Utah Bar JOURNAL

Volume 20 No. 2
Mar/Apr 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: Frozen Stuart Falls, by Nathan Lyon, Weber County Attorney's Office.

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

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Interested in writing an article for the Bar Journal?

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

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

Submission of Articles for the Utah Bar Journal

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

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

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.

The Utah Bar Journal

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Cover Art

Members of the Utah State Bar or members of the Paralegal 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 e-mail 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.

Letter to the Editor

Dear Editor,

A paragraph in the article entitled 'Enforcing the Standards of Professionalism and Civility,' found on page 17 of the *Utah Bar Journal* for November/December 2006, regarding the case of *Advanced Restoration, L.L.C. v. Priskos,* may have caused some confusion. The cited derogatory language the Court of Appeals found inappropriate was language neither from the Landlord nor the Tenant in the case, but language found within the brief submitted by the plaintiff/appellee.

Sincerely,
Dennis Flynn
Donald J. Winder

Access to Justice – We Are Not There Yet

by Gus Chin

Over the years as my family and I have pulled out of the driveway for a vacation trip, or to attend one of the Bar conventions, within minutes our children would ask "Are we there yet? When will we get there?" These same questions apply to AND JUSTICE FOR ALL's tireless efforts to provide legal services to individuals in need, especially those who are often the most vulnerable.

AND JUSTICE FOR ALL began in 1998 as the brainchild of the three primary providers of civil legal services in Utah, Utah Legal Services, Legal Aid Society of Salt Lake, and the Disability Law Center. Their collaboration and common vision of equality of access to justice within our legal system started what has become an amazing fund raising process. Nine years later their commitment is stronger than ever as the need for access to our legal system increases, especially for those with civil legal problems.

On January 31, 2007, I attended the 2007 AND JUSTICE FOR ALL campaign kick-off at the Salt Lake City Center Hilton where highlights of The Justice Gap, a legal needs report were shared with those in attendance. During the slide presentation I was poignantly reminded about the ever growing unmet legal needs of many within our community. Despite the best efforts of many of you who contribute to the campaign and also provide pro bono services, there is still an unmet need for civil legal services.

A copy of the Justice Gap Report can be found in this issue of the *Bar Journal.* Upon reading the report you will find among other things personal stories of individuals who have been helped. As a result, I hope you recognize the need to address the reported 80,320 cases with unmet civil legal problems. You also can rest assured that we are not alone in our concern about the growing unmet civil legal needs.

At the recent National Conference of Bar Presidents meeting, the Honorable Deborah Hankinson, a former Texas Supreme Court Justice told those in attendance at a legislative update session that nationwide in 2005 approximately half of eligible clients seeking civil legal representation or assistance were turned away because of lack of resources. The decline in resources started in 1996 with a major cut in the federal funding of the Legal Services Corporation. It is hoped this year Congress will approve the Legal Services Corporation request without any reduction.

AND JUSTICE FOR ALL's goal for 2007 is to raise $505,000. To date, supporters consisting of individual attorneys, law firms, various corporations and business entities some of whom were recognized at the campaign kick-off have donated more than half of the target amount.

I am heartened by the report that 1650 attorneys have contributed to the 2007 campaign. I encourage more of us to contribute to the AND JUSTICE FOR ALL campaign and also to agree to undertake pro bono cases in order that the right of access to justice can be realized by more of the under-served members of our community. Finally, I wish applaud those who have given and continue to privately give of their expertise, time, and means to those in need of legal assistance. We are not there yet, and when we get there will depend on each of us.

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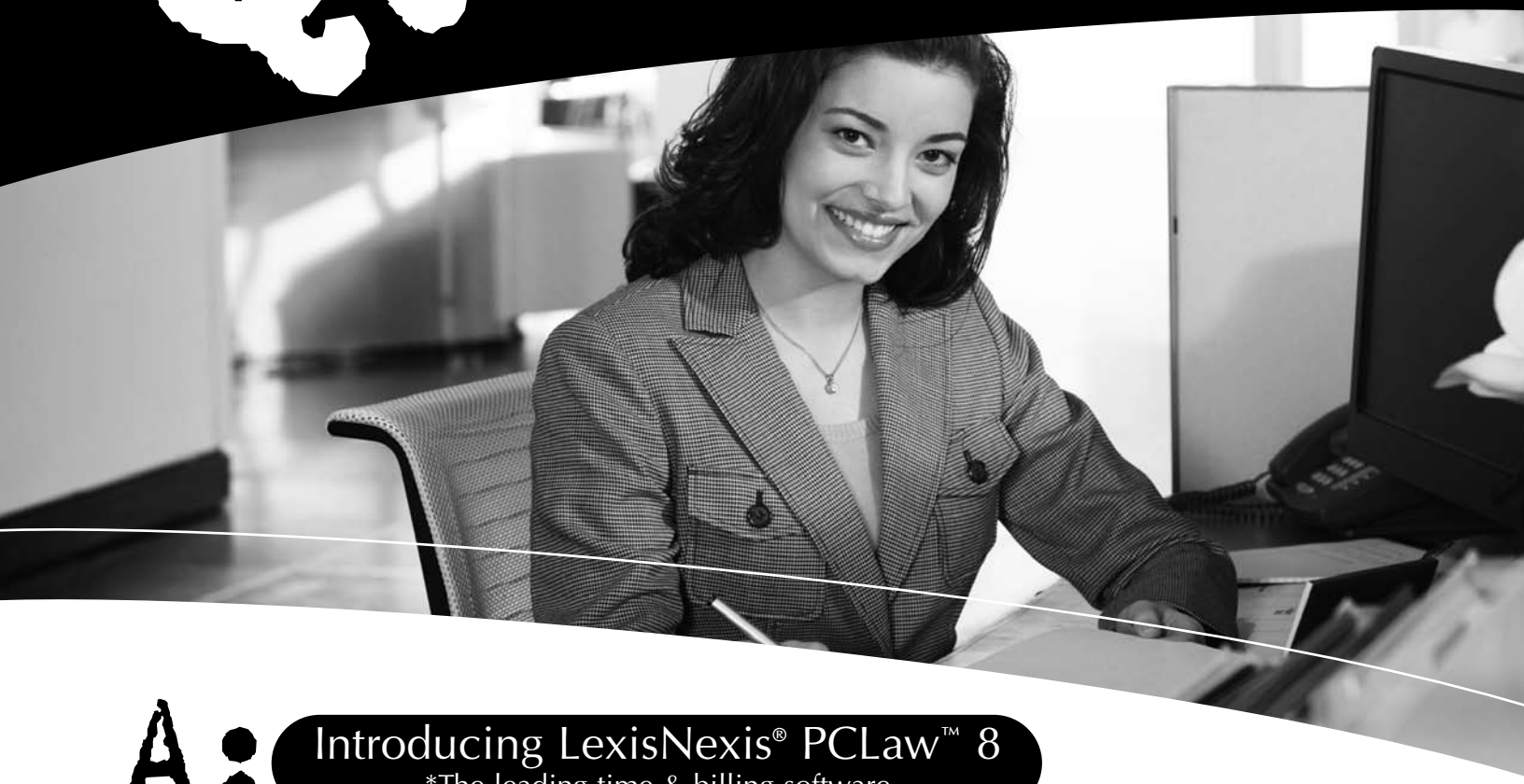

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President-Elect & Bar Commission Candidates

President-Elect Candidate

Retention of President-Elect

Nate Alder has been nominated by the Bar Commission to serve as President-Elect in 2007-2008 and as President in 2008-2009, subject to a retention election submitted to all lawyers on active status. No other candidates petitioned the Commission to run for the office.

NATE ALDER

To the Members of the Bar:

It is an honor to be nominated by the Bar Commission as a candidate for Bar President. I greatly appreciate the Commission's trust in me. I promise to diligently serve you as President and I respectfully ask for your support.

I have served on the Bar Commission for nearly five years now. I have enjoyed this experience very much. We have successfully dealt with a range of interesting and complicated issues. I know that the Commission will continue to address and resolve many issues and concerns.

I believe in collaborative leadership. The President sets the tone for the Commission and helps to develop consensus and achievement toward important outcomes. As an integrated Bar, we are fortunate in that we have had tremendous individuals serve as Bar President and they have contributed much to our profession, to the judiciary, and our community. I have been mentored and encouraged by some of these great people and I, too, seek to serve and contribute.

Please fill out and mail in your ballot. Although this is an uncontested election, our bylaws require that an election take place. I very much appreciate your support in this regard.

I look forward to serving and working with you. The Bar can and should make a difference for members. Let's improve the value and service it provides to you. Please feel free to call or write: (801)323-5000; nathan.alder@chrisjen.com. Again, thank you for your support.

Biography

Shareholder, Christensen & Jensen, P.C.

Judicial Clerk, Hon. J. Thomas Greene, U.S. District Court, District of Utah

Indiana University, School of Law, JD

Indiana University, School of Public and Environmental Affairs, MPA

Utah State University, BA

Dixie College, AA

Board of Bar Commissioners (2001-2002, 2003-2007)

Bar Commission Executive Committee (2004-2006)

Chair, Commission's Subcommittee on Self Representation (2006-2007)

Commission's Subcommittee on Mentoring (2007)

Commission's Subcommittee on Bar Operations Review (2006)

Admissions Committee (2001-2006)

Bar Examiner (2004-2007)

Co-Chair, Bar Exam's Performance Test Committee (2004-2007)

Chair, Dispute Resolution Section (2003-2004)

President, Young Lawyers Division (2001-2002)

Special Task Force on Legislative Appropriation for Judicial Compensation (2005)

Fundraising and Planning Committees, Utah Minority Bar's "First 50" Celebration

Advisory Board, Utah Minority Bar Association

Special Bar Projects Review Committee

Governmental Relations Committee

Utah Supreme Court Advisory Committee on Professionalism (2002-2007)

Western States Bar Leadership Conference (2005, 2006)

Pro Tem Judge, Salt Lake City Justice Court (2002-2007)

Board, Utah Council on Conflict Resolution, Inc. (2004-2007)

Board, Friends of Utah's Children's Justice Centers (2005-2007)

Second Division Candidate

Uncontested Election: According to the Utah State Bar Bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected."

Felshaw King is running uncontested in the Second Division and will therefore be declared elected.

FELSHAW KING

It has been my privilege to serve as a Bar commissioner since 2001. During the past five years I have become familiar with the opportunities, problems and challenges and which we lawyers face as we move further into the 21st century.

The mission of the Utah State Bar is: *"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."*

Many praiseworthy goals are included in this mission statement and progress has been made in each area. As commissioner I would place greater emphasis on the goal "To represent lawyers in the State." We have a responsibility to ourselves and the public, and that responsibility can best be met by maintaining a strong and viable legal profession uniquely suited to avoid and solve legal issues. The public is not well-served by a proliferation of non-lawyer providers and legal "do-it-yourself" programs.

Ours is a noble and honorable profession, the strength of which is a vital element for a successful society. Strengthening our profession depends on the effort of each of us as we interact with the Judiciary, the Legislature and the public. The Bar plays an important role in this process.

My experience gives me tools to serve as commissioner to lead the process of strengthening our profession.

- Practicing lawyer since 1962
- Former majority whip and chairman of Judiciary Committee, Utah House of Representatives
- Appointed by Governor to serve as Chairman of Utah Committee of Consumer Services (1977-1989)
- President, National Association of State Utility Consumer Advocates (1985-1987)
- President, American Inns of Court VII, 1997
- Admitted United States Supreme Court, Tenth Circuit and Fifth Circuit
- Commander, U.S. Navy Reserve (JAGC-Ret.)
- University of Utah, Certificate in Conflict Resolution (2001)

I would appreciate the challenge and the opportunity to serve as commissioner of the Bar and I ask for your support and confidence.

Third Division Candidates

Uncontested Election: According to the Utah State Bar Bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected."

Yvette Donosso Diaz and Scott Sabey are running uncontested in the Third Division and will therefore be declared elected.

YVETTE DONOSSO DIAZ

- Born in Los Angeles, California to Colombian immigrants.
- Mother of three children.
- B.S. Anthropology, BYU (University Honors).
- Graduate of the J. Reuben Clark Law School.
- Clerked for Judges Bohling, Dever, Medley and Thorne in Utah's Third Judicial District Court, and Justice Christine M. Durham in Utah's Supreme Court.

Employment Experience:

- Manning Curtis Bradshaw & Bednar LLC, employment defense litigation;
- Christensen and Jensen, PC., personal injury;
- State of Utah, Executive Director, Department of Community & Culture; and
- Jones Waldo Holbrook & McDonough, general civil litigation.

Service Experience:
As a former President of the Utah Minority Bar Association, helped launch a Diversity Pledge to highlight the need for Utah's legal employers to recruit, hire and promote attorneys of color, and lobbied to ensure that all judicial nominating commissions for the Wasatch Front have at least one ethnic minority representative. Other activities include being Past Chair of the Governor's Hispanic Advisory Council, and member of the Partnership Board for the University of Utah College of Humanities.

Statement of Candidacy:
It has been an honor to serve as a Bar Commissioner for the Third Division for the past four years. In that capacity I have worked to: 1) improve outreach and mentoring efforts to young lawyers, law school faculty and law students; 2) support the Bar's efforts to deliver adequate legal services to low and middle class individuals; and 3) increase visibility and accountability of services funded by the Bar. I believe the Bar has an important role in proactively providing services to all our members, including solo practitioners, lawyers in small firms and lawyers practicing outside of the Wasatch Front. Likewise, I believe the public's perception of our profession and the legal system is derived from their everyday experiences. I have an open mind and am committed to advancing the needs and interests of all members of the Bar in a professional manner. I would appreciate your vote and welcome your input at ydiaz@joneswaldo.com.

SCOTT SABEY
Mr. Sabey is a shareholder at the law firm of Fabian & Clendenin. He focuses his practice in real estate law and development, business law, and related litigation. He has been involved in both residential and commercial real estate developments and transactions since 1985. Mr. Sabey is past Chair of the Real Property Section and past Chair of the Business Law Section of the Utah State Bar. He has served on the Bar's Governmental Relations Committee since 1997, and is currently its Co-Chair. Mr. Sabey is also a registered lobbyist and has lobbied on behalf of the Bar on legislation affecting its members. He served on the Rules Committee for Small Claims Court, served on the Committee reorganizing the Judge Pro Tempore system, wrote the Small Claims Judge's Benchbook, and currently teaches the classes for new Small Claims Judges and Justice Court Judges. Mr Sabey is also the Bar's designated representative on the Supreme Court's Judicial Council through October 2009.

Mr. Sabey received his Bachelor of Arts Degree from Brigham Young University, a degree from the University of Florence, Italy, and later his Law Degree from Golden Gate University, School of Law in San Francisco, California. During law school he was on the Dean's Honor List, and acted as Chairman of the Graduation Committee.

During my past 3 years on the Bar Commission, we have made significant strides in improving our relationship with the Legislature (my primary concern when I ran 3 years ago). We have instituted several programs that have led to that improvement, including an annual New Legislators' Constitutional Law class and regular offering of assistance to legislators with proposed legislation and with problems their constituents are experiencing. We have improved that line of communication but there is still more to be accomplished. The importance of the effect that the Legislature can have on us is demonstrated by the passage (and later repeal) of the House Bill which defined the practice of law as only appearing in a court of record. Every year we see bills that attempt to modify the Rules of Practice or Evidence by statute rather than by the Court's Rules Committee, or to make the judicial nomination process and the judicial review process more and more political. We also see attempts to bring our profession under the Legislature's control through regulation by the Department of Occupation and Professional Licensing. The Bar Commission needs to be vigilant in defending our rights and I want to help.

While I recognize the natural tension which exists between the different branches of government, I would like to see the relationship between the Bar and Legislature continue to improve. An improved relationship would allow for more constructive input by the Bar on the laws with which we all must deal. It would also reduce the amount of negative legislation directed at the Bar and Courts, and I would like to continue this work as a Bar Commissioner.

It is your Bar. Please take the time to vote, and I hope I can count on your support.

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Veni, Vidi, Vici: The Brave New World of E-Discovery

by Blake Miller and Mary Mark

Although attorneys have become converts to the use of technology in their practices, many still eschew electronic discovery in favor of paper. With more than 98 percent of information created and stored electronically it is difficult to justify the continued use of traditional paper production. The recent amendments to the Federal Rules of Civil Procedure, effective December 1, 2006, now make it impossible to avoid e-discovery issues. It is crucial attorneys understand electronic discovery, not only to satisfy their professional obligations but also to avoid severe judicial sanctions.

The rules were amended to "reduce the costs of discovery, increase its efficiency, increase uniformity of practice and encourage the judiciary to participate more actively in case management when appropriate" (Civil Rules Advisory Committee Report). Why the immediate need to amend the rules? Three reasons:

Volume

The volume of electronically stored information (ESI) is exponentially greater than paper documents. Simply put, electronic communication is the preferred method of doing just about everything from ordering pizza to conducting global business. The legal consequences are staggering. One gigabyte of data equals about 75,000 text pages. Microsoft has just released its answer to the iPod called a Zune, which has a 30 GB storage capacity. The average home computer is 80 gigabytes. Computer networks store information in "terabytes," the equivalent of 500 million typewritten pages of plain text. Americans create an average of 250 to 300 million e-mail messages a month. Automobile computers today store more data than the on-board computers that ran the space capsules. A cell phone is a treasure trove of information. In short, data is everywhere and *it's discoverable.* (See side charts.)

ESI is dynamic

ESI can easily be added, changed, saved and deleted – often without any conscious intervention by the operator. Documents that are never intentionally saved by the user may still exist because of the auto save feature of certain software.

While saving a document is easy, deleting ESI is difficult. Hitting the delete button makes the file disappear from your view, but the only thing that is missing is the link to the space where the document was saved on the storage device. The document is still there, "hiding." As space on the storage device is used up, the data is written over and consequently removed, but until it is written over, it may be retrievable by a good forensic technician.

ESI documents also have "metadata" associated with them. Metadata is the information that describes the document, such as who authored it, when the document was created and last updated, and edits. This data is not normally seen by the user but can be extracted for review.

ESI often doesn't stand-alone

Electronically stored information is often incomprehensible when separated from the software that created it. Data created and

BLAKE D. MILLER has concentrated his career on complex commercial litigation involving intellectual property, technology, trademark, trade dress, employee covenants, construction, telecommunications, banking, and the representation of creditors in workouts and bankruptcy matters. He is the Chair of the Law and Technology Committee.

MARY MARK is the owner and founder of Mark & Associates, a litigation support firm offering experienced technical expertise in computer forensics, litigation databases, web repositories, trial support, staffing, and litigation software.

stored in products like Quicken and QuickBooks need the application in order to view the data, as the user would see it.

It's easy to see why the explosive growth in electronic discovery triggered modifications in the federal rules. Here's a quick explanation of how the rules have changed.

Rule 16(b)(5) and (6).
Rule 16 has been amended to allow the scheduling order to address provisions for disclosure or discovery of ESI and any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production.

Electronic data are persistent and fragile. It is constantly being modified and overwritten. The mere act of booting a computer can affect and even delete potential electronic evidence. Whether you want to obtain such information for your case or defend against potential spoliation claims, it is important to address electronic data discovery at the onset of a case.

Rule 26(a)(1)(B).
On and after December 1, 2006, as part of an initial disclosure, each party must provide a copy, or description by category and location, of all ESI the disclosing party may use for its claims or defenses.

You will need to know what technology your client is using and how it's used. Meet with your client's IT staff and walk through their offices to get a first-hand look at potential ESI sources.

Rule 26(b)(2)(B).
Under the amended rule, a party need not provide ESI from sources not reasonably accessible because of undue burden or cost. Two examples of this are data that would be on back-up tapes intended for disaster recovery (which often are not indexed), and legacy data from obsolete systems (which might be unintelligible on successor systems). The party in possession of such ESI, however, bears the burden of establishing that the information is not reasonably accessible on a subsequent motion to compel or for a protective order. A showing of lack of reasonable accessibility may be overcome by a showing of good cause.

Rule 26(b)(5)(B).
If information is produced that is subject to a claim of privilege or work product, after notification, the recipient is required to promptly return, sequester, or destroy the specified information and cannot use or disclose the information until the applicable claim is resolved. The receiving party may present the information to the court under seal for a determination of the claim. If the

ESI Types

- E-mails and attachments
- Databases
- Word Processing documents
- Document Management Systems
- Voicemail
- Software
- Information stored in Data Recorders
- Presentations
- Animations
- Instant and text messaging
- Web and Internet Logs
- Server Logs
- Blogs
- Handheld and Personal Information Manager Data
- Images
- GPS Logs
- Security System Data
- Chat Room dialog
- Related Metadata

Where should you look for ESI?

- Personal computers
- Servers
- Handheld devices
- Cell Phones
- Internet Service Provider records
- Instant Messaging Services
- Internet Search and Data Providers
- Data Recorders
- Security Systems
- External Hard Drives
- Laptop computers
- Thumb Drives
- Fax machines
- Scanners
- Digital copies
- Medical Devices
- Retail purchase and credit card machines
- Voicemail
- GPS systems
- Automobile computers
- Paging devices
- Backup disks and tapes
- Legacy systems
- Archives

receiving party disclosed the information before being notified, reasonable steps to retrieve such information must be made.

Rule 26(f)(3) & (4).

At the parties' Rule 26(f) conference, counsel must confer regarding preserving discoverable information. This is particularly important in the area of ESI. Consider *United States v. Philip Morris USA, Inc.,* 327 F. Supp. 2d 21 (D.D.C. 2004). A preservation order was entered on 10/19/1999. Philip Morris, however, continued to "delete[] electronic mail…which was over sixty days old," and these deletions continued for two years. Counsel became aware in February 2002 and notified the court in June. Eleven employees, including some "hold[ing] the highest, most responsible positions in the company," failed to follow the preservation order. The government sought adverse inference. The Court imposed $2,995,00 in sanctions against Philip Morris.

In addition to preserving discovery information, the parties should discuss any issue related to disclosure or discovery of ESI at the Rule 26(f) conference. This would include "the form or forms in which [ESI] should be produced."

Attorneys will need to be familiar with the discovery's data pool before making any production decisions. In paper document production, parties must decide whether to turn over paper copies or scan the images and produce TIFFs or PDFs. These options also apply to the production of electronic information, but now additional choices are available. They are grouped into four production categories:

1. Paper: Literally printing or "blowing back" hard copies of the images.

2. Quasi-paper: Converting all the documents to TIFFs or PDFs, which can be viewed via an image browser. Usually the text from the data (similar to OCR) is captured and, along with the image, is loaded into a database such as Summation or Concordance.

3. Native: Producing the information in the format that it was used – spreadsheets in Excel, word processing in Word and e-mails as Outlook .PST files.

4. Quasi-native: Producing a database (like Quicken) in an exported file along with the field structure or perhaps requesting that certain reports be generated from the database and produced instead of requesting the entire database.

There are pros and cons for each category. Choose one that best suits your data type.

Paper productions are great for cases with a small number of documents. Blowing back the images may be preferable. However, even when the numbers are small, printing may not be the best choice. Blind carbon copies aren't always shown on printed e-mails. Hyperlinks are lost on paper. None of the metadata is available when you print to paper. Attachments to e-mails are often overlooked when the e-mail is printed.

Quasi-paper has been the top choice for the last few years. E-discovery vendors can quickly create TIFFs or PDFs of the documents and produce litigation database load files with this form of production. The opposing party usually demands the production include metadata, which is not available with paper production.

Native file production is getting a lot of attention lately. Techno savvy attorneys want most of their discovery in native form. Search ability is enhanced and metadata is easily accessible.

However, most e-discovery technicians suggest native format *only* when producing files like spreadsheets or databases. In addition to the figures visible on the page, the formulas and links within the spreadsheet are usually important. You lose the ability to see the formulas when the sheet is simply imaged or printed. Be aware that these files are dynamic and you can easily change the data as you review it. It is always a best practice to keep the originally produced data in a safe place and only view copies to avoid spoliation.

Bates stamping and redacting have been impossible with native files but e-discovery vendors are figuring out ways around these problems.

Another complication with native file production is that you must have the appropriate software to view each file. Documents that are several years old may have been created in older versions of software that are no longer available. Law firms usually update the software they use on a regular basis, so the software version that older documents were created in may not be available at your firm. An advantage to using an e-discovery vendor is that they usually have the ability to process files created in older software versions.

Lastly, in regard to Rule 26(f), if the parties agree on a procedure applicable to the inadvertent production of attorney-client or work product material, such agreement should be memorialized at this time. Any such agreements can be subject to a court order under Rule 16.

Rule 33(d).

This rule was amended to include ESI within the category of business records that a responding party may identify and allow the requesting party the opportunity to examine, audit or inspect.

If such ESI is contained in legacy or other systems not otherwise generally accessible in a usable form, the responding party may have to provide sufficient technical assistance to allow the information to be examined. In some cases, the responding party may need to provide direct access to its electronic information system to the opposing party. Prior to electing this option, think carefully about the consequences.

Rule 34.

A party may serve a request to produce ESI allowing the requesting party to inspect, copy, test or sample such ESI in any medium from which the ESI can be obtained – "translated, if necessary, by the respondent into reasonably usable form." The request may specify the form or forms in which ESI is to be produced. If there is an objection to the form in which ESI is requested, such objection should be stated in the response together with the form or forms in which the responding party intends to produce the ESI. If the request does not specify the form or forms for producing ESI, the responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. A party need not produce the same electronically stored information in more than one form. Electing to produce ESI in the form not ordinarily maintained does not allow the producing party to choose a form that is less searchable or usable than the original form.

Searchability is an important feature in ESI. Because the ESI is already in electronic form, you can use the power of the computer to process it. You can also drastically reduce the volume of documents and the time spent reviewing them by narrowing and searching the ESI using date ranges, names, issues and key words or phrases.

In *J.C. Associates v. Fidelity & Guar. Ins. Co.,* 2006 WL 1445173 (D.D.C. 2006), an insurance company faced a discovery request from plaintiffs that sought the review of 1.4 million active and inactive claims and litigation files in the possession of the producing party. Defendants narrowed the number of potentially responsive files from 1.4 million to 454 based on "internal codes identifying the category of the claim."

Rule 37(f).

Rule 37 has been amended to provide that sanctions are not generally appropriate where ESI is lost as a result of the routine, good faith operation of an electronic information system.

Rule 45.

Subpoenas may be issued to require the production of ESI or testimony regarding ESI. Similar to a Rule 34 request, a subpoena may specify the form or forms in which ESI is to be produced. The request, production (including the form of ESI), challenges to production of ESI, and protection of attorney-client and work product documents under a subpoena generally track the procedures under Rules 26 and 34.

Rule 45 also allows for a subpoena to permit testing and sampling as well as inspection and copying. In cases involving voluminous documents, it may be wise to sample first, which will reveal the appropriate areas of production.

It is obvious that the days of simple document productions are over. The amended rules will require much more attention to discovery early in the case. While the evidence may be more voluminous and dynamic, savvy attorneys who hop on the e-discovery bandwagon now will save themselves headaches, delays, costly errors and expenses later. Remember: e-discovery hasn't changed an attorney's objective – which is to find helpful information as quickly and efficiently as possible, while identifying potential land mines in your client's case before your opponent does. Since this all plays out on a digital landscape instead of paper, the partnerships established with vendors, paralegals and IT staff are crucial and may make or break a case. Attorneys, long regarded as solo entrepreneurs, may have to rethink their "go it alone" strategy in favor of a more inclusive team approach.

Net Operating Losses: Preserving What You Never Wanted in the First Place

by Scott R. Carpenter

One of the ironies of the modern business world is the fact that a company's biggest asset may not be its client list or its intellectual property, but its tax losses. Those losses can be carried forward for up to twenty years and can be offset against the company's future taxable income and tax liabilities, significantly improving its future cash position. For a company with a $100 million net operating loss, that right of offset could translate into potential future tax savings of $40 million, assuming a 40% combined federal and state tax rate.

Unfortunately, the value of a company's tax losses can be wiped out, in whole or in part, by transactions that are outside of the company's control, including routine share transfers and option or warrant exercises. Even the infusion of new capital into the company, unless carefully planned, can destroy the value of its losses. This article discusses one strategy for preserving that value.

The Tax Issue: Limitations on the Use of NOLs

A company's ability to use its net operating losses ("NOLs") and other tax attributes to reduce its future taxes is subject to the limitations described in § 382 of the Internal Revenue Code.[1] If a company undergoes a change of ownership, § 382 severely restricts the company's ability to use its NOLs. A "change of ownership" occurs if the percentage of a company's shares held directly or indirectly by one or more of its "5% stockholders" increases by more than fifty percentage points over the lowest percentage of shares owned by those shareholders at any time during a three-year rolling test period.[2] A "5% stockholder" is a shareholder who held at least 5% of the loss company's shares during the testing period. All shareholders who do not own at least 5% of the loss company's shares are aggregated and treated as one 5% stockholder. The percentage point increase is computed separately for each 5% stockholder and then aggregated.

The treasury regulations provide a simple example of when a "change of ownership" under § 382 occurs:

> A and B each own 40 percent of the outstanding L [the loss corporation] stock. The remaining 20 percent of the L stock is owned by 100 unrelated individuals, none of whom own as much as 5 percent of L stock ("Public L"). C negotiates with A and B to purchase all of their stock in L. The acquisitions from both A and B are completed on September 13, 1990....C's acquisition of 80 percent of L stock resulted in an ownership change because C's percentage ownership has increased by 80 percentage points as of the testing date, compared to his lowest percentage ownership in L at any time during the testing period (0 percent).[3]

Section 382 was enacted to prevent companies with taxable income from reducing their tax obligations by acquiring control of another company with NOLs. It achieves that objective by limiting the amount of the taxable income that can be offset by a pre-change loss to the product of (i) the long-term tax exempt bond rate (published monthly by the U.S. Treasury) as of the date of the change of ownership, and (ii) the value of the loss company's shares immediately before the ownership change.[4]

Because the limitation formula is based in part on the value of the company's shares (which can be quite low because the company is losing money), the § 382 limitation can severely restrict the company's ability to use its NOLs. For example, if the company described above with the $100 million in NOLs had an aggregate share value of only $50 million (because of its extensive losses) and the long-term tax exempt bond rate were 5%, it would be limited to the annual use of only $2.5 million of its NOLs (i.e., $50 million x .05 = $2.5 million) if it triggered the § 382 limitation. That may not be a significant problem if the company continues to incur losses, but if it turns its business around and has $50 million of income the next year, the effect of the limitation could be significant. Assuming a combined federal and state tax rate of 40%, the company would owe $20 million in taxes for the year of that stellar performance, but instead of being able to offset its entire tax obligation with its more-than-ample $100 million in NOLs, it would only be able to use $2.5 million of those NOLs. The company would then have to use $17.5 million of its hard-earned cash to pay the remaining tax bill.[5]

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Determining whether an ownership change has occurred can be complicated if a company is publicly held, since there can be hundreds (or perhaps thousands) of trades a day. The complexity of the calculation is compounded by the fact that share conversions and share acquisitions under warrants, options or other purchase rights are factored into the ownership change formula.[6] Adding to the problem is the fact that the threshold for exceeding the 50% change portion of the test may be relatively low because no one shareholder, or group of shareholders, controls significant blocks of the company's shares. As a result, it is often difficult for a loss company to determine where it stands with respect to the limitation unless it has the complete cooperation of its shareholders and employs a small army of accountants.

Most companies prevent the inadvertent loss of their NOLs by prohibiting their shareholders from making trades that would trigger the § 382 limitation.[7] Transfer restrictions to preserve NOLs are used extensively in bankruptcy cases (where the court has broad authority to impose restrictions on outstanding shares),[8] but in other contexts a company's ability to successfully implement them can be limited by both corporate and securities law.

The Corporate Law Issue: When is a Transfer Restriction Enforceable?

In our practice, we deal mostly with Utah and Delaware companies. The corporate codes of both states limit a company's right to unilaterally impose transfer restrictions on its outstanding shares.[9]

Section 202 of Delaware General Corporation Law allows companies to impose restrictions on the transfer and ownership of their shares as long as the restrictions are noted conspicuously on the share certificates (or, in the case of uncertificated shares, a notice sent by the company to the shareholder). If shares have been issued prior to the adoption of the restrictions, however, the transfer and ownership restrictions are not binding on the holders of those outstanding shares unless the holders are parties to an agreement relating to the restrictions or voted in favor of the restrictions if they were adopted pursuant to an amendment of the certificate or bylaws of the company.[10] The voting test is applied on an individual shareholder basis – even if the majority of the shareholders approves a restriction, a holder is not subject to the restriction unless the holder personally approves it. Section 202 also provides that, where a restriction is properly imposed, the restriction is conclusively presumed to be for a reasonable purpose if the restriction maintains or preserves any tax attribute, including the company's net operating losses.[11]

Utah's corporate code also allows companies to impose transfer restrictions on their shares through their articles, bylaws or agreements among their shareholders.[12] If the restrictions are

adopted after a shareholder receives his shares, however, they do not apply to those shares unless the holder is a party to the restriction agreement, or voted in favor of (or otherwise consented to) the restrictions.[13] The Utah statute does not specifically provide that the preservation of net operating losses is a reasonable purpose, but does provide that a restriction on transfer is authorized "to preserve entitlements, benefits, or exemptions under federal, state, or local laws."[14]

Unless a company has the cooperation of all of its shareholders, it is questionable whether, under either Utah or Delaware law, the company can impose enforceable transfer restrictions on its outstanding shares. As a result, companies are generally left to more indirect methods for adopting those types of restrictions.

One method for imposing transfer restrictions that has been successfully used by a number of companies is to merge the loss company with a new, wholly-owned subsidiary and impose the restrictions as part of the transaction. Under the terms of the merger, the loss company's shareholders exchange their shares in the loss company for an equal number of shares in the subsidiary. The organizational documents for the subsidiary contain the appropriate transfer restrictions (and the existence of the restrictions is noted on the certificates that the subsidiary issues in the merger), and the loss company shareholders receive their shares in the subsidiary subject to those transfer restrictions. This structure converts the unanimity requirement generally applicable to the imposition of post-issuance transfer restrictions to a majority approval requirement.[15]

The Securities Law Issue: To Register, or Not to Register?

If the loss company is closely held, the securities laws implications of imposing transfer restrictions through a merger may be minimal.[16] If, however, the loss company is a widely-held entity, or if it is subject to the reporting requirements imposed by the Securities and Exchange Commission, the subsidiary's issuance of the shares in the merger could trigger a registration requirement, turning the merger into an expensive and time-consuming process.

The general registration requirement at the federal level relating to mergers is Rule 145 under the Securities Act of 1933, and the registration is accomplished using Form S-4, which is limited in use to business combinations, share exchanges, acquisitions between companies and similar transactions. A Form S-4 registration is similar to the registration statement that companies use when they initially go public, but it describes both parties to the transaction and is usually combined with a proxy statement relating to the approval of the merger at a shareholders' meeting.

Most of companies that have imposed NOL transfer restrictions through subsidiary mergers have registered the issuance of the merger shares.[17] There is another route available, however, based on an exception to Rule 145 known as the "change of domicile" exception. The "change of domicile" exception refers to a clause in sub-paragraph (a)(2) of Rule 145, and allows a company to effect a merger without registering the shares if "the sole purpose of the transaction is to change the issuer's domicile."[18] At least one company has effected a reincorporation merger for the purpose of preserving NOLs without registering the new securities on Form S-4.[19]

The SEC has tacitly agreed that the clause can be applied in circumstances that are broader than the literal meaning of the words used in it, and has blessed the exception's use in transactions where there are a variety of differences in the organic documents for the companies effecting the domicile change. The differences include not only transfer restrictions, but changes in the number of the company's authorized shares and the classification of directors.[20] The change of domicile exception has even been sanctioned in cases where there has, in fact, been no change in domicile.[21] As a result, a company could take the position that, even though the SEC has not yet specifically addressed the "change of domicile" exception in connection with transfer restrictions for NOLs, its prior acquiescence in the area suggests that no registration of the shares in a change of domicile merger should be required where the differences in the organic documents for the companies include transfer restrictions for NOLs.

Conclusion

Under § 382, the value of a company's NOLs can be inadvertently lost or diminished by share transfers, option and warrant exercises and capital infusions. Companies can use transfer restrictions to diminish the possibility of that happening, but there are questions about the enforceability of those restrictions if they are placed on outstanding shares. One of the ways to avoid challenges to the restrictions is to adopt them in connection with a merger. That process can trigger a registration requirement under applicable securities laws, but there is also a possibility that a company can avoid even that complication if the merger is structured properly.

1. The Internal Revenue Code of 1986 generally allows companies to carry forward their tax attributes. *See, e.g.,* Internal Revenue Code of 1986, 26 U.S.C. §§ 39(a), 59(e), 172(b), 904(c) (2006). Unless otherwise noted, references to sections in this article are references to sections of the Internal Revenue Code.
2. *See* § 382(g). Section 382 is also triggered by "equity structure shifts,"- essentially any tax-free reorganization other than a "D," "G" or "F" reorganization (unless the requirements of § 354(b)(1) are satisfied in a "D" or "G" reorganization). *See* §§ 382(g)(1), 368(a)(1).
3. Treas. Reg. § 1.382-2T (c)(2)(i) (2006).
4. *See* § 382(b)(1).
5. Section 382 also limits the use of built-in losses recognized during the five-year period after the change of control date. *See* § 382(h). The NOLs limitation example

in the text is obviously a simplified version of the way the credits, roll-overs of unused NOLs, and offsets would be computed and applied under the limitation formula.

6. *See* § 382(k)(6).

7. NOL transfer restrictions are typically more extensive than just a simple prohibition on transfers by "5% stockholders." They include requirements for shareholders to notify the company if they are a "5% stockholder", prohibitions on transfers that increase a shareholder's ownership to the point it becomes a "5% stockholder", and provisions that void transfers in violation of the restrictions. Restrictions typically stay in place until the board determines they are no longer necessary to preserve the company's NOLs.

8. *See, e.g., In re Delta Air Lines, Inc.,* Case No. 05-17923 (PCB) (Bankr. S.D.N.Y., Sept. 16, 2005); *In re US Airways, Inc.,* Case No. 04-13819 (SSM) (Bankr. E.D.Va., Apr. 1, 2005); *In re WorldCom, Inc.,* Case No. 02-13533 (AJG) (Bankr. S.D.N.Y., March 5, 2003); and *In re W.R. Grace & Co.,* Case No. 01-01139 (JKF) (Bankr. D. Del., Jan 24, 2005).

9. Other states have similar statutory provisions. *See, e.g.,* Nev. Rev. Stat. § 78.242 (2006); Colo. Rev. Stat. § 7-106-208 (2006).

10. *See* Del. Code Ann. tit. 8, § 202(b) (2006).

11. *Id.* at § 202(d)(1)(b).

12. *See* Utah Code Ann. § 16-10a-627 (2006).

13. *Id.* at § 16-10a-627(1).

14. *Id.* at § 16-10a-627(3)(b).

15. *Compare id.* at §16-10a-627 *and id.* at § 16-10a-1103. A variation on the structure involves the formation by the loss company of two new entities: "ParentCo" and a wholly-owned subsidiary of ParentCo. The loss company and the new subsidiary are then merged, with the shareholders of the loss company receiving shares in ParentCo in exchange for their shares in the loss company. The ParentCo articles contain the NOLs transfer restrictions and the ParentCo shares are issued subject to those restrictions. As a result of the merger, the shareholders of the loss company receive shares in ParentCo, and ParentCo owns and operates its business as a holding company through its subsidiary. ParentCo and the subsidiary can even be merged. *See id.* at § 16-10a-1104 (which allows for short-form mergers between parent corporations and 90% or more owned subsidiaries). *But see* note 20 regarding the SEC's position on corporate structure changes.

16. This article focuses on securities compliance at the federal level. Companies also have to comply with applicable state securities laws.

17. *See, e.g.,* Registration Statement on Form S-4 for Aether Holdings, Inc., dated May 27, 1005, SEC Accession No. 00000950133-05-002426; Registration statement on Form S-4 for New Thousand Trails, Inc. dated October 3, 1996. SEC Accession No. 0000930661-96-001318; and Registration Statement on Form S-4 for Presley Merger Sub., Inc., dated October 7, 1999, SEC Accession No. 0000892569-99-002622.

18. *See* 17 C.F.R. § 230.145 (2006).

19. *See* Definitive Proxy Statement dated September 11, 1997 for The Beard Company. Since most mergers require shareholder approval, even if the loss company does not elect to register the shares issued in the merger it will still probably be required to comply with the proxy rules. For public companies, the merger does not typically trigger dissenter's rights because of the public trading exemption provided in the dissenter's rights statutes. *See, e.g.,* Utah Code Ann. § 16-10a-1302.

20. *See* SEC Release No. 33-5463 (February 28, 1974). *See also* No Action Requests for: *Russell Corporation,* March 18, 2004; *Adolf Coors Company,* August 25, 2003; *Marantz Company, Inc.,* June 17, 1986; and *The Times Mirror Company,* February 14, 1986. *Cf.,* Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations, C26 and C27 (exception does not apply to a trust that is changed to a corporation or where the basic corporate structure is changed from one corporation to two corporations). The SEC looks at a number of factors to determine if the change of domicile exception applies to a transaction. *See* No Action Request for *Philips Electronics, N.V.,* April 12, 1994.

21. *See* SEC No Action Request for *Dun & Bradstreet, Inc.,* February 15, 1973.

When Lawyers Become Pre-law Advisors

by Eileen Crane

Many practicing attorneys and judges never talked to a pre-law advisor when they were preparing to apply to law school. Often they did not consider themselves pre-law students while they were undergraduate students. Others did not think they needed to speak to someone about the application process, so they collected test materials from various sources and applications directly from the law school. They believed that they successfully completed the process, gauged by the fact that they were accepted and attended law school. Some attorneys have never heard of a pre-law advisor and wonder what use such a person might be.

Sometime later, when the kid down the block says he wants to go to law school next fall and it happens to be late November already, some well-meaning attorney says things like, "I never wasted much time preparing for the test; just take it and see what you get." Bad advice.

Or the bank teller at the bank sees your ABA or Utah State bar card and says that he is studying political science at the local college and wants to go to law school. So the loyal lawyer-customer says, "You'll need a letter of recommendation. You can write it and I'll be happy to sign it." Bad advice.

Or your favorite secretary has always wanted to be a lawyer and she is deciding to which law schools she will apply. You tell her that you know the dean of a law school from when you were fraternity brothers in college and assure her that you can pull strings to get her in. Bad advice.

There are approximately 1200 pre-law advisors in the United States. They work on almost every undergraduate campus in the country. They are about evenly split between professors in some department in arts and science colleges and career counselors specifically trained to deliver student services. They are organized into six regional professional organizations that have annual training conferences as well as a quadrennial national conference. They receive specific information and training from the Law School Admissions Council which administers the LSAT and facilitates the application processes. Many of the application processes that attorneys who graduated more than five years ago know about have changed remarkably due to technology and engineering advances. Simply put, the rules have changed.

Good Advice:

1. The LSAT is a very challenging test that should be extensively prepared for by every student in order to maximize her opportunities for admissions and scholarships at all law schools in the U.S. and Canada. Taking a prep course is likely to enhance a student's performance if she prepares extensively for the test.
2. When a lawyer reads a personal statement written by an applicant, he remembers what he wrote or what he has heard others say they wrote. A lot of people think that they should tell their life stories, or why they want to be lawyers, or what they have done to prepare to become lawyers. But admissions deans see thousands of those kinds of essays. A more effective essay is one that shows who the applicant is through a variety of stories that illustrate, without bragging or forcing the reader to wade through self-enhancing superlatives.
3. Letters of recommendation should be written by professors and employers and other people who actually have known the applicant in a professional, academic, or volunteer setting where they have witnessed the applicant's work ethic, interaction with colleagues and superiors, ability to learn and perform assigned tasks, integrity, and ability to read and write and synthesize copious amounts of information.
4. Students need a mentor. They need to start looking for a law job before they ever set foot into the law school of their choice. They need to be guided by someone who has been there and has accurate, up-to-date information. They should be introduced to lawyers, shadow lawyers at work, read about professional issues that lawyers face, and consider their best alternatives.
5. Applications should be submitted as soon as possible in fall in order to maximize student acceptance opportunities. The LSAT is best taken in June or October so that applications can be in by Thanksgiving.
6. All of a student's undergraduate work at any university (other

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than study abroad programs) must be revealed and is part of their UGPA configured by LSAC in the application process. Applicants must provide evidence of all college work they have completed.

7. Students need to make sure that they keep or get their credit report in good shape. Federal loan programs no longer cover most or all of the cost of attendance at U.S. law schools, so students are forced to pursue private loans that are credit-based. Students with poor credit records may be able to get funding, but they may pay much higher interest rates for it.

8. Students should plan for the unplannable. Just because students think they want to do this kind of law or that kind of law does not mean that they should limit their focus or exploration of various kinds of law. Students should meet attorneys who use their training in a variety of ways so that they can expand their understanding of their career possibilities.

9. When a student is choosing which school to attend from among those that accepted her, many lawyers advise the student to read the rankings or to go to the school near the place where she wants to practice. The rankings have been discredited in a variety of studies attempting to replicate them. And NALP (National Association of Law Placement) data show that people change their minds about their ultimate career goals. As educators we consider that a success. We think that students have been shown that there are many options available after earning a law degree. Students should assess which school would be best for them based on a lot of important factors.

10. Encourage your friend who wants to be a lawyer. So many of my students over the years, each having interviewed the lawyer of his choice, has been discouraged by the overtly negative remarks and regret he has encountered. Students begin to doubt themselves and their judgment and wonder if they can be any different than the seemingly successful lawyers they spent time interviewing. If attorneys do not like this profession, then steps should be taken to improve the satisfaction of those who are in it.

Pre-law advising is an art, but it is also a science. The artful side comes in listening well to the candidate and meeting their needs for information and direction. Relationships between pre-law advisors and law school admissions officers are valuable because pre-law advisors can pass on tips about what admissions committees value in applications. The scientific side comes from the copious data that are published annually by LSAC, the state bars, the ABA, the individual law schools, and various ranking sources. When lawyers want to practice law and be pre-law advisors, they should be responsible communicators of facts and figures that are based on research, not conjecture and conventional wisdom. Alternatively, perhaps the best advice occurs when a lawyer realizes that she could refer the candidate to a pre-law advisor.

The Rapid Evolution of Climate Change Law

by Gary Bryner

The scientific debate over the causes and consequences of global warming likely will continue for years to come, as scientists continue to explore a host of questions about how climate change affects different regions of the world, how current trends compare with historical patterns, and whether the steady increase in carbon dioxide emissions will translate into gradual warming or could, with the help of feedback mechanisms, produce cataclysmic changes. In contrast, the debate over whether to take some kind of action to begin reducing the threat of disruptive climate change is rapidly shifting from whether there will be a national climate change regulatory policy and associated energy policies to when those policies will be put in place and what form they will take. While there is still much uncertainty in climate change law and policy, the trajectory is clearly toward regulating greenhouse gas ("GHG") emissions.

As a result, the case is much stronger for governments and businesses to take aggressive action to manage their carbon emissions and related activities. Pressure is coming from the threat of litigation, the likelihood of national legislation within the next few years, and state and local climate policies that are already in place. Some companies are supporting national policies as a way to simplify the challenge of having to comply with a variety of state mandates. Shareholder and investment demands that companies disclose their carbon liabilities and develop programs to manage those liabilities effectively are growing. International pressure from European countries that are seeking to comply with the Kyoto Protocol and negotiations for a new global accord are also occurring. A wide range of U.S. and multinational companies have concluded that precautionary action to reduce the threat of climate change is in their self interest and have developed voluntary programs to cap and reduce GHG emissions. Michael Northrop, co-founder of the Climate Group, a coalition of companies and governments committed to reducing GHG emissions, said, "It's impossible to find a company that has acted and has not found benefits."[1]

Litigation

Lawsuits are proliferating in the absence of federal regulatory action and as a result of growing evidence that the consequences of climate change are not just future calamities but are already adversely affecting people and property. Plaintiffs and others involved in these cases often liken them to the early tobacco cases, initially derided as improbable but eventually successful because of, among other factors, tobacco company officials' acknowledgment in internal documents of the health threat associated with smoking that conflicted with corporate policy statements. Climate change is beginning to surface in Utah litigation. In a 2006 Utah Supreme Court case, *Utah Chapter of the Sierra Club v. Utah Air Quality Board,* the Court ruled that plaintiffs' affidavits alleging specific damages such as health, decreased visibility, soil damage, and property devaluation that would result from GHG and other emissions from a coal-fired power plant that had received a permit from state air quality officials was sufficient to grant standing to plaintiffs to challenge the permit.[2]

The list below, taken from a compilation of these cases by Peter Lehner of the New York state Attorney General's office, illustrates the growing number of cases and range of issues they raise.[3] Some climate cases have been dismissed for lack of standing on the basis that they raise political questions. Cases where plaintiffs have been successful seek to compel agencies to include climate change in assessing possible environmental consequences of agency actions. One key case to watch is the Supreme Court case concerning the EPA's decision not to regulate GHGs under the Clean Air Act, since a decision favoring the plaintiffs would compel the agency to begin developing climate change regulations. A second key set of cases are the nuisance cases brought by states against large corporations that emit high levels of GHGs. State officials have the resources to prepare these complex cases and there are significant precedents in other areas of environmental law for holding parties responsible for damages despite only being one of many sources of emissions, and precedents in other areas of law for dealing with complex issues of causality. At minimum, these cases will contribute to pressure for national climate legislation and for industries to take actions to reduce their potential exposure to legal action and to the accompanying negative publicity.

Agency Action-Forcing Cases

Action-forcing cases have been brought against federal agencies to compel them to address climate change and GHG emissions.

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The most visible case is the one brought by states and environmental organizations aimed at compelling the EPA to regulate GHG emissions as pollutants under the Clean Air Act.

Massachusetts,* et al. *v. Environmental Protection Agency, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted,* 126 S.Ct. 2960 (June 26, 2006): Twelve states and several environmental organizations sued the EPA to compel it to regulate carbon dioxide from automobiles under Section 202 of the Clean Air Act, arguing that the agency was required to regulate carbon dioxide under the Act, since it is an air pollutant which "may reasonably be anticipated to endanger public health or welfare." The DC Circuit ruled 2-1 in favor of the EPA's position. One judge concluded that plaintiffs had standing, and that the EPA had the authority to regulate carbon dioxide under the Act, but that the EPA Administrator properly exercised his discretion when he decided not to regulate. A second judge argued that the case should be dismissed for lack of standing because global warming presents a generalized grievance. The dissenting judge found that the EPA had such authority. Certiorari was granted by the Supreme Court, and the case was heard on November 29, 2006. Oral arguments centered on whether the states actually had demonstrated imminent harm from global warming and, perhaps more importantly, whether EPA's regulation of motor vehicle emissions could possibly reduce significantly the likelihood of future harm. Some observers expect a 5-4 vote on whether to grant standing, with the swing vote difficult to predict. If standing is granted, the Court would likely only remand the case to the EPA.

Coke Oven Environmental Task Force v. EPA, 2006 U.S. App. LEXIS 23499 (D.C. Cir. 2006): Ten states, Washington, D.C. and New York City, and a number of environmental groups challenged EPA's failure, under Section 111 of the Clean Air Act, to establish a new source performance standard for carbon dioxide from new, modified, and reconstructed stationary sources. The case has been stayed pending the Supreme Court's decision in *Massachusetts v. EPA.*

Northwest Environmental Defense Center,* et al. *v. Owens Corning, 434 F. Supp.2d 957 (D.Or. 2006): Environmental organizations sued the defendant for building a facility without a preconstruction permit required under the Clean Air Act, claiming that they had standing to sue because the facility would contribute to global warming and harm members of their organization. The court denied defendants' motion to dismiss, holding that plaintiffs did have standing, and stated that "issues such as global warming and ozone depletion may be of 'wide public significance' but they are neither 'abstract questions' nor mere 'generalized grievances.' An injury is not beyond the reach of the courts simply because it is widespread." The court reasoned that while global warming may

affect everyone on earth, it will affect different areas in different ways, so that claims brought by those in Oregon would not necessarily be injuries shared by all or "generalized grievances."

Some cases have challenged Department of Energy and National Traffic Highway Safety Administration decisions that have failed to address climate implications of energy decisions, such as issuing environmental assessments that have not included GHG emissions or not implementing alternative energy policies.

Border Power Plant Working Group v. Department of Energy, 260 F. Supp. 2d 997 (S.D. Cal 2003): Environmentalists challenged the DOE's findings of no significant impact for electric line permits to be granted within the United States and across the US-Mexican border. The court held that the agency's environmental analysis was inadequate because it failed to address the "potential environmental impacts" of carbon dioxide emissions, despite carbon dioxide not having been determined by the EPA to be a "criteria pollutant."

Center for Biological Diversity v. Abraham, 218 F. Supp. 2d 1143 (N.D. Cal. 2002): Three environmental organizations alleged that federal agencies had not complied with several Energy Policy Act requirements, such as ensuring that a specified portion of their automobile fleets were comprised of alternative fuel vehicles. The court granted the plaintiffs standing for other reasons, but held that plaintiffs' concerns about global warming were "too general, too unsubstantiated, too unlikely to be caused by defendants' conduct, and/or too unlikely to be redressed by the relief sought to confer standing."

Center for Biological Diversity v. National Highway Transportation Safety Administration, No. 06-71891 (9th Cir. filed Apr. 6, 2006): California, Connecticut, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, New York City, the District of Columbia and several environmental groups petitioned for review of the newly-revised federal fuel economy standards, issued on April 6, 2006, that would relax the corporate average fuel economy (CAFE) standards by 2.4 miles per gallon for light trucks by 2011. The claims of the various petitioners were consolidated. They argued that the NHTSA did not conduct environmental and safety analyses mandated by NEPA and other laws when promulgating these standards.

City of Los Angeles v. National Highway Traffic Safety Administration, 912 F.2d 478 (D.C. Cir. 1990), *overruled in part by Florida Audubon v. Bentsen,* 94 F.3d 658 (D.C. 1996): A group of cities, states, and environmental groups challenged a decision by NHTSA not to prepare an environmental impact statement addressing global warming impacts of its relaxation of the Corporate Average Fuel Economy (CAFE) standards for model years in the late 80s. The environmental groups were found to have standing based on their global warming claims, but the petition was denied on the merits. In finding that the small percentage increase in greenhouses gas emissions from the challenged action was sufficient to confer standing, the majority stated, "the evidence in the record suggests that we cannot afford to ignore even modest contributions to global warming." *Florida Audubon* held that the case was overruled to the extent it allowed standing to be established by showing that agency action would lead to a demonstrable increase in risk.

Several suits have been filed against other federal agencies as well for failing to take into account climate change in assessing environmental impacts.

Center for Biological Diversity v. Norton, No. 3-05-05191 (N.D. Cal filed Dec. 15, 2005): The Center for Biological Diversity, NRDC, and Greenpeace petitioned the U.S. Fish and Wildlife Service in February, 2005, to list the polar bear as "threatened" under the Endangered Species Act because the melting of the Arctic ice was impairing the bears' habitat. After receiving no response well after the statutory deadline for responding to petitions, plaintiffs sued the agency to list polar bear as threatened. In July, 2006, the FWS agreed to respond to the petition by December 27, 2006, and the court retained jurisdiction to oversee compliance for a period of one year. If polar bears become listed as a result, they will be the first mammal found to be at risk because of global warming.

Friends of the Earth v. Watson, No. C-02-4106 JWS, 2005 U.S. Dist. LEXIS 42335 (N.D. Cal. Aug. 23, 2005): Several environmental groups sued the Overseas Private Investment Corporation and the Export-Import Bank, two independent government corporations, for failing to consider the global warming impacts under the National Environmental Policy Act (NEPA) when it decided to fund development projects that would lead to increased production and use of oil and thus to increased carbon dioxide emissions. The court denied defendants' motion for summary judgment, holding that plaintiffs have standing because, among other things, they could show that "it is reasonably probable that the challenged action will threaten their concrete interests."

Foundation on Economic Trends,* et al. *v. Watkins, 794 F. Supp. 395 (D.D.C. 1992): Information-disseminating organizations sued several federal agencies, alleging that defendants did not adequately address effects of some 42 federal actions, such as the energy conservation standards for new residential buildings, on global warming and thus failed to satisfy NEPA requirements. The court granted summary judgment for the defendants, stating that plaintiffs did not have standing because their claim of informational injury was indistinguishable from an ideological interest and insufficiently concrete. Plaintiffs sought to amend their complaint to include an individual plaintiff with environmental injuries. However, the court denied the motion, determining

that plaintiffs would still not have standing as the individual had not alleged an adequate causal connection. The court stated, "notwithstanding the seriousness of the phenomenon," there is no "global warming" exception to the standing requirements of Article III or the APA."

At least one case has been brought by groups seeking to compel local governments to take climate change into account in making land use policy decisions.

Utsey v. Coos County, 32 P.3d 933 (Or. Ct. App. 2001): The League of Women Voters petitioned for review of an Oregon county Land Use Board of Appeals' decision to grant a permit to an off-highway vehicle trail system and racetrack and asserted standing based on the global warming consequences of projected vehicle emissions. The court held that plaintiffs lacked standing, but one judge argued in dissent that because global warming is an issue that could potentially affect everyone living on the planet, a legislature could reasonably believe that everyone has a stake in energy facility siting and thus properly confer standing.

Conversely, some industry groups are challenging state climate policies such as California's regulation of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons that are aimed at reducing GHG emissions from automobiles and light trucks by 18% by 2020 and 27% by 2030, and the policies of other states that are adopting similar provisions.

Central Valley Chrysler-Jeep, Inc. v. Witherspoon, No. CV-F-04-0663, 2006 U.S. Dist. LEXIS 48892 (E.D. Cal. July 7, 2006): Chrysler, GM, and the Alliance of Automobile Manufacturers, together with several automobile dealers, challenged a California rule requiring all motor vehicles sold in the state to meet emission standards for carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. The international automobile manufacturers intervened as plaintiffs; the Sierra Club, NRDC, and Environmental Defense intervened as defendants; and eight states joined as amici supporting California. Plaintiffs seek declaratory and injunctive relief arguing preemption, Commerce Clause, and Sherman Act violations. In September, 2006, the court ruled in favor of defendants for claims brought under the Dormant Commerce Clause and the Sherman Act, but denied all other claims.

Green Mountain Chrysler v. Torti, No. 05-CV-302 (D. Vt. filed Nov. 18, 2005): Domestic automobile manufacturers and local dealers challenged Vermont's adoption of California's GHG automobile emission regulations. A parallel suit was brought by the international manufacturers, *Association of International Automobile Manufacturers v. Torti,* No. 2:05-CV-304 (D. Vt. filed Nov. 18, 2005), and has been consolidated.

Association of International Automobile Manufacturers v. Sullivan, No. 06-CV-69 (D. R.I. filed Feb. 13, 2006): Rhode Island's Department of Environmental Management adopted

California's regulations limiting motor vehicle GHG emissions. Plaintiffs challenged these regulations as violations of, among other things, preemption, Commerce Clause, and antitrust provisions. The companion case brought by automobile dealers and domestic manufacturers, *Lincoln Dodge, Inc. v. Sullivan,* No. 06-CV-70 (D.R.I. filed Feb. 13, 2006), was consolidated with this action. The Conservation Law Foundation, Sierra Club, NRDC, and Environmental Defense joined as defendants in June, 2006.

In the Matter of the Quantification of Environmental Costs Pursuant to Laws of Minnesota 1993, Chapter 356, Section 3, 578 N.W.2d 794 (Minn. Ct. App. 1998): The Minnesota Legislature asked the Minnesota Public Utilities Commission to determine the environmental costs associated with every method of electricity generation. The Commission set values for five pollutants, including carbon dioxide, and several power companies challenged the decision to set values for carbon dioxide. The court held that the Commission's interpretation of the statute was not contrary to the legislature's intent, that deference should be given to the agency's decision, and that there was substantial evidence for the carbon dioxide cost values determined by the agency.

Nuisance Cases

Climate nuisance suits seek damages from major sources of GHG for property damage resulting from the disruption of climate patterns.[4] For example:

Comer v. Nationwide Mutual Insurance Co., 2006 U.S. Dist. LEXIS 33123; now *Comer v. Murphy Oil, U.S.A.,* Case No. 1:05cv436 LTS-RHW (S.D. Miss. Sept. 20, 2005): Property owners in Louisiana filed a class action suit against their insurance companies for failing to reimburse plaintiffs for property damage caused by Hurricane Katrina. The suit also included three chemical companies as defendants, alleging that damages sustained during the hurricane were partially a result of their emissions. The court discussed the difficulty of proving causality and decided that these claims could not be litigated in the same action as against their insurance companies. Plaintiffs then filed an amended complaint that asked for class action status to sue oil, chemical, and coal companies for emissions which allegedly have increased the frequency of hurricanes and other storms and were a proximate cause of Katrina's severity.

Connecticut v. American Electric Power, Inc., 406 F.Supp. 2d 265 (S.D.N.Y. 2005): Eight states and New York City brought suit grounded in federal common law public nuisance and interstate harm to state sovereign interests against the five largest emitters of carbon dioxide among electricity generators. This case was consolidated with a suit filed by a group of land trusts, *Open Space v. American Electric Power Co.* Plaintiffs allege that defendants' carbon dioxide emissions contribute to global warming that causes present and inevitable future harm to the states and their citizens, including rising sea levels, more frequent and intense weather conditions, adverse impacts on state agriculture and on water supply, and harm to tourism and the very fabric of state ecology. The district court dismissed the complaint as a non-justiciable political question, finding that resolution of the issues requires "identification and balancing of economic, environmental, foreign policy, and national security interests." The plaintiffs appealed and argument before the Second Circuit was held on June 7, 2006.

People of the State of California v. General Motors Corp, No. C06-05755, (N.D. Cal., filed Sept.20, 2006): California's Attorney General filed suit against the "Big Six" auto manufacturers, alleging that under federal and state common law (as was argued in *Connecticut v. American Electric Power*) the automakers have created a public nuisance by producing millions of vehicles that collectively emit massive quantities of carbon dioxide, and seeking damages, including future harm, caused by their ongoing, substantial contribution to the public nuisance of global warming.

Conclusion

The legal environment in which companies operate is changing rapidly, and there are clear incentives for them to develop strategies for managing their carbon emissions. The increasing complexity of state climate policies is prompting many companies to call on Congress to develop a national policy to replace the fragmented state policies. States, led by California, are establishing registries so companies can document their emission reductions and ensure that they receive credit for early actions taken before regulatory programs are put in place. Companies that are early actors will have additional experience to draw upon as they seek to help shape climate policies, will be ahead of competitors in finding cost-effective ways to reduce energy use and GHG emissions and differentiating themselves as green companies. They also will be able to sell their GHG reductions as carbon credits in emerging carbon markets.

1. John Carey, "Global Warming," *Business Week,* August 16, 2004, p. 62.
2. Utah Supreme Court No. 20050455 (November 21, 2006).
3. Peter Lehner, presentation at the Second Annual Legal Dimensions of Climate Change Conference, American University, Washington, DC, November 8, 2006.
4. Some cases have already been dismissed. For example, in *Korsinsky v. Environmental Protection Agency,* No. 05-6802-cv, 2005 U.S. Dist. LEXIS 21778 (S.D.N.Y., Sept. 28, 2005), a plaintiff brought a "public nuisance" action against EPA and New York state and city departments for contributing to global warming. The court dismissed the case for lack of subject matter jurisdiction. The plaintiff's "enhanced risk" argument was not sufficient for standing, and his argument that he has a mental illness derived from knowledge about global warming could only be considered a generalized grievance. The Second Circuit affirmed. 2006 U.S. App. LEXIS 21024.

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The Justice Gap: The Unmet Legal Needs of Low-Income Utahns

by Utah Legal Services and "AND JUSTICE FOR ALL" under the guidance of D. Michael Dale

"Equal justice is not just a caption on the façade of the Supreme Court building. It is perhaps the most inspiring ideal of our society....It is fundamental that justice should be the same, in substance and availability, without regard to economic status."

– Justice Lewis Powell, Jr., Former Associate Justice, US Supreme Court

Utah Legal Services and "AND JUSTICE FOR ALL" commissioned a study, summarized in the following reprint of *The Justice Gap: The Unmet Legal Needs of Low-Income Utahns,* in order to better understand the civil legal needs of households 130% below the federal poverty level.

The *Justice Gap* report is the culmination of 1,500 face-to-face and in-depth interviews performed across Utah in 2005 and 2006. Surveyors targeted locations where they were likely to encounter low-income individuals such as laundromats, food banks and low-income housing. The study used a cluster group design to assure collection of information about a broad cross-section of the lower income population, and to learn of disparate barriers to accessing the legal system faced by various demographic groups. The survey focused on 16 demographic groups as well as a control group of individuals who had none of these characteristics. At least 100 surveys of each group were sought and the overall survey results adjusted to reflect the demographic characteristics of the general population.

The *Justice Gap* survey was modeled on an American Bar Association design for a 1994 national study, as well as a modified version of that study used in Montana under the guidance of consultant D. Michael Dale. Data were tabulated by Portland State University. Recommendations based on the findings of this study have started and will continue to be implemented by "AND JUSTICE FOR ALL," the newly formed Access to Justice Council, and the various legal service providers.

Introduction

This report assessing the civil legal needs of low-income Utahns was undertaken to determine how to better serve this often overlooked portion of our society.

To further the goal of obtaining and presenting the most reliable data possible, every effort was made to be conservative in categorizing responses as "legal problems" or "issues," so this report should be read keeping the overlay of "at least this many" in mind. While it provides significant and new information, it invites exploration of further questions in many areas.

From the state's first legal aid program in Salt Lake County in 1922, Utah has continued to develop paid and pro bono programs to address the most pressing legal needs of those who cannot afford an attorney throughout the state. Yet, as indicated throughout this report, much work remains to be done.

General Findings

Sixty-seven and one-half percent of low-income households in Utah will face a civil legal dispute this year. These households report an average of 1.28 legal problems per year. While 32.5% of households will have no legal problems this year, 46.6% will have two or more legal problems and 14.3% will have five or more legal problems.

A legal problem may consist of several issues, such as a family law problem that includes the issues of child custody, child support and a divorce.

Legal problems span a range of problems, with the most common being family law at 20.5% of all problems, employment at 12.3%, housing disputes at 12.1% and consumer issues at 9.8%.

Severity of Legal Problems. Close to nine in ten low-income households with legal problems felt their legal problems were important, with over half indicating their legal problems to be extremely important.

Analysis of Problems within Substantive Areas. The report also provides an analysis, within each issue area, of the relative frequency of those specific issues.

The Gap in Legal Assistance

All respondents reporting a legal problem were asked additional questions to find out how their households dealt with their legal needs. Overwhelmingly, the legal needs identified were not addressed with the assistance of counsel. Only 13% of households reported receiving help from an attorney, leaving 87% without help.

Only 18.4% of households that experienced legal needs sought legal help for their problems. Respondents with family law

Jennifer had been abused by her spouse in the past. After each instance of abuse she chose not take legal action because she was financially dependent upon her spouse. Lately, she began to suspect he would begin abusing her again, so she contacted Utah Legal Services for help. Unfortunately, Utah Legal Services does not have the resources to take cases like Jennifer's, as they only have the means to take cases that involve recent instances of abuse.

problems were the most likely to seek the help of an attorney, with 34.8% turning to an attorney; 22.9% to legal service programs; and 11.9% to the private bar.

While 18.4% of households looked for legal help, only 13% reported having received it. The kinds of problems for which representation was most likely were consumer and family law at 25.7% of low-income households. For other legal problems, fewer than 10% of households received legal assistance.

There were, however, large differences in the levels of service for various types of issues. For example, a household with a family law problem was much more likely to receive full legal representation than one with a housing issue.

Why Did so Few Respondents Obtain Legal Assistance & Where Did Unrepresented Households Turn For Help?
Respondents did not seek legal assistance for a variety of reasons. Nearly one-third did not know where to turn for help. Just over 22% felt it was too much hassle. Close to 21% did not seek help because they feared the cost. Almost 19% felt that nothing could be done about their problem, and about 17% did not perceive the problem to involve a legal issue.

Despite qualifying for assistance, only 23.6% of low-income households were aware of a free legal service program with large variations among groups. Shockingly, only 20.9% of households below 130% of the 2005 poverty level knew they were eligible for free legal help.

Resulting Attitudes of Household That Had Legal Problems
Only 26.8% of all households were satisfied with the outcome of their problems while 71.9% of those who received legal help indicated satisfaction.

Having legal help also had a significant effect on attitudes towards our legal system. Sixty-five percent of those with legal help who were satisfied with the outcome of their cases felt positive or very positive about the legal system, compared to only 20.9% for all respondents.

Differences in Legal Problems of Demographic Clusters
A significant finding of the survey is that certain demographic groups reported varying numbers of legal problems within different legal issues.

Regional Variations
This survey also reflects differences in the number of legal problems and legal issues within the six regions of the state. Households in different regions of the state also have different frequencies of problems within common areas of the law. Further, households in some regions are also much less likely to be aware of legal service programs.

How Large is the Unmet Need for Legal Aid?
The survey found that there is an enormous need for legal services that is not being met – more than 80,320 cases each year. These are not trivial problems. Although a small number of those cases were not seen by the respondent to be important, over 94% of these cases were felt to be important (12%), very important (27%), or extremely important (55%).

After working two weeks at a temporary job, Dave, a day laborer, was released without pay. In order to settle the dispute with his employer, Dave called the Utah Labor Commission, which had him fill out a wage claim form, but was unable to educate Dave on his rights or give any legal advice. Dave called Utah Legal Services, but, due to lack of funding, Legal Services was unable to take the case and referred Dave to a private lawyer, who, depending on the strength of the case, may or may not take the case.

Conclusion

It is important to remember that all the numbers in this report represent actual problems being faced by your fellow Utahns. These problems impact specific households and our community at large. Legal assistance programs help obtain and maintain income, jobs, and housing while increasing the quality of life for all residents and building civic faith in the legal system.

The data from this survey provides a wealth of information to help shape the legal aid delivery system in Utah. Significant conclusions suggested by the findings include:

Low-income Utah households face over 92,000 civil legal problems each year.

Over two out of every three low-income households in Utah will face a civil legal problem each year.

The civil legal help most needed by low-income Utahns are in the following order: family law, employment, housing, and consumer law.

Only 13% of very poor households report receiving legal help with their civil legal problems.

Households that receive legal assistance are much more likely to be satisfied with the outcome of their problems.

Households that receive legal assistance are much more likely to have a positive attitude about the legal system.

Many individuals are unaware of what issues can be resolved through the legal system.

The majority of low-income households facing civil legal problems are unaware of legal aid programs available to them or that they are financially eligible for these programs.

Low-income Utahns facing certain types of legal problems, such as consumer or family law issues, are more likely to receive help from an attorney than those facing, for example, an employment or housing issue.

Recommendations

Based on these findings, Utah Legal Services and "AND JUSTICE FOR ALL" offer the following recommendations to strengthen legal aid programs for low-income households:

1. Convene an Access to Justice Council to develop a statewide plan to address the unmet civil legal needs of low-income Utahns. Create a broad-based effort engaging stakeholders from private, government, religious and non-profit sectors to plan and implement effective programs and policies that increase access to justice for low-income Utahns.
2. Prioritize legal aid services with the most pressing needs of low-income Utahns taking into consideration barriers faced by specific demographic groups.
3. Employ a range of legal advocacy techniques including self-help, brief advice, community legal education and representation to create maximum impact with the smallest amount of resources.
4. Strengthen collaborative efforts within and outside of the legal community.
5. Develop increased resources to adequately address the legal needs of low-income Utahns.
6. Increase opportunities for pro bono attorneys to participate in meeting the legal needs of low-income Utahns. Evaluate which types of cases and levels of service are the most likely to appeal to pro bono attorneys and explore ways to remove barriers to attorneys accepting other types of cases.
7. Continue to strengthen service delivery models that allow legal assistance programs to reach all areas of the state from clinics to toll-free hotlines and web-based programs.
8. Increase outreach to low-income individuals and groups to help them understand when they have a legal problem and where to go for assistance. Develop specific plans to reach vulnerable populations who may face additional barriers.
9. Educate the general public about the impact legal aid programs have on our community.
10. Coordinate with other agencies that provide assistance to low-income individuals and households to create a holistic approach to solving problems.

Practicing to Practice: Scholastic Debate as Law-Related Education

by Chad R. Derum

Before he argued the petitioner's side in the Guantanamo detention case *Hamdan v. Rumsfeld* before the United States Supreme Court last year, Georgetown Law Center professor Neal Katyal first tested his arguments in more than a dozen moot court sessions.[1] It should come as no surprise that, for his first moot court session, Katyal invited the highly-regarded Harvard Law School professor Lawrence Tribe to bombard him with questions. Along with Tribe, however, Katyal also invited Ken Strange, the coach of Katyal's college debate team. Although Strange is not a lawyer, this second invitation should be no more surprising than the first. Katyal had been a champion debater at Dartmouth College in the early 1990's and Strange had been Katyal's greatest teacher in the art of argument and persuasion – the very skills Katyal would need to make an effective argument before the Court. It is also unlikely that Strange's invitation surprised Tribe, who had himself been a national champion debater at Harvard in the 1960s before beginning his own legal career.

The relationship between debate and the practice of law is more than simple coincidence. For generations, young people who wanted to grow up to be lawyers first experienced competitive advocacy on debate teams. Debate, perhaps better than any other academic training, teaches students how to "think like a lawyer" long before they ever set foot in a law school. The fact that Katyal invited his debate coach to attend his moot court in preparation for *Hamdan* demonstrates that the value some lawyers find in debate does not end when legal training begins.

Despite the obvious synergies between scholastic debate and the practice of law, debate is often overlooked as a natural element of law-related education. Although debate encompasses more than strictly "legal" topics, students who are equipped with the skills to analyze, research, and discuss topics ranging from agricultural policy to nuclear proliferation are well-prepared for the transition to legal research, thinking and writing. After all, the practice of law includes more than simply knowing the letter of the law. Legal practice may call upon a lawyer alternately to develop an *ad hoc* expertise on both the grandest and the most obscure human pursuits. It is the ability to think critically and creatively about diverse issues that is the lawyer's true skill. Similarly, debate opens students' minds to a world of facts and ideas – both big and small – and provides students with the necessary analytical tools to recognize the relationships and concepts that connect them. When students put these skills to work before a judge in a competitive debate round, the debate becomes a microcosm of the world many lawyers inhabit every day.

The time is particularly ripe for recognizing the important relationship between debate and the law. Even as many Utah lawyers can look to debate as providing the foundation for their subsequent legal careers, debate programs in some of Utah's public schools are in real trouble. Programs that once flourished are now struggling to survive – the victims of evolving standards for academic achievement and slim budgets that strain resources for extracurricular activities like debate. For example, the debate program at Brighton High School – once a Utah powerhouse – has been eliminated altogether. As debate loses ground generally, the opportunity to expand the activity among students that may be most in need of the opportunities debate provides is also lost. The Utah Bar and its membership, however, can make a difference in reversing these trends.

Many current members of the Utah State Bar were once debaters. As a former high school and college debater myself, I decided to conduct a brief survey of a few of Utah's other debater/lawyers to collect their thoughts on the relationship between debate and the law.[2] The few comments included here likely echo the views of many other members of the Bar.

Rich L. Humpherys

Before beginning his legal practice, Rich Humpherys of Christensen & Jensen, P.C. was a debater at Orem High School and later at Brigham Young University. Debate, in his view "was far more effective in preparing [him] for [his] profession as a litigator than any of [his] specific academic endeavors." His comments provide an insightful overview of the role debate can play in the

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development of a legal career:

> Though I have always desired to be a lawyer, my high school and college debate experience enhanced my desire. It helped me better *understand* many things, such as: (1) there are often good opposing views and authorities on both sides of a tough issue; (2) the most persuasive arguments focus on the real issues, not tangential issues; and (3) in life, we often face very difficult issues that don't lend themselves to black and white answers.
>
> My debate experience also *taught* me many things, such as (1) the need for thorough and accurate research; (2) how to take extensive research and synthesize it into an efficient and meaningful short presentation; (3) how to artfully and persuasively present information; (4) how to train my mind to think in advance about the possible opposing questions or viewpoints and be prepared to meaningfully respond to them (for example, when I prepare to try a case, I prepare different case presentations, depending on how the judge may rule on the admissibility of controverted evidence or how the defense may present its case – debate introduced me to and helped me succeed with this process); (5) to be comfortable and confident with an oral presentation; (6) how to find, analyze and focus on what is key and important, without being distracted by all of the other, though interesting, possible issues; and finally, (7) how to address the issues without giving in to the lure of exchanging personal attacks with the opposing side.
>
> I have also found that many of the old debaters I got to know are now attorneys and our friendship continues.

Richard D. Burbidge

Richard Burbidge, of Burbidge, Mitchell & Gross, is one of Utah's most respected trial lawyers. Before practicing law, Mr. Burbidge debated at South High School in Salt Lake City. Mr. Burbidge's comments about his debate experience demonstrate that it can be difficult to overstate the value that debate can play in a would-be lawyer's education:

> I was enticed to [become a debater] in my senior year, having no prior interest whatsoever in that competitive arena.
>
> The long and short of my encounter with the sport was full and complete engagement.
>
> It was my first encounter with systematic critical thinking and the first opportunity in my educational career to begin to develop systematic skills for critical analysis. It is not an overstatement to say that my debate experience was the

> single most determinative factor in my choice of a life-long profession as a trial lawyer. I simply do not believe that there is a more rigorous or enlightening cognitive training available in a high school setting.

David C. Reymann

David Reymann, a partner at Parr Waddoups Brown Gee & Loveless, debated at Vestavia Hills High School in Alabama, where, along with his twin brother, he was the 1992 national high school debate champion. Reymann then went on to debate for four years at Dartmouth College before attending the University of Chicago Law School. His comments highlight that although there are significant differences between debate and courtroom arguments, debate provides essential training in the core critical thinking skills every lawyer needs:

> Of all of the subjects, classes, and preparations people take in order to get ready for law school and the practice of law, nothing prepares you like debate. Most people think this is because debate trains you for persuasive public speaking, but for me that is not the reason. Court arguments are rarely like debates. Rather, I think the most essential skill debate teaches is the ability to evaluate arguments critically and discern those that are likely to succeed. I believe this is also the most valuable skill for a litigator, and, unfortunately, the one that is most difficult to learn once you are immersed in the practice of law. By developing this skill early, debate plays an enormous role in training and educating future members of the bar.

David F. Mull

David Mull, an associate at Snow, Christensen & Martineau, was a champion high school debater in his native Alaska before going on to debate at Franklin & Marshall College in Pennsylvania, and then on to law school at the S.J. Quinney College of Law at the University of Utah. For Mull, it is debate's role in promoting active citizenship that has left the most lasting impression:

> It is obvious that debate gives students practice in the nuts and bolts of making and analyzing arguments, and it builds public speaking skills. Just as important, I think, is that it shows students how much fun it can be to discuss and engage in issues of civic importance. People who have some confidence in analyzing public affairs are much more likely to engage in them.

Utah Judges

In addition to practicing attorneys, former debaters also number among the judges in the Utah courts. Utah Supreme Court Chief Justice Christine M. Durham counts high school debate as an important stepping stone in developing the logic and language abilities essential to legal thought and practice:

> I think that my early experiences with the structure and focus of debate programs introduced me to critical thinking, to persuasive logic, and to the deep significance of rhetoric (in the classical sense) for human communication and understanding about hard ideas.

Debate also played a very significant role in United States District Court Judge Paul Cassell's legal training. In fact, following a successful high school debate career in Idaho, Judge Cassell initially enrolled at Stanford University, but left Stanford for a time to attend Western Washington University where he could compete on that school's outstanding debate team.[3]

An enthusiastic supporter of debate, Judge Cassell notes, "Debate has helped me see both sides of complicated issues and to understand the relationship between advancing a good argument and prevailing on issues in court."

Judge Michael McConnell of the United States Court of Appeals for the Tenth Circuit was also a distinguished debater before he pursued law. In fact, Judge McConnell was the Kentucky State High School Debate Champion in 1972. His comments reflect on debate's unique role in developing young minds:

> More than any other student activity, debate requires the participant to match evidence to thesis in a logically compelling manner, and to communicate complex ideas to an audience. If some evil genius concocted a magic potion that made high school students voluntarily give up their weekends to engage in so intellectually worthwhile an activity, we would award him a Nobel Prize for pedagogical necromancy.

DEBATE AS LAW-RELATED EDUCATION

The common theme running through the comments of these practitioners, scholars, and judges is that debate develops important skills that transcend the typical classroom experience and translate exceptionally well into legal practice. These skills include developing the capacity for critical thinking, increasing the comprehension of substantive information, developing broad organizational skills, and providing the opportunity to make persuasive presentations that demonstrate an appreciation and understanding of these skills. In the context of a debate round, students must rely on both critical thinking and an ability to apply substantive knowledge in order to succeed. Students must learn to present the most effective argument within the bounds of the accepted rules and time constraints; they must learn how to argue from the evidence, rather than from personal opinions; and they must learn how to think and respond quickly, but carefully, to unexpected arguments, as well as to evolving events

in a changing world.

With these perspectives in mind, it is fair to conclude that debate should properly be considered a form of law-related education, and promoted as such. Not everyone may call their debate coach to attend their moot court session to prepare for an argument before the Supreme Court. In a real sense, however, lawyers with a background in debate carry the skills they learned in debate into every argument they attend.

LOOKING FORWARD: FOSTERING THE BAR'S ENGAGEMENT WITH DEBATE

Decades ago, the Bar sponsored an annual debate tournament for high school students here in Utah called the "Utah State Bar Debate Tournament." The event was very popular among Utah's high school debate programs. For unknown reasons, the Bar's sponsorship of that tournament ended abruptly in the mid 1980's. In 2005, through the sponsorship efforts of the Bar's Young Lawyers Division (YLD) and the Bar's Litigation Section, the Bar's involvement in high school debate found new life, and the "Young Lawyers Debate Tournament" was born. Now in its second year, the Young Lawyers Debate Tournament has brought together hundreds of students from more than two dozen Utah schools to participate in a weekend of intense scholastic competition. Highlighting the overlap between debate and the Bar, the tournament has been organized so that a panel composed of lawyers who were once debaters serve as judges for the final debate round.

The new debate tournament is an important step toward preserving an important link between debate and the legal community in Utah. The YLD and the Litigation Section deserve significant recognition for their efforts these past two years. Looking ahead, it is my hope that the Bar's leadership will endorse sponsorship of the tournament on a long-term basis so that the connection between debate and the Bar will remain vital, even as the individuals involved in coordinating the tournament on an annual basis may change. With the support for this event from the highest levels of the Bar, the Bar can help turn a growing event into an established tradition and give back to the debate community what many members of the legal community have already received.

On an individual level, there are other ways to become involved in fostering and preserving scholastic debate. For example, David Reymann sets aside significant time to coach the debaters at Highland High School's nationally recognized debate program. Robert Wing, an attorney at Holland & Hart, sets aside time to coach the team at Viewmont High School and to judge debate tournaments regularly. Others make financial contributions to the debate programs at Utah high schools, providing the opportunity for students to raise the funds needed to provide essentials that limited school budgets do not cover and to fund travel opportunities to debate tournaments nationwide. Individual law firms can also contribute to the Young Lawyers Debate Tournament or to individual debate programs as an extension of their charitable giving efforts.

CONCLUSION

Obviously, debate will not make a lawyer out of every participant. It may, however, convince some students who might otherwise pursue different careers, to choose law. As Neal Katyal noted, "I do not think there is any chance I would have become a lawyer were it not for debate, both in high school and in college." Participation in debate – the direct engagement in advocacy on hard issues in the context of a head-to-head competition – teaches students much of what lawyers do in daily practice. But these skills are also important for every student we hope and expect to become an effective and engaged citizen. In this sense, creating links between debate and the law advances the Bar's mission of leading society in the creation of a justice system that is understood, valued, respected, and accessible to all.

1. Correspondence from Neal Katyal to Chad R. Derum, on file with the author.

2. The contributors' written comments are on file with the author.

3. *See* http://www.fedbar.org/utah-profile_cassell.pdf

Sundance 2007

by Betsy Ross

Each year I am reminded of how fortunate we are to have the Sundance Film Festival right here in our midst. And I'm not talking about star-gazing. I'm talking about the chance we have to be educated with a minimum of cost, and a modicum of hassle. Many of the films show in Salt Lake City, where one can escape the frenzy of Park City, and just settle in to a cozy theater (showings at the Tower, the Broadway, and Rose Wagner theaters) and watch a film. But not just any film. These are films that can change your heart, your mind, your orientation towards life. This year was no different.

The documentaries are where, for me, the film festival really makes a difference. Last year it was Al Gore's "An Inconvenient Truth," making the case that we cannot wait to address global warming; two years before that it was "Deadline," the story of the then-Illinois governor coming to the decision to commute the sentences of all death-row prisoners because of his conviction that the guilt of all could not be assured; and of "Home of the Brave," the story of the attempt of the family of Viola Luizzo, a white Chicago housewife who was killed in Selma, Alabama during the civil rights demonstrations, to come to terms with what happened to their mother.

This year is the year of exploring man's inhumanity toward his fellow man, a fitting theme while we are in the midst of a brutal war, and should be asking ourselves how we can, in the 21st century, still accept the premise of, and detritus from, war.

As I saw the following films, I was left with two main thoughts: what does it take to treat another human being the way the aggressors in each case did/do, and what does it take to stop them. How can there be among us those capable of such heinous acts, and at the same time, on the same earth, those selfless individuals dedicated to standing in the way of such acts? Some may appease themselves by referring simply to the existence of evil and good, or the devil and god. There is, for me, no simple answer for the lopping off of limbs of children while they are still alive. Devil or no devil.

The first of this year's memorable documentaries was "The Devil Came on Horseback," a documentary chronicling the genocide in Darfur, one person's close-up view of it, and his response to that view. Marine Captain Brian Steidle accepted a post in Sudan as an unarmed monitor of the "peace process" working for the African Union. While there, Steidle saw unimaginable things, things that we saw, too, due to his dedication to filming them, and subsequently transporting that film to the states as witness to the atrocities. Initially, Captain Steidle had such faith in his country, that he testified in his journal of his belief that United States officials needed only to see what he saw, and it would all be ended in one week. That was over two years ago. The United States knows, as well as the global community, what he saw is still occurring in Darfur.

Captain Steidle was thrown in the middle of a conflict in the western Darfur region that has claimed 400,000 lives, and displaced 2.5 million people. He took pictures of traveling bands of "Janjaweed," Arab-African murderers essentially commissioned by the government to burn the refugee villages of Black Africans, and annihilate all residents. *All residents.* Men, women and children. And from the pictures we saw, from the pictures the American government has seen, none of the killings were gentle; none were humane; all defy belief.

How is it that we can do these things to each other, and how is it that *knowing that such things are being done, we can allow it to continue?* Is this not a question the world has asked before, but, seemingly, always too late?

"Nanking" is another such story, and another of this year's documentaries. "Nanking" is the story of the Japanese invasion of China in 1937, and the resulting murder of two hundred thousand Chinese men, women and children, and rape of tens of thousands of Chinese women. There, too, we see archival footage of the villainy – of babies bayoneted alive; of heads chopped off – of one *living* victim whose head was only partially chopped off; of people set on fire while alive and who lived through it. Words cannot deliver the impact of the pictures, but

I attempt to paint the horror because of the question it elicits – it begs: *Who* could do such things?

Finally, I also saw "War Dance," a documentary chronicling current events in northern Uganda, in which rebels (the Lord's Resistance Army) have been at war with the government for 20 years. Many children have become the victims of this war, as over 30,000 have been abducted by the rebel army, forced to become rebel soldiers, and, thus, forced to kill – sometimes their own families. Yet they are still children, and, in this documentary, are part of a refugee-camp school's participation in the national music and dance competition. This film tells the story of three of the participating children, one of whom reveals on film for the first time the details of being forced to kill – or be killed. For these children, the trip to the national competition in Kampala was thrilling not simply because they had the chance to compete, but because they had the chance, as one put it, "to see what peace looks like."

The evil would be unbearable were there not accompanying stories of true heroism. Heroism defined as individuals who had the choice to walk away, but did not. Individuals who chose to risk their own lives in the attempt to save others. Individuals who would refuse the appellation because for them there was no choice.

Captain Brian Steidle, who continued recording the history, and who has dedicated his life to ending the horror that is Darfur.

The group of expatriate westerners – missionaries, doctors and businessmen – who stayed when others fled, and created the safety zone in Nanking that saved so many.

Those who chronicle and attempt to alter the fate of children in places like northern Uganda.

Which are we today? As a country? As communities? As individuals? Do I stare in the face of evil and become blinded by it? Do I, blinded thus, walk away and see it no more? Or do I look at these acts and resolve that I will never see them again, not because I walk away, but because I will do my part to refuse to allow them to happen?

www.savedarfur.org

www.shineglobal.org

www.global-alliance.net

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 #10

by Nate Alder

"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."

This Standard is one of the most straightforward of the twenty Standards of Professionalism and Civility adopted October 16, 2003. Simply put, the Utah Supreme Court considers it unprofessional and uncivil for counsel to not make good faith efforts to resolve "undisputed relevant matters," especially those that can obviously be proven, and counsel may only contest such matters upon a "sound advocacy basis." Otherwise, the clear expectation is that counsel will work together to resolve the issues that should be resolved, and reserve for a contest only those that are truly worth contesting. It is burdensome on courts, litigants, and counsel when we continue to squabble over such "undisputed relevant matters." And in such instances, the person who resists takes on a burden of showing a "sound advocacy basis."

I remember the discussions we on the Supreme Court Advisory Committee on Professionalism had on this particular Standard, particularly our concern about unfortunate lawyers who did not stipulate to otherwise uncontested matters, either because their clients wanted to fight all four corners of the case and had forbidden counsel from "caving in" on anything, or because counsel had chosen that path for themselves. I was one of two young lawyers on that Committee at the time and could not necessarily identify experiences from my legal career that fell under this heading. Then, within a short time after the adoption of the twenty Standards, and to my surprise and dismay, I had two experiences relevant to this particular Standard. As a lawyer, I understand the burden of proof, but these particular instances went beyond that, becoming *unduly burdensome* to the court, parties, and counsel. I question whether there was a "*sound* advocacy basis" in these instances.

In each instance I was representing an injured plaintiff. The accidents involved clear liability on the part of defendant drivers. However, in each instance the insurers had apparently instructed counsel not to concede liability as discovery progressed, and even as it was nearing an end. As plaintiff's counsel, I was frustrated that I could not simply close those chapters of the case and move on to others. I had been taught by mentors to focus on the heart of the dispute, and to move beyond matters that were not in dispute or that were trivial or that may unnecessarily distract from the center of the case. I had heard from judges in CLE contexts that it was impressive to the court when counsel would concede weak points or indicate that they had chosen to drop certain issues or items in order to focus on the main disputed areas or stronger points. I was a pragmatist, but with these two instances I faced the task of having to put on an unnecessary portion of a case in order to jump through what appeared to be an unreasonably imposed hoop. In each instance I was upset. Greater patience by my clients, as well as expenditure of their money, was required. Perhaps the latter is what prompted this position by my opponent. In each instance my clients became frustrated with the legal process.

In the first case, liability was so clear that I simply asked at the outset about a stipulation to that effect. Defense counsel indicated that the insurer was not interested in conceding any points. I asked again, and again, to no avail. Finally, and in response to their line in the sand, I chose to propound an extensive and detailed set of requests for admissions. I left no room for argument or factual dispute in the requests. I asked the defendant to admit even the simplest of undisputed facts. In response to the requests, and to my surprise, counsel called me and again stated that the insurer had reviewed the requests but was "stubborn" and still would not stipulate to liability. The defendant then filed a formal denial of nearly all of the requests for admission. Upon receiving that stunning document, I prepared our liability case, ultimately

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filing a motion for summary judgment and attaching an affidavit from my liability expert. The trial judge held oral argument, then issued a strongly worded opinion, granting our motion and awarding attorneys fees and the expert's fees, as well as other costs associated with the motion. While gratifying, none of this would have been necessary had the insurer and counsel simply made a good faith effort to resolve by stipulation the undisputed relevant matter.

In the second case, I had understood that the defendant would not contest liability. But in response to a settlement offer near the end of factual discovery, the insurer panicked and for the first time indicated that it would indeed choose to contest liability. There was no previous indication that liability was even contestable; all indications were that liability was clear. The insurer had conducted no liability discovery, and had instead focused its energy on understanding and reducing the plaintiff's damages. Counsel's new theory of liability was far-fetched. Simple calculations of time, speed, and distance necessary to construct such a theory appeared bogus, and counsel admitted to having no scientific basis and no expert witness for such a position. The insurer wanted time to develop this theory but gambled by ignoring the settlement offer. I asked, even begged, for a stipulation as to liability. He asked for a stipulation to extend discovery. The time required to search out experts to support such a theory created delay and afforded plaintiff the opportunity to strengthen her damages case. Additional damage depositions occurred and were helpful to plaintiff. Eventually, the defendant's insurer could not find an expert to sign off on its proposed theory of liability. Damage projections had increased, the previous settlement offer had been withdrawn, and the case settled for several hundred thousand dollars more than the previous offer.

In contrast to these two examples, however, I have experienced an overwhelming number of instances with opposing counsel working well together, moving beyond obvious and undisputed issues, and getting to the heart of disputes. I am one who enjoys the practice of law for this very reason. Dispute resolution brings me great satisfaction. I want good working relationships with opposing counsel and I enjoy focusing our attention on finding the contentious areas or issues that may divide us, but at the same time building upon those foundations where we find agreement.

The Utah Supreme Court has recently, once again, emphasized the importance of professionalism and civility, this time while imposing the ultimate sanction – refusal to reach the merits of an offending attorney's client's case:

> We have sought to encourage the bar to aspire to professionalism and civility in the practice of law through our adoption of the Standards of Professionalism and Civility. While these standards are not binding, we encourage members of the bar to study and follow them. Had counsel in the cases at bar observed these standards, he and his clients would not have incurred the severe sanctions we impose today.

Peters v. Pine Meadow Ranch Home Assoc., 2007 UT 2, ¶22. The Court further stated:

> There is a misconception among some lawyers and clients that advocacy can be enhanced by … overly aggressive conduct, or confrontational tactics. Although it is true that this type of advocacy may occasionally lead to some short-term tactical advantages, our collective experience as a court at various levels of the judicial process has convinced us that it is usually highly counterproductive. It distracts the decision-maker from the merits of the case and erodes the credibility of the advocate. Credibility is often directly tied to civility and professionalism.

Id. at ¶21.

Be wise, be professional. Adopt Standard #10 and the other Standards as your calling card. Inform clients that they, too, should abide by these Standards. *See* Utah Standards of Professionalism and Civility 2 ("Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected."); 20 ("Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.") Resolve by stipulation "undisputed relevant matters" and in doing so focus attention at the heart of the dispute where it will more appropriately be resolved.

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during their regularly scheduled January 26, 2007 Commission meeting held at the Law & Justice Center.

1. Gus Chin reported on the Constitutional Law class for legislators and the breakfast held for lawyer-legislators and legislative leadership.

2. The Commission reviewed the request given to the Supreme Court to waive a bylaw provision for a contested election and provide for a retention election this year because only one nominee has been submitted for office of President-elect. We will petition the Court to provide for a retention election in the future, should this happen again. The Commissioners discussed the need to effectively advertise the election process and to do their best to encourage qualified candidates.

3. The Commission discussed the dates for the Commission election and the need to encourage qualified candidates.

4. The Commission discussed December financials and projections through June 20, 2007.

5. The Commission discussed improvements in Casemaker online legal research to include quarterly updates adding recently enacted legislation.

6. John Baldwin reported that the note from the Law and Justice Center to the bar is now paid in full and that the Law and Justice Center Corporation will be dissolved at the end of the fiscal year. There will no longer be a 501(c)3 entity through which tax deductible charitable contributions can be made. There will be no change in the cash outlay for the building operations.

7. Irene Warr was selected for the Dorathy Merrill Brothers Award for the Advancement of Women in the Legal Profession and Judge Glen K. Iwasaki was selected for the Raymond S. Uno Award for the Advancement of Minorities in the Legal Profession. These awards will be presented at the Spring Convention.

8. The Commission approved the Constitutional Law Section Bylaws.

9. The Commission deferred discussion on the proposed Diversion Rule.

10. The Commission voted to petition the Court to require language of the Bar licensing form which will gather information on: (1) whether or not lawyers have malpractice insurance; (2) how much insurance; (3) name of carrier(s), firm size, how many years of practice, nature of their practice and where they practice. If they have no malpractice insurance, is it because of cost or because they practice in an uninsurable field, or other reasons? This information will be private for Bar statistical purposes only and will not be made public. The Bar wants to encourage lawyers to be insured to protect themselves and their clients.

11. The Commission heard from three representatives from Grant Thornton outlining the Bar governance report.

12. Connie Howard gave a report on the CLE Department. Included were CLE goals of:

    - providing diverse subject matter;
    - providing geographic access;
    - focusing on qualified presenters;
    - considering technological variety;
    - understanding the need for networking;
    - providing CLE hours at a low cost; and
    - whether to continue to have the CLE budget break even.

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

Notice of Legislative Rebate

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

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:

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

Pro Bono Honor Roll

Michael S. Anderson	David Hamilton	Craig McArthur
Nick Angelides	Joseph Hatch	Paul MacArthur
Keith Backman	Bill Heder	Kenneth Margetts
James Baker	Rori Hendrix	Suzanne Marelius
Lauren Barros	Kyle Hoskins	Sally McMinimee
Emilie Bean	Jeffrey Howe	Christina Micken
David Berceau	Nicholas Huntsman	Russell Minas
David Blaisdell	Daniel Irvin	Walter Merrill
James M. Brady	Troy Jensen	Stewart Ralphs
David Broadbent	Nathan Jeppsen	Michael Shaw
Brian Cannell	Asa Kelley	Jeremy Sink
Shelly Coudreaut	Thomas King	Jane Semmel
Roberto Culas	H. Ralph Klemm	Carrie Turner
Kenyon Dove	Louise Knauer	James Mitch Vilos
Christopher Edwards	Stephen Knowlton	Frank Warner
Sam Gardiner	Sharee Laidlaw	Tracey Watson
Chad Gladstone	Larry Larsen	Carolyn Zeuthen
Frederick Green	Chris Laurence	Michael Zundel
Brent Hall	Jose Loayza	

Utah Legal Services and the Utah State Bar wish to thank these attorneys for their donation of time and skills during the months of October, November, December and January. Call Brenda Teig at (801) 924-3376 to volunteer.

Distinguished Paralegal of the Year Nominations Now Being Accepted

The Paralegal Division of the Utah State Bar and Legal Assistants Association of Utah are seeking nominations for "Distinguished Paralegal of the Year." Nomination forms and additional information are available online at http://www.utahbar.org/sections/paralegals or you may contact Suzanne Potts at spotts@clarksondraper.com The deadline for nominations is Monday, April 16, 2007. The award will be presented at the Paralegal's Day Luncheon on Thursday, May 17, 2007.

Notice of Utah Bar Foundation Open Board of Director Positions and Notice of Annual Meeting

The Utah Bar Foundation is a non profit organization that acts as the collection point for IOLTA (Interest on Lawyers Trust Accounts) funds and distributes those funds for law related education and legal services for the poor and disabled.

The Utah Bar Foundation is governed by a seven-member Board of Directors, all of whom are active members of the Utah State Bar. The Utah Bar Foundation is a separate organization from the Utah State Bar.

In accordance with the by-laws, any active licensed attorney, in good standing with the Utah State Bar may be nominated to serve a three-year term on the board of the Foundation. If you are interested in nominating yourself or someone else, you must fill out a nomination form and obtain the signature of twenty-five licensed attorneys in good standing with the Utah State Bar. To obtain a nomination form, call the Foundation office at (801) 297-7046. If there are more nominations made than openings available, a ballot will be mailed to each member of the Utah State Bar for a vote.

Nomination forms must be received in the Foundation office no later than Friday, May 18, 2007 to be placed on the ballot.

The Utah Bar Foundation will be holding the annual meeting of the Foundation on Thursday, July 18, 2006 at 9:00am at the Sun Valley Resort in Sun Valley, Idaho. This meeting is held in conjunction with the Utah State Bar's Annual Meeting.

"and Justice for all"

Law Day 5K Run & Walk

May 5, 2007 • 8:00 a.m.
S. J. Quinney College of Law at the University of Utah

"Liberty Under Law - Generations Moving Forward"

REGISTRATION INFO: Mail or hand deliver completed registration to address listed on form (registration forms are also available online at www.andjusticeforall.org). **Registration Fee:** before April 25 -- $22 ($10 for Baby Stroller Division), after April 25 -- $25 ($12 for the Baby Stroller Division). Day of race registration from 7:00 a.m. to 7:45 a.m. Questions? Call 924-3182.

HELP PROVIDE LEGAL AID TO THE DISADVANTAGED: All event proceeds benefit "and Justice for all", a collaboration of Utah's primary providers of free civil legal aid programs for individuals and families struggling with poverty, discrimination, disability and violence in the home.

DATE: Saturday, May 5, 2007 at 8:00 a.m. Check-in and day-of race registration in front of the Law School from 7:00 - 7:45 a.m.

LOCATION: Race begins and ends in front of the S. J. Quinney College of Law at the University of Utah just north of South Campus Drive (400 South) on University Street (about 1350 East).

PARKING: Parking available in the lot next to the Law Library at the University of Utah Law School (about 1400 East), accessible on the north side of South Campus Drive, just east of University Street (a little west of the stadium). Or take TRAX!

USATF CERTIFIED COURSE: The course is a scenic route through the University of Utah campus. A copy of the course map is available on the website at www.andjusticeforall.org.

CHIP TIMING: Timing will be provided by Milliseconds electronic race monitoring. Each runner will be given an electronic chip to measure their exact start and finish time. Results will be posted on www.andjusticeforall.org immediately following race.

RACE AWARDS: Prizes will be awarded to the top male and female winners of the race, the top three winning speed teams, and the top three winning baby stroller participants. Medals will be awarded to the top three winners in every division, and the runner with the winning time in each division will receive two tickets to the **Utah Arts Festival**.

RECRUITER COMPETITION: It's simple: the organization or individual who recruits the most participants for the Run will be awarded trophy possession and air transportation for two on **Southwest Airlines** to any location they fly to within the U.S. To become the 2007 "Team Recruiter Champion," recruit the most registrants under your organization's name. Be sure the Recruiting Organization is filled in on the registration form to get competition credit.

SPEED TEAM COMPETITION: Compete as a **Speed Team** by signing up five runners (with a minimum of two female racers) to compete together. All five finishing times will be totaled and a special trophy will be passed on to the team with the fastest average time. There is no limit to how many teams an organization can have, but a runner can participate on only one team. To register as a team, have all five runners fill in the same Speed Team name on the registration form.

BABY STROLLER DIVISION: To register you and your baby as a team, choose the **Baby Stroller Division**. IMPORTANT: Baby Stroller entrants register **only** in the baby stroller division. Registration for the stroller pusher is the general race registration amount ($22 pre-registration, $25 day of). Simply add on $10 for each baby you want to get a t-shirt for ($12 day of). Don't forget to fill in a t-shirt size for both adult and baby.

WHEELCHAIR DIVISION: Wheelchair participants register and compete in the **Wheel Chair Division**. Registration is the general race registration amount ($22 pre-registration, $25 day of). An award will be given to the top finisher.

"IN ABSENTIA" RUNNER DIVISION: If you can't attend the day of the race, you can still register in the **"In Absentia" Division** and your t-shirt and racer goodie bag will be sent to you after the race.

CHAISE LOUNGE DIVISION: Register in the **Chaise Lounge Division**. Bring your favorite lounge chair, don your t-shirt, and enjoy your racer bag of goodies while cheering on the runners and walkers as they cross the finish line!

REGISTRATION —"and Justice for all" Law Day 5K Run & Walk
May 5, 2007 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

To register by mail, please send this completed form and registration fee to Law Day Run & Walk, c/o Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111. If you are making a charitable contribution, you will receive a donation receipt directly from **"and Justice for all".**

First Name: _____ Last Name: _____

Address: _____

City, State, Zip: _____

Phone: _____ E-mail Address: _____

Birth Date: _____

Recruiting Organization:

_____

(must be filled in for team recruiters' competition credit)

Speed Competition Team: (must be received by April 25, 2007)

_____

(team name)

Shirt Size (please check one)

❒ Child XS ❒ Child S ❒ Child M ❒ Child L

❒ Adult S ❒ Adult M ❒ Adult L ❒ Adult XL ❒ Adult XXL

❒ Long-sleeved T-Shirt (*add $6*) ❒ Tank Top (*add $6*)

Baby Shirt Size (*baby stroller participants only*)

❒ 12m ❒ 18m ❒ 24m ❒ Child XS

Division Selection (circle only one division per registrant)

DIVISION	MALE	FEMALE	DIVISION	MALE	FEMALE	DIVISION	MALE	FEMALE
14 & Under	A	B	45-49	O	P	Wheelchair	CC	DD
15-17	C	D	50-54	Q	R	Baby Stroller	EE	FF
18-24	E	F	55-59	S	T	Chaise Lounge	GG	
25-29	G	H	60-64	U	V	In Absentia	HH	
30-34	I	J	65-69	W	X			
35-39	K	L	70-74	Y	Z			
40-44	M	N	75 & Over	AA	BB			

Payment

Pre-registration (*before 4/25/07*)	$22.00
Baby Stroller (*add to regular registration fee*)	$10.00
Long sleeved t-shirt	$ 6.00
Tank top	$ 6.00
Charitable Donation to "and Justice for all"	$_____
TOTAL PAYMENT	$_____

Payment Method

❒ Check payable to "Law Day Run & Walk"

❒ Visa ❒ Mastercard

Name on Card _____

Address_____

No._____ exp. _____

RACE WAIVER AND RELEASE: I waive and release from all liability the sponsors and organizers of the Run and all volunteers and support people associated with the Run for any injury, accident, illness, or mishap that may result from participation in the Run. I attest that I am sufficiently trained for my level of participation. I also give my permission for the free use of my name and pictures in broadcasts, video, web, newspapers, and event publications. I consent to the charging of my credit card submitted with this entry for the charges selected. I understand that entry fees are non refundable. **I agree to return the timing transponder and its attachment device to an appropriate race offical after the race. . If I fail to do so, I agree to pay $75.00 to replace the timing transponder and attachment device. .**

Signature (or Guardian Signature for minor) Date If Guardian Signature, Print Guardian Name

_____ _____

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Utah State Bar Request for 2007-08 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more of 18 different committees which participate in regulating admissions and discipline and in fostering competency, public service and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name_____ Bar No._____

Office Address_____ Telephone_____

Committee Request
1st Choice_____ 2nd Choice_____

Please describe your interests and list additional qualifications or past committee work.

_____
_____
_____
_____
_____
_____

Instructions to Applicants: Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday.

COMMITTEES

1. **Admissions.** Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.
2. **Annual Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
3. **Bar Examiner.** Drafts, reviews and grades questions and model answers for the Bar Examination.
4. **Bar Exam Administration.** Assists in the administration of the Bar Examination. Duties include overseeing computerized exam-taking security issues, and the subcommittee that handles requests from applicants seeking special accommodations on the Bar Examination.
5. **Bar Journal.** Annually publishes editions of the *Utah Bar Journal* to provide comprehensive coverage of the profession, the Bar, articles of legal importance and announcements of general interest.
6. **Character & Fitness.** Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.
7. **Client Security Fund.** Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.
8. **Courts and Judges.** Coordinates the formal relationship between the judiciary and the Bar including review of the organization of the court system and recent court reorganization developments.
9. **Fee Arbitration.** Holds arbitration hearings to resolve voluntary disputes between members of the Bar and clients regarding fees.
10. **Ethics Advisory Opinion.** Prepares formal written opinions concerning the ethical issues that face Utah lawyers.
11. **Governmental Relations.** Monitors proposed legislation which falls within the Bar's legislative policy and makes recommendations to Bar Commission for appropriate action
12. **Law Related Education and Law Day.** Organizes and promotes events for the annual Law Day Celebration
13. **Law & Technology.** Creates a network for the exchange of information and acts as a resource for new and emerging technologies and the implementation of these technologies.
14. **Lawyer Benefits.** Reviews requests for sponsorship and involvement in various group benefit programs, including health, malpractice, insurance and other group activities.
15. **Spring Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
16. **Law and Aging.** Assists in formulating positions on issues involving the elderly and recommending appropriate legislative action.
17. **New Lawyers CLE.** Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality and conformance with mandatory New Lawyer CLE requirements.
18. **Unauthorized Practice of Law.** Reviews and investigates complaints made regarding unauthorized practice of law and recommends appropriate action, including civil proceedings.

Detach & Mail by June 30, 2007 to: Lowry Snow, President-Elect, 645 South 200 East, Salt Lake City, UT 84111-3834

Utah State Bar Ethics Advisory Opinion Committee

Opinion No. 06-05

Issued December 30, 2006

Issue: Do the Utah Rules of Professional Conduct[1] preclude a lawyer from participating in an *ad hoc* legal advisory group to a private, nonprofit, public interest legal organization, if the persons served by the legal services organization have interests adverse to the interests of a client of the lawyer or the lawyer's law firm?

Conclusion: Generally, no. Rule 6.3, with respect to legal services organizations, and Rule 6.4, with respect to organizations involved in the reform of law or its administration, provide that service as an officer or director of such organizations or membership in such organizations does not by itself create an attorney-client relationship with the organization or the organization's clients. These rules do require that a lawyer be observant of the lawyer's duties under Rule 1.7 to the lawyer's clients and to the clients of the lawyer's firm. Rule 6.3 requires that the lawyer not knowingly participate in a decision of the organization that are incompatible with the lawyer's obligations under Rule 1.7 or that could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer or on the representation of a client of the lawyer or the lawyer's firm. Rule 6.4 requires that when the lawyer knows a client of the lawyer may be materially benefited by a decision of the law reform organization, that the lawyer-member disclose this fact to the organization. Under some circumstances, a lawyer's participation on an *ad hoc* litigation advisory group may create an attorney-client relationship with the organization or the organization's clients requiring the lawyer to comply with Rules 1.6, 1.7 and 1.9 before representing or continuing to represent clients adverse to the interests of the organization or the organization's clients in such matters.

Background: The legal services entity requesting this opinion defines itself as a private, nonprofit, public interest organization. The organization's mission is to enforce and strengthen laws that protect the opportunities, choices and legal rights of certain disadvantaged people in Utah. The organization provides free legal services to such individuals.

In an effort to improve services and provide the best legal representation possible, the organization's board of trustees proposes to establish an *ad hoc* litigation advisory group consisting of experienced and knowledgeable private attorneys. This advisory group of *pro bono* attorneys would be called upon from time to time to answer questions and provide advice on various issues that arise as the organization represents various clients. The organization anticipates most questions would be procedural in nature or would involve general litigation strategy issues.

In the process of establishing the litigation advisory group, questions have arisen about possible conflicts between the interests of clients of advisory group members or their law firms and the organization and/or the organization's clients. Specifically, the organization has asked whether Rules 6.3 or 6.4 of the Utah Rules of Professional Conduct apply to members of a litigation advisory group, and if so, under what circumstances the lawyer-members who represent clients or whose law firms represent clients with interests adverse to the organization's clients could nonetheless serve on the advisory group.

Analysis: The most relevant rules at issue are Rule 6.3 and Rule 6.4. Rule 6.3 provides:

> A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:
>
> (a) If participation in the decision would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
>
> (b) Where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer or on the representation of a client of the lawyer or the lawyer's firm.

Rule 6.4 provides:

> A lawyer may serve as a director, officer or member of an

Notice of Petition for Reinstatement to the Utah State Bar by E. Kent Winward

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 E. Kent Winward in *In re Winward,* Second District Court, Civil No. 050903833. 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.

> organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

The term "legal services organization" in Rule 6.3 is undefined. Rule 7.5(a) is the only other rule to use the phrase "legal services organization," and the word "charitable" is added in that rule as a preceding adjective. From this choice of language, we conclude that a "legal services organization" may include entities other than *pro bono* organizations, but it certainly includes the organization requesting this opinion and similar organizations that provide legal services for indigents.[2]

The phrase "organization involved in reform of the law or its administration" in Rule 6.4, like the phrase "legal services organization" in Rule 6.3, is not defined. Yet, the ABA annotations to both rules make it clear that the entities the rules cover include those that participate in activities for improving the law, the legal system or the legal profession. "What Rule 6.3 does for lawyers serving on boards of legal services organizations, Rule 6.4 does for lawyers serving on the board of 'law reform organizations'."[3]

Both Rules 6.3 and 6.4 use the phrase "director, officer or member" to describe those participating lawyers expressly covered under the rule. The official comments to these rules are similarly focused on "lawyers serving on boards." Because the terms "director, officer or member" and "board" are not defined, the question arises whether a member of a litigation advisory group, such as that described by the legal services organization requesting this opinion, falls within the ambit of the rules' protection for directors, officers or members. From the ABA annotation and commentary on each rule, we conclude that, consistent with the intent of both rules, litigation advisory group members have the same status as a "director, officer or member."

For example, comment [1] of Rule 6.3 states that, "Lawyers should be encouraged to support and participate in legal service organizations."[4] The ABA annotations to the Rules further stress that the Rules should be construed "to promote this kind of service."[5] Encouragement of lawyer participation would be undermined if the protections afforded lawyers serving on boards or afforded to officers and members were not likewise inclusive of members of advisory groups, including litigation advisory groups.

Rule 6.3 contemplates that the legal services organizations to which it pertains serve persons whose interests may be adverse to the interests of clients served by the lawyer-member or the lawyer-member's law firm. The rule and its comments make clear that the lawyer's membership in the organization or service as an officer or director of the organization does not itself create an attorney-client relationship between the lawyer and the organization or between the lawyer and those persons served by the organization. To encourage lawyer participation in legal services organizations, the rule limits the circumstances under which such participation will disqualify a lawyer or the lawyer's firm from representation of clients with interests adverse to the interests of the organization or adverse to the interests of the persons served by the organization.[6]

Rule 6.3 provides, however, that a lawyer may not knowingly participate in a decision or action of the organization (a) if such participation "would be incompatible with the lawyer's obligations to a client under Rule 1.7," or (b) if the decision

would have a material adverse affect (i) "on the representation of a client of the organization whose interests are adverse to a client of the lawyer" or (ii) the representation of a client of the lawyer.[7] Rule 6.3 teaches that a lawyer-member of a legal services organization may avoid the potential conflicts of interest that may arise from these circumstances by not participating in such decisions or actions.

The words "participate in an action or decision" as used in Rule 6.3 are also undefined, but, in context, we conclude that they mean the lawyer cannot knowingly discuss, recommend, advocate or vote upon any matter that conflicts with the lawyer's duty of loyalty under Rule 1.7 or duty of confidentiality under Rule 1.6 to the clients of the lawyer and the lawyer's firm. Rule 6.3(a) uses the words "would be incompatible." Rule 6.3(b) uses the words "could have a material adverse effect." The rule thus applies to potential conflicts of interest as well as actual conflicts. Therefore, when the lawyer knows that an actual or potential conflict exists between the interests of the organization or the organization's clients and the interests of the clients of the lawyer or the lawyer's firm, the litigation advisory group member should recuse himself from any discussion of the matter.[8]

Legal services organizations and the person served by legal services organizations frequently engage legal counsel. Such legal counsel may also be members, officers or directors of the organization. Rule 6.3 does not preclude the formation of an attorney-client relationship between such a lawyer and the organization or between such a lawyer and the organization's clients. In these circumstances, the lawyer may not represent the organization's interests or the interests of the person served by the organization adverse to the interests of the clients of the lawyer or the lawyer's firm without complying with Rules 1.6, 1.7 and 1.9.

A lawyer in the capacity of a member of a litigation advisory group to a legal services organization consulted by the organization regarding legal advice and strategy in specific legal matters may be reasonably perceived by the organization as being its lawyer with respect to the matter. Rule 6.3's protections against disqualification of the lawyer and the lawyer's firm from representing clients with interests adverse to the organization's interests in such matters or adverse to the interests of the persons served by the organization in such matters would no longer be applicable. The lawyer will, in such circumstances, establish an attorney-client relationship with the organization or the organizations clients.[9]

Participation by the lawyer in the litigation advisory group that is in the nature of recommending general policies or procedures for the conduct or administration of litigation by the organization or recommending general strategy for the organization's use of

litigation to accomplish the goals of the organization or its clients would not reasonably appear to create an attorney-client relationship between the organization and the lawyer or between the organization's clients and the lawyer. To the extent that the litigation advisory group is intended to (a) review the facts and pleadings in specific legal matters and to advise the organization or its clients regarding the legal rights of those clients in such specific matters, and (b) recommend legal strategy to advance those rights in such specific legal matters, the lawyer's participation will likely exceed the participation of a director, officer or member intended for protection by Rule 6.3. Members of a litigation advisory group providing such services may create an attorney-client relationship with the organization or its clients that would require that the lawyer comply with Rules 1.6, 1.7 and 1.9 before the lawyer or the lawyer's firm could represent clients with interests adverse to the interests of the organization or the interests of the organization's clients in such matters.[10]

Comment [2] to Rule 6.3 cautions legal services organizations that in appropriate cases it may be necessary that the organization's clients be assured that their representation will not be adversely affected by conflicting loyalties of a member, officer or director of the organization.[11] The comment encourages legal services organizations to adopt written policies to enhance the credibility of such assurances.

The comments to Rule 6.3 do not suggest specific appropriate client assurances or policies the organization could implement. The ABA commentary on Rule 6.3 of the Model Rules of Professional Conduct provides:

> When a lawyer who serves on an organization's board is representing a client, and finds that a particular organizational action or decision would be incompatible with the lawyer's obligations to the client under Rule 1.7 [Conflict of Interest: Current Clients] the lawyer simply is not allowed to participate in that action or decision.[12]

It would be appropriate for the legal services organization to adopt written policies requiring the organization's advisory group members to identify those decisions or actions coming before the group that would or could conflict with the lawyer's duties to an existing client. In such circumstances, it would be appropriate for the organization's written policies to require that the lawyer disqualify himself from participation in the appropriate organization action or decision.

From the facts submitted to us, the legal services organization may also constitute "an organization involved in the reform of the law or its administration" under Rule 6.4. Unlike Rule 6.3, which contemplates the organization will have clients served by the organization, Rule 6.4 does not contemplate that the organization

serves clients. Rule 6.4 does not address the concern that the interests of the persons served by the organization may conflict with the interests of a client of the lawyer. Rather, Rule 6.4 addresses the concern that the interests of the lawyer's clients may be affected by the law reform activities of the organization.

As under Rule 6.3, Rule 6.4 and its comment make clear that the lawyer's participation in the law reform organization as a director, officer or member does not by itself create an attorney-client relationship with the organization.[13] Therefore, even though the law reform activities may adversely impact a client, the lawyer's participation will not normally violate Rule 1.7. However, the Comment [1] to Rule 6.4 makes clear that under certain circumstances the lawyer's participation in the law reform organization may violate Rule 1.7: "In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other rules, particularly Rule 1.7."

Under Rule 1.7(a)(2), a lawyer may have a conflict of interest arising from participation in a law reform organization where the lawyer does not represent the organization, if the lawyer's duties to the organization as a "third party" or the lawyer's "personal interest" creates a significant risk that the lawyer's representation of his or her clients may be materially limited. Rule 6.4 also requires a lawyer participating in a law reform organization to disclose to the organization if the lawyer knows that the interests of a client of the lawyer may be materially benefited by a decision of the organization in which the lawyer participates. Such disclosures are required to protect the integrity of the law reform program.[14]

Service on a litigation advisory group to a law reform organization may also involve specific legal advice to the organization about specific litigation, for example, legal advice in a lawsuit challenging the constitutionality of a statute. Such participation in a law reform organization may result in an attorney-client relationship between the lawyer and the organization. Under such circumstances, the lawyer could not represent clients with interests adverse to the organization's interests in such matters without complying with Rules 1.6, 1.7 and 1.9.

1. Unless otherwise indicated, all references to the "Rules" in this opinion are to the Utah Rules of Professional Conduct, effective November 1, 2006.
2. *See* ABA, ANN. R. PROF. CONDUCT 520 (5th ed.) (2003).
3. *Id*. at 523.
4. Rule 6.3, cmt. [1].
5. ABA, ANN. R. PROF. CONDUCT 520.
6. Comment [1] to Rule 6.3 states: "A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed."
7. Under Rule 1.10, a lawyer should not participate in a decision that could have a material adverse effect on the representation of a client by the lawyer's firm.
8. In such instances the lawyer's obligation to recuse himself is a personal conflict of interest.
9. The lawyer's participation on the litigation advisory group may also under limited circumstances create an attorney-client relationship with the persons served by the organization. If a litigation advisory group member met with the organization's clients and offered legal advice or recommended legal strategies with respect to a specific legal matter, the lawyer may reasonably be perceived by the organization's clients as their lawyer with respect to the matter. Normally, however, direct contact between the litigation advisory group member and the organization's client would be required to form an attorney-client relationship.
10. We assume for purposes of this Opinion that the members of the litigation advisory group are not subject to the protections of Rule 6.5 of the Utah Rules of Professional Conduct, which applies to short-term limited legal services provided under the auspices of programs sponsored by a nonprofit organization or a court.
11. "It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the Board. Established, written policies in this respect can enhance the credibility of such assurances." Rule 6.3, cmt. [2].
12. ABA, ANN. R. PROF. CONDUCT 520.
13. The comment to Rule 6.4 provides:

    Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

14. It is noteworthy that Rule 6.3 requires the lawyer to be recused and not participate in certain decisions and actions of the legal services organization. Rule 6.4 permits a lawyer to participate in a decision of the law reform organization that benefits the lawyer's client, if the lawyer discloses this fact.

2007 "Spring Convention in St. George" Award Winners

IRENE WARR
Dorathy Merrill Brothers Award
For the Advancement of Women in the Legal Profession

Irene Warr, a native of Erda, Tooele County, Utah, began her law-related career as a legal secretary for the Utah State Tax Commission Inheritance Tax Division on March 1, 1949, after graduating from Tooele High School. She enrolled in Westminster College in 1950, when she also began working in the law office of the late Dan B. Shields. She graduated with a Bachelor of Arts Degree in 1954, cum laude in biology, chemistry and pre-med., and then entered the University of Utah College of Law, receiving her Juris Doctor in 1957. Since 1957 she has been engaged in private practice in Salt Lake City.

She has served the Utah State Bar in several capacities, including terms on the Fee Arbitration Committee and Discipline Committee. She has maintained membership in the Utah State Bar, Salt Lake County Bar, and the American Bar Association, belonging to several sections. For more than forty-eight years Irene has been a member of the National Transportation Law, Logistics and Policy Association, where she has served as Regional Vice President.

Irene has served as a Trustee and President of the Legal Aid Society and as a Trustee and President of the Sarah Daft Home and has been a board member on numerous other community charities and civic organizations. She is a member of the Murray Rotary Club and a Paul Harris Fellow.

Upon initiation of that program by the College, in 1998 she received the first Distinguished Alumni Award presented by Westminster College of Salt Lake City. She was recognized among the first 100 women admitted to practice law in the State (she was the 38th admittee). She holds the oldest active license among Utah's women lawyers. In July of 1999, the Utah State Bar designated Irene the "Distinguished Lawyer of the Year" for the State of Utah.

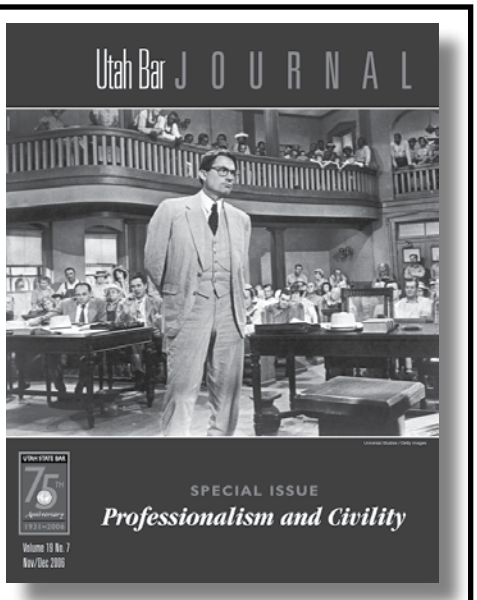
JUDGE GLENN K. IWASAKI
Raymond S. Uno Award
For the Advancement of Minorities in the Legal Profession

Judge Glenn K. Iwasaki was appointed to the Third District Court in July 1992 by Gov. Norman H. Bangerter. He serves Salt Lake, Summit, and Tooele counties. Judge Iwasaki graduated in 1971 from the University of Utah College of Law and served as a Deputy Salt Lake County Attorney. He was also trial attorney for the Salt Lake Legal Defenders Association and was a partner in the law firm of Collard, Pixton, Iwasaki & Downes. Judge Iwasaki has been an Adjunct Professor of Law at the University of Utah and has served on the Board of Trustees, University of Utah College of Law Alumni Association and chair of the Youth Parole Authority. During his tenure as deputy Salt Lake County Attorney, he served as Unit Chief for the Special Victims Prosecution Unit. Judge Iwasaki has served as a member of the Utah Supreme Court Advisory Committee on the Rules of Criminal Procedure, the Utah Task Force on Racial and Ethnic Fairness in the Judicial System, and the Committee on Improving Jury Service. He presently serves on the KUED Board and is a Fellow of the American Bar Foundation.

2006 Utah Bar Journal *Cover of the Year*

The 2006 *Utah Bar Journal* cover of the year comes from the special Professionalism and Civility issue that was published in Nov/Dec of last year. The cover featured an image of Gregory Peck as Atticus Finch in a scene from the film *To Kill a Mockingbird,* based on the landmark novel by Harper Lee. An emblem of legal professionalism and courage, Atticus Finch was an apt image to represent the message of this special *Bar Journal* issue.

Covers of the year are framed and displayed on the upper level of the Law and Justice Center. The editorial board of the *Utah Bar Journal* welcomes your feedback about the covers and invites you to submit your own photos for consideration on a future cover. Since 1989 the covers have included photographs submitted by 68 different attorneys, including 4 first-time contributors in 2006. Thank you to all of the attorneys who provided photographs for the cover.



Discipline Corner

ADMONITION

On January 18, 2007, 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 1.5(b) (Fees), 1.15(c) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In a divorce proceeding, the attorney failed to communicate the basis and rate of the attorney's fee within a reasonable time and failed to account for the retainer in the attorney's trust account after a dispute arose regarding attorney's fees.

PROBATION

On January 16, 2007, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Non-Public Probation against an attorney for violation of Rules 1.1 (Competence), 1.3 (Diligence), 3.2 (Expediting Litigation), 3.4(c) (Fairness to Opposing Party and Counsel), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In two cases, the attorney failed to competently and diligently represent the client by failing to respond to numerous motions, failing to follow court's orders, and expending the court's time and resources in addressing the delays caused by the attorney.

ADMONITION

On January 2, 2007, 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 5.5(a) (Unauthorized Practice of Law), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney agreed to take a case in another state in which the attorney was not licensed to practice. The attorney needed to associate with counsel to enable the attorney to appear on behalf of the client but failed to obtain local counsel. The attorney handled the case for over six months which included appearing in court. The attorney improperly attempted to condition settlement with the client on the client's withdrawal of the Bar complaint.

ADMONITION

On January 2, 2007, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rule 1.4(b) (Communication), 1.5(a) (Fees), 1.15(d) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

At the initial meeting, the attorney collected a retainer, and thereafter performed no meaningful work. The attorney failed to explain to the client the nonrefundable aspect of the retainer agreement. The attorney failed to communicate with the client. The attorney failed to provide the client with an accounting of the work done even though it was in dispute. The attorney failed to properly terminate the representation by failing to refund unearned fees. The attorney also failed to provide responsive information to the OPC that would have supported or clarified the record.

ADMONITION

On December 18, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.15(b) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In a divorce and custody action, the attorney failed to diligently pursue the divorce as directed by the client. Upon withdrawal, the attorney failed to refund unearned fees and failed to give advance notice to the client or make an effort to protect the client's interests.

PUBLIC REPRIMAND

On December 4, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against David L. Cooley for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Cooley represented a client in a medical malpractice action even though he admitted that he had no experience in that area of law. Mr. Cooley's lack of competence affected the unsuccessful pursuit of the action and appeal. For the same client in a wrongful termination action, Mr. Cooley failed to respond to a motion to dismiss. Mr. Cooley failed to communicate to his client concerning the motion to dismiss and his decision to not respond to it. Mr. Cooley also took no action to withdraw from the case.

ADMONITION
On November 13, 2006, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Admonition against an attorney for violation of Rules 1.7(b) (Conflict of Interest: General Rule), 3.7(a) (Lawyer as a Witness), 4.2(a) (Communication with Persons Represented by Counsel), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In one matter, the attorney contacted a represented person without seeking permission from the person's counsel.

In another matter, the attorney filed suit on behalf of one company, against a company in which the attorney held a financial interest as a shareholder. In a related case, the shareholders of the company, represented by the attorney, filed suit against several individual company employees. The cases were consolidated and the court ordered the attorney to withdraw as counsel from both companies. The attorney now appears pro se, solely as a shareholder.

What Is Paralegal Work? – The Utah Supreme Court Offers a Three-Pronged Test

by Peggi Lowden

The Utah Supreme Court's definition of a paralegal does not simply define a category of personnel within the legal profession. It is a useful tool to determine effective delegation of legal tasks to non lawyer personnel. The specific section of the definition that provides this delegation tool states, "[paralegal work] involves the performance . . . of specifically delegated substantive legal work, which work for the most part, requires a sufficient knowledge of legal concepts, that absent the [paralegal] the attorney would perform the task."[1]

The definition identifies the key elements in the delegation of legal work to paralegals as substantive legal work, competency, and performance. If the delegation tests are met, then the task may be paralegal work, as opposed to secretarial or other non lawyer work.[2]

The delegation tests consist of the following:

Substantive Test. The work to be delegated is considered substantive (including procedural) in nature.

Competency Test. Paralegals are expected to possess education, training and experience in substantive legal concepts and procedure enabling them to effectively assist lawyers. During the recent expansion of the paralegal profession, paralegals sought formal legal education through paralegal programs at colleges. Some programs were taken in addition to undergraduate and graduate degrees. Upon meeting certain requirements of formal education, legal education and experience, many passed voluntary general competency and specialty exams. The education and competency examinations that are available to paralegals are continuously refined and expanded to meet the growing needs of lawyers and the legal profession.

Absence Test (Performance). This test meets the requirement that "absent the [paralegal] the attorney would perform the task." Or, if the nature of the task does not require the lawyer to perform it absent the paralegal, then the task may be considered to be secretarial.

The above delegation tests are applicable to any simple or complex task in the practice of law. A simple application of the delegation tests might look like the following:

Is summarizing discovery responses and documents properly delegated to a paralegal to perform?

Is the Substantive Test met? Yes. Analysis and application of the facts to the issues of the case are required to accomplish this task.

Is the Competency Test met? Yes. A sufficient knowledge of legal concepts is required in order to apply the information in the discovery to the case facts and legal issues to identify what is important in a summary for attorneys. Further, sufficient knowledge of legal concepts and procedure is necessary for more investigation, if required.

Is the Absence Test met? Yes. If the paralegal is not tasked with summarizing the discovery responses and documents, then the attorney is required to perform the task. Either the paralegal or attorney is required to perform this task because of the legal knowledge that is necessary to apply the facts to the specifics of the case.

Application of the delegation tests to a more complex task, such as

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deposition setting, may consist of a series of questions. For example:

What are the cut-off dates for deposing fact and expert witnesses? Application of the delegation tests may reveal that this is paralegal work where changes to the discovery order are indicated, but not paralegal work where no changes are required.

How many depositions are allowed under the Case Management Order? Again, application of the delegation tests may indicate this is paralegal work where changes in the number of depositions are necessary, but not paralegal work in the event that no changes are necessary.

Is the witness required to bring documents or items to the deposition? If yes, what documents or items are required? This may pass the delegation tests if the deponent is required to bring anything to the deposition. Where items are required, delegation to the paralegal to describe the items for the subpoena (duces tecum) may be proper.[3]

Lawyers, paralegals, administrators, and clerical staff may find it useful to use the delegation tests for thoughtful and efficient determinations when distributing work to paralegals and other staff. The above delegation tests are applicable to any general or specialty law practice.

I would like to receive feedback about any application of these tests to your practice, favorable or not favorable. Please send your feedback to me at plowden@strongandhanni.com. Thank you.

1. Utah Supreme Court Order – Effective April 1, 1996. Please refer to the Division's web site for a copy of the Order: www.utahbar.org/sections/paralegals/.
2. The majority of paralegals in modern law practice markets do not possess secretarial skills and training.
3. The above examples are not comprehensive, but are offered to illustrate how the delegation tests may be used as a tool for decision-making with respect to work distribution.

Join the Paralegal Division's Team for the

LAW DAY RUN
SATURDAY, MAY 5th, 2007

Runners, walkers and cheering section are welcome.
Contact Dominique Meier at (801)433-5350 or at dsm@pruittgushee.com if you are interested.

Your Attendance is Requested

Paralegal's Day CLE Luncheon

Honoring Utah Paralegals

Hosted by: Paralegal Division – Utah State Bar
&
The Legal Assistants Association of Utah

Thursday, May 17, 2007 • 12:00 Noon to 1:30 p.m.
Joseph Smith Memorial Building – Sharon/Manchester Room
50 East South Temple, Salt Lake City, Utah

Keynote Speaker: Magistrate Judge Paul M. Warner, Former U.S. Attorney for the District of Utah
"Ethical Problems I See in My Courtroom and How to Avoid Them"

1.0 hour of Ethics credit
Register on-line at sections@utahbar.org or by phone at 801-297-7032 by May 11, 2007.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
03/15/07	**NLCLE: Appellate Practice.** Diana Hagan, U.S. Attorney's Office. Yearly practice updates in real property, collections, domestic, business, corporate counsel, and criminal law. Watch for details. 4:30 – 7:45 pm. $55 YLD; $75 others. At door registration: $65 YLD, $85 others.	3 hrs CLE/NLCLE
04/18/07	**Annual Banking and Finance.**	TBA
04/19/07	**NLCLE: Business Law.** 4:30 – 7:45 pm. Pre-registration: $60 YLD members, $80 others. At door registration: $75 YLD, $95 others.	3 hrs CLE/NLCLE
04/25/07	**Annual Collection Law Section**	TBA
04/26/07	**A Short Legal Writing Course.** "Who don't write good – who don't do other things good." Robert Sykes and John Faye. 4:30 – 7:30 pm. $60 YLD members, $80 others. At door registration: $70 YLD, $90 others.	3 hrs CLE?NLCLE
04/27/07	**Legislative Update and Golf.** St. George, Utah, the Ledges.	3
05/03/07	**Annual Corporate Counsel**	TBA
05/10/07	**Annual Business Law**	TBA
05/11/07	**Annual Family Law**	TBA
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. Salt Palace Convention Center. 9:00 am – 5:00 pm daily. Reserved for Litigation Section Members $1,200; Non-Section $1,250; Non-Utah State Bar members $2,000 (space permitting) Limited to 48 registrants.	Approx. 24 hrs Includes 6 NLCLE
05/17/07	**Annual Real Property**	TBA
05/17/07	**NLCLE: Criminal Law.** 4:30 – 7:45 pm. Pre-registration: $60 YLD members, $80 others. At door registration: $75 YLD, $95 others.	3 hrs CLE/NLCLE
06/08/07	**New Lawyer Required Ethics Program.** 8:30 am – 12:30 pm. $55.	Fulfills New Lawyer Ethics Requirements
06/21/07	**NLCLE: Immigration.** 4:30 – 7:45 pm. Pre-registration: $60 YLD members, $80 others. At door registration: $75 YLD, $95 others.	3 hrs CLE/NLCLE

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

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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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