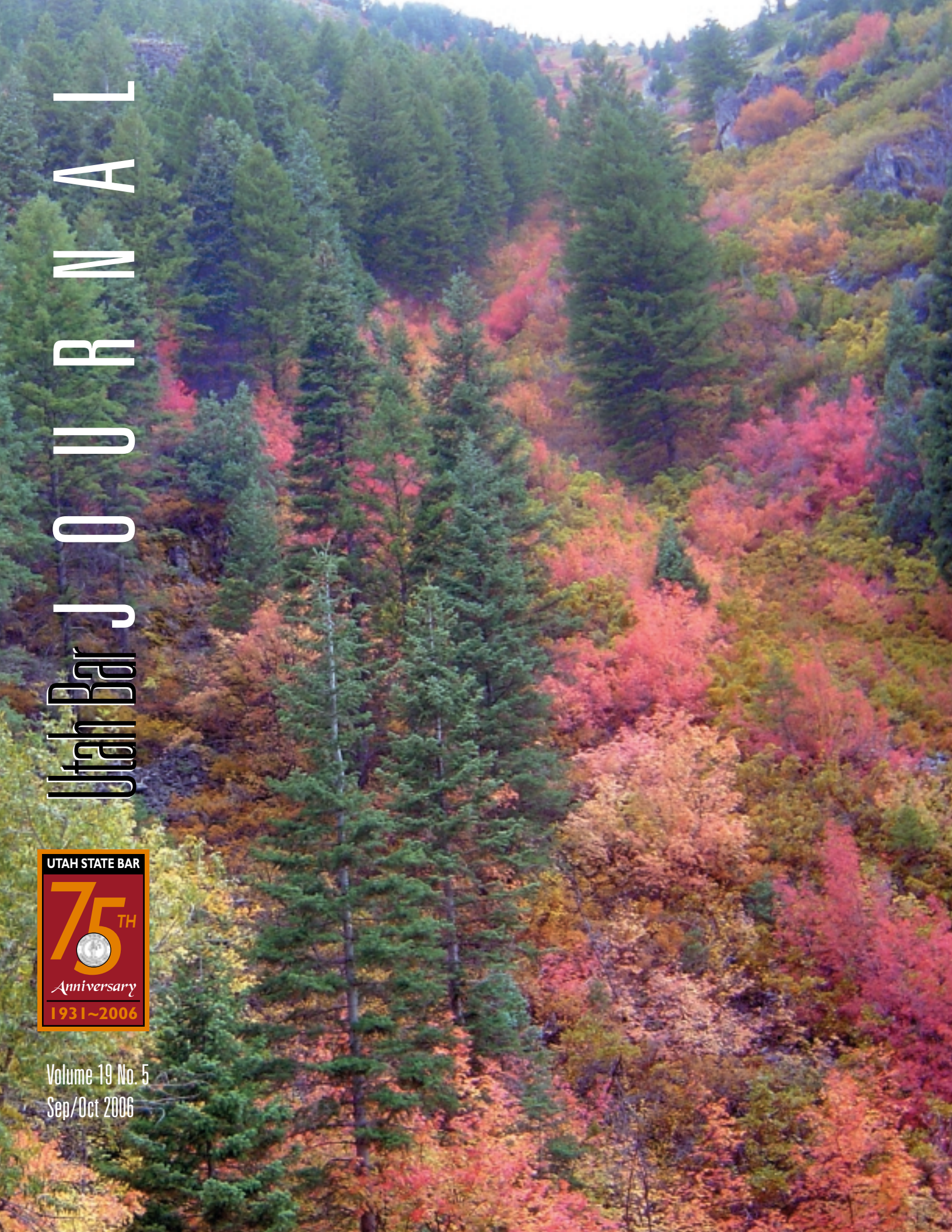
Utah Bar JOURNAL



UTAH STATE BAR
75TH
Anniversary
1931~2006

Volume 19 No. 5
Sep/Oct 2006

Verdicts that have our defendants seeing red.

the personal injury practice group of

PRINCE•YEATES

Utah's largest medical malpractice verdict
Utah's largest wrongful death verdict

175 East 400 South, Suite 900 • Salt Lake City, UT 84111 • (801) 524-1000

Table of Contents

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

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

COVER: Wheeler Canyon in September, by first time contributor Nathan Lyon, Weber County Attorney's office.

The *Utah Bar Journal* is published bi-monthly by the Utah State Bar. One copy of each issue is furnished to members as part of their Bar dues. Subscription price to others, $30; single copies, $5. For information on advertising rates and space reservations visit www.utahbarjournal.com or call Laniece Roberts at (801) 538-0526. For classified advertising rates and information please call Christine Critchley at (801) 297-7022.

Statements or opinions expressed by contributors are those of the author and are not necessarily those of the *Utah Bar Journal* or the Utah State Bar. Publication of advertisements is not to be considered an endorsement of the product or service advertised.

Utah Bar JOURNAL

Volume 19 No. 5
Sep/Oct 2006

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 photographs, along with a description of where the photographs were taken, to Randall L. Romrell, Esq., Regence BlueCross BlueShield of Utah, P.O. Box 30270, Salt Lake City, Utah 84130-0270, or by email to rromrell@regence.com if digital. If non digital photographs are sent, please 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

Published by The Utah State Bar
645 South 200 East • Salt Lake City, Utah 84111 • Telephone (801) 531-9077 • www.utahbar.org

Powerful Client Development resources …

Such as Martindale-Hubbell®, the #1 service for identifying expert counsel

exclusive Research Solutions …

Including *Shepard's*® and The Wall Street Journal Online in association with *LexisNexis*®

customizable Practice Management tools …

Fully integrated services to drive productivity and profitability

the only NITA® endorsed Litigation Services …

Covering the litigation process in the way that litigators work

Where do you find them?

LexisNexis® Total Practice Solutions

lexisnexis.com/tps

A MEMBER BENEFIT OF

TOTAL PRACTICE SOLUTIONS

Client Development | Research Solutions | Practice Management | Litigation Services

AL9172

Mr. Gray Goes to Washington

by Brett J. DelPorto and Jeffrey S. Gray

MR. GRAY: . . . [T]he defendants in this case were the adults inside the home.

JUSTICE STEVENS: Oh, they charge that the adults were intoxicated.

MR. GRAY: Yes.

JUSTICE STEVENS: Well, that's a serious crime in Utah I guess. (Laughter.)

MR. GRAY: We anticipated that comment actually. (Laughter.)

JUSTICE STEVENS: And what's your response?

When Jeff Gray first announced he was appealing *Brigham City v. Stuart* to the United States Supreme Court, the response from colleagues in the Criminal Appeals Division of the Utah Attorney General's Office was immediate. Congratulations. The obligatory "high five." Some even named Jeff as a personal hero.[1]

Privately, however, the mood was a bit more subdued. The United States Supreme Court? The big guys? Virtually every case handled by the office goes no further than the Utah Supreme Court. By one estimate, the State's last cert petition to the U.S. Supreme Court on an issue of criminal law was 17 years ago. And that one was denied. What chance do we have now? Shouldn't Jeff just let this one go?

"I never thought he'd get cert, but it couldn't hurt to try," said Assistant AG Joanne Slotnik. But "[w]hen Jeff aggressively garnered so many states as *amici,* I felt much more encouraged."

Ultimately, the U.S. Supreme Court not only granted cert, but also agreed with Jeff about as thoroughly as the court agrees on anything. By a 9-0 vote, the court adopted the State's position and, in doing so, clarified the scope of warrantless searches under the emergency aid and exigent circumstances doctrines.

Now, five months later, it's time to ask a pertinent question: What was he thinking?

In a sense, the saga began on February 18, 2005, the day the Utah Supreme Court weighed in on *Brigham City v. Stuart.* It is fair to say this was not a good day for anyone in the office, Jeff in particular. Jeff had received the customary phone call the day before informing him that the opinion was to be released the next day. Accordingly, Jeff arrived at work bleary-eyed from a fitful night of worrying about the case and a little apprehensive about the strong possibility that he was about to get skunked.

"I'm usually a sound sleeper, even when I have something important the next day. But it had taken more than eight months after oral argument for the Court to issue an opinion, and oral argument had not gone well. This was an important case we could not afford to lose. Officers deal with domestic violence on a daily basis. I felt a loss would severely hamper their ability to effectively deal with violence. I was already thinking cert."

In taking the case to the Utah Supreme Court, Jeff had hoped to undo at least some of the concerns raised by earlier rulings from the trial court and then from the Court of Appeals. In the State's view, the legal issues presented in *Brigham City* were very straightforward. Should police officers be required to wait until violence becomes life-threatening before entering a home in order to break up a fight? Brigham City police had responded to a loud party complaint at 3 a.m.[2] When they arrived, they quickly determined that some kind of physical altercation was occurring

BRETT J. DELPORTO is an assistant Utah attorney general in the Criminal Appeals Division. In a former life, he spent 10 years working as a journalist and editor for the Deseret News.

JEFFREY S. GRAY is an attorney with the Utah Attorney General's Office, where he has served for eleven years. He is currently a member of the Search and Seizure Team in the Criminal Appeals Division.

inside. Their investigation led them into the back yard. After entering the back yard, the officers watched through windows and a screen door as four adults attempted to pin a juvenile against a refrigerator. When the juvenile freed his hand and socked one adult in the nose, the officers opened the screen door and yelled "Police!" When no one inside heard, the officers entered the home and stopped the fight. In addition to arresting the juvenile, the officers arrested the adults, who were charged with contributing to the delinquency of a minor, disorderly conduct and intoxication.

Defense counsel filed a motion to suppress all the evidence seized inside the home, claiming the search was illegal under the Fourth Amendment to the U.S. Constitution. Brigham City countered that the search was legal because the officers entered the home based on probable cause – an ongoing assault – and exigent circumstances. The trial court disagreed, holding that the officers should have knocked, even though the "loud, tumultuous thing going on" inside would probably have made it impossible for anyone to hear a knock.[3] The trial court granted the motion to suppress and the Utah Court of Appeals affirmed.

It was at this point that Jeff became involved. Because the case concerned misdemeanors, the matter was not handled initially by the AG's Criminal Appeals Division, which generally handles appeals of felonies only. But in the wake of the Court of Appeals' *Brigham City* opinion, it became clear that the case was, from the Office's perspective, a precedent that needed to be overturned.

After receiving authorization from the Brigham City Attorney, Jeff petitioned for certiorari to the Utah Supreme Court, which was granted. This was taken as a positive sign. However, any initial optimism about the court's decision to accept cert was largely dissipated after oral argument.

The court's *Brigham City* opinion was disappointing, but not entirely surprising. By a 3-2 margin, the Utah court affirmed the Court of Appeals' decision, but with a new component. The court agreed that there were no exigent circumstances warranting the officers' entry into the home.[4] The court also concluded that the entry was not justified under the so-called "emergency aid doctrine" – a theory the State had not briefed. According to the Court, "the circumstances known to the officers at the time of entry did not create a reasonable belief that emergency aid was required."[5]

As explained by Fred Voros, Criminal Appeals Division Chief, the court's discussion of the emergency aid doctrine was "a little unexpected. Although the dissenting opinion in the court of appeals had suggested that the officers' entry was justified by Utah's emergency aid doctrine, we had made a strategic decision not

to argue it. In fact, the words 'emergency aid' did not appear in our brief."

It's fair to say that Jeff was miserable. *Brigham City* was a fairly constant topic of conversation and Jeff immediately wanted to take the case to the ultimate tribunal. But petitioning for certiorari to the U.S. Supreme Court is a daunting task. By some estimates, the Court receives more than 6,000 petitions a year. Yet, it grants only about 100. The cert petition is perhaps the single most important document to be filed with the Court. Telling the Court why the opinion was wrong is important, but insufficient. The petitioner must convince the Court that the case is of widespread importance. A former Chief Justice explained it this way: "What the Court is interested in is the actual, practical effect of the disputed decision – its consequences for other litigants and in other situations. A petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court. If it only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose."[6]

Given this task, the decision to file a cert petition was not immediate.

"At this point, Jeff proposed filing a cert petition in the United States Supreme Court," Voros recalled. "I told him I didn't see how we could interest the Court in such a fact-bound case. I didn't see a broad issue of national importance in it. I was convinced that our court had ruled incorrectly, but that's not enough to interest the Supreme Court in a cert petition. Jeff retreated to his office to think about it."

About a week later, Jeff suggested that the Supreme Court might be interested in addressing the emergency aid doctrine. Researching the issue for the first time, Jeff discovered a split in both the states and the federal circuits on the question of how the emergency aid doctrine works. "Nothing catches the Supreme Court's attention faster than a circuit split," Voros noted. "We had an issue. We were on our way."

After filing the cert petition, the next order of business was finding a state willing to file an *amicus*, or "friend of the court," brief on our behalf. The importance of *amicus* support at the certiorari stage cannot be overstated. One study has shown that the participation of an *amicus* at the certiorari stage increased the acceptance rate from 8.5 percent to 26.7 percent.[7] The National Association of Attorneys General (NAAG) has found that the acceptance rate is even greater when a petitioning state receives *amici* support. Some states expressed passing interest, but there were no willing participants until Voros called his friend, Tim Baughman, an attorney with substantial Supreme Court experience from the Wayne County Attorney's Office in Michigan. Baughman agreed and, in about four hours, hammered out a proposed brief. In the ensuing week, two additional counties and attorney generals from sixteen states agreed to sign onto the brief. A couple of key states agreed to sign on after Mark Shurtleff made some personal telephone calls to his fellow attorneys general.

On Friday morning, January 6, 2006, the court responded. The petition was granted.[8]

"I think we all knew when the Supreme Court would conference on the case, and so I think we knew the day, or at least approximate day, when Jeff would hear if cert was granted," recalled Chris Ballard, an assistant attorney general in Criminal Appeals. "Both Joanne [Slotnik] and I were in our offices, adjacent to Jeff's, when the call came. I remember both of us listening very carefully when the call came. Jeff was calm and collected on the phone. I remember him saying something like, 'Yes. Okay. Thank you.' Then he hung up and I heard Jeff say, in an almost disbelieving tone, 'They granted. They granted it.'"

Jeff's take was a little different: "When our secretary, Lee Nakamura, informed me that a clerk from the U.S. Supreme Court was on the line, I could hardly contain myself. However calm I may have seemed on the telephone, I was bursting with excitement inside. This was so important for law enforcement and, for me, it was a personal dream come true."

Even though Jeff had argued the case in the Utah Supreme Court

as well as preparing and filing the petition for certiorari, it was not a given that he would be the one to argue the case in the U.S. Supreme Court. In many states, the attorney general him – or herself argues cases in the high court as a matter of course. Utah Attorney General Mark Shurtleff considered making the argument, but ultimately deferred to Jeff.

"To be honest, my elation at the cert grant was tempered when Attorney General Mark Shurtleff told me in an email that I would have to 'arm wrestle' him for the opportunity to argue the case. I had vigorously pursued the case since learning of the Court of Appeals opinion, I was passionate about the law, and arguing before the Supreme Court was a dream I never imagined would be within my grasp. Yet, I knew who had the 'might' to win an arm-wrestle. Mark was, after all, my boss and the official publicly elected to represent the State. He would be well within his rights to argue the case."

(L–R): Brett DelPorto, Marian Decker, Joanne Slotnik, Jeff Gray, Lee Nakamura, Laura Dupaix, Fred Voros, Ken Bronston.

The following Tuesday, Shurtleff met with Jeff and Fred Voros to announce his decision: Jeff would argue the case.

"I am not typically an emotional person," Jeff recalled, "but I was overwhelmed. I will ever be grateful that Mark allowed me to pursue the case to its end. I know it was a difficult decision for him. He, too, coveted the opportunity to argue before the High Court and, he had the power to do so. Yet, he deferred to me."

With cert granted, the work began. Save for a case or two, Voros cleared Jeff's calendar for the next four months. Others within the division absorbed Jeff's normal caseload. The case was set on a tight briefing schedule. *Brigham City* was among the six cases granted that day which would complete the oral argument calendar for the 2005–2006 term. There would be no room for continuances. Jeff's brief was due February 21, the respondents' brief March 28, and Jeff's reply April 17 – one week before oral argument.

Jeff's petition for cert had merely identified the circuit split without analyzing the issue; it had not discussed the merits of emergency entries by police officers. Jeff was eager to do so in his brief. "I had never believed that the emergency aid doctrine comported with Fourth Amendment jurisprudence. It was too narrow and overly rigid. I always believed that emergency aid entries should be judged against the standard used for other safety exigencies. I did not argue emergency aid in the Utah Supreme Court because I knew that the circumstances in *Brigham City* would not satisfy Utah's narrow exception. The cert grant provided me the opportunity to challenge the doctrine."

At Fred's suggestion, Jeff created a rough timetable to follow, setting target dates for filing the joint appendix, completing brief drafts, editing, and moot courts. After Jeff finished drafting the brief, he submitted it for editing to Voros and Dan Schweitzer, head of the Supreme Court Project for the National Association of Attorneys General (NAAG). The completed brief was sent off to a Midwest publisher that specializes in Supreme Court briefs and the brief was filed with the Court.

The State received additional *amicus* support at this stage of the proceedings. In all, five *amicus* briefs were filed at the merits stage supporting Brigham City's position. Tim Baughman filed a second *amicus* brief on behalf of numerous states and counties. Briefs were also filed by the U.S. Solicitor General, the National League of Cities, the Fraternal Order of Police, and Americans for Effective Law Enforcement.

After filing his brief, Jeff immediately began preparing for oral argument. Very few get the opportunity to argue before the Supreme Court. Those who do had better be prepared. Of oral argument, Justice William Brennan said, "[O]ral argument is the absolutely indispensable ingredient of appellate advocacy. . . . [O]ften my whole notion of what a case is about crystallizes at oral argument. This happens even though I read the briefs before oral argument; indeed, that is the practice now of all the members of the Supreme Court. . . . Often my idea of how a case

shapes up is changed by oral argument. . . .Oral argument with us is a Socratic dialogue between Justices and counsel."[9]

In preparing for oral argument, Jeff participated in nine moot courts. The first few were brainstorm sessions with colleagues from the Division. Thereafter, the moot court sessions attempted to simulate a formal appellate argument, but without the time limits – Jeff wanted to field as many questions as possible. Judges for these sessions were drawn primarily from the Attorney General's Office. Before leaving for Washington, D.C., however, two moot courts were held that included judges from outside of the office. The first included retired Chief Justice Michael Zimmerman and Michael Lee, then serving as general counsel to Governor Jon Huntsman, Jr. (Lee is now serving as a law clerk to Supreme Court Justice Samuel Alito). The second was set up by the Division's law clerk, John Nielsen, who is attending law school at BYU. It included Dean Kevin Worthen and Professors Margueritte Driessen and John Fee. By this time, the respondents had filed their brief and Jeff had submitted his reply to the publisher for printing and filing.

Jeff and Fred flew to Washington, D.C. the following week – six days before the day of oral argument. On Wednesday, they visited the Supreme Court and listened to two oral arguments. This gave them a feel for the justices and the general tenor of the proceedings. On Thursday, Jeff participated in a moot court sponsored by NAAG, comprised primarily of former law clerks to U.S Supreme Court justices. The next day, he participated in a moot court session at Georgetown Law Center. Patricia Millet, who wrote the *amicus* brief on behalf of the Solicitor General's Office, participated as a judge in both moot courts. She was among the State's staunchest allies, but proved to be the most aggressive moot judge. Her contributions were invaluable.

After the moot courts, Fred and Jeff hunkered down trying to fine tune the argument. But by Sunday, Jeff's will to continue his preparation was gone. Jeff spent the day with friends and family enjoying some of the sights in Washington, D.C.

"Emotionally, I was exhausted from preparation. I had prepared for oral argument for four months. If I didn't have a handle on it by now, I never would. One of my 'must stops' before oral argument was the National Archives. I wanted the opportunity to see the hallowed documents that form the cornerstone of our nation. I read the Fourth Amendment, word for word, from the original Bill of Rights. At about 5 p.m., we met up with some friends at the Arlington Cemetery. It then hit me: 'What am I doing gallivanting about in Washington, D.C. when I have perhaps the most important argument of my life the following morning?' I promptly left my family and friends and returned to my hotel room, where I hunkered down for some final preparation."

When the day finally arrived, Jeff was joined at the courthouse by several colleagues who had decided to foot the bill for travel and accommodations just to see the court – and Jeff – in action. Even the division's lead secretary, Lee Nakamura, felt compelled to attend and, by arriving at 6 a.m., managed to be the first person in the pre-dawn line for members of the public to observe the argument. (Attorneys who are members of the Supreme Court bar have their own section and, mercifully, need not show up quite so early.)

Not surprisingly, there are deep-rooted formalities at the Supreme Court. Jeff and all of his supporting colleagues were advised to wear dark suits and avoid button-down shirts, which, for unknown reasons, are regarded as too flamboyant. No talking. No squirming. And sit up straight. When Jeff and Fred attended an argument the week earlier, a bailiff had actually admonished a spectator, quietly but in open court, not to sit with her elbows on her knees.

"I truly did not anticipate the awe I felt sitting in that courtroom," said Slotnik. "It surprised me completely. To have a colleague argue a case I knew so well gave the whole experience an added dimension. I would have hated missing that argument."

At precisely 10 a.m., the nine justices quickly appeared from amid the rustle of dark curtains and took seats designated to indicate seniority – the newest justices on each end. At 10:03 a.m., Chief Justice John Roberts called the case and Jeff rose to give the formal opening: "Mr. Chief Justice, and may it please the Court. . ."

Despite these formalities, the actual argument was surprisingly informal. "It was the argument you might have expected from a group of brilliant laypersons armed with the facts of the case and one rule: the police must act reasonably," said Voros. "They were friendly, showed some humor, and asked a lot of difficult questions. Except for the number of justices, it was not unlike an argument before the Utah Supreme Court."

Jeff spoke for about one minute before the questions began to fly. Justice Ruth Bader Ginsburg wanted to know why the police had not attempted to obtain a telephonic warrant.

"The reason is where there's a violent situation, things can change in seconds," Jeff replied. "I mean, it can turn deadly in seconds. They don't have time. Even though a telephonic warrant would certainly be a more speedy process of getting a warrant, it's not speedy enough where punches are being thrown."

Justice Antonin Scalia wondered whether actual violence was always necessary. "[Y]ou don't really mean that if they saw somebody inside with a gun and they heard him saying, I'm going to shoot you in 2 minutes, since they could have gotten a telephone warrant, they would have to had to get a telephone warrant?"

Jeff replied that actual violence or the threat of imminent violence was probably necessary for a warrantless entry. Interestingly, as the argument continued, it became clear that some members of the court seemed to favor an even more lenient standard that would allow police to enter simply because of the noise.

Chief Justice Roberts pursued this theme: "If the noise is the cause of their being there and if the noise is so loud at 3:00 in the morning that it's still continuing and nobody can hear the knock on the door – they knock on the door several times and shout – would they not have the right to go in then to quell the noise?"

"Absolutely," Jeff responded. "All that I am maintaining is that they would not be justified under a safety exigency to go in. Certainly to – as far as disturbing the peace, then yes, but not where the proffered justification is safety."

Justice John Paul Stevens wondered just how serious injuries or the threat of injuries needed to be before police could enter under such a safety rationale. "What if a father was spanking his child, for example?"

"No," Jeff responded. "Spanking of a child would not. There's no indication under most circumstances of an intent to injure or abuse. Now, of course, if there are circumstances that would suggest abuse, then officers could go in."

Amazingly, virtually all of the questions Jeff fielded from the court had been anticipated in one form or another during the extensive moot court process. Stevens' "spanking" question, for example, had been addressed. Voros had even anticipated Justice Scalia's obscure hypothetical in which officers witness an ongoing crime of counterfeiting: "[Y]ou see a guy turning out counterfeit dollar bills, $100 bills, and can you go in right away if you see him doing that?"

"Well, it's a crime ongoing, in progress," Jeff responded. "So there certainly could be made an argument. Now, whether or not there's an exigency, I think that's doubtful because police could secure the scene and secure a warrant and then execute that warrant."

Some of the justices drew peels of laughter with their comments. Stevens' comment about intoxication being a serious offense in Utah drew thunderous laughter from onlookers, even though the basis for the charge against the Brigham City defendants had nothing to do with liquor laws peculiar to Utah.

"Normally…we think of it a – as public intoxication, and – and that's where it's usually prosecuted and where we find it," Jeff said in reply to Stevens' quip. "But intoxication [in the home] can become an offense where it disturbs others outside of the

home, and that's what happened here."

Scalia consistently drew chuckles with his dry and pointed wit. For example, he marveled at what he viewed as the trial court's "obsession" with the requirement that the officers knock, even though the ruckus from inside the house would have made it impossible to hear. The Brigham City police officer, Scalia noted, "stood at the door. He opened the screen door and said, police…,which he thought would be more effective than knocking on – on the – you know, the – the edge of a screen door, which doesn't make a very good knock."

Paul J. McNulty, Deputy Attorney General of the United States, who filed an *amicus curia* brief supporting Utah, addressed the court next. Then came the attorney for the respondents, Michael P. Studebaker.

Finally, Jeff gave his rebuttal remarks.

"The Utah court created two different tests. And under the one test, it examined whether or not the officers were primarily motivated by a desire to arrest or search for evidence. Now, the court, the Utah Supreme Court, concluded that they did – that… their motives were primarily law enforcement motives because they did not render aid. And this Court has repeatedly held that an officer's subjective motives play no part in the objective reasonableness test, and it should not do so here.

"Justice Ginsburg, you indicated that there was no suggestion of domestic violence. The Utah Supreme Court actually acknowledged that where violence is seen in a home between adults and, for example, a younger person, that there would be reason to believe that domestic violence is possibly present.… [N]ow, the court refused to look at that because there was no finding that the inhabitants or those involved were actually cohabitants. Of course, this Court has never required that officers have a certainty of the situation, only a reasonable belief, and they clearly have that.

"And in any event, whether or not it's domestic violence or some other type of violence, it's something that I believe this Court in *Mincey [v. Arizona]*[10] recognized, that officers can, and probably should…intervene in the face of violence, and that's what the officers did here."

Although it is difficult to predict the result from oral argument, those from the AG's office who attended were optimistic.

"It was clear from the argument that we had won," said Assistant AG Ken Bronston. "In that respect, the USSC is not much different than our appellate courts. That is, generally the court reveals its basic view from the bench, especially when the questioning is intensive. Here, the Court was all over respondent on the basic untenability [of the view] that the police could not react in these circumstances."

The opinion, released less than a month after argument, was gratifying for the entire Division, but especially, of course, for Jeff.

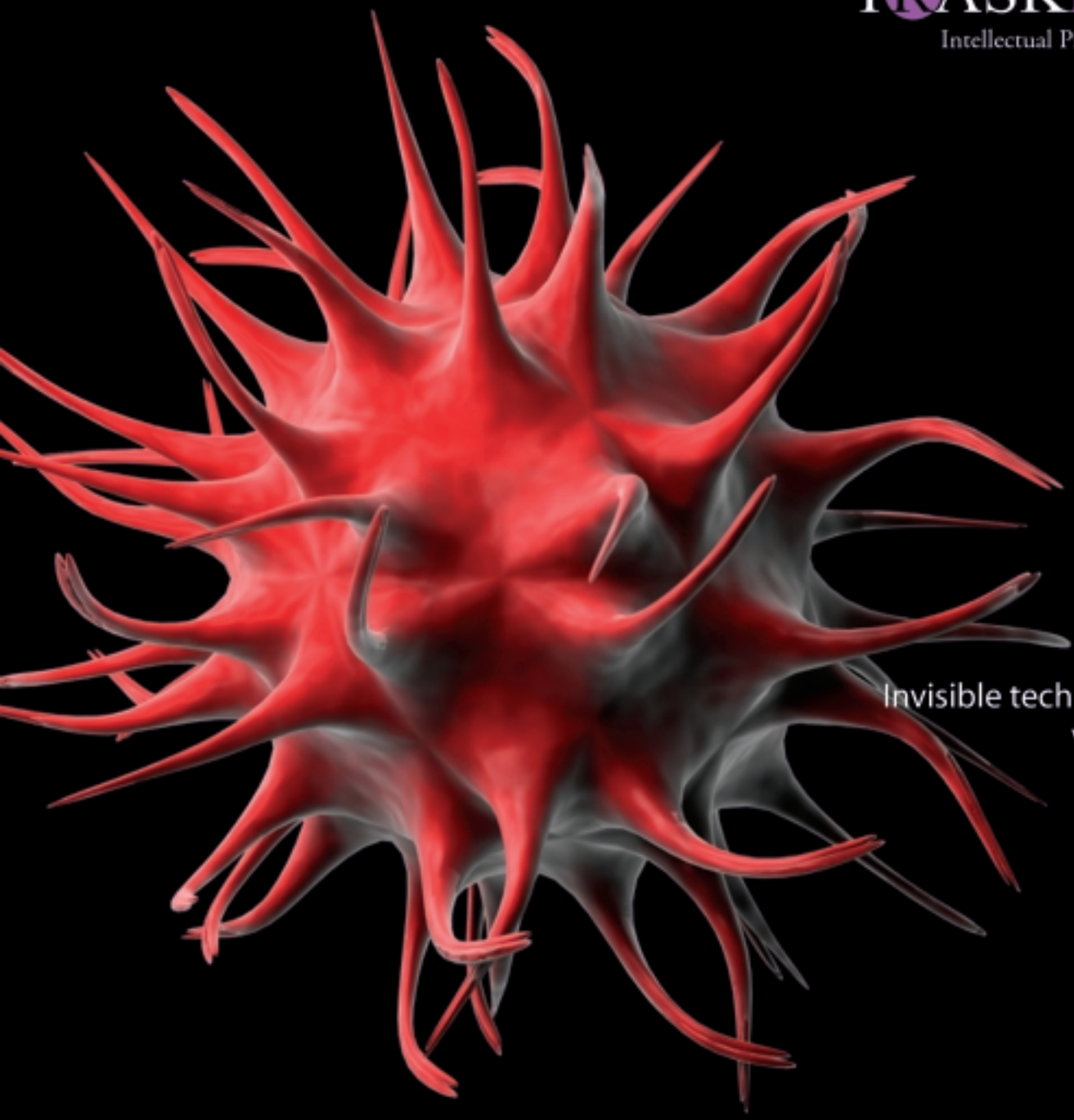
"Arguing before the Supreme Court is clearly the pinnacle of my career thus far. I was awestruck as I entered the courtroom, watched the justices file in, and fielded their questions. These nine justices were very intelligent and sober men and women. They asked practical questions and expected practical answers in return. It was obvious that they took their job seriously, cognizant of the effect their decision would have on many. I felt, in a very small sense, that I was now part of the history of this great country. I had been given the opportunity to make a difference. The effort, however, was clearly not mine alone. I owe a debt of gratitude to my colleagues at the Attorney General's Office. They suffered through my rantings, challenged my ideas, and sharpened my thinking on the case. This was a victory we all earned. But most important, it is a victory for officers who put their lives on the line each day for us and, it is a victory for all victims of violence."

1. This is an attempt to provide a somewhat intimate account of the case, which means certain biases will be evident. This is not an excuse for unfairness, however, and the authors have attempted to present a fair and balanced account.
2. *Brigham City v. Stuart,* 2005 UT 13, ¶¶ 2-4, 122 P.3d 506.
3. *Id.* at ¶ 4.
4. *Brigham City,* 2005 UT 13 at ¶ 37.
5. *Id.* at ¶ 27.
6. Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice,* at 433 (8th ed.) (quoting Chief Justice Vinson in a speech before the American Bar Association at St. Louis, September 7, 1949, 69 S.Ct. v. (1949)).
7. *Supreme Court Practice,* at 465.
8. *Brigham City, Utah v. Stuart,* 126 S.Ct. 979 (2006).
9. *Supreme Court Practice,* at 671 (quoting from *Harvard Law School Occasional Pamphlet* No. 9, 22-23 (1967)).
10. 437 U.S. 385 (1978).

traskbritt.com

traskbritt.com
1.800.900.2001

TRASKBRITT
Intellectual Property Attorneys



Invisible technology...
visible asset?

» Life science research is costly, success is all too rare, but you have IP protection - or do you? TraskBritt attorneys have the expertise to add your successful research to the bottom line.

TraskBritt. Turning your research into visible assets.

PROSECUTION LITIGATION COUNSELING

TRASKBRITT. INSIGHT FOR INTELLECTUAL PROPERTY®

www.traskbritt.com

Contact: Allen C. Turner • 230 South 500 East, Suite 300 • Salt Lake City, Utah 84102

Why Lawyers Matter

by R. Clayton Huntsman

A few weeks ago I had the honor of attending my daughter Sonia's graduation services at Willamette Law School in Salem, Oregon. The dean, and then Willamette's president, spoke to us, with a refreshing absence of cliche or braggadocio, focusing on honoring the new law school graduates and praising the profession of law. As each spoke, I couldn't help but silently assess my own legal career, soon to begin its fourth decade. As I reflected I renewed my own gratitude for the opportunity of practicing law, and reaffirmed an appreciation of our legal system and for those who labor hard in so many ways to improve and maintain it. I was pleased that another generation of accomplished and motivated lawyers was joining us, with all of their hopes for, and good faith toward, their futures.

After almost thirty years in this profession, I am still not cynical. Call me naive if you wish, but I realize that I, my lawyer-daughter, and all of us who labor in our chosen professions matter, even if only to one client at a time, whether it be a small child of divorce, a single criminal defendant or a troubled business.

I would like to share with you three of the many reasons why I believe we do matter and why we should not take our privileged positions lightly, grudgingly, or for granted. Like most of you, I'm one of the Bar's "rank and file." I'm not running for judge or vying for a promotion, so I hope what I have to say resonates with at least some of you.

Permit me a definition first, which I hope you find neither excessively Orwellian or cheesy. When I say "good lawyers," as I frequently do in this article, I mean all of us in the Bar, who I assume strive for excellence as a matter of routine. No one tries to be a bad lawyer. I assume we all try our best, and at least try to do the right thing.

So here are three areas that matter:

A. PREVENTION

Good lawyers prevent problems. They counsel clients so that they won't end up in court, or if they already are in court, so that they will not compound their legal messes. Best of all, prevention-oriented lawyers help clear the way so that clients can build their businesses, estates, lives, and other interests more smoothly and effectively. The longer I'm in this profession, the more I value this proactive aspect of our representation.

My first exposure to the role of a good legal counselor was as a child in my own home, listening to my superintendent father as he discussed complicated problems of the multi-cultural, fast-growing Silicon Valley school district he headed. As he spoke with board members, administrators, concerned citizens and others, on the telephone or in our living room, invariably I would hear "County Counsel advises...." Or "let me check with County Counsel on that." To me, my father was the best example of knowledge, power, and decision-making that I knew. He had rocketed through Stanford University in eight quarters, earning an M.A. and an Ed.D. in record time. He then became assistant superintendent for five years and then superintendent of schools for twelve years in a high school district which ranged from the wealth of Los Altos Hills to the barrios of Mountain View. This was all during the fast-growth fifties and the turbulent sixties, thriving in a job where the average survival rate of school superintendents was just over two years. So who was this all-powerful "County Counsel" whose counsel and every blessing were constantly invoked, this disembodied voice who influenced the building of new schools, acquisition of land for future growth, teacher contracts and employment problems, bus fleets, cultural conflict, and student discipline? Of course, it was the staff lawyer for Santa Clara County, whose assignment was to provide wise legal guidance to busy school superintendents.

Now Dad could have taken the approach that we see so often – arrogance, disdain, disregard. But he did not do so; rather he sought out and listened to good counsel; prevented little problems from becoming big ones, and as a result led his district to national prominence. I learned much from my father – starting with respect for the law and legal counselors.

I have worked with "County Counsel" myself. Of course, they were not called that here in Utah, but their role and effect are the same. Sensible lawyers and decent persons like John Palmer, who represented the Washington County School District for years, come to mind. John and I quietly resolved many potentially inflammatory cases involving students' rights, employment, school prayer, property, and other issues. Good lawyers like John don't provoke unnecessary litigation or contention, but rather act to prevent problems. I learned a lot from John as I matured as a lawyer.

CLAY HUNTSMAN limits his law practice in St. George to domestic law and criminal defense law.

Of course, sometimes prevention, planning and all the best intentions cannot prevent litigation. Sometimes the corruption and crime of the Enrons and Watergates must be met head-on, multimillion dollar defenses notwithstanding. However, I believe that almost any case can be settled amicably if good and ethical advisors are retained and listened to.

B. LIFTING THE BOAT

Every time a courageous lawyer does the hard thing and battles government, corporate tyranny and others with power, money, and influence – we all benefit. Martin Luther King put it well in his classic "Letter from Birmingham Jail":

> ...Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly.... Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.

For decades lynching black people in many of our states was acceptable and went unpunished. Voting and other civil rights denials were often the cultural and legal norm. Jim Crow legislation ruled. Only through the actions of dozens of courageous and effective lawyers, such as Thurgood Marshall, were these institutionally-sanctioned practices halted. As a result, all of us became freer and less intimidated by parochial bullying in opposition to our fundamental rights and liberties as citizens.

We have a long way to go to fully integrate all of our law-abiding citizens who are "different," but as lawyers and decent persons we can try. Every time courageous lawyers like our own Brian Barnard or Dani Eyer and the ACLU of Utah confront the Goliath of institutional injustice, our civilization becomes just a little more friendly – or at least less hostile – to the disenfranchised, the marginalized, the "least of us." They do their good works despite opposition, criticism, and often hostility that comfortable lawyers representing the more popular "status quo" never or seldom know. But by advocating for the "least of us," good lawyers protect and advocate for all of us, because injustice anywhere affects justice everywhere.

It is not just in the controversial world of civil rights law that these efforts matter. Whenever a workplace act of bullying or harassment occurs; whenever a presumptuous government official abuses power, or lends a corrupt ear to special interests; whenever a child is shunned because her parents are "different" – or because she is "different" – and you do something positive about it – you then help to lift the common boat from the shoals of a smug and sometimes unjust world.

"Raising the boat" begins with honest questioning of what we see, hear, read, and presume. There is often a dark side to those cheerful exploitations we buy into and enlightenment may conceal itself in the humble shadows we bypass or ignore.

Mainstream America is now "on board" with racial equality. But are we "on board" with all forms of discrimination, including the often subtle discrimination based on gender preference or personal creed? I think not. Henry David Thoreau said it well when he was hosted by his government in the local jail for refusal to pay a poll tax to protest slavery and American aggression against Mexico. In "On the Duty of Civil Disobedience," Thoreau writes:

> ...Why does (government) not cherish its wise minority? ...Why does it not encourage its citizens to be on the alert to point out its faults...? Why does it always crucify Christ, and excommunicate Copernicus and Luther and pronounce Washington and Franklin rebels?

C. BUILDING

Closely related to our role as "counselors" and "prevention" guides is our role as legal architects, planners, and engineers. We ("good lawyers") help our clients build.

There are two equally important ways, in general, in which we do this. One is the "affirmative" act of helping a client structure something she has an interest in – a business, an estate, even a criminal defense or alcohol and drug treatment program. The second is the "negative" act of saying "no" – don't stalk your ex-wife; don't misrepresent your product or your resume; don't talk to the alleged victim; don't blow deadly toxins into the environment.

Often clients don't want to be told "no", even for their own economic or legal well-being. Their reasons and rationalizations are many and commonplace – we've all seen them: hubris, greed, control, insecurity, errant moral compass. They may resent you for being obstructionist or negative. They may even fire you and seek out counsel with more flexible ethics or less client control, someone who will say, "Yes! Yes! Yes!" I say, let them go. There's plenty of work for good lawyers, and you don't need to sell your soul to get it. If the Ken Lays and Jeff Skillings want "yes-lawyers" to approve their "creative accounting" schemes, I hope you are not among the "chosen." You can still help those who are teachable to reach their worthy goals – including an ethical criminal defense – and not enter Faustian bargains in the process.

In 1940, before I was born, and according to the abstract of deed and written narrative I still retain, my father built a comfortable home in Pocatello, Idaho where he taught school and was later dean of boys of Pocatello High School. His two sons were turning four and three. Dad did most of the heavy labor himself, as he did with our California home a decade later. But in both enterprises he relied on architects, contractors, electricians and plumbers. As self-reliant as he was, and taught his sons to be, Dad had the good sense to take counsel from the pros and to defer to their expertise.

Our favored clients are much like that. They do the labor, the "heavy lifting" in their lives, but they rely on us for the legal guidance and expertise needed for them to build. This is true in both a "micro" and "macro" sense. Good lawyers help build lives, reputations, estates, businesses, subdivisions, communities, complex physical and economic infrastructures, interstate commerce, and nations. We help our clients build "for the good," to "pursue happiness" in ethical and socially responsible ways. Good lawyers would no more help a client steal, cheat, maim, or kill than those my father relied on would have sanctioned building his house on a blue clay deposit, with no plan, no respect for boundaries or the rights of neighbors, or in violation of building codes.

So if you get a little client flack about being "negative" or "obstructionist," put it in context. Don't take it personally or feel you must assert your moral flexibility to accommodate such a client on his or her malignant terms. Without your good and responsible counsel, our clients may as well build on quicksand and it will be at least partly your fault if you fail them.

I hope to never retire from this profession. It can be stressful, but if it doesn't kill you it can make you stronger. I hope all of you can find, and preserve, the good in your respective law practices. Remember that our chosen profession provides us our independence, financial security, and above all the opportunity to counsel, build, and help "lift the boat." Each of us can do so in our different ways, and according to our respective interests, means, and abilities, because we do matter.

How to **market your law practice** *without shedding your last* **vestige** *of* dignity

The decision to market your law practice needn't be a decision to embarrass yourself or your profession. Nor need it be a decision to overcorrect with a message so stuffy it loses everyone but the most diligent reader.

If you're serious about growing your law practice, here are some solid marketing tips.

Know what you want to accomplish

Don't settle for wimpy objectives like "to get our name out there" or "to advertise because other law firms do." Decide what you want. Inquiries? Referrals? Clients? Who and what kind? How many? When? The more specific your objectives, the better you can evaluate concepts and, in turn, results.

Hold marketing accountable

Track results. This lets you know when you're succeeding, and adjust when you're not.

Say something better than "we're the professionals"

Imagine overhearing, "I recommend my law firm because they're *so professional.*" Come on. You're more likely to hear "their knowledge in this area excels" ... "they explain my options so I understand" ... or "they're tenacious bulldogs who fight for me." Because you're attorneys, professionalism is a given. Talk about what makes your firm *unique*.

Say enough

No law says ads must be short. Your market will gobble up a well-written, relevant ad, even if it fills a page. Incidentally, by the end of this paragraph, you'll have read 222 words.

Showing off isn't marketing

Some ad writers think groan-producing puns make great advertising. Others think arresting design or concepts from left field do the trick. These methods only showcase your ad creators, not your law firm. Relevance and directness always make the best strategy.

Use conversational English

Big words and long sentences don't impress. They just make ads unreadable. Earlier in this ad, we used *stuffy* instead of *pedantic* and *wimpy* instead of *ineffectual*. We've used contractions throughout. Fragments, too. And you're still reading.

Project what you wish to attract

If your ad appeals to greed, expect to hear from the greedy. If your ad exudes intelligence and charm, expect to hear from the intelligent and charming. (The first PI firm to appeal to justice and decency instead of opportunism might just attract more likable clients with stronger cases.)

Include a call to action

A good ad does more than make your presence known. It opens dialog. Speaking of which...

RESPONSE

...specializes in helping clients grow their best customers, and find more just like them. We are experienced and adept when it comes to marketing law firms. For more information and a free copy of *The New Yorker Book of Lawyer Cartoons*, please call 801-352-9100 and ask for Steve Cuno. For information about RESPONSE without actually having to talk with us, please visit www.responsepls.com.

RESPONSE

RESPONSE Prospecting & Loyalty Strategies, Inc.
7050 Union Park Ave. #420, Midvale, Utah 84047

For information call us now:
801-352-9100
Learn more about us at www.responsepls.com

Tax Matters: Statutes of Limitation

by Paul K. Savage

Some taxpayers still haven't recovered from their disappointment that the computers at the IRS didn't explode when the calendar rolled over to 2000, but we should all be thankful they did not. Government snafus seldom result in good news for citizens, despite the hopes and prayers of many that somehow the IRS wouldn't be able to collect taxes in the new millennium. Instead, each year taxpayers still have to count all the chickens that finally hatched in order to calculate how much Uncle Sam can lay claim to. We start our calculations by determining our gross income. Congress has defined gross income in broad terms as "all income from whatever source derived" and then provided a non-exclusive laundry list of examples, such as compensation for services, business income, interest, rents, royalties, dividends, alimony, etc. (See Section 61 of the Internal Revenue Code, hereafter "IRC"). It seems pretty simple on its face, until one realizes that hundreds of additional sections of code also come into play, not to mention the thousands of pages of regulations and rulings and innumerable interpretive court decisions.

Little wonder that Justice Learned Hand once wrote:

> In my own case the words of ... the Income Tax [code]... merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception – couched in abstract terms that offer no handle to seize hold of – leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract.... (Learned Hand, *the Spirit of Liberty* (1952), p. 213.)

The good news is that it is no crime to misunderstand the tax code. Sure, if a person fills out a tax return incorrectly it may be audited and result in a subsequent tax bill, together with interest and maybe even underpayment penalties. But to go to jail a person has to "cheat," which means that the IRS can prove that a person willfully broke the law. That is a lot different from getting confused or misunderstanding something.

Neither must a taxpayer look over her shoulder for very long. Typically, the IRS can only audit taxes for three years from the date of filing (IRC §6501(a)), but in instances where a taxpayer understates gross income by more than 25%, that statute of limitations stays open for an additional three years (IRC §6501(e)(1)(A)). One might wonder why this six-year rule only applies to omissions from gross income, but not to omissions from taxable income. For instance, why wouldn't it apply in an instance where a taxpayer overstated deductions rather than understating income? The answer revolves around the concept of why we have a statute of limitations. Life has to go on, so if the players are on notice as to what the issues are, they have to act within a reasonable time frame in order to preserve their rights. Deductions are presumed to be examined in any ordinary audit based on documentation preserved by the taxpayer, but omissions from gross income are much harder to detect in an audit. As a matter of policy, the statute of limitations bar is a little higher for taxpayers underreporting gross income. Of course, the six year rule for 25% percent omissions of income also presumes that the taxpayer hasn't committed tax fraud by filing a false return with the intent to evade tax, not filing a return, or making any other willful attempt to evade tax, in which case the statute of limitation never runs (IRC §6501(c)).

By some strange coincidence, not paying taxes illegally is governed by §6501(c), whereas not paying taxes legally, as a tax exempt organization, is governed by §501(c). In other words, not paying taxes under §6501(c) is bad, unlike not paying taxes under §501(c), which is good. If your client isn't paying taxes, pay attention to the six. As stated above, if a person or entity doesn't pay taxes under §6501(c), the statute of limitations doesn't ever run. Or, as one dissenting and disgruntled judge put it,

> [The IRS] would leave the statute open for that portion of eternity concurrent with the taxpayer's life, whether he lives 3 score and 10 or as long as Methuselah. In most religions, one can repent and be saved, but in the peculiar tax theology of [the IRS], no act of contrition will suffice to prevent the statute from running in perpetuity (*Klemp v. Commissioner,* 77 T.C. 201 (T.C. 1981)).

It is important to distinguish in this context between the afore-

PAUL K. SAVAGE recently joined the law firm Kirton & McConkie in their International and Corporate & Tax Sections, after having spent most of his professional career practicing in the Seattle area.

mentioned statute of limitations for the assessment of civil consequences, as opposed to the criminal consequences, which still carry a six-year statute of limitations. If a taxpayer fails to file a return or files a false one, a criminal prosecution can only be brought within six years of the offense, but in year seven or beyond a civil tax assessment is still possible if the case for civil fraud can be proven. From a practical standpoint, however, making a case for tax fraud after more than six years has passed can be difficult for government authorities, unless the evidence was collected within the six year window.

What of the truly repentant tax evader? Fortunately, though the laws of justice permit a heavy hand, government policy permits a little mercy from time to time, particularly if a taxpayer confesses before getting caught. Under the IRS' "voluntary disclosure" policy, taxpayers who do the *mea culpa* before "the man" is on to them can usually avoid a criminal prosecution. That is not necessarily an easy out for a tax cheat. To be a true voluntary disclosure, the confession has to be timely and complete, and the taxpayer has to be willing to be fully cooperative in the subsequent assessment and payment of the taxes, penalties and interest. To be timely, the disclosure has to occur before a triggering event, such as the beginning of an audit, the beginning of a criminal investigation, or (controversially) even before the receipt by the IRS of an anonymous tip of which the taxpayer may not even be aware. Thus, the decision to make a voluntary disclosure, rather than simply filing amended tax returns, needs to be carefully considered based on the facts and circumstances at the time.

It should also be remembered that the statute of limitations for tax matters is tolled when a taxpayer is living outside the United States for a continuous period of six months or more at a time (IRC §6503(c)). What's more, if a taxpayer has bank accounts outside the United States, it is not just tax returns that come into play. Taxpayers with a financial interest in or signatory authority over foreign bank accounts with collective balances over $10,000 have an obligation to file a disclosure form with Department of the Treasury, under Title 31 of the United States Code. This used to be only a requirement under Title 31 (The Bank Secrecy Act), but in 2004 Congress added a civil penalty for failing to file the form under the Internal Revenue Code (Title 26). Although the penalty may be waived if the taxpayer can show "reasonable cause" for failing to file the form, the penalties under Title 31 and Title 26 can be steep. The statute of limitations for assessing penalties due to willful failure to file the form under Title 31 is six years.

In addition to the limitations imposed on the Internal Revenue Service in *assessing* taxes, the IRS is also subject to time limits in connection with *collecting* them. Once a tax is assessed against a taxpayer, the IRS can actively attempt to collect for a period of ten years. This ten year rule may seem easy on its face; however, the ten year clock doesn't even start until taxes are actually assessed. It would be too convenient to say that these taxes relate to 1996, so the drama is over by the end of 2006. A tax assessment can happen immediately after a return has been timely filed, but it can also happen later; after an audit, for example, or at any time within the statute of limitations periods for assessing taxes described above. The ten year collection period can also be tolled during a period when bankruptcy proceedings are under way, when an offer to compromise the liability for a lesser sum has been submitted and is under consideration by the IRS – forestalling collection action – or, once again, when the taxpayer is residing abroad.

It was Benjamin Franklin who proclaimed that in this world nothing can be said to be certain, except death and taxes. But as somebody once quipped, at least death doesn't get worse every time Congress meets. The good news: whether we get things wrong by accident or on purpose, there are mechanisms for setting things straight, even if it is just through the passage of time. Everyone understands that the tax code is complex, but despite its faults, the tax code seems to work for most people, most of the time (regardless of how they may feel about the rates), and somehow we all muddle through.

Bankruptcy Alternatives in the Face of Recent Bankruptcy Abuse Prevention and Consumer Protection Act

by J. Robert Nelson

I. INTRODUCTION

More than a year has passed since enactment of the well publicized Bankruptcy Abuse Prevention and Consumer Protection Act (the "Amendments") and six months since key provisions actually took effect. The Amendments appeared to make personal bankruptcies more complicated and less accessible. As to business bankruptcies, the Amendments seemed to reduce the leverage of debtors in chapter 11 reorganizations. The last six months would suggest that, as to personal bankruptcies, the Amendments have had the anticipated effect. Compared with the pre-Amendments period, personal bankruptcies are down dramatically.[1] As to business reorganizations, it is still too early to assess whether the Amendments will, as has been speculated, materially change some dynamics.

A. Burdens of Bankruptcy

Even before the Amendments, bankruptcy tended to be a course pursued only as a last resort. As to individuals, the concerns centered on the stigma of bankruptcy and the long term impact on credit worthiness. For businesses, experience showed that bankruptcy was an expensive, cumbersome and usually unsuccessful way to deal with financial pressures. Companies shied away from bankruptcy realizing, among other things, that uncertainties attendant to a bankruptcy filing would make it even more difficult to compete with companies whose continued existence was not in question.

Competitive disadvantage was not the only problem. With bankruptcy came a whole new set of players. Not only was there oversight by a bankruptcy judge but, in many jurisdictions, bankruptcy filings triggered administrative supervision by the Office of the United States Trustee. It also involved the appointment of a committee or even multiple committees to represent the interests of both creditor constituencies and equity holders responsible for monitoring the debtor's reorganization activities and, on occasion, opposing those activities and directions. Bankruptcy also implicated a new set of professionals – attorneys, accountants, financial advisors and even public relations specialists – to advise and represent both the debtor and the appointed committees. The cost of this cadre of new professionals imposed huge burdens on already financially strapped companies.

Bankruptcy also imposed its own frequently restrictive operating requirements and limitations. The "open book" philosophy of bankruptcy required debtors to file detailed operating reports, and, as a matter of course, to provide information to committees. These committees, the United States trustee and the bankruptcy court carefully scrutinized asset purchases, sales and termination of contracts; actions that might have been taken without substantial oversight before bankruptcy. This was a high price for the protection that bankruptcy offered.

If cost and added scrutiny were not enough, many debtors quickly realized that bankruptcy came with its own time pressures. Even before the Amendments, the Bankruptcy Code, 11 U.S.C. § 101 et seq., imposed numerous statutory deadlines. These included deadlines to perform under certain leases (11 U.S.C. § 365(c)(5)), to assume or reject contracts and leases (11 U.S.C. § 365(c)(4)), to resume payments to real estate secured creditors (11 U.S.C. § 362(d)) and to file and confirm plans of reorganization (11 U.S.C. § 1121).

Given these burdens and demands, it was small wonder that so few businesses that sought chapter 11 relief successfully reorganized and emerged from bankruptcy. Indeed, less than one in five chapter 11 cases resulted in court -approved plans of reorganization. The vast majority of reorganizations ended in liquidation.

B. Potential Benefits of Bankruptcy

While the foregoing factors operated as clear disincentives, there were still situations in which bankruptcy was a prudent, and sometimes the only, strategy for individuals and businesses to cope with financial pressures. Bankruptcy probably offered the only effective way for large manufacturers to deal with thousands of suits stemming from asbestos contamination, defective medical products and other product liability issues. Bankruptcy frequently was the only way to deal with a contentious secured creditor

J. ROBERT NELSON is of counsel to VanCott, Bagley, Cornwall & McCarthy, P.C. His practice has focused on debtor/creditor rights and corporate bankruptcy.

positioned, because of its lien, to shut down operations. In a turn on that theme, secured creditors themselves, on occasion, would actually condition cooperation on a bankruptcy filing believing it to be the best way to control a debtor and to prevent loss of collateral value as a result of enforcement actions by other creditors. In other cases, bankruptcy, with the accompanying opportunity to prepare a reorganization plan that bound dissenting creditors under 11 U.S.C. § 1126(c), was the only practical way to deal with a disgruntled, but minority, block of unsecured creditors. Finally, bankruptcy could be an effective tool in maximizing the return on assets through a bankruptcy court-approved sale to a third party, free and clear of liens, claims and encumbrances pursuant to 11 U.S.C. § 363(f).

Because of the significant burdens and low success rates, bankruptcy practitioners and their clients historically have been drawn to other ways to address financial problems. This sensitivity and openness to non-bankruptcy solutions has also applied to creditors who likewise have recognized the potential negative impact of bankruptcy. Even secured creditors recognize that delay is a fact of life in bankruptcy. The automatic stay under 11 U.S.C. § 362 prevents lien enforcement, sometimes for a lengthy period. That delay would be less painful for secured creditors if interest continued to accrue and attorneys fees and costs could be collected in accordance with loan agreements. That frequently was not the case, however. Even if a contract provided for recovery of interest and applicable fees and costs, 11 U.S.C. § 502 limited such "additions" if the collateral was not of sufficient value to cover the entire debt. Thus, bankruptcy was particularly difficult for under-secured creditors.

For unsecured creditors, the problem with the "bankruptcy alternative" was even more acute. With less than 20% of companies successfully reorganizing, bankruptcy did not offer the best odds of being repaid and maintaining a customer.

Because bankruptcy was not a panacea, even before the Amendments, businesses and their creditors considered other options in determining how best to resolve financial problems. Some of those alternatives[2] included (1) forbearance agreements and debt restructurings, (2) composition/extension agreements, (3) deeds in lieu of foreclosure, (4) assignments for benefit of creditors, and (5) liquidations, with or without bankruptcy court supervision.

The remainder of this article will touch upon advantages, disadvantages and issues associated with each of these alternatives and conclude with a brief discussion of pre-negotiated and pre-packaged bankruptcy plans in situations in which bankruptcy presents itself as the most viable debt relief strategy.

II. SOME BANKRUPTCY ALTERNATIVES

A. Forbearance Agreements and Loan Restructurings with Secured Creditors

If a company has lender financing, financial difficulties almost inevitably lead to payment or other defaults under loan agreements, usually both. Although contractually such defaults permit creditor action, enforcement usually is not instantaneous. The "dance" which follows a default usually involves explanations and excuses, then threats (both of enforcement by the lender and bankruptcy by the borrower), and then requests either for short or long term forebearance and finally negotiation of an agreement. This "dance" reflects a recognition that the alternatives (lien enforcement and bankruptcy) are time consuming and expensive and that a negotiated solution is usually best for both sides. Because the "solution," whether temporary or permanent, rarely is immediately apparent, time is needed, without enforcement pressure, to identify the problem and the "fix," and to document appropriate changes.

Although creditor forbearance can be informal, more typically it is governed by an actual forbearance agreement which reflects the terms under which the secured creditor will defer enforcement action. Such an agreement usually includes the duration of the standstill and may dictate required interim payments, special reporting requirements and other conditions. For example, in cases involving lines of credit, a forbearance agreement may modify advance rates and other provisions. The practical effect of some modifications is either (1) to pressure a borrower to locate alternative financing, or (2) to reduce the outstanding loan by tightening credit and forcing at least a partial liquidation of collateral through a borrower's operations.

From a borrower's standpoint, a forbearance agreement is beneficial because it provides needed time to attempt to fix a problem in a way that is more flexible and less expensive than filing a bankruptcy. From a lender's standpoint, a forbearance agreement is beneficial for several reasons. It eliminates the possibility that, by failing to act promptly, the lender has waived otherwise actionable defaults. It clearly sets the "rules" that govern any forbearance. It also can, and frequently does, include a release of claims that a borrower otherwise might assert against a lender. Finally, as noted, it can be used to pressure a borrower to rationalize its operations and/or to locate alternative financing.

The goal of any short term forbearance is a long term solution to a financial problem. For companies experiencing a "minor blip," it can provide sufficient time for a company to return to profitability and to cure loan defaults. In other cases, it provides time, among other things, to locate alternative financing. When neither a cure nor a refinancing materializes, the parties must decide whether permanently to restructure the secured debt. Such a restructuring may include, among other things, a waiver of defaults, restructure of covenants, new loan advances, sometimes supported by the grant of additional collateral.

There are several legal issues associated both with temporary forbearance and permanent debt restructuring agreements. Perhaps the most significant relates to lender control of its borrower. Standard contractual covenants and restrictions necessarily impose some controls on a borrower's operations. Enforcement of those standard provisions normally does not create a legal problem. An issue may arise, however, if a secured creditor "shifts hats" and involves itself directly in operating decisions of its borrower. An example might involve a lender that dictates the specific trade creditors to be paid while a borrower is experiencing financial difficulty. Such involvement in day-to-day operating decisions may create a basis for allegations that the lender, in effect, has become a venture partner with its borrower and, as such, potentially liable for its borrower's debts.

Another problem may arise if a bankruptcy follows hard on the heels of a restructuring under which a lender has received additional collateral. In such case, unless the lender provides new consideration, the grant of additional collateral may be subject to a preference attack in the bankruptcy under 11 U.S.C. § 547.

Finally, any material changes to loan agreements could affect lien priority. Each of these factors should be considered in connection with forebearance agreements and loan restructurings.

B. Agreements with Unsecured Creditors

Out-of-court restructurings of secured debt typically are conditioned on the "stabilization" of trade debt. In a bankruptcy, trade debt is "handled" through the reorganization plan. Creditors are entitled to vote on proposed plan treatment. Acceptance of a bankruptcy plan requires the affirmative vote of a majority in

number and two thirds in amount of unsecured creditors voting. 11 U.S.C. § 1126(c). Such an affirmative vote binds dissenters if the reorganization plan satisfies several other statutory requirements, including the "best interest" standard. That standard requires that a plan provide to creditors at least what they would receive in a liquidation of the debtor's assets (11 U.S.C. § 1129(a)(9)).

The non-bankruptcy equivalent of a reorganization plan is a contractual agreement with creditors in the form of a composition, an extension, or a combination of both. A composition involves a payment of less than the full outstanding balance. An extension involves deferred payments either of the outstanding balance or some lesser amount. Composition/extension agreements are contractual understandings with each individual creditor. Unlike bankruptcy, there is no device to bind creditors who refuse a proposed treatment. Consequently, debtors normally condition any composition/extension proposal on acceptance by a large percentage of creditors so that dissenters represent such a small minority that they will not disrupt the out-of-court restructuring.

C. Liquidation of Assets

There are situations in which rehabilitation is not feasible, and liquidation is the only viable option. In such instances, a debtor's fiduciary duty to creditors requires that it act to protect and maximize the value of its assets. Although it may in some cases be the preferred means (see below), bankruptcy is not the only liquidation vehicle. In addition to liquidation through a bankruptcy, other possible liquidation approaches include the deeding of collateral to a secured creditor in lieu of a foreclosure, an assignment for benefit of creditors and self liquidation.

If there is a secured creditor, it usually will attempt to dictate the manner of liquidation. A secured creditor has rights in collateral which are implicated, particularly upon a default. Interference with those rights could expose management to an action for conversion. In recognition of that leverage, some debtors simply deed the collateral to the secured creditor in lieu of a foreclosure. Although this may be the easiest way to "wash hands" of a problem, it ultimately may not be the wisest course of action. For one thing, management's decision could be questioned by junior creditors if there is even a remote possibility that the value of the collateral exceeds the secured debt. There also are circumstances in which secured creditors actually prefer that management supervise a liquidation of the business and of their collateral. An orderly liquidation by current management, presumably operating under a restrictive liquidation budget, usually maximizes the return for all creditors.

There are instances in which management's participation either is not desirable (lack of creditor confidence) or not possible. In those cases, another non-bankruptcy liquidation option is an assignment for benefit of creditors. In this state, Utah Code Ann.

6-1-1 permits a debtor to assign all of its assets to a designated agent responsible for liquidating the assets, determining claims and distributing cash proceeds to creditors. From that standpoint, an assignment looks much like a liquidation by a trustee in bankruptcy under chapter 7 of the Bankruptcy Code. With fewer statutory and administrative restrictions, however, assignments tend to proceed more quickly than bankruptcy liquidations and at a lower overall cost. An assignment usually is not feasible if there is substantial secured debt. There are several other potential drawbacks. In bankruptcy, a trustee may exercise statutory avoiding powers to recover pre-bankruptcy preferences and fraudulent transfers and thereby increase the "pot" for distribution to creditor. An assignee does not have that power, although individual creditors do have standing to pursue fraudulent conveyance suits but for their own and not general creditor benefit. Also, Utah statutes do not provide the detailed framework for resolution of disputed claims that is available in a chapter 7 bankruptcy.

In some situations, management itself can supervise a liquidation and distribute proceeds ratably to creditors without the additional cost overlay of a bankruptcy or an assignment for the benefit of creditors. This assumes, of course, that creditors refrain from individual enforcement actions (to "get a leg up") long enough for assets to be liquidated. If enforcement actions do ensue, and assuming that management is opposed to permitting one creditor to seize a disproportionate share, either an assignment or a bankruptcy will be necessary.

If liquidation is inevitable, bankruptcy has to be considered. It can be an effective tool in maximizing liquidation proceeds. In most cases, if a seller is in financial distress, prospective purchasers will know it. Sales under distress usually depress the number and amount of offers. Prospective purchasers "look for a deal" either because the seller has limited "staying power" or out of concern for the potential "baggage" (loss of employees and customers, successor liability, among others) associated with a distressed sale. Bankruptcy can provide a solution to these problems. In bankruptcy, a sale can be effected pursuant to a court order which transfers assets to a buyer free of liens, claims and encumbrances. 11 U.S.C. § 363(f). That "protection" tends to increase offers. In addition, bankruptcy is structured to encourage competitive bidding, and that increases the likelihood of a fair market price. Not only sellers, but also prospective purchasers recognize these potential benefits. Indeed, it is not uncommon for a prospective purchaser of a distressed business to make an offer contingent on there being a bankruptcy filing followed by a court supervised and approved asset sale so that the deal is as clean as possible.

III. PRE-NEGOTIATING AND PRE-PACKAGING BANKRUPTCY PLANS

If informal restructuring proves unsuccessful, bankruptcy is probably the one way to deal with creditors and reorganize a business. Because of its disadvantages (*e.g.,* expense and lack of flexibility), however, if bankruptcy is advised, there are pre-bankruptcy steps that should be considered to expedite the process, shorten the time in bankruptcy and minimize the related cost. Negotiation, and even approval, of a reorganization plan, does not have to await the filing of a bankruptcy petition. Claim treatment can be negotiated, and even voted on, before a filing in what, in bankruptcy rubric, is known either as a pre-negotiated or pre-packaged plan. Pre-filing negotiation of the treatment of a financing bank is not unusual. Such pre-bankruptcy negotiation is more difficult with regard to bondholders and trade creditors where, instead of negotiating with only one, a debtor must deal with multiple claimants. However, even in those cases, there are numerous examples of agreements being reached pre-bankruptcy with representatives (a trustee for bondholders or a committee of trade creditor representatives) of the creditors. Although pre-negotiated plans may not be binding in a subsequent bankruptcy, they can expedite the process once a bankruptcy has been filed.

In some cases, there is sufficient time not only to negotiate the framework of a plan but to solicit actual creditor acceptance in what is known as a pre-packaged bankruptcy. The process requires an informed vote based upon adequate disclosure to creditors. Provided that the manner of pre-bankruptcy solicitation was in compliance with applicable nonbankruptcy rule, law or regulation or, after disclosure to creditors of "adequate information" as contemplated by 11 U.S.C. § 1125(a), a bankruptcy court may proceed directly to consideration of confirmation of a plan whose approval has been solicited before bankruptcy. This approach, if successful, can streamline the process to the point that a plan can be confirmed and the debtor emerge from bankruptcy in only a few months.

IV. CONCLUSION

Bankruptcy is not always the option of choice in dealing with and resolving financial difficulties. The recent Amendments to the Bankruptcy Code clearly do nothing to change that reality. Whether the goal is liquidation or rehabilitation, debtors and creditors alike recognize that there are available non-bankruptcy options. As noted, those options can avoid or minimize some of the disadvantages of a bankruptcy. However, there still are situations in which bankruptcy, even with its disadvantages, remains the best vehicle to address and resolve financial problems.

1. Lawyers who regularly handle personal bankruptcy work advise me that, as practice becomes more routine, the impact of the Amendments may not be as dire as first thought. Indeed, "means testing" a major change under the Amendments, may only be significant as to a small percentage (10-15%) of those filing personal bankruptcy.
2. Although the referenced alternatives are discussed with respect to businesses, some may be equally applicable to individual insolvencies.

Add Value
To Your Large Contingency Case

E | G | M

Eisenberg Gilchrist & Morton

Innovative solutions to your complex commercial and injury cases.

900 PARKSIDE TOWER • 215 SOUTH STATE STREET • SALT LAKE CITY, UTAH 84111
TEL: 801-366-9100 TOLL-FREE: 877-850-3030 WWW.EISENBERGANDGILCHRIST.COM

Utah Enacts the Uniform Environmental Covenants Act ("UECA")

by Steven J. Christiansen

Earlier this year, Utah State Senator Lyle W. Hillyard introduced Senate Bill No. 153 entitled, "Uniform Environmental Covenants Act" ("UECA"). S.B. 153 was enacted during the 2006 General Session of the Utah Legislature and should be of interest to anyone involved with real property or environmental issues in the State of Utah.

UECA represents one of the most recent efforts of the National Conference of Commissions on Uniform State Laws ("NCCUSL"). NCCUSL finalized and adopted UECA in August 2003. Since its adoption, UECA has been enacted by a number of state legislatures, including Delaware, Iowa, Kentucky, Maine, Maryland, Nebraska, Nevada, North Dakota, Ohio, South Dakota, Utah, West Virginia, and Wyoming.[1]

The need for a uniform law like UECA arises out of the burgeoning Brownfields movement focused on bringing contaminated and underused properties back into full productive use in the community. UECA is complementary of federal statutes like the Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Amendments")[2] and state statutes like the Utah Voluntary Cleanup Program ("VCP").[3] Among other things, these statutes seek to encourage the purchase of and investment in contaminated sites by offering defenses and alternatives to the notorious strict, joint and several liability scheme of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[4] The VCP also seeks to encourage cleanup of contaminated sites by providing procedures for voluntary cleanup of Brownfields sites using flexible risk-based cleanup levels that are selected depending on the anticipated future use of the property.[5]

The effective, long-term use of risk-based cleanup levels is dependent on the ability of site owners, the Utah Department of Environmental Quality ("DEQ"), and other parties interested in the site to create, implement, and enforce "institutional controls" at Brownfields sites. Generally speaking, institutional controls fall into five different categories: (1) proprietary controls (e.g., deed restrictions, easements, and restrictive covenants); (2) local government controls (e.g., zoning, variances, and building permits); (3) statutory enforcement controls (e.g., administrative orders and consent decrees); (4) information devices (e.g., deed notices, record notice, and notice to government agencies); and (5) engineering and access controls (e.g., pavement or caps over contamination, slurry walls, and fencing).[6]

As of May 1, 2006, institutional controls at Brownfield sites must be implemented under UECA in lieu of the Utah Environmental Institutional Controls Act which was enacted in 2003 by the Utah Legislature.[7]

Hypothetical Example of UECA in Action: For example, ABC Corporation owns an 8-acre parcel in an urban location historically used for commercial and industrial purposes. Over the years, there have been some releases of hazardous constituents at certain locations at the site where raw materials and waste materials were handled. These activities and releases resulted in some contamination of the soil and groundwater. ABC Corporation closed and cleaned up these facilities with the approval of DEQ utilizing risk-based standards that contemplate only commercial or industrial uses on certain contaminated portions of the site. DEQ is satisfied with the closure and issues ABC a "no further action" letter. ABC does not contemplate or desire residential uses on the contaminated portions of its site. A large cap is placed over a significant portion of the waste materials which have been consolidated into a corner of the site. ABC now wishes to sell the property, but is concerned that the cap and other cleanup remedies never be disturbed. ABC sells the property to XYZ Corporation with deed restrictions (i.e. an "environmental covenant") requiring no disturbance of the cap and no future use of designated portions of the property for residential purposes. An environmental covenant is prepared and signed by ABC, XYZ and DEQ. Furthermore, the environmental covenant is recorded in the county where the site is located.

In the foregoing hypothetical, ABC Corporation was motivated to clean up the site only to commercial standards because it is less expensive than cleaning the property to residential standards. Moreover, ABC reasons that so long as its deed restrictions on the site are complied with and enforced the chosen cleanup standards are fully protective of public health and the environment. ABC

STEVEN J. CHRISTIANSEN, a shareholder with Parr Waddoups Brown Gee & Loveless, focuses his practice on environmental and natural resources law.

Corporation is also concerned the designated portions of the property continue to be used only for commercial purposes to avoid possible liability down the road from a subsequent buyer who uses the site for residential purposes and claims injury.

UECA allows a seller to impose restrictions on parcels of real estate in the form of "institutional controls" or "environmental covenants" that are enforceable by the initial seller and his buyer, the state environmental agency (DEQ), the municipality where the parcel is situated, and any other person expressly granted the right of enforcement in the covenant.[8] Moreover, the environmental covenant runs with the land[9] and has a duration that is "perpetual."[10]

To be valid and enforceable, the environmental covenant must be signed by the state environmental agency (DEQ) and each "holder" or grantee of the environmental covenant.[11] The environmental covenant must also be recorded in the appropriate county – in every county in which any portion of the real estate subject to the environmental covenant is located.[12]

Since enactment of UECA by the Utah Legislature earlier this year, DEQ officials have been developing a form environmental covenant that could be used at any particular site to ensure the long-term enforceability of agreed upon environmental restrictions.

UECA is complementary of the growing strategy for dealing with environmental issues in commercial and industrial real estate situations: (1) perform environmental due diligence ("all appropriate inquiry") prior to taking title in any potentially contaminated real property to establish the foundation for qualifying for the "bona fide prospective purchaser," "adjoining property owner" or "innocent purchaser" defenses to CERCLA liability provided by CERCLA and the 2002 Brownfields Amendments; (2) as the new owner of a potentially contaminated site, obtain "written assurances" from federal and state environmental officials acknowledging qualification for the defenses to CERCLA liability on conditions of appropriate care of known contaminants and cooperation, assistance and access to environmental officials; (3) as circumstances dictate, perform a risk-based, voluntary or state directed cleanup of the site to comply with commercial cleanup standards where only non-residential future uses of the site are contemplated; and (4) utilizing UECA, impose appropriate environmental covenants or servitudes on the parcel in order to protect the seller and all subsequent buyers from future liability.

Conclusion:

The field of environmental law continues to evolve and mature through the enactment of more practical federal and state legislation. UECA is the latest example of this trend towards the creation of incentives for investing in and remediating contaminated Brownfields sites. Used properly in the hands of knowledgeable environmental practitioners, UECA can provide protections in the form of environmental covenants for owners, sellers and other parties with an interest in contaminated properties. UECA allows for intelligent, risk-based remedies at contaminated sites with the assurance of minimization of environmental liability through the imposition and enforcement of institutional controls.

1. *See* 19 Probate & Property 31 (May/June 2005), 19 Probate & Property 16 (July/August 2005), 19 Probate & Property 25 (September/October 2005); and 19 Probate & Property 32 (November/December 2005).
2. Pub. L. No. 107-118, 115 Stat. 2356 (2002) (amending 42 U.S.C. §§ 9601 *et seq.*).
3. U.C.A. §§ 19-8-101 to 120.
4. 42 U.S.C. §§ 9601 *et seq.*
5. U.C.A. § 19-8-110(5). *See also* U.A.C. R315-101 (Cleanup Action and Risk-Based Closure Standards).
6. A. Edwards, "Institutional Controls: The Converging Worlds of Real Estate and Environmental Law and the Role of the Uniform Environmental Covenant Act," 35 Conn. L. Rev. 1255, 1260-1262 (2003).
7. U.C.A. § 19-10-101 to 108.
8. U.C.A. § 57-25-111.
9. U.C.A. § 57-25-105(1).
10. U.C.A. § 57-25-109(1).
11. U.C.A. § 57-25-104(1)(e).
12. U.C.A. § 57-25-108(1).

Crimes, Truth and Videotape: Mandatory Recording of Interrogations at the Police Station

by Walter F. Bugden, Jr. & Tara L. Isaacson

It is time for the Utah Supreme Court to exercise its supervisory power to require videotaping of custodial interrogations of juvenile and adult crime suspects. This requirement should be imposed when the questioning occurs at a place of detention where videotaping equipment is available. If video recording is unavailable, an audio recording should be required. The videotaping requirement should only be excused when impracticable, and the failure to do so, excusable. Requiring electronic recording when the questioning occurs at a place of detention will provide courts the means to develop a complete, accurate, and objective record on the voluntariness of a confession. With the simple flip of a switch, the courts can be provided with a record of everything that transpires during a custodial interrogation. Recording is a reasonable safeguard which will ensure the protection of an accused's right to counsel, right against self-incrimination, and his or her right to a fair trial. Recording will also protect law enforcement from false claims of coercion and improper conduct.

I. FALSE CONFESSIONS

Confessions by juveniles and adults are "universally treated as damning and compelling evidence of guilt [that] is likely to dominate all other case evidence and lead a trier of fact to convict the defendant."[1] It is difficult for most people to understand why an innocent person would falsely confess to a crime. However, a combination of interrogation techniques, overzealousness, the length of the interrogation, isolation, police trickery and deception, and threats and promises can manipulate a rational person to rethink his denial of criminal responsibility and falsely admit guilt. Juveniles and mentally challenged suspects are the most vulnerable to psychological interrogation techniques.[2] When police induced false confessions occur, they can lead to miscarriages of justice.

The Central Park jogger case brings home the stark reality of false confessions. *People v. Wise,* 752 N.Y.S.2d 837 (N.Y. Sup. 2002). All five defendants implicated themselves as accomplices to a rape that was committed by someone else. *Id.* at 843. In this infamous case, five juveniles were convicted and sent to prison for the brutal rape of a young woman jogging through Central Park. *Id.* at 840. "Police interrogated each of the five youths separately, keeping them in custody at the Central Park Precinct for more than twenty hours before turning on the cameras for their confessions."[3] All five teens were convicted despite the fact that neither the blood nor the semen found on the victim matched any of the juveniles. *Id.* at 845. Each juvenile confessed after several hours of interrogation. However, in each case the confessor pointed the finger at one of the other teen co-defendants rather than implicating himself. *Id.* at 845-846. Moreover, none of the juveniles provided accurate descriptions of where the attack took place. *Id.* at 846. Even though there was no physical evidence and there were inconsistencies and gaps in the "confessions," the jury convicted the juveniles.

More than twelve years later, the Manhattan District Attorney, Robert Morgenthau, asked the court to overturn the convictions after a convicted rapist, Matias Reyes, confessed. *Id.* at 843-44. Reyes' confession was corroborated by DNA evidence proving that he was the rapist. *Id.* at 844.

The convictions are a prime example of the compelling and damning impact of a confession on a jury. A jury easily overlooks discrepancies between the evidence and the confession. False confessions are real and can result in miscarriages of justice.

II. ADMISSIBILITY OF CONFESSIONS

The State bears the burden of showing that an accused gave a valid waiver of his *Miranda* rights prior to making incriminating statements during custodial interrogation. *Miranda v. Arizona,*

WALTER F. BUGDEN, JR. has been a criminal trial attorney for 29 years. He is a partner in the law firm of Bugden & Isaacson LLC. Since 2000, he won acquittals in 22 of 27 trials ranging from Manslaughter, Negligent Homicide, Forcible Sexual Abuse, Rape, Aggavated Sexual Abuse of a Child to less serious like Assault and Drunk Driving.

TARA L. ISAACSON is a partner in the law firm of Bugden & Isaacson LLC. In her 10 years as a criminal trial attorney, she has won acquittals in 15 jury trials. She has argued cases before the Utah Court of Appeals and the Utah Supreme Court. Ms. Isaacson currently serves on the Board of the Utah Association of Criminal Defense Lawyers.

384 U.S. 436, 475 (1966). In making this determination, courts look at the totality of the circumstances. *State v. Hunt,* 607 P.2d 1297, 300 (Utah 1980). On appeal, a trial court's finding of a valid waiver of *Miranda* rights is granted some degree of discretion. *State v. Leyva,* 951 P.2d 738, 741 (Utah 1997).

After determining a valid *Miranda* waiver has occurred, the courts are then called upon to determine whether a confession was involuntary, unreliable, and a product of coercion. If a confession was involuntary, its admission violates the defendant's due process rights under the Fourteenth Amendment of the United States Constitution, and Article I, Section 7 of the Utah Constitution. Under the totality of circumstances test, courts must consider such external factors as the duration of the interrogation, the persistence of the officers, police trickery, absence of family and counsel, as well as threats and promises made to the defendant by the officers. Moreover, the defendant's mental health, mental deficiency, emotional instability, education, age, and familiarity with the judicial system are additional factors which must be considered.[4]

Coercive police activity is a necessary predicate to a finding that a confession is involuntary. *Colorado v. Connelly,* 479 U.S. 157, 167 (1986). However, police do not need to engage in flagrant misbehavior in order to be coercive. "Rather, subtle pressures are considered to be coercive if they exceed the defendant's ability to resist. Accordingly, pressures that are not coercive in one set of circumstances may be coercive in another set of circumstances if the defendant's condition renders him or her uncommonly susceptible to police pressures." *In Re Jerrell,* 699 N.W.2d 110, ¶19 (Wis. 2005) (citation omitted). Since the police conduct itself is inextricably intertwined with the determination of the voluntariness of a statement, it should hardly be surprising that the police are not likely to admit that they engaged in a host of coercive tactics.

III. CREDIBILITY CONTESTS; DEFENDANTS LIE, POLICE OFFICERS TELL THE TRUTH

Motions to suppress are seldom won when the defendant must persuade the trial court that he, and not the police officer, has told the truth. Instead, when defendants prevail at motion hearings, they do so most often when the judge accepts as true every word spoken by the police, but still concludes that the undisputed facts permit ruling in favor of the accused.

The judicial pronouncement delivered to the jury during voir dire that the testimony of a police officer is to be given no greater weight than the testimony of any other witness is seldom observed by the same judge when called upon to decide a suppression motion.[5] Instead, there is an unspoken bias that guides the judge when he or she serves as the trier of fact in the credibility contest

between the testimony of a police officer and the testimony of the accused. Could it really be true that the testimony of a police officer is invariably more credible than the testimony of the defendant? One only needs to remember the words of Justice Jackson in *Johnson v. United States,* 333 U.S. 10 (1948), to recognize that police have both a bias and an investment "in the often competitive enterprise of ferreting out crime." *Id.* at 14. Both police officers and defendants have an investment in the outcome of a criminal proceeding.

Without a recording to resolve the credibility conflicts between a defendant and his interrogators, the trial court is left to evaluate the credibility of these witnesses and choose which version of the unrecorded events to believe. It should surprise no one that in almost every case, the recollections and testimony of police officers will be chosen over the contradictory recollections of the defendant:

> Without a full recording to resolve the conflict, the superior court was required to evaluate the credibility of the witnesses and choose which version of the unrecorded events to believe. In each case, the court chose the police officers' recollections and determined that the confession was voluntary and, thus, admissible at trial.

Stephan v. State, 711 P.2d 1156, 1158 (Alaska 1985).

The contents of an interrogation are obviously material in determining the voluntariness of the confession. But the task of deciding what transpired in the interrogation room is a challenge:

> The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado.
>
> . . . .
>
> . . . Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.

Stephan, 711 P.2d at 1161 (quoting *Miranda v. Arizona,* 384 U.S. 436, 445, 448 (1966).

Because police officers interrogate suspects in isolated settings, without independent witnesses, a tape recording is the only effective way a defendant can level the credibility playing field. In light of the deference given to a police officer's account of what a defendant said during an interrogation, the tape recording is the essential unbiased witness.

IV. DETERMINING VOLUNTARINESS WITH AND WITHOUT A VIDEOTAPE; PICTURES DON'T LIE

Juxtaposing the determination of voluntariness in *State v. Dutchie,* 969 P.2d 422 (Utah 1998), where there was no videotape, with *State v. Rettenberger,* 1999 UT 80, where there was a videotape, demonstrates who unfailingly wins the credibility contest between a police officer and a defendant.[6] In *Dutchie,* the Supreme Court applied the totality test to a fifteen year old with attention deficit hyperactive disorder, a developmental expressive language disorder, oppositional defiant disorder, and four different psychotic disorders, one of which caused auditory hallucinations. *Dutchie,* 969 P.2d at 428. Dutchie read on the second or third grade level while the language contained in the *Miranda* warnings is equivalent to a fifth or sixth grade reading level. *Id.* Notwithstanding the foregoing, the defense expert was unable to render an opinion of whether Dutchie understood the *Miranda* warnings. *Id.* The expert was unable to make this determination largely because of Dutchie's ability to parrot back portions of *Miranda* warnings made by the interrogating detective. *Id.* at 429. In essence, although Dutchie had a below-average intelligence and psychological problems, his memory of the *Miranda* warnings were sufficient to lead the defense expert to conclude that he might have understood his *Miranda* rights. *Id.* In contrast, the State presented the testimony of the interrogating detective that Dutchie did not appear to be intoxicated or under the influence during the questioning. The detective further testified that Dutchie was responsive to the interrogator's questions, "did not appear confused or afraid, and appeared to be relaxed." *Id.*

Without a recording to resolve the conflict, the trial court sided with the detective and concluded the defendant was able to understand the *Miranda* warning. While acknowledging that the expert's testimony suggested that Dutchie's intelligence was below average and that he had psychological problems, the Supreme Court nonetheless concluded, "we think that his ability to parrot back portions of the warnings and his understanding of their meaning is sufficient to support the trial court's conclusion [that he knowingly, intelligently, and voluntarily waived his *Miranda* rights before giving a reliable, trustworthy, and voluntary statement to the detective]. *Id.* at 429. Moreover, in considering what weight should be given to Dutchie's "young and immature age" of fifteen, the court noted that Dutchie *may* have been more "experienced and brazen" than others of his age. *Id.* at 427.

The Utah Supreme Court's analysis one year later in *State v. Rettenberger,* 1999 UT 80, was decidedly different. In *Rettenberger*, the two interrogations of the eighteen year old defendant were videotaped in their entirety. There was no guesswork. This allowed both the trial court and the Supreme Court to review the actual interrogation without having to rely upon the competing memories of the defendant and the interrogating officers.

A. Susceptible Suspect

Rettenberger had attention deficit disorder, below average IQ, the maturity level of a fifteen-year-old, and symptoms of depression,

anxiety disorder, thought disorder, schizophrenia and a dependent personality disorder. *Rettenberger*, 1999 UT at

B. Lies by Police About Evidence

The police made thirty-six false statements to the defendant during his interrogation. *Id.* at ¶21. "The overwhelming majority of these misrepresentations were not merely 'half-truths' but were complete fabrications about testimonial and physical evidence of Rettenberger's guilt. *Id.* In sum, although the State, in fact, had no physical evidence implicating Rettenberger, the officer sought to convince Rettenburger that the State had an air-tight case against him." *Id.*

C. The Mr. Rogers Technique

The police also utilized an interrogation technique called the "false friend technique" whereby they represented to Rettenberger that they were his friends and that they were acting in his best interest. *Id.* at ¶24.

D. Stick and Carrot

The Supreme Court also reviewed the threats and promises made to the defendant. The record was replete with "significant references to defendant being charged with capital murder, the lethal consequences of being charged with capital murder, and the possibility of lesser charges being brought, depending upon defendant's cooperation." *Id.* at ¶29-31.

E. Video Tells the Truth

Perhaps most compelling about the suppression of Rettenberger's statement were the details of the interrogation readily available on the videotape. What is the likelihood that a police interrogator would acknowledge making thirty-six false statements to a suspect at an evidentiary hearing when there is no record of the interview? The Supreme Court decided numerous issues by quoting the actual exchanges that took place between the interrogator and the suspect. The court also determined that the trial court had "glossed over the several occasions in which the officer strongly suggested that Rettenberger would not face the death penalty as long as he confessed to the crime." *Id.* at ¶29. Finally, the court was also able to question the reliability of Rettenberger's statements since the police, and not Rettenberger, were the general source of so many of the details of his confession. Thus, the Utah Supreme Court determined,

> [A]t times the information that the officers gave Rettenberger took the form of outright instructions or demands. . . . When the officers changed the facts that they had provided Rettenberger, his story also changed. . . . By the close of the second day, the officers had directly or indirectly

> given Rettenberger virtually all of the facts that he used in his confession.

Id. at ¶41-44.

The Supreme Court noted that the district court judge reviewed the videotaped interrogations in their entirety at least four times and catalogued the numerous times that officers provided misleading information to the defendant. *Id.* at ¶8, n.2. Of course, the tapes were available to the appellate court as well. The availability of a recording permitted careful and precise review of both objective events in the interrogations and subjective characteristics that made the defendant more susceptible to manipulation by the interrogating officers. *Id.* at ¶34. The Supreme Court was particularly concerned that "Rettenberger was eighteen years old, had the maturity level of a fifteen-year old and had a below average I.Q. [since]... 'a case involving a defendant of subnormal intelligence is one of suggestibility.'" *Id.* at ¶37 (citing *Jurek v. Estelle,* 623 F.2d 929, 938 (5th Cir., 1980). The Supreme Court also noted that concerns about suggestibility were heightened by Rettenberger's symptoms of depression, anxiety and other mental disorders, which might make "him overly compliant and particularly vulnerable to psychological manipulation." *Id.*

V. SUPERVISORY POWERS OF THE SUPREME COURT

The powers of the Utah Supreme Court are defined in the Utah Constitution and by statute, and the Court has broad supervisory powers to control the course of litigation. This authority stems from Article VIII, § 4 of the Utah Constitution, which mandates that the Utah 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." Utah Const. Art. VIII, § 4. The Court has interpreted this section of the Utah Constitution to grant it inherent supervisory power and defines it as "that which is necessary to protect the fundamental integrity of the judicial branch... This power enables a court to ensure that the judicial process is not abused." *State v. Maestas,* 2002 UT 123, ¶81 (Durrant, dissenting) (*quoting In re Criminal Investigation,* 754 P.2d 633, 642 (Utah 1988)(citations omitted)). The Court has created a process "for the adoption, repeal, and amendment of rules of procedure and evidence." Utah Code for Judicial Admin. 11-101(1)(A). Under this process,

> . . . advisory committees propose changes to the rules, which are then made available for public comment prior to adoption. The process even provides an opportunity for this court, in our discretion, to adopt rules of procedure or evidence ... upon [our] own initiative and without proposals by the committees. Such rules, however, still must "be published for a 45-day public comment period."

Maestas, 2002 UT at ¶81 (Durrant, dissenting).

Thus, the Utah Supreme Court has the authority, through the Utah Constitution, to adopt new or modified rules of evidence, either upon its own initiative or through a notice and comment process.

In fulfilling its supervisory role over the admissibility of evidence and the fair operation of our courts, the Utah Supreme Court has imposed exclusionary rules in a variety of circumstances. The Utah Supreme Court has ruled that hypnotically enhanced witness testimony is inherently unreliable and inadmissible. *State v. Tuttle,* 780 P.2d 1203, 1207-11 (Utah 1989). Similarly, the Utah Supreme Court has also ruled that absent stipulation, polygraph test results are not reliable and are inadmissible. *State v. Eldredge,* 773 P.2d 29 (Utah 1989), *overruled in part by State v. Pecht,* 2002 UT 20 (overruled portion of case unrelated to polygraph test).

The integrity of the judicial system is brought into question whenever a court rules on the admissibility of a challenged confession based solely upon the court's acceptance of the testimony of one of the interested parties, regardless of whether that is the interrogating officer or the defendant. Certainly, there are numerous cases where the testimony from one side or the other is intentionally false, misleading, and self-serving. But inaccurate testimony about what happened in an interrogation room is not always the product of intentional perjury. Human memory is notoriously frail and faulty. Police officers and defendants alike forget specific facts, circumstances and statements. All witnesses remember events through the filter of their own interest in the outcome. In the absence of an electronic recording of an interrogation, it is only natural that people will interpret, reconstruct and remember events differently:

> It is not because a police officer is more dishonest than the rest of us that we . . . demand an objective recordation of the critical events. Rather, it is because we are entitled to assume that he is no less human – no less inclined to reconstruct and interpret past events in a light most favorable to themselves – that we should not permit him to be a "judge of his own cause."

Yale Kamisar, *Forward:* Brewer v. Williams – *A Hard Look at a Discomfiting Record,* 66 Geo. L.J. 209, 242-43 (1977).

VI. TECHNOLOGY READILY AVAILABLE

Police departments have long kept pace with advances in technology. The use of audio and videotapes in police interrogation rooms is the norm rather than the exception in today's society. It is to the advantage of police, citizens and the judiciary to record interrogations.

The videotaping of the field sobriety tests of a suspected drunk driver is a routine matter for the Utah Highway Patrol and some of the police departments along the Wasatch Front. The gap

between an arresting officer's description of field sobriety tests and what can actually be observed on the videotape is startling in many cases. On the other hand, a videotape that shows a defendant stumbling and slurring his speech tends to eliminate every vestige of reasonable doubt. The use of technology assists the defense and prosecutor and ultimately serves the interest of justice. Police interrogations of juveniles and adults at a place of detention can easily utilize readily available recording devices.

VII. SWELL OF SUPPORT FOR RECORDING

The veritable cornucopia of reasons in favor of recordation has prompted the American Bar Association to unanimously adopt a resolution urging legislatures or courts to enact laws or rules:

> Requiring videotaping of the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical to require the audio taping of such custodial interrogations.

A.B.A., N.Y. Country Lawyer's Ass'n, Criminal Justice Section, Report to the House of Delegates (Feb. 2004), available at http://www.abanet.org/leadership/2004/recommencations/8a.pdf.

The supreme courts in Minnesota, Alaska, and Wisconsin have utilized their supervisory authority to mandate an electronic recording requirement. *Stephan v. State,* 711 P.2d 1156 (Alaska 1985); *State v. Scales,* 518 N.W.2.d 587 (Minn. 1994); and *In Re Jerrell,* 699 N.W.2d 110 (Wis. 2005) (in cases involving juveniles). The Alaska Supreme Court states that "[a] general exclusionary rule is the only remedy that provides crystal clarity to law enforcement agencies, preserves judicial integrity, and adequately protects a suspect's constitutional rights." *Stephan,* 711 P.2d at 1164. The Supreme Court of Minnesota exercised its "supervisory power to require that all custodial interrogation of juveniles in future cases be electronically recorded where feasible and without exception when questioning occurs at a place of detention." *Jerrell,* 699 N.W.2d at 173.

In New Jersey, the Supreme Court adopted the recommendations of its Special Committee on the Recordation of Custodial Interrogations on October 14, 2005. All homicide cases must be recorded beginning January 1, 2006, and by January 1, 2007 recordings must be made when suspects are charged with crimes like murder, sexual offenses, aggravated assault and crimes involving firearms.[7]

Twenty-one states had one or more bills introduced in 2005 to require interrogations to be recorded.[8] New laws were passed in the District of Columbia[9] and New Mexico.[10] And in Illinois, an existing law was expanded.[11]

VIII. CONCLUSION

A contemporaneous electronic recording of suspect interviews at places of detention is an easy and efficient mechanism to provide the courts with an accurate and reliable record of interrogations. Recordings will prevent disputes about officer conduct, the treatment of suspects, and the statement itself. Recordation will also enable judges to conduct the nuanced reviews that the *Rettenberger* court was able to complete in resolving the admissibility issues of a challenged confession. With today's technology, the simple flip of a switch will generate a reliable record of everything that occurred during an interrogation. The quest for the "ground truth" (what actually happened) and the pursuit of justice demand nothing less.

1. Richard A. Leo and Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation,* 88 J. Crim. L. & Criminology 429, 431-32 (1998).
2. For a thorough overview of coerced juvenile confessions, see, Nashiba F. Boyd, Comment, *"I Didn't Do It, I was Forced to Say that I Did:" The Problem of Coerced Juvenile Confessions, and Proposed Legislation to Prevent Them,* 47 How. L.J. 395 (2004). The author identifies the Central Park Jogger case and others to demonstrate that false confessions by juveniles are a significant problem in this country. Id. at 403-405.
3. Michael Powell, *Reversal Sought in Central Park Jogger Case,* Wash. Post, December 6, 2002, at A1; Christine Haughney, *Central Park Rape Case Convictions In Question: Man with DNA Match Confessed Attorneys Say,* Wash. Post, Sept. 6, 2002, at A3.
4. *State v. Dutchie,* 969 P.2d 422 (Utah 1998); *State v. Rettenberger,* 984 P.2d 1009 (Utah 1999).
5. The FBI is well aware of the bias in favor of the credibility of the law enforcement officer. Notwithstanding that the FBI is touted as the most sophisticated police agency on the planet, the FBI reportedly prohibits the use of recording equipment without approval of the agent in charge of the local office. Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins,* 95 J. Crim. L. & Criminology 1127, 1137-39, n.41 (2005) (citing Fed. Bureau of Investigation, U.S. Dep't of Justice, Legal Handbook for Special Agents 14 (1987)). Many federal judges have expressed their frustration with this policy. For a more detailed criticism of the FBI practice and comments from federal judges on the practice, *see,* Sullivan, 95 J. Crim. L. & Criminology 1127, 1137-39 (2005).
6. *See,* Troy L. Booher, Note, *Youth Interrogations and the Utah Constitution,* 2001 Utah L. Rev. 777. The author asserts that failing to record interrogations of juveniles violates Due Process under Article I, Section 7 of the Utah Constitution. *Id.* at 780. In support of his argument, the author compares the outcome in *State v. Dutchie* with *State v. Rettenberger* to support his position that recording of juvenile interrogations should be mandated. *Id.* at 785-88.
7. *Report of Supreme Court Special Committee on Recordation of Custodial Interrogations,* October 14, 2005, available at http://www.judiciary.state.nj.us/notices/reports/recordation.pdf.
8. Scott Ehlers, *State Legislative Affairs Update,* The Champion, Dec. 2005, at 49.
9. In the District of Columbia, the City Council gave the police department an opportunity to develop their own guidelines for recording custodial interrogation in 2003. When the department failed to implement such guidelines, the City Council passed legislation to require recordings in cases involving violence. *See,* Scott Ehlers, *State Legislative Affairs Update,* The Champion, Dec. 2005, at 49. Although the legislation was vetoed by the Mayor, the City Counsel overrode the Mayor's action. *Id.; see,* D.C. Code §§ 5-116.01 (2006). A non-recorded statement is subject to a rebuttal presumption that it is involuntary. D.C. Code 116.03 (2006).
10. In New Mexico, the legislature passed H.B. 382. This law requires the electronic recording (audio and/or video) of custodial interrogations in felony cases. The *Miranda* warning must also be included in the recording. N.M. Stat. Ann § 29-1-16 (2006).
11. In 2003, the Illinois legislature passed legislation requiring electronic recording of custodial interrogations of juvenile and adult suspects in homicide and certain sex offenses. 725 Ill. Comp. Stat. § 5/103-2.1 (2005). The recording requirements took effect on July 18, 2005. In 2005, the legislature added DUI cases resulting in death to the list of crimes where suspects must be recorded. 725 Ill. Comp. Stat. § 5/103-2.1(b) (2005).

Stack the Cards In Your Favor.

At Southwest Trust Company, success is measured by the quality of our client relationships. While clients enjoy the benefits of our multi-billion dollar financial services organization, we still conduct business in the traditional, one-on-one, personal way. All decision-making is local, knowledgeable, and individually tailored…which makes our clients happy. Call us today.

TRUST SERVICES • ASSET MANAGEMENT • FINANCIAL PLANNING

SOUTHWEST TRUST COMPANY N.A.

Salt Lake City: (801) 297-7762 • (866) 857-0930 • Orem: (801) 221-0962 • (866) 459-0512

Recent Developments in Criminal Investigation and Discovery: Access, Disclosure and Use of Information in the Criminal Defense Realm

by Ann Marie Taliaferro

INTRODUCTORY COMMENTS

The past year has brought with it both increased questions and additional obstacles for criminal defense practitioners concerning the investigation, discovery, and ultimate presentation of the facts of their cases at a criminal trial. Changes have emerged in how criminal defense practitioners may investigate their cases. Questions have been raised regarding exactly what information discovered by a criminal defense attorney must be disclosed to prosecutors. Finally, how and when a criminal attorney makes use of that discovered information has also been the subject of recent appellate discussion. While there have been several notable and far-reaching decisions issued by Utah courts this past year, this summary of developments is narrowed to those recent court decisions which have commented upon and affected the investigational techniques and overall practice of the criminal bar.

INVESTIGATION & ACCESS TO INFORMATION & EVIDENCE

Investigation and Access to Private Documents

Some criminal practitioners voice concerns that the criminal realm is becoming inundated with our civil colleagues' rules and procedures, which may in the end cause many to forget the special protections guaranteed to criminal defendants through constitutional protections and safeguards. One such imposition of civil procedure standards in the criminal realm surfaced recently in *State v. Gonzales,* 2005 UT 72. In *Gonzales*, it came to be known that the alleged victim was undergoing psychological therapy and was on medication for a psychological condition. Therefore, the alleged victim's ability to perceive and tell the truth became a core defense issue. Appointed defense counsel served a subpoena on the University of Utah Neuropsychiatric Institute (UNI) for treatment records. After some correspondence between UNI and counsel, the records were ultimately released directly to counsel. Not long thereafter, however, UNI indicated that the records had erroneously been released and that UNI should have moved to quash the subpoena. The district court agreed, quashed the subpoenas, and further ruled that the information obtained from the records could not be used at the defendant's trial.

On appeal, Mr. Gonzales raised several issues including what the Utah Supreme Court described as the "narrow issue" as to whether the trial court erred in granting the State's motion to quash subpoenas for the mental health records. The Defendant argued that he had no duty to notify either the State or the court of his pending subpoenas, relying on Utah Rule of Criminal Procedure 14, which does not specifically require a criminal party seeking a subpoena to notify anyone of his intention. However, the Utah Supreme Court disagreed and after discussing policy concerns and victim's rights legislation, held that the notification requirement found in the civil rules of procedure applies to criminal matters *where privileged information* is at stake. *See* Utah R. Civ. P. 45(b)(1)(A). As such, the Utah Supreme Court found no error in the limited issue concerning the propriety of quashing the defendant's subpoenas.

Investigation and Access to Witnesses

Issues surrounding the questioning of witnesses during a defendant's private investigation have also arisen in a capital prosecution in which the Utah Supreme Court has recently granted an interlocutory appeal. In *State v. Wade Maughan,* District Court Case No. 051100355, Supreme Court Case No. 20060189-SC, the State moved to disqualify Mr. Maughan's court-appointed capital attorneys from the case.[1] Relevant to the scope of this article, the State argued that by questioning potential out-of-state witnesses and allegedly telling them they shouldn't speak with others about the case, the situation presented either an actual or potential

ANN MARIE TALIAFERRO is an associate attorney with Brown Bradshaw & Moffat. She practices all levels of criminal defense including misdemeanor, felony, and appellate advocacy.

conflict of interest as the alleged instruction not to speak to others may amount to "witness tampering."[2] The Defendant's attorneys countered that no instruction was ever given to witnesses not to speak about the case and that credible evidence supported their actions as at all times being both lawful and ethical. Defense counsel also asserted that the State could articulate no conflict of interest either actual or possible. Finally, the defense asserted that the investigation and questioning of witnesses is not only a duty of competent defense counsel but a guaranteed part of any accused's defense that will be chilled by the State if allowed to serve as a basis to disqualify aggressive counsel in order to hand-pick the opposition.

The trial court, without holding a requested evidentiary hearing, ultimately ruled that while the court was not making a finding that defense counsel had committed wrongdoing, there was a "reasonable possibility" that a potential conflict existed. However, in an attempt to balance the Defendant's right to be represented by an attorney of his choice, the trial court also found that any possible conflict was waiveable, but ordered the Defendant to choose one of his two appointed attorneys to remain on the case. This decision obviously begs the question that if a conflict is waiveable, it would be waiveable to both counsel and the Defendant need not choose.

Subsequently, both the State and the Defense petitioned the Utah Supreme Court for interlocutory review, which was granted May 24, 2006. This case is one to follow as it raises issues concerning a defense attorney's duty to investigate and interview witnesses and it questions the propriety of State prosecutors in seeking disqualification of those attorneys who seek to fulfill those duties.

Access and Use of Findings Made in Other Legal Arenas

Criminal practitioners know that information with evidentiary value appears in many forms, including parallel litigation involving your client. When findings and rulings favorable to your client are made in administrative proceedings, it is now an "on the books" duty of a criminal defense attorney to seek admission of that information in the client's criminal proceedings. Indeed, it amounts to ineffective assistance of counsel to fail to do so. This is the reasoning in *State v. Ison,* 2006 UT 26.

As the Utah Supreme Court characterized on certiorari review, the *Ison* appeal is the latest chapter in the saga of a Caribbean cruise that set sail in November 1995 and the alleged misdeeds of Lew Ison, the man accused of frustrating the vacation plans of would-be passengers on that cruise. Prior to his criminal trial Mr. Ison was investigated by the Utah Attorney General and the State Division of Consumer Protection (the Division) upon complaints of wrongdoing. As a result of that investigation, the Division issued a citation to Mr. Ison, to which Ison exercised his right to an administrative hearing. A hearing was held before an administrative law judge ("ALJ") who, after hearing testimony and evidence, concluded that Ison had not violated the specified statutes, had "made no misrepresentations to any passenger" and had never "assumed responsibility for the cruise and tour bookings in question." Despite the ALJ's findings, criminal charges were filed alleging felony counts of communications fraud and the case went to trial.

On appeal, the Court of Appeals considered whether the ALJ's findings were admissible and, relatedly, whether defense counsel was ineffective for failing to seek admission of those findings under Utah Rule of Evidence 803(8)(C). The appellate court concluded that the ALJ's findings were indeed admissible under the cited rule of evidence based upon a plain language interpretation of the rule. The Court of Appeals then went on to hold that defense counsel was ineffective in failing to move for admission of those findings, reasoning that since counsel was aware of the favorable decision there was simply no strategic reason for not seeking to admit findings that could have helped exonerate the Defendant. The Utah Supreme Court agreed on certiorari review. The importance of this holding is apparent, especially if prior administrative hearings (think, for example, driver's license and DOPL hearings) have rendered findings favorable to your client. As such, in investigating and representing a criminal defendant, the findings of prior or parallel administrative investigations and adjudications may become useful, if not essential, to an effective defense.

DISCLOSURE OF INFORMATION

All criminal practitioners know of the *"Brady"* duties which stem from the United States Supreme Court case *Brady v. Maryland,* 373 U.S. 83 (1963) and its progeny. In general, it is a well-established precept that the government is obligated to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. A prosecutor is also bound by both statutory and ethical duties and a prosecutor's failure to disclose material evidence violates a defendant's state and federal constitutional rights to due process. This duty, well-known to the criminal bar, has again been recently applied in *Tillman v. State of Utah,* 2005 UT 56, wherein the Utah Supreme Court upheld the vacation of the defendant's death sentence and ordered new sentencing proceedings. The Utah Court noted that the State's failure to disclose partial transcripts of interviews with key prosecution witnesses was sufficient to undermine confidence in the death sentence and thus constituted a cognizable *Brady* violation.

Criminal practitioners are also well aware of their statutory "expert notice" duties in felony cases, of which the State's failure to comply created a reversal in *State v. Torres-Garcia,* 2006 UT App 45. Therein, the Utah Court of Appeals found that the trial court abused its discretion in refusing to grant Defendant's requested continuance where the State did not substantially comply with the statutory notice requirements for expert witnesses. While the duty to disclose evidence has thus far been noted in the context of prosecutorial violations, the question has been raised as to a

Defendant's duty to disclose information to the prosecution, if any exists. *State v. McNearney,* 2005 UT App 133, brings this issue to light. In *McNearney,* the prosecutor moved for discovery under Rule 16(c) of the Utah Rules of Criminal Procedure, requesting a broad scope of information including: 1) Names, addresses, telephone numbers, and dates of birth of all witnesses the defense intended to call for trial; 2) Copies of any reports prepared by defense investigators during the course of the investigation; 3) Copies of any reports prepared by defense investigators where the defense intended calling the investigator as a witness; and 4) Copies of that portion of any reports prepared by defense investigators concerning statements made by witnesses the defense intended calling at trial. Defense counsel objected to the requests not only on the grounds of failure to show "good cause" as required by the criminal procedure rule, but also reasoning that if reciprocal discovery such as that requested were ordered, a criminal defense attorney would be impermissibly compelled to provide information against the client and to produce privileged work product. The trial court granted discovery with some modifications.

On the specific facts of the case, the Court of Appeals found that the trial court's order requiring the revelation of the witnesses Defendant intended to call did not violate his right against self-incrimination, nor the work product doctrine based upon the waiver of the privilege in the case. Importantly, however, the Court of Appeals also recognized that a trial court must analyze a prosecutorial discovery request in light of the privileges asserted by the accused and that a defendant's protection against self-incrimination prevents extensive prosecution discovery and is paramount. Moreover, the Court of Appeals *did not* determine whether the defense witness list is privileged under the work-product doctrine, nor did the appeals court decide whether requiring a defendant to produce witness statements of anticipated witnesses violates a myriad of protections including the work-product doctrine, the right to due process, the right against self-incrimination, the right to full representation of counsel, and the attorney-client privilege. Consequently, this case leaves for another day the question as to whether these types of prosecutorial discovery requests are permissible.

TIMING AND USE OF THE ACQUIRED INFORMATION

One pervasive and complicated decision a criminal attorney continually faces focuses on what to do with the information acquired through investigation, and whether such information should tactically be disclosed prior to trial. As *McNearney* above points out, criminal proceedings implicate a number of ethical duties and constitutional protections that must be safeguarded at all stages in the process.

At least with regard to cases involving sexual assaults, the Utah Supreme Court has recently held that if evidence is available that the alleged victim may have made a prior false allegation of rape, a hearing must be held pretrial at which the Defendant has the burden of showing the falsity of the prior allegation. *See State of Utah v. Tarrants,* 2005 UT 50. While a "Rule 412 hearing"[3] has been required by the Utah rules for some time, when it comes to information that the accuser has made prior false accusations of sexual misconduct in the past, the *Tarrants* Court articulated the specific standard a Defendant must meet pretrial for the admission of that evidence. Specifically, the Court held that allegations of prior false rape claims are inadmissible under Rule 412 unless their falsity can be demonstrated by a preponderance of the evidence. The Court reasoned this must be so because while evidence of false statements of past unrelated sexual assaults are not excluded by the "rape shield rule" *per se,* any potential probative value these prior allegations hold depends upon them being false.

Additionally, *State v. Cornejo,* 2006 UT App 215 (slip op.) illuminates the tactical considerations that must be made as to whether to address an issue pretrial, or instead wait until trial and object to the opposition's anticipated lack of evidence. In *Cornejo*, the accused was charged with various violations including felony DUI. Prior to jury selection on the day of trial, the parties met in chambers and at this time the defense revealed its claim that the blood draw was taken involuntarily. Defense counsel explained that he had not moved to suppress the blood sample earlier because he wanted to use the facts surrounding the involuntary blood draw to demonstrate police misconduct. Defense counsel also made the court aware of his further intent to object to the admissibility of the blood test results.

Based on this legal issue, the court intended to hold a brief evidentiary hearing prior to empaneling the jury. The State objected, contending that the issue had been waived because Defendant had not filed a motion to suppress the blood sample at least five days before trial in accordance with the Rules of Criminal Procedure. The State also requested a continuance, explaining that it was not prepared to present evidence as to the admissibility of the blood sample and had not subpoenaed the individual who had authorized the blood withdrawal. The trial court denied the continuance explaining that the State must be prepared when a trial is set, not only to present its evidence, but also to have a legal basis for the admission of that evidence. The trial court further found that the State wrongfully assumed that Defendant's failure to file a suppression motion meant that Defendant could not simply object to the introduction of the evidence at trial. The Court of Appeals ultimately disagreed and found that denial of the continuance was unreasonable. In doing so, however, the appellate court did note that while Utah Rule of Criminal Procedure 12 states that motions to suppress must be raised at least five days prior to trial or else the issue is waived, the Rule also allows the court to grant relief for cause shown.

A related issue in DUI cases has also arisen in both justice courts and district courts throughout Utah regarding "*Crawford* motions" objecting to the admission of affidavits which purportedly verify the calibration and proper maintenance of intoxilyzer testing machines. *Accord Crawford v. Washington,* 124 S.Ct. 1354 (2004). The general defense argument is that intoxilyzer affidavits are inadmissible hearsay under *Crawford*; therefore, the intoxilyzer test results are inadmissible if the certified breath test technician who maintains and checks the machine is unavailable for trial to lay the proper foundation for the results. The prosecutors argue, as in *Cornejo* above, that this issue must be raised in a "motion to suppress" at least five days prior to the trial of the matter, or else the issue is waived. The defense then counters that it is the duty of the State to lay the foundation for its own evidentiary admissions, and as such, the defense objection to admission of these affidavits is a proper foundational objection not unlike hundreds of other foundational objections made during trials everyday. At most, the request to exclude the affidavits could be considered a motion *in limine*, which is not required to be filed prior to trial.

While this timing issue, as well as the more particularized question as to whether *Crawford* applies to intoxilyzer affidavits, has not yet been decided at the appellate level, justice court and district court decisions have provided mixed results. However, the Utah Court of Appeals has recently granted interlocutory review on the issues and hopefully will provide some guidance soon.

IN SUM....

As summarized herein, recent developments in Utah law have placed additional hurdles in the path of an accused's access to information in preparation of his or her defense. The recent developments have also raised questions as to what information a defendant must provide to a prosecutor and the timing of that disclosure. Many questions remain open, however, and criminal practitioners will seek to answer these questions and continue to navigate the criminal process with not only rules of procedure and precedent in mind, but also with an eye toward upholding those inviolate constitutional guarantees afforded to those accused of crimes.

1. In the interest of full disclosure, the author's law firm aided Mr. Maughan's appointed attorneys in the preparation of briefing and argument of these issues in the district court.
2. The situation at issue is both controversial, adamantly denied, and complicated by the fact that one of the defendant's court appointed attorneys and his investigator were arrested out of state based upon their questioning of witnesses. *No charges* have been filed against either the attorney or his investigator.
3. Utah Rule of Evidence 412 is Utah's "rape shield" protection, and requires that the admissibility of an alleged victim's sexual behavior or alleged sexual predisposition be determined prior to trial and in accordance with the specified procedures of the rule.

BTJD
BENNETT • TUELLER | JOHNSON & DEERE

Attorneys

Steven W. Bennett
Alden B. Tueller*
Barry N. Johnson
Monte M. Deere Jr.**
Clay W. Stucki ***
Daniel L. Steele
Kenneth C. Margetts
Paul M. Johnson
Brent J. Hawkins ****
David M. Kono +
Ryan B. Braithwaite
John R. Barlow ++
Mark H. Richards
Shane L. Keppner
Robert K. Reynard
Taylor L. Anderson
Derek E. Anderson •
Jared L. Inouye ++++
Jason C. Hunter
J. Reed Rawson +++
Daniel K. Brough
Todd A. Reece
Jerry A. Fors

Of Counsel

Philip D. Barker
Sean A. Monson

* Also Admitted in California, New York, Connecticut and Washington State
** Also Admitted in Texas
*** Also Admitted in Colorado and Nevada
**** Also Admitted in Illinois
\+ Also Admitted in Oregon
++ Also Admitted in New York
+++ Also Admitted in California
++++ Also Admitted in Nevada
• Also Admitted in Washington D.C.

3165 East Millrock Drive
Suite 500
Salt Lake City, Utah
84121

t **(801) 438-2000**
f **(801) 438-2050**
www.btjd.com

The Law Firm of

BENNETT TUELLER JOHNSON & DEERE

is pleased to announce that on September 15, 2006 its office will be relocated to Millrock Park, 3165 East Millrock Drive, Suite 500, Salt Lake City, Utah 84121.

BTJD is also pleased to announce that **DAVID M. KONO, RYAN B. BRAITHWAITE** and **JOHN R. BARLOW** have become partners in the firm.

BTJD is also pleased to announce that:

JARED L. INOUYE, formerly of Mabey Murray, LC, has joined the firm as an associate in its litigation department.

MARK H. RICHARDS, formerly of Hatch James & Dodge, has joined the firm as an associate in its litigation department.

JASON C. HUNTER, formerly of Snow Jensen & Reece, has joined the firm as an associate in its tax and estate planning department.

DANIEL K. BROUGH has completed his clerkship with the 9th Circuit Court of Appeals (Judge Ferdinand F. Fernandez) and has joined the firm as an associate in its litigation department.

JERRY A. FORS has completed his clerkship with the Utah Supreme Court (Justice Jill Parish) and has joined the firm as an associate in its corporate department.

Antitrust Immunity for Utah's Political Subdivisions: The Utah Supreme Court's Opinion in Summit Water v. Summit County

by Mark Glick and Michael Petrogeorge

The Utah Supreme Court's November 4, 2005 opinion in *Summit Water v. Summit County,* 2005 UT 73, clarifies the circumstances under which Utah's local governments are immune from liability under the provisions of the Utah Antitrust Act, Utah Code Ann. § 76-10-911, *et seq.* (the "Utah Act"). The Court held that under the plain language of Section 76-10-915(1)(f) of the Utah Act, a municipality is exempt from antitrust liability only if its actions were "authorized or directed" by state law. Adopting the standard for state action immunity under federal law, the Court interpreted the "authorized and directed" language of Section 76-10-915(1)(f) to mean that, for immunity to apply, the municipality's alleged anticompetitive conduct must have been a foreseeable result of action authorized by a state statute. Stated differently, this means that if the activities of a municipality are a foreseeable result of a state statute, such activities are immune from antitrust liability. Only where such conduct is not foreseeable, and it harms the competitive process, is the municipality's activity subject to liability under the Utah Act.

This holding places Utah State law on the issue of state action immunity firmly in the mainstream of antitrust jurisprudence, and renders analysis of such immunity under State law congruent with long held principles of federal antitrust law. Despite concerns raised by some, and as set forth below, the Supreme Court's opinion is based on sound reasoning, establishes good public policy, and will have little or no impact on the legitimate activities of Utah's political subdivisions.[1]

BACKGROUND

Summit Water filed a lawsuit in September 2001 alleging antitrust violations against Summit County (the "County") and the Mountain Regional Water Special Service District ("Mountain Regional") (collectively, the "County Defendants"). Summit Water is a non-profit private mutual water company that sells culinary grade water in the Snyderville Basin. Mountain Regional, a Special District, is a competing provider of culinary water controlled and operated by the County. Developers must have a source of culinary water to obtain necessary approvals from Summit County. Summit Water alleges that the County Defendants attempted to monopolize the relevant water market by passing a series of ordinances designed to competitively disadvantage Summit Water and advantage Mountain Regional, and leveraged the County's planning and development process to force developers to purchase water from Mountain Regional. In particular, Summit Water claims that the County provided advantageous zoning concessions to developers who chose Mountain Regional as its water provider instead of a private competitor such as Summit Water, resulting in a *per se* unlawful tie between water and zoning.

Summit Water brought its antitrust claims under the Utah Antitrust Act. The Utah Antitrust Act is similar to the federal Sherman Act,[2] and prohibits conspiracies in restraint of trade and attempts to monopolize.[3] In its first amended complaint, Summit Water also asserted additional claims under Article XII, Section 20 of the Utah Constitution. That section, added to Utah's Constitution in 1992, is based on language from the Sherman Act itself. It states:

> It is the policy of the State of Utah that a free market system shall govern trade and commerce in this state to promote the dispersion of economic and political power and the general welfare of all the people. Each contract, combination in the form or otherwise, of conspiracy in restraint of trade or commerce is prohibited. Except as otherwise provided by statute, it is also prohibited for any person to

MARK GLICK is of counsel at Parsons Behle & Latimer where he devotes significant time to antitrust and intellectual property litigation matters. Mark is a professor of antitrust economics and law and economics at the University of Utah Department of Economics. He also teaches as an adjunct professor in the University of Utah College of Law.

MICHAEL PETROGEORGE concentrates his practice at Parsons Behle & Latimer on civil litigation, specializing in real estate and general commercial litigation. He currently serves on the executive committee for the Litigation Section of the Utah State Bar as well as the Technology Committee for the Salt Lake Chamber of Commerce.

> monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of trade or commerce.[4]

In response to Summit Water's antitrust claims, the County Defendants brought a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Summit County contended, among other things, that Article XII, Section 20 of the Utah Constitution was not self executing, and that in any event, state action immunity prevented antitrust scrutiny of the activities of a County. The County Defendants also argued that their activities were immune under Section 76-10-915(1)(f) of the Utah Antitrust Act, and that any claim against the County Defendants under that statute must fail as a matter of law.[5]

JUDGE HILDER'S FIRST OPINION

Judge Robert K. Hilder, the trial Court Judge, rendered his first opinion in the case on March 4, 2002, ruling that Summit Water could go forward with its claims under Article XII, Section 20 of the Utah Constitution. The court held that the constitutional provision was indeed self-executing. He further held that the state action immunity doctrine applied only to a state, not to political subdivisions of a state, and that Section 76-10-916(1)(f) of the Utah Antitrust Act did not apply because the County was not a municipality.

The County Defendants filed a motion for reconsideration in January 2003. In their papers, the County Defendants argued that Section 76-10-915(1)(f) was added to the Utah Antitrust Act to assure "that all units of government would be immune from the Utah Antitrust Act,"[6] and that Article XII, Section 20 of the Utah Constitution was intended only as a general statement of policy, and not as a self-executing provision creating a private right of action. The County Defendants also contended that the term "municipality" in Section 76-10-915(1)(f) has the meaning that term has acquired under federal case law applying the Sherman Act, not the meaning given it under other provisions of the Utah Code. According to the County Defendants, the term "municipality" is defined under federal law to mean *all* political subdivisions, and that a county and its special service districts therefore constitute municipalities that are exempt from antitrust scrutiny under Section 76-10-915(1)(f) of the Utah Act.

JUDGE HILDER'S SECOND OPINION

On May 27, 2003, Judge Hilder reversed his prior ruling. In his second opinion, Judge Hilder held that Article XII, Section 20 of the Utah Constitution was merely a statement of policy, and was not self-executing after all. This finding was based on Judge Hilder's view that the legislative history of Article XII, Section 20 lacked any evidence of an intent to craft a self-executing provision, even though the language of the provision, when considered alone, suggests that it is self-executing and prohibitive.

Turning to the scope of immunity under Section 76-10-915(1)(f), Judge Hilder concluded that while the plain meaning of the term "municipality" is a city or town, the legislative intent of the word "municipality" trumps that plain meaning. Judge Hilder based his analysis on the following floor debate statement from Senator Thorpe Waddingham, the bill's sponsor:

> One of the reasons is the legislation we passed two years ago dealing with IPP. And a recent federal case [*City of Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 (1978)], that I have not read, but which has been called to my attention, that in some cases makes municipalities comply with certain sections of the federal antitrust legislation. This – one of the purposes, which I hope that this particular amendment would accomplish was to remove any question as to whether or not its' [sic] a[t] variance with the Interlocal Cooperation Act that we passed two years ago.[7]

According to Judge Hilder, because the United States Supreme Court in *City of Lafayette* used the word "municipalities" in some instances to refer to "units of local government," Senator Waddingham must have intended the word "municipality" in Section 76-10-915(1)(f) to include all units of local government, including a county and its special service districts.[8]

Summit Water moved Judge Hilder to reconsider his second

opinion. In their papers, Summit Water argued that Judge Hilder's second opinion was insufficient to dismiss Summit Water's case. Summit Water took issue first with Judge Hilder's conclusion that *City of Lafayette* interpreted the word "municipality" to mean all units of local government rather than just cities and towns. Summit Water pointed specifically to passages in *City of Lafayette* where the word "municipality" was used in distinction from the term "county." Summit Water also submitted an affidavit from Senator Waddingham stating that he intended the term municipality to refer only to cities and towns.

Summit Water also argued that even if the term "municipality" did include all political subdivisions, including the County and Mountain Regional, Judge Hilder's ruling entirely ignored the second prong of the exemption requiring the alleged anticompetitive conduct to be "authorized or directed by state law."

In response to the latter argument, the County Defendants cited to general zoning and authorizing statutes, arguing that these statutes "authorized or directed" their conduct, and that they were therefore exempt from liability under the Utah Antitrust Act. Summit Water argued that such general grants of authority were insufficient to immunize *per se* tying of water and planning. Moreover, Summit Water contended that if all political subdivisions were immune from the Antitrust Act, it would not make sense for the Legislature to include in the statute, Section 76-10-919, immunizing political subdivisions from monetary damages. Why, Summit Water asked, would the statute limit damages for an entity that is immune from suit?

JUDGE HILDER'S THIRD OPINION

Judge Hilder denied Summit Water's request for reconsideration of his second order, reaffirming his ruling that the term "municipality" in Section 76-10-915(1)(f) includes all political subdivisions and his conclusion that Article XII, Section 20 of the Utah Constitution is not self-executing and does not create a private right of action. Judge Hilder went on to address the "authorized or directed" prong of Section 76-10-915(1)(f), concluding that in order for an activity of a political subdivision to satisfy this requirement "it is necessary only that a political subdivision act pursuant to a general state statute."[9] Thus, after three judicial opinions on the issue of local government immunity under Section 76-10-915(1)(f) of the Utah Antitrust Act, Summit Water's claims were dismissed, and the parties proceeded to face off before the Utah Supreme Court.

THE BRIEFING BEFORE THE SUPREME COURT

Although the Supreme Court's opinion is a lucid statement of antitrust jurisprudence in and of itself, its analysis is better understood when read in light of the briefs submitted by the parties.

1. Summit Water's Opening Brief on Appeal

Summit Water's opening brief began by focusing on the definition of municipality under Section 76-10-915(1)(f). Summit Water invoked two principles of statutory interpretation commonly accepted by the Utah courts: (1) courts must first look to the plain meaning of a statute, and should not consider legislative history when the words of a statute are unambiguous; and (2) antitrust exemptions should be narrowly construed.[10] Under these basic principles of law, Summit Water argued that the term "municipality" in Section 76-10-915(1)(f) should be limited to cities and towns, because that is how the term is used, virtually without exception, in the Utah Code. Summit Water further contended that there was little to support the claim that Senator Waddingham was even referring to *City of Lafayette* in his floor comments, and that the United State Supreme Court used the term "municipality" to mean only cities and towns in some passages of that opinion.

Summit Water spent only three pages on what would become the central issue of the Supreme Court's opinion, whether a general authorizing statute is sufficient to satisfy the "authorized or directed" requirement of Section 76-10-915(1)(f). The remaining sections were devoted to supporting the analysis of Judge Hilder's first opinion, and contending that the legislative history of Article XII, Section 20 of the Utah Constitution did not undermine Judge Hilder's original finding that Article XII, Section 20 was self executing.

2. The Utah Attorney General's *Amicus* Brief

The Utah Attorney General filed an *Amicus* Brief in which it argued that Judge Hilder's opinion was correct with respect to the interpretation of the word "municipality," and supported Judge Hilder's conclusion that Article XII, Section 20 of the Utah Constitution was not self-executing. The Attorney General took issue with Judge Hilder, however, on whether a general planning and zoning statute can immunize a county and its special service district from an illegal tying arrangement or an attempt to monopolize the market for culinary water. The Attorney General argued that the test for what satisfies the "authorized or directed" prong of Section 76-10-915(1)(f) should be the same as the test applied to state action immunity under federal law, noting that the Utah Antitrust Act was patterned after the federal Sherman and Clayton Acts,[11] and specifically directs that it be interpreted in light of federal law.[12] The Attorney General also pointed out that the words "authorized or directed" are lifted directly out of *City of Lafayette,* a case addressing state action immunity under federal law.

The Attorney General next addressed how the phrase "authorized or directed" had been applied under federal law. He argued that federal law requires that the authorizing statute must reflect a state policy to displace competition, and that this state policy must be "clearly articulated and affirmatively expressed."[13] The

Attorney General contended that the general zoning and planning statutes cited by Summit County were insufficient to reflect a state policy that favored tying, or the creation of a single regional water supplier at the expense of private suppliers.

3. The County Defendants' Brief on Appeal.

The Attorney General's brief shifted the focus in the further briefing from the constitutional issues, and the definition of municipality under Section 76-10-9[14](1)(f), to the issues of (i) whether Utah's exemption should be interpreted in light of federal law, and (ii) whether under federal law, a general planning and zoning statute satisfies the "authorized or directed" requirement of the statute.

The County Defendants responded to the Attorney General's brief with a two part argument.[15] First, the County Defendants contended that the exemption set forth in Section 76-10-915(1)(f) should *not* be interpreted in light of federal law because the intent was to give municipalities *more* immunity than that granted by the state action doctrine under *City of Lafayette.* Second, the County Defendants argued that even if Section 96-10-915(1)(f) is interpreted in light of federal law, the County Defendants should still be immune from the Utah Antitrust Act because only a general authorizing statute is required for immunity under federal law.

The County Defendants' argument was based entirely on its rendition of the history of the state action doctrine under federal law, and its relationship to the Utah Antitrust Act. The County Defendants' rendition began with *Parker v. Brown,* 317 U.S. 341 (1943), the first Supreme Court case to consider state action immunity. In *Parker,* the Supreme Court held that activities that are both authorized by a state legislature and supervised by the state are exempt from liability under the Sherman Act. In 1978, the Supreme Court rendered its opinion in *City of Lafayette,* holding that municipalities are exempt from the federal antitrust laws only when they are "authorized or directed" in the alleged misconduct by the state. The County Defendants argued that in the 34 years between *Parker* and *City of Lafayette,* municipalities enjoyed full immunity from the federal antitrust laws.

By assuming that municipalities were totally exempt from federal antitrust scrutiny prior to 1978, the County Defendants were able to argue that *City of Lafayette* increased the exposure of local governments to the federal antitrust laws, rather than reduced it. This lead logically to the County Defendants' argument that, when the Utah Legislature added Section 76-10-915(1)(f) to the Utah Act in 1979, it was trying to insure that municipalities remained fully exempt, as the County Defendants contended they were under federal law prior to *City of Lafayette.* In particular, the County Defendants argued that Senator Waddingham wanted

to protect the IPA from claims that it was engaging in illegal collective activity by organizing 23 Utah rural electricity producers under the Interlocal Cooperation Act, and added the phrase "the activities of a municipality [are exempt] to the extent authorized or directed by state law" to give municipalities broader protection than that afforded under federal law after *City of Lafayette.*

Having made their pitch for full immunity, the County Defendants turned to Summit Water's argument that Section 76-10-919, limiting damage awards against municipalities, is rendered superfluous if municipalities are exempt in the first instance. The County Defendants argued that liability under the Utah Antitrust Act should apply only where the unit of local government acted without any authorization, general or otherwise. According to Summit County, only such *ultra vires* action would subject the local government to liability under the Utah Act, and only then would Section 76-10-919 apply.

Finally, the County Defendants claimed that in *City of Columbia v. Omni Outdoor Advertising,* 499 U.S. 364 (1991), the United Sates Supreme Court "retreat[ed] from the rigorous 'clear articulation' standard" of *City of Lafayette,* and held, effectively, that only a general zoning statute was required to confer immunity.[15]

4. Summit Water's Reply Brief

Summit Water focused almost its entire reply on attacking the County Defendants' version of the history of the federal state action immunity doctrine. Summit Water attacked two prongs of Summit County's contention. First, Summit Water argued that Section 76-10-915(1)(f) should be interpreted strictly in light of current federal law. Second, Summit Water contended that under current federal antitrust law, municipalities must be "authorized or directed" by a state statute to receive immunity. According to Summit Water, the authorization must come from more than a general zoning statute, and the anticompetitive actions complained of must be a "foreseeable result" of the activity actually authorized before immunity will attach.

Summit Water attacked the County Defendants' underlying premise that municipalities were fully immune from antitrust scrutiny prior to *City of Lafayette.* Summit Water argued that contrary to the contention of the County Defendants, Parker did not address municipalities at all, and that it was simply assumed by lower courts in the thirty-plus years prior to *City of Lafayette* that municipalities were to be treated like other non-state entities, and to receive immunity only if its actions were authorized and supervised by the state.[16] According to Summit Water, what *City of Lafayette* actually did was broaden *Parker* immunity for municipalities by removing the supervision requirement, but retaining the authorized or directed requirement.

Summit Water argued, what Senator Waddingham was trying to do by introducing Section 76-10-915(1)(f) was to increase the scope of municipal immunity so that it conformed with the federal standard. That is why he added the words "to the extent authorized or directed" by state law, the exact language used in *City of Lafayette.* Summit Water argued that if Senator Waddingham wanted unbridled immunity for municipalities, his amendment simply would have said that all municipal activities are exempt.[17] Summit Water claimed that this interpretation is the only way to make sense of Senator Waddingham's statement that "municipalities . . . [should] be on the same card as activities conducted by utilities" because utilities are not exempt from federal antitrust law unless their activities are regulated by the state.

The briefing framed two critical questions for the Supreme Court. First, should the Utah Antitrust Act be interpreted strictly in light of federal law? Second, what is the current federal standard for municipal immunity? Both sides agreed that all federal cases up to the Supreme Court's 1991 opinion in *City of Columbia* required municipal action to be authorized or directed by the state to qualify for immunity, although they disagreed on what "authorized and directed" meant. The two sides also differed on the standard set forth in *City of Columbia.* The County Defendants argued that *City of Columbia* dispensed with the authorized and directed requirement and held that a general authorization like zoning was enough; while Summit Water relied on the following language from *City of Columbia* itself to contend that it did no such thing: "Besides authority to regulate, however, the *Parker* defense also requires authority to suppress competition – more specifically, clear articulation of a state policy to authorize anti-competitive conduct."[18] This was the issue that Supreme Court would ultimately decide.

THE SUPREME COURT OPINION

The Utah Supreme Court concluded in its November 4, 2005 opinion that for a municipality to be exempt under Section 76-10-915(1)(f) of the Utah Antitrust Act, the municipality's actions must be authorized or directed by a state statute. Consistent with federal law, the Utah Supreme Court held that the authorizing statute must also be specific enough such that the complained of conduct is a foreseeable result of the authorization.[19]

The Court's analysis of the authorized or directed language in Section 76-10-915(1)(f) began by holding that the Utah Antitrust Act should be interpreted strictly in light of federal antitrust law. As noted by the Court, such interpretation is directed by Section 76-10-926 of the Utah Act: "The legislature intends that the courts, in construing this act, will be guided by interpretations given by the federal courts to comparable federal antitrust statutes and by other state courts to comparable state antitrust statutes."

Having determined that all of Section 76-10-915(1)(f) should be interpreted in light of federal antitrust law, the Court turned to an analysis of what the phrase "authorized or directed" means

under federal law.[20] The Court began by noting that under the *City of Lafayette* opinion, a political subdivision is exempt from antitrust scrutiny *only* when it is acting "on behalf of the state rather than its own parochial interests."[21] The Court observed the tendency for "local governments to act in their own parochial interests rather than in the interest of the state as a whole,"[22] a local unit of government cannot be exempt under state immunity whenever it acts. Noting that state action immunity is based on principles of federalism, and that local governments have immunity only to the extent they act on behalf of the state, the Utah Supreme Court concluded that "[the] state action exemption from our state antitrust law . . . [must] be expressly provided."[23]

The Court then articulated the standard for determining whether a unit of local government is acting on behalf of the state. According to the Court:

> [A]n adequate state mandate for anticompetitive activities of . . . subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.[24]

The Court turned to cases subsequent to *City of Lafayette* for guidance in determining when a state legislature can be said to "contemplate" the activities "complained of." The Court looked specifically at *Town of Hallie v. City of Eau Claire,* 471 U.S. 34 (1985), wherein the United States Supreme Court held that municipal conduct is immune when it is a "foreseeable result" of a state statute. Relying on *Town of Hallie* and other federal cases, the Court determined that while foreseeability does not require "a specific detailed legislative authorization,"[25] and a court need not examine whether a municipal act is "procedurally correct" before granting immunity under Section 76-10-915(1)(f), more is required for immunity than a neutral, general authorizing statute.[26] According to the Court, the "foreseability" inquiry adopted by the United States Supreme Court in *Town of Hallie* provided the appropriate middle ground.[27] Under that analysis, the Utah Legislature is not be expected to enact detailed statutes specifically exempting the municipal action complained of, but there must be some indication that the anticompetitive conduct is a natural and probable result of the powers granted municipalities thereunder.

Having determined that the federal "foreseeability" analysis applied equally under the Utah Act, the Utah Supreme Court applied it to the case at hand.[28] The Court conducted an analysis of the Special Service District Act,[29] and the County Land Use, Development, and Management Act ("CLUDMA"),[30] the two statutes under which the County Defendants claimed they were "authorized and directed" to act. Regarding the Special Service District Act, the Court concluded that while the statute authorized counties to "establish a special service district for the purpose of providing [water] within the area of the special service district,"[31] and gave the district the power to enter contracts, construct facilities and "exercise all powers of eminent domain possessed by the county,"[32] there is no indication that districts were authorized or expected to use those powers to advance their own growth and hinder competition.[33] Turning to CLUDMA, the Court determined while the statute (a) authorized counties to "enact all ordinances, resolutions and rules and . . . enter into other forms of land use controls and developments agreements that they considered appropriate for the use and development of land within the unincorporated areas of the county,"[34] (b) requires a county to "enact an ordinance establishing a countywide planning commission,"[35] and (c) mandates that a county "prepare and adopt a comprehensive, long-range general plan" that "may provide for . . . the efficient and economical use, conservation, and production of the supply of . . . water,"[36] nothing suggests that the county may use those powers to force developers "to accept water service they may or may not desire."[37]

In essence, the Court held that while the cited statutes clearly allowed the County to establish a water company and enact reasonable measures to conserve and protect water resources, the Legislature did not contemplate that the County Defendants would, as a natural and probable result of those powers, engage in tying and other anticompetitive action to displace competition and create a single, regional water provider:

> We can find no other statute within either of these Acts that contemplate[s] any connection between a county's development activities and its favoring of special service districts that it has established. The statutory scheme does not reveal a state policy of allowing counties to displace competition with a special service district unless the special service district is successful through its own competitive efforts in acquiring an exclusive market share within its area.[38]

Accordingly, the Court concluded that the anticompetitive conduct complained of by Summit Water was not a "foreseeable result" of the Special Service District Act or CLUDMA, and that the County Defendants were not, therefore, immune from antitrust scrutiny under Section 76-10-915(1)(f) of the Utah Act. The Court therefore reversed Judge Hilder, clearing the way for Summit Water to proceed with its claims against the County Defendants.

IS THE SUPREME COURT'S DECISION CAUSE FOR ALARM?

The Utah Supreme Court's opinion in *Summit Water* is not alarming; rather, it places interpretation of the Utah Antitrust Act squarely in the mainstream of antitrust jurisprudence. By interpreting our antitrust act in light of federal antitrust law as intended by the Legislature, the opinion gives antitrust lawyers in Utah a known and developed body of case law on which to

understand the state prohibitions and immunities, and allows Utah businesses to operate in an environment of greater certainty. The intent of the Legislature to interpret the antitrust act in light of federal law is inescapable. The Utah Antitrust Act is patterned after the Sherman and Clayton Acts, and contains a specific provision calling for interpretation under federal law. Moreover, and as recognized by the Utah Supreme Court, the words of Section 76-10-915(1)(f) are themselves imported from *City of Lafayette,* a federal antitrust case.

Mainstream antitrust opinion is that local governments are not immune from federal antitrust law unless they act pursuant to a state statute that contemplates the anticompetitive conduct complained of.[39] It is generally agreed among antitrust practitioners that the "foreseeability" test applies under current federal law, and that *City of Columbia* did not alter the result, but rather reaffirmed that test.[40] Thus, by adopting the current federal standard, the Utah Supreme Court simply maintained Utah's presence in the mainstream of antitrust law and effectuated the Legislature's clear intent that the Utah Antitrust Act be interpreted consistent with federal antitrust law.

The complicated fact pattern in the *City of Columbia* case can be confusing and may have led the County Defendants (and others) astray. The statutory scheme at issue in *City of Columbia* was a general statute regulating billboard advertising, not a specific statute authorizing a barrier to entry. The city was specifically authorized to control the amount of billboard advertising available within its boundaries. Omni was a billboard advertiser that claimed it was prevented from entering the market as a result of such control. The critical feature in *City of Columbia,* however, was that when a city is given the power to restrict billboard advertising, an obvious and foreseeable result is less available advertising space. This reduction in space, in turn, could naturally lead to less billboard advertising firms in the market. Thus, the anticompetitive effect that Omni complained about, a barrier to entry, was a foreseeable result of the authorizing statute.

Support for the Utah Supreme Court's adoption of the foreseeability standard is also found in the legislature history of Section 76-10-915(1)(f) itself. In proposing that section, Senator Waddingham was apparently concerned that the IPA formed under the Interlocal Cooperation Act might be found to violate the antitrust laws. The Utah Supreme Court's decision in *Summit Water* is entirely consistent with Senator Waddingham's concern. Presumably, any antitrust action brought against the IPA would be premised on the allegation that it constituted a price-fixing conspiracy among the 23 city members. Such an action would be immune from liability under Section 76-10-915(1)(f) under the Supreme Court's reasoning in *Summit Water,* however, because it is foreseeable that a law allowing cities to combine to form a single entity to provide electricity would result in the cities coordinating the pricing and delivery of that electricity.

Thus, Utah's political subdivisions have little to fear from the Utah Supreme Court's opinion. Consistent with federal law, a political subdivision will be subject to liability under the Utah Act only when it is engaged in activities that one could not "foresee" to result from its core authorized activities, and even then it will be immune from money damages.[41] As discussed above, it is foreseeable that an electric cooperative will collectively set prices and output, and thus the activities of the IPA are likely immune from antitrust scrutiny under Section 76-10-915(1)(f) of the Utah Act. By contrast, it would probably not be foreseeable for the cooperative to require customers to buy groceries from Smith's as a condition of receiving electricity, and to then require Smith's to, in turn, provide side payments to the cooperative. Such egregious conduct would be subject to state antitrust scrutiny under the Supreme Court's reasoning in *Summit Water* (but would be exempt under the full immunity urged by the County Defendants). As this example demonstrates, political subdivisions need be concerned about the Supreme Court's decision in *Summit Water* only when they stray far afield from their authorized activities, and engage in conduct that unforeseeably harms competition in a private market.

IS THE SUPREME COURT'S HOLDING GOOD PUBLIC POLICY?

The Supreme Court's opinion establishes sound public policy for the State of Utah. While the parties to the case disagreed on whether Article XII, Section 20 of the Utah Constitution was self-executing, no one disputed that it was, at minimum, a powerful statement of policy. The first sentence of the provision states:

> It is the policy of the State of Utah that a free market system shall govern trade and commerce in this State to promote the dispersion of economic and political power and the general welfare of all the people.

Full local government immunity from the State's antitrust act would be antithetical to a policy of promoting a free market system. Full immunity would provide no state remedy for parochial local interests that could potentially subvert the free market. As an extreme example, full local government immunity would mean that there would be no state remedy for a local government that sought to impose a government-directed economy (i.e., socialism within its jurisdiction). The political subdivision could simply claim that it was authorized to do so under its broad police powers. Such a result could not be reconciled with the policy of Utah's constitution.

Finally, there is no good reason why the State Legislature would want to take all decision-making power out of its hands and grant political subdivisions absolute immunity. The Utah Supreme Court's opinion in *Summit Water* and federal antitrust law provide a reasonable middle ground. Under the Supreme Court's ruling

all foreseeable actions by a political subdivision are immune from antitrust scrutiny, but if the political subdivision's actions are unexpected or unforeseeable, and will reduce competition in the State, then the Legislature gets the chance to pass on it and determine whether it should be allowed. Because federal law will likely apply in the case of an unforeseeable act in any event, this scheme places little or no additional burden on Utah's political subdivision, but provides an important protection for free enterprise in the State as required by the Utah Constitution.

As detailed below, the Supreme Court's decision also places Utah in the mainstream of other states on this issue.

LESSONS FROM OTHER STATES

A survey of state action immunity as it is applied in the other forty-nine states and the District of Columbia merely confirms Utah's place in the mainstream of antitrust jurisprudence after the Utah Supreme Court's decision in *Summit Water.* This survey reveals that 30 other states plus the District of Columbia have adopted limited immunity for local governments, applying a "foreseeability" test similar to that articulated by the United States Supreme Court in *City of Lafayette* and *City of Columbia,* and like that adopted by the Utah Supreme Court in Summit Water.[42] Virginia's antitrust statute, for example, immunizes "conduct that is authorized, regulated or approved (1) by a statute of this Commonwealth, or (2) by an administrative or constitutionally established agency of this Commonwealth or of the United States having jurisdiction of the subject matter *and having authority to consider the anticompetitive effect, if any, of such conduct."*[43] New Mexico's Antitrust Act similarly states:

> Nothing contained in the Antitrust Act is intended to prohibit actions which are:
>
> i. clearly and expressly authorized by any state agency or regulatory body acting under a clearly articulated and affirmatively expressed state policy to displace competition with regulation; and
>
> ii. actively supervised by the state agency or regulatory body which is constitutionally or statutorily granted the authority to supervise such actions when the agency or regulatory body does not have any proprietary interest in the actions.[44]

The Alaska Restraint of Trade Act exempts "activities expressly required by a regulatory agency of the state," but only insofar as *"the regulatory agency has given due consideration to the possible anticompetitive effects before permitting the activities."*[45] In *Reppond v. City of Denham Springs,* the Louisiana Court of Appeals held that state action immunity for local governments under Louisiana law extends only to those actions *"performed pursuant to a state policy to displace competition with regulation or monopolistic service."*[46]

Only 12 states appear to grant local governments greater immunity from their state antitrust laws than that provided under federal law and in Utah under *Summit Water*.[47] California, for example, narrowly defines the term "person" in their antitrust statute to exclude municipalities and other political subdivisions, thereby exempting local governments entirely from the state's antitrust laws.[48] Illinois' antitrust statute contains a broad exemption, completely immunizing "the activities of a unit of local government or school district and the activities of the employees, agents and officers of a unit of local government or school district."[49] The remaining seven states, by contrast, provide no state action immunity at all,[50] or extend immunity only to specific actions in specific industries.[51]

In sum, seven states provide less immunity, thirty states and the District of Columbia have essentially the same level of immunity, and twelve states have more immunity than Utah. From 1924 to the present, however, there have been only two reported state antitrust cases involving local governments in the seven states affording less immunity than Utah,[52] eighteen reported state antitrust cases involving local governments in the thirty states affording the same immunity as Utah,[53] and twenty-seven reported state antitrust cases involving local governments in the twelve states affording more immunity than Utah.[54] These figures suggest that a more restrictive state action immunity standard is not likely to result in a higher number of antitrust lawsuits being filed against local governments,[55] and that the number of antitrust lawsuits filed against Utah's political subdivisions is not likely to increase as a result of the Utah Supreme Court's decision in *Summit Water.*

CONCLUSION

As set forth above, the Utah Supreme Court's decision in *Summit Water* constitutes a well-reasoned decision appropriately grounded in federal antitrust law, and supported by the clearly articulated public policies of the Utah Constitution and express intention of the Legislature. The opinion confirms Utah's place in the mainstream of antitrust jurisprudence with respect to the level of immunity afforded municipal governments throughout the United States. There is no reason to believe that Utah's local governments will be exposed to increased litigation as a result of *Summit Water,* be unduly hampered in their day to day activities, or prevented from effectively serving their constituents' needs. So long as political subdivisions do not stray far afield from their authorized activities, and engage in conduct that unforeseeably harms competition in a private market, they have nothing to fear from the Supreme Court's decision in *Summit Water.*

Author's Note: *The authors are currently part of the team that represents Summit Water, but did not represent Summit Water before the Utah Supreme Court, or in the lower court proceedings that gave rise to the appeal. The authors would like to thank Zack L. Winzeler, a second year law student at*

the University of Utah, S.J. Quinney College of Law, for his contributions to this article.

1. The Supreme Court left two issues unresolved. The first is which political subdivisions of the State of Utah constitute municipalities. The second is the import of the antitrust provision of the Utah Constition, Article XII, Section 20. We do not address the issue of immunity for the non-governmental defendants, as that issue is currently being litigated.
2. *See* 15 U.S.C.A § 1, *et seq.*
3. *See* Utah Code Ann. § 76-10-914.
4. After the 1992 amendment was added to Utah's Constitution, antitrust attorneys speculated about its import, and whether it is self-executing, creating a private right of action. As far as the authors are aware, however, Summit Water is the first plaintiff to actually bring antitrust claims under the Utah Constitution itself. This approach was attacked by Summit County, and its efficacy remains unresolved.
5. Section 76-10-915(1)(f) states: "This act may not be construed to prohibit . . . the activities of a municipality to the extent authorized or directed by State law."
6. Mem. Supp. Mountain Regional Defendants' Motion to Dismiss and Motion to Reconsider or in the Alternative for Summary Judgment at 12-13.
7. Floor Debate, 43rd Utah Leg., Gen. Session, February 5, 1979.
8. Judge Hilder also ruled that an antitrust plaintiff must plead, as part of the essential elements of its claim, that the alleged anticompetitive actions of a local government are not authorized or directed by state law. The Supreme Court reversed this ruling, holding that the exemptions provided by Section 76-10-915 "are to be pleaded by a defendant as an affirmative defense." 2005 UT 73, ¶ 47.
9. Order on Plaintiff's Motion for Reconsideration and to Amend and Vacate and for New Trial of the Court Ruling and Order of 27 May 2003 at 2, 93.
10. Interestingly, this principle was pronounced by the Utah Supreme Court in *Evans v. State of Utah,* 903 F.2d 177 (Utah 1998), a case involving an exemption under Section 76-10-915(1).
11. For the Clayton Act, *see* 15 U.S.C.A. § 12.
12. *See* Utah Code Ann. § 76-10-926.
13. Brief of Utah Attorney General as *Amicus Curiae* at 38 (quoting *City of Lafayette,* 435 U.S. at 410).
14. Summit County's arguments concerning the broad interpretation of "municipality," and non-self executing nature of Article XII, Section 20, were the same as in their briefs before Judge Hilder.
15. Brief of Appellees at 62-63 & n. 32.
16. *See* Reply Br. Of Appellants at 18 n. 7 (citing lower court decisions prior to *City of Lafayette*).
17. Reply Br. of Appellant at 22.
18. 499 U.S. at 372-73 (quoted in Reply Br. of Appellant at 28).
19. Because it found in favor of Summit Water on this issue, the Court held that it did not need to reach the issue of whether the word municipality includes all units of local government, or whether Article XII, Section 20 of the Utah Constition is self executing. While the opinion sheds virtually no light on the constitutional issues, it noted in dicta that the term municipality is likely limited to mean city or town. 2005 UT 73, ¶ 30 ("For the reasons set forth above, we cannot conclude that the term 'municipality' in Section 76-10-915(1)(f) is ambiguous, nor, if it were ambiguous would we be likely to interpret the term broadly."). Because the Court could not find "any logical reason for including cities and towns in the municipality exemption but excluding other units of local government," the Court decided to "reserve an ultimate decision on the meaning of 'municipality' for another day." *Id.*
20. While not explicit, the Court effectively rejected the notion that *City of Lafayette* narrowed a pre-existing municipal immunity. 2005 UT 73, ¶ 35 & n.7.
21. *Id.* at ¶ 35.
22. *Id.*
23. *Id.*
24. *Id.* at ¶ 32 (quoting *City of Lafayette,* 435 U.S. at 415).
25. *Id.* at ¶ 39.
26. *Id.*
27. *Id.* at ¶ 40.
28. *Id.* at ¶¶ 42-44.
29. Utah Code Ann. § 17A-1-101 *et seq.*
30. *Id.* § 17-27-101 *et seq.*
31. *Id.* § 17A-2-1304(1)(a)(i).
32. *Id.* §§ 17A-2-1314(1)(b), (c) & (d).
33. 2005 UT 73, ¶ 43 & 45.
34. Utah Code Ann. § 17-27a-102(1)(b).
35. *Id.* § 17-27a-301.
36. *Id.* § 17-27a-401(1) & (2)(c)(i).
37. 2005 UT 73, ¶ 44.
38. *Id.* at ¶ 45.
39. Antitrust Developments (Fifth) Vol. II at 1220 ("The 'foreseeable result' test was reaffirmed in *City of Columbia v. Omni Outdoor Advertising* in a dispute over a city restriction on billboard advertising."). See also Areeda & Hovenkamp, Antitrust Law at ¶ 22563, "*Hallie* had concluded that local government conduct is state authorized if it is a "foreseeable result" of the state's grant of local authority to operate in the field. These words were repeated in the Supreme Court's *Columbia* decision, which found restrictions on competition and even creation of a virtual advertising monopoly to be foreseeable results of a state grant of zoning power to regulate land use."
40. *See id.*
41. Utah Code Ann. § 76-10-919(4).
42. *See* Alaska Stat. § 45.50.568 (1998) (Alaska Restraint of Trade Act does not forbid "activities expressly required by a regulatory agency of the state."); Colo Rev. Stat. § 6-4-108(4) (1997) (Colorado's "Catch-all Exemption" adopting the federal common law standard for state action immunity); Del. Code Ann. tit. 6, § 2104(b) (1999) (exempting from antitrust liability conduct required by any statute of Delaware or any conduct approved or required by a regulatory body); Iowa Code § 553.6(5) (1999) (Antitrust liability does not prohibit "[t]he activities of a city or county . . . when acting within its statutory or constitutional home rule powers . . . ."); Kan. Stat. Ann. § 12-205(b) (1991) (exempting municipalities that provide and regulate "certain services and activities" from antitrust scrutiny); Ky. Rev. Stat. Ann. § 367.176(2) (1996) (Kentucky antitrust act shall not apply to "activities authorized or approved under any federal or state statute or regulation."); Me. Rev. Stat. Ann. tit. 5, § 208 (West 1989 & Supp. 1997) (exempting transactions otherwise permitted under laws of the State of Maine or the United States); Mass. Gen. Laws Ann. ch. 93, § 7 (West 1997) (Massachusetts antitrust law does not apply to "[a]ny activities which are exempt from any of the federal antitrust laws . . . ."); Mich. Comp. Laws Ann. § 445.774(4) (West 1989) ("This [antitrust] act shall not apply to a transaction or conduct specifically authorized under the laws of [Michigan] or the United states . . . ."); Minn. Stat. § 325D.55, subd. 2(a) (1999) (Minnesota antitrust law does not apply to "actions or arrangements otherwise permitted, or regulated by any regulatory body or officer acting under statutory authority of [Minnesota] or the United States."); Mo. Rev. Stat. § 416.041.2 (1994) (Missouri antitrust law does not apply to "activities or arrangements expressly approved or regulated by any regulatory body or officer acting under statutory authority of [Missouri] or of the United States."); Neb. Rev. Stat. § 59-830 (1995) (exempting actions taken pursuant to state and federal law); Nev. Rev. Stat. § 598A.040(3)(a)-(c) (1994) (Nevada antitrust law "does not apply to conduct which is expressly authorized, regulated or approved by (a) a federal or Nevada statute, (b) an ordinance of any Nevada city or county, or (c) a federal or Nevada state, city or county administrative agency having jurisdiction of the subject matter."); N.H. Rev. Stat. Ann. § 356:8-a (1999) (exempting any activities that are "permitted, authorized, approved, required or regulated by a regulatory body acting under a federal or state statutory scheme"); N.J. Stat. Ann. § 56:9-5.c (West 1989 & Supp. 1998) (exempting any activity "directed, authorized or permitted by any law of [New Jersey]"); N.M. Stat. § 57-1-16 (Michie 1995) (New Mexico antitrust law does not extend to actions which are "clearly and expressly authorized by any state

agency or regulatory body . . . and actively supervised by the state agency or regulatory body . . . ."); N.D. CENT. CODE § 40-01-22 (1983) (adopting state action immunity in North Dakota by incorporating federal antitrust law); OR. REV. STAT. § 646.740(6) (Supp. 1998) (exempting "activity specifically authorized under state law or local ordinance"); R.I. GEN. LAWS § 6-36-8 (1992) ("Any activity . . . exempt from the provisions of the antitrust laws of the United States shall be similarly exempt from the provisions of this chapter."); S.C. CODE § 39-5-350 (1985) (exempting "actions or transactions permitted under laws administered by any regulatory body . . . of [South Carolina] or the United States . . . ."); TEX. BUS. & COM. CODE ANN. § 15.05(g) (West Supp. 1998) (adopting federal antitrust law exemptions for the State of Texas); VA. CODE ANN. § 59.1-9.4(b) (Michie 1998) (exempting from antitrust liability "conduct that is authorized, regulated or approved (1) by a statute of this Commonwealth . . . ."); W. VA. CODE § 47-18-5 (1996) ("Nothing in this article shall be construed to forbid the existence and operation of . . . any person whose activities or operations are regulated . . . pursuant to the laws of [West Virginia] or of the United States . . . ."); *Laidlaw Waste Sys. v. City of Fort Smith,* 742 F. Supp. 540, 541 (W.D. Ark. 1990) ("[M]unicipalities . . . are immune if they can "demonstrate that their anti-competitive activities were authorized by the state . . . .""") (internal citation omitted) (interpreting Arkansas state law); *In re Bates,* 555 P.2d 640, 642 (Ariz. 1976) (applying federal state action immunity under state law); *Alpert v. Boise Water Corp.,* 795 P.2d 298, 303 (Idaho 1990) (Municipalities acting pursuant to "an affirmatively expressed "state policy to displace competition with regulation or monopoly public service"" are exempt from antitrust liability.) (internal citation omitted); *Collins v. Main Line Bd. Of Realtors,* 304 A.2d 493, 496 (Pa. 1973) (Pennsylvania antitrust law is based upon federal law and federal court decisions); *Byre v. City of Chamberlain,* 362 N.W. 2d 69, 75 (S.D. 1985) (State action exemption applies to "municipal action that furthers or implements clearly articulated and affirmatively expressed state policy."); *Professional Ambulance Service, Inc. v. Blackstone,* 400 A.2d 1031, 1033 (Conn. Super. Ct. 1978) ("The antitrust statutes . . . authorize an exception if the activity is "specifically directed or required by a statute of this state, or of the United States."") (quoting CONN. GEN. STAT. § 35-31(b)); *Reppond v. City of Denham Springs,* 572 So. 2d 224, 229 (La. Ct. App. 1990) (State antitrust immunity extends only to those actions "performed pursuant to a state policy to displace competition with regulation or monopolistic service."); D.C. CODE § 28-4518 (1999) (exempting conduct or activity "specifically regulated, permitted or required by any regulatory body, agency, or commission acting under statutory authority of the District of Columbia or the United States.").

43. VA. CODE ANN. 59.1-9.4(b) (Michie 1998) (emphasis added).

44. N.M. STAT. ANN. § 57-14-7 (Michie 1995) (emphasis added).

45. ALASKA STAT. § 45.50.572(g) (1998) (emphasis added).

46. 572 So. 2d 224, 229 (La. Ct. App. 1990) (emphasis added).

47. *See* CA. BUS. & PROF. CODE § 16702 (West 1997) (excluding municipalities and political subdivisions from the definition of "person" in the Cartwright Act, thus exempting them from state antitrust liability); FLA. STAT. § 542.235(1) (West 1997) (exempting local governments from state antitrust liability); 740 ILL. COMP. STAT. 10/5(15) (West Supp. 1998) (exempting from antitrust liability "the activities of a unit of local government or school district"); MD. CODE ANN. COM. § 11-203(12) (1990 & Supp. 1997) (exempting "the activity of . . . [a] political subdivision of the State in furnishing services or commodities"); *Big Island Small Ranchers Ass'n v. State,* 588 P.2d 430, 436 (Haw. 1978) (holding that Hawaii's antitrust statute did not apply to actions taken by the state of Hawaii); *B.F. Johnson Publishing Co. v. Mills,* 31 So. 101, 102 (Miss. 1901) (holding that Mississippi's antitrust laws did not apply to the State of Mississippi or any of its statutory agencies); *Thaxton v. Medina County Bd. of Educ.,* 488 N.E.2d 136, 137 (Ohio 1986) (the term "persons," as defined in Ohio's Valentine Act, does not include government entities); *Board of Regents of the Univ. of Okla. v. NCAA,* 561 P.2d 499, 504-05 (Okla. 1977) (recognizing state immunity from antitrust actions); *Washington Natural Gas Co. v. Public Util. Dist. No. 1 of Snohomish County,* 459 P.2d 633, 636 (Wash. 1969) (Washington antitrust law does not apply to municipal corporations, including counties, the state, and all of its political subdivisions); *Kautza v. City of Cody,* 812 P.2d 143, 146 (Wyo. 1991) (holding that Wyoming's antitrust statute did not apply to the City of Cody); *Harvey & Corky Corp. v. Erie County,* 56 A.D.2d 136, 139 (N.Y. App. Div. 4th Dep't 1977) (state government agencies are exempt from antitrust liability as long as they act pursuant to government's police power); *Golden Rule Ins. Co. v. Long,* 439 S.E.2d 599, 602 (N.C. Ct. App. 1993) (holding that no antitrust action may be brought against the State of North Carolina or its officials acting as "representatives of the State").

48. *See, e.g., Penn v. City of San Diego,* 188 Cal. App. 3d 636, 643 (1987).

49. 740 ILL. COMP. STAT. 10/5(15) (West Supp. 1998).

50. *See* WIS. STAT. ANN. § 133.02 (defining "person" to include the state and its political subdivisions, all counties, cities, villages, towns, school districts, governmental agencies and bodies politic and corporate," and containing no statutory exemption for state action; *see also generally* IND. CODE ANN. §§ 24-1-1-1 to 24-1-1-6 (1999); MONT. CODE ANN. §§ 30-14-201 to 30-14-224 (1999); 9 VT. STAT. ANN. §§ 2451 TO 2480(g) (1993); 30 ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES §§ 16, 28, 48 & 53 (2d ed. 1999).

51. ALA. CODE § 11-92A-12 (1994) (limiting state immunity to county industrial development authorities acting pursuant to their statutory authority); TENN. CODE ANN. §§ 7-54-101 to -114 (1992) (limiting state immunity to passenger transportation services, energy production facilities, and waste disposal entities); GA. CODE ANN. § 36-65-1 (1993) (limiting state immunity to public utilities).

52. *Walker v. Bruno's, Inc.,* 650 S.W.2d 357 (Tenn. 1983); *Town of Hallie v. City of Chippewa Falls,* 314 N.W.2d 321 (Wis. 1982).

53. *Miller's Pond Co., LLC, v. City of New London,* 273 Conn. 786 (Conn. 2005); *Cheryl Terry Enters. v. City of Hartford,* 854 A.2d 1066 (Conn. 2004); *Plummer v. City of Fruitland,* 87 P.3d 297 (Idaho 2004); *Alpert v. Boise Water Corp.,* 795 P.2d 298 (Idaho 1990); *Crippen v. City of Cedar Rapids,* 618 N.W.2d 562 (Iowa 2000); *Water Development Co. v. Board of Water Works,* 488 N.W.2d 158 (Iowa 1992); *Neyens v. Roth,* 326 N.W.2d 294 (Iowa 1982); *Tri-State Rubbish v. Town of Gray,* 632 A.2d 134 (Me. 1993); *Byre v. City of Chamberlain,* 362 N.W.2d 69 (S.D. 1985); *Dill v. Board of County Comm'rs,* 928 P.2d 809 (Colo. Ct. App. 1996); *Reppond v. City of Denham Springs,* 572 So. 2d 224 (La. Ct. App. 1990); *Brown v. Town of Lexington,* 1998 Mass. Super. LEXIS 716 (Mass. Super. Ct. 1998); *Shapiro v. Middlesex County Ins. Fund,* 704 A.2d 1316 (N.J. Super. Ct. App. Div. 1998); *G&W, Inc. v. East Rutherford Borough,* 656 A.2d 11 (N.J. Super. Ct. App. Div. 1995); *Salt & Light Co. v. Mount Holly Township,* 15 N.J. Tax 274 (N.J. Tax Ct. 1995); *Calcaterra v. City of Columbia,* 432 S.E.2d 498 (S.C. Ct. App. 1993); *Courthouse Cafeteria, Inc. v. County of Fairfax,* 3 Va. Cir. 56 (Va. Cir. Ct. 1982); *Delaney v. City of Phoenix,* 1985-2 Trade Cas. (CCH) ¶ 66,711 (Maricopa County Super. Ct. 1985).

54. *Fisher v. City of Berkeley,* 37 Cal. 3d 644 (Cal. 1984); *ANA Towing, Inc. v. Prince George's County,* 552 A.2d 1295 (Md. 1989); *Fanelli v. City of Trenton,* 641 A.2d 541 (N.J. 1994); *Thaxton v. Medina County Bd. of Educ.,* 488 N.E.2d 136 (Ohio 1986); *Fine Airport Parking, Inc. v. City of Tulsa,* 2003-1 Trade Cas. (CCH) ¶ 73,977 (Okla. 2003); *Elizabeth City Water & Power Co. v. Elizabeth City,* 188 N.C. 278 (N.C. 1924); *Washington Natural Gas Co. v. Public Util. Dist. No. 1 of Snohomish County,* 459 P.2d 633 (Wash. 1969); *Kautza v. City of Cody,* 812 P.2d 143 (Wyo. 1991); *Penn v. City of San Diego,* 188 Cal. App. 3d 636 (1987); *People ex rel. Freitas v. City of San Francisco,* 92 Cal. App. 3d 913 (1979); *Duck Tours Seafari, Inc. v. City of Key West,* 875 So. 2d 650 (Fla. Dist. Ct. App. 2004); *Davis v. Washington County,* 670 So. 2d 136 (Fla. Dist. Ct. App. 1996); *East Naples Water Systems, Inc. v. Board of County Comm'rs,* 473 So. 2d 309 (Fla. Dist. Ct. App. 1985); *East Naples Water Systems, Inc. v. Board of County Commissioners,* 473 So. 2d 309 (Fla. 2d Dist. Ct. App. 1985); *Alarm Detection Sys. v. Vill. of Hinsdale,* 761 N.E.2d 782 (Ill. App. Ct. 2001); *Elec. Inspectors, Inc. v. Vill. of Lynbrook,* 293 A.D.2d 537 (N.Y. App. Div. 2002); *Rea Constr. Co. v. City of Charlotte,* 465 S.E.2d 342 (N.C. Ct. App. 1996); *Carolina Water Serv. v. Town of Atlantic Beach,* 464 S.E.2d 317 (N.C. Ct. App. 1995); *Boykin Enters. Inc. v. City of Columbus,* 1977 Ohio App. LEXIS 9220 (Ohio Ct. App. 1977); *Elec. Inspectors, Inc. v. Vill. of Lynbrook,* 293 A.D.2d 537 (N.Y. App. Div. 2002); *American Consumer Industries, Inc. v. City of New York,* 281 N.Y.S.2d 467 (N.Y. App. Div. 1st Dep't 1967); *Harvey & Corky Corp. v. Erie County,* 392 N.Y.S.2d 116 (N.Y. App. Div. 4th Dep't 1977); *Stow v. Summit County,* 590 N.E.2d 1363 (Ohio Ct. App. 1990); *Atlantic-Inland, Inc. v. Town of Union,* 483 N.Y.S.2d 612 (Sup. Ct. Broome County 1984); *Professional Ambulance Service, Inc. v. Abramowitz,* 328 N.Y.S.2d 467 (Sup. Ct. Niagara County 1972); *Board of County Comm'rs of Wood County v. Toledo,* 1993 WL 372243 (Ohio Ct. App. Wood County September 24, 1993); *Michaels Bldg Co. v. City of Akron,* 1987-2 Trade Cas. (CCH) ¶ 67,652 (Ohio C.P. Summit County 1987).

55. Indeed, it appears that local governments face more litigation in those jurisdictions that afford broader immunity. This may be because the political subdivisions in those jurisdictions feel more emboldened to act in an anticompetitive manner knowing they are likely to enjoy broad immunity from suit.

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 20 – Just Doing the Right Thing

by Judge John Baxter

Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

"Remove all antitrust materials."

The bright yellow sticky note stared back at me. I was a contract hire, just out of law school and engaged as a discovery mole in a multi-district, multi-plaintiff, multi-defendant, class action and individual plaintiff lawsuit. My colleagues and I had spent literally weeks at the headquarters of major national companies and at the offices of the international law firms who represented them, sifting through box after box – thousands of them – of seemingly irrelevant material seeking documents relating to, you guessed it, an antitrust lawsuit. And here it was, the reason we were not finding much. Someone in authority had instructed someone else to, "Remove all antitrust materials."

Interesting, maybe, you say but just what does that have to do with the Utah Standards of Professionalism and Civility? Let's start at the very beginning. Standard 1: "Lawyers shall treat all other *counsel, parties,* judges, witnesses, and other participants in all proceedings in a *courteous and dignified* manner." (Emphasis added.) Without addressing potential civil discovery violations, even in an adversarial system with extraordinary emphasis on winning outcomes, professional and honest behavior must govern lawyers' actions. Cheating by altering, deleting or withholding records or leading others to do so in the name of winning is still cheating. More broadly, any behaviors encouraged by an attorney seeking to deliberately and unfairly alter the course or outcome of a lawsuit by engaging in conduct proscribed by these Standards fails to recognize our duty to engage our adversary with the courtesy and dignity necessary to resolve disputes in a civilized manner.

Standard 6 is about taking your professional adversary at her word, that a promise is a promise. In the scenario I describe above, although I never reviewed the pleadings files, it is reasonable to assume that the federal court supervising the proceedings had extracted certain stipulated promises from the attorneys. For those circumstances where the attorneys were not able to reach an agreement, it is reasonable to assume that the court had ordered compliance. Among the promises or orders, it is again reasonable to assume that the parties were to have access to relevant material through the discovery process. Making promises to each other or promising to comply with orders and then hedging by extracting relevant material by subterfuge is to break the promises made. I do know that in my case, several hearings were held to sort out discovery issues drawing lawyers from across the country and expending substantial court and client resources, all unnecessary if the attorneys had simply, "Adhered to their express promises and agreements . . . and all commitments reasonably implied by the circumstances."

Standard 17 proposes that we use discovery properly as a tool, not as a weapon. Sometimes the use of a tool is burdensome, a fact to which anyone who has handled the business end (where the hands meet the handle) of a pick axe can attest. But it may still be the right tool for the job. On the other hand, the pick axe is ideal for hard ground but potentially lethal if misused. That the discovery process can be difficult and complex, presenting any number of opportunities for abuse, does not justify its use as a weapon. That it is sometimes used as a weapon to harass or to burden an opponent is illustrated in my case by the fact that apparently at least one of the boxes of documents we reviewed had been sanitized at the behest of an authority figure. It's not unreasonable to conclude that more than one box had been edited. Although the case had one set of rich corporations suing another set of rich corporations, parties for whom sympathy may be scarce, someone went to the effort to ensure that at least some of our work was not productive for whatever purposes, presumably including escalating the cost of litigation. The question remains:

JOHN BAXTER, formerly employed by the Salt Lake Legal Defender Association, is a judge in the Salt Lake City Justice Court, presiding over its Domestic Violence Court and Homeless Court.

how much more quickly, and for how much less expense would settlement have been reached had counsel viewed and used discovery as a tool rather than a weapon.

Finally, Standard 19 is about what I will call "cleverness" in lawyering. We have all seen it. The clever, narrowly drafted and construed wording of agreements, draft orders and proposals (among other things) which purports to meet a particular need yet allows sufficient weasel room to avoid meeting the real intent of the words. Paraphrasing the language of the Standard, lawyers do from time to time respond to discovery requests in a manner so as to avoid disclosure of relevant materials. It is the stuff of lawyer jokes and real world disdain for the profession. I have no doubt that had someone on my side in my case become hopping mad at the "Remove all antitrust materials" note and dragged everyone into court, some "clever" opponent would have made a good faith and good-sounding argument that, in spite of appearances, the response to the discovery demand was not only sufficient but generous. Artificial "cleverness" may create billable hours, but it may also add costs for the client and consume court time as a judge struggles to discern the meaning of less than plain language to arrive at decisions which will move a case toward resolution.

Although I have discussed a view of the application of Standard 20 through the narrow lens of a single possible discovery violation, many of us have had clients ask us about whether they should avoid going to court, attempt to unnecessarily delay a case, lie as a witness, or hide assets. This list is not exhaustive. It is only provided to remind us that the opportunity to advise others to not engage in conduct proscribed by these Standards may rise at virtually any time and in any context. Other Standards of Professionalism and Civility may apply. It is after all, in the end, quite simply about just doing the right thing.

Commission Highlights

During its regularly scheduled meeting of June 9, 2006 which was held at Stein Erickson Lodge, Deer Valley, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. David Bird reported on the Judicial Council and noted that there were four openings in the judiciary since Judges Yeates, Fuchs, Hansen and Fredericks will be retiring within the next seven months. Chief Justice Durham noted that the applicant pool was substantially down from previous years. David outlined the recent judicial salary history in Utah along with benefits judges receive. It was noted that the communication process for advertising judicial openings should have a separate e-mail from the Bar's e-Bulletin.

   The Council also expressed interest in the Bar's modified Lawyer Assistance Program. David concluded his report by noting that the judiciary has undertaken a study regarding the issue of judges remaining unbiased in the justice court system. He said the county justice courts judges are appointed and county government generally oversees them. However, in municipal justice courts, judges serve at the pleasure of the mayor.

2. John Baldwin reported that he was pleased with how well Blomquist Hale (LAP) and Lawyers Helping Lawyers (LHL) are working together and how things are developing. He stated that the Paralegal Division has increased its fees to cover the cost of participation in the LAP for those who are interested in doing so. David Bird noted that at the Jack Rabbit Bar Conference, there were many discussions on how to increase participation in EAP's such as Blomquist Hale for lawyers. The motion to mail the LAP brochures to members' homes passed with none opposed.

3. John Baldwin discussed the issue of lack of malpractice insurance coverage for Bar lawyer volunteers. Several solutions were discussed. David Hall observed that in his capacity as the Young Lawyers Division representative and overseeing Tuesday Night Bar, he believes some form of Bar identification would help and increase the number of those willing to participate. Scott Sabey summarized the problem as needing to define the parameters of insurance availability. A committee was appointed to study the issue and report back at the July meeting.

4. John Baldwin reviewed the Commission reimbursement policy for the Newport Beach Annual Convention. He said three nights of accommodation will be reimbursed along with either flight costs or mileage. John announced that the Supreme Court had approved the house Counsel rule.

5. David Bird announced that the 2006 Distinguished Service Award went to the Utah Minority Bar Association. David also discussed the proxy voting policy (need to be present at the Commission meeting to vote absent certain specified exceptions) but said this policy could be changed. Discussion ensued and the motion passed to table the discussion to August.

6. Lifetime Service to Bar Award recipients were discussed and it was noted that any of the six candidates would be very deserving and should be considered to receive the award. Discussion ensued and the motion passed to present the award to all six candidates: Harold G. Christensen, Ray R. Christensen, Elder James E. Faust, Hon. Bruce S. Jenkins, James B. Lee and Stephen B. Nebeker.

7. Scott Sabey reported on the Access to Justice Planning Council. He noted several areas that need improvement: (1) areas where no groups are providing legal service; and (2) areas where legal service efforts are being duplicated. He added that Legal Aid, the Disability Law Center, and Utah Legal Services are already doing some of the proposed work. Scott noted that the new Council is in need of a full-time administrative assistant to run it.

   Funding is an issue for the Council and they do not want to negatively impact "and Justice for All". Scott is convinced that the new entity will be self-sustaining in the near future, "and

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 Christy Abad, 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

Justice For All" is committed to contributing, as Scott hopes the Bar will do also. If these initial efforts are not successful, the Council will not come back for funding. The commission approved a $40,000 contribution over the next two years.

8. John Baldwin reported on the 2006-2007 budget. The Budget and Finance Committee has approved the budget. It was noted that Utah Dispute Resolution has submitted its annual request for Bar funds to help run the program. A motion to approve the $20,000 contribution passed.

9. Katherine Fox presented the Client Security Fund claims to the commission. She also mentioned that a $20 client security fund assessment is required to restore the balance of the fund as required by Supreme Court rule and will be collected during this year's licensing period. The motion to approve the submitted claims passed unopposed.

10. Nominees seeking to serve as the Bar's delegate to the ABA gave a presentation to the Commission. Those included: Charles R. Brown, Erik A. Christiansen, David K. Lauritzen, Steven L. Nichols and Michael D. Wims. Charlotte L. Miller, Mark O. Morris, Michael J. Young and John A. Adams were unable to attend. After the presentations, a vote then resulted in six votes for Charlotte Miller, five votes for Charles Brown and one vote for another nominee. A second round of voting resulted in a six-six tie between Charlotte and Charles. The final result was to reconsider the top two candidates at the Newport Beach Commission meeting. This motion passed with one opposed.

11. Rob Jeffs reported on the performance review. He clarified that the review should concentrate on whether the Commission and staff are responding to the charges given to them by the Supreme Court and whether they are carrying out those charges efficiently and effectively. The review is slated to begin July 10 and completed by September 15 by Grant Thornton. The Commission approved $65,000 to fund the review.

    David noted that the Supreme Court was pushing hard on the Bar's performance review to take place and he informed them that we are moving ahead.

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.

Utah State Bar Presents Annual Awards for Oustanding Achievement

DISTINGUISHED SERVICE AWARD

Utah Minority Bar Association

The Utah Minority Bar Association has promoted the professional advancement of minority lawyers and the social and civic standing of people of color in the state since 1991. UMBA has made great strides in promoting the interests of Utah's minority lawyers and raising awareness of their significant contributions to our system of justice. The association brought esteem and honor to those pioneers of the legal profession last November through its historic First Fifty Celebration, which recognized the profession's rich and diverse cultural heritage. UMBA will receive an award for their efforts from the American Bar Association at its annual convention later this month.

DISTINGUISHED JUDGE OF THE YEAR

Hon. Gordon J. Low – Judge Gordon J. Low received his undergraduate education at Utah State University and a law degree from Arizona State University in 1973. He practiced law in Logan Utah, principally in litigation, both civil and criminal law. Governor Norman S. Bangerter appointed Judge Low to the First District Court bench in 1987 where he served as presiding judge for seven years. He has served as a member of the State Board of Parks and Recreation, a member of the Utah State Bar Commission, a member and chair of the Utah Board of District Court Judges, member and chair of the Utah Judicial Conduct Commission, and currently as the chair of the Standing Committee on Judicial Branch Education. Judge Low and his wife Stephanie, have seven children and thirteen grandchildren.

DISTINGUISHED LAWYER OF THE YEAR

Max D. Wheeler – Mr. Wheeler was born and raised in Ogden, Utah. He received his Bachelor of Science degree in political science from Weber State University in 1965, and his Juris Doctor degree from the University of Utah, College of Law in 1968. His first years as a trial lawyer began in Washington D.C. where he joined the Criminal Section of the Tax Division, United States Department of Justice. In that position, he traveled throughout the United States prosecuting criminal tax cases in many different federal courts.

In 1974, Mr. Wheeler joined the United States Attorneys Office for the District of Utah where he represented the federal government in both civil and criminal cases. He held various positions under several administrations and under four different United States attorneys, including Chief Criminal Assistant and First Assistant, United States Attorney.

Mr. Wheeler left government service in 1979 to enter private practice with the law firm of Snow, Christensen & Martineau in Salt Lake City where he currently serves as Chairman of the Board. In private practice, Mr. Wheeler specializes in complex civil litigation and white collar criminal defense. He has been involved in many high profile cases both as a federal prosecutor and a private practitioner, including the recent Olympics bribery case.

Mr. Wheeler is a member of the Utah State Bar, the American Bar Association, the Federal Bar Association, the Utah Federal Court, the Tenth Circuit Court of Appeals, and he is admitted to practice before the United States Supreme Court. Over the years, he has served as Chairman of the Public Prosecutors Committee, Chairman of the Federal Criminal Rules Committee, Chairman of the Bar Exam Writers Committee on Evidence, Adjunct Professor of Law at the University of Utah College of Law, President of the American Inns of Court VII, Chairman of the Federal Courts Disciplinary Committee, and Fellow in the American College of Trial Lawyers. In 1997, Mr. Wheeler was recognized as Utah Trial Lawyer of the Year by the American Board of Trial Advocates. In 2003, he was given the Distinguished Service award by the Federal Bar Association.

Mr. Wheeler has been married 42 years to the former Diane Smurthwaite and is the father of four children and grandfather to six grandchildren.

DISTINGUISHED SECTION OF THE YEAR

Utah State Bar Litigation Section
Elaina Maragakis, Chair

The Litigation Section, with some 1700 members, is the largest and one of the most active sections of the Utah State Bar. Over the years, the Section has instituted a number of programs and resources that serve litigators throughout the State of Utah. The Litigation Section sponsors numerous CLEs throughout the year, including the weeklong NITA Trial Seminar. Additionally, it hosts a quarterly CLE luncheon for members. The section is an active participant in and sponsor of events including the Utah State Bar Annual Convention, Mid-Year Meeting, and Fall Forum. The section has also joined with other sections of the Bar to co-sponsors a number of CLEs.

One of the most widely used resources created and maintained by the Litigation Section is an on-line Benchbook, which is a comprehensive and indispensable resource for litigators. In addition to information about the policies and procedures of federal and state judges throughout the State of Utah, the Bench-book also contains judicial profiles and interviews. The Litigation Section has a long tradition of being actively involved in the community. For example, the section has established scholarships at both the S.J. Quinney College of Law at the University of Utah, and the J. Reuben Clark Law School, which are awarded to law students who excel in each school's respective trial advocacy program.

In an effort to further enhance the relationship between the section and law students, the section is in the process of offering law student memberships in the Litigation Section. The Litigation Section has also supported numerous events within the Bar and the larger community, including: a contribution to "AND JUSTICE FOR ALL," sponsorship of the 2006 Law Day Newspaper Insert, and sponsorship of the "First 50 Minority Lawyers of Utah" celebration. Members of the Litigation Section's Executive Committee for 2005-06 are: Elaina Maragakis (Chair), Ryan Harris (Vice-Chair), Sammi Anderson (Secretary), Dan Steele (Treasurer), Bruce Badger, Lee Curtis, Ryan Frazier, Jonathan Hafen, Judge Deno Himonas, Wayne Klein, Sean Monson, Willis Orton, Jacquelyn Rogers, Bryan Pattison, Michael Petrogeorge, Scott Reed, and Judge Randall Skanchy.

DISTINGUISHED COMMITTEE OF THE YEAR

Ethics Advisory Opinion Committee
Craig R. Mariger, Chair

The Ethics Advisory Opinion Committee (EAOC) responds to requests for advisory opinions concerning the ethical propriety of professional or personal conduct of members of the Bar under the Utah Rules of Professional Conduct. The EAOC responds to requests by either issuing a formal Ethics Opinion or by issuing an informal Letter Response. The Ethics Opinions of the EAOC are summarized in the Utah Bar Journal and in the ABA/BNA Lawyer's Manual on Professional Conduct and are published in full on the Utah State Bar website and on Westlaw.

The EAOC presently comprises 13 voting members and one non-voting member (representing the Office of Professional Conduct). The Committee Chair and judicial members are selected by the Bar President, and the remaining voting members of the EAOC are selected by a selection committee comprising the Bar President, the Bar Commission Liaison to the EAOC, and the Committee Chair. Members of the EAOC serve three year terms. Efforts are made to select as voting members lawyers in public and private practice, lawyers from diverse practice areas and from firms of varying sizes and locales, and a professor from one of the local law schools. At least one voting member must be a sitting or former judge.

Committee members devote considerable time and energy to the EAOC's work. Since January 1, 2004, the EAOC has responded or is in the process of responding to 43 requests for opinions and has issued for publication 13 Ethics Opinions. The Committee's Ethics Opinions have been cited by the Utah Supreme Court, have been selected for publication in case books used in teaching lawyer ethics, and are extensively included in West's Utah Court Rules Annotated.

Discipline Corner

PUBLIC REPRIMAND

On June 6, 2006, the Honorable Leon A. Dever, Third Judicial District Court, entered Findings of Fact and Conclusions of Law and Order of Discipline: Public Reprimand against April Freedman for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Ms. Freedman failed to act with reasonable diligence and promptness in representing her client. Ms. Freedman failed to keep her client informed of the case status and failed to reply to requests for information from the client. Ms. Freedman failed to adequately respond to the Office of Professional Conduct when it asked for clarification concerning her previous response.

PUBLIC REPRIMAND

On June 30, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Travis Bowen for violation of Rules 1.5(a) (Fees), 1.7(b) (Conflict of Interest: General Rule), 7.1(a) (Communications Concerning a Lawyer's Services), 7.5(a) (Firm Names and Letterheads), 7.5(d) (Firms Names and Letterhead), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Bowen charged his client an excessive fee in trade for services. The fee was excessive considering the time, labor, and skill required to provide legal services and in light of the fees typically charged for similar services in the community. Mr. Bowen instructed his staff to increase his standard legal fee in order to pay for the furniture sold to his firm by the client. Mr. Bowen recommended certain life insurance products without informing his clients of his or his firm's financial interest in the profits to be gained if the clients purchased those products. Mr. Bowen's letterhead was misleading as he identified other office locations on the letterhead when he did not have offices in those locations. Mr. Bowen's letterhead also listed an "of counsel" relationship with another attorney when he did not have such a relationship. Mr. Bowen failed to provide certain documents requested by the Office of Professional Conduct, which impeded the disciplinary process.

SUSPENSION, PROBATION

On May 3, 2006, the Honorable Dennis M. Fuchs, Third Judicial District Court, entered an Order of Discipline: Nine Months Suspension, Fifteen Months Probation against John R. Bucher for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.5(a) (Fees), 1.5(b) (Fees), 3.3 (Candor Toward the Tribunal), 3.5(d) (Impartiality and Decorum of the Tribunal), 8.2(a) (Judicial Officials), 8.4(b) (Misconduct), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In one matter, Mr. Bucher was hired to represent a criminal defendant. The spouse of the defendant contacted Mr. Bucher. Mr. Bucher requested a retainer fee and told the spouse that he would be visiting the defendant in jail. The family of the defendant paid the retainer on behalf of the defendant. No fee agreement was executed by the defendant. After Mr. Bucher entered his appearance in the case, he failed to schedule and attend the bond reduction hearing and the preliminary hearing. Mr. Bucher did not visit the defendant in jail and did not take calls from the defendant. The spouse terminated the representation. Mr. Bucher refused to return the funds from the representation. In response to an inquiry from the Office of Professional Conduct, Mr. Bucher constructed his accounting of time spent on the case, after the fact. He included a fee for an investigator and no report has been provided to the defendant or defendant's spouse.

In a second matter, Mr. Bucher was hired to probate a client's deceased common-law spouse's will. On the day he was hired, the client gave Mr. Bucher half of the fee, the original will, and contact information of the client and the executor. Thereafter, the client sent by mail the other half of the fee. The client wrote to Mr. Bucher requesting a status update. Mr. Bucher never responded. Four years after hiring Mr. Bucher, the client contacted Mr. Bucher and they met. Mr. Bucher informed the client that the three-year deadline for informal probate had lapsed and that it was the client's fault that the three-year deadline had lapsed. A couple of months after Mr. Bucher met with the client, Mr. Bucher filed an application for informal probate, and an ex-parte motion to amend the application claiming the original will was lost. Mr. Bucher's office produced an affidavit based on a note from the executor that the original will was not available or found until approximately a month or two prior to the probate action being filed. The affidavit did not state that Mr. Bucher was the one who lost the will and he was the one who found it a month or two before filing the probate action. Nine months after the probate action was filed, Mr. Bucher withdrew from the case.

In a third matter, Mr. Bucher appeared in front of a judge in a criminal case in or about 1989. The judge accused Mr. Bucher of being under the influence of alcohol in the judge's courtroom. Mr. Bucher filed a complaint with the Judicial Conduct Commission ("JCC"), which was found to be baseless and without merit. In 1995, Mr. Bucher appeared again in front of the same judge in another case. Mr. Bucher filed a Motion for Recusal and Affidavit of Prejudice stating that the JCC issued an admonition against the judge. The judge recused himself and made a telephone a call to Mr. Bucher notifying him of the same. During the telephone conversation, the judge indicated to Mr. Bucher that the JCC action

had been dismissed and inquired of Mr. Bucher the basis of Mr. Bucher's claim. Mr. Bucher indicated that he received a letter from the JCC concerning his complaint that the judge had been sanctioned. The judge requested that Mr. Bucher send a copy of the letter to the judge. Mr. Bucher never sent a copy of the letter. In 2003, the judge received a call from a reporter stating that the paper was doing a feature article on Mr. Bucher and the reporter wanted the judge to respond to Mr. Bucher's claim that the judge had threatened Mr. Bucher, and the judge had been sanctioned by JCC. The judge had to spend considerable resources with legal counsel, the director of JCC, and the media to set the record straight.

In a fourth matter, Mr. Bucher represented a criminal defendant. In the course of the case, Mr. Bucher filed numerous motions to continue the pre-trial conference. When the pre-trial was held the defendant did not appear and a warrant was issued for the defendant's arrest. The defendant called the court indicating that he did not have an attorney because he was unable to reach his attorney's office. The court set the matter for a bench trial, and notice was given to the defendant and a copy was mailed to Mr. Bucher. Some of the notices that were sent to Mr. Bucher were returned because Mr. Bucher was moving offices. However, notices were sent to Mr. Bucher's new address and the court contacted Mr. Bucher's office by phone. The defendant appeared pro se at the bench trial and was found guilty of the charges. The afternoon after the bench trial, Mr. Bucher's office contacted the court indicating that Mr. Bucher would not be present and requested the court's fax number to file a motion to continue.

In a fifth matter, Mr. Bucher pled guilty to a class B misdemeanor for driving under the influence of alcohol/drugs, and pled guilty to a class C misdemeanor for violation of a restricted license. Mr. Bucher was sentenced to 180 days and 90 days, both sentences were concurrent and suspended. Mr. Bucher was also fined and placed on a 12-month probation. Mr. Bucher was arrested on new charges and a warrant was issued. Mr. Bucher failed to appear before the court on the bench warrant. The probation was ultimately revoked and Mr. Bucher was committed to the sheriff for confinement for 30 days. Mr. Bucher's probation was reinstated for 18 months.

Pro Bono Honor Roll

Eric Barnes
Lauren Barros
David Berceau
Jim Brady
David Broadbent
May Pat Cashman
Kenyon Dove
Brent Hall
C. Richard Henriksen
Roger Hoole
Kyle Hoskins
Louise Knauer
Michelle Lesue
Suzanne Marelius
Blaine McBride
Sam Meziani
Michael Mohrman
Grant Nagamatsu
Robert Neeley
Stewart Ralphs
Cecilia Romero
Jim Slemboski
Travis Terry
James Mitch Vilos
Greg Wall
Orson West Jr
Mary Jane Whisenant
Jeanine Williams
Robert Wing
Carolyn Zeuthen

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 June and July. Call Brenda Teig at (801) 924-3376 to volunteer.

DISBARMENT

On June 1, 2006, the Honorable James L. Shumate, Fifth Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Disbarment disbarring Paul C. Droz from the practice of law for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 1.15(a) (Safekeeping Property), 1.15(b) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 3.4(c) (Fairness to Opposing Party and Counsel), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In one matter, Mr. Droz represented a client in an employment termination matter. The client paid for the representation, and Mr. Droz did not keep the funds separate from his own. Mr. Droz wrote one letter on behalf of the client and did no further work on the case. The client unsuccessfully attempted to contact Mr. Droz on numerous occasions. After the client terminated Mr. Droz's representation, Mr. Droz did not refund the unearned fee to the client. Mr. Droz failed to respond to the Office of Professional Conduct's written requests for information.

In a second matter, Mr. Droz was retained to represent a defendant in a federal lawsuit. The defendant paid Mr. Droz a retainer and they entered into a verbal agreement on an hourly rate. Mr. Droz did not follow-up with a written communication with the basis or rate of his fee. Initially, Mr. Droz performed work on behalf of the defendant, but eventually stopped working on the case, even failing to respond to a motion and a discovery request. The defendant left messages, sent faxes and e-mails, but Mr. Droz never replied. The defendant terminated the representation. Mr. Droz failed to refund the unearned portion of the fee, and failed to provide an accounting to the defendant. Mr. Droz eventually told the defendant that he did not have the money that was paid to return to the defendant. Mr. Droz signed a promissory note, but has not paid on the note. Mr. Droz failed to respond to the Office of Professional Conduct's written requests for information.

In a third matter, a couple retained Mr. Droz to represent them in a business dispute. The couple paid Mr. Droz for his services. Mr. Droz has failed to provide an accounting of the fee, and failed to deposit the fee into his attorney trust account. During the representation, Mr. Droz failed to timely request a jury trial, failed to propound discovery requests, failed to participate in a planning meeting, failed to provide his client's initial disclosures, failed to respond to an order to show cause, failed to move to set aside a default judgment, failed to inform his clients that an order had been entered which required the clients to respond to discovery requests, and failed to inform his clients that an order had been entered which required his clients to pay a sanction. Mr. Droz also failed to inform his clients that the court gave them two opportunities to comply with previous orders before entering a default judgment against them. Mr. Droz misrepresented the case to the clients informing them that the case was moving forward and everything was being handled. The clients terminated Mr. Droz's representation and made written requests for the return of their documents, which Mr. Droz failed to return. Mr. Droz failed to respond to the Office of Professional Conduct's written requests for information.

PUBLIC REPRIMAND

On June 30, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Kathleen McConkie for violation of Rules 1.4(a) (Communication), 1.4(b) (Communication), 1.7(b) (Conflict of Interest: General Rule), 1.8(h) (Conflict of Interest: Prohibited Transactions), 5.1(b) (Responsibilities of Partner or Supervisory Lawyer), 8.4(c) (Misconduct), and 8.4(d) (Misconduct) of the Rules of Professional Conduct.

In summary:

Two individuals hired Ms. McConkie to represent them in a lawsuit. Ms. McConkie failed to adequately communicate with her clients regarding their case to allow them to be reasonably involved and understand decisions made in the case. Ms. McConkie failed to ensure measures were in place and followed by her staff and an attorney working under her supervision concerning professional responsibilities. Ms. McConkie also prepared a settlement that included a clause that would release the attorney, and that failed to allow for the clients to seek independent counsel prior to signing it.

ADMONITION

On June 27, 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), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney took fees and agreed to file a bankruptcy on behalf of his clients to stop a foreclosure on the client's home. The attorney failed to file the bankruptcy. A civil judgment has been entered against the attorney.

ADMONITION

On June 26, 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), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.7(b) (Conflict of Interest: General Rule), 1.16(d) (Declining or Terminating Representation), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was hired to file a bankruptcy in order to save the client's house prior to it being sold at a public auction. The attorney failed to file the bankruptcy. After the client received the eviction paperwork, the client contacted the attorney, leaving several messages. The attorney told the client that the bankruptcy was not filed, the attorney was not aware of the auction date, and that the client would need to move out of the house. The attorney refunded the filing fee in cash.

ADMONITION
On June 26, 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 1.4(a) and (b) (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was hired concerning an immigration matter that was pending in another state. In advance of the deportation hearing, the attorney filed a motion for change of venue and to be able to appear telephonically. The client was not able to attend the hearing. On the morning of the hearing, the attorney learned that the motions were denied, and the client was deported in absentia. The attorney failed to communicate properly with the client before and after the motions were filed.

ADMONITION
On June 27, 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 1.4(a) (Communication), 1.4(b) (Communication), 1.15(b) (Safekeeping Property), 7.3(a) (Direct Contact with Prospective Clients), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney solicited the client, in person, without a prior relationship with the client. The attorney represented the client in a wrongful death action and a collection action. The attorney did not keep the client adequately informed about the matter. The attorney did not adequately respond to the client's questions about costs submitted for reimbursement. The attorney failed to provide an accounting as requested by the client.

PUBLIC REPRIMAND
On June 27, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Stanley S. Adams for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.16(d) (Declining or Terminating Representation), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Adams was hired to draft and file two Qualified Domestic Relations Order ("QDRO"). Mr. Adams did not complete the QDROs. He withdrew without protecting his client's interests and failed to promptly refund unearned fees. Mr. Adams also misled his client concerning the status of the QDRO. The client was injured by the delay and loss of interest on the client's 401(k) accounts.

ADMONITION
On June 26, 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 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.14(a) (Client Under a Disability), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was hired to pursue enforcement of the client's divorce decree. The attorney failed to pursue the matters which the attorney agreed to undertake. The attorney stated that the attorney abandoned the case because the client had become delinquent in paying fees. However, the client had recently made a payment and had a low balance. The attorney avoided the client's attempts to communicate. No accounting was provided to the client. The attorney failed to explain details of the fee agreement, in particular fees associated with clerical work and contact with the attorney's office. The attorney failed to advise the client of the opposing party's desire to settle the case and how settling could resolve the client's claims. The attorney failed to consider the client's language difficulties and was indifferent to the client's failure to understand the lack of progress in the case.

PUBLIC REPRIMAND
On June 14, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Patrick Osmond for violation of Rules 1.15(a) (Safekeeping Property), 1.15(b) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Osmond formed a corporation with an individual. Mr. Osmond received repayment on a loan made by the individual to an excavating company, which he placed in his trust account. Mr. Osmond failed to provide an accounting and used the funds to pay bills to a development company. Thereafter, Mr. Osmond became the attorney for the individual's family. Mr. Osmond stated he notified the individual when the payment had been made to the excavating company. The individual contacted the excavating company and confirmed that payment had not been made, and an employee of the company confirmed the same by e-mail.

Message from the Chair

by Kathryn K. Shelton

Front row (L–R): Sharon Andersen, Bonnie Hamp, Peggi Lowden, Tally Burke. Back row (L–R): Robyn Dotterer, Patty Allred, Kathryn Shelton, Aaron Thompson, Greg Wayment, Julie Eriksson, Thora Searle. (Not pictured: Meg Chesley, Danielle Price, Suzanne Potts)

As the new Chair of the Paralegal Division, I am pleased to introduce to you the new officers and directors of the Paralegal Division for 2006-007. These professionals will continue the tradition of excellent leadership and service to our Division members, to the Bar and to the Community. I look forward to working with many members of the Division and its board of directors toward making the Division even more beneficial to its members and continuing its outreach to and support of the legal community. I believe that together we can make a difference in the quality and efficiency of the delivery of legal services. If you would like more information about the Paralegal Division, please visit our website at utahbar.org/sections/paralegals. Our officers and board of directors for the coming year are:

Region I Director represents Box Elder, Cache, Rich, Weber, Davis and Morgan Counties – This position is vacant at this time. If you are a member of the Paralegal Division and would like to serve, please contact Kathryn Shelton.

Region II Director, Thora Searle – Thora is the Director covering Salt Lake, Tooele, and Summit Counties and is also a member of the CLE Committee for the Paralegal Division. Thora has worked in the legal field since 1972, including 21 years working for the Honorable William T. Thurman at McKay, Burton & Thurman and the past 5 years as his Judicial Assistant at the United States Bankruptcy Court.

Region III Director, Claire Frehner – Claire is the Director covering Juab, Millard, Utah, Wasatch, Duchesne, Uintah and Daggett Counties. She was first elected as a Director at Large in 2005 and served as the chair for long range planning and the co-chair of the ethics committee. Since obtaining her degree in Paralegal Studies, Claire has worked in various fields of law including real estate, bankruptcy and estate planning. Due to her nursing background and her advocacy experiences gained raising three children with developmental disabilities and autism, she was drawn to areas of law that were more medically focused. She has specialized in the areas of

personal injury, medical malpractice, product liability, toxic tort and pharmaceutical litigation. Currently Claire is employed with Mildenstein Law Office in Orem, where she has worked in the demanding area of pharmaceutical tort litigation since 2000.

Region IV Director, Suzanne Potts – Suzanne is the Director covering Carbon, Sanpete, Sevier, Emery, Grand, Beaver, Wayne, Piute, San Juan, Garfield, Kane, Iron and Washington Counties. She has been a paralegal for over 15 years and is currently employed by Clarkson, Draper & Beckstrom in St. George, Utah, working primarily in civil litigation. Suzanne is a mediator having completed basic Mediation Training through the Utah State Bar, Alternative Dispute Resolution in 2001. She is a past member of LAAU, having served as the Southern Regional Director. She presently serves on the Ethics and Membership Committees of the Division. Suzanne is also is a volunteer mediator for the Juvenile Court Victim Offender Mediation Program.

Director-at-Large, Chair-Elect, Sharon Andersen – Sharon has been a paralegal in the civil division of the Salt Lake City Attorney's office since June of 2004. She graduated from Westminster College in 1990 and for the past 16 years has assisted as a paralegal/legal assistant for several law firms and corporations including Kennecott Utah Copper, Huntsman Corporation, and IHC where she became the contract administrator. Sharon's primary areas of practice have included litigation, medical malpractice, personal injury, contracts, environmental law; labor relations; family law, and worker's compensation. For the past three years, she has volunteered as a community judge in mock trials for the Utah Law-Related Education Program.

Director-at-Large, Tally Burke – Tally is a paralegal in the corporate legal department of Boart Longyear headquartered in Salt Lake City. Previously, she worked for the law firm of Durham Jones & Pinegar in the areas of Corporate and Securities Law, Intellectual Property and Immigration Law. Tally began her career over 10 years ago at Kruse Landa Maycock & Ricks where she fell in love with the legal profession. She received her Legal Assistant Certificate in 1996, her Associate of Applied Science, with a major in Paralegal Studies in 1997 and her Associate of Science in 2005 from Salt Lake Community College. In 2006, she earned her bachelor's degree from Weber State University. Ms. Burke is an adjunct professor at Salt Lake Community College. In addition to her Division membership, she is also a member of NALA, and LAAU. Tally is a past Chair of the Paralegal Division (2004-2005) and currently serves as their Professionalism Committee Chair.

Director-at-Large, Meg Chesley – Meg is a litigation paralegal at the law firm of Parsons Behle & Latimer, where she focuses most of her work in the area of intellectual property, contract and trade secret litigation. She has been employed at Parsons Behle & Latimer since fall of 1996. Ms. Chesley graduated from the University of Utah with a bachelors in History and a minor in French. She later went on to get her paralegal certificate from Westminster College (an A.B.A. accredited school) and graduated in September 1996. This is Ms. Chesley's second year as the utilization officer in the Paralegal Division of the Utah Bar Association.

Director-at-Large, YLD Liaison, Robyn Dotterer, CP – Robyn has worked as a paralegal for over 15 years. She works for Strong & Hanni with attorney Paul Belnap, primarily in the areas of insurance defense and bad faith litigation. She achieved her CP in 1994 and is a Past President of LAAU. She served two terms as a Director-at-Large for the Paralegal Division of the Utah State Bar, chaired the Division's Utilization Committee and served as liaison to the Young Lawyer's Division. Robyn continues to serve as liaison to the Young Lawyer's Division, is a current Director-at-Large and is honored to be the first Chair of the Division's newly formed Community Service Committee.

Director-at-Large, Julie Eriksson – Julie will be serving as a Director at Large and Co-Chair of the CLE Committee. She is currently serving as Treasurer for the Legal Assistants Association of Utah and has served two terms as President of LAAU. She has also held the positions of 1st Vice President/Education Chair and Secretary. She began her legal career in 1992 and has worked at the law firm of Christensen & Jensen, P.C. since 1999. She specializes in the civil litigation areas of personal injury, bad faith and product liability claims.

Director-At Large, Finance Officer, Bonnie K. Hamp, CP – Bonnie is a Sr. Paralegal with the Litigation Practice Group at Holme Roberts & Owen LLP which represent clients in business, financial, employment, tax, securities, intellectual property, environmental and complex litigation matters. Bonnie began her legal career in 1978 and attained her Certified Paralegal designation from the National Association of Legal Assistants. She served as Region II Director for the Paralegal Division and NALA Liaison for LAAU. She serves on the Unauthorized Practice of Law Committee for the Utah State Bar. She begins her second term as Director-at-Large and will serve as the Division's Finance Officer.

Director-at-Large, Peggi D. Lowden, CP – Peggi is a Certified Paralegal/Civil Litigation Specialist employed with the Salt Lake City Law Firm of Strong & Hanni since 1990. She has held numerous leadership positions with several paralegal associations, including chair of the Paralegal Division. She currently serves as a Director-At-Large and Membership Chair for the Paralegal Division of the Utah State Bar, and as a public member and panel vice-chair on the Utah Supreme Court's Disciplinary Committee where she participates in disciplinary hearings for informal complaints brought against Utah attorneys. She has a B.S. in Speech Communication/Conflict Resolution from the University of Utah, A.S. in Social Science from Salt Lake Community College, and paralegal certificate of completion from Santa Ana College in Southern California.

Director-at-Large, Secretary, Aaron Thompson – Aaron is a Paralegal employed with Headwaters Incorporated assisting the Associate General Counsel, Curtis Brown. Aaron's primary focus is on stock options, Section 16 filings, commercial insurance, mergers & acquisitions, as well as contracts and business entity filings. Aaron graduated from Westminster College with a Paralegal degree, a B.A. degree in English, a minor in Political Science, with an emphasis in Mandarin Chinese. Aaron's academic and working career has provided varying experiences to work for the Utah Attorney General office in the Commercial Enforcement and Consumer Protection divisions, local and national governing bodies as well as various Presidential, Senate and Congressional campaigns around the United States.

Director-at-Large, Greg A. Wayment – Greg studied Sales and Marketing at Weber State University, graduating with a bachelor's degree in 2004. He obtained his paralegal certificate from A.B.A. accredited school, the Denver Paralegal Institute, in January 2005. He previously worked for a large insurance defense firm in Denver, Colorado. Currently, he is a litigation paralegal at the Salt Lake City firm of Magleby & Greenwood, P.C.

Parliamentarian, Deborah Calegory – Deb has worked in the legal field for 25 years. She became a Certified Paralegal in 1986 through the American Paralegal Association. Deb works for the law firm of Barney & McKenna, P.C. in St. George in the areas of business, transactional and real estate. Deb was a charter member of the Paralegal Division and has maintained an active role in the Division since its inception, including serving on the Board of Directors from 1998 through 2004, and as Chair during 2001-2002. She currently serves as the Division Parliamentarian.

LAAU Liaison, Patricia H. Allred, CP – Patty has over 24 years of legal experience. She obtained her Legal Assistant Associate Degree in 1982 from UTC/Orem; her BS in Psychology in 1992 from the University of Utah; and her Certified Paralegal credential from NALA in 1996. Patty is currently a litigation paralegal at Dunn & Dunn, PC., specializing in personal injury, insurance defense, and trial preparation. She has been a member of LAAU for 18 years; the Utah State Bar Paralegal Division since 2004; and NALA since 1994.

Ex-Officio Director, Danielle Price, CP – Danielle is a paralegal with Strong & Hanni and has over 14 years experience in numerous practice areas. She received her paralegal certificate from Westminster College and achieved her Certified Paralegal designation in 2005 from NALA. She is the immediate past Chair of the Paralegal Division; served from 2004-2006 as the Division's ex-officio member of the Board of Bar Commissioners of the USB; was an elected Director-at-Large for the Division; has served on the *Bar Journal,* Governmental Relations, and Licensing committees as the Paralegal Division representative; served with LAAU as President, Education Chair, Parliamentarian, and Newsletter Editor. She is also a member of NALA and LAAU. Danielle has taught seminars for IPE, LAAU, and the Paralegal Division on civil litigation and utilization topics, chaired the Paralegal Division's 10th Anniversary Celebration, and is currently serving as the Chair of a membership task force for the Paralegal Division.

Chair and Ex-Officio member of the Bar Commission, representing the Paralegal Division, Kathryn K. Shelton – Kathryn has been a paralegal for over 11 years and has worked in the legal field for over 23 years. She has been a Paralegal with the law firm of Durham, Jones & Pinegar since 1998 where she works in the Corporate & Securities Section as well as in Intellectual Property and Business Immigration law. Previously Kathryn worked for the General Counsel's office with the Huntsman companies in Salt Lake City and for Van Cott, Bagley, Cornwall & McCarthy. Kathryn served as the Division's Region II Director and Finance Officer from 2004 to 2006 and has served on the Executive Committee, the CLE Committee and the 10th Anniversary committee. Kathryn is also a member of LAAU and NALA. She received her Associate Degree from Ricks College.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
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: Practicing Family Law A-Z.** 4:30 – 7:45 pm.. Court processes and proceedings, pleadings/motions etc, practicing before the commissioners. $55 YLD members, $75 others.	3 CLE/NLCLE
10/10/06	**Appellate Writing.** Speaker: Patricia Millett, US Solicitor General's Office.	2
10/13/06	**Satellite Broadcast: Ethics 2006.** 10:00 am – 1:15 pm. $229, includes study materials and complimentray access to the archived online program. Full-time government lawyers, newly admitted lawyers (within the past two years), and retired senior lawyers (65 and over) are eligible for a reduced registration fee of $119. To register call 800-253-6397 or to to www.ali-aba.org.	3
10/15–20/06	**The 2nd Annual Spanish Immersion and the Culture of Law in Mexico.** Crowne Plaza Hotel, Guadalajara, Jalisco Mexico. $1,200 – covers tuition, materials and morning snacks. Airfare, hotel accommodations, and all other expenses are the responsibility of each registrant.	22 (includes 2 hrs Ethics)
10/19/06	**NLCLE: Personal Injury.** 4:30 – 7:45 pm. $55 YLD members, $75 others.	3 CLE/NLCLE
10/19/06	**Satellite Broadcast: Advanced Writing & Editing for Lawyers (Part 2).** 10:00 am – 1:15 pm. $229, includes study materials and complimentray access to the archived online program. Full-time government lawyers, newly admitted lawyers (within the past two years), and retired senior lawyers (65 and over) are eligible for a reduced registration fee of $119. To register call 800-253-6397 or to to www.ali-aba.org.	3
10/20/06	**St. George CLE & Golf.** The Ledges Golf Course, St. George Utah. Section Members – CLE only: FREE, CLE & Golf: $45. Non-Section Members – CLE only: $25, CLE & Golf: $85. Golf only: $110. Includes breakfast and a sack lunch for those playing golf.	3
11/03/06	**2006 Fall Forum.** 8:00 am –– 5:30 pm. Little America Hotel, SLC. $120 before 10/20/06, $150 after. Non-lawyer assistant $60 before 10/20/06, $85 after.	7 CLE/NLCLE (incl. up to 3 hrs Ethics)
11/10/06	**New Lawyer Mandatory.** 8:30 am – 12:30 pm. $55. Satisfies NLCLE ethics requirement.	
12/19/06	**NLCLE: Wills & Trusts/Probate.** 4:30 pm. – 7:45 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)):

(1) _____ (2) _____

(3) _____ (4) _____

Name: _____ Bar No.: _____

Phone No.: _____ Total $ _____

Payment: ☐ Check Credit Card: ☐ VISA ☐ MasterCard Card No. _____

☐ AMEX Exp. Date _____

Classified Ads

RATES & DEADLINES

Bar Member Rates: 1-50 words – $35.00 / 51-100 words – $45.00. Confidential box is $10 extra. Cancellations must be in writing. For information regarding classified advertising, call (801)297-7022.

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

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

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

POSITIONS SOUGHT

SELLING PRACTICE OR RETIRING? I am interested in purchasing an estate planning/business law practice in Salt Lake or Utah County. Your continued part time involvement is welcome. Reply to Ben Connor 800-679-6709, or email ConnorLaw@san.rr.com.

Attorney licensed in UT and NY seeking position in Utah. 5+ years experience at private and public-interest law firms. Law review, excellent academic credentials, high rate of client satisfaction, a generalist and unique expertise in disability rights. Interests: litigation, transactional, government, or in-house counsel. Dan Morse 801-519-9251 or dmorse.attorney@gmail.com

POSITIONS AVAILABLE

Aggressive PI and medical malpractice firm seeks Associate with 1-3 years of medical malpractice experience. Flexible schedule with no billable hours. Salary DOE. Inquiries confidential. Holladay office. Send resume to Christine Critchley, Confidential Box #8, c/o Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111, or e-mail to ccritchley@utahbar.org.

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.

Growing Sandy based firm is seeking an attorney with 1 to 4 years experience in commercial litigation. The candidate applying must be a member in good standing with the Utah State Bar. The firm offers a unique working environment and business model with an attractive partnership track. Compensation will be competitive and commensurate with experience. Send resume to Olsen Skoubye & Nielson, LLC, Attn. Jeff B. Skoubye, 45 West 10,000 South, Suite 300, Sandy, UT 84070. Email: jeff@osnlaw.com; 801-562-8855.

ASSOCIATE ATTORNEY – Legal Dept. of a growing corporation opening an office in Utah seeks a mid-level associate (3+ years experience). Need background in real estate, land use, corporate, IP and/or entertainment law. Some courtroom & litigation experience required. Fax resume to (702) 658-8828, attn: Maryann or email to steve@shawlaw.biz

EXECUTIVE DIRECTOR ACLU of Utah – The American Civil Liberties Union of Utah, located in Salt Lake City, seeks an Executive Director to promote and defend civil liberties through litigation, legislation and public education. For more information visit www.acluutah.org. Send cover letter, resume, writing sample and three references to aclu@acluutah.org (subject line "ED Search"). All applications will remain confidential. Applications accepted until the position is filled. The ACLU is an equal opportunity/affirmative action employer.Office space/sharing

Trust Administrator – Key Private Bank, Salt Lake City. Key Private Bank seeks a professional with experience in trust and estate administration and a working knowledge of investment management to join a vibrant, collaborative team. The successful candidate will be client focused, a skilled communicator, detail oriented, and comfortable with finance and computer systems. An advanced degree such as CTFA or JD is preferred. Please send your resume to cathy_a_smith@keybank.com for consideration or visit our website at www.key.com. Additional position information can be found under the "About Key" section by selecting the "Careers" link. The job requisition number is PS222855.

Intellectual Property Associate – Holme Roberts & Owen LLP (HRO), an international law firm with approximately 215 lawyers has a tradition of building lasting relationships with the finest entrepreneurial pioneers, from railroads and mining, to oil and gas, and more recently technology and telecommunications. HRO seeks an experienced Intellectual Property Associate for its growing IP practice in our Salt Lake City office. The ideal candidate should have 2-6 years of practical patent experience. To learn more about our firm, visit our website at www.hro.com. To apply submit your resume to Jean Pavek, Legal Recruiting Manager, at jean.pavek@hro.com. EOE

OFFICE SPACE/SHARING

Sole practitioner has offices available. Share kitchen, restrooms. Free reception. Telephone answering available. One room ($700) or 4 room suite ($1,200) available. Excellent downtown location on Social Hall Ave. (801) 533-8883.

PARKING AN ISSUE? The Historic Salt Lake Stock and Mining Exchange Building located one-half block from State and Federal courts has one main floor, 440 sq. ft. office and a 310 sq. ft. garden level office, as well as two garden level office suites of 1,453 sq. ft. and 844 sq. ft. Prices range from $400 to $1,700 per month. Unsurpassed tenant parking with free client parking next to the building. Contact Richard or Michele at 534-0909.

BOUNTIFUL executive office share: right off I-15 exit and only a few minutes from downtown Salt Lake City. Newly remodeled and beautiful space includes receptionist, high speed Internet, fax, telephone, conference/break rooms, copier and convenient parking. Rent starts at $400/mos. (801) 397-2223.

Deluxe office sharing space. Downtown Salt Lake law firm has space to rent. Close to courts, single or multiple office suites, with or without secretary space. Complete facilities available including: receptionist, conference rooms, library, Westlaw, FAX, telephone, copier and parking. Please call Helen at (801) 524-1000.

SERVICES

Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics: Consultant and expert witness. Charles M. Bennett, 257 E. 200 South, Suite 800, Salt Lake City, UT 84111; (801) 578-3525. Fellow, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.

Construction Expert, Cost Expert. We provide expert reports, cost analyses and testimony. We help prepare & resolve: Change Orders, Requests for Equitable Adjustments and Claims. We provide opinions of reasonableness of costs, and audit the costs of opposing sides. Other services include: cost segregation studies, insurance claim support, insurance claim appraisals, construction management, financial management and determining economic and business damages. More than 30 years construction & accounting experience, with regional national and international companies. Ruf & Associates, LLC www.rufassociates.com Toll Free (877) 904-9100

WE HAVE THOUSANDS OF MEDICAL MALPRACTICE EXPERT WITNESSES. Fast, easy, affordable, flat-rate referrals to board certified, practicing doctors in all specialties. Your satisfaction GUARANTEED. Just need an analysis? Our veteran MD specialists can do that for you, quickly and easily, for a low flat fee. Med-mal EXPERTS, Inc. www.medmalEXPERTS.com 888-521-3601

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.

CALIFORNIA PROBATE? Has someone asked you to do a probate in California? Keep your case and let me help you. Walter C. Bornemeier, North Salt Lake. 801-292-6400. (or: 888-348-3232). Licensed in Utah and California – over 29 years experience.

CHILD SEXUAL ABUSE – SPECIALIZED SERVICES. Court Testimony: interviewer bias, ineffective questioning procedures, leading or missing statement evidence, effects of poor standards. Consulting: assess for false, fabricated, misleading information/ allegations; assist in relevant motions; determine reliability/validity, relevance of charges; evaluate state's expert for admissibility. Meets all Rimmasch/Daubert standards. B.M. Giffen, Psy.D. Evidence Specialist (801) 485-4011.

NEED SOMEONE FOUND? Anyone – even unknown heirs. Call Artyn, Inc. with 19 years of successful experience. 800-522-7276.

LUMP SUMS CASH PAID For Seller-Financed Real Estate Notes & Contracts, Divorce Notes, Business Notes, Structured Settlements, Lottery Winnings. Since 1992. www.cascadefunding.com. Cascade Funding, Inc. 1 (800) 476-9644.

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

DIRECTORY OF BAR COMMISSIONERS AND STAFF

BAR COMMISSIONERS

Gus Chin, *President*
Tel: 435-615-3857

V. Lowry Snow, *President-Elect*
Tel: 435-628-3688

Nate Alder
Tel: 323-5000

Steven Burt
Tel: 571-4391

Christian W. Clinger
Tel: 273-3902

Yvette Diaz
Tel: 641-8596

Mary Kay Griffin
Public Member
Tel: 364-9300

Robert L. Jeffs
Tel: 801-373-8848

Curtis M. Jensen
Tel: 435-628-3688

Felshaw King
Tel: 543-2288

Lori W. Nelson
Tel: 521-3200

Herm Olsen
Tel: 435-752-2610

Stephen W. Owens
Tel: 983-9800

Scott R. Sabey
Tel: 323-2204

Rodney G. Snow
Tel: 322-2516

***Ex Officio**

***Charlotte Miller**
State Bar Delegate to ABA
Tel: 487-0600

***David R. Bird**
Immediate Past President
Tel: 532-1234

***David R. Hall**
President, Young Lawyers Division
Tel: 532-1234

***Hiram E. Chodosh**
Dean, Law School, University of Utah
Tel: 581-6571

***Paul T. Moxley**
ABA Delegate
Tel: 521-5800

***Kathryn Shelton**
Paralegal Division Representative
Tel: 415-3000

***Cheryl Miyuki Mori**
Minority Bar Association
Tel: 524-5796

***Kevin Worthen**
Dean, Law School, Brigham Young University
Tel: 801-422-6383

***Margaret Plane**
Women Lawyers Representative
Tel: 521-9862

UTAH STATE BAR STAFF

Tel: 531-9077 • Fax: 531-0660
E-mail: info@utahbar.org

Executive Offices
John C. Baldwin
Executive Director
Tel: 297-7028

Richard M. Dibblee
Assistant Executive Director
Tel: 297-7029

Christy Abad
Executive Secretary
Tel: 297-7031

Katherine A. Fox
General Counsel
Tel: 297-7047

Diana Gough
Assistant to General Counsel
Tel: 297-7057

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

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

Sharon Turner
Admissions Assistant
Tel: 297-7025

Bar Programs
Christine Critchley
Bar Programs Coordinator
Tel: 297-7022

CLE
Connie Howard
CLE Administrator
Tel: 297-7033

Kimberly Van Orden
Section Support
Tel: 297-7032

Communications Director
Toby Brown
Tel: 297-7027

Consumer Assistance Coordinator
Jeannine Timothy
Tel: 297-7056

Finance & Licensing
J. Arnold Birrell, CPA
Financial Administrator
Tel: 297-7020

Joyce N. Seeley
Financial Assistant
Tel: 297-7021

Pro Bono Department
Brooke Bruno
Pro Bono Coordinator
Tel: 297-7049

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

Brooke Bruno
Web Content Coordinator
Tel: 297-7049

Receptionist
Edith DeCow
Tel: 531-9077

Other Telephone Numbers & E-mail Addresses Not Listed Above

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

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

Member Benefits
Connie Howard
297-7033
E-mail: choward@utahbar.org

Marion Eldredge
297-7036
E-mail: benefits@utahbar.org

Office of Professional Conduct
Tel: 531-9110 • Fax: 531-9912
E-mail: opc@utahbar.org

Billy L. Walker
Senior Counsel
Tel: 297-7039

Kate A. Toomey
Deputy Counsel
Tel: 297-7041

Diane Akiyama
Assistant Counsel
Tel: 297-7038

Adam C. Bevis
Assistant Counsel
Tel: 297-7042

Sharadee Fleming
Assistant Counsel
Tel: 297-7040

Margaret Wakeham
Assistant Counsel
Tel: 297-7054

Ingrid Westphal Kelson
Paralegal
Tel: 297-7044

Amy Sorenson
Paralegal
Tel: 297-7045

Jinelle Chard
Intake Clerk
Tel: 297-7048

Alisa Webb
Assistant. to Counsel
Tel: 297-7043