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Volume 20 No. 1
Jan/Feb 2007

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

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

COVER: Winter Cattails, by Bret B. Hicken, Spanish Fork, Utah.

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Letters Submission Guidelines:

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

Cover Art

Members of the Utah State Bar or members of the Legal Assistants Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their 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:

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The Utah Bar Journal

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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.

Letter to the Editor

Dear Editor,

I would like suggestions on how to wake the snoozing judge. I'd like to think I'm not the only boring attorney in Utah. I understand why judges snooze. But each case is important to the litigant and it's frustrating to make an important point I know will not be heard. I'd be interested to hear from attorneys and from judges. I've seen the problem in more than one county, but since my practice is pretty geographically limited, I'd rather not be identified.

Anonymous

The Board of Editors asked Judge Gregory K. Orme, the* Bar Journal's *judicial advisor, to respond to this letter. His response follows, and the views expressed are solely his own:

I'm not going to answer with a defense, a denial, or a rationalization. And I'll skip the part about some judges closing their eyes as part of a deep concentration technique. I actually have no reason to doubt the accuracy of the writer's observation. And my guess is he or she is talking about the same judges I have observed nodding off in meetings and at conferences. In that setting, it is embarrassing, impolite and unprofessional. In the courtroom, it is downright unethical. *See, e.g., In the Matter of Carpenter,* 17 P.3d 91 (Arizona 2001) (judge removed from office for, *inter alia,* sleeping on the bench, despite claim he suffered from narcolepsy); *Public Admonition of Kleimann* (Texas State Commission on Judicial Conduct March 1, 2002) (judge admonished for repeatedly sleeping while on the bench, the commission noting that "sleeping on the bench erodes public confidence in the judiciary by sending the message that the judge lacks concern for the proceedings at hand and for the judge's duties under the law"); *Committee Report and Stipulations (Coffey)* (New Hampshire Judicial Conduct Committee August 23, 2006) (in stipulated informal resolution of complaints of sleeping leveled against judge who happened to be a member of the conduct committee, special investigatory panel had observed that judge's conduct would not qualify as sleeping, "as that term is generally understood," but that it believed credible reports of her head falling forward or to the side as she obviously fought to stay awake would support finding of ethical violation because of appearance of impropriety). *But see In the Matter of Cothren,* No. 28 (Alabama Court of the Judiciary January 22, 1998) (in reprimanding and suspending judge for other ethical violations, Court of the Judiciary imposed no sanction on the judge for dozing off on bench in view of the judge's sleep apnea and another medical condition, for which he had been treated in the past).

I would hope this letter could serve as, well, a wake-up call to judges with a tendency to nod off from time to time. Judges, if this is your problem, get more sleep; see a doctor (there are now sleep specialists); pop some NoDoz; take more breaks; drink as many caffeinated beverages as it takes; stand at the bench (citing, perhaps, your lower back pain); acknowledge your problem and invite counsel to be vigilant in calling any lapses to your attention. Whatever it takes! You're not going to tolerate lawyers snoozing away at counsel table or a juror catching up on his rest during trial. You simply must hold yourself to the same standard.

Attorneys, while I'd probably let an isolated, momentary nod go, you need to deal with a judge who repeatedly dozes off in court and seems disinclined to do anything about it as you would any other ethical violation committed by a judge in your presence.

A little harsh? Does it seem I may have woken up on the wrong side of the bed – or the bench? Then the reader is directed to the essay by Learned Ham, later in this issue, for his unique spin on the question. Finally, I wish to acknowledge Cynthia Gray, Director of the American Judicature Society's Center for Judicial Ethics, who provided me with the specific cases cited above.

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A Mid-Term Report

by Gus Chin

The beginning of the new year marks the midpoint of the 2006-2007 Bar Commission year. I am pleased to report that the Bar is financially sound. The purpose of this mid-term report is to make you aware of some of the issues addressed to date.

Performance Review
Last year the Supreme Court requested that the Bar undergo an operational review and audit by an independent organization to evaluate the policies, structure, and staffing of the Bar, governance of the Bar, and the core areas of admissions, discipline, member benefits and continuing legal education. Grant Thornton started the process last year and will present its findings and recommendations at our January 26, 2007 commission meeting.

The Judiciary
Quarterly, the President, President-Elect and Executive Director meet with the Chief Justice to report and discuss issues of concern. On November 9, 2006, Lowry Snow, John Baldwin and I met for the second time with Chief Justice Christine Durham. Among the matters discussed were judicial salaries, judicial independence, malpractice insurance disclosure, mentoring, and the Office of Professional Conduct's diversion program.

As a Bar, we are fortunate to have a quality judiciary. We especially benefit from the members of the judiciary who serve on committees and panels, and participate at our conventions and various CLE events. Recently, fifteen judges from the federal, state appellate, and state district court benches participated in our Fall Forum, a one-day conference held on November 3, 2006. Their participation was well received by the approximately 530 attendees.

Of special note, this year marks the 20th anniversary of the Utah Court of Appeals. Four of the original seven judges appointed in 1987 still serve on the Utah Court of Appeals.

Relationship with the Legislature
We consider our relationship with the Legislature to be an important part of our mission. The 2007 Legislature will have twelve members of our Bar serving in either the House of Representatives or the Senate. Accordingly, this month, the Bar Commission will sponsor a constitutional law class for new legislators, and will meet both with our lawyer legislators and with our House and Senate leaders. Our Governmental Relations Committee, co-chaired by Lori Nelson (a member of the Executive Committee) and Scott Sabey (who also serves on the Judicial Council) will actively review upcoming legislation. With input from our Governmental Relations Committee, the Bar Commission will meet via telephone conference several times during the session to adopt positions on legislation that impacts practice areas and our profession.

The Law Student Division
The newly-formed Law Student Division is now fully operational. Our first two Bar Commission meetings were held at the S.J. Quinney College of Law and the J. Reuben Clark Law School to introduce the newly-created division and to interact with the students. We are hopeful that this will give the law students who make up the majority of our annual new admittees an opportunity for networking and mentoring, as well as an introduction to the practice of law. We encourage our members, especially sections, committees, and regional and local bar associations, to include interested law students in their activities.

Malpractice Insurance – Mandatory Disclosure
Last year, given the response by our members, the Commission tabled action on the subject of mandatory insurance disclosure. However, this subject continues to be an item of concern. An increasing number of states are advocating mandatory disclosure in the interests of client protection as well as professional obligation, subject to appropriate exemptions for particular types of practice.

California is the most recent state to draft a mandatory disclosure proposal. If adopted, the California State Bar will be among 21 states, including Idaho, that have some type of mandatory disclosure. The Bar Commission will be discussing mandatory disclosure at its January meeting at the Law and Justice Center.

Communication

With 9000 members, communication is important. The *Bar Journal*, conventions, CLE events, and regular e-bulletins are the primary means of communication with our members. Additionally, in an effort to keep you well informed, a copy of the agenda for each Bar Commission meeting will be posted on the Bar's web page for your perusal. The Bar Commission is mindful of the concerns and expectations of our members. We rely on you, however, to inform us about your concerns and expectations so that we can adequately and appropriately address them.

Diversion Rule

At our January meeting, the Bar Commission will further discuss a proposed Diversion Rule that will enhance the Office of Professional Conduct's current diversion program. In select cases, the diversion program will provide for educational, remedial, and rehabilitative opportunities for Bar members facing possible discipline.

Ethics Advisory Opinion

At our December meeting, we discussed the current rule whereby a published opinion of the Ethics Advisory Committee ("EAC") is considered to be binding on Bar members and the Office of Professional Conduct ("OPC"). The Supreme Court is concerned about judicial review of EAC opinions consistent with its constitutional authority over Bar discipline. Craig Mariger, EAC Chair, Gary Sackett, an EAC member, and Billy Walker, Senior Counsel for OPC, addressed the Commission. The Commission also discussed the principle of safe harbor when a member relies on a published opinion. The Commission will reply to the Supreme Court and await its response.

Access to Justice

Access to justice is an ongoing concern, especially when we are reminded about unmet legal needs, including the needs of self-represented parties. Our legal service providers and others need our assistance in meeting the legal needs and demands of our community.

During the recent renewal cycle, our members voluntarily reported a total of 150,844.9 pro bono hours. We applaud those who contribute their time and means, and who encourage others to do likewise. In the near future, we anticipate a report from a Pro Bono Review Committee, chaired by Herm Olsen, with an assessment of pro bono activity by our members as well as a proposal of how the Bar can improve pro bono efforts.

In September, members of the Committee on Resources for Self-Represented Parties, a Judicial Council standing committee, reported their findings and discussed their recommendations. Some of their recommendations include resources for self-represented parties, making forms available, court-sponsored clinics and workshops, and low-fee and no-fee representation opportunities. A Bar Commission committee chaired by Nate Alder will present its analysis of the recommendations.

Diversity

Several Years ago, the Task Force on Racial and Ethnic Fairness made a series of recommendations to the Bar as well as other organizations. Yvette Diaz, a member of the Executive Committee, and a Third Division Commissioner will report on the Bar's performance and related matters.

Mentoring

A presentation by Alan Sullivan at the Commission's December meeting reinforced interest in mentoring. Several Commissioners have agreed to participate on a committee co-chaired by Rod Snow and Margaret Plane to examine mentoring and practical training as a means of improving the preparation and practice skills of new lawyers.

In closing, I wish to express appreciation to the Bar staff, the members of the Board of Bar Commissioners, and the leaders of the many sections, committees, and regional, local, and specialty bars who diligently serve our profession. Their voluntary, timeless dedication makes it a privilege to serve as your Bar President.

Blind Guides: The Difficult Task of Comprehending the Law

by D. David Lambert

One point emphasized during the first year of law school is that the law is difficult to comprehend. Although it was first published three quarters of a century ago, today's reading lists for entering students almost invariably continue to include Karl Llewellyn's book, *The Bramble Bush,* to help drive home that point. The poem facing the title page contains the essence of the book's message. For many first-year students the only thing in the book that they are able to comprehend is the poem:

> *There was a man in our town*
> *and he was wondrous wise:*
> *He jumped into a bramble bush*
> *and scratched out both his eyes –*
> *and when he saw that he was blind,*
> *with all his might and main*
> *he jumped into another one*
> *and scratched them in again.*

This little gem offers hope – hope that if at first the law might seem incomprehensible (our eyes will be scratched out as we learn the law), comprehension will come once our eyes are scratched back in. With time, experience and effort we may gain insight and perspective that will enable us to steer clients through the challenging courses presented by the disputes they might bring to us for resolution.

A recent ruling from the Supreme Court of Utah offers persuasive evidence that even the best and brightest among us have yet to jump into a bramble bush and have their eyes scratched back in again. The case in question is *Medved v. Glenn,* 125 P.3d 913 (Utah 2005), which corrected a misinterpretation of an earlier case, *Seale v. Gowans,* 923 P.2d 1361 (Utah 1996). Both cases involved determining when a plaintiff has suffered an injury cognizable at law in the context of a failure to diagnose cancer. In *Seale*, the court determined that under the facts of the case, it was not until the plaintiff's breast cancer returned that she suffered a cognizable injury upon which a cause of action for a delayed diagnosis could be based. Her claim was not barred, because the court held that the statute of limitations did not begin to run until she sustained damage.

In *Medved*, the plaintiff alleged that because of the doctor's failure to diagnose breast cancer, she had to undergo more invasive and extreme cancer treatments. The plaintiff also sought damages for an increased risk of recurrence of cancer. Relying on an erroneous interpretation of *Seale*, the trial court dismissed all of the claims, reasoning that *Seale* stood for the proposition that until the cancer recurred, there was no cognizable injury in a failure-to-diagnose cancer case. The Court of Appeals affirmed the dismissal.

The Supreme Court of Utah then reversed and at the conclusion of its analysis wrote:

> Although we are baffled by defendants' interpretation of *Seale,* we recognize that it was adopted by our colleagues on both the district court and the Court of Appeals. Moreover, in view of the arguments presented in this case, it appears as if it has been widely accepted in our legal community. It is therefore entirely possible, if not likely, that prospective plaintiffs have delayed filing suit due to the widely-accepted, but erroneous, interpretation of our holding in *Seale.*

Courts do not usually state their incredulity so directly. It seems safe to assume that the Supreme Court justices chose the word "baffled" to emphasize that Utah's highest court could find no logic or legal acumen underpinning interpretations of the issues by the the Court of Appeals' or by the trial court. The Utah Supreme Court justices were perplexed as to how the other judges and lawyers could be so blind to the correct interpretation of the prior decision.

Don't we all frequently feel baffled? Don't we all wonder how

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other lawyers can be so obtuse about their interpretation of a contract, statute or case?

One might attribute the difference between an interpretation of a case and that of opposing counsel to one's superior intellect and experience, or to opposing counsel's lack of it. Such an approach does not explain how the lawyers, the trial court, and the Court of Appeals in *Medved* made such an erroneous interpretation of *Seale*. Do the justices of the Supreme Court of Utah collectively have a vision and understanding of the law that is on a different plane than the other legal thinkers who dealt with the issue, or does the explanation lie elsewhere? Is the law so inherently difficult to comprehend that any argument can be made in good faith, and any lawyer or judge can entirely miss the point?

If some of the best legal minds in our community, such as those on the Court of Appeals and the trial bench, can get something so wrong, it begs the question of how lawyers in their everyday practice are to make correct interpretations of cases, statutes or contracts so as to advise their clients to pursue a reasonable course of action. Is *Medved* an aberration or does this kind of confusion occur daily at every level of the practice of law? How do we "scratch our eyes back in" so we can see what the Supreme Court justices see?

In posing these questions, I realize I can answer none of them, and if my eyes are at best only partially "scratched back in," what do I do to compensate? After reflecting on what I do and on what I ought to do to deal with this dilemma, I offer the following suggestions for how lawyers can deal with the inherent difficulty of understanding the law and making good recommendations to clients:

Practice the fundamentals. Just like blocking or tackling in football or passing and dribbling in basketball, it is the failure to practice the fundamentals of any endeavor that results in failure and loss. Don't cut corners at the investigation stage of a case. As my mother used to say, do your homework.

Get a second opinion before filing a case. Remember, you're not the only person on the planet who has good ideas, so ask for input from an attorney you respect. (If you don't practice in a firm, contact the Utah Trial Lawyers Association, which has a standing offer by its membership to provide this kind of help to fellow lawyers.) Attorneys whom you respect often are also your friends, but friends may be too kind to point out flaws in your case. Consider calling someone who typically takes the opposite side of the type of case you are working on and who is more likely to be objective than either you or your friends.

Consider the early use of intermediaries who specialize in dispute resolution. An experienced mediator can help you understand when you have misjudged a case and can recommend creative solutions.

Be sure you have your client's informed consent before you commit him to an expensive and lengthy court process. The most important decision to be made in a case usually is whether to pursue the matter at all. Helping your client make this decision will require skill and preparation that will in turn earn his confidence and trust and increase your ability to keep matters in perspective. If lawyers overemphasize the difficulties of a case, for example, they may fail in their role as counselor if clients choose not to pursue or defend their legal rights when they should. While it is both easy and tempting to tell clients what they want to hear, what they need to hear is their lawyer's realistic assessments of the strengths of the case as well as its weaknesses. They must be made aware that filing a suit may be comparable to a declaration of war upon the other party and that waging the campaign could be long, bitter and costly. They need to understand that guaranteeing a successful outcome is impossible. Also, if a client might be exposed to such unintended consequences as counterclaims, those cards should be laid face-up on the table.

Treat others respectfully. This may sound like a title for a Sunday school lesson, but it is on my list of suggestions because once you've made up your mind about something, you probably assume that you are right and that the person who is disagreeing with you must be wrong. If we are not respectful of people who disagree with us, we cannot expect them to respect our arguments. Another thing I try to keep in mind is that sometimes I might actually be wrong.

Be willing to reconsider your position. Stubbornly pursuing a wrong strategy will only run up costs and make a reasonable resolution more difficult or impossible.

Develop and maintain positive relationships with opposing counsel – often some of the best and brightest people you'll ever know. You don't give up anything in your case by being courteous and willing to listen to the other attorney with an open mind.

After three years of law school and 27 years of practice, there are still times that the law seems incomprehensible but I maintain hope that Karl Llewellyn's promise will be fulfilled – that my own eyes will be "scratched back in" and that I will be able to do a better job of helping judges and jurors, as well as other lawyers, see things as clearly as I do. In the meantime, if I seem to suffer from lack of vision or insight, I ask for your patience and your help in clearing the brambles from my eyes.

Going Dark – An Alternative to Sarbanes-Oxley Compliance

by Brad Jacobsen and Chris Scharman

A client of ours recently learned first hand the significant costs that implementation of the Sarbanes-Oxley Act of 2002 ("SOX") can have on a small business issuer. In connection with the review of the company's quarterly report, its chief financial officer unfortunately made an off-hand remark regarding the company's internal controls and procedures. As a result of such comment, the company's auditors demanded that the audit committee hire independent counsel and conduct a full review of the company's financial statements – with a materiality threshold (items requiring documented back-up to be provided to the auditors) of only $2,000. Over the next six weeks, the company incurred in excess of $300,000 in legal and auditing fees (not to mention lost opportunity costs and lost management time), filed its 10-QSB late and was threatened with potential delisting by Nasdaq. The resulting review by the auditors and the audit committee's independent counsel found no improper or illegal acts by the company and only required that the company make adjustments to its accruals of a net aggregate amount of less than $1,000. The significant cost incurred by the company for this review nullified its entire third quarter profit.

Like other small business issuers, our client must now seriously consider whether being a public company is in the best interest of its shareholders. As the deadline for compliance with the costly and time-consuming internal controls and procedures requirements for small business issuers nears,[1] many public companies (small and large) are also evaluating the merits of remaining public.

The primary means for a public company to avoid its obligation to comply with the reporting requirements of the Securities and Exchange Act of 1934, as amended (the "Exchange Act"), is to "go private." While going private can be costly and time consuming, many companies are eligible to go private by simply filing a one-page form with the Securities and Exchange Commission (the "SEC"), a Form 15.[2] The filing of the Form 15 without a preceding going private transaction is often referred to as "going dark" and is available to any company, with a few exceptions, that has fewer than 300 shareholders of record.[3] While most public companies have more than 300 individual, or "beneficial," shareholders, the ability to go dark measures only the shareholders "of record" (not the actual individual shareholders). It is estimated that over 84% of securities of most public companies are held in nominee or street name (not held of record by individual shareholders),[4] therefore making the option to go dark available to many public companies. It should be noted, however, that there have been recent discussions to amend the Exchange Act rules to require that beneficial (actual individual shareholders) and not simply record shareholders be included in such count.[5]

"Going dark" and "going private" are sometimes mischaracterized and confused with one another. In fact, following a going private transaction (discussed later), an issuer will file a Form 15 in order to go dark. Going dark and going private both eliminate the obligation of an issuer to file periodic financial and other reports with the SEC, terminate the issuer's obligations to comply with the most onerous provisions of SOX and relieve the issuer of the rules and regulations of its applicable stock exchange on which its shares were listed. However, there are important distinctions between the two, the most notable being that going dark companies usually continue to trade after the date of deregistration on a public market, such as the Pink Sheets.[6] This article briefly discusses going private transactions, but focuses primarily on a company's decision to go dark.

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The following sets forth certain issues and matters related to the process of becoming a private company (*i.e.,* no longer being required to file reports with the SEC under Sections 12(b), 12(g) or Section 15(d) of the Exchange Act).

Going Private vs. Going Dark

There are two distinct approaches to becoming a private company. The first is referred to as "going private," and the second is referred to as "going dark."

(a) Going private generally involves a transaction in which cash is exchanged for stock of a company's existing public shareholders and is designed to reduce the number of shareholders to below the minimum threshold required to deregister a company's stock. In fact, the transaction often results in the company's stock being held by a single party or group of related parties. Such transactions typically include mergers, third party tender offers, reverse stock splits and self-tenders by the company. Those types of transactions are typically costly and require substantial disclosures and filings with the SEC. Going private transactions tend to be scrutinized closely by the SEC (the Schedule 13E-3 filed in connection with a going private transaction will almost certainly be reviewed and commented on by the SEC), as such transactions often include a risk of insider self-dealing. When a controlling stockholder or group of controlling shareholders is involved in the transaction (which is usually the case), the transaction will be reviewed under the "entire fairness" standard, rather than the lesser standard of the business judgment rule.[7] If litigation ensues, which it frequently does in these cases, the board will have to meet this higher standard in defending both its decision to go private and the manner in which the company went private. Such transactions, however, are often favored by shareholders and institutional investors because they require shareholder approval in certain circumstances (mergers, reverse splits) or affirmative actions by the shareholder to tender their shares (which they have the option to do or not do depending on their perceived fairness of the transaction). Upon a merger (or reverse stock split in certain jurisdictions), shareholders will also have appraisal rights.

(b) Going dark, on the other hand, is significantly simpler but is available only to companies whose number of record shareholders already falls below the minimum requirement for continued public disclosure under the federal securities acts (300 shareholders in the case of most small business issuers).[8] Going dark essentially requires only filing a simple form, the Form 15 (also a Form 25[9] for companies listed on a national securities exchange such as NYSE, AMEX and Nasdaq), which suspends a company's public status and reporting obligations (described in more detail below). Although the required form and process are relatively simple and inexpensive (see below for further discussion), a company must properly analyze all aspects of

going dark to determine if it is appropriate for the company and to ensure compliance with all SEC regulations.

Reasons to Go Dark

In 2003 and 2004, approximately 300 U.S. companies deregistered their common stock (for reasons other than in connection with a going private transaction) by simply filing a Form 15 and going dark.[10] There are many reasons companies choose to go dark, including the following:

- reduction in the costs of being a public company, including those costs imposed by Section 404 (Internal Controls and Procedures) of SOX;[11]
- greater corporate governance flexibility;
- allowing management to spend less time on compliance and reporting activities and more time on the company's business;
- the ability to focus more on long-term financial results and goals rather than short-term market concerns;
- termination of the requirement to disclose competitive business and other sensitive information;
- going dark may provide additional cash for distribution to shareholders or other corporate purposes;
- reduction of potential liability of directors;
- limitation to the risk of litigation (other than in connection with actually going dark) due to the lower number of shareholders; and
- termination of the compliance obligations with the proxy rules, insider reporting obligations, periodic reporting requirements and regulation FD, along with their associated legal liability and costs.

Potential Disadvantages of Going Dark

Going dark also has potential disadvantages that should be carefully considered, including the following:

- reduced liquidity of a company's stock;
- reduced ability to use a company's stock as currency in acquisitions;
- perceived loss of prestige;
- potential to make stock-based incentive plans less attractive to employees;
- loss of access to the capital markets to raise money;
- the risk that a company's shareholder base will grow above 500 record shareholders requiring the company to again become a public reporting company;
- not having audited financial statements and complying with certain of the requirements of SOX may make a company less attractive as a potential acquisition target or for future financings;
- as a result of no longer filing periodic reports, holders desiring to sell pursuant to Rule 144 will usually be required to hold their securities for two years rather than one year;
- the substantial risk of shareholder litigation regarding the decision to go dark;
- potential loss of stock value[12] and, even if the company maintains trading status on the Pink Sheets,[13] lower trading volumes; and
- no payments are made to shareholders in connection with the loss of liquidity that going dark will bring.

Shareholder Requirements

To go dark, a company must have fewer than 300 record shareholders or, where the total assets of the company have not exceeded $10 million on the last day of each of the company's three most recent fiscal years, 500 record shareholders.[14] Upon filing the Form 15, the company's obligation to file periodic reports is suspended for a 90-day review period (see below for further discussion). If the company's shareholder base increases above the minimum shareholder number requirement during such period, then the company would again be obligated to begin filing periodic reports. This can happen for reasons outside of a company's control, such as when a broker that holds company stock in street or nominee name distributes that stock to the beneficial owners, thereby effectively increasing the number of record owners. Following the 90-day period, the company would not again become obligated to file periodic reports unless its shareholder base exceeded the minimum requirement of 500 shareholders that applies to any other private corporation, irrespective of the deregistration.[15]

Filing the Form 15 (and Form 25 if Applicable)

To effectuate the termination of a company's obligation to comply with the Exchange Act reporting requirement, a company must file a Form 15 with the SEC. A company that engages in a going private transaction must also file a Form 15 in order to terminate its reporting obligations. The Form 15 requires a company to certify that it meets the above-referenced record shareholder number requirements.

If the company is listed on a national securities exchange (Nasdaq, NYSE, AMEX), it will also need to file a Form 25. Pursuant to Rule 12d2-2 under the Exchange Act, ten days prior to filing the Form 25, the company must first notify the appropriate exchange, issue a press release regarding the imminent filing (filed as a Form 8-K, Item 3.01 "Notice of Delisting...,") and

post a notice on its website. The Form 25 delists the issuer's shares from the relevant stock exchange. The delisting is effective ten days after the filing (unless the SEC postpones the effectiveness) and withdrawal from Section 12(b) reporting (reporting required by virtue of having a class of securities registered under Section 12(b) of the Exchange Act) by the issuer will take effect 90 days later.[16] As with the Form 15, the requirement to file periodic reports is suspended on filing, although the tender offer and proxy rules will continue to apply to the issuer until the deregistration is effective. Although delisting under the Form 25 will terminate registration under Section 12(b) of the Exchange Act, the company's SEC reporting obligations are not terminated because the shares will still be registered under Section 12(g). The company will then additionally need to file a Form 15 as described above.

Timing

The going dark/private transaction becomes effective 90 days after the filing of the Form 15 with the SEC, unless the SEC denies the application. Even though a company's duty to file periodic reports (i.e., Forms 10-K, 10-Q and 8-K, *but not necessarily proxy statements or Forms 3, 4 and 5)* is suspended immediately upon filing the Form 15 with the SEC, if the SEC denies the Form 15, or it is otherwise withdrawn, then the company is required within 60 days to file all reports that would have been required had the Form 15 not been filed.

Recently Effective Registration Statements

A company registered under Section 15(d) of the Securities Act will not be able to suspend reporting during the fiscal year in which a registration statement covering a class of securities is declared effective. Additionally, no issuer may suspend reporting obligations under Section 15(d) unless the company has filed all of its annual and quarterly reports for the shorter of: (a) its most recent three fiscal years and the portion of the current year preceding the filing of the Form 15; or (b) the period since the company became subject to reporting obligations.[17]

Approval Procedure and Legal Risks

(a) Shareholder approval is not required to go dark, but a company's board of directors must approve and authorize the going dark procedures and the filing of the Form 15. Board approval must be given at a duly-called meeting of the board or, alternatively, by unanimous written consent of the company's board. In approving a decision to go dark, a board of directors must fulfill its fiduciary duties. The precise duties that apply in the context of going dark are not entirely clear, although it is clear that the board of directors must believe in good faith that going dark is in the best interests of the company and its shareholders and be able to provide reasonable justifications for reaching that conclusion. As previously described, a board's

decision will usually be reviewed under the business judgment rule standard.

(b) Although there is no affirmative duty to ensure a market in a company's stock, a shareholder may argue that going dark is a breach of fiduciary duty because shareholders assumed or expected the company's stock would have greater liquidity and that the company encouraged this perception. To reduce this possibility, companies not already listed on the Pink Sheets should consider taking steps to ensure that their stock will continue to be traded on an active secondary market such as the Pink Sheets. For stocks to be traded on the Pink Sheets, a market maker is required. See Note 13 of this Article for additional information regarding the Pink Sheets.

Contractual Obligations to Report

Certain contractual obligations may require a company to keep its stock public and comply with SEC reporting regulations. Those contractual obligations may be found in registration rights agreements, shareholder agreements, credit agreements, loan agreements, indentures or other similar agreements. The company should review all material agreements and charter document provisions to identify any ongoing reporting obligations contained therein, if any.

Recommendations:

A company should, at a minimum, take the following steps if considering going dark:

- establish a special committee of its board of directors, comprised solely of independent directors, with separate legal, accounting and financial advisors, to consider all options of the company, including other transactions, such as a merger, a preceding "going private" transaction, sale of assets, sale of stock, etc., and to thoroughly analyze the effects going dark would have on the company and its shareholders;
- make any such determinations sooner rather than later in the event that the Exchange Act rules are changed as recommended to count beneficial, rather than record, shareholders in order to qualify to go dark;
- consider the impact going dark will have on the company's ability to raise funds, make acquisitions, obtain financing, attract qualified employees, etc.;
- carefully review all material agreements and charter document provisions for obligations to remain a public company;
- keep proper records of all such proceedings;
- comply with all filing and disclosure requirements with the SEC;
- analyze the possibility of the shareholder base exceeding the minimum shareholder number requirements in the future;
- consider announcing its intention to go dark two to eight weeks prior to filing the Form 15 and/or Form 25 in order to give shareholders time to sell their shares prior to going dark; and
- consider continuing to publish the company's audited financial statements on its website.

An issuer's decision to "go dark" or "go private" is complex and complicated. Companies must weigh the costs and benefits of being public with the costs and benefits of being private. Although there may be important benefits to going dark, a board should carefully and thoroughly consider the decision with the advice of its legal, accounting and financial advisors.

1. While the deadline for compliance by small business issuers has been extended at least three times, Section 404 of SOX, relating to internal controls and procedures, currently is scheduled to be applicable to all small business issuers for their annual reports filed after December 16, 2007. Small business issuers preparing for such reporting requirements, therefore, will need to start implementing appropriate controls and procedures beginning on January 1, 2007.
2. The Form 15 is available on the SEC's website at http://www.sec.gov/about/formsform15.pdf
3. Exchange Act Rules 12g-4 and 12h-3 regulate when an issuer can exit the reporting system under Section 12(g) or Section 15(d). These rules allow an issuer to terminate its Exchange Act reporting obligations with respect to a registered class of securities held of record by fewer than 300 persons, or fewer than 500 persons where the total assets of the issuer have not exceeded $10 million on the last day of the three most recent fiscal years.
4. Christian Leuz, Alexander J. Triantis & Tracy Yue Wang, *Why Do Firms Go Dark? Causes and Economic Consequences of Voluntary SEC Deregistrations,* 1 (Mar. 2006) (unpublished working paper, available at http://ssrn.com/abstract=592421).
5. *The Final Report of the Advisory Committee on Smaller Public Companies to the U.S. Securities and Exchange Commission,* dated April 23, 2006, recommended that the SEC amend Rule 12g5-1 to interpret "held of record" in Exchange Act Sections 12(g) and 15(d) to mean held by actual beneficial holders.
6. *See* Luez, *supra* note 4, at 5.
7. Jannat Thompson, *Turning Off the Lights: "Going Dark" or "Going Private,"* Wall Street Lawyer, Vol. 9 No. 7 (2005).
8. *See* Luez, *supra* note 4, at 1.
9. The Form 25 is available on the SEC's website at http://www.sec.gov/about/forms/form25.pdf
10. *See* Luez, *supra* note 4, at 1.
11. A survey of 217 public companies with average revenues of $5 billion found that complying with the rules under Section 404 cost on average more than $4 million and that those companies devoted an average of 27,000 hours to their compliance efforts. *See* Financial Executives International, *FEI Special Survey on SOX 404 Implementation* (March 2005).
12. One study indicates that an issuer will lose 10% of its value on average as a result of its decision to go dark. *See* Martin C. Daks, *Companies 'Go Dark' to Avoid SOX Compliance,* New Jersey Law Journal, Aug. 3, 2006 (online article, available at http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1154509535896).
13. After delisting, if a market maker is willing to provide quotations on a company's stock, the stock may be listed in the "Pink Sheets," an Internet-based real-time quotation service for over-the-counter securities. Securities that trade only on the Pink Sheets generally have much lower trading volumes (and therefore less liquidity) than securities on typical markets such as Nasdaq, NYSE and AMEX. For additional information, visit http://www.pinksheets.com.
14. *See* Exchange Act Rules 12g-4 and 12h-3.
15. *Ibid.*
16. *See* Thompson, *supra* note 7.
17. *See* Thompson, *supra* note 7.

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Keep Dreaming

by Learned Ham

The scariest part of the *Bar Journal* is usually the Discipline Corner.[1] There but for the grace of the Office of Professional Conduct go I. But this issue is different. There's a letter to the editor asking the best way to wake a dozing judge. It's one of the most frightening things I've ever seen in print (next to last year's State of the Union Address and that picture in my high school yearbook). The terrifying thing about it is the idea that someone would seriously consider waking a sleeping judge. Letting a 17-year-old pack (or draft) my parachute – yes; climbing behind the wheel of a '72 Vega and dropping in a Barry Manilow eight-track – in a heartbeat; but "Ahem, rise and shine, your honor…" Sleeping dogs, sleeping giants, sleeping babies, sleeping sickness, Sleeping Beauty, sleeping judges – all the same thing. Don't go looking for trouble.

Why would you want to wake a judge? If your case is anything like most of mine, a catatonic judge is a dream come true. No one's going to deny my groundless objections, and there's less chance of being held in contempt. Lemons to lemonade, I always say. "I take it by your silence, your honor, that you do not object to a bail reduction."

Has it occurred to you the court might not be asleep? Instead, your too-eloquent-for-words pronouncement of timeless legal truths has likely induced a deep meditative state (like Civil Procedure lectures in law school, remember?). Step back and let your words have their effect. Abandon your desire for instant gratification (especially if it's an appellate court). The court will presently return from its transcendental realm, and will probably send the bailiff out for some stone tablets (and espresso) when it does. Justice can't really be dispensed with open eyes anyway. That's why the lady holding those scales is blindfolded. If there were any sand nearby, she'd be plunging her head into it. First rule of the bench: when you take something under advisement, a clear view is an obstruction.

Finally, empathize. Imagine yourself at home on the couch, watching Animal Planet while another Saturday floats past the window. You've seen one too many Jack Russells lose to the mechanical rabbit and you pick up the remote and take aim. But nothing happens. You press the button harder, because that always works. But this time it doesn't. You replace the batteries, and it still doesn't work. You walk over to the cable box and start punching buttons, but nothing happens. You bend down and try switching channels on the TV. No response. You have four options: (1) you can pull the plug on the TV; (2) you can leave the room; (3) you can sit there and watch Jack Russells until you go barkingly insane; or (4) you can sit there and watch Jack Russells until you fall blissfully asleep. Being a judge is a lot like that, except you don't have the first two options. And as between options 3 and 4, well, it doesn't take a rocket surgeon to make that pick. And decisions are what judges do for a living.

Still want to wake the judge? To quote from a recent prospectus: "Whoever gave you this idea is trying to take advantage of you. This is a terrible idea that will leave you broke, friendless, and unemployed. It will also result in serious personal injury and certain death. Bad things might happen, too. Do not stay the course. This is the point where even the most gullible summer associates turn and run like Hell." (You can't stick me with 10b-5 liability, at least not twice anyway.) If you've got your heart set on it, though, here are the tried and trues:

10. "Accidentally" knock a handy copy of Black's Law Dictionary to the floor.
9. Politely inquire, in increasingly loud tones if necessary, "Your honor, might this be a good time for a break?"
8. Ask the bailiff to open a few windows, especially if it's January.
7. Bump the microphone for that annoying "scratch, scratch, BOOOOM, scratch" effect.
6. Have an associate at counsel table sneeze or cough loudly each time the judge nods.
5. Wrestle opposing counsel to the floor, and then say, "Sorry, I thought the gun was real."
4. Say something remotely interesting for a change. (I apologize; a very alert judge who enjoys a good cheap shot made me add that one.)
3. Start yodeling like Roy Rogers on quaaludes. After four or five seconds, swallow a couple of Tic Tacs and say "Sorry . . . Tourette's."
2. Calmly call the witness a lying scoundrel, and opposing counsel a bottom-feeding shoe clerk. When opposing counsel bellows out an objection, guess who gets in trouble?
1. "Thank you for your consideration. Does the court have any questions?" That has a frighteningly invigorating effect on the most comatose judge.

1. What a nice name, "Discipline Corner" – so cozy and snug. Bring me a warm mug of cocoa while I sit here and contemplate my disgraceful lapses. (If only they were lapses!) Say, it's getting a little crowded here. Guess that just adds to the coziness.

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Attorney Fee Discrimination for Solo Practitioners?

by Michael A. Jensen

This article stems from a recent case where the trial court excluded billing rates from large law firms and instead relied exclusively on two solo practitioner rates simply because "large law firms, and especially national law firms, have large overhead/ expenses." Such logic, if left to stand, would allow large law firms to charge higher hourly rates than solo practitioners for the same legal services. In effect, trial courts could impose discriminatory billing rates against solo practitioners.

If this seems unlikely, take note that our appellate courts recently approved such discrimination on the basis of "trial court discretion." Before getting to the specific case referred to above, let me provide some appropriate background. The sole issue on appeal was the reasonableness of attorney fees. I was the attorney involved, and so I will relate the case from my point of view. I readily acknowledge from the outset that I may not be fully objective. I will, however, attempt to the best of my ability to relate the facts and the exact statements made by the trial court and the Court of Appeals who reviewed the trial court's ruling.

Since my attorney fees are at issue in this article, I will provide my credentials and background. My career as an attorney began late in life. I first obtained in 1964 a degree in physics and math from the University of Utah. After working four years as a geophysicist for Shell Oil, I earned an MBA degree from the Harvard Business School. After working in various businesses in New York, New Jersey, and Massachusetts for more than 20 years, I again returned to graduate school. This time, I attended the Boston College Law School. Immediately following law school, I moved back to Utah and began practicing law as a solo practitioner.

Since 1995, I have been counsel in numerous cases where attorney fees were approved by a trial court. In most if not all of those cases, I found that the amount of attorney fees approved was highly dependent on the particular trial court. Some courts seemed to take a rather passive role while others seemed highly critical of attorney fees. Some of them actually appeared to make disparaging comments about awarding any attorney fees.

For example, in one case the trial court reduced my fees by reducing my hourly rate to $50 for all legal research. It opined that law school students could have done the research at that lower hourly rate. This struck me as the court attempting to micro-manage my law practice. In another case, the trial court awarded only $3,000 for attorney fees when they were actually more than $30,000. The court opined that the parties should have settled the case earlier despite the intransigence of one party.

As a reminder, attorney fees in the State of Utah are available to a prevailing party in litigation only if provided by statute or contract. When fees are available, the trial court must approve them as "reasonable," although the term "reasonable" is undefined. Perhaps because of the vagueness surrounding the term "reasonable," there is a plethora of appellate cases in which at least one issue has been the amount of attorney fees awarded by a trial court. I have personally been involved in at least three of those cases. One was a divorce case and two were from the same contract dispute case.

I suggested in one of my appellate briefs that the general "system" for determining reasonable attorney fees is broken. I also suggested one solution for helping fix the system: begin with the presumption that attorney fees are reasonable and should only be reduced on a finding that they are unreasonable. I will address this possible solution later.

I will now return to the specific case where the trial court made an express distinction between solo practitioners and attorneys in large law firms. The case began in 2000 by plaintiffs who brought four causes of action for breach of contract against defendants. I represented the defendants. Three of the defendants were quickly dismissed from the case based on the doctrine of *res judicata.* Since the contract provided attorney fees to the prevailing party, the trial court awarded $1,330 in attorney fees. I supported those fees by affidavit in which I stated my billing rate as $175 per hour at that time. The trial court approved those fees as "reasonable."

Over the next year and a half, the remaining defendants prevailed on each cause of action and were also awarded attorney fees. In my affidavit in support of fees, I stated that my billing rate began at $175 per hour but had increased to $185 per hour as of September 2001. In granting summary judgment in early 2002, the trial court requested me to prepare a final order that was to also include an award of attorney fees.

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The order that I submitted, along with my affidavit of attorney fees, requested $11,538 in attorney fees at billing rates of $175-$185 per hour. The final order entered by the trial court stated the following:

> . . . and after reviewing the affidavit of attorney fees submitted by Defendants and finding such fees to be reasonable, orders and . . .

In effect, the trial court found that my fees were "reasonable." And this was consistent with the trial court's earlier approval of attorney fees it awarded for dismissing three of the defendants. However, the trial court then inexplicably reduced the amount of fees from the $11,538 sought to a mere $6,050. No explanation was given by the trial court.

It is important to note that the trial court did not simply rubber stamp my draft of the final order. Rather, the trial court made several handwritten changes to the order, showing that it carefully read the form of the order. But the trial court made no changes to the language that related to the reasonableness of attorney fees. Hereinafter, the 2002 judgment will be referred to as "Judgment I."

As requested by defendants, I appealed Judgment I. The Court of Appeals reversed the trial court and also awarded attorney fees on appeal. *See Blevins v. Custom,* 2004 UT App 265. The Court of Appeals also instructed the trial court to enter "findings of fact" consistent with its decision on Judgment I. On remand, the trial court took more than nine months to render its ruling on the amount of attorney fees, referred to herein as Judgment II.

In Judgment II, the trial court awarded attorney fees for (a) the trial phase, *i.e.,* for Judgment I; (b) the appeal of Judgment I; and (c) during remand, *i.e.,* for Judgment II. The total fees awarded in Judgment II for *all three phases* of the litigation were a mere $11,665 compared with more than $28,000 sought. The amounts in Judgment I and Judgment II are curiously similar. While the amount of attorney fees awarded by the trial court was quite naturally disappointing, the most disturbing part of the trial court's lengthy ruling was its substantial departure from well-established case law.

Dixie State Bank v. Bracken, 764 P.2d 985 (Utah 1988) is the seminal case in Utah on determining whether attorney fees are reasonable. In *Dixie,* the Utah Supreme Court cited *Cabrera v. Cottrell,* 694 P.2d 622 (Utah 1983), and then added four discrete questions that trial courts should answer in determining the reasonableness of attorney fees:

1. What legal work was actually performed?
2. How much of the work performed was reasonably necessary to adequately prosecute the matter?
3. Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?

4. Are there circumstances which require consideration of additional factors, including those listed in the Code of Professional Responsibility?

Dixie, 764 P.2d at 990. The Court of Appeals cited Dixie and instructed the trial court as follows:

> Accordingly, we remand for the entry of findings of fact consistent with this decision, and if appropriate, for an adjustment in the amount of attorney fees awarded to Defendants by the trial court.

While the trial court never made any "findings of fact," it made what it termed as determinations. The trial court examined the four questions posed in *Dixie*. It first undertook to set a billing rate in accordance with the third question from *Dixie: "Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?"* However, the trial court substituted the term *"similar services"* for a new factor: "similar situations." In so doing, the trial court substantially departed from well-established law. It also created discrimination against solo practitioners.

This came about in a curious and inexplicable way. On remand, the trial court issued to the parties the following order by way of a minute entry:

> One factor to be considered is *whether the billing rate is consistent with the rates customarily charged in the locality for similar services*. The Court directs the parties to submit . . . , affidavits from other attorneys that establish the billing rates for attorneys with *four years of practice to nine years of practice* in the areas of breach of contract and collection matters.

Even though the trial court had on two prior occasions in this case approved as reasonable my billing rate of $175 per hour, it ordered the parties to take a poll of billing rates in the local community. In response to the trial court's order, the opposing party submitted two affidavits from solo practitioners in which they stated that they charge $125 per hour, mostly for divorce work. One attorney stated that he charged $175 per hour for court work, including preparation for court appearances.

Since the trial court appeared not to know what attorneys were charging in the local area, I thought it best to obtain a large sample of billing rates. So, I obtained three affidavits from partners of three large law firms in Salt Lake City. Two of the three are local firms, and one firm has offices in two or more states. Those affidavits represented many attorneys with the requisite range of experience as directed by the trial court. The billing rates from one of these law firms ranged from $170 per hour for four years experience to $210 per hour for nine years experience. The rates from another ranged from $190 to $240 for the same range of experience. The third affidavit, from a senior partner in a local firm, contained a review of my billing rates and the content of the work I had performed in the case. The affidavit strongly supported my billing rates as being consistent with the rates charged by the attorneys in that large law firm.

Notwithstanding that the large law firms represented scores of attorneys in comparison with the two solo practitioners, the trial court rejected all affidavits from the large law firms by stating in its ruling the following:

> There is no question that the billing rates contained in the affidavits submitted by Mr. Jensen must be viewed in light of the organization of the offices which submitted them. Large law firms, and especially national law firms, have large overhead/expenses. Mr. Jensen would not have such expenses. As noted in his filings, he worked out of his home.

The trial court's statement was a shock. First, there was no evidence in the record about any overhead expenses. Second, there was no evidence in the record that I worked out of my home. In fact, I have since 1995 always maintained an office on Main Street in Salt Lake City. Third, it is quite possible that my overhead expenses are greater than those for each attorney in a large law firm. After all, large law firms should enjoy some economies of scale.

Nonetheless, this is the first time that any case has used overhead expenses as a factor in determining billing rates. Recall the question from *Dixie: "Is the attorney's billing rate consistent with the rates customarily charged in the locality for similar services?* To my knowledge, there has never been any notion that overhead expenses should be considered. Moreover, Rule 1.5 of the Rules of Professional Conduct, governing fees, is completely void of overhead expenses.

The trial court ruling, now sanctioned by the Court of Appeals and the Utah Supreme Court (*certiorari* was denied), has now introduced this new factor of overhead expenses in determining reasonable attorney fees. After rejecting all three affidavits from large law firms, the trial court then entered in its ruling the following:

> The Court determines that the rates charged by the solo practitioners are consistent with the rates customarily charged for similar services and by attorneys in *similar situations*, and therefore awards Mr. Jensen $125 an hour for non-court time and $175 an hour for court time.

The trial court also introduced the notion of "similar situations" rather than sticking with "similar services."

The trial court then proceeded to estimate the amount of time that should have been billed for each pleading or group of pleadings. For example, I billed 5.8 hours on a motion for summary judgment on the first cause of action. The motion included a meeting with

another attorney who had knowledge and documents from a bankruptcy proceeding that was relevant to the cause of action. It also included the drafting of an affidavit for that attorney. The trial court "determined" that only 1.5 hours was appropriate for such motion for summary judgment and awarded a mere $183. A similar pattern followed for each pleading during the trial phase. In sum, the trial court awarded $11,665 against the more than $28,000 billed and sought.

In the second appeal on Judgment II, the Court of Appeals seems to have gotten it wrong. *See Blevins v. Custom,* 2006 UT App 182. The Court of Appeals stated that:

> Here, where Defendant's attorney worked from his home, we cannot conclude that the trial court abused its discretion in relying on the hourly rate used by a sole practitioner.

First, as indicated above, there is no evidence in the record that I worked from my home. Despite my pointing out this flaw, the Court of Appeals seems to have adopted without question the trial court's error. Second, the Court of Appeals has now sanctioned a new factor in determining reasonable fees. That is, the Court of Appeals is now allowing a trial court to examine billing rates for attorneys in "similar situations" rather than for "similar services."

In effect, the Court of Appeals now allows comparisons of billing rates between classes of attorneys, *i.e.,* solo practitioners and large law firms. The approach taken by the trial court and sanctioned by the Court of Appeals takes us down a very slippery slope. Further, it is against public policy. This change in the "law" will now allow higher billing rates for large law firms or for any attorney who can show that his or her overhead expenses are greater than a solo practitioner. Without any showing of how much overhead expenses a solo practitioner actually has, this new ruling could also impose lower billing rates on solo practitioners than their colleagues in large law firms who provide similar services. The entire fee shifting principle supporting an award of attorney fees is undermined when a trial court reduces those fees, especially when the reduction is substantial. The prevailing party is not restored to its position prior to such litigation.

Let me now return to a possible solution. Utah Rule of Civil Procedure 73 should be amended to include a statement that attorney fees are presumed to be reasonable and are to be reduced only if deemed unreasonable. This would be consistent with the statement made by the Court of Appeals in its opinion in *Endrody v. Endrody,* 914 P.2d 1166, 1171 (Utah App. 1996):

> The court abuses its discretion in awarding less than the amount [of attorney fees] requested unless the reduction is warranted" by one or more of the above factors.

If so amended, Rule 73 would shift the burden from showing that fees are reasonable to showing them to be unreasonable. While the results could be the same, the mindset and presumption are different. It may also remove some of the subjectivity now frequently found in disputes over attorney fees. All too often trial courts expend more energy in reducing attorney fees than do opposing counsel.

The case under discussion also raises the issues addressed in the proposed amendment to Utah Rule of Civil Procedure 63 – an amendment that was never implemented. That amendment would provide for a change in the trial court on remand after a successful appeal. It would eliminate any appearance of bias against the successful appellant.

In conclusion, I hope this article serves as a warning for solo practitioners to be alert to possible discrimination concerning attorney fees. I also urge the Utah Supreme Court to review Rules 63 and 73 of the Utah Rules of Civil Procedure, and Rule 1.5 of the Rules of Professional Conduct. In particular, I urge the Supreme Court to (a) implement the previously proposed amendment to Rule 63 that would allow a change of trial court on remand at the request of the prevailing appellant; (b) implement additional language to Rule 73 that would require trial courts to more objectively review attorney fees with the presumption that they are reasonable; and (c) add clarifying language to Rule 1.5 that would prohibit discriminatory fees between solo practitioners and attorneys in large law firms.

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Going to Court in Babylon

by Major Darrin K. Johns

When I passed the bar exam in July 2003 and became a member of the Utah Bar, I never imagined that I would be presenting criminal cases in an Iraqi court. Although I was already an Air Force officer with over eight years of military experience, I thought at most I might have to deploy to Iraq to work in a deployed legal office taking care of the needs of our deployed troops. I was wrong. Last October I got the call. I was told I was needed in Iraq to present cases in front of Iraqi judges against suspected terrorists and insurgents. I was told to be there only two days after I was notified!

Deployments never come at opportune times. The Air Force had just transferred my family from Elmendorf AFB, Alaska to Edwards AFB, California in July. The first night after being assigned our quarters and starting to unpack our household goods, my wife went into labor and our daughter Kathryn was born. Now I would leave my wife, ten-year-old daughter, 20-month-old son, and my barely two-month-old daughter in a new place while I answered the call to duty.

I arrived in Iraq and was immediately put to work. My team's job was to present evidence against suspected terrorists and insurgents to Iraqi judges and to have American soldiers who had already redeployed back home testify via video teleconference. However, because there was such a backlog of cases involving soldiers who were still in Iraq, I was assigned to help that team present cases with live in-person testimony as well.

The Iraqi legal system is very different from our own. It is based on the Napoleonic Code. The system is non-adversarial. Under their system, judges do the investigating to find the truth. There are no rules against hearsay evidence, but hearsay evidence is not highly regarded. We soon discovered what evidence the judges wanted. They wanted at least two eyewitnesses to the criminal act, a sketch of the crime scene and photos. We soon discovered that an out-of-court confession meant very little to the Iraqi judges. They were so accustomed to the old regime torturing and forcing people to confess to crimes that unless a confession was made in court before the judge it was given little evidentiary value.

In a typical case we would review the case file to determine if it contained sufficient evidence to proceed to trial. We would verify that we had photos, sketches and two witnesses who could testify about what had happened. The witnesses had to be precise. We had one case where the witnesses said they were receiving fire from behind a tree and then saw the accused run out from behind a tree with an AK-47 and into a house. Our soldiers went into the house and caught the accused with the AK-47 still warm and with him, but because the witnesses did not actually see the accused pulling the trigger, the court found insufficient evidence to convict.

Our trips to the courthouse were an event. We would suit up in full battle rattle – body armor, sidearm (we kept our sidearm loaded and with us at all times in the courthouse), helmet, gloves, and blast glasses for eye protection. We would then get into our armored vehicles and head to the courthouse in the Red Zone. Although while I was there, our vehicles never came under attack while en route, we often took small arms fire and occasionally mortar fire while at the courthouse. One day after being escorted, an Improvised Explosive Device (IED) destroyed one of our vehicles. Fortunately, no one was killed in the attack.

When we got to the courthouse we would go to the judge's office with our interpreter and give him our evidence. In the Iraqi system an investigative judge gathers the evidence and takes witness statements. He then submits a report to a three-judge panel that questions the accused after having reviewed the evidence and the investigative judge's report. An Iraqi prosecutor and a defense attorney then make arguments to the panel. After arguments the panel would recess for five to ten minutes and then return with a verdict. If there were a guilty verdict, the panel would also pronounce a sentence at that time.

My team was involved at the investigative judge level. Once we

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gave the judge our evidence, the accused was brought up to the judge's chamber, his handcuffs removed, and he was permitted to sit, listen and observe the witnesses' sworn testimony. In the Iraqi system, there really is no place for a government attorney at this phase of the criminal process. We were there officially as representatives of the United States. The judge would ask all the questions of the witnesses through the interpreter. Usually after he was finished, he would ask us if we had anything we would like to ask the witness. During the questioning, the judge would dictate a summary of the witness testimony to his clerk who would record the summary.

After the witnesses testified, the accused would move to a chair in front of the judge's desk, next to his attorney, and would directly face us – so closely that our knees would almost touch. The defendants were accused of anything from illegal weapons possession, to attacks against Americans, to murder, and yet here we sat so close and personal to each other. The judge would then remind the defendant that he had an attorney and had a right not to answer any questions. The judge would then question the defendant and the judge's clerk would write a summary of the defendant's statement.

Several weeks after the investigative hearing, the judge would submit his report and recommendation to the three-judge panel that would bring the accused back, question him, hear the arguments from the prosecution and the defense and then render a verdict. Witness testimony usually was not taken at this stage of the proceedings. Usually, the three-judge panel relied on the summarized statements submitted by the investigative judge.

I found the judges very committed to making the criminal justice system under the new Iraqi system work. One judge I worked with constantly received death threats. The uncle of another judge I also worked with was murdered shortly before I left. Both judges still continued to professionally perform their duties.

Serving in Iraq was a unique experience. Where else do you get to wear full body armor to court and work with gunfire, bombs, rockets and mortars exploding nearby? And yet you make a difference by taking murderers, terrorists and insurgents out of the fight and by helping to restore peace and freedom to a war-torn country.

A Precious Birthright or Federal Porridge: Which Should Utah Lawyers Choose?

by Paul Wake

In recent months, several attorneys have written interesting *Utah Bar Journal* articles exploring constitutional interpretation. Unfortunately, these articles have tended to assume that "the Constitution" means "the U.S. Constitution." For years, the Utah Supreme Court has encouraged attorneys to remember the Utah Constitution. In *State v. Earl,* 716 P.2d 802 (Utah 1986), the Court suggested that Utah constitutional law is a precious birthright that we have sold for a bowl of federal porridge. In November of 1989, Justice Durham – now Chief Justice – took to the pages of this journal with an article entitled *Employing the Utah Constitution in Utah Courts,* and urged attorneys to help the Court develop a jurisprudence of state constitutional law. Yet in the past decade Utah's appellate courts rejected dozens of different attempts to advance constitutional arguments in appellate briefs, because the analyses were too slipshod to be considered seriously. The same problem plays out in trial courts.

Why have so many attorneys neglected to consider Utah's own constitution when drafting their pleadings and briefs? And why, of those who have cited to the Utah Constitution, have so many attorneys failed to successfully press constitutional arguments? This article will examine three possible explanations: 1) attorneys do not know there is a Utah Constitution, or do not understand why it is important; 2) attorneys do not know how to do the requisite research, or do not have the time it takes to do the research required to provide a sound basis for creating legal doctrine; and 3) attorneys see incorporating such arguments into their pleadings and briefs as futile. This article will also suggest ways to fix these problems, and will argue that we do so. It will also address how the recent *American Bush* case sheds light on how arguments over "original intent" versus "living constitutions" now fare in Utah.

What Do You Mean By "The Constitution?"

It is easy to forget that Utah has a constitution. After all, in discussing constitutional law we often hear arguments about Article III, the First Amendment, and so forth. One need not even add "to the U.S. Constitution," since most people assume that "constitution" means "U.S. Constitution." This is, however, an odd and even unfortunate situation.

At the time of the Revolutionary War, the colonies fought to become sovereign states. After defeating the British they unified as a loose confederation, and several years later strengthened that union by replacing their Articles of Confederation with the United States Constitution. Under that constitution the separate states retained most political power while allowing the federal government supremacy only in enumerated areas. As Chief Justice Rehnquist observed in *United States v. Lopez,* 514 U.S. 549 (1995) (striking down a federal gun control law that Congress lacked the power to create), "We start with first principles. The Constitution creates a Federal Government of enumerated powers. ... As James Madison wrote, '[t]he powers delegated to the federal government are few and defined. Those which remain in the State governments are numerous and indefinite.'" Given the political philosophy underlying our history, it is odd that many people now seem to view the fifty states as dependent subdivisions of a national government, with no sovereignty of their own and no distinctive constitutional law worth exploring.

It is also unfortunate. If the U.S. Supreme Court decides more cases like *Lopez* and returns power to the states, attorneys will increasingly need to turn to Utah's fundamental law to keep up with the times. Utah's governors and legislators have repeatedly shown an inclination toward strengthening state's rights. The Utah Constitution should become, and may well become, more important, and attorneys who seize the opportunity to put it to work will be the attorneys who shape Utah's future.

Perhaps of most interest to attorneys, the Utah Constitution can protect rights to an extent that often goes unrecognized. Until the lifetimes of most people reading this article, the U.S. Constitution's Bill of Rights largely only restricted the federal government,

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not state governments. For most of the past two centuries, the declarations of rights in state constitutions – declarations that often included protections not listed in the Bill of Rights – provided the definitive lists of rights states knew they were obliged to respect. Lately, these declarations of rights have been neglected. Since the Utah Constitution's Declaration of Rights protects a number of rights not mentioned in the U.S. Constitution, giving the Utah Constitution due attention can pay off by giving attorneys additional legal arguments to propound. Attorneys curious about what these rights may be can find the Constitution printed in volume 4 of the unannotated Utah Code, and located online at http://www.le.state.ut.us/%7Ecode/const/const.htm; they include an equal rights provision, protection for labor, and a prohibition against treating prisoner with unnecessary rigor.

Giving attention to state constitutional law also provides important indirect benefits. Greater focus on the Utah Constitution will remind attorneys and other citizens of the importance of structural protections such as federalism. Restoring the role of state and local governments will return political power back home to the people, who can then keep better track of what their government is doing and be better able to influence what government does to and for them.

Whether for mercenary reasons, or out of a sense of civic virtue, Utah lawyers should recognize that the Utah Constitution has much to say about political, economic, and social life in Utah. Attorneys who want an effective say in the development of Utah law will embrace the legal birthright our state's founders bestowed upon us.

Nuts and Bolts: Assembling an Argument Based on the Utah Constitution

In the *Earl* decision, the Utah Supreme Court recommended that attorneys who want to construct effective arguments applying the Utah Constitution should first become familiar with the analytical approach used in a Vermont case, *State v. Jewett,* 500 A.2d 233 (Vt. 1985). The *Jewett* decision was written in part as a primer on how to do state constitutional law analysis. *Jewett* pointed out that there is a "resurgence of federalism" sweeping the country, and quoted former Oregon Supreme Court Justice Hans Linde's statement that "'[a] lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice.'" It then went on to explain how to make such arguments correctly.

After explaining the need for greater attention to state constitutional law, the *Jewett* court suggested some approaches to analyzing state constitutions. The obvious approach is textual in nature. Ideally, a court will be able to determine what a provision means simply by assessing the fair meaning of the words. Another approach is to use historical materials. Such things as legislative history and the social or political context in which a provision originated can provide insight into how a provision should be interpreted. A third approach is the sibling state approach, which looks to how courts in states with identical or similar provisions have interpreted their similar provisions. A fourth approach involves studying economic and sociological materials supporting or discrediting contentions at issue. Other approaches are also possible; it is up to attorneys to find an appropriate approach.

Until recently, the definitive Utah example of state constitutional law analysis was *Society of Separationists, Inc. v. Whitehead,* 870 P.2d 916 (Utah 1993). In *Society of Separationists,* the Utah Supreme Court analyzed the constitutionality of prayer in city council meetings. The Court described the importance of considering textual and historical evidence, sister state law, and policy arguments, but ultimately relied primarily on using historical materials to inform the Court's reading of the religious freedom provision. The holding determined that a historical analysis makes clear that prayers are protected

by freedom of religion (a freedom the Court would later say should have allowed a citizen to open a meeting with a prayer that Mother in Heaven "strike down" those who would use prayer "for their own selfish political gains"). Although the Court reached a principled decision, its call to include policy arguments in constitutional analysis was troublesome, because policy concerns are for legislators.

Quite recently the Court fixed that problem, and also may have answered questions one might ask about how the "original intent" and "living constitution" interpretive controversies described in recent Utah Bar Journal articles apply to the Utah Constitution. In *American Bush v. City of South Salt Lake,* 2006 UT 40, the Supreme Court looked at nude dancing and narrowly decided that South Salt Lake could ban such behavior despite the claim that the Utah Constitution protects such freedom of expression. The Court properly observed that constitutional analysis begins with reading the text of the provisions in question. History can help clarify the text. However, current policy arguments do not determine the meaning of a constitutional provision, because the Court's job is to discern the intent of the drafters and especially of the citizens who voted for the Constitution. Viewing its task in that light, the majority concluded that citizens in 1895 did not believe that freedom of speech protects nude dancing.

There were some odd aspects to *American Bush* (apart from the fact that Utah's appellate courts have until this year been diligently protecting vulgar and offensive speech). Although it is clear that in 1895 the drafters of Utah's Constitution valued natural law and a study of sister state constitutions as wellsprings from which to draw constitutional provisions for Utah, the majority in *American Bush* substituted common law principles described in Blackstone's pre-Revolutionary War *Commentaries on the Laws of England* for natural law and – to some extent – sister state law in looking for the motivations of Utah's founders. (For a different opinion on the level of respect for the common law among the pioneers, *see* Michael W. Homer, *The Judiciary and the Common Law in Utah: A Centennial Celebration,* Utah Bar Journal, Sept. 1996, at 13.) This is peculiar, as few prior cases or articles on the Utah Constitution have emphasized Blackstone's times over Brigham's. Also, the majority described itself as adopting the primary approach, although that approach is usually applied to situations where a state constitutional provision is identical or very similar to a federal constitutional provision. It is good that the majority analyzed the Utah Constitution's distinctive provisions on their own terms, but it is not clear that in such a situation "primacy" is the correct analytical descriptor. In addition, no one floated the idea that Utah's unenumerated rights provision might protect nude dancing even if the free speech provisions do not. Perhaps there were too few poles in Deseret's saloons to allow anyone to say that with a straight face.

Especially in the wake of *American Bush,* Utah attorneys should be familiar with the history of the Utah Constitution, including the rationales behind the drafting of its various provisions. The main difficulty in gaining such information is that it often cannot be found in a few minutes on Lexis or Westlaw. Indeed, some such research cannot be done without digging through historical materials available only on paper or microform, in a limited number of archives. However, some shortcuts are available. One comment dealing in greater depth both with state constitutional law analysis and with the general history of the Utah Constitution and the seven preceeding proposed constitutions was written by this author for the Utah Law Review in 1996: entitled *Fundamental Principles, Individual Rights, and Free Government: Do Utahns Remember How to Be Free?,* a slightly improved version is online at http://www.xmission.com/~wake/utahconstitutionallaw.html. Jean Bickmore White's book *Charter for Statehood: The Story of Utah's Constitution,* also published in 1996, is quite interesting and helpful. Some specific legal issues have been subjected to readily available scholarly analysis, although the

conclusions may not be definitive, as exemplified by the contrast between Kenneth R. Wallentine's 1991 article in the JOURNAL OF CONTEMPORARY LAW, *Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14,* and Paul G. Cassell's 1993 article in the UTAH LAW REVIEW, *The Mysterious Creation of Search and Seizure Rules Under State Constitutions: The Utah Example.* Other issues may require considerable additional research in primary sources.

Attorneys should be aware of the U.S. Supreme Court's decision in *Michigan v. Long,* 431 U.S. 1032 (1983). There, the U.S. Supreme Court stated that if a state court decision is appealed to the U.S. Supreme Court and the state court decision appears to be based on both federal and state law but the "adequacy and independence" of the state law ground is not clear, the U.S. Supreme Court will assume that the state court decided as it did because it was required to do so by federal law. Consequently, when arguing specifically on state constitutional law grounds, attorneys should make it clear when their argument rests on independent and adequate state grounds.

This raises an issue specific to state constitutional provisions that are similar or identical to provisions in the U.S. Constitution: how should such provisions be interpreted? It should be obvious that the Utah Supreme Court can interpret distinctive provisions within the Utah Constitution as the Court sees fit. However, a number of approaches are possible when a Utah provision is very similar to a federal provision. These include the primacy, dual sovereignty, interstitial, and lockstep approaches.

Under the primacy approach, the state court first analyzes the state provision and turns to the federal provision only if the state provision is not dispositive. Under the dual sovereignty approach, a court looks at both state and federal provisions even if the federal provision alone could be dispositive. Under the interstitial approach, the state court turns to a state provision only if the federal provision does not adequately protect a right. Under the lockstep approach, a state court follows the federal provision if it is identical or similar to a state provision.

Attorneys arguing the meaning of state provisions that are similar to federal provisions will likely have to argue that the Court adopt one of these approaches. The Utah Supreme Court seems to be favoring the primacy approach, and it seems clear that a proper respect for state sovereignty and for federalism would militate against a lockstep or interstitial approach.

Constructing a legal argument based on the Utah Constitution is like constructing a legal argument based on other sources of legal authority. It requires selecting the correct analytical approach and working perhaps harder than usual to find the meaning of what are sometimes old and obscure constitutional provisions. Of course, the most important thing is making sure that the Constitution actually supports the point you are arguing.

Is Resistance Futile?

The Utah Advance Reports bring not just a steady stream of new case law, but also a predictable trickle of cases with the now-familiar paragraph declining to address state constitutional law issues mentioned by an attorney but not fully briefed. Too many attorneys resist doing the hard work necessary to muster an adequate constitutional argument. Such resistance is futile. Simply claiming that the Utah Constitution supports the attorney's point is not an adequate means of convincing a court that the Constitution supports that point, and such bare assertions will be rejected.

To succeed in making an argument based on state constitutional law, attorneys must persist. Admittedly, building a successfully argument grounded on neglected constitutional provisions is not easy. It is complicated by the fact that the Utah Supreme Court has been somewhat uneven in its approach to state constitutional analysis. Sometimes, the Utah Supreme Court has talked a good talk about its willingness to interpret the Utah Constitution, and then resorted to the easy lockstep approach in interpreting the state's constitution. Occasionally, the Court has not even been able to agree on what analytical approach it was taking. Yo-yoing on issues such as the extent of protections against self-incrimination or the constitutionality of the Judicial Conduct Commission has not helped inspire confidence, nor has dithering about its open courts provision jurisprudence. And it is disheartening to attorneys to build an argument based on lengthy original research, only to have it spurned.

Still, as Justice Durham described, there are a number of cases spanning the breadth of practice areas in which the Utah Supreme Court has used the Utah Constitution to settle legal questions. Attorneys have successfully convinced the Court that Utah standing standards are broader than federal standards, that under our Constitution parents deserve support against overly aggressive state intervention, that prisoners should be protected from unnecessary rigor, and more. Ultimately, attorneys who believe the Utah Constitution bears on their legal issues must persevere and do the work required to muster convincing arguments. Such efforts may be rewarded by success for a client, and in the process the State will be better off for the focus on its most important law.

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Electronic Filing in Federal Court: Where are We Now?[1]

by H. Craig Hall, Jr.

"Attorneys in this district are charged with learning and becoming proficient with the court's new system."[2]

– Judge Dale Kimball

Just less than ten years ago, an article appeared in the *Utah Bar Journal* entitled: "Is Electronic Court Filing in Your Future?"[3]

My, how far we've come.

In this relatively short time span, electronic filing has gone from a remote possibility, to "mandatory" (beginning May 1, 2006) for all attorneys practicing in the United States District Court for the District of Utah.[4]

Legal practitioners and their assistants are becoming more familiar and comfortable with the Federal District Court's Case Management / Electronic Case Filing ("CM/ECF") system. For example, in the District of Utah electronic filings increased from just nine filings in July 2005 to 3,020 in September 2006.[5]

Despite the increase in the total number of electronic filings, the percentage of electronic filings compared to total filings remains relatively low at approximately 33 percent.[6] Although electronic filing is now "mandatory" in the District of Utah, clearly some are still resisting this change perhaps because they do not understand the benefits of electronic filing and the potential risks of not using CM/ECF correctly.

This article offers several suggestions on how to become more familiar with CM/ECF, how electronic filing can actually benefit your practice, and how to avoid common mistakes associated with electronic filing.

Use it!

Although the District of Utah CM/ECF Administrative Procedures Manual states that "electronic filing is mandatory," and "[r]egistration is required for each individual attorney," the manual concedes that "[p]aper documents presented to the Court for conventional filing will be scanned and docketed. The scanned PDF image will become the official court record . . . ."[7]

In other words, as the rules are currently written, an attorney can get around the electronic filing requirement. The Clerk's office still accepts conventionally filed documents, even for documents that are not considered exceptions to the electronic filing "requirement."[8]

Nonetheless, there are numerous benefits to electronic filing. These include (but are not limited to): (1) ready access to case files; (2) the ability to file court documents from any place and at any time (although, speaking from personal experience, the "any time" possibility is both a blessing and a curse); (3) the elimination of associated copy and postage expenses; (4) the ability to pay filing fees and pro hac vice fees online; (4) fewer trips to the courthouse by attorneys and staff; (5) less time invested in filing electronically as compared to conventional filing; (6) giving judges and law clerks navigation tools within court-filed documents through hyperlinks of cited authorities; (7) immediate e-mail notifications of court filings;[9] and (8) automatic and instantaneous electronic service of pleadings on all parties to an action (as opposed to conventional paper/mail/fax service). In the author's opinion, it is difficult to imagine any advantage to conventional filing now that electronic filing is possible.

Because of these advantages, the Court continues to encourage attorney registration for electronic filing. In June 2006, the Court distributed the following message to attorneys practicing within the District of Utah that were not yet registered e-filers:

> The overwhelming majority of the court's bar have complied with the requirement that active counsel register as electronic filers. All counsel on a case are required to be e-filers, even if only one lead attorney files papers. The deadlines for mandatory e-filing (November 1, 2005, for criminal cases and May 1, 2006, for civil cases) are long past. Generous advance notice was provided, and the court provides several avenues for training at no cost, some including CLE credit. The few counsel who are not e-filers impose a burden of paper service on the court and on counsel who comply with the court mandatory e-filing policy.[10]

To enforce this policy, Magistrate Judge David Nuffer has even entered an order in at least one case (after the May 1, 2006 registration deadline) mandating that "within fifteen days all

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counsel of record in this case who are not registered e-filers in the court's electronic filing system shall register as electronic filers or shall file an affidavit or declaration stating their reasons for not complying."[11] This particular case had over a dozen lawyers and the "conventional" filers were creating a "burden of paper service on those who have complied with the court mandatory e-filing policy."[12] Magistrate Judge Nuffer has also remarked: "Orders such as this may become more common in the future."[13]

Despite the loophole allowing attorneys to file conventionally and avoid the electronic filing requirement, conventional filing is obviously frowned upon by the Court. Through regular electronic filing, attorneys and staff will soon recognize the enormous benefits the CM/ECF system has to offer.

Be careful with confidential and private information

Obviously, electronic filing increases accessibility of court files for everyone. Although sensitive information was certainly part of the open court record before the arrival of the Internet, electronic filing makes such documents quickly and easily available to anyone in the world with an Internet connection.

To lessen the likelihood of possible misuse of such sensitive information, the Court has set forth guidelines in both the Local Rules[14] and the District of Utah CM/ECF Administrative Procedures Manual.[15] The Administrative Procedures Manual warns: "[c]ertain types of sensitive information should not be included in documents filed with the Court. Personal information not protected will be available on the Internet via CM/ECF."[16]

If for some reason highly sensitive personal identifiers must be put in the filing, the Court directs that only partial information be disclosed. For example, social security numbers should only display the last four digits, names of minor children should contain only initials, dates of birth should have only the year listed, financial account numbers should include just the last four numbers, and references to home addresses should contain only the city and state.[17]

It has been my experience that most violations of this rule do not occur in the pleadings themselves, but in the exhibits. Practitioners should be extremely careful to redact sensitive information when exhibits contain social security numbers, driver license numbers, medical records (which may contain social security and driver's license numbers in addition to medical information), employment histories, information regarding crime victims, or proprietary or trade secret information.[18]

Do not expect the Clerk's office to catch your mistakes in this regard. As stated in the Local Rules: "Responsibility for redacting these personal identifiers rests solely with counsel and the parties. The clerk will not review any document submitted for filing to determine whether it complies with this rule."[19]

Continue to include certificates of service with your pleadings

As mentioned above, attorneys who participate in the CM/ECF system receive service of all court-filed documents electronically. This is true whether the document originates from a party or the court. When a document is filed, an e-mail notification is sent to all counsel of record within minutes of filing. This e-mail contains a hyperlink which allows you to view and print the corresponding document(s). Such e-mail notification is known as a Notice of Electronic Filing ("NEF") and serves as "proof of service" if such proof becomes necessary.[20]

Although Federal Rule of Civil Procedure 5(d) states that all documents (after the complaint) shall contain a certificate of service, the Administrative Procedures Manual allows omission of the certificate of service if all parties to the action are electronic filers.[21]

Difficulty arises when a case has one or more party that is listed as a "conventional" filer. If there is a "conventional" filer in the case, any party filing a document must also serve the conventional filer in a conventional method (mail or facsimile). If such conventional service is necessary, the Administrative Procedure Manual does not allow omission of the certificate of service.[22]

This precise situation was addressed in a relatively recent case when a defense attorney electronically filed a response to a motion without a certificate of service.[23] The plaintiff, a pro se prisoner and non-registered e-filer, claimed he was not served the response. Due to this claim and because there was no certificate of service, the plaintiff filed a "Motion to Strike Response to Motion."[24]

In reply, the defense attorney claimed that although the Response did not contain a certificate of service, it was in fact mailed to the plaintiff at the appropriate federal correctional facility. Further, the attorney attached an affidavit from the legal assistant explaining that the legal assistant was under the "mistaken impression that when a document was filed electronically, a certificate of service was no longer needed."[25]

Judge Ted Stewart had mercy upon the defense attorney in this regard and held that "the failure to attach a certificate of service to the document at issue was the result of inadvertent and excusable neglect or mistake which was the result of confusion over the major transition of the Court to CM/ECF. The Court finds that this error was remedied and that the documents were mailed, and that Petitioner has suffered no prejudice."[26]

Because of the apparent conflict between Federal Rule of Civil Procedure 5(d) (which requires a certificate of service on all documents filed after the complaint) and the Administrative Procedure (which allows omission of a certificate of service if all parties are electronic filers), it is prudent to always include a simple certificate of service even if the document is electronically filed and all parties are registered electronic filers. Such a practice will avoid possible problems as illustrated above.

Insert hyperlinks into your pleadings.
Administrative Rule II.C.1 states: "citations of legal authority in standard citation format may be hyperlinked to recognized electronic research services, such as Westlaw, Lexis/Nexis, Findlaw and official government sites."[27] Free software products from Westlaw[28] or Lexis[29] makes adding such hyperlinks relatively simple. Once downloaded, this software can scan (with one click of a button) a Word or WordPerfect document for citations and automatically insert hyperlinks into the document.

Adding hyperlinks to your court filing essentially allows one-click access to legal sources from the electronically filed PDF document. For example, if the citation *Finisar Corp. v. DIRECTV Group, Inc.,* 424 F.Supp.2d 896 (E.D. Tex. 2006) is used in a brief, and the judge or law clerk wishes to examine that case in more detail, clicking on the hyperlink will immediately pull up the precise case in Westlaw (or other research service) via the Internet. There is no need to pull out casebooks or type in lengthy citations into Westlaw to view the case.

Obviously, this makes life much easier for the often over-burdened judge and staff.

Check your e-mail regularly and adjust your spam filter.
After one becomes a registered electronic filer, the only notification of a court filing will be an e-mail to your designated e-mail address(es). A paper copy of the court filing from opposing counsel will likely not arrive at your office, since none is required. If the e-mail notification is not received (or read), it is certainly conceivable (even likely) that an attorney has no idea an appropriate response is due. This can create serious malpractice concerns, especially considering the Court's Local Rule which states: "Failure to respond timely to a motion may result in the court's granting the motion without further notice."[30]

Not many things in life can cause more panic to plaintiff's counsel than discovering his case was dismissed pursuant to a motion for summary judgment that plaintiff's counsel did not even know was filed.

Failure to receive e-mails can occasionally be attributed to an over-aggressive spam filter. Adjust your spam-filter so that e-mail notifications get to your inbox. If that does not work, have e-mail notifications sent to a secondary e-mail address (the e-mail notifications can be automatically sent to up to three separate e-mail addresses).[31] If a practitioner is still concerned about possible missed e-mail notifications, the "Email Sent" report can be easily viewed in the "Reports" section of CM/ECF.

Also, be sure that the e-mail notifications are sent to e-mail addresses that are regularly monitored. If notifications are sent to just one e-mail address, that inbox simply cannot be ignored for a week. It is a good practice to have notifications sent to the attorney, secretary and paralegal assigned to the case. Associates can also be easily added as additional counsel and have notifications sent to them (and their staff) as well.

Understand the possible consequences of not using CM/ECF correctly.
Magistrate Judge Nuffer maintains a weblog (or "blog") to assist attorneys and their staff with the CM/ECF system.[32] In one entry, Judge Nuffer made note of an attorney, who despite having signed up for electronic filing, put the following text on his "auto-reply" e-mail function that would be automatically distributed to all those who sent the attorney an e-mail:

> I am unavailable and due to the volume of emails that I receive, do not assume that I will actually read and/or respond to your email. Accordingly, I am not accepting service by email. If you have time sensitive materials, please forward them both to [name and email address redacted] and to [name and email address redacted] and/or telephone them at [phone number redacted]. Thank you for your cooperation.[33]

Ironically, if a document was served electronically to this attorney through the federal court CM/ECF system, the above "auto-response" e-mail would have never been sent to the serving attorney, since the notification e-mails are generated and sent by the court.

If one registers for electronic filing, he/she consents to electronic service, whether they like it or not. One cannot simply declare: "I do not accept service via e-mail" and expect that statement to take precedence over court rules.

Also, once a filing, order, or other document is served electronically, the attorney is deemed to have actually read the contents of the filing. For example, in one recent case, an attorney was sent an e-mail notification of a Court's order that contained certain time-sensitive deadlines. However, the Judge noted: "counsel did not comply with the conditions of the order . . . because he never read the order."[34] The attorney argued that he "tried to read the order when the Notice of Electronic Filing was sent to him, but was 'unable to do so' . . . ."[35] Counsel also "mistakenly believed he would receive a copy of any order by mail."[36]

In giving counsel "one last chance," Judge Dale Kimball held:

> [S]ome attorneys have been having problems understanding the new electronic case filing system. The court does not condone . . . counsel's conduct, but it recognizes that he could have been genuinely confused about whether an Order was attached to the e-mail notification of electronic filing. This court will give him the benefit of the doubt once. Attorneys in this district are charged with learning and becoming proficient with the court's new system. As is evident in this matter, attorneys who do not educate themselves with regard to the new process run the risk of prejudicing their clients. . . . [C]ounsel is warned that this court will not condone another such misunderstanding from him with respect to the court's electronic case filing system.[37]

Use available resources.

Before an attorney is given a password to use the CM/ECF system, they must receive the required training or have been previously registered to use CM/ECF in another district. This simple (and short) training can be obtained either at the courthouse,[38] on the Internet,[39] or through in-firm training.[40] In addition to the free training, the District of Utah has done a wonderful job of providing continuing support. This includes a CM/ECF website containing the latest information and updates,[41] a "CM/ECF User Manual,"[42] a monthly newsletter distributed by the Court devoted to CM/ECF,[43] Magistrate Judge Nuffer's blog on "Utah District Court CMECF Updates,"[44] and the CM/ECF telephone help desk which is staffed during court business hours.[45]

The training and resources available on the Internet answer most, if not all, questions you may have. If all else fails, the telephone help desk is more than willing to walk any attorney or staff member through any type of filing.

Conclusion

Electronic filing is certainly a significant change to the practice of law. There are undeniable growing pains associated with this change. However, like it or not, electronic filing in federal court is here to stay. Considering the above-outlined advantages of electronic filing, the Court's encouragement to attorneys to properly utilize CM/ECF, and the possible consequences of not using CM/ECF correctly, the time spent familiarizing yourself and your staff with this system is time well spent.

1. The author gratefully acknowledges the assistance of The Honorable David Nuffer, United States Magistrate Judge for the District of Utah, in writing this article.
2. *Graczyk, v. Weider Nutrition Group, Inc.,* 2:04-CV-01065 DAK, Order Granting Motion to Exclude Expert Report and Expert Testimony, docket no. 125, p. 2, June 16, 2006.
3. Rolen Yoshinaga, Eric Leeson and David Nuffer, *Is Electronic Court Filing in Your Future?* 10 Utah Bar J. 15, April 1997.
4. District of Utah CM/ECF Administrative Procedures Manual, September 22, 2006, p. ii.
5. Magistrate Judge Nuffer, *Attorney E-Filings Steady,* at Utah District Court CMECF Updates, http://utd-cmecf.blogspot.com/2006/10/attorney-e-filings-steady.html, October 2, 2006 (last visited December 5, 2006).
6. *Id.* In September 2006, 9,103 total documents were filed, 3,020 of which were filed electronically (for a total of 33.18%).
7. District of Utah CM/ECF Administrative Procedures Manual, September 22, 2006, p. ii. Section I.A.1., p. 1, Section II.F.1, p. 7.
8. *Id.,* Section II.F.4, p. 8. This section mandates conventional filing of certain documents, including (but not limited to) papers filed pro se, ex parte submissions to the court, and sealed documents.
9. Attorneys have the option of receiving "Summary" Notice of Electronic Filings ("NEF") rather than receiving a separate NEF for each document. The Summary NEF is generated and sent to the attorney at approximately midnight each night and includes all items filed within the last 24 hours. If the attorney chooses the summary option, the notification and service will obviously not be immediate.
10. Letter sent from the United States District Court for the District of Utah, June 14, 2006. *See also,* Magistrate Judge David Nuffer, *Attorneys Who Are Not E-Filers Get Special Letter,* at Utah District Court CMECF Updates, http://utd-cmecf.blogspot.com/2006/06/notice-to-unregistered-counsel.html, June 14, 2006 (last visited December 5, 2006).
11. *Phillip M. Adams & Associates, L.L.C. v. Lenovo International et al,* 1:05-CV-00064, docket entry no. 111, June 5, 2006.
12. Magistrate Judge David Nuffer, *Report – Notice to Unregistered Council,* at Utah District Court CMECF Updates, http://utd-cmecf.blogspot.com/2006/06/notice-to-unregistered-counsel.html, June 6, 2006 (last visited December 5, 2006).
13. *Id.*
14. DUCivR 7-3; DUCrimR 47-2.
15. District of Utah CM/ECF Administrative Procedures Manual, September 22, 2006, Section II.D.1, p. 6.
16. *Id.*
17. *Id.;* DUCivR 7-3(a); DUCrimR 47-2(a). Further, "[w]here a party deems it necessary to file a motion, pleading, document, or exhibit with unredacted personal data identifiers, the party may do so under seal . . . ." DUCivR 7-3(b); DUCrimR 47-2(b).
18. District of Utah CM/ECF Administrative Procedures Manual, September 22, 2006, Section II.D.2, p. 6; DUCivR 7-3(c); DUCrimR 47-2(c).
19. DUCivR 7-3(a); DUCrimR 47-2(a). *See also* District of Utah CM/ECF Administrative Procedures Manual, September 22, 2006, Section II.D.3, p. 6.
20. District of Utah CM/ECF Administrative Procedures Manual, September 22, 2006, Section II.H.4, p. 12.
21. *Id.*
22. *Id.*
23. *Colonna v. United States of America,* 2006 U.S. Dist. Lexis 43964 (D. Utah, June 13, 2006).
24. *Id.* at 14-15.
25. *Id.* at 16.
26. *Id.* at 16-17.
27. District of Utah CM/ECF Administrative Procedures Manual, September 22, 2006, Section II.C.1, p. 5.
28. http://west.thomson.com/westcitelink/ (last visited December 5, 2006).
29. http://support.lexis-nexis.com/lndownload/default.asp (last visited December 5, 2006).
30. DUCivR 7-1(d).
31. District of Utah CM/ECF Administrative Procedures Manual, September 22, 2006, Section IV.1, p. 15.
32. Magistrate Judge Nuffer, Utah District Court CMECF Updates, http://utd-cmecf.blogspot.com (last visited December 5, 2006).
33. Magistrate Judge David Nuffer, *Attorney Auto Response to E-mail: Return to Sender!,* at Utah District Court CMECF Updates, http://utd-cmecf.blogspot.com/2006/08/attorney-auto-response-to-e-mail.html, August 11, 2006 (last visited December 5, 2006).
34. *Graczyk, v. Weider Nutrition Group, Inc.,* 2:04-CV-01065 DAK, Order Granting Motion to Exclude Expert Report and Expert Testimony, docket no. 95, p. 1, April 17, 2006.
35. *Id.*
36. *Id.*
37. *Graczyk, v. Weider Nutrition Group, Inc.,* 2:04-CV-01065 DAK, Order, docket no. 125, p. 2, June 16, 2006.
38. http://ors.utd.uscourts.gov/cgi-bin/class.pl (last visited December 5, 2006).
39. http://www.utd.uscourts.gov/cmecf/training/training.html (last visited December 5, 2006).
40. http://www.utd.uscourts.gov/cmecf/documents/Firms_with_Court_Certified_Trainers.pdf (last visited December 5, 2006).
41. http://www.utd.uscourts.gov/cmecf/documents/ecfpage.html (last visited December 5, 2006).
42. http://www.utd.uscourts.gov/cmecf/documents/CMECF_User_Guide.pdf (last visited December 5, 2006).
43. http://www.utd.uscourts.gov/cmecf/documents/newsletter.html (last visited December 5, 2006).
44. Magistrate Judge Nuffer, Utah District Court CMECF Updates, http://utd-cmecf.blogspot.com (last visited December 5, 2006).
45. District of Utah CM/ECF Administrative Procedures Manual, September 22, 2006, p. ii. The Help Desk phone number is (801) 524-3248.

The Paperless Deposition

by Bradley Parker, Jim McConkie, Bradley Sidle and Lynn Packer

Historically, depositions have been a bonanza for billable hours, airlines and certified court reporters. An out-of-state deposition often meant hours of travel to gather witnesses, attorneys and sometimes even parties in a single room to scour piles of documents, often at a distant locale. During the past few years, technology has begun to change this time-honored tradition.

Recently, a deposition was held in Salt Lake City without a single paper exhibit being exchanged or any stenographer making the official record. Instead of shuffling paper documents and exhibits in front of the deponent, they were displayed on an LCD screen while both the deponent's testimony and the LCD screen were simultaneously recorded with a remote-controlled video camera. The entire deposition was streamed over the Internet to other rooms at the law firm and to the clients at their home 40 miles away.

The world's first paperless video deposition was taken here in Utah for a case involving a Syracuse, Utah man whose claims included severe brain damage after undergoing a hernia repair procedure. The deponent described documents and photographs with gestures and body language that were all captured on camera. There was no need to describe for the record where the deponent was pointing on documents – because it was all captured by the video camera for everybody to see and review.

The deponent even used a tablet PC to annotate digital text documents on the screen – just like a traditional pen and paper exhibit mark-up, but in a digital paperless format.

Although *video* depositions are not new, *paperless* depositions have until now been virtually unknown. Some attorneys and courtrooms use document cameras to enhance paper document presentation. Occasionally, attorneys may show digital exhibits on laptop screens, perhaps play video clips from time to time, or even use PowerPoint presentations, but those are at best rare occurrences.

The concept of a paperless deposition follows the trend in many courtrooms where more and more evidence is being displayed from a screen rather than on paper. Additionally, the legal profession's trend is away from stenographic and toward electronic record making. There is a smattering of steno-less depositions where attorneys, in search of a better record at lower prices, use audiotape or videotape proceedings with no stenographic backup. Bankruptcy attorneys, especially, have been ditching steno in favor of audio for their Rule 2004 examinations. The move away from paper in the courtroom parallels the same move many law offices are making toward paperless file systems.

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Paralegal Nicole McDonald operates the robotic camera (left in photo) while monitoring the audio from the audio/visual recorders.

The pool of people who know shorthand and how to operate stenograph machines has been drying up. Unlike their federal district court counterparts that still utilize steno, bankruptcy courts have been converting to audio recording. Utah's state courts are also ahead of law firms and federal district courts on the electronic record making front. Most proceedings in Utah's state court system are now recorded by digital audio and videotape machines. (Unfortunately many of the old analog video recording systems are now being replaced with audio-only recording, representing one step back after two steps forward.)

Video depositions are perfectly permissible under the Utah Rules of Civil Procedure. Utah's rules, similar to the federal rules and those of several other states, permit video to completely replace steno as the official deposition record. Specifically, Rule 30(b)(2) states: "The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means." The word "or" means that stenographic means are expendable.

Courts have long lauded the use of video depositions. In 1987, the United States District Court for the Middle District of North Carolina stated, "video depositions provide greater accuracy and trustworthiness than a stenographic deposition because the viewer can employ more of his senses in interpreting the information from the deposition." *Burlington City Board of Education v. U.S. Mineral Products Co., Inc.,* 115 F.R.D 188, 189 (M.D. N.C. 1987). Paperless video depositions are a natural technological progression. The benefits are undeniable:

- Each deposition costs less. After the initial costs, video depositions are much cheaper than stenographic depositions.
- The record of the deposition is an exact record, as opposed to a traditional stenographic record which may contain inaccuracies.
- Each deposition takes less time by eliminating delays for paper shuffling and the need to speak at a slowed rate that steno reporters can keep up with.
- The number of full-blown depositions can be reduced by deploying a strategy of recording video declarations of some witnesses that are shared with opposing counsel.
- The impact of the video testimony in settlement discussions, hearings and trials is much greater than printed testimony. Video testimony is more memorable to the viewer than simple audio or printed testimony.
- Secondary witnesses may appear at trial on video, rather than live, reducing trial costs and substantially cutting trial duration.
- Reactions, physical articulation and diction, which are otherwise lost in stenographic transcripts, are captured on video testimony.
- Other parties may watch streamed depositions remotely, which cuts down on travel costs.

The system as used by the authors has additional advantages. The setup allows for exhibits (documents, charts, timelines, photos, videos, etc.) to be displayed over the deponent's shoulder, facing the camera, in a paperless format. This facilitates clear interaction with the exhibits viewable to all. Additionally, unlike some other video recording setups, the entire deposition record is displayed in a single window rather than the typical practice of

Attorney Jim McConkie can watch streaming depositions on a computer screen in his office.

displaying disconnected presenters and visuals on two displays, split screen or picture-in-picture.

A picture really is worth a thousand words. Often the answer of a deponent in a deposition and what that deponent communicates cannot be accurately reflected in black and white printed words. Relying on archaic stenographic means of transcription simply ignores the available technology. A video record is a more accurate record than a transcript. A transcript always leaves the question of whether it was transcribed with complete accuracy. A video record allows the proceeding to be reviewed for what was said, and sometimes more importantly, how it was said.

The disadvantages of paperless video depositions are limited. One concern is whether a text copy of the deposition can be procured. Digital audio/video files of a deposition can be provided on a CD or DVD within minutes after the deposition.

Camera 1 medium shot.

If a certified text record is needed quickly, the deposition can be streamed live or emailed to a certified transcriber who can work on a text transcript (in some cases even as the deposition is underway). Another concern is what happens when questions or answers need to be repeated from the record. Fortunately, many digital audio and video recorders provide a "read while writing" function – that is, they can play back while recording.

To minimize initial costs, video deposition setups can be procured step-by-step: first by procuring the display technology, then adding a camera and recorder, then adding back-up recording devices and streaming capabilities. The components can turn a vacant office into a miniature television production facility.

Equipment used by the authors includes a 40-inch Westinghouse LCD panel for display, and a high-end, robotic, remote-controlled Sony pan/tilt/ zoom camera for primary video recording. Those are coupled with a pair of Sanyo digital video recorders (DVRs), a Marantz digital audio recorder, a Behringer audio mixer and Bescor lights. A second fixed Sanyo camera is added for video backup and to capture the same kind of cross shot seen in television newscasts. There is also a digital audio recorder wired into the system to provide triple redundancy. Internet streaming and video conferencing capabilities have been added to make the setup even more versatile and functional.

While all of this technology does take some getting used to, with a little practice and experience the paperless video deposition is easily mastered. Pre-programmed camera settings allow for push button camera shots which can zoom in on the witness, the displayed exhibit, or both. Targeted viewer-focus technology via preset camera shots, directs judges' and jurors' attention to the witness when the deponent testifies without exhibits, to the exhibits when the witness is testifying about exhibits, and to lawyer/deponent exchanges when the question is as important as the answer. The camera is much more interactive in the paperless deposition process than is a traditional camcorder on a tripod in the back of the room that gets a single fixed shot the entire deposition. It is important to be able to get a tight shot on a deponent during his or her response to some questions so as to capture body language which gives the full effect of his or her answer across to a viewing audience.

Documents and other evidence can be easily displayed in simple PowerPoint presentations. Although this does mean that in order to conduct a paperless deposition, all exhibits must be scanned in before the deposition, it is possible to scan in documents at the last minute. Moreover, with traditional paper depositions, many attorneys find themselves printing electronic documents to paper in order to facilitate the cumbersome paper deposition.

The authors' experiences with paperless video depositions are very positive. The witnesses they have been deposed so far – ranging in ages 10 to over 70 – have intuitively responded to the images projected on the video display. This has only helped them to explain and clarify their testimony. They point, they gesture and their testimony is much more clear and captivating than a dry black and white, written record. One can determine what pre-programmed shots may be needed before the deposition, and the rest falls into place as the deposition progresses. The camera remote control allows change from one shot to the next while still being able listen and oversee the audio levels of

counsel and the deponent.

The authors have also procured a portable video deposition system that fits entirely in a suitcase. They video-recorded a paperless deposition in San Francisco using equipment they carried with them on the plane. An expert witness was deposed about a case involving a woman whose appendix had ruptured. The major components of the portable system are a Da-Lite rear projection screen, a Sony pan/tilt/zoom camera, a Casio "short throw" projector, an nNovia video recorder, and a Rolls audio mixer.

The on-the-road paperless video deposition was streamed, live, back to Salt Lake over the Internet so other attorneys and assistants could be apprised of the proceedings. The authors' plan is to reduce the number of attorneys who travel, yet keep them in contact for input regarding the deposition. Instead of having multiple attorneys travel to a deposition, one attorney can conduct the deposition and have others watch the deposition back in the office over the Internet. At a break, a simple phone call can solicit any input the viewing attorneys may have.

The move toward greater use of paperless video depositions is undoubtedly the wave of the legal future. Traditional video depositions last way too long. Much of the 'dead air' is due to lawyers shuffling documents in front of deponents – documents that the camera cannot even 'see.' Paperless video depositions simply utilize available technology in an effective manner. Lawyers are slow to take advantage of the visual technology that is available, but jurors are often receptive to a more visual presentation.

There is no question that trials in the future will be conducted technologically. A time will come when shuffling paper documents around the courtroom and presenting information by blowing it up and pasting it on foam core boards will be a time-honored tradition of the past. Paperless trials which display information on a big screen that is easily visualized by everyone in the courtroom will be the norm. PowerPoint opening statements and closing arguments will be common. Documents will be displayed on the big screen during direct and cross examination. Impeachment by video deposition will be far more effective than reading back the cold print in a deposition. Learning to use and become comfortable with this technology at the deposition stage is the prelude to the courtrooms of the future. Effectual use of computer technology in the courtroom will, more often than not, give the side that uses it the definitive edge.

Utah Standards of Professionalism and 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 19

by Donald J. Winder and Lance F. Sorenson

"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."

Two boys go into a bakery looking for something to eat. When the baker is not looking, one boy steals a muffin and hands it to his companion, who hides it in his coat. The baker, upon learning the muffin is missing, asks the boy who is hiding it, "Did you take a muffin from the shelf?" The boy answers, "No, I did not." The baker then asks his companion, "Do you have the muffin?" The second boy answers, "No, I do not."

Both boys' answers to the baker's inquiries were technically true. Yet both boys acted unethically and immorally not only by stealing the muffin, but also by interpreting the baker's questions in such an artificial and restrictive manner that their responses hid the truth of what happened.

A lawyer may feel justified in withholding relevant and non-privileged information from an opponent where the request or question can technically be interpreted in a manner so as to render the information outside the scope of the request. The lawyer may even assert proudly that by withholding the information, he forces his opponent to be more careful in crafting document requests and interrogatories. So, too, the boys who stole the muffin might blame the baker for not asking the right question. However, the lawyer who "creates confusion" through artificial discovery responses is no less deceptive than the boys in the bakery. He obscures relevant information and may even hide its existence altogether. Such actions implicate not only the lawyer's duty to act with civility toward his opponent, but also his ethical duties as a member of the bar. See Rule of Professional Conduct 3.4(a).

Additionally, a lawyer may try to hide discoverable information from his opponent by playing "52-card shuffle," whereby he shuffles documents between the file maintained by the firm and the file maintained by the client in hopes of rendering certain documents outside the scope of the discovery request. Again, such actions may cause the non-production to comply technically with the request, but such artificial interpretation of a discovery request is unethical and contributes to the perception that members of the legal profession seek to evade honest and direct answers by finding legal loopholes.

Although a lawyer is already compelled to disclose relevant and non-privileged information during discovery by Utah Rule of Civil Procedure 26(b)(1), Standard 19 reinforces the notion that the purposes of discovery rules are to make discovery as simple and efficient as possible by eliminating any unnecessary technicalities, and "to remove elements of surprise or trickery so that the parties and the court can determine the facts and resolve the issues as directly, fairly and expeditiously as possible." *Ellis v. Gilbert,* 429 P.2d 39, 40 (Utah 1967). By following the counsel of Standard 19, a lawyer helps achieve an expeditious resolution of the issue at hand and helps maintain the integrity of the profession.

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Judge Disqualification Rules in Action

by Judge Robert K. Hilder

In the Third District, the associate presiding judge acts as reviewing judge for most Rule 63(b), Utah Rules of Civil Procedure, and Rule 29, Utah Rules of Criminal Procedure, motions to disqualify the assigned judge.[1] After more than one year of direct exposure to the rules in action, I am persuaded that ignorance of the rules' substance and procedural requirements is the norm, both for judges and lawyers. The Third District has thirty-two and one-half judicial officers (we presently share one of our five commissioners with the Third District Juvenile Court). I have now reviewed more than thirty motions to disqualify (all but two in civil cases), involving nineteen of those officers.

The experience has been often frustrating, sometimes humorous, and always revelatory. My purpose in this article is to draw from my wholly unscientific sample, and the research it has impelled, to consider the rules in practice and give some suggestions to both lawyers and judges who are faced with disqualification issues. Obviously the suggestions result from problems I have seen in both the motions filed, and judges' responses to those motions. This article is not intended to suggest that counsel and parties refrain from filing well-founded motions. The option to seek disqualification is a critical safeguard in the judicial system, and all judges support appropriate filings. I hope that this article will help counsel determine when a motion is valid, and assist judges (who each generally see very few such motions) in responding appropriately.

Utah does not provide each party a peremptory judge removal right. Except for the narrowly drawn Rule 63A option, which provides one stipulated change of judge as of right, counsel and parties are usually wedded to their judge for the term of the litigation, absent valid grounds for disqualification under the rules, or in some districts the automatic effect of assignment rotation, and of course changes caused by retirement or other administrative reassignment.

For Judges

– Do not engage regarding the motion. Do not request briefing, or set for argument before you determine legal sufficiency. Do not take the motion personally, even if it is patently personal and/or manifestly unfair. Everyone in your courtroom may stand in your presence and call you "You Honor," but that doesn't mean they actually like or respect you, and they don't have to, and you do not have to argue the merits of their position. If you do engage, you have probably made the best argument for disqualification.

The rules are explicit on this point: "The judge against whom the motion and affidavit are directed shall, without further hearing, enter an order granting the motion or certifying the motion and affidavit to the reviewing judge." Utah R. Civ. P. 63(b)(2) (emphasis added). Despite this clear directive, I have seen judges request briefing, set argument on the motion, and even call upon counsel present in the courtroom to essentially testify to the judge's impartiality or the appropriateness of his or her conduct in a specific instance. When the judge becomes enmeshed in the proceeding in this fashion the process itself may create hostile and biased reactions. At the very least, in the midst of such proceedings it becomes much more difficult to avoid an appearance of partiality sufficient to require disqualification.

– Recuse, or certify the motion. Say no more. The case law is clear that a judge's comments included in his or her certification risks improperly influencing the determination by the reviewing judge.[2]

JUDGE ROBERT K. HILDER was appointed to the Third District Court in 1995, and has served as Associate Presiding Judge since July, 2005. He has also served as a member of the Utah Judicial Council since August, 2001.

– Stay any action on the case until the reviewing judge has determined the motion following certification. We do not presently have an explicit rule that prohibits further proceedings when a disqualification motion is filed (although at least one decision appears to read the "no further hearing" language to preclude any action in the case, and not just a hearing on the motion). Regardless of whether the rule language is that broad, it is very likely that any judicial actions taken after the motion is filed are void, at least if disqualification is ordered.[3]

– The standard by which the challenged judge should consider the motion has changed over the years. Some older cases, including *Haslam v. Morrison,* 190 P.2d 520 (Utah 1948), suggested a presumption in favor of disqualification even when no bias exists. Justice Wade stated the rationale in his concurrence: "If the judge is not biased and prejudiced, there does not seem to be any good reason why, if the litigant in the court believes he is, that he should not get another judge to try the case since the result of the litigation should be the same in both cases." *Id.* at 526 (Wade, J. concurring).

The reasoning has some superficial appeal, but applying the presumption is an invitation to judge-shopping, and in today's busy courts the result would be an administrative nightmare. In 1948 the court was ready to defer to a subjective fear of bias. I would suggest that even when a party perceives bias, the standard is now objective (see discussion of *Madsen,* below).[4] Moreover, even if there was a presumption favoring disqualification at one time, at least one former justice of the Utah Supreme Court has reversed that presumption. In *In re Affidavit of Bias,* 947 P.2d 1152, 1153 (Utah 1997) (memorandum decision of Zimmerman, C.J., sitting alone), Chief Justice Zimmerman stated that when reviewing affidavits of bias, the court begins with the principle that "judges are presumed to be qualified."

Finally, on this point, I note the advice of a wise colleague who should not be named, because his advice, good as I found it, is not grounded in published precedent. I asked him what I should do when, through repeated experience, I had learned not to trust the representations of a certain lawyer (unfortunately, I was speaking generally, with more than one lawyer in mind). He asked if this knowledge, honestly gained by me through first-hand experience in judicial proceedings, prevented me from addressing each case on its merits and treating the lawyer, his or her client, and/or the opposing side, fairly. I stated that, so far, that was not a problem. His advice then was that until my subjective ability to adjudicate fairly was impacted, I owed it to all counsel, parties, and my colleagues, to keep the cases and not send the lawyer to a judge who may not yet be wise to his or her conduct.

– If the reviewing judge poses questions as permitted by Rule 63(b)(3)(B), answer in writing, in affidavit form, and in the immortal words of Sgt. Joe Friday, "just the facts," judge. No editorializing, opinion, or argument should be included.

– Recognize that a party may not create actionable bias, etc. solely by suing the judge, reporting to the Conduct Commission or Bar, or even threatening the judge's life or well-being (all of which have occurred to me and many others, and usually all in one proceeding), but be sensitive to reality; i.e. has the aggressive action been effective in creating bias? If yes, recuse. If no, then certify the motion for review by another judge. Neither counsel nor litigant should be permitted to manipulate judge assignments by such aggressive behavior, but it is even more important that each litigant has the benefit of an impartial forum.

– Avoid at all costs what may be erroneously perceived as improper *ex parte* contact. The specific conduct that I see most often is normal social courtesies between counsel and judges

that in fact have nothing to do with the case at issue and are not prohibited judicial conduct, but unrepresented parties are particularly (and understandably) sensitive to any indication that the opposing lawyer has an inside track with the judge. The most typical complaint is that at some point, usually following a hearing, opposing counsel may engage in social discourse with the judge, even approaching the bench or exiting the courtroom into the chamber's area. We all know (or at least have heard) that judges were people once, and may even have a friend or two left in the Bar, but such contact in the presence of opposing parties causes understandable fear of favoritism.

For Lawyers

– Consider whether grounds exist beyond the fact that the judge ruled against you; i.e. bias, prejudice or conflict of interest.[5] It is not enough to argue that there exists an appearance of partiality or bias, unless counsel can show an objective basis for such a belief. It is true that our Supreme Court has stated that, "… an appearance of bias or prejudice is sufficient for disqualification." *Madsen v. Prudential Fed. Sav. & Loan.,* 767 P.2d 538, 544n.5 (Utah 1988). This language makes frequent appearances in the motions I have reviewed, but strangely, the following phrase is often missing: "…even disqualification because of appearance must have some basis in fact and be grounded on more than mere conjecture and speculation." *Id.*

There is obviously room to argue how strong the evidence supporting an appearance of bias must be, but I find the facts of *Madsen* instructive. In that case the motion alleged that the trial judge (1) had personal knowledge of disputed evidentiary facts, (2) displayed bias against a financial institution party,[6] and (3) allegedly had a financial interest in the outcome. The decision suggests that there was at least some evidence regarding each of the allegations, but viewed objectively the facts neither singly nor together justified disqualification.

– Consider the source of any bias or partiality, and if it can reasonably be said to arise within the course of the litigation, think again. As a general rule, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.[7]

– Do not hide behind dishonest, emotional, irrational or unfounded accusations of clients set forth in affidavits and advance the motion, while at the same time attempting to suggest distance from the claims. When counsel file a motion (even the typical one paragraph motion that accompanies the most scurrilous client affidavits) counsel have impliedly, and perhaps expressly, adopted the allegations of the client. You may not sit on the sidelines or avoid responsibility for allegations you advance, even without comment.

– Do not use the motion to attempt to create a bias. For example, I have recently seen several motions that attach a copy of a complaint filed with the Judicial Conduct Commission. In most cases judges never become aware of Conduct filings, because the majority are dismissed as meritless and no response is necessary. By attaching a copy of a complaint which the judge will otherwise probably not see, the lawyer or unrepresented party is sharing accusations, warranted or not, that could poison a previously impartial forum. Moreover, the Conduct Commission process is intended to be generally confidential. Although there is no prohibition preventing a complaining party from sharing the fact that he or she made a complaint, use of the complaint to create bias and disqualify a judge is improper, and I suggest that a lawyer is on dangerous ethical ground if he or she shares the existence or content of a complaint indiscriminately or for an improper purpose, such as judge-shopping.

– If you are opposing counsel (and do not think the motion has merit), you are not prohibited from responding, but do not do so routinely. If, however, you believe facts or case proceedings relevant to the motion are mis-stated, a brief response may be helpful. At a minimum, it may aid the reviewing judge's decision to review the case history more deeply, view video or listen to audio of proceedings, or pose helpful questions to the challenged judge.[8] On the other hand, you may agree with the motion. I am aware of nothing that would prevent you from filing a pleading joining in the motion, but as opposing or co-counsel I would not do so unless I could also submit an affidavit regarding facts supporting the joinder, along with a certificate of good faith.

– Don't be thin-skinned. Argument in an adversarial context is what litigators train for and anticipate. While the judge is not your adversary, don't confuse probing, even aggressive questioning, with bias. At a minimum, don't expect more gentleness than you received from the average professor in your first-year of law school. I always review audio and video when such claims are

made, and I have yet to find that the record, including the judge's tone or general demeanor, matches the hyperbole of many complaints (one example from an actual case: "Scoured and smoked on the roasting pit of [the judge's] wrath."). It may be that the party or lawyer felt such barbs subjectively, but the objective evidence must be present. Look at the video, or listen to the tape, and maybe have someone else do so, before you file the Motion.

– The fact that the judge has found the lawyer, or the client, in contempt, or imposed sanctions in this or another case is not, standing alone, grounds for disqualification. A 2005 Ethics Opinion[9] is helpful by analogy. That opinion addressed whether judges must be disqualified in a proceeding in which the judge has previously (1) found an attorney in contempt, or (2) sanctioned an attorney, or (3) referred an attorney to the Office of Professional Conduct. The Judiciary's Ethics Advisory Committee determined that the issue is the source of the disqualifying bias, and that generally, if the source is a judicial proceeding, no disqualification is required, unless the "court's action or opinion is undeserved and indicates a deep-seated antagonism." The rationale is that a judge finding contempt, among other actions, is "presumably . . . doing what is expected as part of the judge's duties." Whether the judge discharges those duties correctly is not for a judge reviewing a disqualification motion to decide.

– The reviewing judge is not an appellate court. Argument that the trial court has ruled incorrectly, without more, is simply not a basis for disqualification and it is not a proper area of inquiry for the reviewing judge. Unless you can establish facts that tend to show the ruling (whether legally correct or not) was the result of bias, prejudice or conflict of interest, do not submit a motion premised on claims of an incorrect ruling. It is not enough to say, as some do, that "the judge could not possibly have reached his or her result in the absence of bias."

Do not take the foregoing thoughts as a suggestion that motions to disqualify should not be filed. They have their place. They are an important check on the human failings of even the best judges, and they are a valuable tool to promote confidence in the integrity of the judicial process. I think most reviewing judges share my view that even motions that are ultimately ruled to be meritless should be considered without undue sensitivity by both the challenged judge and the reviewing judge. Lawyers and litigants need to be able to express good faith concerns regarding unfairness, but such motions should never be used as a litigation tactic to change judges or simply delay a proceeding.

1. I have referred to the rules without specific reference to either throughout this article, because the substance of each is the same.
2. *See Barnard v. Murphy,* 852 P.2d 1023 (Ut.Ct.App. 1993), *cert. denied,* 878 P.2d 1154 (Utah 1994).
3. *See Pugh v. Dozzo-Otero,* 2005 UT App 203, ¶ 21, 112 P.3d 1247, 1251 (Ut.Ct.App. 2005).
4. The judge should recognize, however, that even when the bias is not objectively present, there are times when recusal or disqualification based on perception is the prudent course. It is not easy to recuse when there is no valid objective basis, but it is better to do so than to allow even a misperception of bias to undermine confidence in the forum and the ultimate decision. Recusal based on unjustified perceptions would normally occur only if the challenged judge so decided. There would likely be no basis in such a case for a reviewing judge to order disqualification, so please do not pass the motion on for review if you recognize that disqualification, while unwarranted, is the better course in the circumstances.
5. The fact that you believe that no judge could have made such a wrong-headed decision in the absence of bias is rarely enough to create the required objective basis for a legitimate challenge, particularly because a challenge of this nature asks the reviewing judge to assume a role more akin to the appellate role. As discussed later in this article, that is not the purpose of the rules.
6. Among other comments that the Utah Supreme Court characterized as "somewhat less than diplomatic," the judge stated "I have cussed financial institutions," 767 P.2d at 545.
7. *See Liteky v. United States,* 510 U.S. 540, 555, 114 S.Ct. 1147, 1157 (1994) (quoted in *Campbell, Maack & Sessions v. DeBry,* 38 P.3d 984, 992 (Utah 2001)).
8. But, please do not file an opposing memorandum in the hope of gaining favor with the judge. Most of us will see the motivation, and think less of you than if you remained silent.
9. Informal Ethics Opinion 05-2, dated November 22, 2005.

Jest is for All…

"And to my nephew Norman, the TV game show addict, I give and bequeath the sum of one thousand dollars – or what's behind curtain number three!"

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during their regularly scheduled September 21, 2006 Commission meeting held at Brigham Young University, J. Reuben Clark Law School.

1. Gus reported that John Baldwin, Lori Nelson and John T. Nielsen were making plans for the annual Bar-sponsored constitutional law class and that Commissioners are invited. John said there would be two legislative events. The first will be the breakfast with legislative leadership and the second will be the constitutional law class. Gus concluded by saying that a proposed bill relating to the judiciary is being carefully monitored by the Bar.

2. John Baldwin reported that the UPL Committee is currently working on trying to get tighter control over the "notario" situation. They are currently seeking sponsors for a bill to change the law to provide for criminal sanctions for "notarios" who prey on mostly non-English speaking immigrants who need legal assistance for a variety of problems.

3. Gus observed that there were complaints regarding the cramped July exam conditions. John responded that the admissions office is currently looking into alternative sites to hold the exam next July. John continued by noting that the July 2007 exam falls on a state holiday (July 24th) and said a decision needs to be made on whether the exam date should be moved from the traditional days of Tuesday and Wednesday to Wednesday and Thursday to accommodate this holiday.

4. Mary Kay Griffin distributed the recent auditor's report and stated that the Budget and Finance Committee had recently met with Deloitte & Touche to review the financial statements. The auditors issued an unqualified or "clean" opinion. She reported that assets are fairly stable with the decrease mostly due to depreciation, that licensing fees are up and finally, that the Bar expended $173,860 in excess of revenue this past year. Overall, the Bar is in "excellent stable financial condition at this time."

5. Lowry Snow reported that the annual leadership training seminar is scheduled for October 26th from 11:30 a.m. – 3:00 p.m., at the Little America Hotel. A proposed agenda has been drafted and Justice Jill Parrish is the scheduled keynote speaker.

6. The Blomquist Hale report shows this program is being utilized by members. John said that new brochures are at the printers and will be mailed to the members' homes in the near future.

7. Cheryl Mori announced the UMBA awards. They are as follows:

   – Jimi Mitsunaga Excellence in Criminal Law Pro Bono Award was presented to Professor David Dominguez at BYU J. Reuben Clark Law School;

   – UMBA Honoree of the Year Award was presented to Governor Jon Huntsman;

   – UMBA Lawyer of the Year Award was presented to the Honorable Paul Iwasaki, Second District Juvenile Court Judge; and

   – Pete Suazo Community Service Award was presented to Robert Rendon, Senior Vice President of Zions National Bank.

8. The Commissioners approved Commission subcommittee to review mentoring concepts.

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

- Catastrophic Injury and Wrongful Death
- Medical Malpractice
- Defective Products and Defective Drugs
- Insurance Bad Faith
- Commercial Litigation

The team you want for your plaintiffs' cases…

Each of Dewsnup, King & Olsen's personal injury lawyers is a front line, first chair litigator with numerous trials to his or her credit. Combined, we have in excess of 100 years of litigation experience and have obtained numerous multi-million dollar verdicts and settlements, including many of the largest and most significant Utah verdicts and settlements in complex tort and insurance bad faith cases.

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Ralph L. Dewsnup
Colin P. King
David R. Olsen
Edward B. Havas
Ruth Lybbert
Paul M. Simmons
Alan W. Mortensen
John C. Hansen
Tawni J. Sherman

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Utah State Lawyer Legislative Directory 58th Legislature 2007–2008

The Utah State House of Representatives

Ralph Becker
MINORITY LEADER
Democrat – District 24

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

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

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

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

Elected: 1994

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

Practice Areas: Real Estate and Land Use and Development

Lorie D. Fowlke
Republican – District 59

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

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

Kay L. McIff
Republican – District 70

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

Legislative Assignments: Higher Education Appropriations Subcommittee; House Public Utilities and Technology Committee; House Judiciary Committee

Elected to House, 2006

Practice Areas: Former presiding judge for the Sixth District Court, 1994–2005. Before his appointment, he had a successful law practice for many years, most recently as a partner in the law firm of Olsen, McIff, & Chamberlain.

Stephen H. Urquhart
MAJORITY WHIP
Republican – District 75

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

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

Scott L. Wyatt
Republican – District 5

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

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

Elected to House, 2004

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

The Utah State Senate

Gregory "S" Bell
Republican – District 22

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

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

Elected to Senate, 2002

Area of Practice: Real Estate Development

Lyle W. Hillyard
Republican – District 25

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

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

Elected to House, 1980; Elected to Senate, 1984

Areas of Practice: Criminal; Domestic; Personal Injury

Mark B. Madsen
Republican – District 13

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

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

Elected to Senate, 2004

Practice Area: General Counsel Office of Larry H. Miller

Scott D. McCoy
Democrat – District 2

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

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

Appointed to Senate, 2005

Ross I. Romero
Democrat – District 7

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

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

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

John L. Valentine
SENATE PRESIDENT
Republican – District 14

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

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

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

Notice of Election of Bar Commissioners – Second Division

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

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

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

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

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

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

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

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

Notice of Election of Bar Commissioners – Third Division

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

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

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

2007 Annual Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2007 Annual Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Friday, April 21, 2007. The award categories include:

1. Judge of the Year
2. Distinguished Lawyer of the Year
3. Distinguished Section/Committee of the year

Notice of Petition for Reinstatement to the Utah State Bar by Sheryl L. Gardner Bunker (a.k.a. Sheryl Rose)

Pursuant to Rule 25(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of a Verified Petition for Reinstatement ("Petition") filed by Sheryl L. Gardner Bunker in *In re Bunker,* Third District Court, Civil No. 040916336. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

2007 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2007 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession. Award applications must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Friday, January 12, 2007.

1. **Dorathy Merrill Brothers Award –** For the Advancement of Women in the Legal Profession.

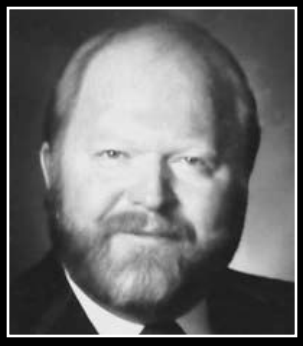
2. **Raymond S. Uno Award –** For the Advancement of Minorities in the Legal Profession.

Encourage Your Paralegals to Join the Paralegal Division

Lawyers are encouraged to have their paralegals review the criteria for membership in the Paralegal Division of the Bar and to support and encourage them to join. Division members are qualified by education, experience or training that can assist members of the Bar in improving the quality and efficiency of the delivery of legal services and the practice of law. In addition, your paralegal's membership in the division assists the Bar in the protection of the public from unqualified persons engaging in the unauthorized practice of law, and will increase the availability of low-cost legal services through the increased utilization of paralegals.

The division offers excellent professional benefits including, among others, notification of CLE seminars, the *Bar Journal,* and access to Blomquist Hale counseling services. For information and qualifications of your paralegals or legal assistants, go to utahbar.org/sections/paralegals.

IN MEMORIAM



Robert M. Johnson

1945 ~ 2006

The Bar would like to express their appreciation for the years of service Robert gave to Utah lawyers on health care.

Discipline Corner

ADMONITION

On November 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 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 3.2 (Expediting Litigation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney failed to timely draft and file an order as instructed by the court to do so on behalf of the attorney's client. The attorney failed to keep the client reasonably informed of the case status and failed to respond to the client's phone calls. The attorney failed to properly explain the legal work necessary to accomplish the client's desired result. The attorney's failure to do so resulted in the client's misunderstanding of the attorney's scope of representation and the necessary legal work to accomplish the client's goals. Mitigating factors were: absence of a prior record of discipline; absence of a dishonest or selfish motive; personal or emotional problems; and full and free disclosure to the client or the disciplinary authority prior to the discovery of any misconduct or cooperative attitude toward proceedings.

PUBLIC REPRIMAND

On November 3, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Mark R. Emmett for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.5(a) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In a bankruptcy matter, Mr. Emmett failed to manage his caseload in order for him to provide competent services to his client, which led to the dismissal of the client's bankruptcy. Mr. Emmett failed to submit the required documents to the bankruptcy court to proceed with his client's case. Mr. Emmett admittedly failed to keep his client reasonably informed and failed to comply with the client's requests for information. Mr. Emmett charged his client for work not completed, and for work completed without meaningful results.

RESIGNATION WITH DISCIPLINE PENDING

On November 8, 2006, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Craig P. Orrock.

In summary:

Mr. Orrock failed to fully account for funds in his trust account.

SUSPENSION

On October 30, 2006, the Honorable Sandra N. Peuler, Third Judicial District Court, entered Findings of Fact and Conclusions of Law, and Order of Discipline: Suspension suspending Karen Thomas for six months from the practice of law for violations of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), 3.2 (Expediting Litigation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. Ms. Thomas's suspension was effective thirty days from the date of its entry.

In summary:

Ms. Thomas was hired to finalize an adoption, in which the natural mother had agreed to relinquish her parental rights. The client paid Ms. Thomas for the drafting of the adoption agreement, the finalization of the adoption and the filing fee. The client notified Ms. Thomas of the birth of the baby. The client took the baby home from the hospital. Five weeks after the baby's birth, Ms. Thomas had not arranged for the natural mother to sign the required relinquishment papers in front of a signing judge. The client left numerous messages for Ms. Thomas concerning the status of the relinquishment. Ms. Thomas failed to keep the client informed of the status and failed to promptly comply with the client's requests for information. Ms. Thomas informed her client that the delay was due in part because the signing judge was out of town. The natural mother became frustrated with Ms. Thomas and the delay. The client arranged, on her own, for the natural mother to appear before the judge to sign the relinquishment papers. At the hearing, the natural mother demanded that the baby be returned. The court ordered that the client return the baby within an hour's time. Ms. Thomas informed the client that she would help the client try to get the baby back without charge to the client. Ms. Thomas did not earn the fees she collected from the client. Ms. Thomas collected an excessive fee given the work performed in the adoption.

ADMONITION

On October 20, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violations of Rule 1.3 (Diligence), 1.16(c) (Declining or Terminating Representation), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In a custody case, the attorney failed to follow up with opposing counsel regarding a stipulation and other issues that required

action, or enforcement. The attorney failed to pursue the issue before the court concerning the opposing party's relocation to another state although a stipulation was in place for joint legal custody. The attorney failed to provide the court and the client notice of the attorney's withdrawal in the case.

PUBLIC REPRIMAND

On October 20, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Alejandro Maynez for violations of Rules 1.4(a) (Communication), 1.4(b) (Communication), 3.3(a)(1) (Candor Towards the Tribunal), 3.3(a)(4) (Candor Towards the Tribunal), 3.4(b) (Fairness to Opposing Party and Counsel), 4.1(a) (Truthfulness in Statements to Others), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In a bankruptcy matter, Mr. Maynez changed the signing date of his client's signature and estimated the client's financial figures to correspond with the new signing date. Mr. Maynez did not consult with his client concerning the changes. The altered documents were filed with the court and without the client's authority. Mr. Maynez was not candid with the trustee concerning the change in the documents. Mitigating factors were: remorse; candor to the Ethics and Discipline Committee's Screening Panel; attempt to resolve harm to client and Trustee; and Mr. Maynez's self report of the matter to the OPC, albeit under threat that the bankruptcy Trustee would report the conduct if Mr. Maynez did not report it.

PUBLIC REPRIMAND

On October 12, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Philip Danielson for violations of Rules 1.4(b) (Communication), 1.15(b) (Safekeeping of Property), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

After being hired for a criminal matter, Mr. Danielson left the law firm he was with, turning all of his cases over to another attorney. Mr. Danielson's failure to communicate the reasons for his withdrawal did not allow his clients to make informed decisions. Mr. Danielson failed to give his clients adequate notice of his withdrawal. Mr. Danielson failed to provide an accounting until long after it was requested by his client. Mr. Danielson knowingly failed to respond to requests for information by the OPC.

SUSPENSION

On October 4, 2006, the Honorable Judith Atherton, Third Judicial District Court, entered an Order of Discipline: Six Month Suspension suspending Gordon W. DeBoer from the practice of law for violations of Rules 8.1(a) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. DeBoer made false statements or omitted material facts on his application for admission to the Utah State Bar.

ADMONITION

On October 10, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violations of Rules 1.4(b) (Communication), 5.1(b) (Responsibilities of a Partner or Supervisory Lawyer), 7.1(a) (Communications Concerning a Lawyer's Services), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney was in a supervisory role in the firm. A client approached the attorney when the client was having problems with another attorney in the firm. The attorney agreed to take the case from the other attorney. After taking the case, the attorney failed to explain statute of limitations issues. The attorney failed to take reasonable efforts to ensure the performance of the other attorney, who was a new attorney. The attorney also held out the nature of the law practice as a firm when it was not.

ADMONITION

On October 10, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violations of Rules 1.3 (Diligence), 1.5(b) (Fees), 1.6(a) (Confidentiality of Information), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney was hired to defend a notice to vacate. The attorney failed to follow-up on the changes made by the client to the complaint. The attorney did not have a signed fee agreement with the client, which would have evidenced that the attorney communicated the basis and rate of his fee to his client. The attorney shared confidential information with another attorney, not associated with the attorney, without the client's consent.

The Young Lawyer Division in 2007

by David R. Hall

The Young Lawyers Division of the Utah State Bar (the "YLD") is looking forward to another outstanding year in 2007. With a leadership body made up of five officers, eleven committees, and six liaisons, the YLD continues to make significant contributions to the Bar and the public. The following is a brief overview of the YLD as well as a look at what is planned for the coming year.

Who is a member of the YLD? You may be a member of the YLD and not even know it. There is no need to sign-up or pay dues to be member of YLD. All members of the Utah State Bar in good standing under 36 years of age as well as members who have been admitted to their first state bar for less than three years, regardless of age, are automatically members of the YLD. Membership terminates automatically at the adjournment of the annual convention of the Utah State Bar following a member's thirty-sixth birthday or the third anniversary of a member's first state bar admission.

YLD's Elections & Officers: YLD members elect new officers each summer. I (David Hall) am currently serving as the 2006-2007 YLD President. Sean Reyes is Treasurer, and Craig Hall is Secretary. Stephanie Wilkins Pugsley is the President-Elect for 2007-2008, and Debra Griffiths Handley is the Past-President of YLD.

And Justice For All: (Karthik Nadesan and Ryan Christensen, co-chairs) Now in its fifth year, the YLD continues to help organize and sponsor the "Bar Sharks for Justice" pool tournament each Fall to help raise money for "and Justice for all." This event continues to grow in popularity and raises more money each year. This past November the tournament raised over $5,000. In addition to the pool tournament, the committee helps organize the "And Justice for all" volunteer fundraising phone-a-thon held each year.

Community Service: (Rachel Terry and Emily Smith, co-chairs) The Community Service Committee is traditionally one of the most active committees of the YLD. Recent projects have included volunteering at Globus Relief, Children's Justice Center, YWCA, Utah Food Bank, Utah Aids Foundation and hosting the annual "Law Suit" Day during which professional clothing is gathered and donated to the Road Home and Assistance League of Salt Lake City.

Tuesday Night Bar: (Kelly Latimer, Christina Micken, and Matt Wride, co-chairs) At "Tuesday Night Bar," volunteer attorneys provide free legal assistance to the general public, including helping unrepresented individuals obtain counsel. As its name suggests, Tuesday Night Bar is held on Tuesday evenings between 5:30 and 7:00 p.m. at the Utah Law & Justice Center (645 South 200 East). In addition, the Young Lawyers Division and the Tuesday Night Bar program sponsor CLE luncheons on areas of law that frequently come up at Tuesday Night Bar. If you would like more information about the program or would like to volunteer, please contact Kelly Latimer at kellylatimer@comcast.net or Matt Wride at mwride@kmclaw.com.

Continuing Legal Education: (Matt Tarkington and Keli Beard, co-chairs) The CLE committee is involved in helping to develop and sponsor CLE that is meaningful for young attorneys. The YLD has recently co-sponsored CLE luncheons on appellate brief writing, civility in the practice of law, and basics of criminal law.

Needs of Children: (Lance Rich and Jeremy Reutzel, co-chairs) The Needs of the Children Committee has been working with the Utah Heart Gallery to help children stuck in the foster care system find adoptive families. The Committee is also in the early stages of partnering with the U.S. Dream Academy, a national organization dedicated to mentoring children who are facing the anxiety and upheaval brought on by having a parent in prison.

Public Education: (Marianne McGregor Guelker and Barbara Ishimatsu, co-chairs) The Public Education Committee is

working with the American Bar Association to implement the "Choose Law" program in Utah. The project aims to increase diversity in the legal profession by assisting and encouraging young individuals of color to become attorneys. The project emphasizes the importance of law in society and introduces students to the steps they need to take to go to law school.

Law Day: (Gary Guelker and Tyson Snow, co-chairs) The Law Day Committee is responsible for hosting the annual Law Day Reception and related Law Week activities. This event honors those individuals and groups who have committed their time and resources towards serving our legal community and its members. It also honors members of our local youth who participate in the Mock Trial, Art-and-the-Law, and Law-Related Education Essay contests. The theme for this year's Law Day is "Liberty Under Law: Empowering Youth, Assuring Democracy." Plans are in the works for a Law Day luncheon to be held May 1. Watch for more information coming soon.

Utah State Bar Conferences: (Chris Snow and Kurt Hawes, co-chairs) The YLD sponsors and coordinates with various practice sections of the Utah Bar to organize the "Back to Basics" CLE sessions at the Bar's Spring and Annual meetings. The goal of the "Back to Basics" sessions is to provide valuable training to new lawyers in various fields of practice as well as refresher courses for more experienced practitioners. In addition to CLE, the committee organizes and staffs the popular "Kid's Fair" that is part of the Utah State Bar's Annual Conference held in Sun Valley, Idaho.

Professionalism and The Practice of Law: (Christopher M. Von Maack and Dennis Flynn, co-chairs) The Professionalism and The Practice of Law Committee works to foster and improve professionalism and civility. The committee is currently developing a free, on-line mentoring resource designed for new lawyers, but also available to the public. Attorneys will be able to choose from a variety legal topics on the Bar's website, click a button, and view a short video presentation by an experienced attorney or judge on that topic. Filming has commenced and tutorials will be available on the Bar's website in the near future.

Membership/Recruitment: (Seth Hobby and Brian Rosander, co-chairs) The Membership Committee works to increase participation of the 2,000 young lawyers within the Bar. This year the committee is making a special effort to reach out to law students at the University of Utah and BYU to educate them about the numerous educational and service opportunities within the Bar. Too often, the only aspect of the Bar that young attorneys are familiar with is the admissions process.

High School Debate Tournament: (Chad Derum, YLD Liason) The High School Debate Tournament Liason organizes and coordinates the YLD's sponsorship of an annual debate tournament. Specific responsibilities include fundraising for the event, advertising and promotion, ensuring that judging commitments are met, and conducting public relations on behalf of the YLD in the high school debate community. In October 2006, the YLD and the Litigation Section co-sponsored a very successful Young Lawyers Invitational Debate Tournament held at Highland High School in Salt Lake City.

Utah Bar Journal: (Nathan Croxford and Peter Donaldson, co-chairs) The YLD Bar Journal Committee and the *Utah Bar Journal* actively seeks article submissions from young lawyers for publication in the *Utah Bar Journal.* Please send submissions or questions to Nathan Croxford (ncroxford@berrettandassoc.com) or Peter Donaldson (pdonaldson@swlaw.com).

The YLD is committed to serving the legal profession and the community as a whole. I would like to personally thank the numerous attorneys who volunteer their time and energy on behalf of the YLD. Additional information regarding the YLD is available on the Bar's website: www.utahbar.org/sections/yld. The website has contact information for all the officers, committee chairs, and liaisons. I would encourage you to contact me or any of the committee chairs if you would like to learn more about a program or become involved in the YLD. We look forward to an exciting year in 2007!

Thank You!

The Young Lawyers Division of the Utah State Bar would like to thank the following attorneys for volunteering at the Tuesday Night Bar pro bono legal clinic during the 2006 calendar year. Because of their efforts, over 600 members of the public were provided with a free initial legal consultation, including preliminary legal counseling and general legal information.

Tuesday Night Bar is held at the Utah Law and Justice Center (645 South 200 East, Salt Lake City) on Tuesday nights from 5:30 – 8:00 p.m. If you are interested in volunteering, please contact Kelly Latimer, Tuesday Night Bar Co-Chair, at kellylatimer@comcast.net.

Kenneth Ashton
Angela Atkin
Lois Baar
Joel Ban
Blake Bauman
Mike Black
Josh Bowland
Elizabeth Bowman
David Broadbend
Aaron Brogdon
Bob Brown
Mary Brown
Stefan Brutsch
Perry Bsharah
Wade Budge
Mona Burton
Carolyn Clark
Tim Conde
Jeff Corey
Denise Dalton
John Delaney
David Dibble
Chad Derum
Jeff Droubay
Matt Droz
Steve Edwards
David Elmont
Adam Elmore
Dawn Emery
Janelle Eurick
Jared Fields
John Fowles
Craig Galli
Michael Garret
Damon Georgelas
Tammy Georgelas
Alisha Giles
Debbie Griffiths-Handley
Brent Hall
David Hall
Ruth Hawe
John Heath
Maria Heckel
Shane Hillman
Seth Hobby
Chad Hoopes
James Holtkamp
Rob Hughes
Scott Irwin
K.C. Jensen
Kevin Jones
Brian Karren
Akiko Kawamura
Shani Kennedy
Mark Kittrell
Jennifer Lange
Kelly Latimer
David Leigh
Lisa Lewis
Greg Lindley
Charles Livsey
Romaine Marshall
Ryan Marshall
Ted McBride
Marianne McGregor-Guelker
Oliver Melgar
Sam Meziani
Christina Micken
Mark Miller
Dave L. Mortensen
Daren Mortenson
Karthik Nadesan
Jason Nelson
Kim Neville
Kate Norman
Carolina Nunez
Melissa Orien
Doug Owens
Justin Palmer
Jonathan Pappasideris
Stewart Peay
Wendy Petersen
Amy Poulsen
Stephanie Pugsley
Knute Rife
Sean Reyes
Kathie Roberts
Jacquelyn Rogers
Scott Rosevear
Cameron Sabin
Timothy Schade
Sarah Schwartz
Sharrieff Shaw
Billie Siddoway
Emily Smith
Angela Stander
Gregg Stephenson
Jess Stengel
Steven Stewart
Lara Swenson
George Tait
Jake Taylor
Rachel Terry
Steven Tyler
Nate Wheatley
Juliet White
Chris Wight
David Williams
DJ Williams
Robert Wing
Matt Wirthland
Mark Wiser
Matt Wride

Nonlawyers Help Keep Lawyers out of the "Discipline Corner"

by Peggi Lowden

In most states of America, disciplinary panels hear evidence about complaints that are brought against lawyers alleging violations of the rules of professional conduct. After the evidence is heard, the panel deliberates and either dismisses the complaint or recommends disciplinary action against the lawyer. In the situation where the complainant is the accused lawyer's client, the hearing is the place where clients often paint a picture of personal betrayal and a loss of confidence in the legal system. Testimony may be through cracking voices, angry words, and tears. The accused lawyer speaks and offers evidence in defense. Neither complainants nor lawyers leave the hearing room appearing to be satisfied. However, rising out of the ashes of this unpleasant experience there are lessons of hope for clients and lawyers.

COMMUNICATION

One lesson concerns communication between lawyer and client. A client retains a lawyer most often when they have a problem or crisis in their life. The client has an expectation that the lawyer will not only help with the crisis, but will reduce the client's stress related to the problem. In some cases, however, the client experiences additional stress from unreturned telephone calls, inadequate or nonexistent notification of case events, or lack of prompt responses to questions and concerns. As a result of the client's unfulfilled expectations, the client feels personal betrayal followed by a lack of confidence in the legal system.

Communication Practices – Admittedly, it is often inconvenient when a client calls with concerns because you are extremely busy meeting the constantly demanding deadlines of the legal business. However, each client's needs and concerns are important to them, and should be important to you. Absent clients, you would probably be looking hungry!

In order for a client to feel that their needs and concerns about the legal matter will be attended to, there are three telephone handling communication practices that you can use. These practices are identified below:

1. Assure that a client's telephone calls are returned within a reasonable time period, usually the same day, unless you tell the client otherwise.
2. At times, the lawyer is not able to return a call personally within a reasonable time due to traveling, depositions, trial, etc. You should feel comfortable to take the initiative to return the call to inform the client that the lawyer is aware of the call and will return their call as soon as possible. It is important that a client receive contact from someone with the lawyer's office, even if it is simple assurance that the lawyer is attentive to client concerns and needs.
3. Be aware that clients may telephone several times within the same day or over a period of days. Do not assume that all of the calls are for the same purpose. Ask the client about the reason for each call to the lawyer's office. It is a good practice, when you are in doubt about the status, to pick up the telephone and make a quick courtesy call to the client to ask if all of their calls were answered.

Through daily use of these three practices, you cultivate a communication style and process that develops relationships of respect and trust with clients. Be courteous, helpful, prompt and reassuring in your contacts. When the lawyer is busy, paralegals and support staff are charged with the responsibility to keep the client informed about when the lawyer will return their call.

PEGGI LOWDEN is a paralegal at the law firm of Strong & Hanni in Salt Lake City. She recently completed six years of service as a public member (the final year as a panel vice chair) for the Utah Supreme Court's Disciplinary Committee. She is active with issues concerning the legal profession and is a director of the Paralegal Division of the Utah State Bar.

Paralegals and legal secretaries should work together to assure that this crucial communication occurs on a continual basis.

CLIENT AND BUSINESS RECORDS

The second lesson deals with the creation and maintenance of client and business records by the lawyer. These records help the client to understand what work was done for them and why specific tasks were performed. Additionally, records are essential to fully defend against a client complaint. Unfortunately, and frankly a surprise to me, many lawyers fail to maintain records at a level that is helpful to defend themselves in a disciplinary panel hearing.

Nonlawyer Roles in Creation and Maintenance of Records – The creation and maintenance of client and business records is an area where paralegals, legal secretaries and administrative staff have important roles to help lawyers. By creating and maintaining records daily, you help lawyers take adequate precautions in their law practices to assure compliance with many rules of professional conduct. Records set the foundation for an effective defense against a disciplinary complaint. The records should consist of work completed by lawyers, paralegals, and secretaries concerning all phases of representation, but especially of communication with clients and counsel for other parties. The records should be maintained daily.

THE RULES OF PROFESSIONAL CONDUCT

What are the rules of professional conduct? The American Bar Association (ABA) created the *Model Rules of Professional Conduct* (Model Rules) to define a lawyer's responsibilities and duties to clients, the public and as officers of the court and the American legal system. A majority of the states adopted the ABA's Model Rules for use within their own jurisdiction. If you are not familiar with these rules, find them and review them for your jurisdiction. Some of the rules are discussed in the following paragraphs.

Rule 1.4 (Communication) – Rule 1.4 requires that the client be promptly and reasonably informed about their matter, along with prompt compliance with the client's reasonable requests for information. Although you understand the nuances of the legal processes, remain aware that the clients do not fully understand what is going on. Clients are sometimes concerned, nervous, frightened and bewildered by the legal system. Often you and the lawyer are perceived as their protectors. Looking from the client's viewpoint, you can understand why some feel betrayed by lawyers and unenchanted with the legal system when their calls are not returned or they do not understand what the lawyer did to earn the fee that was paid by the client.

Rule 1.5 (Safekeeping Property) – Rule 1.15 deals with the safekeeping of a client or another's property in the possession of a lawyer. The rule states,

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.
>
> (b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.
>
> (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
>
> (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> (e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

The safekeeping of property includes separateness of the property of others, good accounting practices, documenting the movement of property (i.e.; trust account funds to operating account), prompt disclosure of property in which an attorney or third party holds or develops an interest, prompt and thorough accountings, and prompt distribution of property when required. The production of documents and accountings may, for example,

be important where clients pay flat fees for legal services and bring a complaint against the lawyer. Some lawyers take the position that a flat fee is earned by the lawyer whether or not substantial work is done on the case, and, therefore, the creating and maintenance of adequate records and accountings of billed work for the client is not required. The potential consequence of this lack of record keeping is a complaint that alleges an overcharging of fees by the lawyer. It is difficult to deal with this allegation effectively if there are no records or accountings of what was done on the client's behalf.

It is recommended that the lawyer maintain records of services performed on the client's behalf, for all fee arrangements. Adequate records include maintenance of monthly or quarterly statements of legal services performed, correspondence, pleadings, records of telephone communications, and similar records. If you wish to set up procedures and systems of accountings and records, review other Model Rules that pertain to legal fees (Rule 1.5), confidentiality of information (Rule 1.6), conflicts of interest (Rules 1.7, 1.8, and 1.9), and bar admission and disciplinary matters (Rules 8.1 and 8.4), along with any other rules that you and the lawyer may determine applicable to establishing systems and procedures for the practice. It is wise to maintain a backup of billing sheets, phone logs, correspondence, etc., because an attorney in a disciplinary hearing who says that they don't have the evidence to defend themselves due to a computer failure, flood, or fire may sound an awful lot like "my dog ate my homework."

Rules 8.1 and 8.4 (Bar Admission and Disciplinary Matters) – Bar Admission and Disciplinary Matters are good rules to know so that you are fully informed about the potential consequences from a client complaint. These Rules, in part follow:

> An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
>
> . . . (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6. (Rule 8.1)
>
> * * *
>
> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> . . . (d) engage in conduct that is prejudicial to the administration of justice . . . (Rule 8.4)

As a prior disciplinary panel member, I've found it to be rather disheartening to determine that the only rule violation is 8.1(b) because the lawyer failed to respond to the complaint as required under the rules. Moreover, 8.4(a) may be violated by virtue of a Rule 8.1 violation. A lawyer may end up with two rules violations against him/her because of a failure to respond to requests for informal from the Office of Professional Conduct, even where the complaint is determined to be without merit. Unfortunately, this situation does occur frequently; lawyers should respond appropriately and in a timely manner.

What can you do to help the lawyer to stay out of the discipline corner? First, become familiar with the rules in your jurisdiction. Secondly, as you read the rules, notice the common sense and reasoning of the rules. Finally, apply the common sense and reason of the rules to your everyday communication and record keeping practices.

What are the Consequences to the Lawyer of a Rule Violation? The finding of a violation of a rule of professional conduct places the lawyer's license to practice law, as well as his or her reputation, in grave jeopardy. A violation may result in a private or public reprimand, suspension, or the loss of a license to practice law. Additionally, in many jurisdictions, a finding of a rule violation will prevent a lawyer from becoming a judge in the future.

READY. . SET . . . GO!

Now, you may be more familiar with some of the ABA's *Model Rules of Professional Conduct.* You should feel comfortable enough to open discussions with the lawyers in your office about how you and the lawyers may work together toward compliance with the rules of professional conduct. Generally, improved communications, safekeeping of client property, and adequate record-keeping sets the stage for success. The ultimate goal should be satisfied clients who trust in lawyers and the legal system, which in turn keeps legitimate client complaints at the lowest levels and keeps lawyers out of the discipline corner.

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CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
01/17/07	**Ethics School:** 8:30 am – 4:00 pm. Early registration $150 before January 6th, $175 after.	6 Ethics
01/25/07	**NLCLE: Real Property.** 4:30 – 7:30 pm. $55 YLD; $75 others.	3 CLE/NLCLE
02/16/07	**IP Summit.** Downtown Marriott. Details TBA.	TBA
02/22/07	**NLCLE: Law Firm 101: What Jr. Associates Should Know About Client Management, E-Mail Etiquette, Record Keeping, Billing/Time Keeping.** 4:30 – 7:30 pm. $40 YLD; 60 others.	2 CLE/NLCLE
03/08–10/07	**2007 Spring Convention in St. George.** Go to www.utahbar.org/cle for a complete schedule.	8 (incl. 1 hr Ethics & up to 4 hrs NLCLE)
03/15/07	**NLCLE: Appellate Practice.** Yearly practice updates in real property, collections, domestic, business, corporate counsel, and criminal law. Watch for details. 4:30 – 7:30 pm. $55 YLD; $75 others.	3 CLE/NLCLE
05/16–19/07	**The National Institute for Trial Advocacy (NITA):** Trial skills training, featuring learning-by-doing exercises emphasizing persuasive presentation of case story in bench and jury trials. Reserved for Litigation Section Members $1,200; Non-Section $1,250; Non-Utah State Bar members $2,000 (space permitting) Limited to 48 registrants.	28–32 hrs
06/08/07	**New Lawyer Mandatory.** 8:30 am – 12:30 pm. $55.	Satisfies NLCLE Ethics requirement

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.

FOR SALE

Family law practice for sale. $4,000.00 OBO. 21 open cases with several closed cases. Salt Lake practice. Much ongoing work. Call: (801) 608-5202.

Cherry furniture/pewter handles includes solid wood and matching: Desk, three filing cabinets, book shelf, lamp tables, end table, coffee table, side board/supply cabinet, burgandy leather overstuffed chair and sofa, 2 Dell computers with screens, two HP laserjet 1012 and 1020 printers, four framed Monet prints, safe. 801-359-8544.

Receptionist desk for sale. Excellent condition. L-shaped 7' x 8'. White-washed maple. Green granite counter top. Bull-nosed edging. Locked drawers. Under-cabinet lighting. Brass toe kick. Asking $3000. For pictures on website and any further questions call James at 801-364-5600.

OFFICE SPACE/SHARING

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

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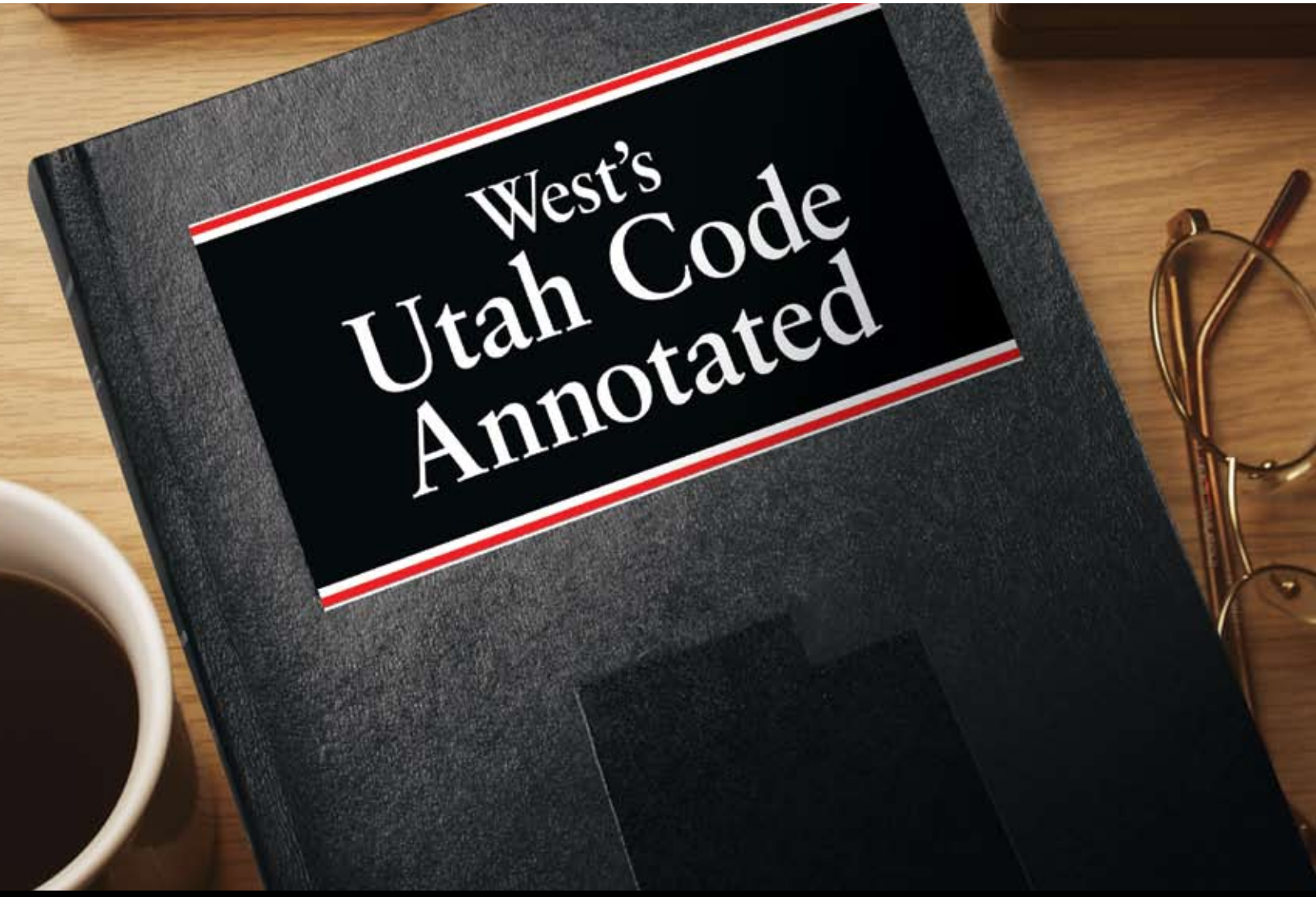

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