers with revoked licenses, the drivers who cannot obtain licenses because nature itself made them "incapable of safely driving a vehicle," and many other types of "classes" showing incapacity to drive safely need fear no more than a misdemeanor and a year in jail, while their brethren with the baited breath get the book.⁷

Saint or Tyrant

Justice Henriod commented on another statute upheld as constitutional by the majority in *Kent Club v. Toronto*.⁸ The appellants in *Kent Club* argued, *inter alia*, that an amendment to a non-profit corporation statute impermissibly delegated a judicial function to the secretary of state by authorizing the secretary to revoke the charters of social clubs. Justice Henriod dissented:

In my opinion the amendment to the statute places a club in the hands of one man that could destroy a legitimate corporation and assassinate the character of reputable officers, if wielded carelessly by one who, for one reason or another, chose to effect such destruction and assassination.

* * *

BRYAN J. PATTISON is an attorney with the St. George office of Durham Jones & Pinegar. He is a member of the Executive Committee of the Utah Bar's Litigation Section and also serves on the Supreme Court's Advisory Committee on Rules of Appellate Procedure.

Our rights in property and in freedom of enterprise and association seem to me to be too sacred and important to be guaranteed or condemned, not by our courts under proper due process assurances, but by a politician who may or may not be a saint or a tyrant, and who may or may not like the color of one's hair.⁹

Drawing Lines

*Utah Liquor Control Commission v. Club Feraco*¹⁰ involved a building that was divided inside by a partition. There was a bar on one side and a restaurant on the other. When an illegal sale of liquor was made to a police officer, the officer seized all personal property in both the bar and the restaurant. The majority of the Utah Supreme Court agreed with the trial court that, under the applicable statute, it was permissible to seize the property in the bar, but not the personal property in the restaurant. Justice Henriod disagreed:

I cannot subscribe to the trial court's conclusion that the club in question was something in the nature of a set of Siamese twins with respective Dr. Jekyll and Mr. Hyde personalities.

* * *

On the north of this so-called partition were a bar and nearby tables where members and their guests might sit. On the south of this so-called partition were tables where members and their guests might sit. For aught we know the members seated to the north could have ordered a steak, and those seated to the south could have ordered a bucket of ice and a mixer. Yet, according to the decision below, the arresting officers properly seized the tables and chairs to the north but made a grave error in seizing the tables and chairs to the south of this quasi-partition whose presence, with its lattice work and flowers, by some sort of statutory prestidigitation separated the reveling goats from the punctilious sheep. One wonders what the arresting officer should or could have done had there been a foursome seated at a table astraddle the imaginary Mason and Dixon line extending from the ends of the partition to the west and east walls, and certainly such a situation would have presented an enigmatic problem in division on the occasion of the drafting of a seizure and sale order. One wonders if the immunity that was granted in this case to the tables and chairs lying south of the border would have persisted had the arresting officers elected to buy a drink to the south instead of to the north. One wonders, in such case, if seizure of property would have to have been confined to the area south of the so-called partition, while that to the north thereof, including the bar and the liquor, would have enjoyed the immunity

spoken of above as being in a domain geographically protected by the pseudo-partition with its imaginary extended lines.¹¹

Predictions

Justice Henriod was not shy about warning the majority of the effect its rulings might have on future cases coming before the court. For example, in *Startin v. Madsen*,¹² he commented that the majority's decision "establishes a precedent in the opinion of the writer that will return to plague us, and which will result in future fine distinction, apologetic attempt to explain, or outright reversal." In *Gord v. Salt Lake City*,¹³ he opined: "The main opinion, in my opinion, confuses the meaning of this statute to the point where a laboring man or his counsel is on a raft without a rudder, which will float back to this court for aid in cleansing the muddy waters provoked."

The Not So Subtle Disagreement

He was anything but subtle when he felt the majority had relied on weak authority or precedent. For example, he once attacked the reasoning of a majority as nothing more than "a weak and unrealistic substitute for precedent and judicial authority."

*Vrontikis Bros. Inc. v. Utah State Tax Comm'n.*¹⁴ In another case he stated of the majority's opinion: "to determine this case by the illuminating phraseology mentioned, by judicial fiat and ipse dixit, and clearly without judicial precedent, simply casts a shadow on the rule announced by the great weight of authority, obscuring that which seems to exist in the clear light of logic and reason." *Western States Refining Co. v. Berry.*¹⁵

"The Great Train Robbery"

Perhaps his most colorful dissent came in *Tribe v. Salt Lake City*,¹⁶ when, now Chief Justice Henriod took issue with the majority's decision to, *inter alia*, uphold the constitutionality of the "Utah Neighborhood Development Act," which authorized the creation of a redevelopment agency and the agency's authority to tax and issue bonds, the funds from which would be used for the construction of private facilities. In a lengthy dissent, he spared nothing and no one.

In my opinion, this case represents one that is *not* an adversary proceeding, has *no* character as to justiciable controversy, is unilateral in objectivity, represents an apparent obeisance to self-interest pressure groups, is devoid of any outcry by the so-called protestants, — a case where both sides seem to furnish not only the silage that created some straw men, all of whom were fired upon, burned and killed, by the double-barreled musket of extinction, the triggers of which were pulled, one by the one side and one by the other.¹⁷

The "straw men" were the individuals who were, in his view,

chosen to be the plaintiffs in this case.

The complaint here . . . set up all the objections that a good municipal bond firm of attorneys could muster to set up straw men to be gunned down not only by their creators, but by the creators' adversaries, as was the case here.

In my opinion both the protesters and their declaratory judgment foes were of one mind, and there appeared to be not even a David in the crowd to take on the Goliath.

The [plaintiffs] either lent or sold their names to someone or anybody, as litigants, since they are conspicuous by absence. They were named in the complaint's caption, and on its first page were taxpayers claiming to represent *all* taxpayers from almost everywhere. They promptly performed the greatest disappearing act since Houdini lost his sawed-in-half woman.¹⁸

He asserted that certain provisions in the legislation were "as American as apple pie filled with cherries[,]""¹⁹ and even challenged the title of the legislation, writing:

Everyone likes to develop the *Neighborhood* which means homes, nice streets, a church and, if possible, maybe a playground or a hopscotch area, rather than the instant money-inspired non-Neighborhood, but commercial program for high rise hotels, banks, shoe stores, parking meters and parking lots, convenient for Sheraton, Continental Bank, Valley Bank, Zions Bank, Walker Bank, the Kearns Building, et al. One may call 20 acres of commerciality a Neighborhood if he chooses, when it is the choice of lobbyists who wrote the law, the special interests promoting the legislation, the legislators who fell for such fancy, phoney phraseology, city commissioners who committed the same sin and some courts, including, in my opinion, this one. The whole thing, however, is but a snare and a delusion. The legislature should have amended the Title to "The Commercial Encouragement Taxpayer Funded Complex." The word "Neighborhood" is the "blight" in this case, — not its virtue or description.²⁰

Assuming the role as advocate for the taxpayers in what he called both a "quixotic drama,"²¹ and a "legislative marathon,"²² he opined:

. . . I consider this case to be a \$15,000,000 rip-off of taxpayers' money that ordinarily and constitutionally would have gone into the general fund owned by the citizens of Salt Lake City, — denied to them by a somewhat ridiculous two-hatted special commission that statutorily plays musical chairs on an eccentric carousel, providing a vehicle for an insurance policy against liability, — the premium for which is paid by a small filing fee, a large

attorneys' fee, and a taxpayer's migraine headache.

I am well aware that after legislative approval, lobbyist participation, municipal Commission approbation, this dissent may be anathema to some interests and pressures that may have "engineered" this admittedly novel legislation, that seems to have had the planning, timing and strategy, wanted to be characteristic of The Great Train Robbery.²³

He who represents himself...

Finally, to leave no question that Justice Henriod did carry a majority on more than one occasion, is the case of William Arnold Langley who decided to represent himself in all stages of his criminal defense. On appeal, Justice Henriod, writing for a unanimous court, was unsympathetic:

[A]s the adage goes, one who represents himself has a fool for a client, a truism poignantly borne out in this case, when defendant's loquacity was exceeded only by the idiocy of the crime for which he was convicted, when he uttered the profound observation that "I would like to show that I object to anyone assisting me in any way at this time" and that "I am my own advisory [sic], here," and that "If a lawyer assists me at this time, it eliminates reversible error." *Very good bad advocacy.*

State v. Langley²⁴

1. See James E. Magleby & John M. Peterson, *Justices of the Utah Supreme Court: 1896-1996* 49-50 (1997).
2. *Id.* at 50.
3. 8 Utah 2d 183 (1958).
4. *Id.* at 187 (Henriod, J., dissenting).
5. *Id.* at 188.
6. 8 Utah 2d 314 (1959).
7. *Id.* at 319, 321 (Henriod, J., dissenting).
8. 6 Utah 2d 67 (1957).
9. *Id.* at 77, 78 (Henriod, J., dissenting).
10. 7 Utah 2d 172 (1958).
11. *Id.* at 179-80 (Henriod, J., dissenting).
12. 120 Utah 631, 643 (1951) (Henriod, J., dissenting).
13. 20 Utah 2d 138, 145 (1967) (Henriod, J., dissenting).
14. 9 Utah 2d 60, 66 (1959) (Henriod, J., dissenting).
15. 6 Utah 2d 336, 339 (1957) (Henriod, J., dissenting).
16. 540 P.2d 499 (Utah 1975).
17. *Id.* at 507 (Henriod, C.J., dissenting).
18. *Id.* at 510.
19. *Id.* at 509.
20. *Id.* at 508.
21. *Id.* at 507.
22. *Id.* at 511.
23. *Id.* at 507 (footnotes omitted).
24. 25 Utah 2d 29, 31 (1970) (emphasis added).

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Facsimile 801.395.2430

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Geologic Hazard Disclosure Laws: Why They Make Sense

by Stephen Cranney and Trevor Salter

The population of Utah County is projected to double in just 25 years,¹ creating tremendous demand for new housing. Such development is often built close to the mountains. This land is often geologically hazardous. Hazardous land is designated as such by state and federal geologic agencies as having an increased risk of mudslides, floods, earthquakes and other natural disasters. One recent example of the risks associated with hazardous land development is the Cedar East Townhomes subdivision in Cedar Hills, Utah County.

Nestled at the mouth of American Fork Canyon on a mountain bench, Cedar Hills is one of the fastest growing Utah communities. The demand for plots with scenic views has led to significant construction along the foothills. In 2000 a geologic study of the land designated for the Cedar East Townhomes subdivision found it unsafe to build there. Another study done in 2002 contradicted that report which highlights the inherent scientific uncertainty and, at times, guesswork that is involved in hazardous land use decisions. Nevertheless, the city gave developers permission to build. Having no legal obligation to do so, the developers failed to notify the buyers of potential risks due to geologic hazards making the inhabitants unaware of the potential serious consequences of their purchase.

On April 28, 2004, a portion of a hillside above Cedar East Townhomes began slowly moving down the hillside and into a fourplex. The ensuing damage absorbed by the complex forced the evacuation of its inhabitants and eventually necessitated the destruction of the townhouses. The homeowners were reimbursed for their mortgages, closing costs and temporary housing by the developers. While the developers made admirable recompense to the homeowners, might the homeowners be better served if the risks were disclosed to them before they purchased? This article posits that mandatory disclosure laws benefit all parties in real estate transactions – the seller, buyer and the municipality that approves new subdivisions. A brief historical review of real estate disclosure law will be followed by a discussion of the universal benefits resulting from disclosure. The question of scientific uncertainty will also be examined in the light of disclosure laws. Finally, this article will present some specific recommendations for the Utah State Legislature in considering enacting

disclosure statutes.

Background of Disclosure Law

The history of disclosure regulations of properties on geologically hazardous land is ambiguous not only in Utah, but also in much of the United States. The prevailing rule for a long time was *caveat emptor*, “let the buyer beware.” In other words, the buyer was solely responsible for defects of purchased products. *Caveat emptor* assumed the equal ability of buyer and seller to access product information. This principle peaked in the laissez-faire, pro-business climate of the late 19th century. But since the early 20th century, courts have started to suggest that it is unreasonable for a buyer to understand all the factors at the same level of the seller.² With some exceptions,³ courts have generally restricted *caveat emptor*. One law professor summarized the prevalent jurisprudence: “We should not realistically expect a purchaser to check the county clerk’s office, the planning and zoning commission files, the Army Corps of Engineers, the United States Geologic Society, the state geologist, other agencies, and the internet. . .”⁴

State legislatures around the country have been even clearer than the courts. About half of U.S. states currently require disclosure laws of defects known to the seller of the home or with the land on which the home is built.⁵ This trend started with California in 1985. In Utah, however, a dearth of superior judicial precedent or statutes has led to confusion about hazardous land disclosure.

This lack of widespread, enforceable rules is a mistake. Failure

TREVOR SALTER will graduate in August with a degree in Political Science from Brigham Young University. Upon graduation, he plans to attend law school.

STEPHEN CRANNEY is a Brigham Young University student.



to notify buyers of geologic hazards in an area may distort the market price. While it is true that the Utah Geologic Survey publishes a map of geologically hazardous areas, this map is rarely consulted in buying decisions. Further, the basic economic concept of cost internalization hurts the buyer as well. This concept holds that if costs aren't internalized, in this case if the buyer isn't aware of additional costs associated with the property built on hazardous land, more houses will be built than is reasonably safe. From the developer's perspective, it will be profitable to build more houses if buyers aren't aware of risks.

Competing Groups

There are three different and often competing groups that have an interest in development: homeowners, municipalities, and vendors. For the purposes of this article, vendors include developers, contractors and real estate agencies.

Even though many consumer goods carry disclosures, vendors of the most expensive consumer good a buyer will ever purchase – a home – have little legal requirement to notify buyers of potential problems. The benefits of notification requirements to homeowners are obvious. They will simply have more information specific to their home site to guide them in buying decisions. One regional planner pointed out that information on site-specific hazards is publicly available.⁶ However, few potential homebuyers are aware of the full range of information available to them and fewer still consult it. While not consulting information is certainly an unwise practice, as the professor noted above, the amount of information that needs consulting on every aspect of a home purchase may be daunting to all but the most meticulous purchaser. This information could be summarized and centralized onto a few disclosure notification forms so purchasers can both receive and understand all the relevant information of their purchase.

There are also clear benefits for municipalities. To understand the benefits of disclosure for municipalities it is necessary to review the process by which cities plan for and approve new developments. Municipalities manage growth within city limits. State law requires long-term general plans wherein the city projects how it will accommodate growth in the future. In reality, however, the pressures of growth make municipalities generally deferential to the wishes of developers rather than abiding to the requirements of the municipal plan. One Utah County official offered a critique of why city officials afforded what he believes is too much deference to developers: "Look at who's on the city councils – they're mostly packed with developers. Cities don't look to the future, but proceed case by case. They rarely follow their own general plans; they're more like suggestions than plans."⁷ The regional planner offered a different justification:



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"Cities have to adjust their plans as they need to, especially when something better comes along." He then smiled and said, "But it's not always a bad idea to follow them."

In addition to planning, cities also approve new developments. The problem for cities in approving developments on hazardous land is it creates a tension between two government responsibilities – ensuring public safety and managing growth.

According to the *Municipal Land Use Development and Management Act*, municipalities are required to do several things in approving a new development,⁸ but none of the provisions specify how to deal with hazardous land. Thus, hazardous land is subject to the same practices as other land. Cities require vendors to survey, examine existing easements and right-of-ways, and ensure there are no outstanding taxes on the land. The city planning commission then grants a hearing on the proposed development and notifies the public at least 14 days before such hearing. Developers may submit an engineering or environmental impact report as part of their proposal, but the burden of proof is placed on the city to show that the development is unsafe. Cities rarely have the resources or the will to examine in depth the safety of a proposed subdivision and are most often deferential to development proposals.⁹ Deference toward the developer is even built into the law. The statute specifies the city "shall"

approve the development if the vendor meets the criteria.¹⁰

The above discussion shows that cities are under no legal requirement to notify its citizens when developments are built on hazardous land. The city is not in legal jeopardy because the *Governmental Immunity Act of Utah*¹¹ grants immunity to governments from prosecution for official acts. However, municipalities would still benefit from notification rules because it resolves the tension between ensuring public safety and managing growth. Cities could better fulfill their role in ensuring public safety by informing their citizens of potential hazards. Citizens can make informed decisions instead of relying solely on the good graces of vendors.

Requiring the developer to notify would also necessitate more in-depth engineering and impact reports. The Cedar Hills development used a study that contradicted an earlier report that showed the townhouse site was unsafe. Notification requirements would require a higher burden of proof of the developer, which is reasonable when one considers that whoever wants to take action should first demonstrate the consequences of the action. The cities can therefore satisfy public safety by making citizens aware of risks and also make developers more responsible for good development practices within city limits.

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development practices falls squarely on vendors. However, the lack of a clear statute also hurts vendors. Surely vendors will experience increased costs in the short term, but notification requirements make sense for vendors in the long term. Disclosure provides a legal shield for vendors if property damage results from a geologic event. Vendors across the country have been successfully sued because of property damage resulting from homes built on hazardous land.¹² All a citizen must do is prove that the vendor was negligent in putting the home on a site at an increased risk of natural disaster.¹³ An attorney who frequently represents developers in land use law cited another reason for why notification requirements are reasonable.¹⁴ He said in his experience 90% of developers worked according to ethical standards. But a small minority cut corners and a few are even unscrupulous. All vendors would be held to a higher ethical standard with mandatory disclosure statutes.

Vendors have recognized their vulnerability to liability suits. The National Association of Realtors has estimated that about three quarters of the lawsuits filed against real estate agents and sellers result from lack of disclosure about property conditions.¹⁵ Perhaps ironically, realtor associations have often been the prime movers in legislatures to get disclosure laws passed because they know of the shield such statutes afford them.¹⁶ Notification requirements

would provide needed liability protection to vendors. Higher ethical standards and greater legal protection improves the reputation and the practice of the profession.

Scientific Uncertainty

Beyond being beneficial to the parties in question, the degree of scientific uncertainty involving hazardous land use decisions also makes notification requirements smart policy. Scientific uncertainty makes any prescription based on environmental hazard problematic. Even though the Utah Geological Survey produces maps detailing the location and degree of geologic hazards in Utah County, these maps are inconclusive at best. Even the regional planner whose office was instrumental in formulating the state's hazard maps criticized their accuracy:¹⁷ "The Federal Government requires the state to create hazard maps to get disaster money. We had a lot of bad data, but the state told us to use it anyway because it's the best we had." The planner questioned whether it is even possible to strive for accuracy when measuring potential hazards because of the inherent uncertainty involved in predicting future events. The result, according to the planner, "is that we don't really know anything because we're not confident in the data." When city planners are put between such a degree of scientific uncertainty on one side and the pressure of demographic growth on the other side,

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Should governments defer a public safety risk, no matter how slight, in the name of growth? On the other hand, should progress be held captive to potential unknown and probably rare natural disasters? David Church, general counsel for the Utah League of Cities and Towns, presented this opposing view of the impracticality of halting development due to possible risks. "If it were up to the Utah Geological Survey, there would be no building going on along the benches."¹⁸

There must be some balance reached that mediates between the need for public safety and the need for development. In other areas of environmental law this balance is often struck by providing for notification. Notification is especially good practice in areas with a high degree of scientific uncertainty because the consequences to public safety of a false-positive (building a subdivision on hazardous land) are much greater than the consequences of a false-negative (no action taken at all). Thus, notification makes sense in light of scientific uncertainty.

Recommendation

A compulsory notification scheme would have to be handled delicately. In addition to being burdensome to the vendor, an over zealousness to define and label every possible geologic hazard would lead to a depreciation of the value of the disclosed knowledge. A buyer could very well experience information saturation if all possible information were disclosed. An optimal level of mandatory disclosure should be sought: One that balances between the value of information simplicity and the safety concerns the buyer should be informed of. Professor Binder of Chapman University Law School surveyed the major provisions of disclosure laws in other states and summarized five key ingredients to a disclosure statute.¹⁹ This recommendation adapts and rewords some of her recommendations in the hopes of being as specific as possible while still providing discretionary latitude to legislators:

1. An inventory stated in general terms of all possible risks associated with the site. (Flood danger from a nearby waterway, mudslide danger from a hillside, etc.)
2. A brief review of the historical occurrences of geologic events and the severity of the impact.
3. An estimate in non-quantified terms of the chance of the risk becoming reality. (High, serious, moderate, low, slight, negligible. Quantifying the risk, as Professor Binder recommends, is perhaps too unreliable or arbitrary when analyzing such a degree of scientific uncertainty).
4. A listing of all relevant contact information for the purchaser if they want to know more. (This would include geologic agencies,

FEMA, engineering firms, city officials, soils specialists, etc.). This last recommendation was not included in Professor Binder's list.

Professor Binder also recommends a statement of the potential consequences involved in a geologic event. Again, this may result in an arbitrary and unsubstantiated projection.

At first, the gathering of this information might seem burdensome to the vendor. However, the Utah Geologic Survey and private firms the builder would hire would provide all of this data, so it would simply be a matter of looking it up or making the information available for the purchaser in the contract. The only expense on the part of the vendor would be the possible decrease in price for the property because of this new knowledge.

As one of the fastest growing states, the issue of geologically hazardous land will be more relevant for Utah in the years to come. Incidences like Cedar Hills will become more common as houses are built closer to the mountains. The prospect of Utah vendors and purchasers clashing in costly legal battles can be obviated with common sense and mutually beneficial disclosure statutes.

1. Utah Office of Planning and Budget, 2005.
2. Cf. *Woody v. Benton Water Co.*, 102 P. 1054, 1056 (Wash. 1909); *Osborne v. Howard*, 242 S.W. 852 (Ky. 1922); *Rothstein v. Janss Investment Co.*, 113 P.2d 465, 467 (Cal. Ct. App. 1941); *Chandler v. Madsen*, 642 P.2d 1028, 1031 (Mont. 1982); *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985).
3. See *Schubert v. Neyer* (1959, App) 12 Ohio Ops 2d 231, 90 Ohio L Abs 437, 165 NE2d 226, supra § 4 [b] (no vendor liability for damage incurred during mudslide). Also see *ABC Builders, INC. v. Phillips* (1981, Wyo) 632 P2d 925, supra §§ 3 [b] and 4[b] (no vendor liability for landslide damage to the house)
4. Binder, Denis "The Duty to Disclose Geologic Hazards in Real Estate Transactions." *Chapman Law Review* at 13 (Spring 1998).
5. Peterson, Megan. 2002. "Seller Beware: Mandatory Disclosure Provisions in Iowa Put Sellers of Residential Real Estate on Alert." *Drake Law Review* 50, 569.
6. The individual interviewed did not wish his comments to be on the record.
7. This individual did not want his words for attribution.
8. Utah Municipal Code, Title 10 Chapter 9.
9. Church, David. Personal Interview, November 10, 2005.
10. *The Municipal Land Use Development and Management Act*, 10-9-804(d).
11. Utah Code, Title 63 Chapter 30d.
12. For a discussion of this see note iv, pgs. 26-30.
13. Cahoon, Bradley. Personal Interview. November 14, 2005.
14. This individual did not want his words for attribution.
15. See note v, pgs. 578-9.
16. *Id.*
17. See note viii.
18. See note xii.
19. See note iv, pg. 42.

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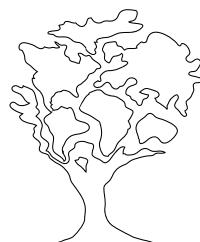
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Gallegos ex rel Rynes v. Dick Simon Trucking – The Use of Price-of-Annuity Evidence as Present Value of Compensatory Damages

by Andrew M. Morse

In 2004, the Utah Court of Appeals decided an important case that will affect how cases involving future long term damages are tried and evaluated. *Gallegos v. Dick Simon Trucking*, 110 P.3d 710 (Utah Ct. App. 2004), *reh'g denied*, March 30, 2005, *and cert. denied* Sept. 19, 2005. In *Gallegos*, the Court of Appeals held that competent annuity evidence may be used to prove the present value of long term future damages. This article explores the case and the implications it presents for plaintiffs and defendants.

Case Background

In 1998 an 80,000 pound Dick Simon tractor trailer went too fast around a downhill curve and rolled over into the path of a sedan, instantly killing the driver, Patricia and her six year old son, Angelo. Patricia's eight-year-old son, Anthony Rynes, survived, but his skull was severely fractured, as was his arm, leg and thoracic spine. Significantly, Anthony's frontal and temporal lobes were severely damaged, permanently crippling his executive functioning, intelligence and behavior control. Dick Simon Trucking admitted liability, and it conceded that Anthony needed life long care in a brain injury facility that cost \$16,000 per month. The parties hotly disputed how to pay for that care.

Six months before trial, Dick Simon Trucking filed a motion in limine seeking to admit annuity evidence as it relates to the present value of future care damages. Dick Simon Trucking contended that the premium cost of a single premium annuity that would pay \$16,000 per month for the rest of Anthony's life was equal to the present value of the stream of income the annuity would pay. Over Gallegos' strenuous objection, the court granted the motion, subject to the parties submitting a jury instruction about annuities.

Battle lines were drawn. Gallegos would try to prove present value the traditional way using discount rates, inflation rates and a disputed term of years over which the payments would extend. Gallegos contended that Anthony would live a normal life expectancy of an additional 66 years. They also contended that his care cost would inflate at 8% to 11% annually, a far

greater rate than that which could be earned by the corpus invested in Treasury Bills. By this approach, they concluded that the present value of Anthony's future care cost would be 14 to 52 million dollars.

On the other hand, Dick Simon Trucking planned to introduce the much lower annuity costs of 4.1 to 5.7 million dollars, depending on inflation rates of 4% to 6%. The wide gap in the parties' amounts was attributable to the inflation rates expected for this type of care, and how the annuity issuer sets the premium. To set a premium annuity issuers make an underwriting judgment about how long the beneficiary will likely live. In Anthony's case, underwriters studied his medical history, and, based on his preexisting condition and injuries, determined that he would likely not live a full life, but would likely live 27 fewer years than a healthy 11 year old. The company "rates" his expectancy as the same as someone in the population of 38-year-old men, giving Anthony a "rated age" of 38. The population of 38 year olds have a life expectancy of another 38 years, to age 76. As Anthony was in this group for underwriting purposes, the annuity issuer projected it would likely pay for 38 years, as opposed to plaintiff's 66 years. By issuing the lifetime annuity, the company guarantees to pay for the life of the beneficiary, no matter how long he lives, so it takes the risk that he will outlive its underwriter's projections.

Trial

In its opening statement, Dick Simon Trucking promised to introduce evidence of a new way to pay for Anthony's care: with a single premium annuity guaranteed to pay for his entire life.

ANDREW M. MORSE has been a shareholder at Snow Christensen & Martineau since 1990 and has years of experience defending trucking companies in catastrophic injury matters. He is lead counsel for the defendants in the litigation which is the subject of this article.



Dick Simon Trucking promised that the annuity evidence would simplify the complex and confusing old way of computing the present value of the long term care cost: the premium is the present value of the payments guaranteed under the annuity. Dick Simon Trucking promised to show that the proposed annuity would be from a large reliable company that had never missed an annuity payment in 80 years.

Throughout the Gallegos case, Dick Simon Trucking laid the groundwork for its annuity evidence. It asked Anthony's guardian whether he had considered buying an annuity for Anthony's benefit. He was asked how much a financial advisor would charge to manage millions of dollars if the entire corpus was not invested in an annuity. If a financial manager charged just 2% of \$15,000,000, it would cost Anthony \$300,000 a year or \$25,000 a month. On the other hand if an annuity was bought, no financial management would be needed, and this high annual cost would be avoided. Further, Gallegos' economist was asked whether annuities were a sensible investment vehicle and why. Finally, Dick Simon Trucking put Anthony's life expectancy into issue through his treating doctors, so it could later argue that no matter how long he lived, the lifetime annuity would pay.

Gallegos rested. Dick Simon Trucking's first witness was a physician who discussed Anthony's life expectancy, again to dovetail with the annuity's lifetime care feature. Then the court unexpectedly

granted Gallegos' motion to reconsider the order permitting annuity evidence. It excluded all evidence of annuities on the ground that "the testimony asked the jury to decide how to invest the damage award." Dick Simon Trucking's annuity expert, an executive from an international life insurance company that issues annuities, did not take the stand. Gallegos did not, therefore, voir dire the expert on his qualifications or foundation for his opinion. Nor was Dick Simon Trucking's economist permitted to testify about annuities, so his qualifications and bases for his opinions regarding annuities were not elicited.

The ruling disallowing annuity evidence prompted Dick Simon Trucking to move for a mistrial, because it would not be able to fulfill the promises it had made to the jury. The motion was denied, so Dick Simon Trucking had no choice but to prove present value using the traditional method of projecting inflation rates, investment return rates, Anthony's likely life span, and so on. A verdict was returned for \$16.4 million. An even \$12 million was awarded for future long term care costs. Interviews with jurors revealed that they found the present value evidence and calculations too confusing, so they simply multiplied the yearly cost by the number of years a healthy 11 year old would live and rounded the result to \$12 million.

Dick Simon Trucking posted a \$20 million bond and appealed. Michael D. Zimmerman and Tawni J. Sherman of Snell & Wilmer,

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submitted the briefs on behalf of Dick Simon Trucking, Inc. The judgment accrued post judgment interest at 7.34%, approximately \$100,000 per month. Dick Simon Trucking appealed only the \$12 million long term care cost award. It satisfied all other amounts of the judgment. It abandoned all other errors on appeal for three reasons. First, this would allow the briefing to focus solely on the annuity issue, avoiding the risk that this critical issue would be diluted by other assignments of error. Second, if the case were reversed and remanded for a new trial, Dick Simon Trucking did not want to retry the other issues, such as general damages, and other special damage numbers, because the jury had awarded reasonable amounts for these damage categories. Moreover, at re-trial, Dick Simon Trucking would avoid damaging evidence about the accident, Anthony's long recovery, and other evidence that could inflate a second verdict. Dick Simon Trucking wanted the second trial to focus solely on long term care costs and the present value of those costs. Third, if Dick Simon Trucking lost the appeal, at least it would have saved a portion of post judgment interest by satisfying the uncontested portions of the judgment.

The Decision

Without a hearing, the Court of Appeals reversed. In an opinion by Judge Norman H. Jackson, the court held that it was harmful error to exclude all evidence of annuities. It remanded for a new trial, and ordered that the annuity evidence be admitted if proper foundation were laid for the evidence. Trial will be held

in September 2006. Three issues controlled the decision: the standard of review, the meaning of Utah Rule of Evidence 702, and harmful error analysis.

Judge Jackson first noted that the trial court did not consider whether Dick Simon Trucking's annuitist was qualified as an expert, observing that there had been no voir dire of the witness about his knowledge of the basis for the annuity quote. Nor was there any consideration by the trial court of Dick Simon Trucking's economist's knowledge of annuities, or whether Dick Simon Trucking could lay a foundation for the economist's knowledge of the basis of the annuity costs. Judge Jackson differentiated between the clearly erroneous standard of review, which would apply to a trial court's decisions about an expert's qualifications and the foundation for an opinion, and the correctness standard that would apply to legal determinations, such as the application of a privilege or the admissibility of evidence. Given that the trial court's decision was not based on Dick Simon Trucking's experts' qualifications or foundations for their opinions, the clearly erroneous standard of review did not apply. Rather, Judge Jackson noted that the trial court had made a legal determination that all annuity evidence was inadmissible, and hence the correctness standard of review would apply.

The legal issue was the following: May a party introduce evidence of annuity cost? The Model Utah Jury Instructions require the jury to reduce awards of future damages to present value, an "almost impossible" job for the jury to tackle without expert help, noted the Court. Courts in Illinois and Wisconsin had rejected annuity evidence, but for reasons the court found to be unpersuasive,¹ while courts in two federal circuits and ten states allow it because it is helpful to the jury.² Judge Jackson acknowledged that more information, not less, about present value would help the jury determine the cost today of income for the future, under Utah Rule of Evidence 702.

Finally, the court found that the trial court's legal error was harmful. The mistake undermined the Court of Appeals' confidence in the outcome, such that the error probably affected the outcome of the trial. Gallegos' present value ranged from \$14 million to \$52 million. Dick Simon Trucking's rejected proffered present value, based on the annuity premium, was \$4.1 million to \$5.7 million. Left with using the traditional discount rate method of calculating present value, Dick Simon Trucking set a floor of \$4.9 million to \$6.6 million. The jury awarded \$12 million. In finding the error was harmful, the court implicitly found that the annuity evidence of present value was straightforward and convincing, and that had it been heard, it probably would have been believed, so the verdict would have probably been lower.

Juror interviews revealed that some jurors were so confused by the present value labyrinth, that the jury did not reduce the amount to

Charles Gruber,
formerly of the Utah State Bar's
Office of Professional Conduct,
is available to represent and consult with
individuals and law firms in matters related to
malpractice and ethics issues, including service as
an expert witness and defense of ethics complaints.

He continues his practice in
plaintiff's personal injury representation.
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Mr. Gruber is licensed to practice law
in Utah and California.
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P.O. Box 900122 • Sandy, UT 84090
telephone: 801-577-4973 • fax: 801-523-3630
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present value. It simply multiplied the annual cost of Anthony's care by the number of years left in a normal life expectancy. The verdict could not be impeached via juror affidavits, but the fact that Dick Simon Trucking was denied the reduction to present value to which it was entitled, may have contributed to the harmful error found by the court. After all, a hallmark of the annuity evidence is that it is more understandable and less complex than the traditional approach to calculating present value. The court likely reasoned that had the jury heard the evidence, it likely would have applied it to reduce the future award to present value.

Implications

Gallegos changes the way cases with long term future damages will be tried. From now on defendants will likely devise ways to persuade the jury to use annuity premium evidence to determine present value. Defendants should consider using a three expert team comprised of an economist, an annuity broker, and an expert from the annuity industry, such as a company executive, or actuary. Through this team the jury would learn about present value and the problems with the traditional, more complex approach. It would then learn about annuities and that the premium cost is the present value of the payments promised under the single premium annuity. Finally, it would learn how large, stable insurance companies manage annuities to be sure that payments are made, and that annuities are a reasonably prudent and safe investment tool. The three expert approach is detailed next.

The economist would testify first, setting the stage for the team's evidence. It is critical that the jury understand that present value is the amount needed today for a payment in the future. The economist will simplify and teach the basics of present value, and will explain that the plaintiff's present value analysis contains too many assumptions and risky speculative forecasts to be reliable. In addition, plaintiff's economist will use life expectancy tables to calculate how many years funds will be needed. Yet few people live the exact expected lifetime, so plaintiff's assumption that plaintiff will live a certain number of years nearly always provides either too much or too little money for the projected needs.

To set the groundwork for the annuity evidence, the economist will then explain how different investment vehicles work and their comparative risks and rewards. Annuities will be introduced as another investment option, with emphasis on single premium life annuities with a guaranteed payout. Through the economist, the jury will know that in exchange for a single upfront premium, the annuity company will contract to pay a stream of monthly payments for the rest of plaintiff's life. From this foundation, the economist will then explain that the premium amount, the amount that is presently paid, represents the present value of the future payments expected under the annuity contract. Stated another way, the premium is the present value of the future annuity

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payments. Finally, the proposed annuity would include annual upward adjustments to anticipate inflation.

The features and costs of an annuity would then be contrasted by the economist with the risks and unreliability of the plaintiff's approach. With the annuity there are few assumptions and forecasts to be made by the jury about length of life, inflation fluctuations, rates of return and risks of various investments. Instead, the annuity market sets the present value through setting a premium. It is a market driven present value, not one derived by courtroom experts. Relying on the annuity premium as the present value also allows the jury to avoid the confusing and intimidating present value formulas and calculations. The economist would also explain that life annuities pay for as long as the plaintiff lives, guaranteed. It will never pay too little, or too much, eliminating the inherent risks of the current approach. A life annuity is the perfect compensatory tool.

Finally, the economist will address the annuity feature that plaintiffs frequently attack: If the plaintiff dies prematurely, the annuity company keeps the premium, enjoying a windfall at the plaintiff's expense. To forestall a windfall, the economist will explain that the proposed annuity will pay for a certain number of years, even if the plaintiff dies prematurely to ensure that plaintiff's estate over time will receive the premium originally invested.

Next, an annuity broker would explain how to pick a reliable safe company by using the ratings available on each company. Then the broker would present quotes for the same annuity from half a dozen well-rated, large and stable companies, giving the jury a good overview of the market price for the annuity. There will likely be disputes about the monthly amount and likely future inflation necessary to meet plaintiffs future economic needs, so the broker will present quotes for annuities at various monthly

payment amounts at different inflation rates. Annuity tax advantages would then be reviewed, specifically that the annuity payments, including earnings, are not taxed when the annuity is purchased through a defendant. This is a tremendous advantage when compared to the capital gain taxes that plaintiff would have to pay if she invested judgment proceeds in stocks and bonds.³

Next the broker would explain the spendthrift features of life annuities. That is, by allowing the annuity carrier to manage her funds, plaintiff avoids the real risk that she or her advisors would manage a lump sum poorly, perhaps dissipating the funds completely. Purchasing an annuity also avoids costly financial management fees. Moreover, it allows plaintiff to focus on rehabilitation instead of money management. Finally, the broker would state that she would not place any annuity that the plaintiff might buy, but would leave that to plaintiff's broker. This will obviate any bias by the broker.

The third expert would be an actuary or an executive with substantial experience in the life annuity industry. This expert would explain how large highly rated companies manage money for long term stability, as they are world wide experts in long term financial management. Through explaining how many annuities the highlighted companies have issued, and that they have never missed a payment, this expert should convince the jury that an annuity with a highly rated company is a reasonably prudent investment.

Some small poorly capitalized companies in the annuity business have gone out of business. Plaintiffs rely on this fact to argue that the defendant's proposed investment method is fraught with risk. This expert would easily counter the argument by showing that the companies that have quoted the subject annuities have not failed, nor are they at risk to fail. He or she will also explain that the companies that did fail were new, small and poorly capitalized.

By following this general presentation of evidence, a defendant stands a good chance of convincing the jury that annuity evidence is a helpful tool by which to calculate present value. This will likely lower the potential verdict range in cases involving long term future damages. In turn, the effects of the *Gallegos* decision will likely lower settlement value of cases like this, because the exposure to an excessive verdict will be lower.

1. See *Wingo v. Rockford Memorial Hosp.*, 686 N. E. 2d 722 (Ill. Ct. App. 1997); *Herman v. Milwaukee Children's Hosp.*, 361 N. W. 2d 297 (Wisc. Ct. App. 1984).
2. See, e.g., *Scott v. United States*, 884 F.2d 1280 (9th Cir. 1989); *Thomas v. Whiteside*, 421 P.2d 449 (Mont. 1966); *Rayner v. Lindsay*, 138 So. 2d 902 (Miss. 1962); *Southlake Limousine and Coach, Inc. v. Brock*, 578 N. E. 2d 677 (Ind. Ct. App. 1991); *Cornejo v. State*, 788 P.2d 554 (Wash. Ct. App. 1990); *Atchinson, Topeka & Santa Fe R. R. Co. v. Ham*, 454 S. W. 2d 451 (Tex. Civ. App. 1970).
3. See I. R. C. § 104(a)(2) (1986); Treas Reg § 1.104-1(c); P. L. 97-473 § 101(a), inserting the parenthetical language "whether as lump sums or as periodic payments" into I. R. C. § 104(a)(2); Rev. Ruls. 79-313, 1979-2 C. B. 75; 79-220, C. B. 74; 77-230, 1977-2 C. B. 214.

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(866) 763-0412 Facsimile
rmabey@stutman.com
www.stutman.com

First Impressions

by Judge Carolyn B. McHugh

*"Knowledge and timber shouldn't be
much used till they are seasoned."*

Oliver Wendell Holmes
The Autocrat of the Breakfast Table, 1858

Because I agree with Justice Holmes and will not have been on the bench for a year until August 1, 2006, I am somewhat reluctant to share any "pearls of wisdom" at this early juncture. At the urging of my colleague and the *Bar Journal's* "judicial advisor," Judge Orme, I have acquiesced. There is, however, one advantage to being a rookie. I still identify strongly with those of you on the other side of the bench and am eager to provide whatever information you might find helpful. Thus, I have included my answers to the questions most frequently asked since I made this transition and have also added some observations that might help you to be a more effective appellate advocate.

Do The Judges All Read the Briefs or Do They Delegate that to Their Law Clerks?

Yes. Not only does each of the judges on your panel read the briefs, and appendices, and often controlling cases, your briefs are also read by at least one law clerk and one of our staff attorneys. Without exception, each judge on every panel to which I have been assigned has been prepared by the time of oral argument to discuss the matter intelligently during conference.

Why Does it Take So Long To Get A Written Decision?

It doesn't. The Court of Appeals strives to render a written decision no more than one year after the Notice of Appeal is filed. We are relatively successful at that. Most of that time runs before the members of the panel assigned to your case ever see the briefs. This period before the briefs are delivered to us includes any time used by preparation of the transcript, extensions, supplementation of the record, motions to strike, and rescheduling of oral argument. The panel members receive the briefs on the fifteenth day of the month that is two months prior to the month in which your matter will be heard. According to our internal rules, the assigned author should circulate the initial draft of the decision within ninety days after oral argument, although most opinions circulate much more quickly. Even if the matter is not scheduled for oral argument, we have a date on which it is calendared and the time runs from the conference on that

matter. The other judges on the panel are expected to act on the proposed decision within seven days, although additional time is allowed for dissenting and concurring opinions. Our average time for issuing a final written decision after conference or oral argument is 47 days.

What's the Difference Among Opinions, Memorandum Decisions, and Per Curiam Decisions?

Complexity and novelty. When a case involves an issue of first impression or if this court concludes that the trial court erred, it will be addressed in a published opinion that we hope provides helpful guidance to the bar and the trial courts. If, in contrast, the issue presented is a limited matter of settled law, the court will issue an unpublished per curiam decision that is not "authored" by any particular judge. Somewhere in the middle are memorandum decisions. These involve more complicated factual patterns or legal issues than a per curiam, but do not address new legal concepts. Although typically these are not published, on occasion the panel deems that a memorandum decision may have some utility to the bar at large and designates it for publication. The theory of unpublished per curiam or memorandum decisions is that they are intended to be helpful only to the parties and trial judge involved in that particular case because they do not advance the development of the law generally.

Why Does Everything I File in the Supreme Court End Up in the Court of Appeals?

Because the Supreme Court transfers them to us. With the exception of matters that may only be heard in the Utah Supreme Court, all cases are now routinely transferred to the Court of Appeals for disposition. In this manner, the Supreme Court is able to control its docket by granting petitions for certiorari only on matters that warrant the attention of the highest court of this state. When a notice of appeal is filed on a matter that the

JUDGE CAROLYN B. MCHUGH was appointed to the Utah Court of Appeals by Gov. Jon M. Huntsman, Jr., in August 2005. She received her law degree in 1982 from the University of Utah College of Law, where she was an editor of the Utah Law Review and a member of the Order of the Coif.



Supreme Court intends to transfer to this court, the clerks' office will notify the parties that they have ten days to indicate why the matter should be retained by that court. If the parties do not respond or the Supreme Court is unconvinced, it will be transferred to the Court of Appeals.

Do You Have Any Advice for Advocates?

Yes, subject to the caveat that I still have a lot to learn myself.

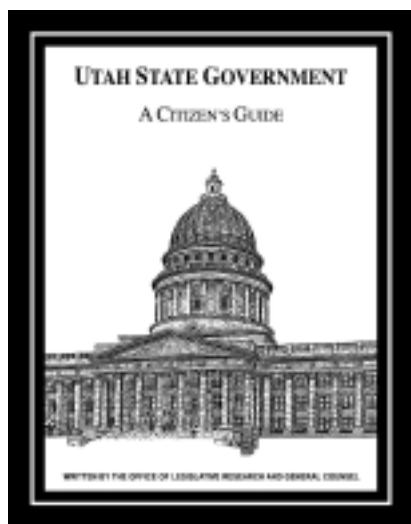
1. **The Addendum Is Your Friend.** It is not unusual for me and others of my colleagues to read briefs at places other than the office. Therefore, it is helpful to have the critical documents available while we are reading. For example, if your case is a contract dispute, please include a complete copy of the contract in the addendum. It is my strong preference to read the critical language in context. Although this may seem obvious, I have had to ask my law clerks to search through the record for the relevant documents on a number of occasions already. Likewise, if the dispute concerns competing claims for real property, i.e., boundary by acquiescence, a map can be very useful in educating us about the dispute. In suggesting that you utilize the appendix, I am not asking you to include every document or deposition cited in the brief. An over-inclusive addendum is as unhelpful as an under-inclusive one.
2. **Focus on the Standard of Review – We Do.** After a few months of serving on this court I observed to one of my

colleagues that each time I picked up a set of briefs, I also had to find the right color reading glasses for that matter. By that I meant that the standard of review drives the analysis. We look at matters very differently depending upon the context in which it arrives at this court. For example, an appeal of a summary judgment is reviewed de novo to determine if there were material issues of fact in dispute – green glasses; an assertion that the trial court has erred as a matter of law is reviewed de novo with no deference to the trial court – blue glasses; and challenges to a factual finding of the trial court are reviewed with great deference to the trial's court's unique ability to weigh the evidence – red glasses. Written and oral argument is most effective when tailored to the relevant standard of review. Because we are wearing our tinted glasses, we won't see it your way unless you do.

3. **The Marshaling Rule is Just An Attempt to Make You Wear Your Red Glasses.** A huge portion of the briefs filed with this court are spent rearguing the weight of the evidence presented in the trial court. Because we are wearing our red glasses, this approach is not persuasive. I now think of the marshaling rule as an exercise in intellectual discipline. If you can fill a page with evidence that supports the challenged factual findings, an attack on those findings is probably not your best argument on appeal.

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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 17

by Scott Daniels

One area of litigation practice which frequently gives rise to unprofessional behavior is discovery. Standards 17, 18 and 19 seek to address the problems in this area.

Standard 17 addresses, among other things, the practice of attempting to wear an opponent down by using discovery to increase litigation expense. It also addresses the practice of delaying discovery of unpleasant, but clearly discoverable, facts.

This problem was worse prior to the change in Rule 33 of both the Utah and Federal Rules of Civil Procedure, which limits the number of interrogatories which may be propounded. The practice of initial disclosure under Rule 26 has also helped, as has the practice of meeting for a discovery conference under Rule 26(f) in order to agree on discovery limitations and timing. Having said that, it is obvious that there is still a huge problem in this area, particularly with initial disclosures which disclose almost nothing.

The overriding principle is clear here, as it is with so many of these standards: A lawyer has a duty to represent the client zealously. That means discovering all relevant information and objecting to discovery which is privileged or not calculated to lead to the discovery of admissible evidence. It does not include objecting to discovery which the court will surely eventually order disclosed. It does not include objecting to discovery for the purpose of delay. It does not include providing inadequate initial disclosures, when the information which should be in them will have to be disclosed eventually anyway. And it does not include practice designed to increase litigation costs. Discovery can be relatively painless, or it can be like pulling teeth. If the tooth is going to be pulled anyway, the only effect of making the process more difficult is to increase cost and delay.

Many clients and some lawyers, probably influenced by television lawyers, think that litigation is a game in which the better gladiator

will prevail. Lawyers should educate their clients to the simple fact that judges do not view it that way and these practices will almost always hurt the client and the case in the end. The judicial process is not a game. It is designed to accomplish justice, not to reward the more clever lawyer or litigant.

The real solution for this problem lies mostly with the judges. Judges have a full quiver of very sharp-pointed sanctions under Rule 37. Ninety-five percent of lawyers comply with the discovery standards, and always have, even before they existed in written form. We beg the Bench to use a big stick on the five percent who do not.

SCOTT DANIELS is a former District Court Judge, Bar President and Member of the Utah House of Representatives. He currently practices exclusively in mediation, arbitration and other forms of dispute resolution.





V. Lowry Snow

President-Elect & Bar Commission Election Results

V. Lowry Snow was elected President-Elect of the Utah State Bar. He received 1,109 votes to Felshaw King's 1,078 votes.

Nate Alder and Christian W. Clinger ran unopposed in the Third Division, Robert L. Jeffs was unopposed in the Fourth Division, and Curtis M. Jensen ran unopposed in the Fifth Division. Under the Utah State Bar bylaws, these uncontested candidates were declared elected. Yvette Donosso Diaz has agreed to fill Gus Chin's unexpired one-year commissioner term in the Third Division.

Commission Highlights

During its regularly scheduled meeting of January 27, 2006, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. David Bird reviewed the priority items of the June 2005 Bar Commission Retreat Governance Resolutions. David Bird also discussed the Commission priorities adopted in July 2005 by the Commission: *Relations with Legislature and Courts, Performance Review, Lawyers Assistance Program and Relations with Law School Faculty and Law Students*.
2. Gus Chin reminded Commissioners that the September 22, 2006 the Commission meeting will be held at BYU and at the conclusion of the meeting, he would like to schedule a time for interaction with law school students. Nate Alder said that he, Steve Owens, and Gus Chin all went to the University of Utah to review their initiatives/programs on *pro bono* efforts. He reported that law school students paired up with lawyers to do *pro bono* work and that about 70 students are currently involved. Kevin Worthen said this opportunity is a much better first encounter with the Bar than the Admissions process. John Baldwin said the Bar is drafting a letter to send to law students informing them of the group benefits available to them such as the *Bar Journal*, regular e-bulletins, discounted CLE, discounted admission to conventions, etc., through the law student affiliated program.
3. David Bird reviewed the Commission calendar. He noted that the next Commission meeting is scheduled for 1:00 p.m. on Thursday March 9th, during Spring Convention and the April meeting will be held in Provo, Utah. He also invited Commissioners to attend the And Justice for All breakfast scheduled for February 9th beginning at 7:30 a.m. on the 5th floor of the Wells Fargo Building.
4. Danielle Davis Price invited the Commissioners to the 10th Anniversary dinner event for the Paralegal Division to be held on April 6, 2006; further details will be forthcoming.
5. David Bird said that while the proposal for malpractice insurance disclosure had previously been tabled, some items needed to be reviewed. He noted that Marsh would be conducting a presentation later that morning. John Baldwin said the Bar will continue to collect voluntary information such as where lawyers work and if they have malpractice insurance. David said that a portion of OPC's annual report ties into this subject. He noted that 68% of the OPC's cases are violations of communication and diligence, with competence coming in second at 40%. He believes the Bar should provide more education in these areas which would decrease the cost of malpractice insurance and increase availability of insurance to members.
6. Gus Chin reported on the 75th Anniversary planning. He noted that each Commissioner should have received a list of former Commissioners and Bar Presidents and asked that they double-check these lists to make sure everyone has been included. He reported that celebration is scheduled for Rice Eccles Stadium and will include a short program along with a musical interlude.
7. David Bird announced there are two open seats for Third District Commissioner in addition to the Fourth and Fifth District Commissioner seats.
8. Grant Clayton, Chair of the Bar's Member Benefits Committee was in attendance along with Denise Forsman (Client Executive for Marsh) and other individuals from Liberty Insurance for this portion of the meeting. Discussion ensued over the parameters of the current insurance program. Yvette Diaz and Rod Snow will co-author a *Bar Journal* article on the need to carry malpractice insurance and options that the Commission will be considering in the future. Rob Jeffs, Felshaw King and

Lowry Snow will draft a letter to Bar members encouraging them to purchase professional liability insurance. The letter will include some rate quotes from Marsh/Liberty.

9. John Baldwin reported on Bill Gephardt's request to resolve consumer complaints and a discussion ensued. The Commission has carefully considered the issues and discussed it with others. The Bar already has avenues available to resolve this issue and a letter to Gephardt will be drafted.
10. John Baldwin reported that the Bar had changed internet providers – moving from Aros Net to X-mission.
11. John Baldwin reported on the current changes being made to the Bar Alliance database. He said the MCLE, the CLE and the Licensing databases are complete with only a few bugs needing to be worked out which would be the case with any new system. The Admissions database is nearly complete and Bar Alliance will begin working on OPC's database shortly. He said we are working towards a member-based system where lawyers can make address changes, MCLE reports, etc., on line.
12. John Baldwin reported on the proposed conflict of interest policy. He noted that although there has not been particular concerns raised about conflicts of interest among Commissioners, he believed it would be a good idea to have a policy in place for the future. A discussion ensued and this item will be placed on next month's agenda for a decision.
13. Spring Convention Awards were selected after discussion and voting. Janet H. Smith was selected as recipient of the Dorathy M. Brothers award and Mona Burton was selected as recipient of the Raymond S. Uno award.
14. V. Lowry Snow and Felshaw King were nominated to run for President-elect. This motion passed unanimously.
15. George Daines reported on the LAP Committee. The Committee recommends "that the Commission petition the Utah Supreme Court to approve rules which provide diversion to the services of Blomquist Hale (or like services/monitoring) as a condition of discipline to be imposed as appropriate and at the discretion of the Ethics and Discipline Committee, the District Courts and the Supreme Court." This proposal will, however, place an additional burden on the Ethics and Discipline Committee to follow-up with monitoring assistance. The motion to adopt the recommendations as stated passed unopposed.
16. The Lawyers Helping Lawyers (LHL) proposed budget was discussed. The Committee recommends: (a) LHL be funded with \$25,000 for one year and be encouraged to raise money through CLE seminars and to seek other sources of funding; (b) LHL continue to provide educational seminars and coordinate volunteer peer-to-peer assistance from direct calls and through referrals from Blomquist Hale; and (c) that LHL coordinate volunteer lawyer-to-impaired lawyer practice assistance in emergency instances. The program would be evaluated after a year. The motion to approve these recommendations passed unanimously.
17. Mary Kay Griffin reviewed the financial reports. She noted the Bar's 75th Anniversary celebration funds will be largely derived from next fiscal year's budget.
18. Debra Griffiths Handley reported on the Young Lawyers Division. Debra stated that YLD would like to implement an online program entitled "Ten Minute Mentor", which would be available 24 hours a day and would feature helpful information on particular practice areas with Legal Span sponsoring the program. The YLD is anticipating a launch date of May 1st with 30 or more topics to be up and running.
19. David Bird briefed the Commission on a complaint letter relating to security at the Matheson Courthouse. The Executive Committee believes that the Bar lacks the authority to address court security concerns and noted that Peggy Gentles from the AOC is responding in this matter.
20. David Bird reported on the Judicial Council and noted that the appellate courts are considering e-filing for briefs.
21. Rob Jeffs reported on the Bar's Performance Review Committee and noted that the Committee had finalized the RFP and it was ready to be distributed. The motion passed unanimously to finalize and distribute the RFP. A timeline was suggested as follows: 2/15/06 – RFP finalized and sent; 3/31/06 – responses from entities due; 4/21/06 – responses reviewed and recommendation made by Committee to Commission for entity; 7/06 – review completed by entity.
22. David Bird reviewed OPC's Annual Report and noted that the caseload has increased. Gus Chin noted that discipline will be a topic for discussion at the Commission retreat.

Forensic Psychology Evaluations

Mark Zelig, Ph.D., ABFP

Board Certified Forensic Psychologist

Evaluation/Testimony:

- Personal injury/malpractice/torts
- Sexual abuse claims
- Civil & criminal competencies
- Crime scene analysis, including homicides and equivocal deaths.
- Continuing education presenter on above topics.



Qualifications, Distinctions:

- M.S., Brigham Young University
- Ph.D., University of Alabama
- Fellow, American Board of Forensic Psychology
- Well-referenced on internet search engines

3760 Highland Dr., Ste 500, Salt Lake City, UT 84106
801-273-3365 dr.zelig@att.net

During its regularly scheduled meeting of March 9, 2006, which was held in St. George, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated:

1. David Bird reported on the Judicial Council, stating that during the last legislative session, the courts requested 7% additional compensation but received 3%. One-half percent of this increase, however, was designated for medical insurance. This package was identical to what all state employees received.
2. David Bird announced that the Lifetime Service to the Bar Award would be presented at the Bar's 75th Anniversary celebration. Criteria for the award will be in recognition of a distinguished career in the law and for the many years of leadership, loyalty, contributions and devotion to the programs, services and activities of the Utah State Bar. Nominations are being sought from Commissioners along with reasons why the individual has been nominated according to the established criteria. The motion to accept the established criteria for the Lifetime Service to the Bar Award passed unopposed.
3. David Bird and John Baldwin reviewed the Spring Convention Calendar and John reminded everyone to make their reservations now for the Annual Convention to be held in Newport Beach, California.
4. Gus Chin reported on the Commission elections. Gus stated that he currently occupies two Commission seats (as President-elect and as a Third Division Commissioner) but will be vacating his Commissioner seat at the conclusion of the year beginning in July. That will leave a one-year unexpired term open in the Third Division. David then interjected that currently there are three people running in the Third Division for two openings: Nate Alder, Christian Clinger and Yvette Diaz. After consideration, Yvette has indicated that she will volunteer to assume the one-year term. As a consequence, there will be no contested election in the Third Division. The motion that in anticipation of Gus resigning his Commission seat, the Commission will appoint Yvette to fill Gus's unexpired one-year term and declare both Christian and Nate Third Division Commissioners so that no election will be necessary, passed unopposed.
5. Lowry Snow introduced Curtis Jensen (who was in attendance at the meeting) as his declared replacement for Commissioner in the Fifth Division.
6. John Baldwin reported that the Judicial Conduct Commission is moving to a new municipal building in Ogden in the fall, and their office space in the Law and Justice Center will be vacant.
7. John Baldwin reported on a violence survey that had been done by Steve Kelson, a lawyer from Kipp and Christian. Towards that end, a survey was distributed via the Bar's e-bulletin. There were approximately 1,000 responses received and John asked what kind of response, if any, the Bar should make to the results of the survey. It was suggested that John follow up with Kelson to ascertain what else Kelson may do with the survey results. Mr. Kelson is writing a *Bar Journal* article based on the responses in the survey.
8. John Baldwin, Larry Stevens and Billy Walker are currently working on the proposed diversion rule changes for the Rules of Lawyer Discipline and Disability.
9. John reported that currently two petitions are before the Supreme Court: (1) House Counsel petition; and (2) petition to increase inactive full service fees from \$90 to \$120. The Court did not approve the law school faculty pro bono service petition.
10. The Criminal Law Section would like to amend their bylaws. Nate Alder stated that the current bylaws do not provide contact information for a Governmental Relations Committee liaison. John Baldwin will follow up on this for next month's agenda.
11. John Baldwin informed the Commission that the front landscaping at the Law and Justice Center will be re-done later in the year (xeriscaping) which will ultimately save the Bar money and improve the appearance of this area.
12. Debra Griffiths Handley discussed the issue of possible "sponsorship money" (for attendance purpose) for Young Lawyers Division for the Annual Convention. Discussion followed. On a related note, John said that overall convention attendance isn't increasing as it should with the increase in lawyers.
13. John Baldwin reiterated his statement at the last meeting that although there has not been particular concerns raised about conflicts of interest among Commissioners, he believes it would be a good idea to have a policy in place for the future. The motion to adopt the policy passed unopposed and the policy will be effective July 14, 2006.
14. Lori Nelson reported that the Governmental Relations Committee was a huge success this year. John T. Nielsen noted that it might be a good idea to have an orientation letter containing the committee's policies and procedures distributed to new members next year. John T. Nielsen discussed some of the bills from the latest legislative session and discussion followed.

David Bird expressed appreciation for Commissioners who donated their time and effort on these legislative issues. He said great strides were made in continuing to improve our relationship with legislators.

15. Charles R. Brown reported that ABA Resolution #177B would raise ABA dues by 17% and resolution #302 addressed issues relating to wiretap/surveillance in the executive branch had been recent topics. He also said that Hurricane Katrina issues were discussed at recent meetings as well as the topic

that the Department of Justice is coercing clients into waiving attorney/client confidentiality privileges.

16. Grant Clayton, Chair of the Member Benefit Committee, was in attendance to follow up on malpractice insurance disclosure issue. A discussion followed and Rob Jeffs stated that at the Commission meeting scheduled for April 28th in Provo, he would like to have information available relating to the new EAP and malpractice insurance for lawyers who attend the lunch function. Yvette said she and Rod will work on the *Bar Journal* article and circulate it. John Baldwin said he and Connie Howard will continue to work with Clayton on this issue.
17. Yvette Diaz announced that she will be returning to regular practice as she is leaving the Governor's Office.
18. Rob Jeffs reported on the Bar's performance review. He stated that the RFP's had been mailed out to various auditing companies including Ray Westergard at Grant Thornton and responses are due April 10th. He also added that Rusty Vetter recently had provided information regarding a firm that recently had conducted the audit of the prosecutor's office of Salt Lake City and Rob will contact that firm.

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

American Bar Association Representative

The Board of Bar Commissioners is seeking applicants to serve a two-year term as the Bar's representative to the American Bar Association's House of Delegates. The term would begin at the conclusion of the ABA's Annual Meeting in August, and run through the August, 2008 Annual Meeting.

Please send your letter of application and resume no later than Friday, June 2, 2006 to:

John C. Baldwin
Executive Director
Utah State Bar
jbaldwin@utahbar.org
645 South 200 East
Salt Lake City, Utah 84111

Applicants Sought for Second District Trial Court Nominating Commission

The Bar is seeking applications from lawyers to serve on the Second District Trial Court Nominating Commission. The Commission nominates judges to fill vacancies on the district court and the juvenile court within the Second Judicial District. Two lawyers are appointed by the Governor from a list of six nominees provided by the Bar.

Commissioners must be citizens of the United States and residents of the Second District (Davis, Morgan and Weber Counties). Commissioners are appointed for one term of four years and may not serve successive terms. No more than four of the seven members of the nominating commission may be of the same political party.

Please identify your political party or if you are politically independent.

Submit resumes to John C. Baldwin, Executive Director, by e-mail at john.baldwin@utahbar.org, or by mail at 645 South 200 East, Salt Lake City, UT 84111.

Resumes must be received by Tuesday, August 1, 2006

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2005 Utah Bar Journal Cover of the Year Announced



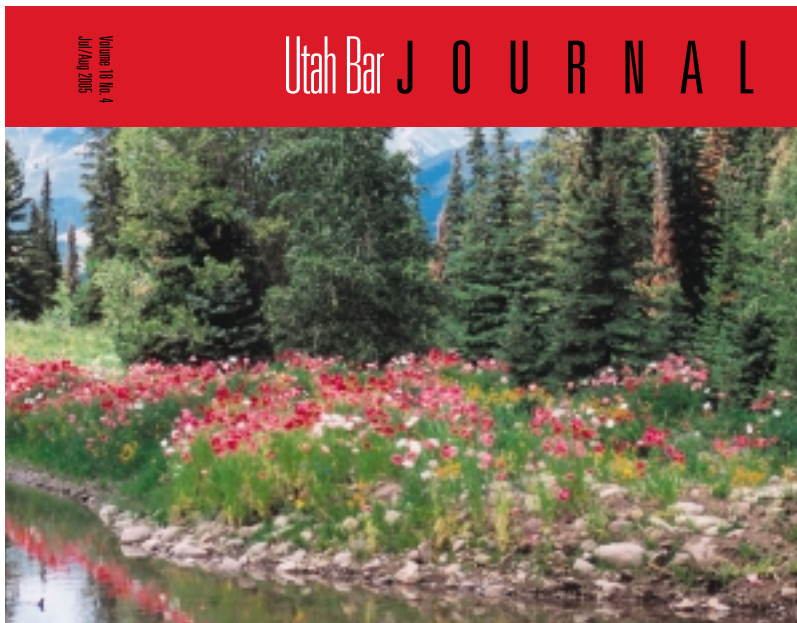
The winner of the *Utah Bar Journal* Cover of the Year award for 2005 is Marva Match of Cannon & Match in Salt Lake City. Her photo of Thousand Peaks Ranch on the Weber River east of Oakley, Utah was featured on the cover of the July/Aug 2005 issue of the *Utah Bar Journal*.

Marva is one of 57 attorneys, or members of the Paralegal Division of the Utah Bar, whose photographs of Utah scenes have appeared on at least one cover since August, 1988.

This is Ms. Match's first photograph to be featured on the cover of the *Journal*. Covers of the year are framed and displayed on the upper level of the Law and Justice Center.

The editorial board of the *Bar Journal* welcomes your feedback about the covers and invites you to submit your own photos for consideration on a future cover.

Congratulations to Marva Match, and thanks to all who have provided photographs for the cover.



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Notice of the Utah State Bar Young Lawyers Division Elections

Nominations are being accepted for the 2006-07 President-Elect, 2006-07 Secretary and 2006-07 Treasurer for the Young Lawyers Division ("YLD"). Each nomination must be accompanied by a written statement which contains the candidate's biography, qualifications and platform. The written statement shall be no longer than the equivalent of two pages, typewritten and double-spaced. For more information regarding the elected offices and duties, please visit the YLD website (<http://www.utahbar.org/sections/yld/Welcome.html>) and review sections 2 and 3 of the YLD Handbook. Nominations for the offices listed above must be signed by three members of the YLD who are in good standing and must be received by 5:00 p.m. on June 16, 2006 by Ruth Hawe, VanCott Bagley Cornwall & McCarthy, 50 South Main Street, #1600, Salt Lake City, Utah, 84111; Fax: 534-0058.; Email: rhawe@vancott.com

The YLD General Election will be conducted by electronic ballot June 26-30, 2006. In order to vote, the YLD needs your email address. If the Utah State Bar does not currently have your correct email address, please send it to arnold.birrell@utahbar.org by 5:00 p.m. on June 20, 2006.

Utah Bar Criminal Law Section's New Look

The Criminal Law Section of the Bar has re-invented itself and is absolutely worth joining. Dues are only \$10 per year.

Based upon a suggestion from Jim Bradshaw, several prosecutors and defense counsel recently met to re-vamp the Section by making it balanced and attractive to all interested in criminal law.

New bylaws now make the Section's officers balanced between defense lawyers and prosecutors, with the Chair rotating annually between a prosecutor and a defense counsel. Further, the Utah Association of Criminal Defense Lawyers names one Vice Chair of the Section, as does the Utah Prosecution Council. The section will offering programming that will be of interest to all and which will be fairly presented.

A day-long CLE event is currently planned for June 21. It will consist of six hours of CLE (including one of ethics) and will include lunch. The cost, including lunch, is only

\$30 for section members. The cost for a non-member is \$40, but the extra \$10 can be applied as the annual dues for membership in the section. Several presentations have already been confirmed, but as of this writing the schedule is not yet final. As soon as it is, a mailing will go out and the program will be posted on the Section's website.

Officers for the coming fiscal year are:

Chair: Michael Wims

First Vice-Chair: Mark Moffat

Vice-Chair for CLE: Paul Boyden

Secretary-Treasurer: Lynn Donaldson

Vice-Chair at large (UPC): Brenda Beaton

Vice-Chair at large (UACDL): Candace Johnson

To join the Criminal Law Section contact the Utah State Bar (801)531-9077

Mailing of Licensing Forms

The licensing forms for 2006-07 are scheduled to be mailed during the last week of May and the first week of June. Fees are due July 1, 2006; however fees received or postmarked on or before August 1, 2006 will be processed without penalty.

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

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

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

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

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2006 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2006 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, September 18, 2006. The award categories include:

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

Notice of Legislative Rebate

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

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 2006 and ends June 30, 2007. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its June 2, 2006 meeting.

The Commission is interested in assuring that the process includes as much feedback by as many members as possible. A copy of the proposed budget, in its most current permutation, will be available for inspection and comment at the Law & Justice Center. You may pick up a copy from the receptionist.

Please call or write John Baldwin at the Bar Office with your questions or comments.

Pro Bono Honor Roll

Lois Baar	Colin McMullin
Lauren Barros	Richard Medsker
Richard Bird	Scott Moore
Rex Bushman	William Morrison
Merlin Calver	William Ormond
Dee Chambers	William Parsons
Shelly Coudreaut	James Peters
Lou Harris	Stewart Ralphs
D. Rand Henderson	Kevin Sheff
George Hunt	V. Lowry Snow
Jarrold Jennings	Scott Thorpe
Jonathan Jaussi	Tracey Watson
Brent Johns	Weston White
Louise Knauer	Timothy Williams
David Lambert	Lamar Winward
Suzanne Marelius	Carolyn Zeuthen
Suzanne Marychild	John Zidow

Utah Legal Services and the Utah State Bar wish to thank these attorneys for either accepting a pro bono case or volunteering at clinic during the months of February and March. Call Brenda Teig at (801) 924-3376 to volunteer.


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Discipline Corner

ADMONITION

On February 10, 2006, the Chair of the Ethics and Discipline Committee entered an Order of Discipline: Admonition against an attorney for violation of 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney was served with a Notice of Informal Complaint from the Office of Professional Conduct. The attorney failed to respond timely.

PUBLIC REPRIMAND

On February 10, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Alan Stewart for violation of Rules 1.15(a) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules

of Professional Conduct.

In summary:

Mr. Stewart failed to supervise his employee who embezzled money from his attorney trust account. In Mr. Stewart's initial response concerning an overdraft on his attorney trust account, he provided information that was untrue. Mr. Stewart voluntarily admitted the truth near or around the time of a Screening Panel of the Ethics and Discipline Committee. Mitigating factors included: absence of prior record of discipline; absence of dishonest or selfish motive; and remorse.

ADMONITION

On February 10, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.3 (Diligence, 1.4 (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

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In summary:

The attorney was hired to pursue a personal injury claim that occurred in another state. The attorney failed to inform the client of the applicable statute of limitation in the other state. The attorney failed to advise the client of the advantages and risks regarding statute of limitations in choosing where to file the claim. The client was not allowed to participate in the decision of where the claim should have been filed. The attorney was negligent in not communicating with the client in writing concerning the decision of where to file the claim.

ADMONITION

On March 15, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.15(a) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney did not keep unearned client funds in a separate account in a financial institution that agrees to report insufficient funds to the Office of Professional Conduct.

PUBLIC REPRIMAND

On March 10, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Jonathan Pace for violation of Rule 1.1 (Competence) of the Rules of Professional Conduct.

In summary:

Mr. Pace failed to protect the interests of his client by failing to ensure that a meeting between his client and a law enforcement agency would not take place in his absence.

ADMONITION

On March 10, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rule 1.4(a) (Communication) of the Rules of Professional Conduct.

In summary:

The attorney was hired to pursue an out of state small claims dispute. The attorney failed to return the client's phone calls, failed to explain the strategy to the client, and failed to explain the necessity of hiring an in-state attorney for an appeal.

PUBLIC REPRIMAND

On March 10, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Christopher Edwards for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Edwards was hired to pursue a personal injury claim as well as a matter involving the Office of Recovery Services ("ORS"). In the personal injury claim, Mr. Edwards failed to take action on behalf of his client prior to the expiration of the statute of limitations. Mr. Edwards failed to keep his client adequately informed concerning the case status and failed to protect his client's claim. In the ORS matter, Mr. Edwards failed to serve the defendants and proceed with the action, failed to pursue the relief necessary for his client by failing to secure the entry of an order to show cause, and failed to adequately inform his client regarding the ORS matter.

SUSPENSION

On February 16, 2006, the Honorable Robert K. Hilder, Third Judicial District Court, entered an Order of Discipline: Two-Year Suspension suspending Carlos Chavez from the practice of law for violating Rules 1.3 (Diligence), 5.3(a), (b), and (c) (Responsibilities Regarding Nonlawyer Assistants), 8.1(b) (Bar Admissions and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Chavez employed Jose Luis Trujillo, a disbarred attorney. Mr. Trujillo met with a client, who signed two retainers that named Mr. Chavez as the attorney being retained. The client had never met Mr. Chavez, and Mr. Chavez never informed the client, either orally or in writing, that Mr. Trujillo was disbarred. The client paid fees to Mr. Trujillo. Mr. Chavez never filed an action on behalf of the client, although he worked on drafting a Complaint. Mr. Chavez's office attempted to file the Complaint but the filing fee was incorrect. Before it could be refiled, the client terminated the representation. Mr. Chavez failed to ensure that Mr. Trujillo's conduct was compatible with his professional obligations. Mr. Chavez also failed to respond to the Notice of Informal Complaint and failed to appear for a Screening Panel hearing of the Ethics and Discipline Committee.

PUBLIC REPRIMAND

On February 23, 2006, the Honorable W. Brent West, Second Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Discipline publicly reprimanding Alyson Draper for violations of Rules 1.2 (Scope of Representation), 1.3 (Diligence), and 1.4(a) and (b) (Communication) of the Rules of Professional Conduct.

In summary:

Ms. Draper undertook the representation of a client in a job discrimination case in 1999. In the course of that representation, Ms. Draper failed to adequately communicate with the client, failed to pursue the client's objective in a timely fashion, and decided not to submit the client's claim without notifying the client of this decision in advance of the deadline.

Message from the Chair

by Danielle Price

This year marks the 10th Anniversary of the Paralegal Division since its creation by the Utah Supreme Court in April of 1996. The Division hosted an anniversary celebration on April 6, 2006, at Rice Eccles Stadium Tower to recognize those who worked to create the Division and to continue its growth and progress. The event celebrated the accomplishments of the Division and its members over the past ten years, as well as the growth of this profession. The evening included special guest speakers, Steven Kaufman, Former Chief Justice Michael Zimmerman, Peggi Lowden, and Mary Black. The celebration wrapped up with an amazing performance by Kurt Bestor. A copy of the program for the event is available on the Division's website and contains some interesting historical information from 1996 to present. I hope you will take a moment to review the program if you have not already. We also posted several photographs from the event.

Our anniversary celebration would not have been possible without our very generous sponsors. I thank each and every one of our sponsors for their contribution and support. Our sponsors include:

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Special thanks as well to our Gold Sponsors, **Utah State Bar**, **Holme Roberts & Owen**, and the **Business Law Section**. Gold sponsors contributed \$1000 each. We had one more Gold Sponsor, **Litigation Document Group**, who in addition to a financial donation, printed all of our invitations and programs free of charge. Many thanks to all of our sponsors for enabling the Division and our many guests to have such a wonderful evening.

The end of my term is quickly approaching in June. It has been an honor to lead the Division this year and to have worked with such a dedicated and impressive Board of Directors. A bio and photo for each can be found on our website. Elections will be held on June 16th at our Annual Meeting. At the Annual Meeting I will hand over the reins to Kathryn Shelton, our Chair-Elect. Kathryn is a paralegal with Durham Jones & Pinegar and has been a great asset to the Division. I am sure that Kathryn will lead the Division to new heights because she has much to offer. I know I am leaving the Division in capable hands.

Please keep in mind that there are always opportunities for involvement if you are interested. Contact any Board member for information on volunteering on a committee or on the Board of Directors. The Paralegal Division needs your involvement to assure that the next ten years are as successful as the first ten years.

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
05/11/06	Annual Business Law Section Seminar: 8:30 am–12:00 pm. Breakfast included.	3
05/12/06	2006 Annual Family Law Seminar. 8:00 am–4:45 pm. \$125 for Family Law Section Members; \$155 for others.	6.5
05/17/06	Annual Labor and Employment Law Section Seminar: 9:00 am–12:00 pm	3
05/18/06	Annual Real Property Seminar. 8:30 am–1:30 pm.	
05/18/06	Criminal Law NLCLE: 5:30–8:30 pm. Learn the Step-by-Step Court Process on a Criminal Case. \$55 for Young Lawyers; \$75 for others.	3 CLE/NLCLE
05/19/06	Elder Law Seminar. 8:00 am–4:00 pm. \$120 early registration; \$150 at the door.	6
06/01/06	Satellite Broadcast: Advanced Estate Planning Practice Update – Spring 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.	3
06/14–17/06	The National Institute for Trial Advocacy (“NITA”): NITA brings its international expertise in trial skills training that feature learning-by-doing exercises emphasizing persuasive presentation of case story in bench and jury trials. Salt Palace Convention Center. \$1200 Litigation Section Members; \$1250 Non-Litigation Members; \$2000 Non-Utah State Bar Members (space permitting). Limited to 48 participants.	28–32
06/15/06	NLCLE: Law Practice Management: 5:30–8:30 pm. Choice of Entity. Lease? Business license? Malpractice Insurance – Yes, no How much? Personnel/Outsourcing. Equipment/Furnishings. Advertising.	3 CLE/NLCLE
06/15/06	Annual Corporate Counsel: 8:30 am–1:30 pm. Agenda pending.	4
06/21/06	Annual Criminal Law Section Seminar. 8:00 am–5:00 pm. \$30 for Criminal Law Section Members; \$40 for Non-Criminal Law Section Members. \$20 for law students and paralegals. You may join the Criminal Law Section for \$10 and receive the \$30 price if you are a member by 06/21/06.	6 including 1 hr Ethics
06/23/06	New Lawyer Mandatory. 8:00 am–12:30 pm. Fulfills mandatory requirement. \$55.	
06/29/06	Satellite: Protecting ERISA Fiduciaries, Employers, and Administrators from Benefit Plan Risks and Liabilities: ERISA, Sarbanes-Oxley, Circular 230, and Other Hobgoblins. 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. Register at 1-800-CLE-NEWS or www.ali-aba.org	3.5
07/19/06	Ethics School. 9:00 am–3:45 pm (includes lunch). The course is required for those admitted by reciprocal admission. \$150 prior to July 12th, 2006; \$175 after.	6 Ethics or 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.**

Classified Ads

RATES & DEADLINES

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

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

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

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

NOTICE

Davis County attorney looking for Last Will and Testament of MARGENE STEVENS (aka MARGENE DeWINTER). The Will was likely executed in the last decade in Davis County (likely Layton or Clearfield). Please call Trent D. Nelson, Attorney at Law, LLC, at 801-547-8985, with any information.

POSITIONS AVAILABLE

NATIONAL ARBITRATION AND MEDIATION – Help Wanted, Top-Tier Arbitrators And Mediators – National provider of premium alternative dispute resolution services seeks to increase our current roster of top-tier hearing officers with additional highly qualified and well-respected attorneys, former state and federal judges and law school professors. Please contact our Panel Coordinator at (800) 358-2550 ext. 192 or e-mail us at panel@namadr.com.

Small family law firm is seeking associate attorney.

Applicants should submit resume with references. Area of focus is primarily family law. However, additional practice areas range from tort, criminal defense, contract and juvenile law. Applicants should be proficient in Lexis and have exceptional writing skills. Salary and benefits dependent on experience and skills. Please send resume to ccritchley@utahbar.org.

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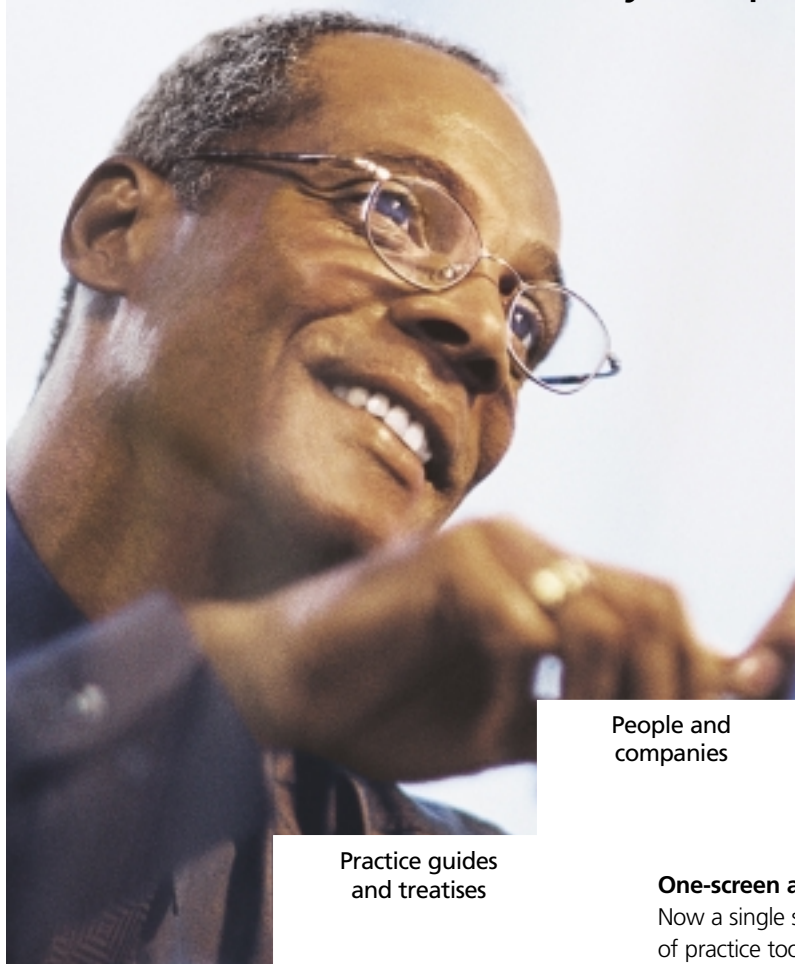
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