Volume 20 No. 3
May/June 2007

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Utah Bar JOURNAL

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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: Scene near Spirit Lake in the Uintah Mountains. Taken by first time contributor Michael D. Bouwhuis of Ogden, Utah.

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Utah Bar JOURNAL

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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.

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.

The Utah Bar Journal

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Letter to the Editor

Dear Editor,

I enjoyed reading both the letter about "the snoozing judge" from the "Anonymous" attorney and the responsive advice of Judge Orme. I do have reason, however, to doubt that the anonymous attorney's observations are broadly accurate – it's a curse of our time that the anecdote becomes the generality. I was also surprised that you did not consult any trial court judges, since it is obvious that the letter is aimed at us. Furthermore, each one of us spends more time listening to lawyers and litigants than a dozen appellate court judges, so we have more "opportunity" to doze in court. As one member of the trial bench, I suggest that attorneys who encounter sleepy judges ask themselves a couple of questions.

First, how does your presentation sound? I once listened for four hours to English barristers presenting a murder case in London's Central Circuit Court, the "Old Bailey." They spoke as clearly and directly as stage actors, and the result was engrossing. Do you sound practiced and professional, or are you mumbling and stumbling with mind-numbing effect?

Second, do you know when you should simply stop talking? On occasion, I have listened to attorneys who seem to think they can't lose if they just don't stop talking – it's like a courtroom filibuster. Do you recognize when you have all the testimony you need or will ever get from your witness? Do you make your point and then just stop talking, or do you flog it until the judicial mind retreats to sleep in self-defense?

I don't doubt that some trial judges become sleepy sometimes, but before following Learned Ham's suggestions, some attorneys who encounter a sleepy judge should consider reciting, in solemn tones, a paraphrase of Cassius's speech from Shakespeare's *Julius Caesar:* "The fault is not in our judges, but (maybe) in ourselves."

Wakefully yours,
Judge Rand Beacham

Make a Difference, Be a Mentor

by Gus Chin

Recently, several relatively young lawyers expressed frustration with the profession and told me that they have been considering leaving the practice of law. Among the reasons given were burnout, the demands of the profession, non-enjoyment of their practice, the need for a change, and the need for something less stressful. Further discussion revealed that among other things they have unfulfilled expectations, lack balance between personal and professional commitments, and are burdened by stress due to such things as time constraints, caseload management, income deficiency, and multiple demands.

In analyzing their reasons, I wondered if their view of the profession would have been different if they had an opportunity to discuss their frustrations or concerns. Would they have a more positive view of their future as a lawyer had they had someone in whom they could confide as well as seek some guidance? I then concluded that in reality, given the nature of the practice of law, it is difficult for us as lawyers to properly address these issues and the challenges of the practice of law alone. We need a listening ear. We need someone to give wise counsel. In other words, we need mentors.

According to Greek mythology, Mentor was a senior friend of Odysseus who was placed in charge of Odysseus's son Telemachus, when Odysseus left for the Trojan war. Modern usage of the word "mentor" refers to one usually more experienced who is a trusted friend, counselor, or teacher. I applaud our two law schools, the S.J. Quinney College of Law, and the J. Reuben Clark Law School and well as bar organizations such as the Utah Minority Bar Association, the Young Lawyers Division, and the Women Lawyers of Utah for actively promoting mentoring, especially for law students.

Given the dynamics of the profession, I believe that having a mentor can make a difference. I am also convinced that success, as well as long-term survival, as a lawyer cannot be achieved alone. The practice of law is a collaborative journey that requires more than just a casual exchange of opinions or ideas. The practice of law involves civil interaction between professionals who differ as to the application of the facts and the law. As experienced and inexperienced lawyers interact, they mentor each other and essentially advance the interest of justice.

While giving thought to my projected longevity as a lawyer, I looked at the Bar's list of active and inactive emeritus attorneys. The emeritus members of the Bar consist of senior members of the Bar either 75 years of age or older, or who have been members of the Bar for 50 years or more. Reviewing the list, I am amazed by the number of emeritus lawyers who have weathered the challenges of the profession for almost, if not over, half a century. Upon examining the Bar's list of emeritus attorneys, one would find that, in addition to their civility, they all exhibit respect for the rules of the practice of law, congeniality even with opposing counsel, use of diplomacy, personal and professional integrity, and a commitment to mentoring other lawyers and law students.

Among the Bar's list of emeritus lawyers are many respected and trusted attorneys and judges such as Richard L. Bird, Sidney Baucom, Ray Christensen, Harold Christensen, Walter Ellett, James Faust, Floyd Gowans, J. Thomas Greene, Jr., Gordon Hall, Glenn Hanni, W. Eugene Hansen, Richard Howe, Dale Jeffs, Bruce S. Jenkins, James Lee, Oscar McConkie, Macoy McMurray, Maurice Richards, Herschel Saperstein, James Sawaya, Raymond Uno, Irene Warr, Homer Wilkinson, and Earl Wunderli, who have been role models and mentors for many. A more complete list of active emeritus attorneys will be published in a future edition of the *Bar Journal.*

Richard L. Bird, Jr., Utah's most senior active lawyer, who has been an active member of the Bar since his admission in 1933, heads the class of emeritus lawyers. At last year's Fall Forum, in conjunction with the Bar's 75th Anniversary celebrations, Mr. Bird received a Distinguished Service Award. He has been repeatedly described as a good, honest, and fine lawyer. Over his seven decades of practice, Mr. Bird has tutored and counseled many lawyers.

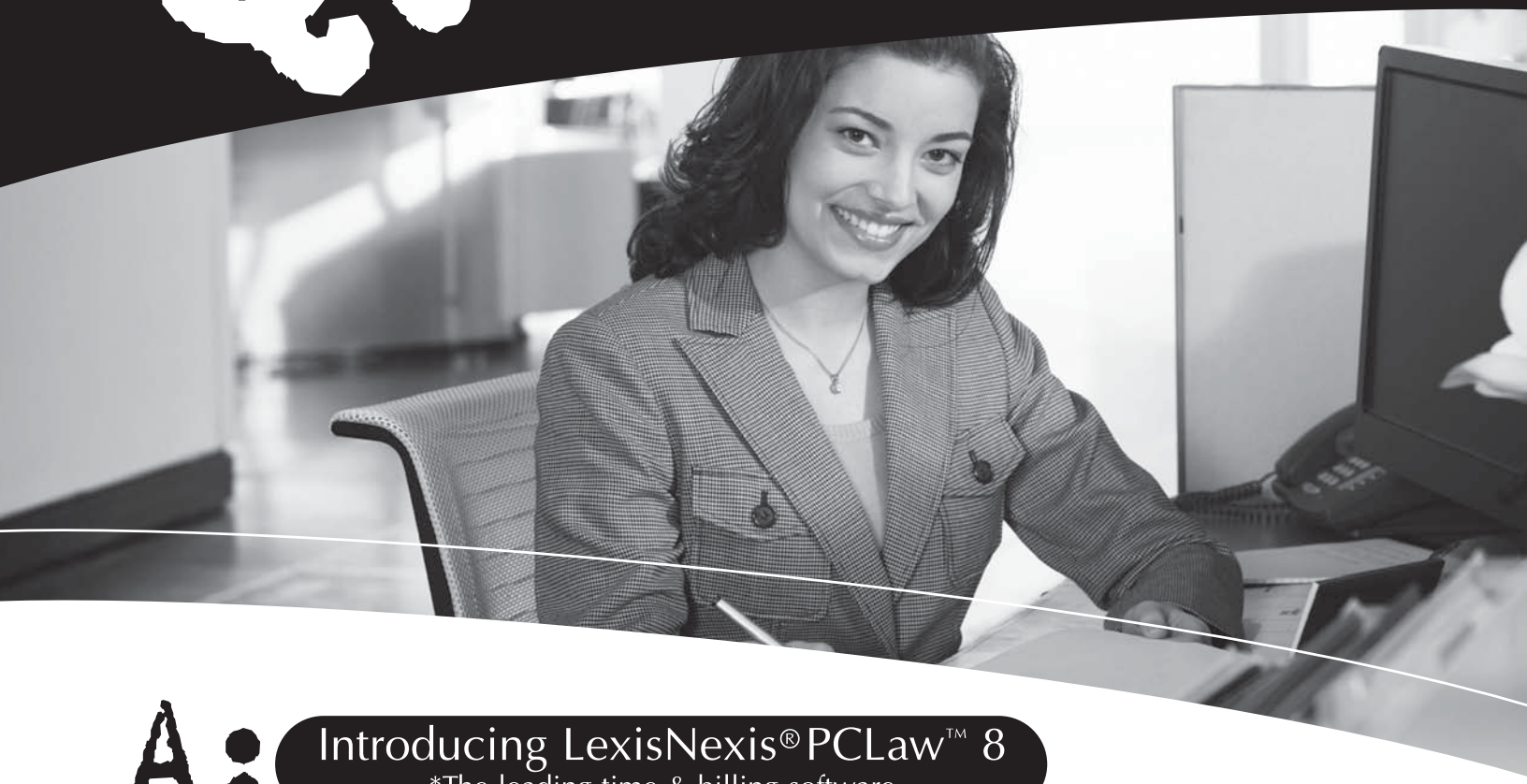
Another attorney who has mentored other lawyers is Irene Warr, a private practitioner, who is Utah's most senior active woman lawyer. Ms. Warr was admitted to the Bar in 1957 and is the 2007 recipient of the Utah State Bar's Dorothy Merrill Brothers Award for the Advancement of Women in the Legal Profession. At last year's Fall Forum convention, several women lawyers commented on her impact on their careers.

For minority attorneys and law students, retired District Court Judge Raymond Uno is considered to be the platinum standard. He is always willing to share his experiences and encourage and counsel others. His advocacy for the cause of the minority attorney in the State of Utah influenced the increase in the number of minority lawyers in Utah and led to the naming of an annual award in his honor, the Raymond S. Uno Award for the Advancement of Minorities in the Legal Profession.

I believe that in the process of mentoring other lawyers we are rewarded with career satisfaction and longevity. Ms. Warr, Mr. Bird, and Judge Raymond Uno are examples of the many lawyers who have influenced and continue to influence members of the Bar and the community.

Mentoring is even more important today because of the increasing challenges of the legal profession. Mentoring is a tool that will help ensure job satisfaction and advance the practice of law. The examples and advice from trusted experienced attorneys and judges can help law students and lawyers find balance, deal with stress, and enjoy a lifelong career as lawyers. I hope that we will take the time to mentor others and make a difference in the practice of law.

Q: Is there a better way to run your back office?



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The Utah Court of Appeals – Twenty Years Later

by Judge Gregory K. Orme

In his book, *An Unfinished Life – John F. Kennedy,* author Robert Dallek quotes Kennedy as saying he felt like he had always been president. I thought that was odd. After all, Kennedy was president for just under three years. Reading this passage, however, did prompt me to muse that I feel like I have always been a Court of Appeals judge. Really. And if I may say so, this seems inherently less incredible. After all, I have been a Court of Appeals judge about seven times longer than Kennedy was president. I have been an appellate judge twice as long as I was a practicing attorney. I have been on the court for two-thirds of my adult life. At the first out-of-state judicial conference I went to, somebody asked me if I was there with my dad; at the last one I went to, somebody asked me when I plan to retire. So I guess I shouldn't be surprised – much less shocked – to remember that this year marks the twenty-year anniversary of the Utah Court of Appeals.

Three other original appointees to the Court – Russ Bench, Judy Billings, and Pam Greenwood – also continue to serve on the court. Each of us has contributed a personal "side bar" in the pages that follow. Only Chief Justice Durham and a handful of other Utah judges have more seniority than we do. In contrast, consider the turnover in the position first occupied by our former colleague Dick Davidson. He was replaced by Leonard Russon, who left us to join the Supreme Court and has since retired; and Russon was replaced by Mike Wilkins, who left us to join the Supreme Court; and Wilkins was replaced by Bill Thorne, who, given this history, probably wishes that Wilkins was older. The two other original appointees, Reg Garff and Norm Jackson, retired in 1993 and 2005, respectively, and were replaced by our colleagues Jim Davis and Carolyn McHugh.

We do our work pretty much in the same way we did twenty years ago. We read briefs and hear arguments and "conference" on the cases (often after hearing arguments) and write opinions. But there have been a lot of changes, too.

We started our institutional existence in the Midtown Plaza, 230 South 500 East. There wasn't room for us in a real courthouse. It was a brand new office building, and the owner simply finished the space per our specifications, with a courtroom and library to go along with offices for the judges and staff. There was an aerobics studio and optical shop on the first floor, and a dentist on the fifth floor. Dunn & Dunn was across the lobby from us on the fourth floor. The Administrative Office of the Courts was on the third floor. Security was basically some "dummy" surveillance cameras, the last one out remembering to lock the door, and a "No Soliciting" sign on the front door. Still, kids selling candy bars and "college students" selling magazine subscriptions would occasionally turn up in my office unannounced – having scooted past the receptionist when she had her back turned. On Tuesdays, I think it was, "the Bagel Lady" would turn up. She was not regarded as an intruder but rather as a most welcome visitor. She carried a Goldilocks-like basket brimming with bagels and brownies and donuts and such, which she sold at reasonable prices. And if you didn't have any cash, you could just pay her next time. It was a sad day when she suddenly quit coming – some rigamarole over a business license and food handler's permit, we were told – and I still owe her $1.50, if anybody knows how to get a hold of her.

Now we're in the Matheson Courthouse with lots of other court people. Solicitors couldn't possibly get past the deputies that secure our entrances; the Bagel Lady has been replaced with lots of vending machines and The Courthouse Café; and I have to drive to the dentist and the optical shop.

We used to just have one law clerk each; now we have two.

JUDGE GREGORY K. ORME has served on the Utah Court of Appeals since its inception.

Memorable "Firsts" of the Court

by Presiding Judge Russell W. Bench

By virtue of the Chief Justice's decision to swear us in individually and alphabetically, I became the very first member of the Utah Court of Appeals (albeit by only a few minutes). The swearing-in ceremony was conducted in the rotunda of the State Capitol on Saturday January 17, 1987. The following Monday, Judge Norman Jackson and I went to work as court of appeals judges, and the others joined us a couple of weeks later. Judge Jackson and I held the first hearing of the Utah Court of Appeals even before our doors were officially opened. The hearing addressed a criminal defendant's request for release on a certificate of probable cause while his appeal was pending. Because construction of our courtroom in the Mid-Town Office Plaza was not yet completed, we had to hold the hearing downstairs in a conference room of the Court Administrator's Office.

It was a unique and exciting experience to be a part of setting up a brand new organization. The judges of the new court had to make many, many organizational decisions. One of our first orders of business was to select our leadership and to fill other staffing needs. Because of his ingratiating personality and long tenure on the juvenile court, we elected Judge Regnal Garff to serve as our first presiding judge. Judge Richard Davidson was designated associate presiding judge. And we selected Judge Gregory Orme as our first representative on the Judicial Council, based largely on his campaign claim of being more of a Senator than a CEO!

Tim Shea was our first clerk of court. Tim had been working in the administrative office, helping to set up the court long before the judges were even named. Clark Nielsen, then an experienced central staff attorney with the Utah Supreme Court, agreed to move over to our office. We hired Karen Thompson away from a law firm to fill our other central staff position. Karen is still with us today, as is Kathy Vass, one of our original secretaries. Initially, each judge had just one law clerk. The law clerks hired that first year included Kyle Latimer, Jodi Sutton, Ken Updegrove, Linda Barclay, Karin Hobbs, Annina Mitchell, and Beverly Farr.

I am personally grateful for the contributions of our "first" employees, and those who followed. We've worked hard and had a lot of fun, as we've tried to establish the Utah Court of Appeals as a respected institution.

We used to have two central staff attorneys; now we have four. I used to have this great law library with tons of books just outside my door, but now I have the State Law Library a short elevator ride away and my clerks mostly use their computers for research anyway. (A few years ago, my clerks wondered if they could go home because the computers were "down" so they weren't able to do anything, they said. We took a field trip to the library and learned all about digests and ALR and Shepard's and pocket parts and treatises and the like. The whole time, they had these looks on their faces like I had proposed starting a campfire with two rocks and some dry leaves.) I used to have a typewriter at the side of my desk; now I have a laptop. Seven judges used to share a printer, which sounded like an old dishwasher as it printed line by line, and now we each have our own printer – quiet gizmos that spit out 30 pages in the time it takes me to get up from my desk and walk the twenty feet from my desk to my printer. I still have my same robe, but the taxpayers were kind enough to have it refurbished this past summer.

The one constant in the twenty-year history of the court has been an obsession with delay reduction and avoidance. Some of my colleagues may prefer I couch this in terms of a mission or goal, but that understates it. It *has* been an obsession – an understandable obsession, given our origins, but an obsession nonetheless.

The genesis of the Court of Appeals was interminable delay in civil cases pending before the Supreme Court. A single appellate court had served Utah since before statehood, but by the '80s, if not earlier, a single state appellate court was no longer feasible. It was not uncommon for five years or more to pass between the filing of a notice of appeal in a civil case and receipt of an opinion from the Utah Supreme Court. The resulting inefficiency compounded itself, as the justices had to read the briefs and otherwise prepare twice in every case – once for oral argument and again several years later, having long since forgotten the case, when an opinion was finally circulated. So along came the Utah Court of Appeals, as the centerpiece – along with creation of the Utah Judicial Council as we now know it – of a comprehensive revision of the judicial article (Article VIII) of the Utah Constitution. *See generally* William C. Vickrey & Timothy M. Shea, *House Bill 100 and the Utah Court of Appeals: A Blueprint for Judicial Reform,* Utah Bar Journal (Fall-Winter 1985).

When we took office, the Supreme Court's entire backlog of unargued civil cases was loaded into Geoff Butler's pickup truck and delivered to us. It was several hundred cases. Plus we had an immediate and constant stream of new appellate filings in

cases within our original jurisdiction: most criminal cases, all family law cases, all appeals from Circuit Court (remember the Circuit Court?), and appeals from all but a few of the administrative agencies. We knew it would be a challenge to dig out from the backlog, and we knew we didn't want success in that regard to be a one-time deal, only then to lapse into a slow slide of increasing delay. So from the get-go we institutionalized measures with that object in mind, and we have constantly sought to devise additional such measures. (As a result, although earlier projections called for us to be up to about 10 judges by now, we're still at seven, and will remain so for the foreseeable future.) In the remaining pages of this article, I want to concentrate on this defining aspect of the court's history.

Case Assignment

We started out with an ambitious, ultimately unsustainable, pace of hearing cases. For the first several months, although it meant lots of weekend and evening work, we heard and wrote cases at a rate that had most of us reading briefs and hearing arguments in 18 cases a month and writing opinions in six of those. These weren't easy slam dunk cases, mind you; these were all but exclusively cases newly moved from the Supreme Court's backlog. That pace could not be sustained for long without burning ourselves and our law clerks out, but we stuck with it long enough to put a real dent in the backlog in a very short time.

Accountability

From the very beginning, we enshrined our expectations in internal operating procedures that we have rather strictly adhered to. Bi-weekly (now monthly) reports show us who's responsible for which cases, how long they've been pending, who has any action outstanding, etc. Nothing gets lost in the shuffle, and judges are regularly reminded of any older cases under advisement needing immediate attention. Judges are expected to circulate proposed opinions within 90 days (while some occasionally take longer, our collective average is *well* below 90 days), and to act on proposed opinions within a week. Separate opinions, like dissents, don't circulate in the by-and-by, but are due within a month of when the principal opinion first circulated. We have managed to keep the average time between notice of appeal and issuance of opinion to just over the one-year mark called for in ABA standards. Much of that time is somewhat beyond our control, but we have encouraged the accountability of other key players in the system and helped keep such potential sources of delay under check by being rather parsimonious in considering extension requests, whether from attorneys or court reporters.

Dispositional Creativity

It didn't take us long to realize that not every case really needs the "Cadillac" treatment – full briefing, oral argument, and an elaborate written opinion. Some cases just are, well, Fords and Volkswagens. That's not to say they aren't important cases that merit attention; only that the level of attention needed to decide some cases appropriately may be less than in some other cases. We have constantly been about the business of developing and refining a rather wide range of these alternatives. We have tried to resolve cases early and summarily, under Utah R. App. P. 10, when it is clear there is no jurisdiction or no substantial question for review or when the case is moot. This is often done in the context of inviting the submission of short memos rather than briefs to aid our decision. Even cases that are fully briefed can sometimes be appropriately decided without an in-depth judge-authored decision. The use of "per curiam" opinions, reviewed by three judges but with the research and drafting done by one of our central staff attorneys, has always been a significant part of our total output.

Saving judicial time on the back end rather than the front end, i.e., hearing arguments but then disposing of the case almost immediately with a one-sentence order, proved singularly unpopular with the Bar, and that practice has been essentially abandoned. The idea was that the dialogue at oral argument would serve as an adequate vehicle for imparting the court's view of the case, but practitioners didn't like it. I think it may have been as simple as this: Even if the comments at oral argument fully informed counsel of the rationale for the one-line order, typically an affirmance, there was nothing to mail the client that contained the court's analysis. In retrospect, I can fully sympathize with an aversion to having to send a letter to client, enclosing a one-line order, in which counsel has to set out her best guess about what the court was thinking. Thus, although the practice once did help us concentrate our writing energies on the Cadillacs we inherited from the Supreme Court, we no longer make use of Utah R. App. P. 31 and 30(d).

We have, over the last few years, institutionalized the frequent use of memorandum decisions, usually in cases that have not been scheduled for oral argument and which usually are not designated for official publication. Unlike per curiam opinions, these are decisions for which an authoring judge is responsible, with the research and drafting assistance of a law clerk rather than a staff attorney, and which are considered by a panel of three judges as part of our regular calendar. There is admittedly variety among the judges, but I tell my clerks we are writing memorandum decisions for the parties, their attorneys, and the

Pioneers in the Utah Judiciary

by Associate Presiding Judge Pamela T. Greenwood

There were seven of us. We included two district court judges, one juvenile court judge, two civil law practitioners, one corporate counsel, and one Utah Supreme Court staff attorney. We included five men and two women, our ages spanned about twenty years, and our heights ranged from about 5'2" to 6'6" (guess who). None of us knew all of the others who would be our colleagues. We began by having dinner together at Le Parisien, in downtown SLC, to get an initial read of each other. It was a good start.

Each of us had experience in several but not all of the areas of the law that we would encounter as court of appeals judges. Our first clerk of court, Tim Shea, helped us put together a curriculum of tutorials to help close the gap in our experience. Before we started hearing any cases, we spent several days listening to and asking questions of experts in such fields as juvenile law, workers' compensation, criminal law, and others.

Because we were starting a brand new court with no real detailed guidance about how to run it or how to interact together, we had a several-day session with Dr. Isaiah Zimmerman, a small group psychologist. Dr. "Z" was a godsend. He helped us learn how to effectively communicate with each other and to establish "norms" about how we would operate. For example, we decided as a group that we would prioritize attendance at our monthly judges' meetings, we would treat each other with respect at all times, and we would remain flexible and open to new ways of doing our work. I think that early work has guided us all the years since.

It was an exciting and challenging time. The work was daunting but manageable because of the wonderful people, judges, and staff I've had the privilege of knowing and working with. Being a pioneer is part of Utah history and it was wonderful to be in the same position with respect to the court of appeals.

In the Beginning

by Judge Judith M. Billings

It was exciting and daunting to be a founding member of the Utah Court of Appeals in 1987. I knew a few members of the court but had not met others. We had been given no internal procedures and faced the challenge of creating a new appellate court that could assist the Utah Supreme Court. From the outset, we were all dedicated to becoming a hardworking, efficient and, most importantly, a collegial court. I personally treasure my association with the founding members of the court and those who subsequently joined us.

One of my favorite recollections is our decision as to how many cases we judges would consider each month and how many opinions we would author. We inherited an approximately five hundred case backlog that had accumulated at the Supreme Court, so we thought more was better. We each had only one law clerk. We had no experience at appellate judging. Nevertheless, we naively decided that each judge would hear eighteen cases and author six opinions each month. Within the first year it became apparent that we had overestimated our abilities and underestimated the challenges of appellate work. We soon discovered that we simply were moving the "backlog" from "at issue" to "under advisement" – a less than desirable situation. Fortunately, we had agreed from the beginning that we would not have "rules" at the court but only "norms" that could easily be changed. We thus modified our workload. However, in just over a year, we had eliminated our five-hundred-case backlog and were dealing with newly filed cases.

It seems impossible that I have been with the Court of Appeals for twenty years. Time flies when you are having fun.

trial judge – not for posterity – so it doesn't matter if a stranger to the case couldn't figure out what was going on, so long as our small target audience understood completely. Accordingly, issues might be referred to in a shorthand way, the facts are not set out in any detail, and the analysis is truncated. Regular use of memorandum decisions is probably the single most important reason we have not had to add judges.

Staffing

Adding appellate judges is expensive. Each comes with a robe and two law clerks, and all three need a package of benefits appropriate to the position, furniture, computers, law books, telephone, secretarial support, etc. etc. If in lieu of adding a judge, other staff can be added to help increase output, the taxpayers are better off. (And so is the court. By all accounts, a smaller court is a more collegial court.) With this in mind, over the years we have added law-trained staff instead of judges whenever the opportunity has arisen. Thus, fairly early on in the court's history, we went from one law clerk per judge to two. We have gone from two central staff attorneys to first three and then four. We even tried an experiment in adding a judge "on the cheap." For a couple of early years when we were in the throes of that initial inherited backlog, we utilized a rotation of senior judges to help us hear – and, after adding a temporary law clerk assigned exclusively to them, to write – opinions in fully briefed cases scheduled for argument.

Working with judges like Dean Conder, Robert Newey, and Bob Bullock was a pleasure, but the need to rotate judges who were retired and mostly wanted to keep it that way was inefficient. As soon as one had his sea legs, he was replaced by the next volunteer.

Appellate Mediator

Another experiment proved much more successful. A few years ago, we opened the Appellate Mediation Office, annexed to the Court of Appeals. Staffed by a lawyer paid less than a judge, with the assistance of one secretary rather than two law clerks, the mediator accounts for as many resolutions in the average year as does the average judge. As importantly, the parties in those successfully mediated cases leave the system much happier, typically spared the expense of briefing and with both sides feeling that they won, or at least didn't lose.

* * *

As an exercise in backlog elimination and appellate delay reduction, the Utah Court of Appeals has been an unqualified success. We like to think we have also made a contribution in other ways, perhaps most importantly in making a significant contribution to the development of the common law of Utah in areas which had been unintentionally, but necessarily, somewhat neglected by the Utah Supreme Court as it tried to do everything by itself. But we know why the Court of Appeals was created, what our core mission was. And as to that mission, those who had the foresight to establish the court, those who have worked here over the years in one capacity or another, and the practitioners who help us figure out how best to resolve each case are able to join me in saying: "Mission accomplished!"

Thrown Into the Deep End

by Judge Gregory K. Orme

Although the Administrative Office of the Courts had designed an education and orientation program for us so we'd have some sense of what we were supposed to be doing before we started hearing cases, it didn't really work in my case. I was the Court of Appeals representative on the Judicial Council. Soon after I was sworn in, the Council was scheduled to meet in St. George – maybe in conjunction with the mid-year meeting of the Bar – and the Supreme Court was scheduled to hear cases down there, too. Chief Justice Hall called me at home and asked if I could fill in for Justice Stewart, who wasn't feeling well and wouldn't be making the trip. I had been sworn in, but hadn't read a single brief or heard a single argument as an appellate judge. Our robes hadn't arrived yet, so I was invited to borrow the Supreme Court's "loaner," which proved to be former Justice Henriod's robe. I accepted the invitation. This promised to be excellent on-the-job training! And it was.

A couple of days after returning to Salt Lake, the Chief called and told me Justice Stewart was quite ill, and he asked if I could just take Dan's place for the rest of that month's calendar, including taking his share of the writing responsibility. I jumped at the chance, of course, and so heard arguments in fifteen Supreme Court cases, and drew the responsibility to write three Supreme Court opinions, before I'd ever cracked my first brief at the Court of Appeals.

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BYU Alumni Women's Law Forum Survey on Maternity/Paternity Leave and Flexible Schedule Policies for Lawyers

EDITOR'S NOTE: *The editorial staff of the* Utah Bar Journal *believes that an important part of its mission is to share with our readers information, such as these survey results, which helps to describe the experience of practicing law in our community. We applaud the efforts of the BYU Alumni Women's Law Forum, which is of course solely responsible for the contents of this report.*

The BYU Alumni Women's Law Forum surveyed several organizations in Salt Lake City regarding their maternity and paternity leave and flexible schedule policies and would like especially to thank those that responded to this survey for their time, effort and willingness to participate. The following spreadsheet is a summary of their survey responses. The data in this spreadsheet was provided directly by the organizations/firms themselves and is provided for informational purposes only. It should not be relied upon in making employment or other decisions or for research or other purposes. The data was current when it was collected. For the most recent information individuals should directly contact the organizations/firms.

As a reminder to the reader, the Family and Medical Leave Act (FMLA) requires employers of 50 or more employees to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the birth or adoption of a child or for the serious illness of the employee or a spouse, child or parent. The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances. For more information go to the U.S. Department of Labor's web site at: www.dol.gov/esa/whd/fmla/index.htm.

The BYU Alumni Women's Law Forum serves the women alumni and student body of the J. Reuben Clark Law School to foster a support network for women graduates and provide a forum to discuss issues women face in the workplace and legal community. For more information about our organization, please go to: www.byulaw.org/AWLF.

Maternity/Paternity Leave Policies

Firm or Organization	Total leave a female can take for birth or adoption of her child	Total leave a male can take for birth or adoption of his child	Amount of paid leave for female associates	Amount of paid leave for female partners	Amount of paid leave for male associates	Amount of paid leave for male partners
Ballard Spahr Andrews & Ingersoll	24 weeks	12 weeks	12 weeks	As much time as she chooses	None	
Callister Nebeker & McCullough	12 weeks	12 weeks	None	12 weeks	None	12 weeks
Clyde Snow Sessions & Swenson	3 months	Determined on a case-by-case basis	1 month	1 month	Determined on a case-by-case basis	Determined on a case-by-case basis
Durham Jones & Pinegar	12 weeks	12 weeks	Generally none, although granted in the past on a case-by-case basis	Generally none, although granted in the past on a case-by-case basis	Never been requested, but would be considered on a case-by-case basis	Never been requested, but would be considered on a case-by-case basis

Firm or Organization	Total leave a female can take for birth or adoption of her child	Total leave a male can take for birth or adoption of his child	Amount of paid leave for female associates	Amount of paid leave for female partners	Amount of paid leave for male associates	Amount of paid leave for male partners
Fabian & Clendenin	No set maximum, determined on case-by-case basis[1]	No set maximum, determined on case-by-case basis	Determined on a case-by-case basis	Determined on a case-by-case basis	Determined on a case-by-case basis	Determined on a case-by-case basis
Holland & Hart	12 weeks[2]	12 weeks	8 weeks	8 weeks	2 weeks	None
Holme Roberts & Owen, LLC	Up to one year	Up to one year	12 weeks	12 weeks	May take 3 weeks; if primary caregiver, paid for 12 weeks	May take 3 weeks; if primary caregiver, paid for 12 weeks
Howrey LLP	16-18 weeks + unpaid time	12 weeks + unpaid time	16-18 weeks	3-4 months	10 weeks	3-4 months
Jones Waldo Holbrook & McDonough	12 weeks + additional time if requested	12 weeks + additional time if requested	Compensation is typically reduced (approx. 3/4 pay) but is tailored to individual circumstances	Compensation is typically reduced (approx. 3/4 pay) but is tailored to individual circumstances	Compensation is typically reduced (approx. 3/4 pay) but is tailored to individual circumstances	Compensation is typically reduced (approx. 3/4 pay) but is tailored to individual circumstances
Kirton & McConkie	12 weeks	12 weeks	8 weeks for birth (although another 4 weeks may be paid if medically necessary) If adoption, no paid leave	8 weeks for birth (although another 4 weeks may be paid if medically necessary) If adoption, no paid leave	12 weeks	12 weeks
Parsons Behle & Latimer	12 weeks	12 weeks	45 calendar days	45 calendar days to 12 weeks	45 calendar days	45 calendar days to 12 weeks
Prince Yeates & Geldzahler	12 weeks	12 weeks	Up to 10 workdays without regard to tenure, plus 5 workdays for every full year of service, up to 65 workdays	The firm has not adopted a maternity leave policy for shareholders	Up to 10 workdays without regard to tenure, plus 5 workdays for every full year of service, up to 65 workdays	The firm has not adopted a paternity leave policy for shareholders
Ray Quinney & Nebeker	Associates up to 12 weeks	Associates up to 12 weeks	Full pay, depending on years of service[5]	90 days for pregnancy or birth	None	None
Richards Brandt Miller & Nelson	12 weeks	12 weeks	12 weeks	12 weeks	2 weeks	2 weeks

Firm or Organization	Total leave a female can take for birth or adoption of her child	Total leave a male can take for birth or adoption of his child	Amount of paid leave for female associates	Amount of paid leave for female partners	Amount of paid leave for male associates	Amount of paid leave for male partners
Salt Lake County District Attorney	12 weeks	12 weeks	None	None	None	None
Snell & Wilmer	12 weeks	12 weeks	12 weeks (after one year of service)	At partner's discretion	12 weeks (after one year of service)	At partner's discretion
Snow Christensen & Martineau	12 weeks	12 weeks	6 weeks	8 weeks	6 weeks	8 weeks
Stoel Rives LLP	12 weeks plus	12 weeks	8 weeks	8 weeks	8 weeks	8 weeks
VanCott Bagley Cornwall & McCarthy, PC	12 weeks[6]	12 weeks[7]	6 weeks		6 weeks	

Flexible Schedule Policies

Firm or Organization	Can a new mother opt to work part-time before returning to work full-time?	Can a new father opt to work part-time before returning to work full-time?	Do any attorneys at your firm work a flexible schedule?	How is a flexible schedule attorney's compensation calculated?
Ballard Spahr Andrews & Ingersoll	Determined on case-by-case basis.	Determined on case-by-case basis.	No	
Callister Nebeker & McCullough	Yes, under certain conditions	Yes, under certain conditions	Yes	On a pro rata basis
Clyde Snow Sessions & Swenson	Determined on case-by-case basis	Determined on case-by-case basis	Yes	Salary and overhead adjusted proportionately
Durham Jones & Pinegar	Yes	Never been requested, but would be considered on a case-by-case basis	Yes	Commensurate with reduced productivity.
Fabian & Clendenin	Yes	Yes	Yes	Based on the number of hours worked
Holland & Hart	Determined on a case-by-case basis	Determined on a case-by-case basis	Yes	Determined by percentage of work
Holme Roberts & Owen, LLC	Yes, may work as low as a 50% schedule	Yes, may work as low as a 50% schedule	Yes[3]	On a pro rata basis

Firm or Organization	Can a new mother opt to work part-time before returning to work full-time?	Can a new father opt to work part-time before returning to work full-time?	Do any attorneys at your firm work a flexible schedule?	How is a flexible schedule attorney's compensation calculated?
Howrey LLP	Yes, must be at least 60% of full-time to maintain benefits	Yes, must be at least 60% of full-time to maintain benefits	Yes	On a pro rata basis
Jones Waldo Holbrook & McDonough	Yes	Yes	Yes[4]	On a pro rata basis
Kirton & McConkie	Determined on case-by-case basis	Determined on case-by-case basis	Yes	Attorneys receive a proportionally reduced salary or are paid on an hourly basis
Parsons Behle & Latimer	Determined on case-by-case basis	Determined on case-by-case basis	Yes	Paid hourly, eligible for bonuses, pension and profit sharing
Prince Yeates & Geldzahler	Determined on a case-by-case basis	Determined on a case-by-case basis	Not at the present time	In the past, female attorneys who were new mothers worked part-time with commensurate compensation
Ray Quinney & Nebeker	Yes	Yes	Yes	Number of hours worked combined with fees generated
Richards Brandt Miller & Nelson			Yes	Determined subjectively based on collections and other contributions
Salt Lake County District Attorney	No	No	No	N/A
Snell & Wilmer	Determined on case-by-case basis	Determined on case-by-case basis	Yes	On a pro rata basis
Snow Christensen & Martineau	Determined on case-by-case basis	Determined on case-by-case basis	Yes, senior share-holders approaching retirement	Determined subjectively based on collections and other contributions
Stoel Rives LLP	Determined on case-by-case basis	Determined on case-by-case basis		
VanCott Bagley Cornwall & McCarthy, PC	Determined on case-by-case basis	Determined on case-by-case basis	Yes	Compensation is based on an established methodology that takes into account a number of factors

1. Leaves of up to 20 months have been granted.
2. Up to six months with approval from the managing partner
3. Many attorneys work reduced schedules from 50% - 95%.
4. Schedules have varied from 20-30 hours per week.
5. One year = one month paid; two years = two months paid; three years = three months paid.
6. Not defined for adoption
7. Not defined for adoption

Utah Department of Commerce Answers Call for Electronic Images of Uniform Commercial Code Filings

by Kimberly Frost

For several years, the Division of Corporations and Commercial Code, located within the Utah Department of Commerce, has made it possible for users to file Uniform Commercial Code (UCC) statements electronically, as well as to search the Division's index of active UCC filings online. In February 2007, the Division launched a new application that allows users to view and print images of paper UCC filings over the Internet. The new application, called "UCC Imaging," is one more tool the Department of Commerce has added to its menu of online services to make it easier to do business in Utah.

With this new service, once a UCC filing has been located online through the Uniform Commercial Code & Central Filing Search System, https://secure.utah.gov/uccsearch/uccs, an image of the filing can be downloaded instantly to the end user. Previously, the only way to retrieve these images was in person at the Department of Commerce, or through an in-house search based on legal need. The new online service now fills a critical need for bankruptcy trustees, lenders, creditors and their transactional and litigation counsel.

In order to understand how this new service works with existing services, it is first necessary to provide a quick background of the UCC filing process. Currently, there are two ways to file an Initial Financing Statement with the Division: electronically or by paper. The same fee applies to both filing methods. Continuation Statements and Termination Statements can also be filed electronically through this system. All other filings, such as Assignments and Amendments of parties and collateral descriptions, must be filed in person or by mail. Last year, the percentages of new filings completed electronically were as follows: Financing Statements – 55%, Continuations – 53%, and Terminations – 61%.

Regardless of the filing method, paper or electronic, images can now be retrieved through UCC Imaging for any active filing. The data currently dates back as far as 1965. If a transaction is filed by paper, the online image can be viewed as a scanned document, or as a PDF document populated from electronic data. Scanned images of paper filings are somewhat self-explanatory: the original documents are scanned and uploaded for viewing. Scanned images of paper filings are uploaded within a few days of receipt. At the same time, the information from the original paper documents is transcribed and entered into the electronic database as PDF document files. The populated PDF documents are made to look nearly identical to the paper filings. End users have the choice of viewing scanned images or the PDF documents of all electronic data in the UCC Imaging system.

Online filings on the other hand, are only available in the PDF format. The PDF images for online filings are generated instantly and available immediately after filing. Scanned images from paper filings and PDF documents from electronic information are both recognized as valid agency records, and the Division shows no preference for one over the other.

As previously noted, UCC filings have long been available to the general public at the Department of Commerce. UCC Imaging is also available to the general public, but it requires a Utah.gov network registration. Anyone wishing to view UCC Images can register for a Utah.gov account, either online or by mail for an annual fee. Each downloaded image (be it a Financing Statement or an Amendment) costs the user $2.00. If any problems should arise when using the online UCC Search application or the related UCC Imaging tool, the website provides customer support for the online user.

KIMBERLY FROST is the Marketing Executive for Utah Interactive in partnership with Utah.gov and the Utah Department of Commerce.

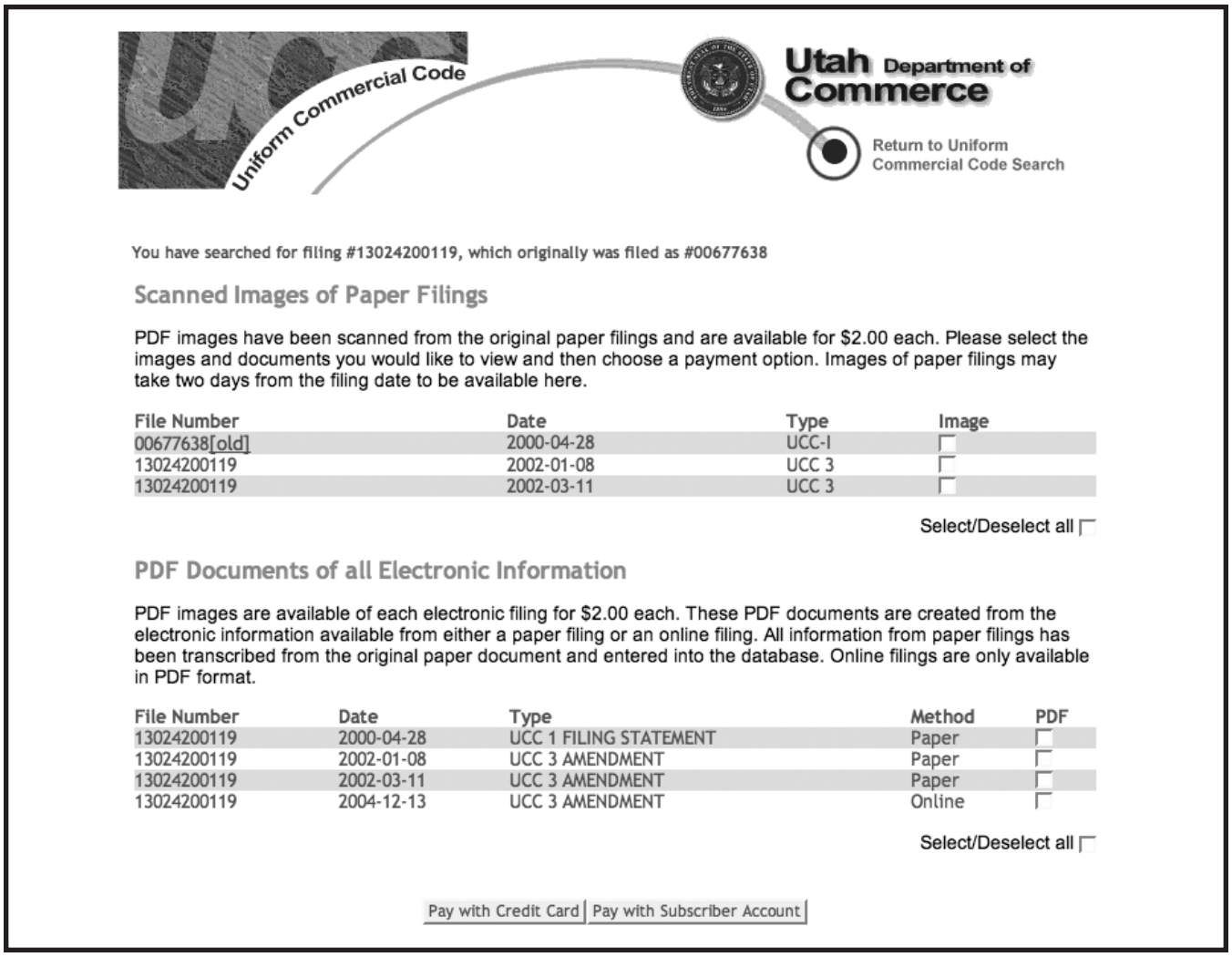


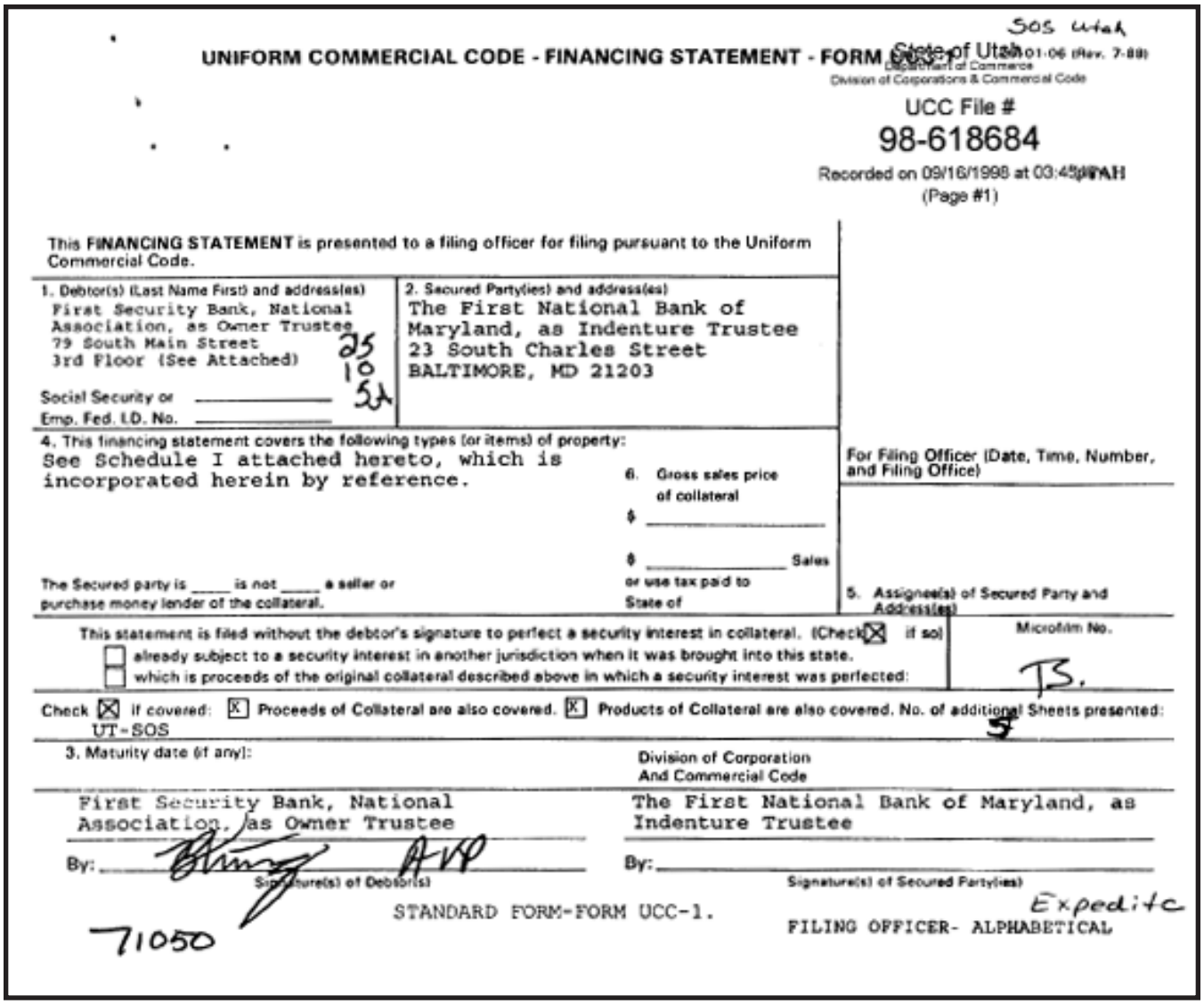
Image of online search results for UCC Images. Allows user to select scanned images of paper filings or PDF document of electronic information.

Image of online UCC filing records details. New "Search for Images" tab appears at the bottom of this screen.

UCC filings serve as public notice posted with the Division of Corporations and Commercial Code. All filings that meet minimal statutory requirements for filing components are indexed and filed. At no point does the Division otherwise determine the legal sufficiency or insufficiency of a document, or determine whether the information in the document is correct. As such, when a transaction is filed electronically, the Division does not make attempts to determine who is making the filing.

UCC Imaging is not the only addition the Division of Corporations plans for the UCC filing and search system. The Division plans to make all types of UCC filings available electronically for online users. In the near future, the Division will enable UCC filers to upload images of collateral descriptions for electronic filings. Currently, the online user is limited to a 4,000-character description per page of the collateral. The Division plans to make it possible for scanned documents to be attached as an alternative. This change will make it possible for filers to include a far more inclusive description of collateral, providing additional protection to both creditors and debtors.

For more information on electronic UCC services can be found at http://corporations.utah.gov/uccpage.html.



SOS Utah

UNIFORM COMMERCIAL CODE - FINANCING STATEMENT - FORM UCC-1

State of Utah
Department of Commerce
Division of Corporations & Commercial Code

UCC File #
98-618684

Recorded on 09/16/1998 at 03:45 PM UTAH
(Page #1)

This FINANCING STATEMENT is presented to a filing officer for filing pursuant to the Uniform Commercial Code.

1. Debtor(s) (Last Name First) and address(es)
First Security Bank, National Association, as Owner Trustee
79 South Main Street
3rd Floor (See Attached)
25 10 5A

Social Security or Emp. Fed. I.D. No. _____

2. Secured Party(ies) and address(es)
The First National Bank of Maryland, as Indenture Trustee
23 South Charles Street
BALTIMORE, MD 21203

4. This financing statement covers the following types (or items) of property:
See Schedule I attached hereto, which is incorporated herein by reference.

6. Gross sales price of collateral
$ _____
$ _____ Sales or use tax paid to State of

For Filing Officer (Date, Time, Number, and Filing Office)

The Secured party is ____ is not ____ a seller or purchase money lender of the collateral.

5. Assignee(s) of Secured Party and Address(es)

This statement is filed without the debtor's signature to perfect a security interest in collateral. (Check ☒ if so)
☐ already subject to a security interest in another jurisdiction when it was brought into this state.
☐ which is proceeds of the original collateral described above in which a security interest was perfected:

Microfilm No.
T3.

Check ☒ if covered: ☒ Proceeds of Collateral are also covered. ☒ Products of Collateral are also covered. No. of additional Sheets presented: 5
UT-SOS

3. Maturity date (if any):

Division of Corporation And Commercial Code

First Security Bank, National Association, as Owner Trustee
By: _____ AVP
Signature(s) of Debtor(s)

The First National Bank of Maryland, as Indenture Trustee
By: _____
Signature(s) of Secured Party(ies)

71050

STANDARD FORM-FORM UCC-1.

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Example of a scan of the original filing that can now available online. (Note: historic attachments are included in the image available on-line, but are not reproduced in this Journal *article.)*

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Utah's Parental Involvement Law: Minors' Access to Abortion

by Margaret D. Plane

During the 2006 General Legislative session, Utah amended its laws requiring prior parental notification for minors seeking abortions.[1] Utah lawmakers passed House Bill 85 S1, "Abortion by a Minor – Parental Notification and Consent," which requires, except in limited circumstances, that minors both notify and receive consent from a parent or guardian before obtaining an abortion. *See* H.B. 85, 56th Leg., 2006 Gen. Sess. (Utah 2006). The amended Utah Parental Consent Act (the Act), Utah Code Ann. § 76-7-304.5, took effect on May 1, 2006.

After passing the Act, Utah became one of 34 states currently enforcing laws that require a minor to notify and/or obtain the consent of a parent or guardian before an abortion.[2] Ten states have laws that are either enjoined by a court, largely because of constitutional infirmities, or not enforced.[3] Although the laws differ from state to state, they can be generally categorized into two, non-equivalent types: parental consent and parental notice. Parental consent is often considered a legal bar to a minor's access to abortion, whereas parental notice may be a *de facto* bar to access. In legal challenges to these laws over the decades, courts have tried to balance the reproductive rights of teens, the interest of the state in the health and welfare of teens, and the rights of parents to direct their children's upbringing. This article will provide the legal framework for mandatory parental involvement laws and then outline the provisions and implementing rules of the Utah Act.

Legal Framework

A series of judicial decisions concerning the validity, construction, and application of statutes requiring parental consent or notification before a minor obtains a first-trimester abortion began in the United States Supreme Court more than thirty years ago. The landmark case, *Bellotti v. Baird,* 443 U.S. 622 (1979),[4] started with the premise that minors possess constitutional rights, although they are not equal to those of adults. In *Bellotti* the Court reviewed a Massachusetts statute that required parental consent for a minor to obtain an abortion. The law gave a young woman the right to bypass parental consent by demonstrating to a court that she is mature and well-enough informed to make the abortion decision on her own, or that an abortion would be in her best interest. However, the statute also required that an available parent be given advance notice of any judicial proceedings brought by a minor to obtain a judicial bypass of parental consent. This provision essentially amounted to required parental consultation before a minor could seek a judicial bypass. Additionally, the law allowed a judge to disregard a well-informed minor's maturity if the judge determined that an abortion would not be in the minor's best interest.

The Supreme Court invalidated the Massachusetts statute, holding that, although a state may require parental consent, the state must afford the minor an alternative by which she may bypass the requirement, without first notifying her parents. The Court's decision was partially based on the fact that the statute indirectly gave parents veto power over their daughter's abortion decision. Three years earlier, the Court had held unconstitutional a blanket parental consent requirement because it amounted to giving a third-party "an absolute, and possibly arbitrary" veto over the minor's abortion decision. *See Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 75 (1976). The Massachusetts law in *Bellotti* was also invalidated because it allowed judges to withhold consent independent of a minor having established her maturity or that an abortion was in her best interest; essentially, the statute also gave judges veto power over the minor's decision. *See Bellotti,* 433 U.S. at 650.

The *Bellotti* Court recognized that, like adults, minors possess constitutional rights, including the right to seek an abortion. The Court did not equate the rights of minors with the rights of adults because of concerns about the "vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." *Id.* at 634. Nevertheless, the Court acknowledged the unique nature of the abortion decision, noting that the "potentially severe detriment" facing a pregnant woman is not mitigated by her minority, and that unwanted motherhood may be especially burdensome for a minor in light of her "probable education, employment skills, financial resources, and emotional maturity." *Id.* at 642.

MARGARET D. PLANE served as Legal Director of the ACLU of Utah from 2004-2007. She recently became an Assistant City Attorney for the Salt Lake City Attorney's Office.

While the *Bellotti* Court held that minors must be able to bypass parental consent and consultation, it acknowledged that the bypass need not be a judicial process in a court of general jurisdiction. For instance, the state could delegate the bypass procedure to a juvenile court or an administrative agency or officer. However, because the challenged Massachusetts law included a judicial process, the Court set forth the standards a judicial bypass procedure must satisfy if a parental consent law is to survive constitutional scrutiny. Under a judicial bypass alternative, the minor must be given the opportunity to show that she is mature enough and well informed enough to make the decision whether to have an abortion on her own. If maturity[5] is established, the court must permit the minor to bypass the parental consent requirement. The minor is then entitled to make her own decision; the court cannot make it for her. *Id.* at 643-44, 647. The minor must also be given the opportunity to show that the abortion is in her best interest.[6] If she makes this showing, the court must grant her bypass petition. *Id.*

Importantly, the *Bellotti* Court also held that a judicial bypass hearing and any appeals that follow must "be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained." *Id.* at 644. In mandating expedition, the Court recognized that the minor's opportunity to have an abortion, should that be her choice, expires in a matter of weeks. The bypass process must therefore be expedited, or it will fail to protect the minor's right. *Id.* at 642.

Parental consent laws continue to be measured against these standards. *See, e.g., Planned Parenthood v. Casey,* 505 U.S. 833, 899 (1992) (reaffirming *Bellotti* standards). Since the *Bellotti* decision, no court, looking to the merits, has upheld a parental notice statute that lacks some form of a bypass. *See, e.g., Hodgson v. Minnesota,* 497 U.S. 417, 460-61 (1990) (holding two-parent notification law without bypass unconstitutional); *Planned Parenthood v. Miller,* 63 F.3d 1452, 1460 (8th Cir. 1995) (holding one-parent notification law without bypass facially unconstitutional); *Zbaraz v. Hartigan,* 763 F.2d 1532, 1536, 1539-44 (7th Cir. 1985) (holding unconstitutional parental notice law whose bypass did not meet previously established requirements), aff'd by equally divided Court, 484 U.S. 171 (1987); *Indiana Planned Parenthood v. Pearson,* 716 F.2d 1127, 1132 (7th Cir. 1983) (same); *Akron Ctr. For Reprod. Health v. Slaby,* 854 F.2d 852, 861 (6th Cir. 1988) (same), rev'd on other grounds; *Ohio v. Akron Crt. For Reprod. Health,* 497 U.S. 502 (1990).

Utah's Law

Utah's current parental involvement law is unique because of its provisions requiring both the notice and the consent of a minor's parent or guardian, with limited exceptions. During legislative deliberations, questions were raised as to the constitutionality

of requiring both notice and consent with only limited waiver provisions. The law's permissibility is at least suspect, although the Supreme Court has reiterated that it has not decided whether parental notice provisions require bypass provisions. *See Lambert v. Wickland,* 520 U.S. 292 (1997).

Utah's law applies to all minors under eighteen years of age, except those who are married or emancipated. *See* Utah Code Ann. § 76-7-304(1)(b). There are two essential requirements under the Utah statute: first, the minor either must obtain the informed written consent of a parent or guardian, or the minor must, through a judicial bypass proceeding, obtain a court order waiving this requirement. *Id.* § 76-7-304.5(2). Second, the physician must notify the minor's parent or guardian at least twenty-four hours in advance of the abortion. *Id.* § 76-7-304(3). There are limited exceptions to the 24-hour advance parental notification requirement, including when the minor is pregnant "as a result of incest to which the parent or guardian was a party," "the parent or guardian has abused the minor," or "the parent or guardian has not assumed responsibility for the minor's care and upbringing." § 76-7-304(4). If the minor has another parent or guardian who does not fall under one of the notice exemptions, then that individual must be notified. Because the notice provision is not affected by the implementing rules, it will be discussed before turning to a discussion of the bypass provision and the implementing rules.

Utah's notice provision differs from the *Bellotti* provision discussed above in several ways. First, the provision at issue in *Bellotti* essentially made parental consultation a precondition to a minor's obtaining a judicial bypass. There were no exceptions to the notification requirement. In contrast, under the Utah notice provision, notice must be given at least twenty-four hours before the abortion occurs, rather than at some point before the bypass hearing. The Utah Act does not provide a mechanism for a waiver of the notice requirement, although it does allow for limited exceptions; the limited exceptions do not include an opportunity for a minor to demonstrate either that she is mature or that an abortion would be in her best interests.[7] *See Planned Parenthood, Sioux Falls Clinic v. Miller,* 63 F.3d 1452 (8th Cir. 1995) (affirming decision that provision requiring parental notification except in specified cases was unconstitutional because it failed to provide bypass mechanism to allow mature minors or best-interest minors to proceed without notification). Further, the Utah notice provision may violate the minor's confidentiality and anonymity.

Since the *Bellotti* decision, the Supreme Court has reiterated that it has not decided whether statutes requiring parental notification must include some sort of bypass provision in order to be constitutional. *See Lambert v. Wickland,* 520 U.S. 292 (1997). The Court has stated, however, that statutes merely requiring notice are not constitutionally obliged to include the full panoply of safeguards required for parental consent statutes. *See Hodgson v. Minnesota,* 497 U.S. 417 (1990). The lower courts are divided about whether a mature minor, or one for whom an abortion is in her best interest, is unduly burdened by a statutory requirement that her physician notify one of her parents before performing an abortion.

The second statutory requirement under the Utah Act is that the minor obtain either the informed written consent of a parent or guardian, § 76-7-304.5(3)(a), or a court order waiving the informed written parental consent requirement, § 76-7-304.5(3)(b). Informed consent is statutorily defined and includes requirements to obtain various categories of information at

specified times, from specified people, before an abortion may be performed. *See* § 76-7-305. If a minor seeks a waiver of the parental consent requirements, she may file the petition in a juvenile court in any Utah county. *See* § 76-7-304.5(4); UTAH R. JUV. P. 60(a), (b).[8] There is no filing fee. The filing of the petition, the petition itself, all hearings, proceedings, and records are confidential under the Act and the implementing rules. Any hearings are closed to the public, and court personnel are explicitly prohibited from notifying the minor's parents, guardian, custodian, or any member of the public that she is pregnant or wants an abortion. *See* Utah Code Ann. § 76-7-304.5(6)(c); UTAH R. JUV. P. 60 (g); UTAH R. APP. P. 60(h).

A minor may file the petition either on her own or through an attorney. If the minor is not represented by a private attorney, the juvenile court "shall consider appointing an attorney under Utah Code Ann. § 78-3a-913 and/or the Office of Guardian ad Litem under § 78-3a-912."[9] UTAH R. JUV. P. 60(c). Providing for the appointment of counsel in a judicial bypass procedure is not unique to Utah. Courts have considered provisions for the appointment of counsel to be critical "to ensure that the waiver hearing becomes an effective opportunity for the minor to obtain an abortion upon the proper showing." *Indiana Planned Parenthood Affiliates Ass'n v. Pearson,* 716 F.2d 1127, 1138 (7th Cir. 1983). Under Utah rules, if an attorney or guardian ad litem was appointed at the trial level, the appointment continues through any appeals. *See* UTAH R. APP. P. 60(i).

Because of the time-sensitive nature of a minor's abortion decision, the juvenile court must schedule a hearing and resolve the petition within three days of receipt. *See* UTAH R. JUV. P. 60(d). The hearing may be continued for no more than one day. Notably, there is no provision in the rules for additional continuances or to remedy a court's inaction or delayed action.[10] Many states include provisions to account for such delays in order to safeguard the minor's right to an expeditious bypass proceeding. Expedition is vital because "[a] pregnant adolescent . . . cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy." *Bellotti,* 433 U.S. at 642. If a juvenile court failed to act on a petition, a minor would presumably have a right to seek an expedited writ of mandamus from the Utah Supreme Court.

The bypass proceeding itself is an informal hearing, conducted by the court, to hear evidence relating to the minor's maturity and best interest. It is a non-adversarial hearing. The court hearing the waiver petition must grant the petition if it finds one of two things. A court may find, by a preponderance of the evidence, that the minor has given her "informed consent to the abortion" and "is mature and capable of giving informed consent to the abortion." Or, the court may find, again by a preponderance of the evidence, that "an abortion would be in the minor's best interest." *See* § 76-7-304.5(5)(b); *see also*

Utah R. Juv. P. 60(e). Under either of these findings, the court is not requiring a minor to seek an abortion; rather, the court is granting the minor the right to make that decision without the consent of her parents. The order must be entered immediately after the conclusion of the hearing.

If the court denies or dismisses the petition, it must inform the minor of her right to an expedited appeal. Utah R. Juv. P. 60(e). The notice of appeal is filed with the clerk of the juvenile court, who must "immediately" notify the Court of Appeals. Under the rule, the juvenile courts will make available blank notices of appeals; there is no filing fee. The record on appeal, including a recording or transcript of the proceedings below, must be transmitted to the Court of Appeals within 48 hours after notice of appeal is filed. No brief is required, although a memorandum in support of the appeal is discretionary. If the Court of Appeals orders oral argument, the argument must be held within three days after notice is filed; a decision must be issued immediately after the argument. If oral argument is not held, an order stating the decision must be issued within three days after the notice of appeal is filed. As with the hearing below, all documents and proceedings are confidential.

If the Court of Appeals affirms the juvenile court's denial of the bypass petition, there is no appeal as of right to the Utah Supreme Court. *See* Utah R. App. P. 46(a). However, under Utah Rule of Appellate Procedure 46, a minor may ask the Utah Supreme Court to review her case under its discretionary jurisdiction. The Supreme Court has discretion to hear cases by a writ of certiorari, but review "will be granted only for special and important reasons," most relevantly, "[w]hen a panel of the Court of Appeals has rendered a decision that has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision," or when the Court of Appeals has decided "an important question" of law that should be settled by the Utah Supreme Court. *Id.* If a writ of certiorari is sought, it would likely need to be done under the appellate rule for emergency relief. *See* Utah R. App. P. 8A. As there are no rules specifically in place guaranteeing expedition or confidentiality at the Supreme Court level, a minor or her counsel would need to take affirmative measures to ensure these, if review is sought.

Conclusion

When Utah enacted its parental consent and notification statute, it joined the majority of states with similar laws. Still, Utah's law is slightly different than any tested in court to date, primarily because of its notification provisions. The Supreme Court and lower courts have accepted that a parental notification statute, applied to immature minors who are dependent upon their parents, does not give parents the type of absolute veto power over a minor's decision that the Supreme Court has rejected. However, it remains an open question whether Utah's notification requirement violates federal constitutional requirements based on its lack of exceptions for minors who establish their maturity or best interest and its apparent violation of minors' confidentiality and anonymity.

1. Utah's previous parental involvement statute, Utah Code Ann. § 76-7-304(2) (1978), required a physician to "[n]otify, if possible, the parents or guardian" of the minor upon whom an abortion is to be performed. In *H.L. v. Matheson,* 450 U.S. 398 (1981), the statute was upheld. In a class action, the plaintiff, an unmarried minor dependent upon and living with her parents, did not allege that she or any member of the class was mature or emancipated. As a result, the statute, as applied to an immature, unemancipated minor, dependent upon and living with her parents, passed constitutional scrutiny, and plaintiff lacked standing to assert a facial challenge.
2. The 34 states are: AL, AZ, AR, CO, DE, GA, IN, IA, KS, KY, LA, ME, ME, MA, MI, MN, MS, MO, NE, NC, ND, OH, OK, PA, RI, SC, SD, TN, TX, UT, VA, WV, WI, WY.
3. The 10 states are: AK, CA, FL, IL, MT, NV, NH, NJ, NM, OK.
4. This case is often referred to as *"Bellotti II,"* as it is the second of two Supreme Court decisions in this case. In the first, *Bellotti v. Baird,* 428 U.S. 132, (1976), the Court vacated the district court's judgment, holding that the federal court should have abstained from a decision until the Massachusetts courts had ruled on the construction of the statute.
5. There is no set definition of "maturity." To establish maturity, cases have considered activities such as good grades and school involvement; church or other community activities; responsibilities in her home; jobs, including baby sitting; money management; future educational, work, and family plans; relationships with adults; an understanding of her decision, and of the medical and court processes; and whether the minor already has a child.
6. If the court does not find that the minor is sufficiently mature to make the abortion decision or that she has not given her informed consent, the court separately must consider whether an abortion is in her best interest. This inquiry may consider the consequences for the minor if she is required to go through full-term pregnancy and childbirth, including factors like disruption to her education; burden on future plans; and inability to support a child.
7. Under this provision, a minor's parent might be notified of the abortion because the limited exceptions are not met, despite the fact that a court has determined, through the consent bypass procedure, that it is not in the minor's best interest to obtain her parent's consent. Because notice, while not a legal bar to obtaining the abortion, may act as a *de facto* bar, the minor may be put at risk where family violence, for example, is present.
8. The implementing rules, Utah Rule of Appellate Procedure 60 and Utah Rule of Juvenile Procedure 60, were issued under the Supreme Court's emergency rule making authority on the effective date, May 1, 2006. (Thereafter, the rules were open for public comment.) In an amendment on May 10, 2006, a requirement that a minor state she is a resident of Utah, suggesting that non-Utah residents may be unconstitutionally barred from seeking medical care in Utah, was deleted from Utah Rule of Juvenile Procedure 60(a). Both rules were amended on January 31, 2007.
9. It is unclear how the language providing for the appointment of an attorney and/or a guardian ad litem will be applied. The roles of an attorney-advocate and a guardian ad litem are markedly different. Indeed, the Utah Supreme Court has recognized, "that the role of a guardian ad litem is to represent the best interests of those not legally competent to represent themselves, primarily children . . . . [T]he duties and responsibilities of a guardian ad litem are not always coextensive with those of an attorney representing a party in an action." *State v. Harrison,* 24 P.3d 936, 942 n.4 (Utah 2001).
10. Before the rules were amended on January 31, 2007, Utah Rule of Juvenile Procedure 60(f) provided that if no hearing is held within three days, "the petition shall be deemed granted." This provision was deleted.

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DAVID L. GLAZIER, formerly Of Counsel with Howard, Lewis & Petersen, will join the firm as a member of the Corporate & Tax Section.

CHRISTOPHER E. BRAMHALL, formerly a Senior City Attorney with the Salt Lake City Attorney's Office, will focus his practice on real estate, water and municipal law.

Also joining the office as Of Counsel is

EUGENE H. BRAMHALL, former General Counsel for Brigham Young University.

Further, the following attorneys in the firm's Salt Lake City office will relocate to the firm's Utah County Office:

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Laying the Foundation

by Learned Ham

I don't like litigation. That's probably why I haven't done any for about 20 years. A good 20 years. A great 20 years. Well, that's one of the reasons, anyway. Another reason would be the senior partner who was eventually assigned to watch me in action. I guess they wondered how someone could be so convincing in an interview and so, well, less than convincing in court. Most of my oral arguments started out with a variation on one of the following themes: "This is probably a long shot, Your Honor, but…" Or, "It isn't every case that presents this Court with an opportunity to establish its reputation as a maverick in the District, but…" Or, "Fine. I remember very well what you said last time, and you can rule against me again if you want, Your Honor, but…" Or, the proven winner: "Your Honor, you and I may simply have to agree to disagree, but…" I thought the court would be impressed with my candor and I was certain the firm's lobby would be jammed with clients eager for my unique brand of passive aggressive advocacy. I do remember clients in the lobby. And they were there to discuss my litigation style. And there was a certain eagerness about them. I was probably just ahead of my time.

So the litigation section sent one of its fatherly alpha male silverbacks along to give me a little confidence – which actually helped in an awkward sort of way because I could at least take comfort in knowing that I wasn't the only one who failed at his job that day. He watched me argue a motion to sell dirt in a bankruptcy proceeding. I decided that the highest and best use of the real estate (which comprised pretty much all the assets of the debtor) would be to dig it up, carry it off in buckets, and sell it out of the trunk of a car to some limited partnership in Spanish Fork. I lost the motion, but avoided being held in contempt. So I told the client the results were mixed.

On other red letter days, Alpha Partner heard various judges say, "Counsel, I have neither the time nor the inclination to read your brief." "Counsel, was that your best authority?" And the clincher, "You just don't get it, do you?" Alpha Partner returned and dutifully reported the proceedings to the firm's litigation group – probably sounding like the distraught reporter who narrated that famous footage of the Hindenburg.

The partners decided I did my best thinking on my seat, instead of on my feet. They were probably right, and I've been there ever since – which is an uncomfortable way of describing a transactional practice. But as one of my former clients would always say after describing his latest hopeless predicament (usually involving a brilliant idea, followed by products liability, personal injury, and just a pinch of securities fraud), "There it sits." I was not born to be a barrister. (Which reminds me of a funny thing that happened the other day. I was working on a matter with a British firm and one of the lawyers needed to contact me at home. He called; no one was home; and he got the friendly greeting that says, "This number does not accept unidentified calls. If you are a solicitor, please hang up." He thought that was hilarious. I guess you had to be there.)

This flood of nostalgia was triggered by a recent bout of home remodeling. I won't bore you with the details. OK, if you insist. It started as a new kitchen. The avocado appliances and gold swirl Formica still looked as stunning as the day they were installed, but the orange plaid linoleum was getting a little tired in spots. After dismembering the kitchen, the contractor pointed out that the floor appeared to have sagged a little more than one might have expected. The design of the home was novel (some might say 'baffling,' others would say 'tortious'). The house itself was balanced on top of a tiny foundation – think of a mushroom – with the perimeter inadequately supported by wooden posts. The wooden posts weren't up to the job. The contractor recommended an architect. The architect recommended a structural engineer. The structural engineer recommended that we never stand under the house again. And he confessed that he'd feel a whole lot more comfortable if we would continue the conversation out in the driveway. Safely in the driveway, he gave us two options: (i) an attractive set of reinforced concrete pillars to replace the wooden posts and give our home the understated elegance of a freeway overpass; or (ii) do a little excavating and slide a full basement under the house.

One thing led to another, and after a series of pleasant surprises (miles of aluminum wiring, an uphill sewer drainpipe, mold in the sheetrock, two colonies of carpenter ants, beams that disappear into walls and end instead of spanning the length of

the structure, and some ingeniously creative code violations[1]), I now have a completely new house and no prayer of retirement. I know – join the club.

The whole episode reminded me of a simple commercial collection case I filed that spawned a Frankenstein counterclaim that refused to die. I won't bore you with the details of that one either, but the lead attorney for the defendant-counterclaimant later named her first born 'Robinson Patman' in celebration of how the little guy's future Ivy League post-graduate studies will be funded (and he should be just about ready to start them by now…).

But I haven't yet gotten around to mentioning the part of the remodeling that made me feel so nostalgic about the good old days of being a litigation associate. That was triggered by one of the most puzzling and humiliating experiences of my life (and that's saying a lot… after all, I've been through law school, divorce, and the Uniform Commercial Code): appearing before the Salt Lake County Board of Adjustment. We want to turn our carport into an enclosed garage, but we need a zoning variance to do that. In our neighborhood there is a 10 foot side yard setback requirement, and our carport is only 6 1/2 feet from the property line. I filed my variance application and paid my non-refundable $1,000 application fee for the privilege of groveling before the Board of Adjustment. The Board sits upon a big platform behind a huge hardwood desk with microphones while you cower in front of them in a dark little pit and beg for permission to improve your property. I apologized for the location of my carport and tried to explain that it really wasn't my fault because I was only eight years old and living in another city when it was built, and all I want to do is put walls on it and I'm here because I want to follow the rules. By the time they were finished with me, I had confessed to kidnapping the Lindbergh baby, in German so they would understand. But the kicker – I got my variance and all it cost me was $1,000 and my dignity. Passive-aggressive advocacy. I knew it would work. I still think there's a market for it. Alpha Partner, are you watching? I *was* ahead of my time.

1. Did I consider a home inspection when I bought the place? Of course not, why waste $250? I'm not stupid.

How to Advise Employers on Immigration Issues

by Roger Tsai

Immigration related liabilities are an increasing concern for employers. In 2006, the number of employers and employees arrested in immigration raids quadrupled, and immigration enforcement will continue to increase in 2007. While hiring undocumented workers has been illegal for twenty years, federal agencies have in the past year shifted from imposing minimal fines to serious criminal penalties against employers that knowingly hire undocumented workers.

For businesses like Kawasaki's, one of Baltimore's best-known sushi restaurants, the increased enforcement has pushed their business into bankruptcy. In April 2006, Kawasaki's two owners were arrested and charged with money laundering and alien harboring, crimes that carry penalties of ten years imprisonment. Immigration officials alleged that the owners exploited cheap illegal labor to maximize profits so that they could purchase luxury vehicles and other assets for themselves. Ultimately, the owners were forced to forfeit over a million dollars in cash and property. Investigations and raids have not been limited to small employers; multi-national corporations such as Swift & Company, Wal-Mart, and IFCO have also been the target of raids.

The message is clear: regardless of the size of the company or the industry, it is increasingly likely that your client's business could be the target of a civil or criminal immigration investigation. In 2007, the White House will add 171 new agents and an additional $41.7 million dollars towards worksite enforcement. More importantly, federal agents are shifting from civil fines towards tougher criminal charges such as harboring, money laundering, and alien smuggling to hold small business owners, human resource specialists, and even corporate executives accountable.

Swift & Company

On December 12, 2006, Immigration and Customs Enforcement (ICE) conducted one of its largest raids in history by arresting 1,282 workers at six Swift & Company meat processing plants, including one in Hyrum Utah.[1] ICE began investigating Swift in February of 2006 when immigrants in deportation proceedings confessed to working at the Swift plant in Iowa.[2] ICE had also received anonymous calls on its hotline and referrals from local police.[3] Due to the arrests, Swift lost 40 percent of its labor force and temporarily suspended operations at all six of its plants. The one day raid resulted in $20 million dollars of lost production, and Swift is now considering buy-out options.

A casual observer might ask how Swift could not have suspected that much of its labor force was undocumented. In fact, Swift, fearful of being penalized for hiring undocumented workers, had intensely scrutinized the documents of its workers – so much so that in 2001 Swift was forced to pay a $200,000 settlement to the Department of Justice Special Counsel for excessively scrutinizing documents of individuals who looked or sounded "foreign."[4] Federal immigration laws prohibit employers from considering foreign appearance, accents, or national origin in their hiring practices. Employers are caught between two federal agencies with opposing interests: ensuring that all workers are authorized for employment and protecting those who are lawfully here from discrimination.

I-9 Obligations

The Immigration Reform and Control Act of 1986 (IRCA) requires all employers to fill out an I-9 form, available at www.uscis.gov, for all employees hired after November 6, 1986, regardless of their immigration status.[5] The purpose of the I-9 form is to ensure the identity and employment authorization of workers. The form consists of two portions. In the first portion, the employee attests, under penalty of perjury, that he or she is a citizen, lawful permanent resident, or alien authorized to work temporarily. In the second portion, employers are required to record that they have examined original documents from a specified list verifying the employee's identity and eligibility to work. Employers must accept the documents if they appear "reasonably genuine" and relate to the person presenting the documents.

The I-9 must be completed within three days of starting work. The I-9 itself is not submitted to the ICE. Instead, the employer must keep the form on file for three years from the date of hire, or one year after the last day of work, whichever is later. The I-9 may be stored in its original form, microfilm, microfiche, or electronically. The only exceptions to an employer's I-9 obligation are independent contractors and sporadic domestic laborers. Employers are not required to complete I-9s for independent

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contractors, but remain liable if they know that contractors are using unauthorized aliens to perform labor or services.

Generally, in cases involving a corporate reorganization, merger, or sale of stock or assets, no new I-9 form is necessary as long as the employer obtains and maintains the previous employer's I-9s.[6] A successor employer is exempt by regulation from completing I-9 forms where the predecessor employer has fulfilled that obligation. An employer who has acquired a business and retains the predecessor's employees is neither expected to dispose of I-9s previously executed by its predecessor in interest, nor required to execute all new I-9s. However, if the succeeding company chooses to retain the old I-9 forms rather than completing new ones, the succeeding company will be liable for any omissions and defects in the original I-9s.[7] A successor employer may choose to complete new I-9's for all employees to ensure proper completion.

"Knowing" Employment

The IRCA prohibits any person or entity from knowingly hiring or continuing to employ an unauthorized worker. "Knowledge" may be either actual or constructive. Constructive knowledge is defined as knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. A non-exhaustive list of conditions which would establish a rebuttable presumption of constructive knowledge include employers who (1) fail to complete or improperly complete the I-9, (2) have information available to the company that would indicate that the alien is not authorized to work, or (3) act with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into the workforce.

Initially, courts interpreted the doctrine of constructive knowledge fairly narrowly. Constructive knowledge was specifically found where employers ignored notices by INS stating that certain employees were not authorized to work.[8] The Ninth Circuit overruled an administrative law judge's finding of constructive knowledge where the employer had failed to notice that the employee's name was misspelled on his Social Security card and a lack of lamination of the Social Security card.[9] The Court disagreed with the INS argument that constructive knowledge should be found where the employer failed to notice the delay in presentation of a Social Security card, the lamination of the card, the misspelling of Rodriguez as Rodriquez on the Social Security card, the lack of any reference to the United States of America on the card, and the use of two family names on Rodriguez's California drivers license but not on the card. In that case, the Ninth Circuit noted that "to preserve Congress' intent ... the doctrine of constructive knowledge must be sparingly applied."[10] More recent cases have broadened the interpretation of constructive knowledge to include instances where an employer was in possession of an I-9 that indicated the alien was out of status

and failed to re-verify.[11]

Social Security No-Match Letters

The Social Security Administration (SSA) is often the first government agency to give an employer notice of unauthorized employment. The SSA issues No-Match letters when the employee name and Social Security number provided on the W-2 form conflict with the Social Security Administration's records. In 2003, the SSA sent 126,250 No-Match letters to employers that corresponded to about 7.5 million incorrect W-2's. Many employers have received a No-Match letter, but few understand how to properly respond. Many employers find the No-Match letters confusing because they instruct employers not to fire workers solely on the basis of such letters, but failure to follow-up with the Social Security Administration may be deemed constructive knowledge of unauthorized employment.

Last April, seven managers of IFCO Systems, the largest pallet services company in the country, were arrested on criminal charges for failing to terminate workers after being repeatedly notified that more than half of IFCO's workers had invalid or mismatched Social Security numbers. Immigration agents consider the percentage of employees which were deemed a No-Match, and the employer's response, in determining good faith compliance with immigration laws.

On June 8, 2006, the Department of Homeland Security issued a proposed regulation describing the steps an employer should take after receiving a Social Security No-Match Letter. An employer who receives a No-Match letter should not terminate an employee solely on the basis of the letter. Instead, employers must 1) attempt to resolve the discrepancy within 14 days and 2) reverify employment authorization through the I-9 procedure within 63 days. If the employer completes a new I-9 form for the employee, it should use the same procedures as if the employee were newly hired, except that documents presented for both identity and employment (a) must not contain the Social Security number or alien number and (b) must contain a photograph. While this is only a proposed regulation, it represents the Department of Homeland Security's view of an employer's current obligations. It is critical that employers respond correctly, as failure to respond may impute constructive knowledge of unauthorized employment.

Good Faith Defense

If an employer has employed an undocumented worker, good faith compliance with I-9 procedures provides a "narrow but complete defense."[12] A person or entity that has complied in good faith with the requirements of employment verification has established an affirmative defense against unlawful hiring.[13] Completion of the I-9 form raises a rebuttable presumption that the employer has not knowingly hired an unauthorized alien, but the government may rebut that presumption by offering proof that the documents did not appear genuine on their face, that the verification was pretextual, or that the employer colluded with the employee in falsifying the documents.[14] The good faith defense does not apply to employers who fail to make corrections on the I-9 after being given 10 days notice, or employers who have a pattern and practice of hiring undocumented workers.[15] Therefore, setting proper policies and training employees who administer I-9 documents is critical to demonstrating good faith compliance.

Basic Pilot

Widespread fraudulent Social Security cards and drivers licenses have circumvented the federal government's archaic verification through the I-9 form. Because there are over twenty employment authorization and identity documents that are acceptable for I-9 purposes, employers have significant difficulty in determining which documents are genuine. Congress addressed this problem through a technology-based solution rather than stiffer penalties against document fraud or identity theft. Since 2004, the Department of Homeland Security has begun the Basic Pilot program, a free online verification system. Currently 14,000 employers participate in the program. Once employers are registered, they enter in the Social Security number and name of the employee into the web-based program, and receive confirmation on work eligibility within seconds.

After the Swift raids, Department of Homeland Security Secretary Michael Chertoff said, "if you enter into Basic Pilot and you do it in good faith, that will protect you against criminal and civil liability." Using Basic Pilot does not create bullet-proof liability protection, but an employer using Basic Pilot establishes a rebuttable presumption that the employer has not violated the immigration laws for that worker.[16] One major limitation to immunizing the entire company from liability is that Basic Pilot can only be used on new hires, not job applicants or current employees. The Basic Pilot program is not currently mandatory, but it may be in the future. Both of the 2005 Immigration bills considered in the U.S. House and Senate would have required the use of Basic Pilot for all employers, but neither bill was enacted.

State Involvement

Employers should take note that both comprehensive immigration bills passed in the House[17] and the Senate[18] included provisions that would have made the Basic Pilot Program mandatory for employers. States who are frustrated with the federal government's inability to stop undocumented hiring have taken matters into their own hands. In 2006, Colorado enacted two laws which will affect employers who do business with the state and all employers in the state.

The first law authorizes the Colorado Department of Labor and Employment (CDLE) to conduct audits of all employers in Colorado.

Beginning on January 1, 2007, all employers in Colorado are required to retain the I-9 forms and copies of the identity and employment authorization documents.[19] Unlike IRCA, the state law has no good faith defense, and requires employers to "verify" the information and documents of the employee. In addition to the I-9, a one page "Affirmation of Legal Work Status"[20] must be completed by the employer for each employee within 20 days of hire, and must be retained with the I-9.[21] Employers who fail to comply with this law face fines of $5,000 upon the first offense, and $25,000 on the second or any subsequent offense. This first law may be challenged on the basis that Congress has specifically preempted states from taking action in imposing civil and criminal sanctions against employers.[22]

The second Colorado law, effective August 7, 2006, requires employers who have public contracts for services with the state, city, or county to participate in Basic Pilot.[23] Because state regulations have not been issued concerning the law, it is unclear whether the law includes employees working on the state contract regardless of whether they work in Colorado.[24] Employers who have public contracts must verify that subcontractors also comply with Basic Pilot. Where a publicly contracted employer has actual knowledge that a subcontractor has hired an undocumented worker, the employer has a duty to inform the contracting state agency within three days. While there are no civil or criminal penalties for non-compliance, an employer found to be in breach will be held liable for actual and consequential damages for breach of contract. A public list of non-complying employers will be maintained by the Secretary of State for two years.

Georgia passed its own State Bill 529 and, beginning July 1, 2007, will require employers who have public contracts to use Basic Pilot.[25] It is likely that more states will take action, as nine states have introduced similar legislation. Many of these proposals contain employer verification requirements and additional penalties for employers who hire unauthorized workers.

Two Utah bills, House Bill 127 and 156, were introduced by Republican representatives in an attempt to make Basic Pilot mandatory for government contractors and potentially all employers. Neither bill was able to obtain committee approval in the 2007 legislative session.

Conclusion

With the Congressional debates on an immigration reform bill, worksite enforcement will continue to intensify in 2007. As with the Immigration Reform and Control Act of 1986, which legalized millions of workers while imposing new obligations on employers, any new immigration reform bill will likely impose a higher standard of due diligence required of employers. With the government's renewed enforcement efforts, simple precautionary

measures such as internal audits and strict compliance with I-9 related regulations are now more important than ever.

1. Press Release, U.S. Immigration and Customs and Enforcement, U.S. Uncovers Large-Scale Identity Theft Scheme by Using Illegal Aliens to Gain Employment at Nationwide Meat Processor. (Dec. 13, 2006) (on file with author).
2. Sudeep Reddy, *Government Raids of Swift Plants Add to Growing Immigration Debate,* The Dallas Morning News, Dec. 14, 2006.
3. *Id.*
4. Staff Reports, *Swift Responds to Plant Raids,* The Greeley Tribune, Dec. 22, 2006.
5. 8 C.F.R. § 274a.2(b) (2006).
6. 8 C.F.R. § 274a.2(b)(1)(viii)(7) (2006)(an individual continues his or her employment with a related, successor, or reorganized employer, provided that the employer obtains and maintains from the previous employer records and Forms I-9 where applicable).
7. *U.S. vs. Nevada Lifestyles Inc.,* 3 O.C.A.H.O. 518 (1993).
8. *Mester Mfg. Co. v. INS,* 879 F.2d 561 (9th Cir. 1989); *New El Rey Sausage Co. v. INS,* 925 F.2d 1153 (9th Cir. 1991).
9. *Collins Foods International Inc. v. INS,* 948 F.2d 549 (9th Cir. 1991).
10. *Id.* at 555.
11. *INS v. China Wok Restaurant, Inc.,* 1994 WL 269371 (O.C.A.H.O.).
12. *United States v. Walden Station, Inc.,* 8 O.C.A.H.O. no. 1053, 810, at 813 (2000), 2000 WL 773098 (O.C.A.H.O. 2000), *See* Immigration and Nationality Act § 274A(b)(6)(A), 8 U.S.C.A. § 1324a(b)(6)(A) (2005).
13. *Id.*
14. H.R. Rep. No. 99-682, at 57 (1986) as quoted in *Collins Foods International Inc. v. INS,* 948 F.2d 549 (9th Cir. 1991).
15. Immigration and Nationality Act § 274A(b)(6)(B)-(C), 8 U.S.C.A. § 1324a(b)(6)(B)-(C) (2005). Immigration Reform Act § 411. "Technical or paperwork violations of the employer sanctions provisions are exempted, as long as there has been a "good faith attempt" by an employer to comply with the verification requirement. The exemption will not apply if the employer fails to cure the violations within a ten-day window or if the employer has engaged in pattern and practice violations. This section applies to violations occurring on or after September 30, 1996."
16. A rebuttable presumption is established by 402(b) of Immigration Reform Act that the Employer has not violated section 274A(a)(1)(A) of the Immigration and Nationality Act with respect to the hiring of any individual if it obtains confirmation of the identity and employment eligibility of the individual in compliance with the terms and conditions of Basic Pilot.
17. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).
18. S. 2611. 109th Cong. (2005).
19. Colo. Rev. Stat. § 8-2-122 (2) (2007).
20. Affirmation of Legal Work Status, Colorado Department of Employment and Labor, www.coworkforce.com/ice/AffirmationOfLegalWorkStatus.pdf.
21. *Id. See also* Colorado Dept. of Labor FAQ's, (Jan. 10, 2007)
22. 8 U.S.C.A. § 1324a(h)(2) (2005). The provisions of this section preempt any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.
23. Colo. Rev. Stat. § 8-17.5-101 (2007)
24. Colorado Dept. of Labor FAQ's. (Jan. 10, 2007) (available as AILA Doc. 07011073), The Colorado DLE has interpreted HB 1343 to apply to out-of-state employers and employees, so long as they are performing a service under a public contract.
25. Ga. Code Ann. § 13-10-91 (2007).

Mediation Confidentiality and Enforceable Settlements: Deal or No Deal?

by Karin S. Hobbs

EDITOR'S NOTE: On May 2, 2007, the Utah Supreme Court will hear argument on an interlocutory appeal involving a trial court's order requiring an attorney to testify regarding mediation discussions.

After hours of mediation, the parties have reached a "deal" on the principal issues. The parties want closure. Attorneys begin preparing the written agreement to ensure the deal is clear, complete, final and enforceable. Mediation discussions continue. Emotions run high as the parties work through the final issues. If the "deal" is not written and signed, is there an agreement? Are the discussions confidential? How do attorneys ensure confidentiality of mediation? How do attorneys create an enforceable settlement agreement and avoid court action?

Why is confidentiality so important? Confidentiality is a critical element of successful mediation. In order for the mediator, the attorneys and the clients to understand the central issues, the motivations, the pressure points and the risks of litigation, the participants must be assured the discussions cannot and will not be disclosed to others so they can talk openly. Frequently, some of the motivating forces behind lawsuits are legally irrelevant and yet exceptionally important to understanding the conflict and facilitating resolution. Frequently, clients disclose private events, perceptions or issues in mediation they would not want disclosed to anyone. Explaining their concerns and fears is often critically important to them in order to resolve the conflict. If discussions with the mediator are not confidential and privileged, the mediation process, the mediator's role and the potential for resolution are significantly diminished.

In preparing for mediation, attorneys explain to clients that mediation is confidential. "These are settlement discussions and cannot be disclosed in court," attorneys tell their clients. "You can feel free to talk to the mediator. She won't disclose it to the other side if you tell her the information is confidential." In the opening session of the mediation conference, the mediator explains that the discussions are confidential and privileged. All participants sign an Agreement to Mediate, stating they understand the mediation process, the mediator's role and the confidentiality of the discussions. Mediation proceeds based on an understanding that the mediation discussions are confidential.

Despite mediation confidentiality, courts are increasingly asked to enforce settlement agreements reached in mediation, jeopardizing the confidentiality of mediation discussions.[1] Confidentiality and privilege, two different yet intertwined concepts, are often used interchangeably. Confidentiality means the mediation communications are not disclosed. The mediation privilege is a rule providing that the confidential communications are not admissible in court. Utah recently enacted the Uniform Mediation Act, articulating guidelines for mediation privilege and mediation confidentiality. Attorneys can take steps to plan for and create enforceable settlement agreements to ensure that the process remains confidential and privileged.

THE UNIFORM MEDIATION ACT

Mediation Communications

On May 1, 2006, Utah became the eighth jurisdiction to adopt the Uniform Mediation Act (UMA).[2] The UMA defines mediation communication as "conduct or a statement, whether oral, in a record, verbal, or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." Utah Code Ann. § 78-31c-102(2) (2006). Thus, discussions with a mediator before, during or as a continuation of the mediation discussions are both confidential and privileged under the UMA. When the mediator meets with the attorney and client before mediation or in a follow-up meeting, the protections of confidentiality and privilege continue to apply.

Mediation Confidentiality

1. Prior to the UMA

Even prior to the creation of the UMA, courts throughout the country recognized mediation confidentiality as essential to effective mediation because it allows a candid and informal exchange of information.[3] "The process works best when parties

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speak with complete candor, acknowledge weaknesses, and seek common ground, without fear that, if a settlement is not achieved, their words will later be used against them in the more traditionally adversarial litigation process."[4] Courts agree that "[w]hat is said and done during the mediation process will remain confidential, unless there is an express waiver by all parties or unless the need for disclosure is so great that it substantially outweighs the need for confidentiality."[5] Further, "[t]he mediation process was not designed to create another layer of litigation in an already over-burdened system."[6]

2. Confidentiality under the UMA

The UMA, finalized in 2003, solidifies and reinforces mediation confidentiality. Mediation confidentiality, according to the drafters of the UMA, encourages parties to have an informal and candid exchange of ideas.[7] Frank discussions are essential to opening constructive and creative dialogue and to enabling parties to discover ways to resolve their disputes independent of the judicial system.[8] According to the Act, "[t]his frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and adjudicatory processes."[9]

The Utah UMA specifies that mediation communications are "confidential to the extent agreed by the parties or provided by other law or rule of this state" unless subject to the open and public meetings statutes or government access to records laws. Utah Code Ann. § 78-31c-108 (2006). Thus, the Act provides for a general protective umbrella of confidentiality over mediation communications.

3. Confidentiality Rules and Statutes in Utah

Utah's Alternative Dispute Resolution Act also provides that "[u]nless all parties and the neutral agree, no person attending an ADR proceeding…may disclose or be required to disclose any information obtained in the course of an ADR proceeding, including any memoranda, notes, records, or work product." Utah Code Ann. § 78-31b-8(4). Further, "an ADR provider…may not disclose or be required to disclose any information about any ADR proceeding to anyone outside the proceeding…." Utah Code Ann. § 78-31b-8(5).

Further, the Utah Rules of Alternative Dispute Resolution provide that "[m]otions, memoranda, exhibits, affidavits, and other written, oral or other communication submitted…to the ADR provider…shall be confidential and shall not be made a part of the record or filed with the clerk of the court. Neither shall any such communication be transmitted to the judge to whom the case is assigned…."[10] The ADR provider "shall not disclose to or discuss with anyone, including the assigned judge, any information about or related to the proceedings, unless specifically provided otherwise in these rules. ADR providers shall secure and ensure the confidentiality of ADR proceeding records."[11]

Rule 4-510 of the Utah Rules of Judicial Administration also states that "No ADR provider may be required to testify as to any aspect of an ADR proceeding except as to any claim of violation of Rule 104 of the Utah Rule of Alternative Dispute Resolution which raises a substantial question as to the impartiality of the ADR provider and the conduct of the ADR proceeding involved."

Thus, the Utah UMA, the Utah Alternative Dispute Resolution Act, the Utah Rules of Alternative Dispute Resolution and the Utah Rules of Judicial Administration all provide that mediation discussions are not to be disclosed to others. In one narrowly drawn Utah appellate case, the Utah Court of Appeals enforced the confidentiality of court-ordered appellate mediation stating that counsel, the parties, and the mediator could not disclose any statements, comments, or notes made during the initial mediation conference or in related discussions.[12]

Mediation confidentiality is more expansive than confidentiality in other professional relationships. In many professional relationships, the duty of confidentiality, such as the attorney/client relationship and the physician/patient relationship, the obligation restricts the professional only and not the client or patient.[13] For example, in the attorney/client relationship, the client is free to disclose conversations with the attorney, whereas the attorney is prohibited from doing so.[14] However, mediation is different. In mediation, the duty to maintain confidentiality extends *to all participants*

from all participants, including third-parties, "to the extent agreed to by the parties or provided by other law or rule of this state." Utah Code Ann. § 78-31c-108 (2006). The Utah UMA specifically allows third party involvement in mediation and allows third-parties the protection of mediation confidentiality and the mediation privilege.

Mediation Privilege

So, how does the mediation privilege mesh with mediation confidentiality? Confidential mediation communications, under Utah evidentiary law, are settlement discussions under the federal and state rules of evidence and are not disclosed in court.[15] The UMA specifically provides for a mediation privilege and articulates waivers of the privilege and exceptions to the privilege. For example, in the medical profession, patient records are confidential; however the physician/patient privilege regulates whether the information can be admitted as evidence in court. Similarly, mediation communications are confidential, and the privilege governs admission of the confidential information in court.

Waiver of the Privilege

How can the privilege be waived, thus allowing the mediation communications to be admitted as evidence in a proceeding? The UMA provides that the mediation privilege may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and is expressly waived by the mediator and by the third party participants. Thus, in order to waive the privilege, *everyone involved* in the mediation must waive the privilege in a record or in a proceeding.

The Act further states that a person may be precluded from asserting the privilege if a person discloses or makes a representation about a mediation that prejudices another person in a proceeding. Utah Code Ann. § 78-31c-105(2) (2006). Thus, attorneys, clients, mediators and third-party participants in mediation should be forewarned that they may waive the privilege if they make a statement about mediation communications. For example, if a client takes confidential mediation discussions to the media and the disclosure prejudices the other side, the privilege may be waived. If the privilege is waived, it is only waived to the extent necessary for the person to respond to the representation or disclosure.

All mediation participants should be on notice that disclosure of confidential information may leave a crack open in a door they wanted sealed shut. For example, if a mediation participant learns confidential information during mediation, disclosure of that information may give rise to a lawsuit for breach of contract, *i.e.,* the mediation agreement. If damages are proven, a plaintiff may prevail on the breach of a confidentiality provision in a mediation agreement. All mediation participants should understand that breaching the Agreement to Mediate and mediation confidentiality can lead to future problems and potential lawsuits.

Exceptions to the Privilege

The UMA also provides exceptions to the mediation privilege. Prior to the UMA, case law developed exceptions to the mediation privilege. In 1999, Magistrate Judge Wayne Brazil jolted the mediation community when he ordered a mediator to testify.[16] In *Olam v. Congress Mortgage Company,* a woman participated in mediation late into the night and signed an agreement. She then moved to set aside the agreement, claiming that she was physically, intellectually and emotionally incapable of giving consent. The court held that the best evidence of her capacity to consent was testimony from the mediator. Both parties waived their right to maintain the confidentiality of the mediation communications. The mediator did not join in that waiver, but Judge Brazil ordered

the mediator to testify in a sealed proceeding. Judge Brazil reasoned that the public interest in disclosing the confidential mediation discussions outweighed the interest in confidentiality. Although this case has been distinguished due to the parties' waiver of confidentiality, the case created great concern among the mediation community and is often cited for the proposition that the interest in confidentiality may be weighed against the public interest in disclosing the confidential information[17]

Mediation confidentiality has also been deemed waived when an attorney failed to object to admission of or evidence of events occurring in mediation.[18] In addition, a juvenile's significant constitutional right to a defense has been held to outweigh mediation confidentiality.[19]

Prior to May 1, 2006, attorneys relied on the evidentiary rule that evidence of conduct or statements made in compromise negotiations is not admissible.[20] The Utah UMA creates a specific mediation privilege and extends it to the parties, the mediator and third-party participants. The mediation communication is not privileged if the mediation communication is demonstrated "in an agreement evidenced by a record signed by all parties to the agreement." Utah Code Ann. § 78-31c-106(1) (2006). Thus, if all parties sign an agreement, that agreement is not privileged. In addition, there is no privilege if the mediation communication is available to the public under the public meeting laws or if a threat is made to inflict bodily injury or to commit a crime of violence. Also, the Act states there is no mediation privilege if the mediation communication is used to plan a crime or if it is sought or offered to prove or disprove a claim or complaint of professional malpractice. Utah Code Ann. § 78-31c-106(1)(b) – (e) (2006).

Finally, the Utah UMA states that mediation communications are not privileged if "there is a need for the evidence that substantially outweighs the interest in protecting confidentiality." Utah Code Ann. § 78-31c-106(2)(b) (2006). To qualify under this provision, the mediation communications must not otherwise be available and the communication must be sought or offered either in a felony or misdemeanor proceeding *or in a proceeding regarding a contract arising out of mediation.* Thus, if one of the parties seeks to enforce a mediation agreement, the court may find no mediation privilege if a more important countervailing public interest is involved, the evidence is not otherwise available and the communication is sought in an action to enforce a mediated agreement. Utah Code Ann. § 78-31c-106(2) (2006)

PRACTICAL STEPS TO MAINTAIN CONFIDENTIALITY AND AVOID COURT ACTION

Prepare Settlement Agreement in Advance of Mediation

Mediation has expanded enormously. As a result, actions to enforce mediated agreements are becoming more common. Although the UMA and other rules offer a veil of confidentiality, what practical steps can attorneys take to avoid court action and preserve confidentiality?

Prior to the mediation conference, attorneys should envision standard provisions of a settlement agreement. Attorneys can either arrive at the mediation conference with a laptop computer, a partially drafted settlement agreement or prepared staff members standing by to compose and/or email documents to the mediation. Clients are also excellent sources of this preparation, as they often identify unknown and important terms.

Create and Sign a Written Agreement in Mediation

At the close of the mediation conference, attorneys and clients should create and sign a written agreement addressing all essential terms, if possible. Additional time spent in mediation drafting and signing the settlement agreement, while everyone is focused on settling the case, will significantly reduce the most common reason to explore confidential mediation communications. How can you accomplish this effectively at the end of a long day when the participants are exhausted? What if a party voices a desire to prepare the agreement the following day or a desire to "sleep on it." At this point, the clients and attorneys are required to think about the benefits of closure versus the risk the agreement may fall apart. Both options are available. If a signed agreement is not possible due to lack of information, insufficient time or complexity of the issues, the parties may want to continue the process. If enough of the information is available, continuing the process is generally not helpful. However, some cases require more than one or two mediation sessions. In addition, attorneys should clarify for clients the impact of leaving the mediation without signing an agreement, the loss of momentum, and whether either party will be held to any statements made during the mediation process. Momentum is another consideration. At the end of the negotiation, parties have momentum and are more likely to concede on minor issues.

Desire for Finality vs. Reluctance to Enter an Agreement

Finalizing the agreement in writing is the final stage of the mediation process. Momentum is often lost if the parties leave mediation without an agreement. Frequently, if an agreement is not signed on the day of mediation, one party retracts the agreement. Attorneys and clients can prepare for this tension of reluctance to enter an agreement versus desire for finality by understanding this tension exists and knowing this tension is a common final step in resolving conflict. Mediators and attorneys can facilitate closure. As the agreement is prepared, food can be delivered, rejuvenating the participants. Clients can take a walk around the block, check their email or run an errand. Just the brief break assists the parties in clearing their minds and preparing to sign the final agreement.

Standard Provisions in Settlement Agreements

Standard provisions in settlement agreements include releases

of liability, resolution of all claims and defenses, dismissal of lawsuits, timelines and security for payments, confidentiality clauses, cooperation in preparing documents necessary to effectuate the agreement, and payment of attorney fees. The parties may want their agreement to state that in the event of a dispute regarding the agreement, they will return to mediation prior to initiating court action. As with all other provisions of the agreement, this provision could be negotiated, including the process to be used, the allocation of costs and other terms that serve the parties' interest in resolving the dispute and avoiding the litigation process. To avoid claims of duress, agreements should also state that the parties enter the agreement freely, voluntarily, without duress or coercion and with the advice of counsel.

Standard Settlement Agreement Provisions:

- Mutual releases of liability
- Dismissal of lawsuit(s)
- Timelines for payments, interest, security, liens
- Confidentiality clauses
- Cooperation in preparing documents necessary to effectuate agreement
- Payment of attorney fees
- Resolution of all claims and defenses
- Dispute resolution clauses, i.e., mediation, arbitration, allocation of costs
- Agreement entered freely, voluntarily, without duress or coercion and with the advice of counsel

Achieving Closure

The goal of the mediation process is to empower parties with information and a process for solving their own issues by mutual agreement without court intervention. If the process produces another layer of litigation, the mediation process will suffer and parties will hesitate to engage in frank and productive settlement discussions. After the agreement is signed, the clients generally feel relief. They have compromised more than they wanted but are relieved the conflict is resolved. Carefully crafted settlement agreements insulate the parties from court action, and allow parties to resolve the conflict, move on and focus their emotions and energy on other more positive aspects of their lives.

1. *Simmons v. Ghaderi,* 143 Cal. App. 4th 410 (Cal App. 2d Dist.) (2006).
2. Utah joins Washington D.C., Iowa, Nebraska, Illinois, Ohio, New Jersey, and Washington. Vermont was the ninth state to adopt the UMA, and the UMA is pending in four states: New York, Massachusetts, Connecticut and Minnesota.
3. *Foxgate Homeowners Association v. Bramalea California, Inc.,* 26 Cal.4th 14 (Cal. 2001); Sharp, D., *Mediation Confidentiality,* AAA Handbook on Mediation (2006). Hoffman, D. and Shemin, V., *The Uniform Mediation Act: Upgrading Confidentiality in Mediation,* Massachusetts Lawyers Weekly, July 18, 2005.
4. *Princeton Ins. Co. v Court of Chancery of Delaware,* 883 A.2d 44, 51 (Del. 2005); *see also, Foxgate Homeowners Association v. Bramalea California, Inc.,* 26 Cal.4th 1, 14 (Cal. 2001).
5. *Lehr v. Afflitto,* 382 N.J. Super. 376, 391, 889 A.2d 462, 472 (N.J. 2006).
6. *Id.*
7. *Uniform Mediation Act,* Final Version with prefatory remarks, National Conference on Commissioners of Uniform State Laws (2003).
8. *Id.*
9. *Id.*
10. Utah Rule of Alternative Dispute Resolution 103.
11. *Id.*
12. *Lyons v. Booker,* 982 P.2d 1142 (Utah 1999).
13. Utah Rule of Evidence 506(c); *DeBry v. Goates,* 999 P.2d 582 (Utah 2000).
14. Utah Rule of Professional Conduct 1.12
15. Utah Rule of Evidence 408; Federal Rule of Evidence 408.
16. *Olam v. Congress Mortgage Company,* 68 F.Supp.2d 1110 (N.D. Cal. 1999)
17. *Eisendrath v. Superior Court,* 109 Cal.App.4th 351 (2003) (participants to mediation cannot impliedly waive their confidentiality rights by challenging the agreement reached in mediation.)
18. *Regents of University of California v. Sumner* 42 Cal. App.4th1209 (1996).
19. *Rinaker v. Superior Court,* 62 Cal.App.4th 155 (Cal. 1998) (Prior inconsistent statements made by a witness at mediation may be introduced at a subsequent delinquency hearing.).
20. Utah Rule of Evidence 408, which is identical to Federal Rule of Evidence 408.

The Strength is in the Research

by Duane L. Ostler

America in the mid 1780s was in turmoil. The sacrifice of the sons of liberty had won the revolutionary war, but not the peace. The economy was tattered and practically nonfunctional because of the ongoing British embargo. The various states were constantly quarreling about who should pay war debts. There was much resentment among the common people who had borne the suffering of the war against those who had profited by it. And in the midst of it all, the Continental Congress was powerless to do anything about the deteriorating situation.

At a time like this, who in their right mind would think of doing research? After all, how could research possibly solve problems such as these? Fortunately for us, however, one enlightened individual did just that. He made a diligent study of all governmental systems, ancient and modern. He pondered their strengths and weaknesses, and contemplated their days of greatness and what had brought about their eventual downfall. Then he researched some more.

Based on the core principles he found in his research, he constructed a model of government. He then gathered with other men of influence and presented his plan. His name was James Madison. The plan he presented was the Virginia Plan, on which our constitution is based. The gathering was the constitutional convention, which adopted Madison's plan, with a number of changes, as a new system of government. No one else had come prepared with such a proposal. Although some delegates from the smaller states hurriedly created an alternate plan in a desperate attempt to create more rights for small states, their plan was quickly discounted as inadequate since it did not have as strong a foundation of research as Madison's plan. In short, research changed the course of history.

So Research Got Us A Constitution, But What Can It Do For Me?

One of the least appreciated and most frequently overlooked tools in the attorney's arsenal is that of legal research. While all attorneys know how to do it (or at least think they know how), and frequently engage in it in some fashion during their practice, surprisingly few ever come to understand how powerful it can be.

Creative and thorough research can make or break your case. After all, how can you lose if you have a dozen cases, directly on point, supporting your position? Research will make a strong case unbeatable. Even if your case is not that great, referring to cases and other legal sources can give it added strength. Indeed, research in a mediocre case will tell you which strong areas to emphasize, and which weak ones to avoid. And if your case is extremely weak, research will give you the basis for a heart to heart chat with your client that may save you both a great deal of embarrassment.

While research at all stages of a case is vital, it is particularly important to do research early in the case, before filing the complaint or answer. Not only is such preliminary research required by Rule 11, but it will also help you know where you are, and where to focus your discovery – and whether you even have a case at all, or should try to settle. You should never spew causes of action or defenses in your pleadings without first verifying them with legal research.

Many attorneys fail to realize how devastating things can be if research is not performed. Consider, for example, the case of *State v. Moritzsky,* 771 P.2d 688 (Utah App. 1989), in which a criminal defendant prevailed on his ineffective assistance of counsel claim because, as the court stated, "it appears to us that counsel merely overlooked the statutory presumption by failing to check the 'pocket-part' of the Utah Code." *Id.* at 692. Or consider the following thoughts of Justice Zimmerman from his dissent in *Kaiserman Assoc. Inc. v. Francis Town,* 977 P.2d 462 (Utah 1998).

> This case is before us only because [counsel] failed to do even minimal legal research before garnishing Francis Town's assets ... [B]asic legal research illustrates that governmental entities are exempt from garnishment proceedings. It may be the case, as [counsel] argues, that the governmental immunity from garnishment is little-known. This is especially true for attorneys who have done no research ... [T]he fact that the statute is not common knowledge is no excuse for failing to conduct the basic research which would reveal its existence."

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Id. at 466.

While legal research can help avoid a scathing rebuke such as this, there is a more serious and basic reason it should be performed. If not, the attorney may face a malpractice claim or Rule 11 sanctions. In *Taylor v. Estate of Taylor,* 770 P.2d 163 (Utah App. 1989), the Utah Court of Appeals noted that Rule 11 requires at least some inquiry by the attorney into both the facts and the law before filing pleadings or motions. In *Taylor,* the court granted Rule 11 sanctions, stating that the client or his attorney failed to properly research the case. The court remanded to the trial court to determine whether the client or his attorney should pay the sanctions. *Id.* at 170-71.

Legal Research May Save My Skin. So, How Can Everybody In My Firm Do It Better?

The remainder of this article discusses a four-step practical approach to accomplish quality, effective research. These four steps are incredibly simple, and amazingly under-used. The steps are as follows:

1. Be sure you are researching the right question.
2. Put some time into research, and verify your conclusion.
3. Don't overlook important sources.
4. Stop and rethink your original question often. Has it changed?

Each of these steps will be discussed in turn.

Be Sure You Are Researching The Right Question

This is probably the most important and least recognized point for solid, quality research. Usually, most attorneys think they already know the question that needs to be researched. (Indeed, many think they also know the answer too, before doing any research). But experienced researchers know that a careful evaluation of the question about to be researched may make the difference between average research findings, and those that will give you a winning argument.

Consider for example that you represent a client making an insurance claim for illness caused by mold in his house. The insurer denies coverage, claiming that mold is a pollutant excluded under the policy, even though mold is not specifically listed as a pollutant. Your initial gut reaction would be to research cases about mold as a pollutant, right?

While you'll find some great cases, you'll be missing out on research that would make all the difference in your case. You need to take the time to carefully think about the question. What is mold anyway? A by-product of moisture, right? What is moisture? Water. Is water excluded under the policy? Not likely. If mold exists, it had to be caused by water. Harm caused by water is therefore what you really want to be researching for. And if you do, you will find the case of *Alf v. State Farm,* 850 P.2d 1272 (Utah 1993), which *does not* mention mold and therefore would not have turned up under your other search, but which is directly on point in your case. *Alf* describes the "efficient proximate cause doctrine," under which the insurer is still liable even if mold is excluded under the policy, if water was the real cause of harm and the policy has no "lead in" clause.

As this example illustrates, it is crucial to make sure you are researching the right question to start with. You need to think carefully about your case for awhile, and what you are really trying to find. Trust your instincts. If some claim in your case seems inequitable or wrong, or if you have a gut feeling that something is there but you are not sure what, trust your feeling and articulate it as best you can in your computer search terms.

The average attorney will dive into research without thinking. Don't yield to this temptation. Spend the time to just sit and think about your case, to know what question you should research. Charles Schulz, creator of the famous Peanuts comic strip, said that when people came to where he was working they expected to see him drawing, so he would grab a pen and doodle. But when they were gone, he would gaze into space, seeming to daydream, and do his most important and creative work.

Put Some Time Into Research, And Verify Your Conclusion

Quality research takes time. Few researchers can find the answer to a complex legal question in an hour or two. If you rush the research, you will probably miss something. Of course you must be mindful of your client's pocketbook and try to use your time efficiently. But your client must also be told that the surest way to victory in his case is to spend the time needed to do the research.

Consider for example that you are asked to research an issue about gravel pits. The city will not allow your client to extract gravel from his newly acquired property, even though extraction occurred there in the past and the adjacent property has an active gravel pit. Your initial research uncovers the case of *Gibbons & Reed v. North Salt Lake City,* 431 P.2d 559 (Utah 1967), which is helpful in indicating that further extraction should probably be allowed. However, you sense that you need to find more. If you are willing to put in the time to do the research, you will discover the "diminishing asset doctrine," which allows expansion of a mining operation throughout the parcel and sometimes across adjacent parcels, even where there is a lapse of several years between extraction efforts. This doctrine may make the difference in your client's case.

There is a great temptation for those who are impatient or inexperienced at research to stop once they think they have the answer. Do not yield to this temptation. While you should not research endlessly, and it is an art to know when to stop, you

should not end your research until you have found the majority position, and verified that it is followed in your jurisdiction.

While not all research projects require discovery of the majority and minority positions, you should always keep researching until you verify that your findings are still followed in your jurisdiction. You should especially make sure that the cases you have found have not been overturned by the legislature, as often happens when the legislature dislikes a holding by the courts. Therefore, you should take the time to search the codes after completing your caselaw research, since recent statutory changes often cannot be found in any other way.

Remember to be thorough and not stop until you have found and verified the answer. You can almost always find a case that supports your position, but you must find more. Find the cases that are against you, that your opponent may or may not find, so that you will know how to prepare for what may be thrown your way. Don't stop until you find the majority rule and confirm that it is good law in your jurisdiction. In short, don't stop until you become an expert in the area of law you have been asked to research.

Don't Overlook Important Sources

Most attorneys when faced with a research question think primarily of searching case law in Lexis or Westlaw. However, there are a number of other sources that can greatly assist the researcher in quickly finding what he needs, and which sometimes will make all the difference in his case.

Where the question to be researched is a general one, it is often helpful to start by looking in Am. Jur. 2d or the American Law Reports (ALR). Consider for example that you are asked to find whether a buyer who sues for specific performance of a contract is also able to request damages, or if he is limited to specific performance as his sole election of remedies. While you could surely find the answer in case law, a quick look in 71 Am.Jur.2d *Specific Performance* § 235 gives the answer: "it is not erroneous as a matter of law to award both damages and specific performance." Subsequent sections of Am. Jur. 2d refer to several Utah cases that support this proposition in respect to buyers' claims, although the law is different in respect to sellers' claims.

The ALR can also be a powerful tool for the researcher since it contains summaries of the majority and minority positions of the states on most legal issues. The beauty of the ALR is that someone else has already done the research for you. In addition, hornbooks on various fields of the law can also be helpful, such as *Utah Real Property Law* by Thomas and Backman, and *Utah Evidence Law* by Kimball and Boyce. There are also a number of excellent treatises that have become preeminent in their field, such as *Powell on Real Property* and *Corbin on Contracts.* Likewise, the Restatements of the Law can often be helpful, and are often quoted by the courts. Finally, regional digests such as *Pacific Digest* compile cases by topic, and can often be a quick way to find a case in your jurisdiction that would take much longer to find by a web-based search. If you can't find a quick answer to your question in one source, switch to another.

Annotated codes should always be consulted when reviewing statutes. In addition, a search for keywords in the Utah or federal codes online can sometimes turn up surprising results. The Utah administrative rules also provide valuable insights into such things as definitions of terms and administrative practices.

Sometimes even sources outside the statutes and rules can provide valuable information to the researcher. Consider for example that you are asked to find out more about reservation agreements for unplatted subdivision lots which are soon to be offered for sale. While Utah Code Ann. § 10-9a-611(1)(a) says it is unlawful for a developer to sell lots before they are platted, it does not mention anything about reservation agreements. Interestingly, reservation agreements are also not mentioned in any Utah administrative rules, and there appear to be no cases that define just what they are. It would be easy to stop your research and conclude that reservation agreements are a nebulous creation by developers that can be written any way they want. However, such is not the case. The Utah Division of Real Estate has clearly articulated what a reservation agreement should be, and what it needs to say. Reservation agreements are discussed in the August 2001 edition of *Utah Real Estate News,* which can be found online on the website for the Utah Division of Real Estate. While this information about reservation agreements does not have the full force of law, it is still extremely compelling information about reservation agreements.

Stop And Rethink Your Original Question Often. Has It Changed?

When involved in extensive research, it can be easy to lose sight of the goal and become mired in time consuming, unnecessary research on needless details. To avoid getting sidetracked, it is helpful to stop researching occasionally and review what has been found so far, to confirm that you are still going in the right direction. It is extremely disconcerting to realize (and rather difficult to explain to your client) that you have spent hours researching the wrong question.

At these times, you should rethink your original research question. Usually the results of your research will be different than what you expected. Based on these results, you may need to readjust and change the focus of your research, and pursue the new leads that you have found. You should also verify that your research efforts are being productive, and what further research is necessary.

Consider for example that you have been asked to research the "after acquired title doctrine" found in Utah Code Ann. § 57-1-10. Under this doctrine, a real property conveyance by a

non-owner is valid if he later obtains title. Your hope is to find a way around the doctrine in respect to an easement signed by a mortgage beneficiary who later foreclosed and obtained title. After some initial research, you stop to reassess your case in light of the information you have found so far. Upon reviewing your research, you see the suggestion in some cases that the signing party should be identified as the grantor in the conveyance. You notice that your easement does not identify the mortgage beneficiary as the grantor. Rather, the grantor is identified as the then-owner, and the mortgage beneficiary only signed the easement at the bottom. If you conduct further research on this new issue of identification of the grantor you will find the way out that you were looking for.

Again, it cannot be overstated that you must be clear on the question to be researched. Your research will usually give you new ideas of different avenues to pursue. You need to stop often to reassess where you are, and where you are going, to take full advantage of all of the new ideas that your research is generating for you.

A Word About Factual Research

This article has focused so far only on legal research. However, no matter how successful your legal research is, you may face serious problems if you are not clear on the facts of your case. It is vital that you conduct factual research in your case before you get too far into it. This can not only prevent potential embarrassment in the courtroom, but will often provide insights or suggestions about what legal research you need to perform.

For example, consider that your client is a property buyer who wishes to enforce a Real Estate Purchase Contract (REPC) that the seller does not want to honor. You need to look carefully at a number of facts in relation to this claim. Are the seller and the buyer both identified in the REPC? If so, under what names? If one is an LLC or similar entity, does the State Division of Corporations show that it exists as an active entity? Did both parties sign the document? Who wrote it up? Was each page initialed? Was there a reservation agreement, or an addendum? If the property is a lot in a subdivision, was the plat recorded before the sale? What deadlines were contained in the REPC? Was the REPC modified? Was there some aspect of the transaction that was so obvious to both parties that they did not feel the need to write it down?

There are a number of very basic, simple fact questions such as these that should be verified in every case. A good client will not be offended if you ask these types of questions, since they will know you are just doing your job. And it is surprising what your factual research will sometimes uncover, both good and bad. Your factual inquiry should create a clear picture of the case in your mind, including such things as the time of day, or the day of the week when things took place, any witnesses who saw the events unfold, any documents in existence that describe what happened, and what was in the minds of the parties when the events occurred. Knowing these facts will help you in deciding what direction your case should take, and where to focus your research efforts.

Too often attorneys merely accept without question the facts presented by their client or asserted by their opponent. Don't accept and react; investigate and create. Then use research to reverse the presumption that the other party is trying to put into the mind of the judge. Find a way to turn your opponent's allegations 180 degrees back on them. Use the facts and the law discovered in your research to paint a picture that shows that your client should prevail. Usually there will be something in the facts and law that will help you do this.

Conclusion

Research is like watching a mystery movie unfold. You never know quite what will happen, or what is going to turn up next. Research can be a grand adventure of discovery, and a creative exercise that uses all of your wits, experience and talents. Never sell yourself short by failing to do the research. If you don't do it, your opponent probably will, and will get the best of you.

Truly, the strength is in the research because the research can make or break your case – and usually will.

Update: The Utah State Law Library

by Jessica Van Buren

A Bit of History

The Utah State Law Library has existed in some form since the Territory of Utah was established in 1850. In fact, Congress appropriated $5000 for the library in the same enabling act that created the territory.[1] The territorial librarian earned a salary of $400 per year, with an additional $150 for contingent expenses.[2] We still have a few books that bear the Territorial Library property stamp.

In 1890 the state legislature broke up the library's collection, directing books "more useful to the University library" be given to the then University of Deseret[3] and retaining only the law-related books for the collection.[4]

With statehood in 1896, the Territorial Library became the State Library. In 1957, the legislature changed the name of the library from the State Library to the State Law Library,[5] and established a new, separate, State Library.[6]

The State Law Library Today

The State Law Library is housed in the Matheson Courthouse in Salt Lake City. We are open to the public and serve a diverse clientele including judges, their clerks and other court staff, state government employees, attorneys, and the public.

The library's collection is much smaller than what you'll find at Utah's law school libraries, but we do have all state and federal cases, all federal laws and regulations, statutes for about 30 states other than Utah, a modest journal collection, and treatises on a variety of topics. We have two collections that may be of particular interest to attorneys:

Appellate Briefs

Our collection includes Utah Supreme Court briefs back to the 1960s (older briefs are available at the State Archives) and Court of Appeals briefs from 1986.

Historical Utah Materials

Our collection of historical Utah materials includes the record of the Constitutional Convention, Laws of Utah (1851-), House and Senate Journals (1876-), superseded Utah Codes (1876-), Administrative Regulations (1987-) and Utah Court Rules (1950-).

Library Website

www.utcourts.gov/lawlibrary/

The law library's website provides links to state and federal legal research resources. Of special interest are the legal research guides on the following topics:

- Utah Constitution
- Utah Statutory Codes
- Utah Judicial System
- Utah Case Law, Briefs, Digests and Citators
- Utah Court Rules
- Utah Attorney General Opinions and Related Materials

These research guides provide subject overviews and bibliographic information, including citations to articles and books, where available. We have also compiled the following bibliographies:

- Utah Judge Memorials & Profiles
- Utah Legal History Articles & Books

Library Catalog

Ever wonder what books are available in the State Law Library? The library's collection of 3800 titles and 55,000 volumes is cataloged in a searchable database which you can search from the library's website.

When you look up something in our catalog, the record will not only tell you whether we own it and how current it is, but will also provide a link to an online version, where available.

For example, you can page through the two-volume set *Official report of the proceedings and debates of the convention: assembled at Salt Lake City on the fourth day of March, 1895, to adopt a Constitution for the State of Utah* in the law library, or you can read the text of those volumes on the legislature's website, following the link from the library catalog for that title.

JESSICA VAN BUREN has been director of the Utah State Law Library since December, 2004. She was previously public services librarian at the Alaska State Court Law Library.

Document Delivery Service
Can't get to the law library to use our collection? We offer a document delivery service where we will copy and mail, fax or email materials from our collection to anyone statewide. There are charges associated with this service which are posted on our web page.

Free Wireless
Thanks to the sponsorship of the Utah State Bar we offer free wireless access at the law library. This is the only free public wireless available in the Matheson Courthouse.

Attorney Lounge
Our attorney lounge offers attorneys a private place to make phone calls, use their computers, confer with clients or just read the paper.

Free Westlaw
The law library subscribes to Westlaw's public access program that all library users can access at no charge. Our subscription includes all state and federal primary law, as well as a law journal database, and KeyCite, an online citator service. The only limitation is that you cannot download to disk or email documents to yourself.

Free HeinOnline
The law library also subscribes to HeinOnline. Databases provide access to more than 900 legal journals (most back to their first volume), U.S. Reports (v.1-), U.S. Federal Legislative History resources, the Federal Register (1936-) and Code of Federal Regulations (1938-83), a legal classics library, and many other resources. All documents are fully searchable PDF images, which include all charts, graphs and photos appearing in the original.

Conclusion
We invite you to visit or call the State Law Library to take advantage of our services and collections.

1. An act to establish a Territorial Government for Utah, ch. 51 §14, 9 Stat. 457 (September 9, 1850)
2. Resolution appropriating money to pay the expenses of the Utah Territorial Library, Laws of Utah (December 27, 1853).
3. Now University of Utah
4. An act providing for and regulating the Utah Territorial Library, Laws of Utah, ch. 67 (1890)
5. An act ... relating to the State Library; and providing for the name to be changed to the State Law Library, Laws of Utah, ch. 67 (1957)
6. An act ... for the establishment of a State Library ..., Laws of Utah, ch. 68 (1957)

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 #1 – Principles that Span the Generations

by Judge Ann Boyden

Not long ago, my fifteen-month old grandson, Juddy, was helping me make my bed. Each step of the process was a big deal. As I smoothed a wrinkle from the sheet, he cheered a supportive, "Good job!" When I handed him a pillow to plump, he beamed a "thank you." When the task was finally completed, he threw his chubby arms straight up in the air and while pulling them down, shouted "Yes!!"

I smiled at how just a little encouragement can transform mundane routine into a pleasant occasion. I was reminded of how often we use childhood behavior, good or bad, to illustrate the type of behavior expected from members of the Bar. We recognize that courteous, supportive behavior is taught at a young age. We frequently compare lawyers in a courtroom to youngsters in a schoolyard.

Such metaphors serve well to illustrate the basic, fundamental nature of principles of civility. But they fall short in addressing the depth that the Utah Standards of Professionalism and Civility are intended to reach. We are no longer children at recess. We are educated adults, engaged in the legal profession, appearing before judicial authority. Our conduct should exhibit that mature level of development.

The opening phrase of Standard #1 succinctly states a lawyer's job: "[L]awyers shall advance the legitimate interests of their clients." The remainder establishes parameters in which that job must be done: "Lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner."

These parameters do not limit lawyer conduct. Instead, they provide a framework that enhances a lawyer's effectiveness. It works like this.

A lawyer advances a client's interests by persuading the trier-of-fact to the client's position. The rules require that attorneys only argue facts in evidence. Whenever argument shifts from the facts to an attack on opposing party or counsel; by rule, that part of the argument cannot even be considered.

Also, such conduct is a flag to the judge or juror considering the case that the proponent's argument is not strong enough to stand on its own. Often enough, one has the weaker argument. No need to concede it by treating the opposition in an undignified manner.

The same analysis applies when dealing with a witness. The lawyer's job in examining a witness, in court or deposition, is to elicit facts and information that will advance the client's interests. Attempts to demean or intimidate a witness are not part of a proper examination. They diminish the credibility of the examiner, not the examinee. They do nothing to promote a client's case.

The justice system is comprised of various players who play essential roles. The system works when each player fulfills each's responsibilities. It is not a caste system. No hierarchy of importance is assigned. Our mothers may be proud, but that is the extent of deference entitled by position.

A lawyer's treatment of all participants in all proceedings directly affects that lawyer's ability to advance client interests.

For instance, the court reporter is such a participant, with the specific responsibility to maintain a complete, accurate record. Often, in the intensity of legal proceedings, participants will speak too fast and over other speakers. The reporter must then stop the proceeding and ask for accommodation to assure a proper record.

As a judge, I observe attorneys respond in one of two ways. In one, the attorney stops, understandably frustrated at the break in momentum, but remains dignified. With a nervous smile,

JUDGE ANN BOYDEN was appointed to the Third District Court in 1997. She currently serves in the Matheson Courthouse in Salt Lake City.

the attorney clearly restates what was missed by the reporter, and proceeds.

In the other, the attorney responds with indignation; lecturing the reporter as to who is the attorney and who is the record-keeper. This attorney may even ask me, in front of the jury, to repeat the same arrogant admonition. There is little question which attorney better advances client interests.

Court interpreters are also participants, working under difficult pressure to assure non-English speaking parties are able to fully participate in court hearings. Recently, after a particularly difficult calendar, an interpreter stepped to the clerk area of my courtroom, to have her time-voucher signed. I motioned to her, so that I could thank her for the exceptional effort she had given. She hesitated, and then expressed relief. Apparently, the only other time she had been motioned forward by a judge, she was scolded for her choice of sweater!

It is important to express specific gratitude and encouragement to one another. All are buoyed and strive to work harder.

Bailiffs and court clerks are essential components of the system. There are as many different relationship styles here as there are clerk-bailiff-judge combinations. But in each case, these people determine to some extent an attorney's ability to communicate with the Court. They can be an attorney's advocate or adversary. The result is determined by how courteously and professionally they are treated.

Cultivating principles of civility in all our professional interactions not only makes lawyering more effective, but more satisfying as well.

Ours is a confrontational and adversarial job. Daily, we deal with situations that are harsh, tragic and shocking. One of the pleasant parts of the work is the personal relationships we form.

The days are too long and the work too hard, to be constantly angry, offensive or offended. Gracious conduct towards the others in our profession and in the broader institution in which we all work promotes a support system that deepens job satisfaction.

A worn document hangs on the wall behind me. It was meticulously penned to my grandfather upon his retirement after twelve years on this District Court bench. It is dated November 14, 1940, and signed by his bailiff, clerk and reporters. It reads in part:

> No judge could have been more thoughtful or helpful to court officers than you have been. We shall always remember your kindness to us.

The professional behavior contemplated in Standard #1 is not mere surface compliance with etiquette rules because a judge is watching. It entails deeply-rooted, behavioral patterns that exhibit genuine respect and esteem for those we deal with in our professional lives.

From my retiring grandfather to the little grandson who is anything but, principles of civility do not change from generation to generation. They are and should be hallmarks of our profession in every decade.

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during their regularly scheduled March 8, 2007 Commission meeting held in St. George, Utah.

1. After review of the Grant Thornton Bar Governance Report, the Commission acted on the specific recommendations as follows:

   Recommendation #1 (Consider Changing Board Meeting Attendance Policies to Emphasize Transparency). In light of the discussion that the current Board composition works well, this recommendation was not adopted, particularly as it applied to proposal to limit ex-officio members' attendance and participation. Commission will consider current policy of continuing to fund both ABA delegates, one of whom is chosen by the Commission and the other who is designated by the ABA. Suggestion made to make more use of a consent calendar to free up more time for more substantive issues.

   Recommendation #2 (Formally Utilize the Non-Profit Framework When Analyzing Any Project that Falls Within the "Other" Category). This recommendation was tabled for further discussion in conjunction with Recommendation #3.

   Recommendation #3 (Regularly Formulate and Document a Long-Term Strategy for the Bar). This recommendation was adopted. The recommendation will be developed further in April and implementation will begin in June.

   Recommendation #4 (Restructure How the Executive Director is Employed, Compensated and Evaluated). This recommendation was discussed in Commission Executive Session.

   Recommendation #5 (Institute Periodic Operational Audits of the Executive Director and Staff). Recommendation #5 was tabled for further discussion and development before implementation.

   Recommendation #6 (Create an Independent Committee Function). This recommendation was not adopted at this point. The Commission decided that they need to more fully develop Recommendation # 3 first.

   Recommendation # 7 (Establish a Whistle-Blower Function). This recommendation was adopted. The Commission will need to resolve details and how to meaningfully implement this recommendation.

   Recommendation #8 (Implement the Use of a Board Governance Self Assessment Checklist). This recommendation was adopted. Commissioners agreed to complete the sample checklist in packet by April meeting, which will be tabulated for the June retreat. Suggestion made to also include any written comments. Thereafter, checklist needs to be modified to more accurately reflect the nature of the organization. Suggestions made for revised form include a "I don't know" response, to shorten it, to format in an electronic form and possibly utilize a survey format in order to sort responses.

   Recommendation #9 (Institute an Ongoing Conflict of Interest Policy for the Bar Staff.) This recommendation was also adopted. The Executive Director will use an appropriate policy tailored for employees.

   Recommendation #10 (A Justice from the Court Should Attend at Least One Commission Meeting Annually). This recommendation was not adopted. Commission believes that members of the Court have an open invitation to attend any meeting at any time and are more than welcome to do so. Matty Branch, the Court's representative to the Commission, is also in agreement with this assessment. (Observation made that "enforcement" would be difficult if recommendation were to be adopted in this form.)

2. The Commission approved name change of Fee Arbitration Committee to "Fee Dispute Resolution Committee" and raised threshold of claims from $1,500 to $3,000 to require only one arbitrator instead of a panel of three. These changes will go to the Utah Supreme Court for their consideration.

3. The Commission approved a new diversion rule with slight modifications which will be presented to the Utah Supreme Court for its consideration.

4. The Commission appointed Stewart Ralphs and Adam Caldwell to Governor's Advisory Committee on Child Support Guidelines.

5. The Commission agreed to voice appropriate concerns to Governor's Office in person or by letter relating to SB 221 as it may impact the separation of powers and inhibiting a fair and impartial judiciary.

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.

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 2007 and ends June 30, 2008. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its June 1, 2007 meeting.

The Commission is interested in assuring that the process includes as much feedback by as many members as possible. A copy of the proposed budget, in its most current permutation, will be available for inspection and comment at www.utahbar.org.

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

Mailing of Licensing Forms

The licensing forms for 2007-08 are scheduled to be mailed during the last week of May and the first week of June. Fees are due July 2, 2007; however fees received or postmarked on or before July 31, 2007 will be processed without penalty.

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

If you need to update your address information, please submit the information to: Arnold Birrell, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. Fax: (801)531-9537. e-mail: arnold.birrell@utahbar.org

STEPHEN G. MORGAN

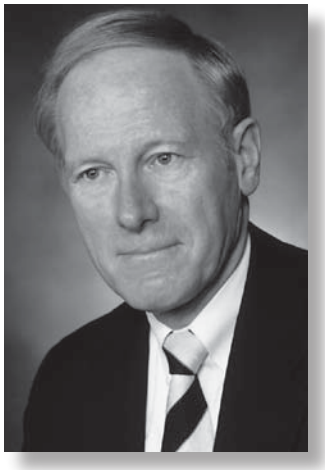
Morgan, Minnock, Rice & James

I am honored to count myself among the members of the legal community who from time to time had an opportunity to bear witness to Steve's ability to quickly and effortlessly command the attention of anyone with whom he shared a courtroom with his integrity, intelligence, and humanity. With his passing, the young lawyers of our state have been deprived of the opportunity to see how the legal profession is "done right."

– Justice Ronald Nehring
Utah Supreme Court

Steve Morgan was a lawyer of the highest abilities and unbending civility. He's the one you would want to represent you at the Judgment Bar. He will be missed by all.

– Judge John Paul Kennedy
Third District Court



1940–2007

Last year I had the opportunity to try a case with Steve – perhaps his last trial. Steve was a rare combination of brilliance, fair mindedness and amazing energy. It was an honor to be able to spend that time with him – and I told him so.

– J.W. Steele, Esq.
Steele & Biggs

Steve was a professional and a gentleman at the highest level. I never found him unpleasant, even when he was vigorously opposed to my position. He exemplified our Code of Professionalism and Civility. With his passing, the Bar has lost a beacon.

– L. Rich Humpherys, Esq.
Christensen & Jensen

Steve was an honorable man and a worthy opponent.

– David R. Olsen, Esq.
Dewsnup, King & Olsen

Pro Bono Honor Roll

Stanley Adams
Karen Allen
Deb Badger
Judy Barking
Lauren Barros
Jon J. Bunderson
Shelly Coudreaut
Jeanne Dickey
Brent Hall
Neil Harris
Bret Hicken
Kyle Hoskins
Nick Huntsman
Jonathan Jaussi
Troy Jensen
Keith Kelly
Randy Kester
Louise Knauer
Suzanne Marelius
Sally McMinimee
Christina Miller
Bruce L. Nelson
Brandon Owen
Jon Rogers
Linda F. Smith
Earl Tanner
Pamela Thompson
Scott Thorpe
Carrie Turner
Tracey Watson
Jeanine Williams
Tim Williams

Utah Legal Services and the Utah State Bar wish to thank these volunteers for their time and assistance during the months of February and March. Call Brenda Teig at (801) 924-3376 to volunteer.

Committee on Law & Aging Pro Bono Honor Roll

Professor Richard Aaron
Kent Alderman
James Baker
Sharon Bertelsen
Richard L. Bird, Jr.
John Borsos
Douglas Cannon
David Castleton
Mary Jane Ciccarello
TantaLisa Clayton
Elizabeth Conley
Steven D. Crawley
Douglas Cummings
Marlin G. Criddle
John Diamond
Phillip Ferguson
Joseph Goodman
Laurie Hart
Craig Hughes
Dwight Janerich
Michael A. Jensen
Kevin Jones
Bill Kadarusman
Ellen Kitzmiller
Kenneth Margetts
Joyce Maughan
Harry McCoy II
Thomas Mecham
Mark Morrise
Kerry Owens
David Pace
Kami Petersen
Kara Pettit
Leslie Randolph
Barbara W. Richman
Kathie Brown Roberts
Deanna Sabey
Scott Sabey
Penniann Schumann
Jane Pett Semmel
Kendall R. Surfass
Jeannine Timothy
Troy Wilson

May is Elder Law Month. The Committee on Law and Aging and the Utah State Bar wish to thank these attorneys for their donation of time and skills for Senior Citizens' Legal Clinics during the months of May 2006 through April 2007. To volunteer, please call Cristine Critchley, Coordinator of the Senior Citizens' Legal Clinics Volunteer Project, at 801-297-7022.

2007 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2007 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, September 17, 2007. The award categories include:

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

Discipline Corner

PUBLIC REPRIMAND, PROBATION

On March 21, 2007, the Honorable Robert Hilder, Third Judicial District Court, entered an Order of Discipline: Public Reprimand and [Six Months] Probation against Mitchell R. Jensen for violations of Rules 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

On two occasions concerning the same client, Mr. Jensen failed to supervise his non-lawyer assistants. On the first occasion, one of Mr. Jensen's non-lawyer assistants obtained the client's husband's signature on documents. Another of Mr. Jensen's non-lawyer assistants then notarized the client's signature on the documents without being present at the time the signing of the documents.

On the second occasion, the non-lawyer assistant signed for and notarized the client's name to a release form without indicating that the release was signed based on the power of attorney.

RESIGNATION WITH DISCIPLINE PENDING

On March 14, 2007, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending, effective November 9, 2005, the date of his interim suspension, concerning Howard Johnson.

In summary:

Mr. Johnson pled guilty to one count of Unlawful Sexual Activity With a Minor, pursuant to Utah Code Annotated section 76-5-401, a third degree felony; and pled guilty as an Alford plea to one count of Enticing a Minor Over the Internet, pursuant to Utah Code Annotated section 76-4-401, a class A misdemeanor.

ADMONITION

On March 14, 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 1.15(b) (Safekeeping Property) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In a personal injury case, an attorney received a settlement check from an insurance company. A lien holder, a medical service provider, had a claim to the settlement monies. However, the attorney used a large portion of the settlement funds in trust to pay a doctor's witness fees without the lien holder's agreeing to this use of the money it was claiming.

RECIPROCAL DISCIPLINE

On February 26, 2007, the Honorable Pamela Heffernan, Second Judicial District Court, entered an Order of Discipline by Consent: Public Reprimand against Roy Cole for violation of Rules 1.1 (Competence), 1.3 (Diligence), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

In an appeal before the Tenth Circuit Court of Appeals, Mr. Cole failed to make his appearance, order a transcript, file a docketing statement, and submit a filing fee in a timely fashion; all after he received notice from the court, and the deadline to comply was extended. Thereafter, Mr. Cole filed a deficient docketing statement. Although the court notified Mr. Cole of the deficiencies and gave him additional time to comply, Mr. Cole failed to correct the deficiencies. Mr. Cole also filed a deficient motion to appoint new counsel, which was denied giving Mr. Cole an express directive on how to proceed. Mr. Cole took no action. The Tenth Circuit then issued an Order to Show Cause for his failure to comply to which Mr. Cole submitted an inappropriate pleading attempting to explain his conduct. The Tenth Circuit entered an order removing Mr. Cole from the case, and suspending him from appearing before the Tenth Circuit Court of Appeals for a period of not less than three months.

INTERIM SUSPENSION

On March 12, 2007, the Honorable Glenn K. Iwasaki, Third Judicial District Court, entered an Order of Interim Suspension, suspending Larry A. Kirkham from the practice of law pending final disposition of the Complaint filed against him.

In summary:

On February 21, 2007, Mr. Kirkham was convicted of Driving Under the Influence of Alcohol/Drugs (with priors), Utah Code Annotated section 41-6a-502, a third-degree felony. The interim suspension is based upon this conviction pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability.

PUBLIC REPRIMAND

On February 28, 2007, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Matthew Storey for violation of Rules 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), 5.3(c) (Responsibilities Regarding Nonlawyer Assistants), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Storey directed his paralegal to sign his client's name to a settlement release pursuant to a power of attorney. Mr. Storey's paralegal signed the client's name to the release without indicating that the release was being signed pursuant to a power of attorney. The paralegal then signed the release as a witness to the client's signature when in fact the client had not signed it.

DISBARMENT
On February 14, 2007, the Honorable Denise Lindberg, Third Judicial District Court, entered Findings of Fact, Conclusions of Law and Judgment of Disbarment, disbarring Kevan Eyre from the practice of law, effective October 26, 2005, the date of his interim suspension, for violations of Rules 8.4(b) (Misconduct, 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Eyre was convicted of six counts of failing to render a proper tax return in violation of Utah Code section 76-8-1101(a)(c)(i), a third degree felony, and six counts of intent to defeat the payment of a tax in violation of Utah Code section 76-8-1101(1)(d)(i), a second degree felony. The crimes committed reflect adversely on Mr. Eyre's honesty, trustworthiness, and fitness as a lawyer.

ADMONITION
On February 28, 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 1.15(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 criminal matter, the attorney destroyed the client's file which included the client's vehicle title. The attorney did not take reasonable or prompt efforts to assist the client in replacing the file or the vehicle title. There was little or no harm to the client.

DISBARMENT
On February 20, 2007, the Honorable Joseph C. Fratto, Jr., Third Judicial District Court, entered an Order of Discipline: Disbarment, disbarring Geoffrey L. Clark from the practice of law, effective December 13, 2004, the date of his interim suspension, for violations of Rules 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
On September 14, 2005, Mr. Clark was convicted of Attempted Distribute/Offer/Arrange to Distribute a Controlled Substance, Utah Code Annotated section 58-37-8(1)(a)(ii), a third degree felony; Possession of a Controlled Substance, Utah Code Annotated section 58-37-8(2)(a)(i), a third degree felony; Attempted False/Inconsistent Material Statement, Utah Code Annotated section 76-8-502, a third degree felony; and Simple Assault, Utah Code Annotated section 76-5-102, a class A misdemeanor. The convictions reflect adversely on Mr. Clark's honesty, trustworthiness and fitness as a lawyer.

PROBATION
On February 14, 2007, the Honorable Wallace A. Lee, Sixth Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Discipline suspending Richard L. Musick from the practice of law for a period of one year, with the suspension stayed in favor of probation for a period of one year, for violations of Rules 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.16(d) (Declining or Terminating Representation), 3.2 (Expediting Litigation), 3.4(d) (Fairness to Opposing Party and Counsel), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In one matter, Mr. Musick failed to notify his client of outstanding discovery requests, failed to respond to those discovery requests, failed to respond to a motion to compel and a motion to dismiss, and failed to overall communicate with his client. Mr. Musick abandoned his client without taking steps to protect the client including failing to file a withdrawal and providing the file to the client. Mr. Musick's failures to respond not only delayed the case but caused harm to the client. Mr. Musick's conduct also caused the court to expend time and resources in addressing his failures to represent his client. Mr. Musick also failed to respond to the Office of Professional Conduct's Notice of Informal Complaint.

In a second matter, Mr. Musick filed two separate personal injury cases on behalf of one client. In the first action filed, Mr. Musick abandoned his client by failing to diligently represent the client and by failing to formally withdraw from the case. In the second action filed, the case was dismissed because Mr. Musick failed to ensure that the complaint was served in a timely manner. Mr. Musick also failed to withdraw from the case to protect his client's interests. In both cases Mr. Musick failed to communicate and adequately explain information to the client to keep the client informed and able to make informed decisions. Mr. Musick also failed to respond to the Office of Professional Conduct's Notice of Informal Complaint.

ADMONITION
On February 12, 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 1.3 (Diligence), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In an immigration matter, an attorney failed to perform a diligent review of the client's file which evidenced that the client was illegally in the country. The attorney also failed to review the work of the attorney's paralegal.

ADMONITION
On February 12, 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 1.15(a) (Safekeeping Property) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
An attorney ordered that a client's file and documents be destroyed less than 90 days after the termination of the representation. The notice given to the client regarding the destruction was inadequate in light of a subsequent phone call from the client followed up by a postcard from the client.

ADMONITION
On March 20, 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 8.4(d) (Misconduct) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In a criminal matter, an attorney failed to appear for a scheduled hearing and had no excuse for not appearing at the hearing.

SUSPENSION
On March 21, 2007, the Honorable Bruce C. Lubeck, Third Judicial District Court, entered an Order of Discipline: Suspension, suspending James L. Stith from the practice of law for a period of twenty-one (21) months for violation of Rules 1.2 (Scope of Representation), 1.4(a) (Communication), 3.3(a)(4) (Candor Toward the Tribunal), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
On behalf of a client, Mr. Stith extended and entered into a settlement offer. The offer was accepted, however Mr. Stith did not provide any of the proposed settlement documents to his client. Unaware that the settlement had been reached, the client instructed that the offer be withdrawn, and Mr. Stith conveyed the withdrawal by letter stating that the offer was withdrawn because of damage to the property that was subject of the settlement and a typographical error in the original offer. The error was a difference of a year in the payoff date of the agreement. Opposing counsel filed a motion to enforce the settlement. In response to the motion to enforce, Mr. Stith filed his reply along with an affidavit that purported to be from his client. The affidavit was not false from the standpoint that if the client had reviewed the affidavit, he was in agreement with the substance of the affidavit. However, Mr. Stith's client did not approve or sign the affidavit. The motion to enforce was granted and served on Mr. Stith. Mr. Stith did not object. Thereafter, the court awarded attorney fees to opposing counsel. Mr. Stith did not inform his client that an award for attorney fees was entered and that the client was under an obligation to pay attorney fees. Opposing counsel on several occasions communicated with Mr. Stith concerning the paying of the attorney fees. Opposing counsel filed a motion seeking entry of judgment, which was granted by the court. Thereafter, the client terminated Mr. Stith's representation. Mr. Stith also failed to respond to the Office of Professional Conduct's Notice of Informal Complaint.

PUBLIC REPRIMAND, PROBATION
On March 5, 2007, the Honorable David L. Mower, Fifth Judicial District Court, entered an Order of Discipline: Public Reprimand, [Six-Month] Probation against Shawn T. Farris for violations of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In a civil action, Mr. Farris failed to respond to discovery requests. Mr. Farris also failed to respond to a Motion to Compel Discovery. The court granted the Motion to Compel and awarded attorney's fees. Mr. Farris failed to comply with the order and failed to inform his clients of the order. Thereafter the court granted the opposing counsel's Motion to Dismiss. Mr. Farris did not inform his clients of the dismissal. Mr. Farris failed to keep his client apprised of the status of the case and failed to timely respond to his clients' requests for information about the case. Mr. Farris failed to timely inform and explain developments in the case to his clients. After the dismissal of the case, Mr. Farris informed his clients that the case had been set for trial, but then the trial setting had been vacated and he was working to get it back on the court's calendar. Mr. Farris filed a notice of appeal, but did not inform his clients of his actions. Mitigation: Absence of prior discipline; cooperative attitude toward proceedings; inexperience in the practice of law; and remorse.

Beyond Civility for Paralegals

by A. Patrice Whitby

After reading an article titled "Civility for Paralegals" by Greg Wayment, *Utah Bar Journal,* Vol.19 No.7, 2006, I was provoked by several questions originating from Mr. Wayment's statement, "Incivility has long plagued the legal profession." Why the legal profession? Where does incivility start? And what can be done to reverse the stigma with which the legal profession has been plagued?

Attorneys, paralegals, legal secretaries and legal staff work in a consistently stressful, competitive office environment. Realistic and unrealistic deadlines, hectic schedules, adversarial and combative bantering, highly-charged attorney or client meetings, to name just a few, are the backdrop to the legal habitat. Incivility is born in that workplace, the office or the firm. Workplace contemptuousness is brought to life by attorneys, paralegals or coworkers.

Manners in the workplace in general have manifestly deteriorated in the last ten years.[1] Manners are an essential part of the image one projects. Forgetting manners makes a lasting impression on others. Conversely, the devastating results of incivility in the workplace are lower job satisfaction, repeated tardiness, unnecessary sick days, and very simply, not working very hard anymore. Once incivility rears its nasty head, the results lay waste to those who are culprits as well as the organization itself.[2]

Workplace incivility includes both things you do and things you don't do. Workplace incivility is both active and passive. For example, active incivility is when you decline a colleague's request to provide him or her with information which is in your area of specialization in fear of losing a billable hour; when you expect unequivocal perfectionism from a junior coworker, thereby intimidating him or her and creating hostility; or when you make unreasonable requests, name-call, rebuke others' actions, or undermine credibility in front of others. On the other hand, passive incivility is when you do not respect other people's time and privacy or you do not recognize a staff member for their help on a case or project. A distinguishing characteristic of passive incivility is that it is ambiguous and its intent to harm another is not obvious.[3]

Studies show the number one motivator for most employees is feeling recognized and appreciated. Forty-six percent (46%) of employees leave a workplace because they do not feel appreciated.[4]

Paralegal employees show no exception to the number one motivator statistic. For example, in response to a question posed to the "2006 Paralegal of the Year," *Legal Assistant Today Magazine* (2006), a twenty year environmental law paralegal in a Buffalo, New York firm, Katherine Manns replies "[I]t's nice to be recognized."[5] Simply feeling valued is what it is all about.

Since paralegals always float between support staff and legal staff (sometimes they fit into the support staff and sometimes they fit into legal staff), the legal habitat ladder literally places paralegals right in the middle. And, a paralegal is split in the middle between subordination and leadership. It can be tough and frustrating, but rewarding, if that juggling results in creating teamwork. A paralegal can be the relay person who holds the task together. The middle position can be a good place to foster workplace civility and to improve behavior in the legal habitat.

However, the burden of law firm civility does not simply rest on the paralegal. Everyone in the legal habitat needs to put their best efforts together in order to do a good job and make the clients happy. The whole idea is to think about a legal workplace where positive reinforcement flows all ways. Clients first make the decision about which firms are qualified to provide legal services to them. Rules of etiquette and protocol convert into behaviors which clients observe and use to base their decisions. Client service goals are best met where a culture exists in which people desire to give their best efforts every day. James Wilber, a principal in Altman Weil, Inc., an exclusive legal management consulting group, believes that a firm's support staff plays a significant role in the success of the firm. Vincent Romano, president of Attorney Services Marketing, believes good support staff means more income because of increased productivity and efficiency. Romano also believes that if a paralegal is unsatisfied with the job, it can have a detrimental effect on the client and ultimately

A. PATRICE WHITBY has been a litigation paralegal for twenty-one years, twenty of which have been with the law firm of Callister Nebeker and McCullough. Ms. Whitby has been a member of the Paralegal Division of the Utah State Bar since its origination in 1996.

the firm's revenues.[6] According to Stanford University Business School surveys, eighty-five percent (85%) of success in business is a result of people skills.[7]

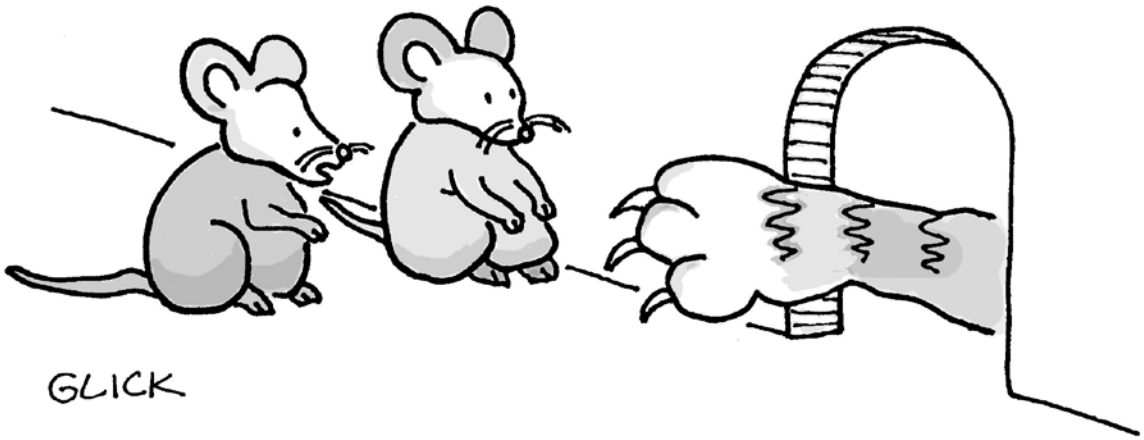
If feeling valued and appreciated results in economic benefit to the legal workplace and better behaved employees are more valuable than insensitive brutes, then what is the cure for eliminating incivility in the legal habitat? Well, it behooves us, all of us, to look into the mirror. It is one of the remedies you truly have control over.

Most of us have been inconsiderate of coworkers at one time or another. It's essentially about treating others with respect. "*Do unto others as they would have you do unto them*." Individualize how you treat others.[8] Focus on the other person's interests, not their position. When incivility rears its ugly head, don't take it personally. When you are angry and frustrated at a file clerk, or the copy person, or even your supervising attorney; when you would like to label them with a negative coloration, change your response. Don't react. Trying to control other people's behavior will not change them, but changing yourself in relation to them will. Focus on the other person's interests, not on their rank on the legal ladder. If you treat people's time and attention as precious, more people will do what you ask more often. Develop a communication strategy. Listen. Listening shows empathy. Passive attention is not listening. Listening is a deliberate act of understanding and earning the right to reciprocation. Communicate. Communicate directly with body language that shows support and attention.[9]

Changing unwanted uncivil behavior in the legal habitat obviously involves some sort of intervention. And, since paralegals are literally right in the middle of it, then let it begin with you. Give a compliment or a piece of praise every day, and keep your attitude as positive as possible even under difficult circumstances. Then, conceivably, the plague of incivility in the legal profession will be diminished and a culture of benevolence will emerge.

1. TMP Worldwide Advertising Communication Survey (2002).
2. Pearson, C., Anderson, L. and Porath, C. "Assessing and Attacking Workplace Incivility," Organizational Dynamics Journal (Fall 2000).
3. Fritschner-Poter, K., "Taming Workplace Incivility," Office Pro Magazine (July 2003).
4. Annonymous, "Manners Still Matter," OfficePro Professional Secretaries International, Vol.66; Issue 5 (2006).
5. "Rochester Paralegal Profiles: Katherine Manns" Rochester Daily Record, (Sept. 28, 2006)
6. Vasillo, S. "Support Staff Is Vital for a Thriving Law Firm," Michigan Lawyers Weekly (Mar. 13, 2006).
7. "Manners Still Matter", supra.
8. Kunz, M., Salt Lake City Attorney, "Working with Difficult People, Setting Personal Boundaries & Assisting HR, Personnel and/or Your Attorney in Resolving Issues" Utah State Bar Annual Paralegal Division Seminar (Jun.16, 2006).
9. Belak, T., "How to Handle Difficult Behavior in the Workplace," Sullivan University Press (Feb.2004).

Jest is for All…



"I think we're about to come under that cat's long arm jurisdiction."

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
05/10/07	**Annual Business Law Section Seminar:** 8:30 am – 12:00 pm. Topics include: Entity Formation and Buy-Sell Agreements, Personnel Issues – Employment, Non-Compete and Confidentiality Agreements, Exit Strategies – Taxable Business Sales. FREE to section members, $50 others.	3 hrs.
05/11/07	**Annual Family Law Seminar:** 8:00 am – 4:30 pm. Topics include: What Bankruptcy Judges Wish Attorneys and State Court (Panel or Judge) Family Judges Knew about Bankruptcy, Business Valuation: Method Really Matters, Alimony Panel (Hot Topics): Gender Bias, Possible Formulas, Adjustment for Voluntary Contributions, Taxes, Ethical Dilemmas, etc. $125 section members, $155 others, $70 paralegal members.	6.5 hrs. (including 1 Ethics)
05/16–19/07	**The National Institute for Trial Advocacy (NITA):** ial skills training, featuring learning-by-doing exercises emphasizing persuasive pres t ory in bench and jury trials. Salt Palace Convention Center. 9:00 am – 5:00 pm d ed for Litigation Section Members $1,200; Non-Section $1,250; Non-Utah State Bar mem s $2,000 (space permitting) Limited to 48 registrants. FULL	Approx. 24 hrs (includes 6 NLCLE)
05/17/07	**Annual Real Property Seminar:** 7:30 am – 2:00 pm. Topics include: Supreme Court, Court of Appeals, Real Property Case Update, Legislative Update, Ethics. $60 section members, $80 others.	5 hrs (includes 1 hr. Ethics)
05/17/07	**NLCLE: Criminal Law.** 4:30 – 7:45 pm. Pre-registration: $60 YLD & UACDL members, $80 others. Day of registration: $75 YLD, $95 others.	3 hrs CLE/NLCLE
06/08/07	**New Lawyer Required Ethics Program.** 8:30 am – 12:30 pm. $55. For all newly admitted attorneys within their first compliance period who sat for the two day bar exam.	Fulfills New Lawyer Ethics Requirements
06/21/07	**NLCLE: Immigration.** 4:30 – 7:45 pm. Pre-registration: $60 YLD members, $80 others. Day of registration: $75 YLD, $95 others.	3 hrs CLE/NLCLE
08/01/07	**Ethics School.** 9:00 am – 3:45 pm. This seminar is designed to answer questions and confront issues regarding some of the most common practical problems that the Office of Professional Conduct assists attorneys with on a daily basis. $150 before 07/25/07, $175 thereafter. Required course for attorneys admitted on reciprocal rule by motion.	6 hrs. Ethics
08/10–11/07	**30th Annual Securities Law Workshop.** $205 section members, $225, non-section.	TBA
08/16/07	**NLCLE: Employment Law.** 4:30 – 7:45 pm. Pre-registration $60 YLD members, $80 others. Door registrations: $75 YLD members, $95 others.	3 hrs CLE/NLCLE

To register for any of these seminars or to access an agenda online go to: www.utahbar.org/cle.
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