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COVER: Pine Creek Canyon, Zions National Park, by first time contributor Steven Black, Highland, Utah.

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Utah Bar JOURNAL

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Letters Submission Guidelines:

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

Cover Art

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

Interested in writing an article for the Bar Journal?

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

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

Submission of Articles for the Utah Bar Journal

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

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

The Utah Bar Journal

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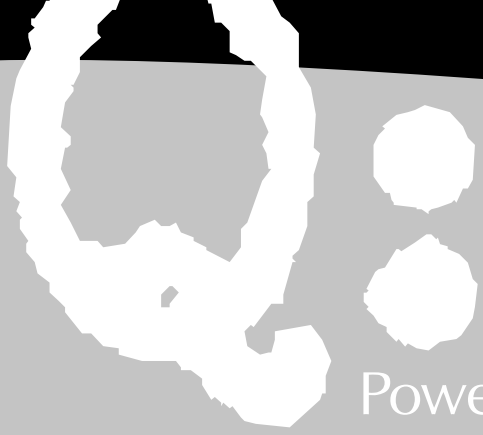

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Letters to the Editor

Dear Editor:

I enjoyed Bryan Pattison's article, "Henriod, Dissenting" in the May/June 2006 issue, on the flamboyant and humorous dissents by Justice F. Henri Henriod.

When I clerked for Justice Henriod part-time as a law student in 1974-75, I found him always decent, courteous, and sensitive to the rights of litigants and their attorneys. He believed that legal precepts often could be conveyed best through a unique phrase.

My own favorite Henriodism was not a dissent but a concurrence. In a divorce appeal, he joined the majority opinion which disallowed testimony from a mother who attempted to show that a child born during the marriage was not the legitimate offspring of the husband. The husband acknowledged paternity but the wife disputed it. The majority was critical of the attempt by a parent to subvert the interests and welfare of the child. Justice Henriod added: "[I]n cases like this the children are not the bastards, but you know who." 518 P.2d at 690.

Roger Bullock

Dear Editor:

In May/June volume of the *Utah Bar Journal,* Jessica Peterson published her analysis of the Utah Supreme Court's opinion in *Chen v. Stewart,* 2004 UT 82, 100 P.3d 1177. While Ms. Peterson acknowledged her affiliation during law school with the law firm that lost the appeal, she nonetheless presented her analysis as objective. We also served as counsel in *Chen v. Stewart* and have a rather different view of the Court's opinion. However, instead of publishing our own lengthy analysis exposing each of Ms. Peterson's mistakes, we simply urge those interested in what the case stands for to read the opinion for themselves. In our view, *Chen v. Stewart* does not represent the furtive, radical shift in Utah law that Ms. Peterson suggests.

Todd M. Shaughnessy

James D. Gardner

Dear Editor:

I read the recent article entitled, "Along for the Ride?: Warrant Checks and the Status of Passengers During Traffic Stops in Utah" in the last issue of the *Utah Bar Journal* with interest. While I join with Mr. Starr in urging Utah appellate courts to place more reasonable restrictions on law enforcement officers in traffic stop circumstances, I cannot agree with Mr. Starr's premise that present law can be interpreted to allow Utah law enforcement officers to conduct a more expansive investigation with respect to passengers than can be conducted with the driver on the basis that the passenger is not justifiably seized. Utah law holds that a traffic officer exceeds the permissible scope of a traffic stop when he unlawfully seizes a passenger by taking her name and birth date, while expecting her to await the completion of a warrants check. To date, Utah cases continue to reason that if the officer is restrained from exceeding the scope of investigation permitted incident to a traffic stop with respect to a driver, then the officer is even further restrained with respect to the innocent passenger – not less as Mr. Starr suggests. Although there is room to refine Utah's passenger-warrants cases in light of recent U.S. Supreme Court opinions holding that questioning is not a seizure, it is unlikely that Utah appellate courts will abandon their previous acquiescence in defendants' arguments claiming that the passenger is seized concurrently with the driver by the initial stop of the car. It is difficult for me to imagine a traffic officer permitting passengers to run about or flee while a citation is being issued. Nevertheless, I applaud Mr. Starr's efforts in raising several of the many thorny issues involved in the law regarding traffic stops.

B. Kent Morgan

Violence Against the Utah Legal Profession – a Statewide Survey

by Stephen D. Kelson

I. Introduction

When a sensational act of violence against the legal profession occurs somewhere in the United States, we see repeated updates on television, websites, and in newspapers and magazines for the next week or two. Legal commentators quickly appear and voice their opinions that the latest incident is just another example of increasing violence against the legal profession. However, after a week or two, the event is generally forgotten as media attention is turned to the next new big story. Such was the situation in early 2005 with the media coverage of the slaying of U.S. Judge Joan Lefkow's husband and mother in Chicago, Illinois, on February 28, 2005, and the courtroom slayings of Judge Rowland Barnes, a court reporter and deputy in Atlanta, Georgia, on March 11, 2005. Such acts of violence are soon forgotten and the legal profession continues with its daily activities. Many members of the Utah legal profession assume that similar acts of violence are too remote to occur in Utah or won't happen to them. Think again.

Whether you are aware of it or not, many attorneys in Utah regularly experience workplace violence. From January 17th through February 17th, 2006, the Utah State Bar performed the first state-wide survey (the "Survey") concerning violence against members of the legal profession. The results of the Survey present a vivid and perhaps shocking picture of the nature and level of violence against the Utah legal profession. This article presents and examines the results of the Utah State Bar's Survey on Violence. Contrary to public perception, members of the Bar are not exempt from workplace violence, but in fact regularly face danger from opposing parties, interested parties, and their own clients, at anyplace and at anytime.[1]

II. Studies of Violence Against the Legal Profession

While there is no national method for reporting attacks against the legal profession, the few existing studies show that a substantial amount of violence regularly occurs. For example, statistics gathered by the U.S. Marshals Service provide a thorough study of violence against federal judicial officials in the United States. From October 1, 1980 to September 30, 1993, there were a total of 3,096 inappropriate communications or threats and assaults reportedly made against federal judges – an average of 238 per year.[2] In comparison, 1,207 inappropriate communications or threats were reported in 1998 and 1999.[3] To date, threats against federal judges have drastically increased to an average of 700 annually.[4]

It has been represented that threats against the legal profession at the state and local courts are far more serious and occur more frequently than those at the federal level.[5] A 1999 survey by the Administrative Office of Pennsylvania Courts found that of 1,029 judges, 23 percent reported that they had received explicit threats; 17 percent reported actual physical assaults; and 44 percent reported inappropriate approaches.[6] In 2001, the federal Bureau of Justice Statistics (BJS) conducted the first and only published study examining workplace aggression as it relates to prosecutors and office personnel.[7] It reported that 81 percent of large state prosecutors' offices reported work-related threats or assaults in that year alone.[8] A recent 2005 Canadian study of 1,152 lawyers in Vancouver and British Columbia indicated that 59.2 percent, 583 lawyers, reported varying degrees and numbers of threats.[9]

Closer to home, in December 2000, the Davis County Bar Association of Utah conducted a survey of its 161 members.[10] In total, 130 members, representing 81 percent of the county bar, responded to the survey. Of the respondents, 13 percent reported that they had been physically assaulted at least once. Moreover, 59 percent reported having been threatened at least once by a client, the opposing party, or other interested persons in a legal action. Of 94 incidents of violence reported in the Davis County Bar Association survey, 12 incidents were perpetrated against lawyers by their own clients, and 69 incidents of violence were

STEPHEN D. KELSON is an associate attorney in the office of Kipp and Christian, P.C. where his practice focuses on civil and commercial litigation and insurance defense.

perpetrated by the opposing party in a case.[11] Interestingly enough, the survey also revealed that 3 assaults and 1 threat were perpetrated by opposing counsel.[12] These statistics clearly showed that violence against the Utah legal profession was not as uncommon as previously believed.

III. The Utah State Bar's Statewide Survey of Violence Against the Legal Profession

From January 17th through February 17th, 2006, the Utah State Bar conducted the first statewide survey of violence against the legal profession in the United States. During the relevant time period of the Survey, the Utah State Bar consisted of 8,745 members, including 6770 active and 1975 inactive members.

The 2006 Utah Bar Survey

The Survey was conducted online through www.surveymonkey.com. All members of the Utah State Bar with available e-mail addresses were requested to respond. The Survey itself was a hybrid of the prior 1999 survey performed by the Administrative Office of the Pennsylvania Courts, the 2001 Davis County Bar Association Survey, and the 2005 survey conducted of lawyers in Vancouver and British Columbia, Canada. It consisted of thirteen closed-ended questions with open-ended responses provided in two of the questions as they related to the category of law practiced and types of violence experienced. One descriptive question was also provided, wherein respondents could provide a brief description of any threat(s) or physical assault event(s).

Of the Survey's thirteen close-ended questions, five were demographic in nature and sought information from Bar members regarding:

- Gender
- In-state or out-of-state practitioners
- Age
- Area of practice
- Years of practice

The remaining eight close-ended questions sought responses regarding:

- Whether respondent had ever received threats or been the victim of violence
- Number of threats received
- Types of threats and/or violence
- Location of threats or violent acts
- Association between threat and violent act
- Relationship with perpetrator
- Reported to police
- Change in conduct

For purposes of the Survey, a "threat" was defined as: "A written or verbal intention to physically hurt or punish another, and (or) a written or verbal indication of impending physical danger or harm."

The Result: Threats and Violence.

The Survey received a total of 984 responses out of 8,745 members of the Utah Bar, representing 11.25 percent of its total membership. Where the Survey's responses present sufficient results to provide a thorough analysis of each of the close-ended questions as they relate to the five demographic close-ended questions, for purposes of length, this article focuses on the responses to the questions themselves and to the demographic questions solely as they apply to whether respondents have ever been the recipient of threats and/or violence.

1. Threats and Acts of Physical Violence.

The Survey's first question, and its primary focus, asked members to identify whether they had ever been the recipient of threats and/or acts of violence. Of the 984 responses to this question, 452 or 45.9 percent of the total respondents reported that they had been threatened and/or physically assaulted at least once. Respondents to the survey identified over three hundred examples of threats and/or acts of violence that have been perpetrated against them in response to the two open-ended responses in the Survey. Although there are far too many examples to list in this article, a few examples are provided to provide a sense of the kinds of violence attorneys in Utah have experienced:

- Over the years various telephone threats of bodily harm; vulgar notes, signed and unsigned;
- Numerous incidents of vandalism of my house and car, all by husbands who didn't like me representing abused spouses in divorces;
- I was told by gang detectives after visiting the prison that two gangs had placed a hit out for me;
- Struck by the brief case of opposing counsel who was attempting to remove confidential documents from my office;
- Individual ran me off the road after court. Did not actually hurt me but made threats and really scared me;
- I have had a defendant post a statement on his web site that he intended to kill me and my family;
- Night before trial, [client's] motel window was shot out with a bb gun. I was sitting at my desk the same evening preparing for trial and a bb shot went through my window whizzing past my ear;

- Pro se opposing party who called to tell me he was on his way to my office with a gun to kill us all;
- Client threatened to have me killed because she was not happy with the outcome of her auto/PI case;
- As I was going back into the courtroom I was 'body slammed' against the wall by the defendant's brother;
- A fake bomb placed in my mail box;
- I was meeting with this client who became upset and slugged me in the chin;
- Telephone messages left with details of my movements and places and times that I could be vulnerable to attack with threats of violence if I didn't change my position on a case;
- During recess from a custody trial – Woman I was examining threatened to kill me and was later arrested trying to smuggle a gun into the courtroom;

These responses represent only the tip of the iceberg, and represent actual situations of threats and violence that members of the Bar experience.

2. Number of Threats Received.

The Survey's second question requested those respondents who had identified themselves as recipients of threats and/or violence to identify the number of threats received. A total of 443 respondents reported in the Survey that they had received threats in the practice of law. As shown in Table 1, the largest number of respondents, 159 (35.9 percent), identified that they had only received one threat. A total of 114 (25.7 percent) reported receiving two threats. Another 50 respondents (11.3 percent) reported having received three threats. Only 12 (2.7 percent) reported four threats. However, 108 (24.4 percent) of the respondents reported having received more than four threats during their legal career.

Table 1: Threats Experienced n=443

	# of Respondents	Percentage
One	159	35.9
Two	114	25.7
Three	50	11.3
Four	12	2.7
More than 4	108	24.4
Total	443	100%

In total, 284 members of the Utah legal profession or 28.9 percent of the Survey's total respondents reported receiving more than one threat during their legal career. The responses to this question show that attorneys in Utah, as a whole, receive a significant number of work-related threats.

3. Types of Threats.

The Survey's third question asked respondents to identify the type(s) of threats and/or acts of violence received as it/they related to the recipients' responsibilities as a legal practitioner. (*See* Table 2). The 430 affirmative responses to this question identified 754 different kinds of threats that occurred, including: 229 inappropriate, menacing, troubling communications (*e.g.* letter, phone, fax, verbal); 270 threatening communications (*e.g.* verbal, letter, phone, fax); 164 inappropriate approaches (*e.g.* followed, face-to-face confrontation or attempts); 25 physical assaults; and 66 incidents of a combination of two or more of the above kinds of threats/acts of violence.

Table 2: Types of Threats / Inappropriate Communications n=754

	# of Type	Percentage
Inappropriate Communications	229	30.4
Threatening Communications	270	35.8
Inappropriate Approaches	164	21.8
Physical Assaults	25	3.3
Combination of two or more of the above	66	8.7
Total	754	100%

4. Location of Threats.

The Survey's fourth question asked members of the Bar to identify the location of the experienced threats or violent acts. (*See* Table 3). Not surprisingly, the Survey responses identify that the most prominent locations of threats or violence have been the business office and courthouse. Of 674 reported locations of incidents, 280 (41.6 percent) occurred in the office, 205 (30.4 percent) occurred at the courthouse, 59 (8.8 percent) occurred at the attorney's residence, and 65 (9.6 percent) occurred at other locations. An additional 65 responses (9.6 percent) identified a combination of the other responses.

Table 3: Where ThreatsViolence Occurs	n=674	
	# of Respondents	Percentage
Office	280	41.6
Courthouse	205	30.4
Residence	59	8.8
Elsewhere	65	9.6
Combination	65	9.6
Total	674	100%

The responses to this question show that although threats and violence predominantly occur at an attorney's work-related environment, it also occurs beyond the office and courthouse, including at home and other locations. For example, after prevailing in a case, one attorney found over a pound of nails spread in his driveway. Another attorney stated that an opposing party tried to hit him with golf balls while he was at a golf course. Many attorneys reported threatening telephone calls to their residence.

5. Threats and Subsequent Assaults.
In the Survey's fifth question, those members of the Bar who reported that they had received threats were asked to identify if the author or an individual connected to the author of an inappropriate or threatening communication subsequently physically assaulted the respondent. A total of 57 incidents of subsequent physical assaults were reported, and respondents reported an additional 6 incidents where they were unsure if the threats and subsequent assaults were related.

Table 4: Perpetrators of Threats / Assaults	n=412	
	# of Respondents	Percentage
Opposing/Associate of Client	197	47.8
Relative/Association of Opposing Party	82	19.9
Clients	65	15.8
Relatives of Client	24	5.8
Unknown	17	4.1
Opposing Counsel	27	6.6
Total	412	100%

6. Relationship with the Perpetrators of Threats/Assaults.
The Sixth question asked members of the Utah Bar to identify their relationship with the individuals who threatened/assaulted them. (*See* Table 4). Of 412 affirmative respondents, 197 (47.8 percent) of the incidents were perpetrated by the opposing/associate of the client, 82 (19.9 percent) of the incidents were by the relative/associate of an opposing party, 65 (15.8 percent) were perpetrated by clients, and 24 or 5.8 percent by relatives of a client. In 17 (4.1 percent) of the incidents, the relationship with the individual that threatened/assaulted a Bar member was unknown. The most interesting statistic was that 27 (6.6 percent) of reported incidents were perpetrated by opposing counsel.

These responses show that threats and violence are primarily perpetrated by opposing parties, their associates and relatives, and an attorney's own client. They also show that threats and violence can occur from any individual involved in a legal case, including other members of the Bar.

7. Responses to Threats/Physical Assaults.
The Survey's seventh question asked those respondents that received threats or have been the victim of a physical assault if it was reported to the police. Only 144 or 31.9 percent of the 452 members of the Bar who identified themselves as the recipients of threats or as the victims of violent acts reported such incidents to the police. Related thereto, the Survey's eighth question asked those members of the Utah Bar that identified themselves as recipients of threats and/or physical assault, if such violence altered the way they conducted their legal business. Only 28 respondents indicated that incidents had affected their conduct a great deal, and 168 stated that their conduct had somewhat been affected.

C. Demographic Survey Results.
The Survey's five demographic questions provide additional information regarding the distribution of threats and violence against members of the Utah legal profession by gender, in-state/out-of-state membership, age, area of practice, and years of practice.

1. Threats by Gender.
During the time period the Survey was conducted, the Utah State Bar consisted of 1269 active and 602 inactive female attorneys, who jointly represent 21.4 percent of the total membership (8745) of the Utah State Bar. In response to the Survey, 252 respondents identified themselves as female, representing 26 percent of the total respondents who identified their gender. Of this number, 115 or 45.6 percent of female attorneys who responded to the Survey identified that they had been the recipient of threats and/or the victim of violence during the course of their legal careers. Female attorneys represented 25.6 percent of the total respondents

who identified that they had been the recipients of threats and/or violence. (*See* Table 5).

During the same time period, male attorneys represented 6874 or 78.6 percent of the total membership of the Utah State Bar. Of those attorneys who responded to the Survey, 717 identified themselves as male, which represents 74 percent of the respondents and 334 or 46.6 percent of the male attorneys stated they had been the recipient of threats and/or violence at some time during the course of their legal careers. *See* Chart 5 below.

The Survey revealed that although slightly more female attorneys, or slightly fewer male attorneys, responded to the Survey than representative of their total Bar membership, the percentage of male and female attorneys who identify themselves as recipients of threats and/or violence is approximately the same (46.6% and 45.6%).

(48.5 percent) of out-of-state members indicated that they had been the recipient of threats and/or violence arising from their work in the legal profession.

A review of these Survey's results reveals that a disproportionately lower number of out-of-state members responded to the Survey than those in-state. The greater number of responses from in-state members arguably provides a more realistic representation of the level of threats and violence against the legal profession within the state; however, a greater response from out-of-state members would have provided a more accurate representation of threats and violence against the entire membership of the Utah State Bar.

3. Age.

Members of the Utah Bar were asked to identify their age as part of the Survey. 972 members responded as follows; 97 members indicated that they are 30 years and under, 311 members indicated

Table 5 — **Threats / Violence by Gender**

	# of Bar Members	% of Bar Members	# of Respondents	% of Respondents	# of Threats/ Violence (all attnys)	% of Threats/ Violence (all attnys)
Female Attorneys	1871	21.4	252	26.0	115	45.6
Male Attorneys	6874	78.6	716	74.0	334	46.6
Total	8745	100%	968	100%	449	100%

2. In-State/Out-of-State Members

As previously set forth, during the time period of the Survey, the Utah State Bar consisted of 8,745 members. This total included approximately 6832 in-state and 1913 out-of-state members (or 28 percent of the total membership in the Bar). A total of 972 respondents identified themselves as in-state or out-of-state members of the Utah Bar. Of the respondents, 904 (93 percent) identified themselves as in-state members, and 68 (7 percent) identified themselves as out-of-state members. Furthermore, 417 (46.1 percent) of the responding in-state members, and 33

that they were between 31 and 40 years old, 265 indicated that they were between 41 and 50 years old, and 299 indicated that they were 51 years or older. Of 97 respondents 30 years and under, 19 identified that they had been the recipient of threats and/or violence. Of the 311 respondents between the ages of 31 and 40, 113 identified that they had been the recipient of threats and/or violence. Of the 265 respondents between the ages of 41 and 50, 143 identified that they had been the recipient of threats and/or violence. And of the 299 respondents ages 51 and over, 174 iden-

Table 6 — **Threats / Violence by Age Grouping**

	# of Respondents	% of Respondents	# of Threats/ Violence	% of Threats/ Violence
30 and Under	97	10.0	19	4.2
31 to 40	311	32.0	113	25.2
41 to 50	265	27.3	143	31.8
51 and Over	299	30.7	174	38.8
Total	972	100%	449	100%

tified that they had been the recipient of threats and/or violence. These results are more easily characterized in Table 6 below.

A simple examination of the Survey's results reveals what appears to be a correlation between the rising number of respondents who identify themselves as recipients of threats and violence and their reported age. While one might assume that the older respondents are the longer they have practiced law, and the more likely they are to be the recipient of threats and/or violence, such is not the case. As shown in Table 6, the number of threats and violence experienced by members of the Bar by age does not directly correspond with the number of years an attorney has practiced.

4. Area of Law.

The Survey also requested that respondents identify what area of law comprises a majority of their legal practice, and were provided the following options to choose from:

- Criminal Defense;
- State/Federal Prosecution;
- Family/Divorce;
- Wills/Estates;
- Administrative;
- Corporate/Commercial/Real Estate;
- General Litigation;
- Labor/Employment/Civil Rights;
- Other

A total of 971 respondents identified their primary area of practice, and of those, 448 or 46.1 percent indicated that they were recipients of threats and/or violence. Table 7 below, identifies the number of respondents in each area of law with their corresponding responses of threats and/or violence related to their involvement as legal practitioners, and represents the following: 33 (63.5 percent) of the 52 members who identified Criminal Defense; 75 (68.2 percent) of the 110 who identified State/Federal Prosecution; 57 (68.7 percent) of 83 who identified Family/Divorce; 6 (24 percent) of the 25 who identified Wills/Estates; 10 (34.5 percent) of 29 who identified Administrative; 52 (32.5 percent) of 160 who identified Corporate/Commercial/Real Estate; 114 (46.3 percent) of 246 who identified General Litigation; 18 (47.4 percent) of 38 who identified Labor/Employment/Civil Rights; and 84 (58.3 percent) of 228 who identified their primary area of law as Other.

The results show that by percentage, attorneys that practice in the areas of Criminal Defense, State/Federal Prosecution and Family/Divorce received the greatest numbers of threats and/or violence. However, the results also show that a significant number of threats and violence occur in all of the Survey's other identified areas of law, as well as in other unidentified areas of law.

5. Years of Practice.

Lastly, Respondents were asked to identify the number of years that they have been in practice. Of the 969 members who responded

Table 7 — **Threats / Violence by Area of Practice** — **n=971**

	# of Respondents	% of Respondents	# of Threats/Violence	% of Threats/Violence per Category
Criminal Defense	52	5.4	33	63.5
State/Federal Prosecution	110	11.3	75	68.2
Family/Divorce	83	8.5	57	68.7
Wills/Estates	25	2.6	6	24.0
Administrative	29	3.0	10	34.5
Corporate/Commercial/ Real Estate	160	16.5	52	32.5
General Litigation	246	25.3	114	46.3
Labor/Employment/ Civil Rights	38	3.9	18	47.4
Other	228	23.5	84	36.8
Total	971	100%	449	

to this question, 448 or 46.1 percent identified that they were recipients of threats and/or violence. Table 8 below, identifies the number of respondents who indicated that they had experienced threats and/or violence with respect to the number of years they have been in practice: 4 or 8.7 percent of 46 with less than 1 year; 58 or 30.4 percent of 191 with 1 – 5 years; 62 or 37.8 percent of 164 with 6 – 10 years; 74 or 53.6 percent of 138 with 11 – 15 years; 78 or 65 percent of 120 with 16 – 20 years; 116 or 52.3 percent of 222 with 21 – 30 years; and 57 or 64.8 percent of 88 with more than 31 years in practice.

The Survey's results show a strong increase in the percentage of violence that was reported by attorneys that have been practicing for 20 years or less. Interestingly enough, there is a significant decrease of threats and/or violence reported by attorneys that have practiced for 21 to 30 years, then another rise for attorneys that have practiced for more than 31 years. It could be argued that these changes in the percentage of threats that were reported by attorneys who have practiced for more than 20 years might be related to the fact that violence in the legal profession has been increasing since the 1980's. Although, the Survey was not designed to examine this issue, and the results do not provide sufficient information to make any conclusion, it is possible that such a dynamic might explain the gradual rise of threats/violence against Utah Bar members who have been practicing during the past 20 years.

IV. Conclusion

The results of the Utah Bar's 2006 survey of violence against the legal profession shows that contrary to public perception and those of the Utah legal community, a large percentage of members of the Bar regularly face threats and/or violence in their practice. Although the amount of violence experienced by the Bar varies due to factors such as the age, area of practice, and years of practice of an attorney, the Survey's results clearly show that threats and/or violence can come from clients, opposing parties, interested parties, and even opposing counsel in any field of the legal profession at any place and at any time – and no member of the Utah Bar is necessarily immune from the potential of workplace violence. So the next time the media reports an unfortunate but sensational act of violence against the legal profession somewhere else in the United States, take note, it doesn't mean that something similar cannot happen here.

1. I would like to thank Lincoln Mead of the Utah Bar for his help in organizing the Violence Survey and for its distribution to members of the Bar.

2. Frederick S. Calhoun, Hunters and Howlers: Threats and Violence Against Federal Judicial Officials in the United States, 1789-1993, 51 (U.S. Marshals Service, 1998).

3. *See* Kim Smith, *Threat Investigator Works to Keep Judges from Harm,* Las Vegas Sun, August 10, 1999, available at http://www.lasvegassun.com/sunbin/...0/509159941.html; *see also* Andrew Woldfson, *Judges, Prosecutors Feel Vulnerable: Capps Killing Illustrates Perils They Face at Work, Home,* The Courier-Journal Local News, June 13, 2000, available at http://www.courier-journal.com/localnews/2000/0006/13/000613fear.html.

4. *In Courts, Threats Become Alarming Fact of Life,* New York Times, March 20, 2005, at 11, available at 2005 WLNR 4309270.

5. Calhoun, note 9, at 29.

6. Don Hardenbergh & Neil Allen Weiner, Preface, in The Annals of the American Academy of Political and Social Science 2001: 576, 13-15 (Alan W. Heston, et al. eds., July 2001).

7. DeFrances, C.J., "State Court Prosecutors in Large Districts, 2001," Bureau of Justice Statistics Bulletin. Washington, DC.: U.S. Department of Justice (2001); De Frances, C. J., "Prosecutors in State Courts, 2002," Bureau of Justice Statistics Bulletin. Washington, DC: U.S. Department of Justice. (2002).

8. *Id.*

9. Karen N. Brown, An Exploratory Analysis of Violence and Threats Against Lawyers (2005) (unpublished M.A. thesis, Simon Fraser University) (on file with the Simon Fraser University), available at http:ir.lib.sfu.ca/retrieve/2110/etd1740.pdf.

10. Stephen Kelson, *An Increasingly Violent Profession,* 14 Utah Bar J. 13, March 2001, at 9.

11. *Id.*

12. *Id.*

Table 8 **Threats / Violence by Years of Practice** **n=969**

	# of Respondents	% of Respondents	# of Threats/Violence	% of Threats/Violence per Category
Less than 1	46	4.8	4	8.7
1 – 5	191	19.7	58	30.4
6 – 10	164	16.9	62	37.8
11 – 15	138	14.2	74	53.6
16 – 20	120	12.4	78	65.0
21 – 30	222	22.9	116	52.3
31 and over	88	9.1	57	64.8
Total	969	100%	449	

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Separating Powers: the Judiciary's Constitutional Claim on Procedural and Evidentiary Matters

by R. Chet Loftis

Article VIII, Section 4, of the Utah Constitution was amended in 1984 to explicitly state:

> The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature….

The significance of this amendment has been a matter of debate over the years as legislators and interest groups have initiated legislation relating to evidentiary or procedural matters.

On the one hand, arguments have been made that the 1984 Amendment preempts any legislative action that pertains to evidence or procedure other than a "joint resolution" of the Legislature that literally seeks to amend a Court rule.

On the other hand, arguments have been made that while the Court has the authority to adopt rules of procedure and evidence, this authority should not reduce or restrict the overall role and power of the Legislature to determine matters that come squarely within the realm of public policy, even if they relate to evidence or procedure, and that amending Court rules is not an effective option for establishing public policy because of the authority of the Court to change a rule back at its pleasure.

As these arguments have gone back and forth, the Legislature has continued to enact statutes and establish public policy. It has continued to maintain and add to Title 77 (Utah Code of Criminal Procedure), Title 78 (Judicial Code), and others. It has continued to maintain and add to various Uniform Laws that, more often than not, include specific provisions on evidence or procedure. And it has continued to maintain "Judiciary" standing and interim committees that often consider matters of evidence and procedure.

The cumulative effect of all of this is that the Utah Code is deeply embedded with laws that arguably relate to evidence and procedure. It has been assumed, moreover, that these laws enjoy the same basic presumption of constitutionality as any other statute enacted by the Legislature.

All of this, however, is a little uncertain now.

On March 3, 2006, the Utah Supreme Court handed down a unanimous ruling in *Burns v. Boyden,* that refused to permit a chiropractic physician to use the patient-physician privilege as grounds for denying a request for documents in a fraud investigation, holding that the presumption allowing a physician to assert the privilege on a patient's behalf can be rebutted when the only interest being served is that of the physician.

In reaching this conclusion, the Court incorporated the 1984 constitutional amendment into its analysis, deciding one important issue, raising a few others, and underscoring the Court's "primary constitutional authority to promulgate procedural and evidentiary rules subject to the possibility of amendment by two-thirds absolute majority vote of the Legislature."

First, the Court ruled that it has no obligation to give any weight, consideration, or deference to the statutory-based patient-physician privilege in Utah Code Ann. § 78-24-8. It was enough that there was a Court rule on point. With that, the statute, in effect, did not exist.

Second, the Court, in footnote 3, raised the possibility, without deciding, that statutes that pertain to evidentiary or procedural

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matters may not be valid, even if there is no Court rule directly on point. This, if true, could have a monumental impact in invalidating a considerable number of laws that are currently on the books but are not reflected in Court rules – laws that have been relied on for decades and have taken just as long to develop and refine.

Third, the Court, in footnote 4, raised the possibility, without deciding, that even if a statute were to be given legal effect outside of court, it would not be given legal effect inside court if it conflicted with a right or privilege established by Court rule.

Fourth, the Court, in footnote 7, elevated the constitutional role and significance of advisory committees on Court rules to that of a legislative body that warrants deference and serves as the source of legislative intent.

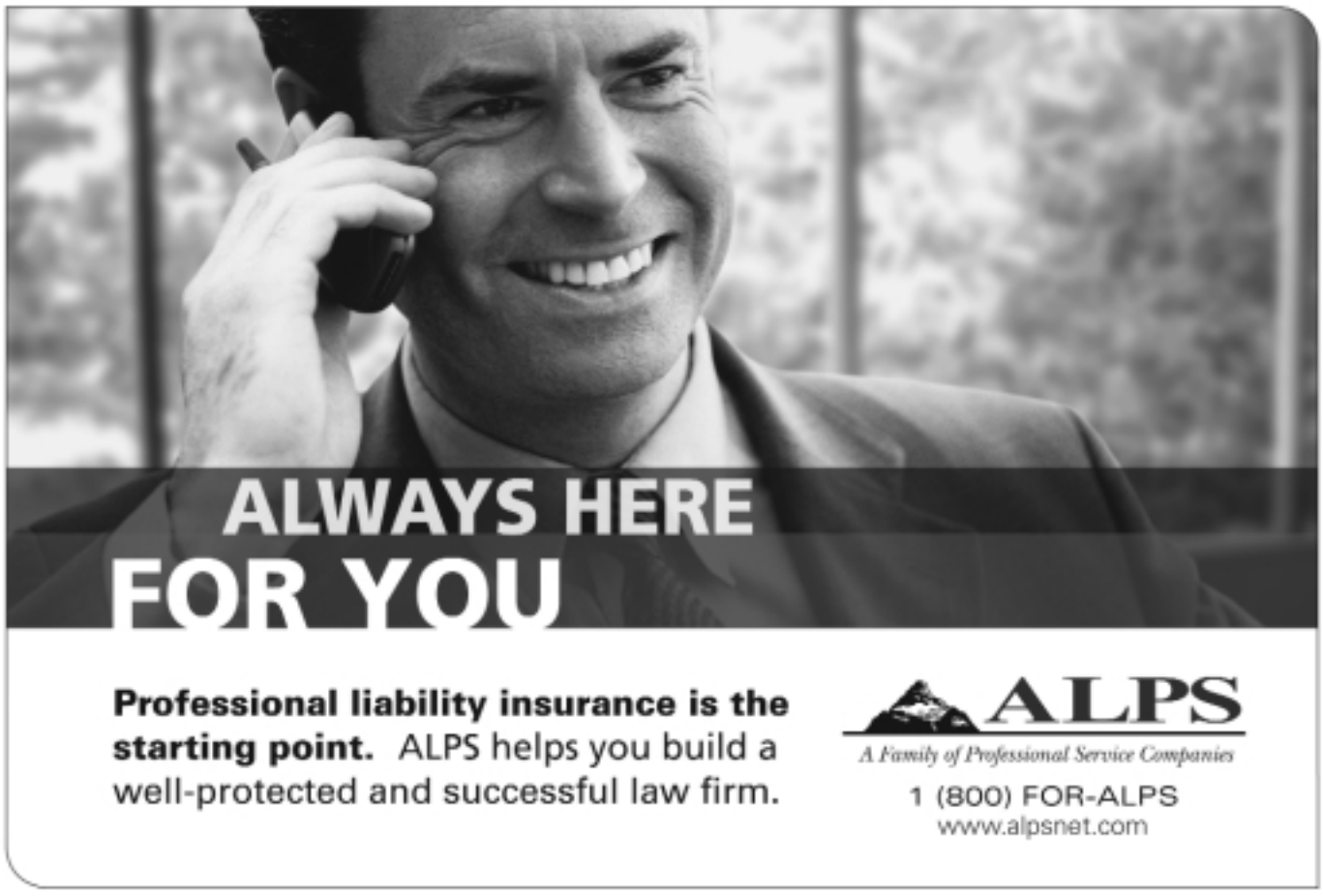
So what does all of this mean?

First, the case creates legal uncertainties that lawyers need to be aware of and should make their clients aware of, too.

Second, the case significantly elevates the importance of the Court's rulemaking process and the role of advisory committees since, if nothing else, it is possible under *Burns* to eviscerate a statute through the adoption of a Court rule on the same matter.

Third, hopefully, the case can serve as an opportunity for the Judicial and Legislative Branches to work toward a mutually-based understanding of the scope of the 1984 constitutional amendment that, perhaps, could be reflected in an umbrella Court rule.

UPDATE: Burns v. Boyden *has recently been the subject of discussion before the Constitutional Revision Commission and the Judiciary Interim Committee. You can listen to these discussions on the Legislature's website at le.utah.gov.*



Separation of Powers

by Judge Carolyn B. McHugh

EDITOR'S NOTE: *The following text is taken from the Law Day Speech given by Judge McHugh on May 1, 2006.*

When I was invited to speak to you about Separation of Powers, I enthusiastically accepted because of my conviction that this doctrine is the cornerstone of the United States' Constitution. Indeed, I believe that the understanding of and respect for the doctrine of separation of powers is what has made our system of government successful for the past 200 years and what will see it through the next centuries.

The doctrine of separation of powers is simply the idea that government functions best when its powers are not concentrated in a single authority. It is premised on the conviction that all people, and institutions run by people, are potentially corrupt. As cynical as this proposition may be, it is the acceptance of it as a tenet of the human condition that forms the justification for a government, like ours, which is designed to prevent the accumulation of power in a single branch or person.

President Abraham Lincoln recognized the temptation for even good men to be negatively affected by too much power when he said: "Nearly all men can stand adversity, but if you want to test a man's character, give him power."[1] The premise of the Constitution is to never put anyone to that test. Instead, power in this country is intentionally separated among three distinct branches of government.

The idea that governmental power should not be concentrated was introduced as early as Aristotle's time and was discussed and promoted as a governmental model prior to the time our Constitution was written.

Despite the intellectual acceptance of separation of powers, no existing nation was free to form a government completely from scratch until the United States broke from Great Britain. As Margaret Thatcher, the former British prime minister, noted: "Europe was created by history. America was created by philosophy."[2]

The framers of our Constitution did not want a king and likewise did not want a person holding an elected or appointed office who could manipulate the powers of the government so as to become a de facto king. To prevent this, they wrote separation of powers into the structure of the United States Constitution of 1789.

Indeed, the United States is the first nation[3] to incorporate the doctrine of separation of powers into its written constitution and today serves as a model for the constitutions of other emerging democracies. In fact, the United Nations has advocated both separation of powers and the need for an independent judicial branch as the best defense against reverting to a dictatorship.[4]

Interestingly, the United States Constitution never uses the phrase "separation of power." Instead, it implements the doctrine by the creation of three separate branches of government in the first three articles of the Constitution.[5] Each of these branches is given discrete authority to perform certain functions and each is also provided with built-in mechanisms, usually referred to as checks and balances, for preventing the other two branches from encroaching on that authority or overstepping its own.

After the Constitution was drafted, it had to be approved by the states. The Federalist Papers are essays written by James Madison, John Jay, and Alexander Hamilton encouraging the ratification of the U.S. Constitution. Referring to the need for these checks and balances, Federalist Paper No. 51 explained that:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[6]

Imagine, if you will, building a house of cards. Three cards placed at precisely the correct angle and position to stand together. If one is moved too upright or another tilted too far down, the whole house will fall. But, if placed carefully and maintained exactly, the house will stand. That is how separation of powers works. The three cards are: the Legislature; the Executive; and the Courts.

The Legislative Branch

Article I of the Constitution creates Congress and grants to it the power to make laws. The greatest power held by Congress is control of the national budget. Congress alone has the power to

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raise taxes, borrow money, and authorize the expenditure of federal funds.[7]

There are checks and balances on Congressional power. The Executive can exercise the Presidential veto and refuse to sign legislation into law.[8] In addition, the Judicial branch can check Congress' power by exercising judicial review of legislation. If the courts determine that a law passed by Congress and signed by the President is in conflict with the Constitution, the courts must declare the law unconstitutional and of no effect.[9]

The Executive Branch

Article II of the Constitution creates the Executive branch, which is headed by the President .[10] The President's powers include the power to enforce the laws passed by Congress, to make treaties with other nations, to nominate judges, to appoint officers of the government, and to oversee federal agencies.[11]

The checks on Presidential power are held by the courts and Congress. Congress has the right to remove the President from office if he is guilty of "bribery, treason, or other high crimes or misdemeanors."[12] Congress also has the right to reject any treaty negotiated by the President and it can refuse to confirm the appointments made by the President to the judiciary and other government offices.[13]

The judiciary's ability to check the actions of the President is again through judicial review. If the court determines that an executive action is unconstitutional, it must declare it invalid.[14]

The Judicial Branch

Article III of the Constitution vests the judicial power of the United States in the Supreme Court and such other inferior federal courts as established by Congress.[15] The power of the judiciary includes the power to hear all cases and controversies arising under the Constitution, international treaties, or federal statutes, as well as disputes between the States.[16]

The checks on judicial power are held by the other branches. Congress has the power to impeach and try federal judges for misconduct in office.[17] Furthermore, no person can serve as a federal judge without being confirmed by the Senate.[18]

The President has the exclusive right to appoint persons to vacancies on the federal courts.[19]

An additional check on judicial power is that the courts can only decide cases and controversies. That means, they can only weigh in on an issue if it is brought to the court by a person or entity that is actually affected by the law or action challenged.[20]

Balance Among the Branches

The framers of the Constitution thought it not only essential to create separate branches, but also imperative that each be equally

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powerful. The reason for this was that each branch would be required to preserve its own power by defeating attempts by the other branches to expand their own.

While the President, as commander in chief of the armed forces, holds the sword, and Congress, as the only entity that can authorize federal expenditures, holds the purse, the judiciary had control over neither. The framers of the Constitution therefore had to design some power that would allow the courts to perform their oversight responsibility and maintain their position in this tri-party system of government.

The solution they arrived at was to make the courts free to issue fair and impartial decisions without fear of retribution from the President or Congress. Under our Constitution, federal judges are appointed for life during good behavior and their salaries cannot be diminished.[21]

The belief that courts should be free from undue influence was part of the justification for the American Revolution. The Declaration of Independence starts with a long list of grievances against King George. One of the unacceptable conditions of British rule prominently listed was that the King made judges "dependent upon his will alone, for the tenure of their offices and the amount of their salaries."[22] Our forefathers knew from personal experience that the courts could not remain impartial if they were subject to dismissal or a cut in pay for unpopular decisions.

Perhaps you wonder why the fathers of our country wanted the courts to be free to render unpopular decisions. This is particularly puzzling in a democracy, where the expectation is that the majority rules. To understand the role of the courts, it is essential to recognize the premise upon which our Constitution was based.

Surprisingly, the United States is not a pure democracy. By that I mean, the majority does not always get to decide an issue. Rather, the United States was based on the acknowledgment that there are certain rights that each human being possesses inherently. These human or civil rights were never ceded by the people to their government. Government was formed to protect and enhance those rights, but could not curtail them.

As part of the ratification process, a number of these individual rights were expressly set forth in the first ten amendments to the Constitution. These amendments, referred to as the Bill of Rights, enumerate limitations on the power of government to intrude upon certain individual liberties.

The guardians of these individual rights are the courts. The judicial branch is required to uphold the constitution in the face of inconsistent legislation or executive action, even if a majority of the country supports it. In that way, the courts stand as the last defense of each individual's rights.

Justice Antonin Scalia of the United States Supreme Court recognized that, stating "without a secure structure of separate powers, our Bill of Rights would be worthless."[23]

Perhaps the best description of the role of the courts can be found in one of my favorite novels, *To Kill a Mockingbird* by Harper Lee. In that book, Atticus Finch makes an impassioned argument to the jury in a trial in which a black man in the deep south before the civil rights movement has been charged with a crime punishable by death. He states:

> But there is one way in this country in which all men are created equal – there is one human institution that makes a pauper the equal of a Rockerfeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court. It can be the Supreme Court of the United States or the humblest J.P. court in the land, or this honorable court which you serve. Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.[24]

That ladies and gentlemen is the role of the courts in our system of government.

Although the legislative and executive branches were designed to be responsive to the wishes of the majority, the courts were to answer only to the constitution itself and to do so completely unaffected by outside influence.

The Natural Tension Among the Branches

By dispersing pockets of power among three separate branches of government, the framers created an intentional and natural tension among those branches. Few leaders like to share power. Consequently, it is not at all unusual to hear one branch issue bitter and public criticism of another branch.

Theodore Roosevelt appointed Oliver Wendell Holmes to the United States Supreme Court, thinking that Justice Holmes would see issues much like the President himself. Once on the Court, Justice Holmes voted on several cases in a way that disappointed the President. Not one to mince words when unhappy, President Roosevelt publically announced that he "could carve a judge with more backbone out of a banana."[25]

This type of conflict was intended by the fathers of our country and, when tempered by ultimate submission to the separate powers paradigm, is a sign that the system is operating correctly.

At times, however, the rhetoric is disturbing not only for its vehemence but also for its disrespect for the system itself. When a judge issued orders to enforce the Supreme Court's school desegregation order, Alabama's Governor, George Wallace, publically described the judge as an "integrating, scalawaggin, carpetbagging liar."[26]

Few today would agree with racial segregation or with Governor Wallace's comments, but at the time he had overwhelming public support and the judge's personal safety was at risk.[27]

Furthermore, removing the judge from office or subjecting him or her to threats of violence is not the method provided by the Constitution for addressing unpopular decisions. If Congress does not agree with the Supreme Court's interpretation of the Constitution, Congress can act to amend the Constitution. Our forefathers intended this to be a difficult process and it requires the vote of two-thirds of both houses of Congress and the approval of three-fourths of the States.[28]

If the legislature believes that the court has misinterpreted a statute or misapplied common law principles, they need only pass legislation that makes their intention on the matter clear.

Of course, attacks are not limited to the judiciary. Will Rogers, a political commentator writing in the 1920s and 30s, stated: "This country has come to feel the same when Congress is in session as when the baby gets hold of a hammer."[29]

And, one cannot turn on the TV or read the paper without seeing extremely unflattering cartoons and commentary aimed at the President.

What these comments show is threefold: First, there will always be conflicts among the various branches of government. Second, we have the privilege of living in a country where political debate and disagreement is tolerated and protected. And third, if we preserve the doctrine of separation of powers, our descendants will enjoy the same liberties.

If, on the other hand, we tamper with this amazing gift from our forefathers and upset the delicate balance they created, we risk losing what makes us unique and, in my view, the greatest system of government ever created. The balance is precarious and each of us has a responsibility to keep those cards perfectly aligned so that our house does not fall.

1. Michael Moncur, Michael Moncur's (Cynical) Quotations, *at* http://www.quotationspage.com/quote/414.html (last visited May 3, 2006).
2. Michael Moncur, Classic Quotes, *at* http://www.quotationspage.com/quote/32966.html (last visited May 3, 2006).
3. James Madison, however, was instrumental in incorporating the doctrine of separation of powers into the written constitution of the State of Massachusetts in 1780. *See* Mass. Const. pt. II, chs. 1-3. Much of the format for the nation's constitution was borrowed from the structure already adopted by Massachusetts.
4. *See* F.B. William Kelly, *An Independent Judiciary: The Core of the Rule of Law, at* http://www.icclr.law.ubc.ca/Publications/Reports/An_Independant_Judiciary.pdf (lat visited May 10, 2006.
5. U.S. Const. art. I-III.
6. The Federalist No. 51 (Alexander Hamilton or James Madison).
7. U.S. Const. art. I.
8. U.S. Const. art. I, § 7.
9. *See Marbury v. Madison,* 5 U.S. 137, 178-80 (1803) (holding that courts have the duty to declare laws invalid if they are in opposition to the constitution).
10. U.S. Const. art. II, § 1.
11. U.S. Const. art. II, § 2.
12. U.S. Const. art. II, § 4.
13. U.S. Const. art. II, § 2.
14. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579 (1952) (striking down executive action to seize control of steel mills during the Korean War).
15. U.S. Const. art. III, § 1.
16. U.S. Const. art. II, § 2.
17. U.S. Const. art. II, § 1.
18. U.S. Const. art. II, § 2.
19. U.S. Const. art. II, § 2.
20. *See Liner v. Jafco, Inc.,* 375 U.S. 301, 306 n.3 (1964) (holding that court may not entertain action after it has become moot).
21. U.S. Const. art. III, § 1.
22. The Declaration of Independence, para. 11 (U.S. 1776).
23. *Morrison v. Olson,* 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).
24. Harper Lee, *To Kill A Mocking Bird* 205 (Warner Books 1982) (1960).
25. Todd S. Purdum, *Presidents, Picking Justices, Can Have Backfires,* N.Y. Times, July 5, 2005, *available at* http://www.nytimes.com/2005/07/05/politics/politicsspecial1/05history.html?ex=1278216000&e n=275e7437bd70309d&ei=5090&partner=rssuserland&emc=rss.
26. *Biography of Frank M. Johnson, Jr., Unrelenting Devotion to the Rule of Law,* Academy of Achievement, at http://www.achievement.org/autodoc/page/joh2gio-1 (last visited May 10, 2006).
27. In fact, the judge in question, Judge Frank M. Johnson, Jr., had to be given police protection because his mother's house was bombed and a cross was burned on his lawn. *Id.*
28. U.S. Const. art. V.
29. *Quotations by Subject,* The Quotations Page, *at* http://www.quotationspage.com/subjects/Congress/.

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Constitutional Adjudication[1]

by Benjamin Toronto Davis

Introduction

In the past several issues of the Utah Bar Journal four articles were published dealing with judicial interpretation of our American Constitution. These articles constitute a representative sampling from some of the "in vogue" approaches to constitutional adjudication. The approaches variously claim to originate, or apparently do originate, from what would normally be considered both liberal and conservative perspectives. One of them represents perhaps the currently predominant "originalist" approach to Constitutional adjudication. However, assuming that what we want in America is a limited and democratic constitutional republic – a representative government with ultimate sovereignty residing in the people themselves, and a government limited both by the people's specific delegation of power to that government and by an acknowledgment of each individual's Creator granted, unalienable, and equal rights; in short, an American constitutionalism grounded upon the principles of the Declaration of Independence – none of these approaches to constitutional adjudication fits the bill. None of these or other similar approaches is up to the task of securing our liberty under the rule of law. In fact, they contribute to ensuring that what Abraham Lincoln described as "government of the people, by the people, [and] for the people" will indeed "perish" in America.

Part I

Subjective Approaches to Constitutional Adjudication

First I refer to emeritus U. of U. Law Professor John J. Flynn's article in the July/August 2005 Utah Bar Journal. (*"Making Law and Finding Facts" – Unavoidable Duties of an Independent Judiciary*) The particular type of approach advanced by Professor Flynn for adjudicating constitutional meaning has a distinguished pedigree. It is largely descriptive of the approach advocated by Edward H. Levi in his influential book, *An Introduction to Legal Reasoning* (1948). Professor Flynn argues that the judicial function inherently consists of a process in which judges "cannot avoid 'making law.'" He distinguishes "making law" from merely "apply[ing]" the law. This is the same distinction made by Alexander Hamilton in rejecting a judicial authority to make law. Hamilton wrote that the "judiciary can take no active resolution whatever..." and that it can exercise "neither Force nor Will, but merely judgment." (*Federalist* No. 78) Professor Flynn contends that in the judicial process of resolving cases "the way the law interacts with the facts" creates ambiguities that must be resolved by judicial law-making.

These ambiguities exist, says Professor Flynn, because "[t]he words used in our laws are not rigid boxes with fixed meanings to be mechanically applied to a dispute... Legal words are flexible concepts and tools for the analysis of disputes that arise in countless different circumstances." He indicated that the "words of law symbolize... normative propositions with evolving meanings in light of changing factual circumstances; evolving understandings of reality; reflections upon the history of society and its laws; meandering precedent dealing with the legal concept in somewhat similar circumstances; and changes in philosophy, morality and technology – indeed, evolutions in every field of human knowledge." Now indeed if words and concepts of law are so inevitably flexible, judges really cannot avoid making law. Furthermore, with such inherent flexibility of legal concepts, meaningful distinctions between the legislative and judicial function would be impossible except insofar as various procedures are established for bringing policy disputes before a decision maker. In our system that distinction consists of a process of legislative law-making initiated by a bill, as opposed to judicial lawmaking which commences with the filing of a petition and proceeds on a case-by-case basis.

The second article to which I refer is by U of U Law Professor Boyd Kimball Dyer in the January/February 2006 Utah Bar Journal. (*A Conservative View of the Originalist View of the Bill of Rights*) His view of constitutional interpretation acknowledges the legitimacy of a judicial "power to find new rights." He correctly points out that rights deemed by the Constitution's framers to be in need of protection were not all included in the Constitution. This is confirmed by the language of the 9th Amendment and original ratification of the Constitution without the Bill of Rights. Professor Dyer believes that as courts find and protect new rights, drawing their authority from "open ended" constitutional phrases, the Constitution counsels courts to avoid upsetting the balance of power "struck" by constitutional framers. According to Professor Dyer, any "flaw in *Roe v. Wade*" is not that the judiciary found a "new right... not expressed in the Constitution,"

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but that the decision failed to appropriately promote and preserve the "Constitutional balance" of powers.

Thus, Professor Dyer's approach is a conservative call to judicial self restraint based on the balance of power suggested by the constitutional document. This approach is very similar to that advocated by another local luminary, the late Rex E. Lee, founding Dean of the J. Reuben Clark Law School, former U.S. Solicitor General, and former President of B.Y.U.[2] President Lee also called for judicial self restraint based in large part upon the "nature and structure" of the Constitution's "allocation of governmental power." He acknowledged, however, given the "extraordinary breadth and vagueness" of the Constitution's "most important provisions" and the authority of judicial review, "five people – a majority of the Supreme Court – have the power not only to interpret the Constitution, but also effectively to amend it if they choose to do so, with little effective power in Congress, the President, or the people to reverse what the Court does in any particular case." They have such authority due to the existence of "a large overlap" of the judicial over the legislative function that "arguably reaches the total universe of legislative power."

The third article, also in the January/February 2006 Utah Bar Journal, by Thomas L. Murphy (*The Dangers of Overreacting to "Judicial Activism"*), is essentially an apology for vesting in the courts, rather than "elected politicians," final and authoritative determination of the boundaries and substance of constitutional law. Mr. Murphy joins the predominant theme echoed by a seemingly unending panoply of theories and explanations – many by highly esteemed academics – justifying this judicial supremacy. Most all such theories and explanations, including the two types noted above, ground judicial authority in something outside of the constitutional text, or they make the Constitution into a living and expanding document capable of an "idea, a set of principles, a penumbra or an emanation" not foreseen or necessarily intended by the Constitution's framers.

The problem with all of the approaches described above is that they all call for or allow judicial decisions without an objective grounding in the written Constitution and without any inherent limits as to constitutional jurisdiction or subject matter. The Constitution essentially becomes an empty vessel into which constitutional adjudicators "pour[] content... as they decide disputes that come before them on a case-to-case basis." (Lee) Most of these approaches do call for some restraint in the application of judicial authority by confining it within newly minted or modified traditional judicial *processes*. Some, however, simply argue the superiority of our particular constitutional system which trusts the policy making ability of judges as they decide constitutional issues. Nevertheless, none of these approaches is

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capable of providing a principled or effective assurance against decisions based on a judge's personal policy preferences or other purely subjective justifications. They are thoroughly subjective in both theory and application.

The following is a representative sampling of restraining applications and arguments employed to justify and legitimize subjective approaches to constitutional adjudication: "the long run... reaction chain between the electorate and the courts" through the "power of the President to appoint judges" (Lee); the "court's obligations to hear cases in open court and to write coherent opinions explaining the rationale of the decision" (Flynn); a court's careful articulation of "specific points at issue, a narrowing of the determinative factors, and to some extent care not to take unnecessary steps" extending judicial power (Edward H. Levi, "The Nature of Judicial Reasoning" 32 Univ. of Chi. L. Rev. 395 (1965)); judicial self restraint "based upon the premise that the Constitution is a balance of powers and rights that the courts should respect and preserve" (Dyer), including an appropriate choice and application of a judicial "standard of review" (Lee); supporting only judicial policy making "in the context of discrete cases... through the exercise of case-by-case decisional authority" where "[p]olicy development" is not the "primary judicial objective" but is only "incidental to the decision of actual cases, progressing only as necessity and experience mandate (Lee);" or the Court being specially situated to make decisions as the authentic spokesman of the people or to correctly decide policy issues according to something like Dworkin's "justice" or Rousseau's "general will."

Because the above described approaches to constitutional adjudication are so thoroughly subjective – even with their restraints of process – they are simply incapable of being squared with a devotion to popular sovereignty – a principle, founded upon the equality of all men's natural and unalienable rights, that "Governments... derive[] their just powers from the consent of the governed." Through the vehicle of judicial review, all such approaches essentially empower the American judiciary, and particularly the Supreme Court, as supreme overseers of American public policy.

This judicial supremacy is the order of the day especially when the claim is made, and it is currently the predominant claim, that Supreme Court decisions constitute precedents which prospectively bind all other branches of government and all persons under the Constitution's authority. This claim is largely based upon a combination of the Constitution's supremacy clause and stare decisis. Of course it doesn't apply to future Supreme Courts because the Supreme Court is considered supreme and bound only to consider such precedents as suggestive of a ground for decision.

Now one might argue that in large measure American public opinion seems to accept and is comfortable with our current regime of judicial supremacy. Isn't that sufficient for consent? As Mr. Murphy puts it, "It is shocking to suggest that we live under tyrannical rule; we do not. Judicial activism is not a form of tyranny, but a pejorative label used to distinguish judges and judicial opinions with which we do not agree." I answer as follows: Even the most ruthless and powerful dictators must give prudential consideration to public opinion, with the smart ones manipulating such opinion to further increase their influence and power. Kings, dictators, and aristocrats can, do, and oft times must pander to public opinion. Some may even genuinely desire and try to govern "for" or in the best interest of "the people." Maybe benign rule by philosopher kings is what some want for America? In America's constitutional system, however, such governance by the judiciary, even if it is benign, is a subversion of the people's "consent" and government "by the people."

Some have argued that judicial lawmaking in the Constitutional context is consistent with Founding America's common law traditions where judges for centuries previous to the founding were engaged in the development of law. One commentator has suggested that the Constitution could perhaps be described as "a charter for common-law-type adjudication of the evolving meaning of key provisions." Such constitutional adjudication would have "the flexibility and dynamic character of a judicially administered common law" as opposed to an interpretive approach reflecting "the relative certainty of a legislatively enacted code of laws" and where "[t]he judge's contributions come case-by-case on factual ground not of his own choosing and must bear fruit, if at all, on the branch and root of precedent." (Oaks, "Judicial Activism" 7 Harv. Jour. of L. & Pub. Pol'y 1 (1984).) Comparing current common-law-type approaches of

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constitutional adjudication to the real thing, however, reflects a misunderstanding or misapplication of the English common law tradition and the development of the common law through case law adjudication in at least three ways.

In the first place, it takes longstanding common law traditions and rules which bear upon statutory interpretation and makes them, if not irrelevant, merely optional. These rules could be summed up as constituting customary and common sense judicial practices – tried, tested and proven over centuries – which have the object of applying in the courts of law the will of the statute's maker or the intent of the law's framer.

Secondly, the ultimate ground of the common law system generally, and of traditional common law case by case adjudication particularly, was the consent of the people. The traditional common law was consensual because it was customary law. Judicial precedents, according to Sir Edward Coke, were not actually law, but were the best evidence of what the customary law actually was. And the law was built over a "succession of ages" and "fined and refined by an infinite number of grave and learned men, and by long experience." (Coke's *Institutes*) Blackstone taught that the unwritten common law achieved the status of law only "by long...usage, and... universal reception throughout the kingdom... [being] expressed or sanctioned by the tacit and unwritten customs and consent of men." (References to Blackstone are from his *Commentaries on the Laws of England.*)

Thus, according to Coke, through the development of the custom based common law subjective adjudication was avoided as "the old rule [was] justly verified of it... No man (out of his own private reason) ought to be wiser than the Law, which is the perfection of reason." Although custom, and thus consent, is a possible ground for making common-law-type constitutional adjudications, such has not generally been the practice or aim of those who exercise an authority of subjective judicial review. In the first place, they have abandoned the traditional common law rules of statutory interpretation as an end run around the explicit consent of majorities. Why then would they bind themselves to the consent required by customary law? By eliminating the requirement of compliance with common law rules of statutory interpretation, a court releases itself from any obligation to the intent of the laws' makers and thus constitutes itself, at least in a particular case, as an authority superior to the law-making body. In the exercise of judicial review the American courts thus become unaccountable and superior, in a particular case or controversy, to what John Marshall called the "original and supreme will" of the people as expressed in the written Constitution. (See *Marbury v. Madison* 5 U.S. 137 at 175 (1803).) Whether such decisions are based on the people's consent of custom is entirely left up to

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the discretion of each individual judge or judicial body.

This brings us to the third way that subjective "common-law-type" constitutional adjudication departs significantly from the common law tradition. It is in the hierarchical application of common law precedent, or "stare decisis," based upon the Constitution's supremacy clause. Such application affirms that the Supreme Court's subjective decisions are not only binding on the parties before the court, but are prospectively binding on all other lower courts, all other governmental agencies and branches of government, and all others under the authority of the Constitution. This gives the Supreme Court a decisive and a "from the top down" authority over the development of a type of unwritten judicially developed law all based on the authority of the Constitution. Such an application of stare decisis is utterly contrary to the common law tradition. Customary law was never authoritatively modified by one or even a few decisions. As an inherently customary law it couldn't be so. Yes, new applications of customary law were accepted as valid precedent if they were consistent with the overall custom of the common law. But to "make" customary law, decisions had to be ratified by practice and reconsideration over time. Furthermore, the common law knew nothing of a "supreme court" superior to the supreme legislative authority. Yes, America's new constitutionalism did provide an implicit authority of judicial review to declare even laws or acts passed by national and state legislatures unconstitutional when "repugnant" to the written constitution. But at the founding such judicial authority was deemed inferior to the sovereign will of the people as expressed in their approved constitutional document. All branches of government, including the federal judicial branch, derived their authority from that same source.

The acceptance and prevalence of subjective constitutional adjudication has turned the common law tradition on its head. Still, much of the current practice of constitutional adjudication is consistent with the common law tradition in its forms – case by case adjudication commenced by petition. But the substance is gone.

There are two primary reasons many accept subjective approaches to constitutional adjudication. The first is that many deem objective interpretation of the Constitution according to the intent of its framers to be unworkable, if not impossible. My explanation in Part II of how such adjudication should proceed responds directly to that view. The second reason is the erroneous acceptance of an idea that positive human law "is that rule of action prescribed by some superior, and which the inferior is bound to obey." This faulty definition of human law as set forth by Blackstone was accepted also by many otherwise very good natural law philosophers. According to American founder James Wilson, the "artful use of 'superiority' in politicks" has been a tool of "despotism" that "destroy[s] true liberty" such that "the science of government ha[s] been poisoned to [its] very fountains." (*The Works of James Wilson* 103 (1967) at 103) The correct view is that "the sole legitimate principle of obedience to human laws is human consent." (Wilson, *Works* 180) Of course to Blackstone and during his time the English Parliament was "the superior." Americans understood things differently. They believed the people themselves, and not their legislature, to be the supreme sovereign authority. Through the Declaration of Independence they taught that because each person was created with equal and unalienable natural rights, including the right to govern himself, no other person had authority to govern him without his consent.

Now if we take and fit the judicial review of American constitutional government under a conception of law as the rule of a superior to an inferior; and if we join that philosophical position with the belief that Constitutional interpretation according to the intent of its framers is impossible or unworkable; and if we further unite those two notions with a view that traditional common law judicial practices are consistent with an American founding "intent" that judges engage in subjective adjudications of vague and open ended constitutional provisions; we better understand why even many modern American conservatives who believe they support the natural law principles of the Declaration also support and accept subjective approaches to constitutional adjudication. One such conservative wrote, "Orderly government under a constitutional system requires that the final authority to

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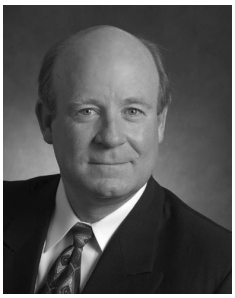

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say what the Constitution means be vested somewhere. For several reasons, history, common sense and the independence of the judiciary among them – I conclude that the responsibility rests with the courts." (Lee)

Part II

Originalism

I now turn to consideration of a fourth Utah Bar Journal article in the September/October 2005 issue by David R. McKinney (*The Tyranny of the Courts*). Mr. McKinney trots out a theory or view of constitutional interpretation that is appropriately labeled by Professor Dyer as "Originalist." Originalism, or original intent adjudication, constitutes a theory or view which promotes a judicial interpretation of the Constitution according the "original" intent of the Constitution's framers. Such interpretation is the only possible doctrine or method of judicial interpretation objectively and verifiably grounded in something other than a court's subjective judgment. For in the interpretation of any written text, if the intent of the author when he wrote the work is not the guiding objective then the subjective view of the interpreter is the only possible alternative. Thus, however inadequate may be Mr. McKinney's particular version of originalism, it is the only interpretive approach that can square judicial review with America's founding principle of government by consent of the people.

Original intent approaches have been criticized as not being flexible enough for good government and for unwisely freezing American governance in a dead past. This criticism misses the mark because the Constitution was never intended to cover every possible or imaginable issue that might come before a court. Although the Constitution's primary underlying purpose was to protect individual and unalienable natural rights, even many such rights not specifically mentioned such as the right of self-government, its primary and most effective method for such protection was in setting forth a recipe for the basic power structure of American government. Many important substantive and procedural issues of societal government are just not encompassed within that relatively short document. They are left up to sundry governmental and nongovernmental institutions quite adaptable to modern wants and conditions.

Perhaps the most compelling argument against an originalist approach is that so many years of subjective and authoritative constitutional decisions have passed that a return to originalism would require extensive and unacceptable change in current practices. Because that criticism offers only an excuse for continuing subjective adjudications and is a practical rather than a principled criticism, I will not address it here.

I thus join Mr. McKinney in his view that original intent interpre-

tation is the proper and necessary method for constitutional adjudication. I do, however, have a very important and fundamental quarrel with Mr. McKinney's brand of originalism. He wrote,

> "Despite the philosophical motivations behind the Constitution, the people did not adopt a philosophy as their law. They did not adopt an idea, a set of principles, a penumbra, or an emanation. They adopted certain language..."

In this, Mr. McKinney rejects a judge's subjective choice of a particular moral or philosophical ground for constitutional decision-making, which I also reject. But in this he also rejects any use of the Declaration of Independence in construing constitutional language. In fact, the principles represented by the moral and political philosophy of the Declaration were intended by the Constitution's framers to be, and indeed should be, a very important part of interpreting the Constitution. Consideration of the contextual backdrop of any text is important in its interpretation according to authorial intent. This is especially true in the case of the United States Constitution as it is a constitution of statutory language written within the context of the English common law tradition.

The historical English common law understanding of statute, as reaffirmed by Blackstone, was that it was either "declaratory of the common law, or remedial of some defects therein." Thus, in large measure interpreting a statute under the common law consisted of understanding it in relation to or in light of the traditional common law. Similarly, in construing the Constitution anything that could provide an indication as to what the framers were trying to accomplish in restating or continuing certain traditions and practices, or in changing and remedying the defects of such, would be appropriately employed.

Now when we understand that the Constitution was not only written in the context of the common law tradition, but that much of its language drew upon common law concepts, meanings, and terms of art, (for several examples see Robert Clinton, *God and Man in the Law* 96-103 (1997)) it seems obvious that finding its intended meaning would certainly include a look backward to such concepts, meanings and terms of art. Furthermore, the common law tradition included not only words, legal concepts, and their meanings, it also included institutions and even a basic philosophy. Deeply embedded in the common law and its supporting political systems was a moral and political philosophy at one with the twin principles of government by consent and natural law-derived rights. These principles formed the foundation for customary and prescriptive English rights and liberties. Because of the ebb and flow of various institutions and ideas sometimes contrary to these bedrock principles, consent and natural rights were not always front and center in England. But those principles are what made the common law so durable. Frederick William Maitland, the esteemed English legal historian, wrote,

> "The English common law was tough, one of the toughest things ever made. And well for England was it in the days of the Tudors and Stuarts that this was so. A simpler, a more rational, a more elegant system would have been an apt instrument of despotic rule.... [The common law] was ever awkwardly rebounding and confounding the statecraft which had tried to control it. The strongest king, the ablest minister, the rudest Lord Protector could make little of this." (Selected Historical Essays of F. William Maitland 127)

Leading up to 1776, the consent of customary common law had been slowly developing into a more explicit consent of electoral or democratic representation in both England and America. It came faster in America. Nevertheless, even after their break from the English crown in 1776 (they had already rejected the idea, if they ever believed it at all, that they were appropriately governed by parliament) Americans continued to claim the English common law as their own. But it was received only – as good common law would require – as it suited their particular circumstances and disposition.

The American founders, with their Whig interpretation of history, argued that the bedrock consent and natural right principles of the common law tradition – such tradition being properly understood as a "blend of nature, custom, and reason," (Clinton, *God and Man in the Law,* at 102) – were the essence especially of their Saxon heritage in practice as well as in principle. These principles were deemed equally to uphold the consent of the common law as well as the explicit consent of electoral or democratic representation. Such principles – included in the Declaration – were believed to be founded upon human nature, to promote the common good, and to be discoverable by a combination of reason and even more importantly a "moral sense" (Wilson, *Works* 132-34) equally accessible to "all men." Being natural principles they were understood to be manifest in ancient tradition as well as being consistent with the "sacred oracles" of Christianity. According to Thomas Jefferson, as a statement of philosophy, the purpose of the Declaration of Independence was "not to find out new principles, or new arguments, never before thought of..., but to place before mankind the common sense of the subject..." and "to be an expression of the American mind.., [a]ll its authority [resting] on the harmonizing sentiments of the day..." (*Writings*, 1501 ed. Peterson, 1984)

As the American founders set out in the Constitutional Convention to create a government "by reflection and choice" (*Federalist* #1), they drew upon their deep insights into political and philosophical systems, both ancient and modern, and culled from them the very best of their ideas and practices. Furthermore, they referred to their own experience of government under the English throne, as well as government under the Articles of Confederation. In such American constitutionalism modern historian Gordon S. Wood saw

a "peculiar moment in history when all knowledge coincided, when classical antiquity, Christian theology, English empiricism, and European rationalism could all be linked." (*The Creation of the American Republic,* 1776-1787 (1969).) It was in such a combination that the founders believed and hoped they had found a lasting "empire" and "rule of laws and not of men."[3] And a proper approach to constitutional interpretation should consider the entire backdrop of that moral and political empire.

The interpretive importance, particularly of the Declaration of Independence, was certified in 1825 by Thomas Jefferson and James Madison. They wrote, "that on the distinctive principles of the government of our State, and of that of the United States, the best guides are to be found in 1. The Declaration of Independence, as the fundamental act of union of these States...." (*Writings*, 479). Abraham Lincoln – a philosophical and political heir of the founders if there ever was one – also understood the important place of the Declaration in American constitutionalism. He described the American "Union" and "Constitution" as a "picture of silver... framed... [and] made... to adorn, and preserve" the "apple of gold" that is the "principle of 'liberty to all'" announced in "that immortal emblem of Humanity" – the Declaration of Independence. (*Works*, 4:169; 2:547, ed. Basler 1953) His "four score and seven years" language at Gettysburg highlighted the Declaration's importance as a major constellation in American constitutionalism. It indicated 1776 – and not the constitutional ratification date – as the date of America's birth as a nation. (Harry Jaffa, *A New Birth of Freedom* 189 (2000)) With a true conception of the Constitution, its relationship to the Declaration, and the Declaration's true meaning of "all men," Abraham Lincoln understood that the "temple" of American constitutionalism "built" to preserve the Declaration's principles of equal liberty, called for "gradually remov[ing] the disease" and "evil" of slavery from the land. (See *Works* 2:546-47). His understanding and its contradiction by secessionists led to civil war.

Now interpretation of the Constitution in light of its historical backdrop, especially including the Declaration, is consistent with the traditional common law judicial practices and institutions current at the founding. It is also consistent with the common law judiciary's traditional rules of statutory construction. Blackstone summarized such rules as follows: "The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and the reason of the law." (*Commentaries*) These rules can be summed up into a combination of three general rules with each of them often used in conjunction with, or as an exception to, one of the others. (See Clinton, *God and Man in the Law* 111-117) First, we have the "plain meaning" or "literal rule." Second, is the "mischief" or "social purpose rule" (sometimes called *Heydon's* rule from *Heydon's Case* (1584) reported in Coke's *Reports*). And, third, we have the "golden rule." The first two rules are more or less self explanatory. The third is primarily an exception to the plain meaning rule and authorizes departure from the literal interpretation of unambiguous language in the case of an absurd result.

Given the history and status of common law judicial institutions at the time of the founding, employment of such rules in constitutional adjudication would be necessarily implied by the very use of constitutional terms such as "judiciary" or "judicial branch." Thus, the common law rules of statutory interpretation, along with their underlying purpose as a tool for finding the intent of the law's maker, would indeed be required as part of the constitutional framers' implied intent. In a similar manner, and grounding his argument on the underlying theory of American government only hinted at in the constitutional text, Chief Justice Marshall found an implied recognition of the Court's constitutional authority to interpret the Constitution as a law and order a remedy – judicial review. (*Marbury v. Madison* 5 U.S. 137 (1803)) In fact, finding a constitutionally implied and required use of statutory rules of construction as well as an implied authority of judicial review are both constitutional applications of the social purpose rule. The frequent use of common law rules of statutory interpretation, especially prominent in early constitutional decisions, indicates an intent and expectation that

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they be employed in constitutional adjudication.

Now an "originalism" like that of Mr. McKinney, denies that there is anything to be taken from the richness of the Declaration's moral and political philosophy and much of the common law tradition. He is not alone in his approach. Many very prominent originalists are of the same stripe. Former Chief Justice Rehnquist said that if "a society adopts a constitution and incorporates in that constitution safe-guards for individual liberty, these safeguards do indeed take on a generalized moral rightness or goodness. They assume a general social acceptance neither because of any intrinsic worth nor because of any unique origins in someone's idea of natural justice, but instead simply because they have been incorporated in a constitution by a people." ("The Notion of a Living Constitution," 54 Tex. L. Rev. 693, 1976) Similarly, Judge Robert Bork wrote that in determining "value judgment... [t]here is not a way to decide these questions other than by reference to some system of moral or ethical imperatives about which people can and do disagree. Because we disagree, we put such issues to a vote and... the majority morality prevails." (*The Tempting of America* 259 (1990)) Likewise, Justice Scalia has said, "The whole theory of democracy... is that the majority rules; *that is the whole theory of it.* You protect minorities only because the majority determines that there are certain minority positions that deserve protection." (Address at Gregorian University in Rome, 1996 – www.learnedhand.com/scalia.htm)

These prominent originalists reject the founding doctrine and "sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression." (Jefferson, *Writings*, 492-93) Jefferson declared, "An elective despotism was not the government we fought for." (*Writings*, 108) Such originalists reject the natural law and its derivative unalienable natural rights of individuals and "their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God... That [such liberties] are not to be violated but with his wrath." (Jefferson, *Writings*, 289) These originalists are thoroughgoing legal positivists. And in constitutional adjudication the Declaration of Independence would to them be mere legal fluff.

I recently read a very fine 200 plus page book in defense of originalism titled *Constitutional Interpretation* (1999) by Keith E. Whittington. His criticisms of subjective constitutional adjudications were precise and devastating. His suggestions and arguments in favor of original intent interpretation were extensive, thought provoking and insightful. He argued that original intent and a theory of democracy were external "constructions" not required by the Constitutions' original intent. However, he made a compelling argument that a theory of democracy is the one best fitted for the logic of having a written constitution and that original intent is the interpretive method best suited to a theory of democracy. But in the entire book I did not find one mention of the Declaration of Independence. Why? He is apparently a legal positivist attached to original intent and democratic theory.

Although such soul-less originalism probably advances the cause of democracy or rule by majority more than do subjective approaches to constitutional adjudication, such an approach needlessly, and contrary to the intent of the framers, empties the Constitution of much of its rich original context and meaning. It also abandons us to a government where rights and limited authority are defined and determined by pure majoritarianism mitigated only by a constitutional text largely disassociated from its underlying purpose and philosophy. Such a "majoritarianism for its own sake" originalism ultimately undermines the moral argument for the superiority of government by the consent of the governed. Without a moral argument or convincing moral philosophy underlying a claim to democracy, then why not abandon originalism – especially when so many smart people say it's unworkable – and allow ourselves to be governed by a "living constitution" with a meaning subjectively and authoritatively determined by a majority of the Supreme Court? Why not government grounded on the divine right of kings? Why not government by the will of the proletariat as determined by the party? Why not something else – anything?

Yes, we desperately need a return to an originalist approach of constitutional adjudication according to the intent of the Constitution's framers. It is necessary to preserve government "of" and "by" the people. But in order to secure such government and also to have a government "for" the people, we need originalism with a soul – a Declaration of Independence soul.[4]

1. This article essentially constitutes a short summary of a 200 plus page book with over 1300 annotations written by the Author. The book is currently in finished rough draft form and the Author is exploring publication possibilities. The book is titled, for now, But Professor, It's Still Substantive: Objective Original Intent Constitutional Adjudication v. Subjective Approaches to Constitutional Adjudication.

2. The references in this article to Rex E. Lee are taken from the following sources: Rex E. Lee, A Lawyer Looks at the Constitution (1981); *Preserving Separation of Powers: A Rejection of Judicial Legislation through the Fundamental Rights Doctrine,* 25 Ariz. L. Rev. 805 (1983); *Legislative and Judicial Questions,* 7 Harv. J. of L. and Pub. Pol'y, 35 (1984); *The Constitution and the Restoration,* in Brigham Young University 1990-1991 Devotional and Fireside Speeches 67 (1991); *Provinces of Constitutional Interpretation,* 61 Tul. L. Rev. 1009, 1014 (1987); and Rex E. Lee and Richard G. Wilkins, *On Greatness and Constitutional Vision: Justice Byron R. White,* 2 B.Y.U. L. Rev. 293 (1994).

3. John Adams is often credited for making that phrase "rule of law and not of men" notable in American politics. He published it in an article in the Boston Gazette in 1774 and incorporated it into the Massachusetts Constitution in 1780; *see* John Adams, *Novanglus Papers,* Boston Gazette, no. 7 (1774); Adams attributed this phrase to James Harrington in his *Oceana*, (1656), whose actual words were an "empire of laws."

4. *See,* Thomas G. West, *Jaffa Versus Mansfield: Does America Have A Constitutional or A 'Declaration of Independence' Soul,"* Perspectives on Political Science, 31 (Fall 2002), 235-46.

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Fee Arbitration

by G. Steven Sullivan

One of the big challenges of private practice is an unhappy client. One of the more emotional issues is a controversy over the lawyer's fee.

A fee dispute generates a unique set of issues for both the lawyer and the client. For the average legal consumer, the attorney fee is one of the most important factors in the legal relationship.

Fee disputes arise in all practice areas. Most lawyers set out in writing the fee arrangement. Nonetheless, lawyers and clients can disagree on the number of hours that should have been billed, when a lawyer's time should be billed, timing of billing statements, etc. Often, lawyers have the obligation of continuing to represent a client that has not kept a legal bill current. Lawyers have the ethical complications of how and when to institute collection actions against a past and present client. Oftentimes, a collection action filed by the lawyer is met with a complaint to the Office of Professional Conduct filed by the past client.

Several years ago, the Utah State Bar established the Fee Arbitration Committee. The Utah Supreme Court approved needed rules to govern the arbitration process. Those rules can be found on the web site for the Utah State Bar.

Importantly, either the lawyer or the client can request use of the arbitration process. However, both parties must agree to be bound by the arbitration decision. In the event one party or both will not agree to be bound to the arbitrator's award, mediation services are also available through the committee.

Part of the application process is to frame the amount of the fee dispute. If the fee dispute is $1,500 or less, a single arbitrator will be assigned. Otherwise, a panel of three is available, made up of a lawyer from the committee, a judge, and a lay person from the community.

Once assigned, the single arbitrator, or the lawyer acting as the chair of the arbitration panel, will schedule a hearing date, will resolve any discovery disputes, and will rule on any evidentiary issues.

The parties to the arbitration are encouraged to provide documentation prior to the hearing. The hearing itself is informal in nature, with rules of evidence being construed liberally. The hearing is typically kept fairly short in duration, toward promoting the goal of efficient administration of the case.

Any award entered in the arbitration process can be docketed as a judgment in the district court.

The Fee Arbitration Committee is prevented from adjudicating disputes collateral to a disputed fee. That is, issues of professional negligence and issues that might otherwise surround a disputed fee, but are, in fact, not part of a fee dispute, cannot be heard by the committee.

Grounds to modify an arbitration award are extremely narrow in scope. A party can ask the arbitrator or arbitration panel to modify an award when (a) there are evident miscalculations of figures or descriptions of a person or property, (b) the award is imperfect as to form, or (c) the award requires clarification.

Use of the Fee Arbitration Committee process generates several benefits to the involved lawyer and to the Bar in general.

The lawyer has the ability to adjudicate a fee dispute without dragging a client through a court of law. Many lawyers have foregone collection of an earned fee because of the hassle, time and energy of litigating a fee dispute through the courts.

The legal profession has the ongoing challenge of maintaining a positive public image. Having members of the Bar use the courts to collect fairly-earned fees only adds to the Bar's public image concerns.

The biggest benefit of all goes to the client. As noted, it is difficult for a lawyer to drag a client through the courts. However, for the average consumer of legal services, it is, from an economic and pragmatic standpoint, very difficult to litigate a fee dispute with the lawyer through the courts. As a profession, lawyers should promote a client's ability to challenge a disputed fee through a process that is fair and efficient to the client.

The fee arbitration process repeatedly generates a very significant benefit of getting the client and the lawyer in the same room to listen and consider the concerns of the other person. Through hearing each other out in the structure of an arbitration hearing, many times the dispute is resolved without the arbitrator entering an award. Where an award is entered, both parties have a much better understanding of the basis for the other party's claims. The natural emotions and bad feelings that otherwise exist in a fee dispute are often resolved or substantially lessened through the arbitration process.

The Bar liaison for this program is Christine Critchley, (801) 531-9077. Christine can answer any questions the lawyer or client may have about the arbitration process.

We encourage Bar members to educate your clients about the fee arbitration option and make to use of the Fee Arbitration Committee.

G. STEVEN SULLIVAN is the Chairman of the Fee Arbitration Committee of the Utah State Bar. He is the managing attorney of Robert J. DeBry & Associates and works in the area of personal injury law.

"Max 25" is Retiring – the End of an Era in Utah Law Enforcement

by Judge Donald J. Eyre

This year will mark a changing of the guard in Utah law enforcement history. Sergeant Paul V. Mangelson has retired after nearly 39 years of service to the Utah Highway Patrol and the citizens of the State of Utah. There are varied opinions about his performance as a law enforcement officer. But most people would have to agree that he has made a great impact upon the criminal justice system of the State of Utah and the development of criminal case law. I have had the privilege of associating with Sergeant Mangelson for the past 29 years: the first two years were as a criminal defense attorney, the next 16 years were as the Juab County Attorney, and the past eleven years were as a District Judge.

In *State v. Sims,* 808 P.2d 141, 142 n.1 (Utah App. 1991), Judge Pam Greenwood of the Utah Court of Appeals observed:

> Sergeant Mangelson's efforts to thwart illegal drug trafficking are well known in Utah's appellate courts... Besides the present case, at least one other case involving an automobile search by Sergeant Mangelson is pending in this court… As a central player in at least five published search and seizure scenarios to date, the redoubtable trooper's notoriety is approaching that of Max 25, a narcotics detection dog whose nose for crime has figured in at least seven published federal cases in the District of Columbia Circuit. [Citations omitted.]

From my review of Utah cases, both state and federal, I have found more than 30 published cases in which Sergeant Mangelson was involved to some extent. A full list of those cases is set forth at the end of this article. When *State v. Sims* first came out, Sergeant Mangelson took on a new nickname in Juab County, that of "Max 25." It just happened that his call number with the Highway Patrol at the time was 25. Judge Greenwood's comparison of him to a drug-sniffing dog is appropriate from my experience. Sergeant Mangelson has almost a sixth sense with respect to his ability to detect criminal activity. His observational skills are exceptional, which enable him to investigate circumstances that other officers might not detect.

Sergeant Mangelson has been involved in the seizure of thousands of pounds of marijuana, cocaine, methamphetamine, and other drugs. His arrests have led to the forfeiture of hundreds of motor vehicles to the State of Utah because of their use in the transportation of controlled substances. He has also been involved in the seizure of many hundreds of thousands of dollars that were the proceeds of illegal drug trafficking. Those monies and vehicles were also forfeited to the State of Utah to help assist local and state police and prosecution agencies in enforcing the controlled substance laws.

Sergeant Mangelson has been known to be critical of the judiciary both at the trial and appellate level. In my discussions with him, this can be somewhat explained by his perception that the courts have not been willing to protect his personal and physical safety. In the case of *State v. Castonguay,* 663 P.2d 1323 (Utah 1983), the Utah Supreme Court overturned a conviction for the attempted murder of Sergeant Mangelson, finding there was insufficient evidence to sustain a conviction even though Sergeant Mangelson testified he had observed the defendant raise the rifle to his shoulder and fire a shot at him across Main Street in downtown Nephi. That was after the defendant had shot toward Mangelson and another officer, and Mangelson had demanded that the defendant drop his weapon, just prior to the final shot across Main Street.

In recent years, a trial court also failed to bind a defendant over for trial on a charge of aggravated assault when the defendant had physically struggled with Mangelson and attempted to take his weapon from its holster. That resulted in Mangelson and police agencies lobbying for the passage in the 1999 Legislature of Utah Code § 76-5-102.8, which made it a first-degree felony to attempt to take or remove a firearm from a peace officer. Governor Michael Leavitt invited Sergeant Mangelson to the signing of the bill. The bill's strong penalty will hopefully deter individuals from attempting to harm law enforcement officers.

Another area where Sergeant Mangelson has developed an amazing expertise is in the detection of secret compartments in vehicles used to conceal drugs, money, or other contraband. He has found these items concealed in spare tires, air cleaners, fake car batteries, second gas tanks, hollowed out timber, and many specially-designed compartments where the original vehicle was modified to conceal the compartment.

JUDGE DONALD J. EYRE was appointed to the Fourth District Court in November 1994 by Gov. Michael O. Leavitt.

In *State v. Poole,* 871 P.2d 531(Utah 1994), the Utah Supreme Court overturned the trial court's granting of a motion to suppress, finding that Sergeant Mangelson had probable cause to continue the search after consent to search had been withdrawn by its occupants. The search resulted in the seizure of more than 100 pounds of marijuana. Justice Howe in that case listed six factors to establish probable cause for the search, one being that Sergeant Mangelson could articulate that the truck had a significant and unusual alteration in its bed, which was in plain view and concealed a secret compartment. Another factor was that the compartment was found by Sergeant Mangelson, an officer who then had 24 years of experience in the field and had seen other false beds that contained contraband. This was also the case where the Supreme Court found I-15 to be a known drug-trafficking route.

In *State v. Contrel,* 886 P.2d 107 (Utah App. 1994), the Court of Appeals upheld the stop and search of a pickup truck by Sergeant Mangelson in which he found over 100 pounds of marijuana. The only basis Mangelson had to establish reasonable suspicion to stop the vehicle was that he was able to articulate a series of observations he made of the vehicle that were identical to a truck he stopped several months prior wherein he found a secret compartment behind the rear bumper containing a large amount of cocaine. In the *Contrel* case, once the vehicle was stopped, Mangelson received consent to search the vehicle from the driver and took off the bumper as he had in the earlier case and found an identical compartment containing 100 pounds of marijuana.

After the United States Supreme Court case of *Delaware v. Prose,* 440 U. S. 648, (1979), which implied that roadblock stops by police agencies for the purpose of checking driver's licenses and vehicle registrations might be constitutionally permitted under certain circumstances, Sergeant Mangelson and other police agencies in Juab County used roadblocks to help enforce the laws of the State of Utah during the late 1980s. In a series of cases in the early 1990s, Utah appellate courts found these roadblocks to be unconstitutional. *State v. Sims,* 808 P.2d 141 (Utah App. 1992); 881 P.2d 840 (Utah 1994); *State v. Kitchen,* 808 P.2d 1127 (Utah App. 1991); and *State v. Park,* 810 P.2d 456 (Utah App. 1991). The holdings in these cases led the Legislature to adopt the Administrative Traffic Checkpoint Act, Utah Code §§ 77-23-101 through 77-23-105, which set up a formal planning and approval process for administrative checkpoints. Sergeant Mangelson and other police agencies have used administrative checkpoints to enforce certain targeted laws of the State since the adoption of that act.

Mangelson also had an involvement in several cases that helped define and interpret Utah's Illegal Drug Stamp Tax Act and the forfeiture provisions under Utah's Controlled Substance Act. In *Sims v. Utah State Tax Commission,* 841 P.2d 6 (Utah 1992), the Utah Supreme Court held that unconstitutionally seized evidence could not be used under the Illegal Drug Stamp Tax Act even though it is a civil proceeding because it is quasi-criminal in nature and the exclusionary rule would provide a deterrent to unconstitutional seizures. The case of *State v. House and 1.37 acres,* 886 P.2d 534 (Utah 1994) began with a seizure by Mangelson of 15 pounds of marijuana on the Interstate, leading to a controlled delivery of the property that became the subject of a forfeiture action. The Supreme Court found in that case that although the facts met the requirements of Utah Code §58-37-13(1) for forfeiture, the forfeiture of the property was excessive when there was not sufficient evidence to establish that the property was the instrumentality of a crime.

Another aspect of Sergeant Mangelson's law enforcement career has been to instruct and train other police officers in the techniques he has used in drug detection as well as other areas of law enforcement where he had developed an expertise. These instructions almost always included a section covering the current case law, so the officers would know the standards to which the courts would hold them and so evidence from their searches and arrests would not be subject to suppression. He has not only instructed and trained officers in Utah, but across the Western United States. He has trained police officers in the State of Minnesota annually for many years. He has also given presentations at the annual meetings of the Utah State Bar and at the Annual Judicial Conference.

There has been some controversy over the years whether Sergeant Mangelson and other officers inappropriately profiled ethnic minorities in traffic stops. To assist in resolving the controversy, Sergeant Mangelson was one of the first police officers in the state to install a video camera and recording system in his patrol car to provide an accurate record of what transpired in each traffic stop.

There are many Paul Mangelson stories, some of which have become legend in Central Utah. One involves a criminal preliminary hearing in which Sergeant Mangelson was testifying. The defense attorney kept asking Sergeant Mangelson the same question over and over again, even after objections. Finally, Sergeant Mangelson looked the attorney straight in the eye and asked if he was calling him a liar. The attorney thought for a minute and said, "I guess I am." At that point, Sargent Mangelson stood straight up and said, "The last person who called me a liar found his back side against the floor in a very short period of time." At that point, the Judge called a timely recess and cooler heads prevailed.

Another story involves a pickup truck that was seized at the time of arrest by Sergeant Mangelson after he found 10 pounds of marijuana in the interior of the vehicle. The driver ultimately pleaded guilty to a felony drug charge and the truck was forfeited to the State of Utah. Some time later, I received a call from an FBI agent in San Francisco who said he had just been contacted by one of his informants who stated he has been approached to steal a certain pickup truck from the impound yard of the Juab County Sheriff's Office in Nephi, Utah. By the time of the call, the truck was being used as an undercover vehicle in Utah County. After the call, Sergeant Mangelson and I drove to Spanish Fork and had the truck brought to the Spanish Fork City Shops. We

then spent an hour trying to locate the secret compartment and its contents that would make this truck so valuable. Sergeant Mangelson finally figured out there was an unaccounted for space between the bed of the truck and the frame. It required that the whole bed of the truck be removed. Once removed, numerous securely packaged bricks of marijuana in excess of 100 pounds were found. Sergeant Mangelson couldn't believe that he had failed to discover it at the time of the initial arrest.

I for one will miss Paul Mangelson's presence at mile post 221 on I-15, just south of Nephi, where I imagine most residents of Utah have driven past him at some point in their travels. He has had a great impact upon law enforcement and the criminal justice system in the State of Utah. The war on drugs has not been won in the State of Utah, but Sergeant Mangelson has been a major player in trying to disrupt the distribution systems of the many criminals who involve themselves in drug trafficking. I, along with many other members of the Utah Bar, wish Sergeant Mangelson well in his retirement. Maybe now he will have more time to spend with his wife, children, and grandchildren (of which he and I share two). Maybe he will be able to use his keen sense of observation to improve his golf game.

Mangelson-Involved Cases

Utah Appeals Court Cases

1. *State v. Aguilar,* . . . . . .758 P.2d 457 (Utah App. 1988)
2. *State v. Baird,* . . . . . .763 P.2d 1214 (Utah App. 1988)
3. *State v. Arroyo,* . . . . . .770 P.2d 153 (Utah App. 1989)
4. *State v. Park,* . . . . . .810 P.2d 456 (Utah App. 1991)
5. *State v. Kitchen,* . . . . . .808 P.2d 1127 (Utah App. 1991)
6. *State v. Sims,* . . . . . .808 P.2d 141 (Utah App. 1991)
7. *State v. Sepulveda,* . . . . . .842 P.2d 913 (Utah App. 1992)
8. *State v. Mirquet,* . . . . . .844 P.2d 995 (Utah App. 1992)
9. *State v. Lopez,* . . . . . .831 P.2d 1040 (Utah App. 1992)
10. *State v. Contrel,* . . . . . .886 P.2d 107 (Utah App. 1994)
11. *State v. Delaney,* . . . . . .869 P.2d 4 (Utah App. 1994)
12. *State v. Beddoes,* . . . . . .890 P.2d 1 (Utah App. 1995)
13. *State v. Spurgeon,* . . . . . .904 P.2d 220 (Utah App. 1995)
14. *State v. Wright,* . . . . . .977 P.2d 505 (Utah App. 1999)
15. *State v. Granau,* . . . . . .31 P.3d 601 (Utah App. 2001)

Utah Supreme Court Cases

1. *State v. Castonguay,* . . . . . .663 P.2d 1323 (Utah 1983)
2. *State v. Earl,* . . . . . .716 P.2d 803 (Utah 1986)
3. *State v. Arroyo,* . . . . . .796 P.2d 684 (Utah 1990)
4. *Sims v. Utah State Tax Commission,* . . . . . .841 P.2d 6 (Utah 1992)
5. *State v. a House & 1.37 acres of Real Property,* . . . . . .886 P.2d 534 (Utah 1994)
6. *State v. Poole,* . . . . . .871 P.2d 531 (Utah 1994)
7. *State v. Marquet,* . . . . . .844 P.2d 995 (Utah 1996)

Federal District Court Cases

1. *U.S. v. Castillo,* . . . . . .864 F. Supp. 1090 (D. Utah 1994)
2. *U.S. v. Rivas-Lopez,* . . . . .988 F. Supp. 1424 (D. Utah 1997)
3. *U.S. v. Farias,* . . . . . .43 F. Supp.2d 1276 (D. Utah 1999)
4. *U.S. v. Wisniewski,* . . . . . .358 F. Supp. 2d 1074 (D. Utah 2005)

10th Circuit Appeals Court Cases

1. *U.S. v. Corral,* . . . . . .899 F.2d 991 (10th Cir. 1990)
2. *U.S. v. Lyons,* . . . . . .7 F.3d 973 (10th Cir. 1993)
3. *U.S. v. Nicholson,* . . . . . .17 F.3d 1294 (10th Cir. 1994)
4. *U.S. v Fernandez,* . . . . . .18 F.3d 874 (10th Cir. 1994)
5. *U.S. v. Castillo,* . . . . . .76 F.3d 1114 (10th Cir. 1996)
6. *U.S. v. Wald,* . . . . . .216 F.3d 1222 (10th Cir. 2000)
7. *U.S. v. Nava Ramirez,* . . . . .210 F.3d 1128 (10th Cir. 2000)

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"A Relatively Simple Matter"[1] – Navigating the Utah Discovery Rule

by Christopher M. Von Maack

Simply put, operation of the so-called "discovery rule" tolls a limitations period (e.g., statute of limitations, statute of repose, or lookback period) until a plaintiff discovers or reasonably should have discovered the facts forming the basis for his or her cause of action. The discovery rule serves to balance the competing interests of predictability, on one hand, with penalizing wrongdoing, on the other.[2] However, before the discovery rule can operate, the plaintiff must trigger application of the discovery rule to his or her cause of action. This article aims to guide the plaintiff's cause of action through the potential pitfalls of the Utah discovery rule.

While the discovery rule can apply to any claim, the Utah Supreme Court recently elucidated a framework to determine whether the discovery rule applies to a particular cause of action. Specifically, in the *Russell Packard Development, Inc., v. Carson* case, decided last year, the court explained that the discovery rule applies if the plaintiff demonstrates that his or her cause of action is subject to either the statutory or equitable discovery rule.[3] In other words, although there is just one discovery rule, there are two ways to trigger its application. A plaintiff should frame his or her cause of action with *Russell Packard* in mind, because claims that do not conform to the *Russell Packard* framework may fail to trigger tolling and thus may be lost via a motion to dismiss or a motion for summary judgment. Indeed, whether the discovery rule applies is a question of law to be determined by the court.[4]

The plaintiff's first inquiry is whether the limitations period is at issue. Obviously, tolling the limitations period becomes relevant only when the limitations period on the plaintiff's cause of action has run, and but for the operation of the discovery rule, the claim will be barred. Because the statute of limitations must be raised as an affirmative defense, an examination of the defendant's pleadings will quickly resolve this inquiry.[5]

If the limitations period is at issue, the plaintiff's next inquiry is whether the cause of action stems from a statute that, by its own terms, contains a statutory discovery rule. A statutory discovery rule is language *within* the statute that expressly tolls the limitations period until a party discovers or reasonably should have discovered the facts forming the basis for the cause of action.[6]

In Utah, the civil causes of action that contain statutory discovery rules are those based upon the following Utah Code sections: 13-24-7 (misappropriation of trade secret), 51-7-24(4) (public treasurer's securities action), 61-1-4(6)(e) (bond liability), 61-7-22(7)(a) (securities sales or purchase action), 70A-2-725(2) (UCC sales breach of warranty extending to future performance), 70A-2a-506(2) (UCC lease default), 75-1-106 (Uniform Probate Code fraud), 77-23b-8(5) (violation of access to electronic communications chapter), 78-12-19 (action to set aside sale of estate property by executor or administrator), 78-12-21.5(3)-(4) (action related to improvements to real property), 78-12-25.1(2) (sexual abuse of child), 78-12-26(1) (waste, trespass, or injury to real property), 78-12-26(3) (fraud or mistake), 78-12-27 (action against corporate stockholder or director), 78-12-48(1) (asbestos damages), 78-14-4(1) (medical malpractice), and 78-15-3 (product liability). If the cause of action stems from one of these statutes, the discovery rule necessarily applies because "[w]here a statute already exists to toll a limitations period, there is no need to invoke equitable principles to achieve the same end."[7]

If the cause of action is not based upon a statutory discovery rule, then the plaintiff must attempt to trigger application of the discovery rule through the second option, the equitable discovery rule. According to the Utah Supreme Court, the equitable discovery rule applies in instances of either fraudulent concealment or exceptional circumstances.[8]

As its name connotes, the fraudulent concealment version of the equitable discovery rule applies where the defendant conceals the plaintiff's cause of action.[9] Thus, the plaintiff must determine whether the defendant concealed facts that would have alerted the plaintiff to his or her cause of action. If the defendant concealed the plaintiff's action, the plaintiff should next evaluate whether, because of the defendant's concealment, (a) "the plaintiff neither

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discovered nor reasonably should have discovered the facts underlying the cause of action before the limitations period expired," – i.e., the plaintiff reasonably did not know the facts;[10] or (b) the "plaintiff either knew or reasonably should have known of the facts underlying his or her cause of action *before* a limitations period expired," but reasonably "delayed in filing his or her claim until after the limitations period expired" – i.e., the plaintiff reasonably did not act on the facts.[11] Under either test, the inquiry focuses on the plaintiff's reasonableness.[12] If the plaintiff is able to satisfy either of these tests, the equitable discovery rule triggers application of the discovery rule.

A plaintiff may also use the exceptional circumstances version of the equitable discovery rule to trigger application of the discovery rule.[13] This version of the equitable discovery rule is a catchall for plaintiffs who are able to demonstrate the existence of exceptional circumstances such that it "would be irrational or unjust" to apply the limitations period, "regardless of any showing that the defendant has prevented the discovery of the cause of action."[14] The Utah Supreme Court applies a two-step analysis to determine whether the exceptional circumstances version applies.[15] First, the plaintiff usually must show that he or she did not know and could not reasonably have known of the cause of action in time to file suit within the limitations period.[16] Although the court has explicitly left open the possibility of tolling the limitations period even where the plaintiff seeking the tolling knew of the cause of action before the limitations period expired, no Utah court has ever found occasion to do so, illustrating "the high bar [the court] has required those seeking such extraordinary relief to hurdle."[17] If the plaintiff satisfies the first step, then the court balances the plaintiff's burden of working within the limitations period against the prejudice to the defendant from letting the action proceed.[18]

Should the plaintiff succeed under the procedures described above, such that the court determines that the discovery rule applies as a matter of law, there remains the question of fact whether the discovery rule will operate to toll the limitations period under the facts at issue.[19] This question – When should the plaintiff reasonably have discovered the facts forming the basis for the cause of action? – is highly fact-dependent and is thus almost invariably left to the finder of fact.[20] Indeed, only in the clearest of cases, when the material facts are not in dispute should the court rule whether the discovery rule operates as a matter of law.[21] For instance, in *Russell Packard,* the court held that the trial court erred when it granted the defendants' motion to dismiss on limitations grounds because, although "it is possible and perhaps even probable that a reasonable plaintiff would have discovered a sufficient number of" the relevant facts before the limitations period expired, "'close calls are for juries, not judges, to make.'"[22]

To summarize, the discovery rule applies to potentially save a cause of action otherwise barred by a limitations period if (1) the applicable statute includes an express discovery rule (statutory discovery rule), (2) because of the defendant's concealment (a) the plaintiff demonstrates that he or she reasonably did not know the facts underlying the cause of action, or (b) the plaintiff demonstrates that he or she acted reasonably in delaying to file suit (equitable discovery rule – fraudulent concealment), or (3) the presence of exceptional circumstances and the application of the limitations period would be irrational and unjust (equitable discovery rule – exceptional circumstances). Once the plaintiff satisfies one of these tests, generally the inquiry shifts to the fact finder to determine whether the discovery rule operates to toll the limitations period – when the plaintiff discovered or reasonably should have discovered the facts forming the basis for the cause of action. Thus, in most cases, triggering application of the discovery rule is sufficient to overcome the defendant's motion to dismiss or motion for summary judgment anchored upon a limitations period. Navigating the relative complexity of Utah's discovery rule need not be a problem, and may indeed be a real advantage to the plaintiff's attorney who knows how it works.

1. *Russell Packard Dev., Inc., v. Carson,* 2005 UT 14, ¶ 22, 108 P.3d 741.
2. *See id.* ¶ 28.
3. *See id.* at ¶¶ 21, 24.
4. *See id.* at ¶ 18.
5. *See Koch v. Shell Oil Co.,* 52 F.3d 878, 880 (10th Cir. 1995); *Christiansen v. Union Pac. R.R. Co.,* 2006 UT App 117, ¶ 12, 548 Utah Adv. Rep. 3.
6. *See Russell Packard,* 2005 UT 14 at ¶ 21.
7. *Beaver County v. Property Tax Comm'n,* 2006 UT 6, ¶ 36, 128 P.3d 1187.
8. *See Russell Packard,* 2005 UT 14 at ¶ 25.
9. *See id.* at ¶ 29.
10. *Id.*
11. *Id.* at ¶ 30 (emphasis in original).
12. *See id.* at ¶ 28.
13. *See id.* at ¶25.
14. *Id.*
15. *See Macris v. Sculpture Software, Inc.,* 2001 UT 43, ¶ 18, 24 P.3d 984.
16. *See id.*
17. *Beaver County,* 2006 UT 6, at ¶ 29.
18. *See Sevy v. Security Title Co. of S. Utah,* 902 P.2d 629, 636 (Utah 1995).
19. *See Russell Packard,* 2005 UT 14 at ¶39.
20. *See id.*
21. *See id.; see also Stafsten v. LDS Social Servs., Inc.,* 942 P.2d 949, 953 (Utah 1997).
22. *Russell Packard,* 2005 UT 14, at ¶¶ 42-43 (quoting *Berenda v. Langford,* 914 P.2d 45, 54 (Utah 1996)).

Parduhn Me: the Utah Supreme Court and the Insurable Interest Requirement

by Mark W. Dykes

Insurance is not supposed to be a vehicle for gambling or incentive to murder. The law thus forbids a party from taking out a life insurance policy on a total stranger, given the risk that the beneficiary might attempt prematurely to dispatch the life of the insured and reap the proceeds. One may thus take out a life insurance policy only on a life in which one has an "insurable interest," that being defined (as noted below) as an interest grounded in family relationships or business ties.

A critical issue is *when* that insurable interest must exist. In *Parduhn v. Bennett,* 61 P.3d 982 (Utah 2002) ("Parduhn I") and *Parduhn v. Bennett,* 112 P.3d 495 (Utah 2005) ("Parduhn II"), I believe the Utah Supreme Court erred in determining when an insurable interest must exist.

A detailed description of *Parduhn I* and the background of the insurable interest requirement is contained in Beard, *Recent Case Law Developments,* 2004 Utah Law Review 211 ("Recent Developments").

I. The General Rule, both Common Law and Statutory. "[T]he almost universal rule of law in this country is that if the insurable interest requirement is satisfied at the time the policy is issued, the proceeds of the policy must be paid upon the death of the life insured without regard to whether the beneficiary has an insurable interest at the time of death." *Secor v. Pioneer Foundry Company, Inc.,* 173 N.W.2d 780, 782 (Mich. App. 1969). *See also McKee v. Penick (In re Al Zuni Trading, Inc.),* 947 F.2d 1403, 1405 (9th Cir. 1991) (quoting *Secor* and affirming summary judgment directing policy proceeds to be paid to decedent's former employer rather than decedent's estate).

Thus, in *Herman v. Provident Mutual Life Ins. Co.,* 886 F.2d 529 (2nd Cir. 1989), the trial court, finding that the decedent's law partners no longer had an insurable interest in the decedent's life at the time of his death because the law firm had dissolved, refused to order the distribution of life insurance proceeds to the remaining former partners, and instead directed an award to the decedent's family.

The Second Circuit reversed, as follows:

> The [district] court…incorrectly assumed that the cessation of an insurable interest prior to the insured's death – as occurs upon the dissolution of a law firm – defeats any claim of right to the proceeds of policies that were valid at their inception. In holding that "it is only if one assumes the firm's continuing practice of law that surviving partners have an insurable interest in the continuing life of a partner," the district court adopted a view that is contrary to the common law development of rules pertaining to the requirements of an insurable interest and to the effect of its termination. More particularly, the district court's ruling contradicted the law of New York….

Id. at 533.

The "law of New York," N.Y.Ins. Law. § 3205(b)(2), "Insurable interest in the person, consent required, exceptions," in part provides:

> No person shall procure…any contract of insurance upon the person of another unless the benefits under such contract are payable to the person insured or his personal representatives, or to a person having, at the time when such contract is made, an insurable interest in the person insured.

According to the Second Circuit, "th[is] statute clearly states that when a policy is valid at its inception, it remains so even after the purchaser's insurable interest in the life of the insured has ended." *Id.* at 534. The court, citing a plethora of cases from across the county in support of the majority view, rebuffed the district court's reliance on "a minority rule followed in only a

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handful of jurisdictions," *id.* at 535, and reversed.

Similarly, in *In re Al Zuni, supra,* the Ninth Circuit Court of Appeals construed an Arizona statute, Ariz. Rev. Stat. Ann. § 20-1104(A) (1990), which provided as follows:

> No person shall procure or cause to be procured any insurance contract upon the life or body of another individual unless the benefits under such contract are payable …to a person having, at the time when the contract was made, an insurable interest in the individual insured.

947 F.2d at 1405. The Ninth Circuit took this statute to mean that "where a valid insurable interest exists when the Policies are issued, subsequent cessation of that insurable interest does not void the Policies." *Id.*

II. *Pardubn* and Utah Law.

The Utah Insurance Code ("Code") provides in part as follows:

> **31A-21-104. Insurable interest and consent.**
> (1) (a) An insurer may not knowingly provide insurance to a person who does not have or expect to have an insurable interest in the subject of the insurance.
>
> (b) A person may not knowingly procure, directly, by assignment, or otherwise, an interest in the proceeds of an insurance policy unless that person has or expects to have an insurable interest in the subject of the insurance.

Utah Code Ann. § 31A-21-104(1)(a). Utah's Code is, if anything, more liberal on the insurable interest issue than the laws of New York and Arizona, for Utah's statute can be satisfied by the *expectation* of such an interest, although if the expectation never bears fruit, presumably the policy will not be effective.

The statute then tells us what an insurable interest is for the purposes of life insurance:

> (a) (i) "Insurable interest" in a person means: (A) for persons closely related by blood or by law, a substantial interest engendered by love and affection;
>
> or
>
> (B) in the case of other persons, a lawful and substantial interest in having the life, health, and bodily safety of the person insured continue.

The Code then gives some examples of insurable interest, including the following:

> (iv) A shareholder or partner has an insurable interest in the life of other shareholders or partners for purposes of insurance contracts that are an integral part of a legitimate buy-sell agreement respecting shares or a partnership interest in the business.

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This example was the one at issue in the *Parduhn* cases, for therein, as explained in *Recent Developments,* two partners had a buy-sell agreement (a standard agreement which provides for one partner to buy out the other's interest in case of death, with the purchase price often funded by life insurance). One partner died. The other partner, Parduhn, had been named the beneficiary of the life insurance proceeds. A dispute arose between the decedent's heirs and Parduhn over whether the partnership, and thus the buy-sell agreement, had terminated prior to the death, and to whom the policy proceeds should be distributed.

The trial court held, *inter alia,* that the policy's designation of beneficiary was ambiguous. The *Parduhn I* Court reversed this finding, noting that "[t]he insurance policy unambiguously designate[d] Parduhn as the beneficiary." 61 P.3d at 984. The Court nonetheless found that the partnership, and the buy-sell agreement along with it, had terminated prior to the death, that Parduhn had lost his insurable interest in the decedent's life, and that the matter should be remanded for an equitable distribution of policy proceeds under Utah Code Ann. § 31A-21-104(5), which permits the court to distribute policy proceeds when the beneficiary fails to meet the insurable interest test. 61 P.3d at 987.

In *Parduhn II,* the decedent's former partner challenged the distribution of proceeds. The Supreme Court affirmed.

III. The *Parduhn* Analysis.

Concerning the issue of insurable interest, *Parduhn I* held as follows:

> Section 31A-21-104(2)(a) specifically limits partners' insurable interest, required by section 31A-21-104(1)(b) for obtaining insurance generally, to those that are "for purposes of insurance contracts that are an integral part of a legitimate buy-sell agreement." Because the buy-sell agreement was terminated, Parduhn had no insurable interest which was "for purposes of [an] insurance contract [] that [was] an integral part of a legitimate buy-sell agreement." Thus, at the time of Buchi's death, Parduhn lacked an insurable interest under section 31A-21-104(1)(b), and may "not knowingly procure…an interest in the proceeds of [the] insurance policy."

61 P.3d at 986. Parduhn sought re-hearing, arguing (correctly, I believe) that the Court had erred in finding that section 31A-21-104(2)(a) "limits a partner's insurable interest" to partnerships with buy-sell agreements. Parduhn further challenged (again, correctly, and this is the far more important point) the Court's holding that a beneficiary of a life insurance policy could collect only if the insurable interest existed at the time the proceeds were distributed. 112 P.2d at 499. The Court "denied Parduhn's motion for rehearing without discussion." *Id.*

When Parduhn came back to challenge the distribution made by the trial court after remand, the *Parduhn II* Court remained steadfast:

> Parduhn makes two additional argument. First, he argues that we erroneously concluded in Parduhn I that a partner's insurable interest must exist at the time policy proceeds are distributed, rather than at the time the insurance policy is acquired. Second, he argues that we incorrectly concluded in Parduhn I that the only insurable interest a partner may have in a copartner's life is through a buy-sell agreement. Because those claims were squarely at issue in Parduhn's petition for rehearing, which we denied, we decline to revisit them here.

Parduhn II at 502 n.4. *See also id.* at 499 ("Although Parduhn was the designated policy beneficiary, we held [in *Parduhn I*] that he could not legally collect the proceeds because he had lost his insurable interest in Buchi's life upon the dissolution of the partnership and the termination of the buy-sell agreement.")

But Utah's insurable interest statute nowhere requires that an insurable interest exist at the time the proceeds are distributed (it is incorrect to conclude, as does *Recent Developments,* that "[t]he statute does not clearly address the situation…where an insurable interest existed at the inception of the policy but extinguished prior to death.") The holding of *Parduhn I* that "Parduhn lacked an insurable interest under section 31A-21-104(1)(b), and may 'not knowingly procure…an interest in the proceeds of [the] insurance policy'" fails to take into account that Parduhn already *had* such an interest when the policy was taken out (neither *Parduhn* decision cites any cases or statutes from other jurisdictions on the insurable interest issue).

To be sure, Utah's statute does not contain the phrase "at the time the contract was made" when referring to when the insurable interest in the beneficiary must exist, but this was done only so that the statute, without resulting in ambiguity, could make clear that the insurable interest requirement is satisfied as long as there is an *expectation* of such an interest when the policy is issued, thus creating an even more liberal version of the rule. Nothing in the Utah statute vitiates the rule that the insurable interest, once it attaches, suffices for payment of policy proceeds upon the insured's death. *See, e.g., Herman v. Provident Mutual Life Ins. Co., supra,* 886 F.2d at 535 ("'the dissolution of a partnership does not preclude recovery upon the life of one partner in favor of the other'") (citation omitted).

This conclusion I believe finds additional support in section 31A-21-104(1)(a) of the Code, the insurable interest requirement for *insurers,* which provides that "[a]n insurer may not knowingly provide insurance to a person who does not have or expect to have an insurable interest in the subject of the insurance." This language clearly speaks to the outset of the transaction, not the end of it, and there seems no reason to read the insurable interest requirement imposed on the beneficiary in any different light.

Concerning the court's reliance on the section of the Code covering partners and "buy-sell" agreements, the *Parduhn II* court read the *Parduhn I* holding to be that "a partner has an insurable interest in the life of a copartner *only* if the "insurance contracts…are an integral part of a legitimate buy-sell agreement respecting… a partnership interest in the business." *Parduhn II,* 112 P.3d at 499 (emphasis added). Yet the word "only" nowhere appears in the statute, and in fact many partnership agreements require partners to carry life insurance payable to the partnership for a whole variety of reasons that have nothing to do with buy-sell agreements.

The Court's error here is in confusing an *example* of an insurable interest (that which inheres in a buy-sell arrangement) as pre-empting the general, governing rule of section 31A-21-104(2)(a)(i)(B), which provides that an insurable interest, for non-relatives, is "a lawful and substantial interest in having the life, health, and bodily safety of the person insured continue." In other words, this is a case of *"ejusdem generis"* in reverse: the general rule governing insurable interests is given first, followed by examples. Here, however, the specific does not control the general, but the general the specific.

IV. The Unaddressed Issue of Standing.

"The law is well established throughout the country that only the insurer can raise the objection of want of an insurable interest." *Ryan v. Tickle,* 316 N.W.2d 580, 582 (Neb. 1982). It does not appear from the captions or texts of the *Parduhn* decisions that the actual insurer participated in the case. Neither *Parduhn* decision addresses whether the Court was adopting a rule permitting parties other than the insurer to challenge insurable interests.

V. The Issue of Equitable Distribution, and Whether *Parduhn* was Narrowly Decided.

As *Recent Developments* explains in detail, *Parduhn I* did not throw Parduhn out of court, but instead remanded the case for an equitable distribution of proceeds, and clearly left Parduhn in the running for such a distribution (although we know from *Parduhn II* that the distribution did not turn out as Parduhn had hoped).

In addition, from the lack of case citations on the insurable interest issue in *Parduhn,* we perhaps can conclude that the Court did not truly intend to adopt a rule of universal applicability, and that *Parduhn* should be limited solely to insurance policies entered into in connection with partnership buy-sell agreements. The Court's language, however, seems broader than that. We will need to await further decisions to see how wide of a net was truly cast.

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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 15 – of Calendars, Courtesy, and Holiday Weekends

by Ken Black

"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."

Not long ago, I found myself arguing a motion for protective order before a magistrate judge in a California federal court. The subject of the motion? Opposing counsel had subpoenaed an important third-party witness for an all-day deposition on the Saturday of Easter weekend. Upon receiving the notice, I told opposing counsel of long-scheduled family travel plans I had for that weekend. I repeatedly implored counsel to notice the deposition for another date. He refused, and insisted that the deposition go forward on the holiday weekend. I do not know what motivated his intransigence. I do know there was no reason that the deposition could not be taken at a later, more convenient time. Given the witness's importance in the case, my client understandably wanted lead counsel to attend and examine the witness.

I work as hard as the next guy. I have spent my share of weekends in the office over the years and am not opposed to an occasional Saturday deposition. But neither my client nor I believed that long-standing family travel plans should bow to counsel's inflexibility. We filed a motion. Predictably, the court granted a protective order, requiring that the deposition not proceed on the noticed holiday weekend. The deposition went forward a few weeks later on a weekday. We had "won" this little skirmish, but we wasted the court's valuable time, and the client incurred needless expense associated with the motion.

The Preamble to the Utah Standards of Professionalism and Civility explains that lawyers' "conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms." Like many of the Standards, Standard 15 describes a basic tenet of decency and courtesy – that lawyers should work cooperatively with each other in scheduling depositions, hearings, and conferences. The litigation process necessarily impacts the schedules of many: judges, court staff, parties, third parties, and, of course, counsel. All are busy. Courts have full dockets, and counsel have tight schedules. Basic courtesy requires that there be flexibility and accommodation in scheduling matters.

The Utah Standards are not alone in their call for scheduling courtesy. State and local bar organizations around the country have adopted such rules and standards. All are phrased a bit differently, but the message is the same: counsel can and should cooperate with each other in scheduling. Some courts have adopted similar rules. For example, a local rule in the United States District Court for the Southern District of Florida provides that "[d]iscovery in this District is normally practiced with… cooperation and civility," and "[a] lawyer shall normally attempt to accommodate the calendars of opposing lawyers in scheduling discovery." U.S.D.C., S.D. Fla., Local Rule, Appendix A, Rule I.A.(1) & (2). Courts play an important role in policing – and imposing sanctions for – conduct of egregious offenders. *See, e.g., Bernstein v. Boies, Schiller & Flexner, LLP,* 416 F. Supp. 2d 1329, 1333 (S.D. Fla. 2006) (imposing sanctions for attorney's unilateral filing of scheduling report and "unreasonable and vexatious conduct").

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In my experience, most Utah lawyers embrace the principles of courtesy set forth in Standard 15. They call or write each other before scheduling conferences or hearings. At a minimum, their deposition notices (if not preceded by a phone call) are accompanied by a letter explaining that, if the chosen dates are not convenient for the witnesses and counsel, then the propounding lawyer will cooperate in identifying convenient dates. Most lawyers also adjust previously agreed upon dates when reasonably and timely asked to do so. They do it not because a rule requires it, but because they are professionals. They also know that, if they expect to receive an accommodation when needed, they must be prepared to afford opposing counsel equal courtesy.

Standard 15 does not call for anything extraordinary. It does not require concessions that prejudice a client's legitimate rights. To the contrary, the Standard condemns those who seek scheduling changes "for tactical or unfair purpose." Standard 15 does, however, suggest that lawyers work cooperatively in scheduling discovery and court dates. Standard 14 provides that lawyers should explain to their clients that "they reserve the right to determine whether to grant accommodations to other counsel… in matters not directly affecting the merits."

The principles in Standard 15, if followed, make the practice of law much more enjoyable. They will surely eliminate motion practice over holiday weekend depositions.

Very recently, in reviewing my calendar, I found that I had agreed to a two-day arbitration in Salt Lake City that now conflicted with another promised date on my calendar. I first called opposing counsel. Then, together, we called the arbitrator. Both are first-rate Utah lawyers. I asked that we adjust the arbitration dates by one day to accommodate my scheduling conflict. Neither was obligated. If my request had not worked for them, or if the change had prejudiced the opposing party, I would not have expected an accommodation. But both checked their calendars and graciously extended the courtesy. I was grateful. That is the model – the spirit and intent – of Standard 15.

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.

Please send a copy of the photo only (no originals) that you would not expect to be returned to you, to:

Randall L. Romrell
Regence BlueCross BlueShield of Utah
2890 East Cottonwood Parkway
Mail Stop 70,
Salt Lake City, Utah 84121

The board will consider all photos that are submitted, but we cannot guarantee we will use them. Be sure that you identify what the photo is, the names of people in the groups or at least a description of what the group is, the names of the buildings, etc. Thank you in advance for your extra work in searching out old photos and making copies to submit.

Commission Highlights

During its regularly scheduled meeting of April 28, 2006, which was held in Provo, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. David Bird discussed the Lifetime Service Award and follow up on this issue will take place at the June meeting.

   David also discussed assignments for the malpractice insurance letter and article. Denise Forsman (Marsh) and Grant Clayton (Member Benefits) will draft the proposed letter encouraging members to obtain insurance and providing helpful information. Yvette Diaz and Rod Snow are writing the article for the *Bar Journal.*

2. David Bird reported on the quarterly Bar meeting with Chief Justice Durham. They discussed insurance issues and the LAP program as well as the petition process. The Court's perspective is that they regulate the practice of law and have simply delegated some aspects of it to the Bar. David noted that we are fortunate to have the relationship we do with the Court.

3. David Bird and John Baldwin reported on the status of the Operation Review. Ten RFPs were mailed out and two were returned. Chief Justice Durham said that a performance review is important so that the Bar can improve its efforts and that it is also important for the Court to better fulfill its oversight obligation. Rob Jeffs stated that the field may have been narrowed by the requirement that the company have previously experienced reviewing a legal entity.

4. John Baldwin reported on the annual convention status, stating that the current block of hotel rooms at the Marriott had been filled but that we blocked additional rooms at other nearby facilities. Registration materials were published in the May/June 2006 issue of the *Bar Journal.* John noted that he had recently visited the meeting facility and that he feels good about this convention financially.

5. John Baldwin reported on the proposal for alternative to discipline (diversion) rule which is modeled after Colorado's rule. John noted that although OPC is concerned with a few of the details, they believe these issues will get fleshed out in actual practice after the rule is implemented. Commissioners Lori Nelson, Felshaw King, Lowry Snow and Steve Owens were asked to look at the proposal and John will facilitate communication with Billy Walker.

6. The recent changes and reorganization of the Bar's Policies and Procedures were discussed after which the motion was made and seconded to adopt the changes. The motion passed without dissent.

7. The motion to support the ABA's request for resolution on diversity in the profession passed without dissent.

8. The Navajo Nation Judicial Complex request for support was discussed. Dan Moquin, Staff Attorney, Tuba City District of the Navajo Nation and Councilman Raymond Berchman, Navajo Nation Council Delegate and Vice Chairman of the Navajo Nation Judiciary Committee were present for this discussion. Currently, the Nation has the land and plans have been drawn up for new appellate judicial facilities to replace the inadequate facilities which currently exist, but they are trying to solicit members of Congress for building funding. Rep. Jim Matheson and Sen. Bob Bennett are supportive of these efforts since Utah has Navajo residents and this project will affect those residents. The motion to send letters of support to our Utah delegation and copy the Arizona and New Mexico Bar passed with none opposed. Lori Nelson will hand deliver the letters on Tuesday when she is in Washington, D.C. for Law Day. Both Councilman Berchman and Dan Moquin expressed their sincere appreciation for the support.

9. The Western States Bar Conference resolution resolves to create a program in conjunction with the ABA to improve public understanding of the judicial branch of government. The motion that the Bar support the concept that the ABA and bar associations institute an initiative to promote greater understanding of judicial branch of government in our system passed without dissent.

10. Nominees for the annual awards were reviewed and Judge Gordon Low was selected as the recipient of Judge of the Year award, Lawyer of the Year went to Max Wheeler and Section of the Year went to the Litigation Section. The Ethics Advisory Opinion Committee was selected as the recipient of the Committee of the Year Award.

11. Katherine Fox discussed the UPL Committee's request for formal action against Aaronson Grand & Associates for engaging in the unauthorized practice of Law. The motion to approve the request passed without opposition.

12. Discussion ensued over the amendment to the Criminal Law Section's bylaws to include a provision that they annually appoint a representative to serve on the Governmental Relations committee. The motion to approve the amended bylaws passed without dissent.

13. Grant Clayton and Connie Howard were in attendance to discuss and answer questions regarding the Bar's endorsement of Marsh as the designated malpractice insurance broker. Grant said that an endorsement allowed a vendor to use the Bar's name and logo and Connie said that before an endorsement is given, she receives samples, tests the product and determines if the product would benefit Bar members. Connie noted that the Bar normally does not offer exclusive endorsements, except for Marsh, which requires it. Discussion on this issue ensued.

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

Mailing of Licensing Forms

The licensing forms for 2006-07 were 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.

Thank You!

We wish to acknowledge the efforts and contributions of all those who made this year's Law Day celebration a success. We extend a special thank you to:

"and Justice for all" Law Day 5K Run/Walk
Staci Duke, Development Coordinator, Law Day Run/Walk Committee and its members, and all those who participated.

Law Day Luncheon/Awards
Young Lawyers Division – Debbie Griffiths, President
Kim Neville & Angela Stander, Co-Chairs

and the following:

ATK Launch Systems

Holme Roberts & Owen

Parr Waddoups Brown Gee & Loveless

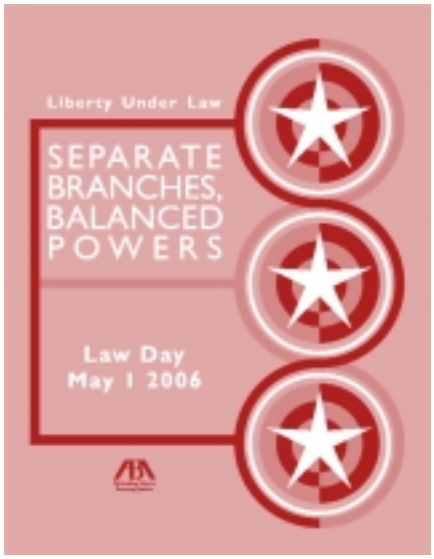
Parsons Behle & Latimer

Snell & Wilmer

Utah Hispanic Chamber of Commerce

Van Cott Bagley Cornwall & McCarthy

Mock Trial Competition
Utah Law Related Education project and all volunteer coaches, judges, teachers and students.



Salt Lake County Bar Association
"Art & the Law" project

Utah Minority Bar Association
Essay Contest

Thank you for your participation!

Bar Commission Law Related Education and Law Day Committee

Pro Bono Honor Roll

Angela Adams
Stanley S. Adams
Heidi Alder
Fred Anderson
Selina Andrews
Lauren Barros
Erika Birch
John Black Jr.
Matthew Boley
James Brown
Charles Carlston
Mary Pat Cashman
Thomas Crowther
Shelly Coudreaut
Mary Cline
Clark Fetzer
Jonathan Grover
Brent Hall
George Hunt
Laura Hansen
April Hollingsworth
Kyle Hoskins
Bill P. Kandarusman
Anthony Kaye
Jay Kessler
Louise Knauer
D. David Lambert
Larry Larsen
Robert Lovell
Brandon Mark
Sean McBride
Chad McKay
Jack Molgard
Matt Moncur
Lawrence Peterson
Ken Reich
Boyd Rogers
Richard J. Rowley
Lauren Scholnick
Elizabeth Schulte
Steve Stewart
Scott Thorpe
Stewart Ralph
Frank Warner
Tracey Watson
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 April and May. Call Brenda Teig at (801) 924-3376 to volunteer.

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

Nominations for the Peter W. Billings, Sr. Outstanding Dispute Resolution Service Award

In memory of the great contributions of Peter W. Billings, Sr. to alternative dispute resolution in our state, the ADR Section of the Utah State Bar annually awards the Peter W. Billings, Sr. Outstanding Dispute Resolution Service Award to the person or organization that has done the most to promote alternative dispute resolution in the State of Utah. The award is not restricted to an attorney or judge. The ADR Section is currently seeking nominations for this award, which will be presented at the Bar's Annual Fall Forum.

Please submit nominations for this award by October 13, 2006 to Peter W. Billings, Jr., P. O. Box 510210, Salt Lake City, UT 84151.

Thank you to all the sponsors of the 2006 "AND JUSTICE FOR ALL" Law Day 5K Run & Walk

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Midvale Mining Company
Noodles & Company
Office Max
Red Butte Cafe
Rico Mexican Market & Catering
Rumbi Island Grill
Salt Lake Bees
Salt Lake Film Society
Salt Lake Running Company
Schiff Nutrition International
Sweet Tomatoes
Target
Tracy Aviary
Trolley Wing Company
Utah Arts Festival

PLEASE NOTE:

The *Bar Journal* has been requested to clarify that the Jonathan Pace whose disciplinary action was reported in the May/June edition is not lawyer John P. Pace of the Salt Lake Legal Defender Association.

Discipline Corner

PUBLIC REPRIMAND

On April 10, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Justin Roberts for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 1.5(b) (Fees), 1.15(a) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Roberts was hired to represent his client in a contested divorce. Mr. Roberts failed to adequately advise his client; failed to keep up on the matter's status after entering his appearance; failed to explain to his client what was required by Court orders; failed to advise his client of status updates; failed to maintain an attorney trust account; failed to account for his earned fee; failed to provide a written basis for his fee to his client; refused to communicate with his client about accounting and billing for fees; failed to provide an accounting; and failed to provide requested and necessary documentation to the OPC when required.

STAYED SUSPENSION

On March 20, 2006, the Honorable Timothy Hansen, Third Judicial District Court, entered an Order of Discipline: Suspension, Stayed During a Period of Probation, against Amy Boettger for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.5(b) (Fees), 1.6(a) (Confidentiality of Information), 1.15(a) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Ms. Boettger was hired to assist a client in two matters. Ms. Boettger failed to demonstrate the necessary skill, thoroughness, and preparation reasonably necessary for the representation; failed to act with reasonable diligence and promptness; failed to keep her client reasonably informed about the status of the client's matters; collected fees for work not completed; failed to comply with reasonable requests for information from her client; and failed to provide, in writing, the rate or basis of her fee. Ms. Boettger's car was stolen when it had her client's file in it thereby revealing information concerning her representation of that client, and failing to safeguard the file. Upon termination, Ms. Boettger failed to take steps reasonably practicable to protect the interests of her client by failing to provide the file, surrender papers and other property to which her client was entitled. Ms. Boettger also made negligent representations to her client concerning the status of the work she was performing and knowingly failed to respond to the OPC's specific request for information.

PUBLIC REPRIMAND, PROBATION

On April 8, 2006, the Honorable Fred D. Howard, Fourth Judicial District Court, entered an Order of Discipline: Public Reprimand, Probation against S. Austin Johnson for violation of Rules 1.1 (Competence), 4.3(a) and (b) (Dealing with Unrepresented Person), 5.3(c) (Responsibilities Regarding Nonlawyer Assistants), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In one matter, Mr. Johnson represented a husband in a deportation matter. His client married a U.S. citizen five days prior to the date the citizen's divorce was final. Mr. Johnson filed a petition to modify the divorce nunc pro tunc in order for his client to remarry the citizen and not be deported. At the time the petition was filed, Mr. Johnson was out of state and had instructed his office staff to serve the petition on the citizen's former spouse, and get an acknowledgement from the spouse, who at the time was living out of state, that he would not oppose the petition. At a hearing concerning the petition, the judge informed Mr. Johnson that the signature of the former spouse on the acknowledgement did not match the signature on the divorce papers. Mr. Johnson did not represent either party in the original divorce. After investigation, Mr. Johnson's staff had contacted the former spouse who authorized that the staff sign the acknowledgement on his behalf. The staff then notarized the former spouse's signature as if he were present and filed that document with the Court.

In a second matter, Mr. Johnson filed a civil cause of action against a number of individuals, seeking damages for injuries that were caused in a massacre that occurred in Vietnam over 30 years ago. Mr. Johnson's office contacted one of the named defendants to solicit his involvement in the suit. Mr. Johnson requested the named defendant to stipulate that a judgment be entered against this individual and based on this stipulation Mr. Johnson would not collect on the judgment. The individual ignored contact from Mr. Johnson. About ten months after the complaint was served, based on the individual's refusal to respond, a certificate of default was entered against him. The individual obtained counsel to set aside the certificate of default. The judge in the case ruled that the individual may have been discouraged from seeking counsel by false representations concerning the individual's status, rights, and defenses as a defendant. Mr. Johnson was ordered to pay attorneys fees and costs. Mr. Johnson challenged the judge's ruling, and once all appeals failed, Mr. Johnson satisfied the judgment for attorneys fees and costs.

ADMONITION

On April 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

3.5(d) (Impartiality and Decorum of the Tribunal) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney repeatedly argued with a judge about the judge's ruling, making inappropriate and disrespectful comments.

ADMONITION
On April 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 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.16(d) (Declining or Terminating Representation), 3.2 (Expediting Litigation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was hired to modify child support on behalf of a client who was incarcerated. The attorney failed to serve the petition and summons in a timely fashion; and failed to accurately inform the client of the status of the service and process. The attorney failed to properly communicate by accepting and returning the client's phone calls. It was not until after the client filed a Bar complaint that the attorney communicated with the client. Upon withdrawal, the attorney failed to properly communicate and render an accounting to the client.

ADMONITION
On April 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 8.1(b) (Bar Admission and Disciplinary Matters) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney failed to respond to the Office of Professional Conduct's Notice of Informal Complaint.

PUBLIC REPRIMAND

On April 10, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Brandon Hodgkinson for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Hodgkinson was hired to represent a client and the client's spouse in immigration matters. Mr. Hodgkinson sought to obtain a work permit on behalf of his client when it was not appropriate. Mr. Hodgkinson failed to respond to requests from Immigration for additional evidence. Mr. Hodgkinson failed to communicate the case status and respond to requests for information from his clients. When matters were pending Mr. Hodgkinson disappeared. Mr. Hodgkinson failed to protect his clients' interests by failing to give them notice of the termination of his services, and failing to return client files. Mr. Hodgkinson also failed to respond to the Office of Professional Conduct, and failed to attend the Screening Panel hearing in the matter.

PUBLIC REPRIMAND

On April 6, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Larry Larsen for violation of Rules 1.4(a) (Communication), 1.5(b) (Fees), 1.15(b) (Safekeeping Property), 1.15(c) (Safekeeping Property), and 8.1(b) (Bar Admission and Disciplinary Matters) of the Rules of Professional Conduct.

In summary:

Mr. Larsen was hired to assist a client in reducing alimony payments. Mr. Larsen did not keep his client informed and did not proceed as the client requested. Mr. Larsen made representations to his client that he had filed a motion and a hearing had been set concerning the motion when no motion had been filed and no hearing had been set. Mr. Larsen failed to provide documents to his client; failed to communicate the basis of his fee in writing; failed to provide an accounting for fees that had already been paid by the client, or any sort of billing; failed to promptly return phone calls; and failed to timely or adequately respond to requests for information from the Office of Professional Conduct.

SUSPENSION

On February 6, 2006, the Honorable L. A. Dever, Third Judicial District Court, entered a Ruling and Order re: Sanctions, suspending J. Keith Henderson from the practice of law, effective March 8, 2006, for one year for violation of Rules 1.1 (Competence), 1.4 (Communication), 1.16(d) (Declining or Terminating Representation), 3.3 (Candor Toward the Tribunal), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The order permits Mr. Henderson to petition the court to abate the period of suspension to three months with a nine-month supervised probation. A Notice of Appeal was filed in this matter on May 16, 2006.

In summary:

Mr. Henderson represented a client in a worker's compensation case who had also pursued a personal injury claim based on the same accident against a third party. Mr. Henderson failed to explain how the settlement in the personal injury case would impact the client's worker's compensation case. Mr. Henderson failed to ascertain the status of the personal injury case before filing the worker's compensation claim. The insurance company asserted a counterclaim against Mr. Henderson's client for reimbursement of money paid out since the client had received money from the personal injury settlement.

Mr. Henderson failed to provide the client copies of documents filed in the matter prior to the hearing in the case. After the hearing was continued to allow the parties to attempt to settle the matter, the client did not hear from Mr. Henderson for about five months. The client then received a letter from Mr. Henderson informing the client there could be no recovery on the claim.

Around the time of Mr. Henderson's letter, he was suspended from the practice of law. Mr. Henderson did not notify his client that he was suspended and could no longer represent the client and he failed to advise the client to seek another attorney or that he could represent himself pro se. Mr. Henderson did not provide the file to the client and he did not inform the client of an upcoming hearing in the case and the need for the client to attend.

When the administrative law judge ("ALJ") phoned Mr. Henderson to inquire about his failure to appear at the hearing, Mr. Henderson informed the ALJ that he had withdrawn from the case since it had settled, when in fact the case had not settled. The ALJ instructed Mr. Henderson to file a withdrawal so that the case could move forward. Mr. Henderson filed a notice of withdrawal nearly two years after the ALJ instructed him to do so.

RESIGNATION WITH DISCIPLINE PENDING

On June 1, 2006, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Victor M. Gordon, effective thirty days from the date of its entry.

In summary:

In one matter, Mr. Gordon represented a client on criminal charges. The court set a date for trial, informing both parties that the trial was not to be continued. Prior to the trial Mr. Gordon moved to

continue the trial. The court heard the motion on the day of the trial. Mr. Gordon made arguments to the court that were not in his motion. The court denied the motion. After the motion was denied the court was informed that Mr. Gordon's client, who was in jail at the time, was not provided street clothes to wear to the trial. The court recessed to allow Mr. Gordon to take clothing to his client. Mr. Gordon informed jail personnel that he was ill and he went home. Mr. Gordon did not return to court nor did he inform the court of his illness. Mr. Gordon also left his client's file in the courtroom and failed to retrieve it. The court set another hearing to reschedule the trial. Mr. Gordon failed to appear and the court removed Mr. Gordon from the case based upon ineffective assistance of counsel.

In a second matter, Mr. Gordon represented a husband and wife concerning criminal charges. Mr. Gordon did not inform the clients of the possible conflict of interest of Mr. Gordon representing both of them, nor did he withdraw as counsel. The preliminary hearing was continued three times; twice because Mr. Gordon was significantly late and a third time because he failed to appear. Mr. Gordon was ordered to pay the prosecutor's costs for his failure to appear because each time the court, prosecutor, and witnesses were all present and ready to proceed.

In a third matter, Mr. Gordon represented a client in a divorce and custody matter. The client paid Mr. Gordon for the representation. Mr. Gordon did not have a written fee agreement or any other writing stating the basis or rate of his fee. Mr. Gordon prepared the wrong pleadings, and failed to file any pleadings on behalf of the client. During the representation, Mr. Gordon failed to keep the client reasonably informed of the case status. Mr. Gordon did not refund any of the money the client paid to him. Due to health problems, Mr. Gordon did not have the ability to competently and diligently represent his client.

In a fourth matter, Mr. Gordon failed to timely return sixteen books he checked out from the S. J. Quinney Law Library. Mr. Gordon eventually returned eleven of them over a year after they were overdue. The remaining five books were returned almost two years later.

In a fifth matter, Mr. Gordon was administratively suspended from the practice of law for failing to comply with mandatory continuing legal education ("MCLE") requirements. During his suspension Mr. Gordon attended a hearing on behalf of a client where a commissioner asked Mr. Gordon if he was authorized to practice law and he answered in the affirmative. The commissioner proceeded with the hearing. Prior to the hearing, Mr. Gordon contacted the Office of Professional Conduct concerning his status with the Bar. He was informed that his license was suspended for failure to comply with MCLE.

PROBATION

On May 2, 2006, the Honorable Denise Lindberg, Third Judicial District Court, entered Amended Findings of Fact, Conclusions of Law, and Order of Discipline, suspending Steven Crawley from the practice of law for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 8.4(c) (Misconduct), and 8.4(a) (Misconduct). The original Findings of Fact, Conclusions of Law, and Order were entered by the Honorable Deno Himonas on February 9, 2006. The suspension is stayed, and Mr. Crawley is placed on an 18 month probation subject to certain conditions. A Notice of Appeal was filed in this matter on May 16, 2006.

In summary:

Mr. Crawley was part of a firm and represented a client in two matters. In the first matter, as part of his client's primary claim and third-party claims, the claims would have been enhanced by an expert report or affidavit. Mr. Crawley failed to obtain an expert report or affidavit. Thereafter, the client lost some of the third-party claims for lack of any supporting evidence, which included an expert report. The court assessed attorney fees against Mr. Crawley's client in two of the third-party claims, dismissed the third-party claims, and entered a partial summary judgment against Mr. Crawley's client. Mr. Crawley failed to advise his client of the assessment of attorneys' fees as well as the dismissal of the third-party claims. Mr. Crawley misrepresented the status to both his client and the firm.

In the second matter, Mr. Crawley represented the client in a breach of contract claim. The client counterclaimed for breach of contract and negligence. The client's case depended on obtaining an expert report. The court entered summary judgment against the client for failure to present an expert report or affidavit in its cross claim. Mr. Crawley informed his clients that the cross claim was dismissed for reasons other than the actual reasons. An amended judgment was awarded against Mr. Crawley's client. The client wanted to pursue an appeal and Mr. Crawley informed the client that he would, and in fact had filed an appeal. Mr. Crawley did not file an appeal on behalf of the client.

Mr. Crawley was also in charge of renewing the professional negligence insurance coverage for the firm. On the form he filled out, he marked "no" to a question concerning whether there were any acts, omissions, or circumstances that would give rise to a professional liability claim against the firm or its lawyers. Mr. Crawley should have been aware that his acts and omissions could give rise to a professional liability claim in the two above mentioned matters, but did not disclose the information.

Saviors

by Paul Eggers

Reviewed by Betsy Ross

I find myself waking up these days to a kind of hazy depression attributable to some extent to mid-life crisis, I suppose, but to a greater extent I am probably no different than many who harbor what seems to be a lingering dis-ease with the world around them. From the very local to the world-wide scene, I feel oppressed by leaders who are not "leaders," by the elevation of differences over commonalities, and by the pure, unadulterated hubris exhibited by those in power.

What does that have to do with *Saviors,* a novel set in the immediately post Vietnam era, about former Peace Corps volunteers working in a Vietnamese resettlement camp on the island of Bidong in Malaysia? Nothing and everything. *Saviors* is a novel that asks the question, "What are our deepest motivations?" and "Why do motivations matter?"

The "saviors" (a tongue-in-cheek appellation) in the novel are a cauldron of personalities and motivations. Referred to by the locals as "white bastards," they exhibit self-righteousness and condescension, yet there is undeniably sincerity flailing about in the mix. We question whether their motivations are to improve the condition of life for refugees; whether their motivations are the guise for imposing upon others their self-righteous viewpoints; or, indeed, whether their motivations are simply an excuse for the self-affirming exercise of wielding power.

Why do these motivations matter? They raise the issue of whether the human condition improves when one acts out of power or self-righteousness. Eggers suggests, in the following excerpt, that it takes moving beyond what I would call the fearful motivations: power and certainty (i.e. self-righteousness) – motivations that separate us from others – to be an effective force of good, or perhaps simply, to be authentic. One of the workers, while examining what she was doing in Bidong, reflects:

> "When you are new to a place, what could you do but accept its surprises? You knew nothing. What could you do but keep looking and wait for the day when you would just be sitting in a chair or waving to someone, and all of a sudden your spirit would whisper into your ear: *You are in this place. You are here.*
>
> Every morning, she woke early and sat up in her bunk, just listening, hoping her spirit would whisper into her ear."

This is more than just physically being there. Eggers was talking about being there in *toto*; "being there" as in being there in all authenticity, being in the same state of mind and heart with the object of your actions. It is at once very spatial and not spatial: it is the absence of space between desires and actions. And absence of space results in the elevation of similarities over differences – a key to overcoming personal and political dissonance.

Motivations matter because, ultimately, sincerity and authenticity matter. When what we say we want to do for others is bound up in undisclosed self-interest, we are simply inauthentic, and inauthenticity is a recipe for failure in the execution of our actions. It takes only asking a simple question to illustrate this point: Will my actions in bringing relief to refugees – or my efforts to bring democracy to a foreign land – be embraced if what I am really trying to do is bolster my ego by asserting my own superiority?

Motivations matter.

BETSY ROSS works at the Office of the Utah State Auditor.

Message from the Chair

by Danielle Price

I have a few membership and CLE updates to share and I have some information in follow up to Paralegal's Day, which was May 18th.

As many of you may already know, the Bar has added a new member benefit for attorneys which is a Lawyers Assistance Program that began in March of this year. The Paralegal Division is very pleased to announce that the Bar is also making this program available to members of the Paralegal Division. These services are offered through Blomquist Hale and will be available to Division members beginning September 1, 2006. Additional information about Blomquist Hale is available on their website at www.blomquisthale.com. The Paralegal Division will be mailing information on this program to all Division members at their home address in August.

Lonnie Dawson, paralegal at Summit County Attorney's Office – recipient of the first annual Distinguished Paralegal of the Year award presented by the Paralegal Division and LAAU on May 18, 2006.

Blomquist Hale offers services throughout the state and beginning September 1, 2006, "you and your family will have immediate access to trained counselors for face-to-face help with family problems, stress, depression, anxiety, personal cash management difficulties, elder care challenges, assessment of drug/alcohol dependence, and any other issues impairing your work or personal lives." This is just some of the information available on the Bar's website at http://utahbar.org/members/blomquisthale.html.

This added benefit for Division members is provided at a very reasonable cost. However, in order to offer this benefit, it is necessary to increase Division membership dues. The Board of Directors feel strongly that this is a valuable and tangible benefit for Division members and voted, without any opposition, for a dues increase of $25. The Division has not increased dues for many years now and the Board has been very reluctant to do so on prior occasions, but this really is a worthy benefit for members making the dues increase an easy decision. The Board recognizes that for some members, this increase could be a burden and may affect their ability to renew membership. If this is the case for you, please contact Kathryn Shelton as soon as possible.

Membership renewals have been sent and are due June 30th. A late fee of $25 is applicable for renewals postmarked after July 15, 2006. Please note that if you submitted your application for membership after March of this year, you will only need to remit $25 for the dues increase to continue your membership for the 2006-2007 year. All of the membership forms are available on the Division's website at http://www.utahbar.org/sections/paralegals/Welcome.html.

Also, note that the renewal documents include a volunteer form. There are many areas for involvement and the Board of Directors can definitely use your help in accomplishing all of the work that needs to be done throughout the year. Please consider getting involved.

As you know, the Division has been co-sponsoring with LAAU, monthly Brown Bag CLE in the Salt Lake area for the past couple of years. Jones Waldo graciously hosts these seminars on the 2nd Wednesday of the month and provides drinks. In addition, Ikon provides cookies for everyone. Over the past several months, the Division and LAAU have been working to provide Brown Bag seminars in the Ogden area. Due to the assistance of paralegal, Kenneth Raya with Smith Knowles in Ogden, the Division is pleased to announce the first Ogden CLE on June 21st. Brown Bags will be held each month in Ogden, on the 3rd Wednesday of the month, with the exception of July and possibly December. Seminars will alternate between Smith Knowles and VanCott Bagley in Ogden. Obviously, if you are in the area, your attendance would be appreciated. If you are interested in presenting or know of someone who may be, please contact Sharon Andersen at Sharon.andersen@slcgov.com. Likewise, if your firm is interested

in hosting a Brown Bag, contact Sharon. Presenters receive 3 hours of CLE credit for their 1 hour CLE presentation. As a simple reminder, all Brown Bag seminars are free of charge, making it very easy to add up those CLE hours required for members of both LAAU and the Paralegal Division.

As for Paralegal's Day, this year's committee did an amazing job in planning the annual celebration luncheon. The event was at the Joseph Smith Memorial Building with just over 150 people in attendance. What a turn out! Ron Yengich presented an engaging and entertaining CLE program which garnered rave reviews. In addition to our regular program for the day, we added the presentation of the first annual Distinguished Paralegal of the Year award. This award was created by the Division in conjunction with LAAU with nominations accepted from attorneys and paralegals. The Nomination Selection Committee consisting of Judge David Nuffer, Katherine Fox, Charlotte Miller, Suzanne Potts (Paralegal Division representative), and Lorraine Wardle (LAAU representative), was charged with reviewing the nomination forms and selecting the award recipient. Lonnie Dawson, a paralegal with the Summit County Attorney's Office, was this year's recipient. Summit County Attorney, David Brickey, nominated Lonnie on behalf of the attorneys at his office. I had not met Lonnie prior to Paralegal's Day at the time of her award presentation, so I do not have personal knowledge of her accomplishments as a paralegal. Therefore, I refer to the information provided by Mr. Brickey who nominated Lonnie due to her "unparalleled professionalism and excellence." "Lonnie exhibits compassion, professionalism, and tact in dealing with the various personalities that come through the door, and our office routinely receives compliments on the way Lonnie performs her duties." According to Mr. Brickey, all of the attorneys at his office use Lonnie as a model for their own work ethic and disposition. It is apparent from Mr. Brickey's nomination that Lonnie is an invaluable asset to his office and that she exemplifies the best qualities of a paralegal. The Division was pleased to present her with the first Distinguished Paralegal of the Year Award.

This award is intended to be an annual presentation, which means that you should expect to see nomination information circulated next Spring. This award is not restricted to members of either LAAU or the Paralegal Division. I am sure that we all know someone who should be nominated for this award, so be prepared!

A helping hand is *still* just a phone call away

Lawyers Helping Lawyers remains committed to providing confidential assistance to any Utah attorney whose professional performance may be impaired due to depression, substance abuse, or other problems. LHL believes that by accepting the responsibility to help those in need we help to save the lives and law practices of impaired attorneys. If you need a helping hand, please call.

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See Rule 8.3,
Utah Rules of Professional Conduct.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
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
08/17/06	**NLCLE: Immigration Law Primer.** 5:30 – 8:45 pm. $55 YLD members, $75 others.	3 CLE/NLCLE
08/25/06	**Annual Securities Law Section Seminar.** Downtown Marriott, 8:30 am – 5:00 pm. $110 section, $150 others (includes lunch). KEYNOTE: Patrick Byrne, CEO, Overstock.com. Venture financing. Avoiding mistakes in Rule 506 filings. Executive compensation. Roundtable on new reporting obligations and other corporate issues. Panel on recent enforcement topics. Updates from the SEC and Utah Division of Securities. Please contact Mark Pugsley (mpugsley@rqn.com) if you have any questions.	
09/08/06	**Utah County CLE & Golf Event.** 8:00 am – 12:00 pm. Litigation & CUBA members: CLE & Golf – $45, CLE only – free. Non Litigation or CUBA members: CLE & Golf – $85, CLE only – $30.	3 Ethics
09/21/06	**NLCLE: Family Law.** 5:30 – 8:45 pm. $55 YLD members, $75 others.	3 CLE/NLCLE

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

REGISTRATION FORM

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

Registration for (Seminar Title(s)):

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Name: _____ Bar No.: _____

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Large Salt Lake City law firm seeks associate with 3 to 7 years experience in bankruptcy and litigation. Strong research and writing skills are required. Salary negotiable depending on experience, with excellent benefits. Must be a member of the Utah State Bar or be willing to become a member within one year. Please send resume to Christine Critchley, Confidential Box #2, Utah State Bar, 645 S 200 E, Salt Lake City, Utah 84111 or respond via email to ccritchley@utahbar.org

Alcala Law Firm, PC is seeking a permanent Foreign Legal Assistant for SLC Office. Duties: Provide legal advice, perform legal research on Venezuelan corporate/Immigration law; Advise multinational clients on Venezuelan law issues affecting business operations; Draft legal memoranda; Review contracts; Manage negotiations involving Venezuelan law. Develop strategies on immigration matters such as American temporary work. Coordinate representation of firm's Venezuelan corporate/non-corporate clients. Must be bilingual and fluent in Spanish/English. Must be licensed to practice law in Venezuela; Must possess Master of Law from accredited American University. 40 hours a week. Salary: $21.43/hour. If interested, fax resume to (801) 886-2007 C/O – James Alcala

PacifiCorp Energy, a division of PacifiCorp, in Salt Lake City, UT, is seeking a Senior Contracts Attorney reporting to the general counsel; providing overall legal advice and assistance on resource development and contracting issues and a wide range of legal issues. Full job description online. Requires 7 years law firm or in-house counsel experience, w/Juris Doctorate. Energy or utility industry experience preferred. Applications may only be accepted on-line. Visit our web site at www.pacificorp.com to apply for job# 060500. All employment offers are contingent upon successful completion of background check/drug screening. PacifiCorp is an equal opportunity employer.

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Rocky Mountain Power, a division of PacifiCorp, in Salt Lake City, UT, is seeking a Senior Regulatory Attorney reporting to the general counsel; providing overall legal advice and assistance on state regulatory issues and a wide range of legal issues. Full job description and requirements online. Requires a minimum 7 years law firm or state/federal regulatory experience, w/Juris Doctorate, and utility experience. Applications may only be accepted on-line. Visit our web site at www.pacificorp.com to apply for job# 060494. All employment offers are contingent upon successful completion of background check/drug screening. PacifiCorp is an equal opportunity employer.

Salt Lake Legal Defender Association is conducting interviews for trial and appellate attorney positions. Eligible applicants will be placed on a hiring roster for present and/or future openings. Salary commensurate with criminal experience. Spanish speaking applicants are encouraged. Please contact F. John Hill, Director, for an appointment at (801) 532-5444.

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

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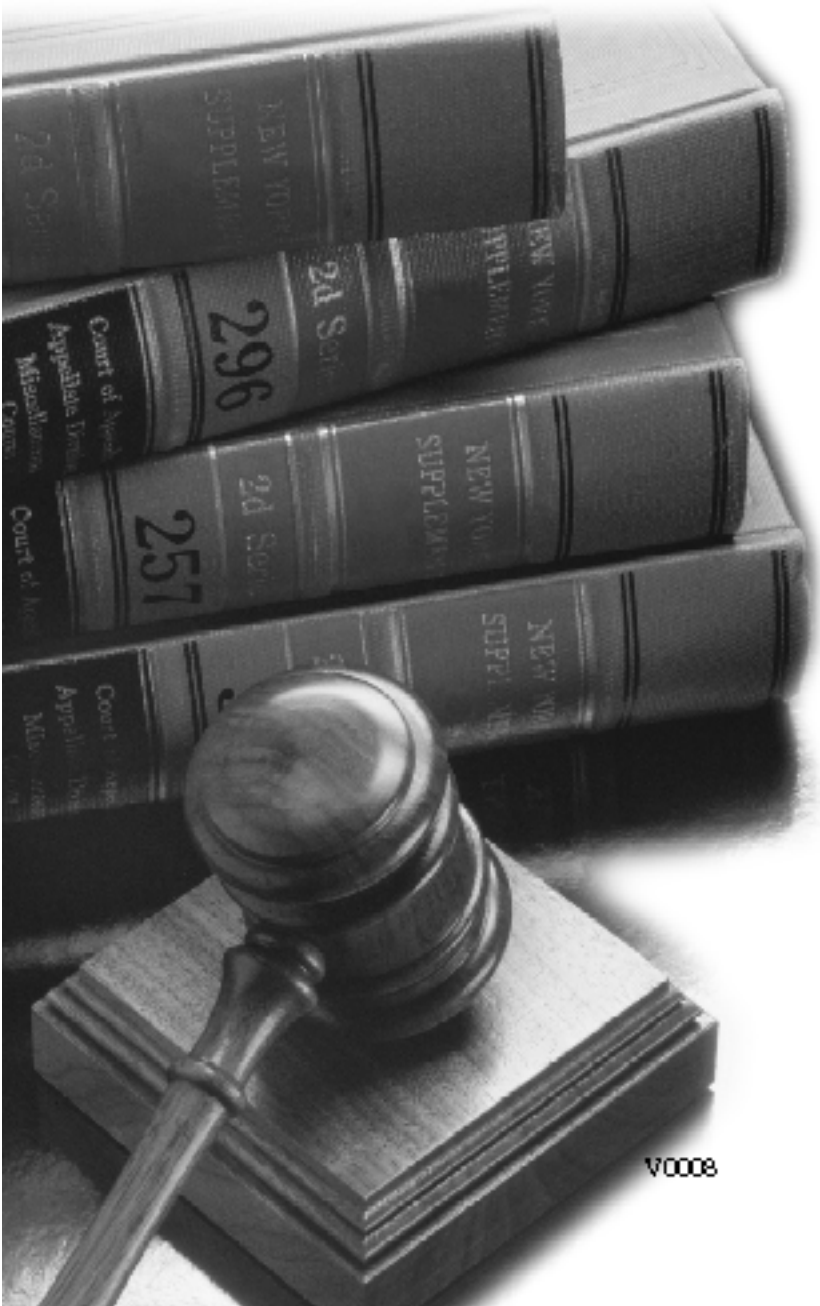

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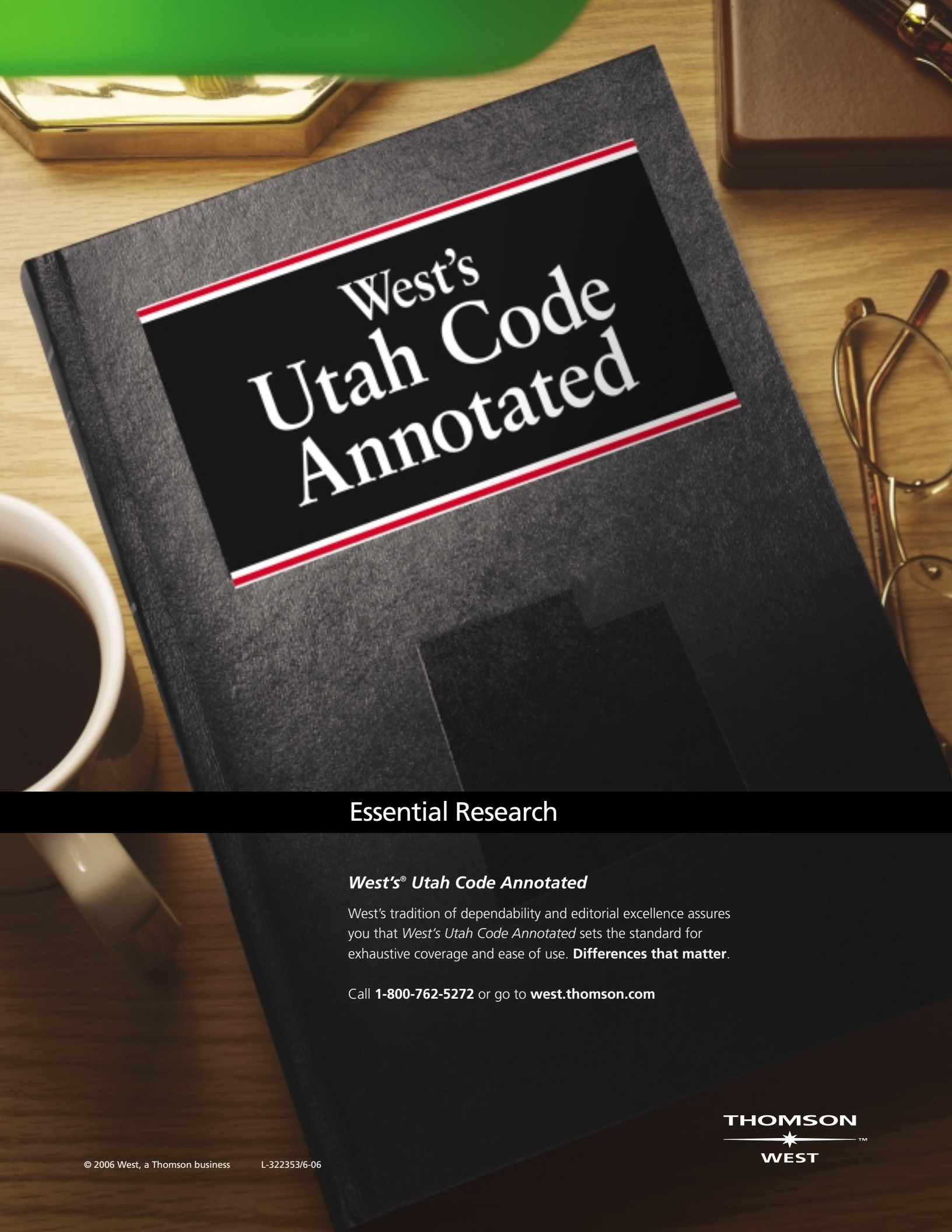

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