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July/Aug 2007

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

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

COVER: Summer Flowers on Mount Timpanogos, by Nathan Lyon, Weber County Attorney's Office.

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Letters Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author and shall not exceed 300 words in length.

2. No one person shall have more than one letter to the editor published every six months.

3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.

4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published which (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published which advocates or opposes a particular candidacy for a political or judicial office or which contains a solicitation or advertisement for a commercial or business purpose.

7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.

8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

Cover Art

Members of the Utah State Bar or members of the 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.

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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:

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Submission of Articles for the Utah Bar Journal

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

1. Length: The editorial staff prefers articles having no more than 3,000 words. If you cannot reduce your article to that length, consider dividing it into a "Part 1" and "Part 2" for publication in successive issues.

2. Format: Submit a hard copy and an electronic copy in Microsoft Word or WordPerfect format.

3. Endnotes: Articles may have endnotes, but the editorial staff discourages their use. The *Bar Journal* is not a Law Review, and the staff seeks articles of practical interest to attorneys and members of the bench. Subjects requiring substantial notes to convey their content may be more suitable for another publication.

4. Content: Articles should address the *Bar Journal* audience, which is composed primarily of licensed Bar members. The broader the appeal of your article, the better. Nevertheless, the editorial staff sometimes considers articles on narrower topics. If you are in doubt about the suitability of your article for publication, the editorial staff invites you to submit it for evaluation.

5. Editing: Any article submitted to the *Bar Journal* may be edited for citation style, length, grammar, and punctuation. Content is the author's responsibility – the editorial staff merely determines whether the article should be published.

6. Citation Format: All citations should follow *The Bluebook* format.

7. Authors: Submit a sentence identifying your place of employment. Photographs are encouraged and will be used depending on available space. You may submit your photo electronically on CD or by e-mail, minimum 300 dpi in jpg, eps, or tiff format.

A Few Parting Thoughts

by Gus Chin

Dear Bar Members:

At the May Bar admission ceremony, Senior United States District Judge Bruce S. Jenkins, in his remarks to the new admittees, mentioned how times have changed. He had them stand, look towards their family and friends, and reminded them that their accomplishments, including admission to the practice, were not achieved alone. He also said that ends and means must harmonize and challenged the new admittees to use their skills so that the rule of law continues in all of its revolutionary majesty.

Undoubtedly, the Bar has experienced and will experience change. We have benefitted from the increase in young, minority, and women lawyers, as well as paralegals and legal assistants who are committed to the ideals of the profession. Technological advances and skilled bar personnel now make it possible for members in rural areas to access live CLE classes and seminars without having to drive to Salt Lake City. Casemaker allows full service Bar members no-cost, unlimited access to legal research.

One recent change is the Utah Supreme Court Order requiring mandatory malpractice insurance disclosure to the Bar as a condition of licensing for the next two years. The Bar Commission supports this disclosure rule which will provide important information about the state of malpractice insurance coverage among our members and also assist us in determining how to address reasons for lack of malpractice insurance coverage.

Over the next several months, the Bar Commission will be considering an alternative to the current lawyer referral service, whose contract expires in 2008. Additionally, at some future point in time, it is possible there will be a change in bar dues. The Bar Commission understands that this is and will be a difficult issue and will, I am sure, give full consideration to member concerns, as well as the best interest of the profession and the Bar.

Throughout the year, I have enjoyed our meetings with members of the Weber County Bar, the Utah County Bar, the Southern Utah Bar, the Uintah Basin Bar in Vernal, and the Southeastern Bar in Price, as well as with students from both law schools. These meetings proved to be productive, as they allowed us to have instant feedback from our members and future members. We anticipate holding similar meetings to improve outreach, promote greater communication, and address concerns.

I wish to acknowledge the dedication of our members who help us achieve our mission and goals by sharing skills and giving of their time to chair and participate in sections, committees and regional, local and specialty bars, and who also provide quality CLE instruction. Without your help, we could not meet the needs or expectations of our members. I hope you will continue to give of your time and skills and will be joined by others, thereby enhancing the practice of law in Utah.

Finally, as I conclude my year, I thank you for the privilege of serving as your 75th Bar president. I am proud to belong to a noble profession whose members are constantly trying to make a difference as well as safeguarding justice. I am also particularly grateful to the staff of the Bar and the members of the Board of Bar Commissioners, whose work ethic, professionalism, commitment to excellence, and friendship have made my journey meaningful and memorable.

Active Emeritus Lawyers

The Board of Bar Commissioners congratulates the eighty lawyers who, according to our records, enjoy the distinction of 50 years or more as an active member of the Utah State Bar. With apologies for any inadvertent omissions, the lawyers and their dates of admission to the Bar are as follows:

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11-5-55

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1-10-55

Ronald C. Barker
11-7-55

Sidney G. Baucom
1-11-54

David E. Bean
10-21-57

John C Beaslin
11-7-55

Wilford A. Beesley
11-7-55

James W. Beless
1-8-40

Richard L. Bird Jr.
10-9-33

Edward M. Bown
1-10-55

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1-14-52

Richard W. Campbell
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Harold G. Christensen
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Ray R. Christensen
10-30-44

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5-31-49

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11-7-55

Richard C. Dibblee
6-13-51

Thomas A. Duffin
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Walter R. Ellett
12-28-53

George K. Fadel
6-2-48

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10-22-56

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5-29-42

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Charles M. Pickett
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B. Maurice Richards Jr
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Advance Health Care Planning in Utah

by Maureen Henry

The Utah State Legislature updated and transformed advance health care directives in Utah during the 2007 legislative session. Effective January 1, 2008, under Senate Bill 75 (second substitute), the Advance Health Care Directive Act will replace the Personal Choice and Living Will Act[1] as the law governing advance health care planning in Utah. The new law was developed through collaboration among dozens of organizations and individuals with an interest in aging and health care planning.

The collaborators identified the following objectives:

1. Improve the likelihood that an individual's documented health care preferences will be honored when the individual can no longer make health care decisions;
2. Remove barriers to the creation of written or oral advance directives;
3. Allow individuals to choose among end-of-life care options;
4. Protect individuals' rights to make health care decisions; and
5. Expand the pool of surrogates available to make routine and extraordinary decisions for adults who lack medical decision-making capacity.

Every aspect of the statutory form and the new law was measured against these objectives. The result is a law that is on the cutting edge of advance health care directive laws in the nation. This article highlights the major changes in the law and discusses the role of an attorney in the advance health care planning process.

Why Change?

Before and after passage of the Advance Health Care Directive Act, attorneys have asked, "Why change?" The short answer is that the current system does not work. The system's failure has many sources: advances in medical technology that have outpaced the law's language; a legal system and medical system that each knows too little about how the other operates; a tremendous gap between what individuals think their living wills say and the very limited scope of the language of the statutory forms; and the list goes on.

Under the Personal Choice and Living Will Act, an attorney can quickly and easily review and provide Utah's living will[2] and special power of attorney[3] forms to their clients for signature. But the limited amount of thought put into the process is reflected in the limited value of the signed forms when difficult decisions have to be made. If a client thinks that end-of-life planning is complete after the forms are signed, and if that misperception results in failure to communicate with a health care agent or family about end-of-life wishes, chances are that family members will be left guessing about the client's wishes. Rarely would the living will form be relevant.

The limited value of the form has its roots in the language of the Personal Choice and Living Will Act. The law was state-of-the-art when passed in 1985. At that time, advocates feared that living wills would be used to improperly withdraw care, perhaps even leading to euthanasia, so the scope of application was very narrow. For the statutory living will form to be relevant, two physicians must certify, in writing, that the patient suffers from a "persistent vegetative state" or "terminal condition."[4] While Utah sees more than 13,000 deaths each year, it is hard to find examples of either triggering condition. A persistent vegetative state is very rare; at most, a very small handful of Utah's deaths each year would follow this diagnosis.

The statutory definition of "terminal" also has a very limited

MAUREEN HENRY is the Executive Director of the Utah Commission on Aging. She was a founding member of the law firm Henry & Ciccarello, LLC, devoted to serving the needs of aging clients in Utah. Maureen has lectured on end-of-life issues and legal issues facing those who are aging throughout Utah and at national meetings.

application, which has become even more limited as medical technology has advanced. While the medical literature recognizes many conditions as terminal, the definition is so narrow that a conservative reading of the statute would make it extraordinarily difficult to find a condition to be terminal. Rarely would any patient suffer from a condition for which treatment with life-sustaining procedures would "serve only to postpone the moment of death," as the statute requires.[5] For many patients, the application of all available life-sustaining procedures, such as feeding tubes, respirators, cardiac support devices, and dialysis, could prolong life for hours, days, weeks, months, or even years. Most deaths in Utah occur when a decision to refuse life support is made when the patient would reject the care, not because the statutory definition of terminal is met. But even a change in the statute to broaden the scope of the law would have left two significant problems in place.

The statutory living will form fills in the blanks for the declarant, rather than offering the declarant a choice among end-of-life care options. The form does not allow for an advance directive expressing a preference in favor of life-sustaining procedures; the only choice is to reject life-sustaining care. In the 1970's and 1980's, living will laws were drafted in the face of a medical ethic that had difficulty stopping life-sustaining care, whether or not the patient would have wanted care. The current ethic more readily allows the termination of life-sustaining care, but some fear this ethic too readily allows termination of care, particularly for the elderly and disabled. Aging individuals and advocates for the aging and disability communities expressed a desire for an advance directive that allowed the declarant to choose care for the purpose of prolonging life.

The second challenge, which also arose from the absence of choice, was a presumption on the part of some health care providers that the mere existence of a living will meant that the individual wanted very limited or no care. Anecdotes abound: do not resuscitate (DNR) orders improperly placed in a patient's file without consent after the patient acknowledged that she had a living will; antibiotics withheld from a patient suffering from pneumonia because she had signed a living will, even though antibiotics could have restored her to the condition she was in before the illness. In my experience educating health care providers about living wills, I found that many sincerely thought they knew the contents of the statutory form, but few did. The lack of choice, discussed above, makes it easy for a provider to never lay eyes on the form. Rather than carefully scrutinizing each living will, the provider may simply assume that all living wills express a preference to forego life-sustaining care.

The new Advance Health Care Directive lets individuals choose among options and will force health care providers to consider each patient's choices, as they are documented in the Advance Health Care Directive.

Adding to the challenges raised by the Personal Choice and Living Will Act is the limited nature of the statutory Health Care Power of Attorney, which authorizes the appointed agent to do only one thing: "to execute a directive on [the declarant's] behalf under Section 75-2-1105."[6] Outside of nursing facilities, it was, and it remains, very unusual to see a directive under section 75-2-1105, typically called a Medical Treatment Plan. While appointed agents and family surrogates routinely make end-of-life decisions for patients in Utah, such decisions are rarely made in compliance with this statutory scheme. This system's design was innovative and made sense in theory, but it did not take hold in most corners of the health care community. The new form encourages appointment of an agent and an alternate agent with broad authority to make decisions in any manner that is appropriate.

Highlights of Changes

The statutory Advance Health Care Directive form:

- Combines into one form what were three forms under the Personal Choice and Living Will Act;
- Emphasizes the need to appoint an agent by placing the appointment of the agent first, with the living will portion of the document second;
- Grants to the agent broad decision-making authority within the form, but allows the declarant to modify that authority;
- Allows the declarant to choose whether the agent can disregard the declarant's documented preferences;
- In plain language, offers choices among real-life options in the living will portion of the document;
- Allows the declarant to choose conditions that must be met before life support is withdrawn; and
- Requires only one disinterested witness to the signing of the document, eliminating the barriers of multiple witnesses or a notarized signature.

In addition to updating the form, SB 75 also made substantial changes to the law. Concerning an individual's decision-making capacity, the new law:

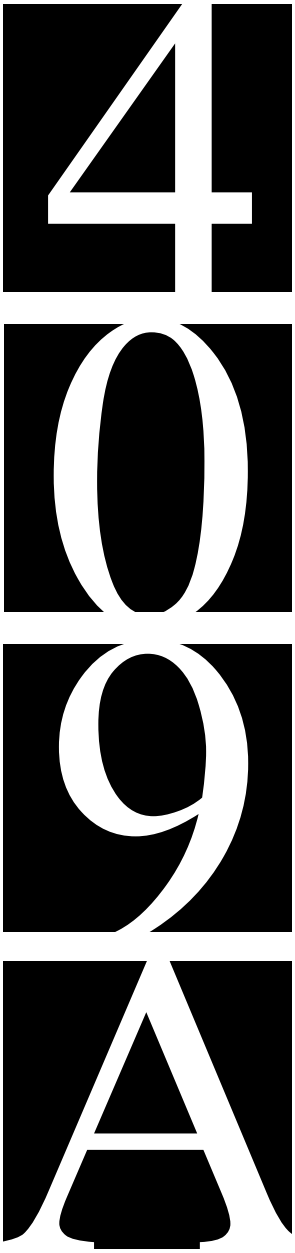
- Establishes a presumption that all individuals have decision-making capacity;
- Defines capacity to make a health care decision;
- Requires a physician's finding that an individual lacks capacity to make a health care decision to overcome the presumption of capacity;
- Defines capacity to appoint an agent;
- Recognizes that an individual who lacks health care decision-making capacity may continue to have the capacity to appoint an agent;
- Sets forth factors to consider when determining whether the individual has the capacity to appoint an agent; and
- Emphasizes that an individual's constitutional right to make health care decisions may not be taken away without due process of law.

To eliminate barriers to the creation and use of advance directives, the law:

- Allows written or oral directives;
- Expands the authority of surrogate decision makers; and
- Eliminates the statutory requirement that a patient be terminally ill or in a persistent vegetative state before an advance directive is effective.

To allow appropriate surrogates to serve without resorting to guardianships, to clarify who can serve as a surrogate decision maker and how decisions should be made, and to protect the individual's right to choose a surrogate, the law:

- Expands the circle of family members authorized to make end-of-life decisions on behalf of an incapacitated individual as default surrogates;
- Enables a distant relative or other person who has a relationship with an individual who lacks capacity to serve as a default surrogate decision maker when no appointed agent or close family member is available to serve;



- Adopts the substituted judgment standard for decision making, with the best interest standard to be applied only when an individual has always lacked decision-making capacity or when the individual's past preferences are unknown; and
- Gives the individual broad authority to disqualify an appointed agent or default surrogate, even if the individual has been found by a physician to lack decision-making capacity.

To provide a mechanism for translating directives into physician orders, the law

- Recognizes the Physician Order for Life Sustaining Treatment (POLST) form;
- Clarifies the role of the form as a form that shall be honored by emergency medical service personnel;
- Allows a POLST form to be issued for a minor child after specific requirements are met.

To allow for the effective administration of the medical system and the ability of health care providers to act pursuant to a patient's wishes, the law:

- Provides broad access to courts to determine an individual's decision-making capacity or to adjudicate disputes among surrogates or between surrogates and health care providers;
- Confirms the status of surrogate decision makers as "personal representatives" for the purposes of HIPAA;
- Protects health care providers who comply with directives from civil or criminal liability; and
- Allows a health care provider to withdraw from caring for a patient for reasons of conscience.

Finally, to protect against abuse, the law establishes criminal penalties for falsifying, forging, or destroying a directive.

The Attorney's Role in the Advance Care Planning Process

In Utah, the statutory forms under the Personal Choice and Living Will Act and the new Advance Health Care Directive Act were drafted as documents that could be completed and signed without legal help. Notwithstanding the drafters' intent, estate planning attorneys in Utah and throughout the nation have offered living will and special power of attorney forms for health care as part of the estate planning process. Attorneys have provided a service to the community by integrating these documents into the estate planning process; getting the forms signed is a major barrier to more widespread use of advance directives. Attorneys have also used these forms as part of larger plans to protect clients' rights in anticipation of future incapacity.

Attorneys who wish to continue to address these issues with their clients can no longer merely introduce the client to the statutory forms and assure that the forms are signed in compliance with the statute. The choices documented in the Advance Health Care Directive should be the product of a potentially complicated advance care planning process. This process may require that clients obtain more information from health care providers or

that they work through some difficult choices in consultation with an agent or family members. With healthy clients, the process may not take much more time than it did with the old forms. The process becomes far more complicated, however, when a client is facing a life-threatening or life-limiting illness, such as cancer, chronic obstructive pulmonary disease (COPD), or congestive heart failure (CHF). An attorney who fails to understand how the choices made on the form will affect the client's health care in the future may fail to protect the client's interests. An attorney who plans to complete these documents with clients should therefore seek educational opportunities to learn how to facilitate an advance health care planning discussion. An attorney may also wish to educate paralegals about this process, enabling the paralegal to conduct an initial assessment and to help the client to formulate questions for health care providers, for example.

An attorney who does not wish to become enmeshed in the health care planning process can appropriately choose to leave the process to others. Resource packets containing statutory forms and model instructions to be issued by the Utah Department of Health will be widely available. In addition, trained facilitators will be available in health care facilities and in the community. Deferring to other trained facilitators is a good option for attorneys. In contrast, it would be inappropriate for an attorney to pretend that nothing but the form has changed, get no additional education, and continue to facilitate the form signing, without developing an understanding of how the completed form will affect clients' interests.

Another way to put a client's interest at risk is to disregard the statutory form and draft a customized directive. An attorney may, with all good intention, develop an extensive, carefully drafted advance directive for clients that covers all scenarios and carefully outlines the client's wishes. As a practical matter, however, such a document may wreak havoc if it arrives at the hospital with a client who is unable to speak for himself. If the form is not familiar, the health care provider is likely to seek input from a surrogate decision maker, if available, without regard to the directive. If no surrogate is available, the provider may then seek an opinion from risk management, legal counsel, or an ethics committee about what care should be provided in light of the directive. It would be an unusual physician who would read, interpret, and implement a directive without consulting others, particularly in the hospital setting where many of these decisions are made. Meanwhile, the client could remain in medical decision-making limbo for days, possibly subjected to interventions he has tried to explicitly reject, while the document

is interpreted by various entities. The use of a statutory form to document the client's wishes is far more likely to protect the client's interest.

Advance Health Care Planning

The completion of the Advance Health Care Directive should be the last step in the advance health care planning process. An attorney who chooses to serve in this role needs to:

1. Understand the client's current medical conditions;
2. Assess the client's understanding of conditions, prognosis, and treatment options;
3. Identify goals of care;
4. When more information is needed to formulate a plan, help the client develop appropriate and targeted questions for the health care provider;
5. Facilitate a discussion of options without imposing his or her individual opinions, preferences, or beliefs on the client; and
6. Help the client to link goals of care with the choices on the form to document the plan.

Only after completing all relevant steps should the client record choices and sign the directive before a witness.

To be effective, a facilitator must also have knowledge of:

1. How directives are translated into instructions for care in physicians' orders;
2. Basic facts about end-of-life care;
3. Common misperceptions and myths about end-of-life care;
4. Local options for end-of-life care; and
5. How changing circumstances affect medical decision making.

For an example of a question an attorney may be asked to navigate, consider tube feeding. Most healthy individuals would agree to tube feeding following a serious illness or injury from which they are likely to recover. In these circumstances, the goal of care is to survive the crisis and return to good health. Some individuals suffering from life-limiting neurological illnesses such as multiple sclerosis or ALS (Lou Gehrig's disease) will lose the ability to swallow; some of these individuals choose a feeding tube. The goal of care is to extend life, even though tube feeding may be necessary for the duration of life. In contrast, many individuals, including some of those who would accept tube feeding in the two previous scenarios, would reject the use of tube feeding if the need arose due to advanced dementia. In this case, care is rejected because the goals of care are to promote comfort, even if doing so has the potential of shortening life, and to avoid interventions that may increase anxiety and discomfort without substantial chance of improving function or quality of life. An attorney who chooses to facilitate advance health care planning needs the skill and knowledge to navigate this type of discussion.

At the same time, an attorney needs to know when decisions are outside the scope of the practice of law. For example, if a client suffering from multiple sclerosis came to an attorney seeking advice on whether or not to agree to a feeding tube, the attorney should refer the client back to a health care provider for medical advice. An attorney who provided advice on whether or not to accept a feeding tube would be vulnerable to an accusation that he or she is practicing medicine without a license. But an attorney could properly help the same client to complete a directive that documents a plan developed with the physician, which instructs that a feeding tube may be placed but should be removed if the client is near death and can no longer communicate with family and friends.

The Committee on Law and Aging of the Utah State Bar is in the process of planning a CLE session on how to facilitate advance health care planning discussions that will be offered on September 27th and 28th of 2007. The Utah Commission on Aging will also offer facilitator training shortly after the first of the year. Additional materials, including a sample of a formatted statutory form, are available at www.coa.utah.gov.

Utah now has the opportunity to lead the nation in demonstrating how advance health care planning can improve the way people die. To effectively implement the new law, attorneys must develop new skills and obtain relevant knowledge to enable them to help their clients to develop and document health care plans.

1. Utah Code Ann. §75-2-1101, *et seq.*
2. Directive to Physicians and Providers of Medical Services, Utah Code Ann. §75-2-1104.
3. Special Power of Attorney, Utah Code Ann. §75-2-1106.
4. *See* Utah Code Ann. §75-2-1104.
5. *Id.*
6. Utah Code Ann. §75-2-1106.

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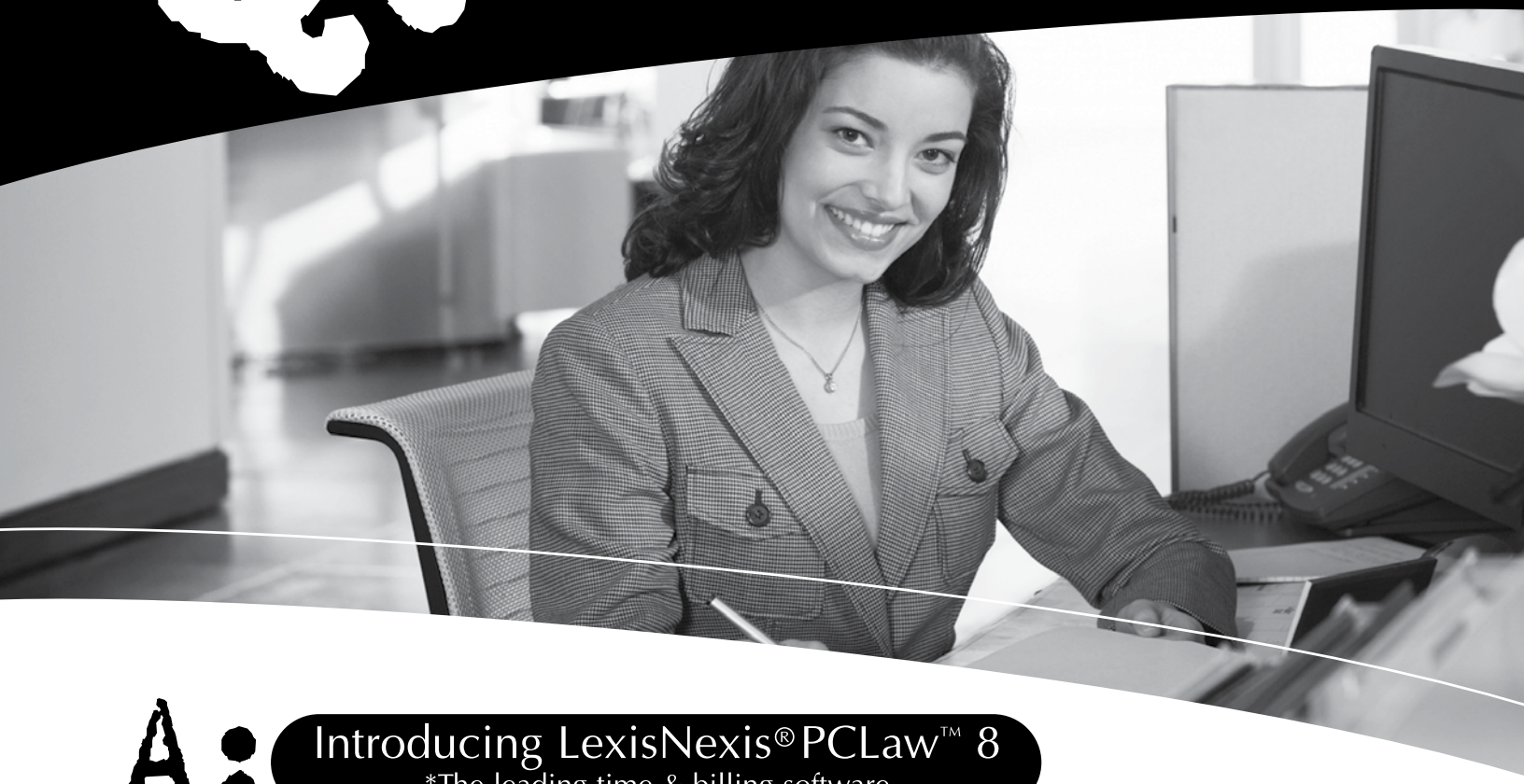

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Noteworthy Laws Passed During the 2007 Legislative Session

by Neal C. Geddes

The purpose of this article is to highlight some of the noteworthy laws passed during the recent legislative session. As members of the Bar, it is important to be aware of modifications to existing laws, as well as provisions that are altogether new. Please note that this article does not provide a detailed analysis of the bills passed. Accordingly, attorneys are encouraged to initiate a more detailed review of these laws on their own.

Declarations

For many years, un-sworn declarations have been allowed in place of affidavits in federal court. The convenience factor of not needing a notary is obvious. Now declarations may be used in state court. The Utah Legislature passed what is now Utah Code Ann. §46-5-101, and the convenience of un-sworn declarations is available in state court.

Water Law

Here in Utah, water rights are of the utmost public concern. Accordingly, the legislature passed several bills that affect the practice of water law and are likely to be important to many members of the Utah Bar. HB 53, Share Assessment Act, describes how water shares may be assessed, provides rules for assessing shares, and allows enforcement of assessments by various methods, including sale of shares with unpaid assessments. SB 9, "Nonprofit Corporation Amendments," makes several changes to nonprofit corporations. The bill defines the term "mutual benefit corporation," and addresses property rights of members of a nonprofit corporation, voting requirements, transactions where an officer or director has a conflict of interest, and prevents the transfer of water rights upon dissolution of a nonprofit corporation.

The passage of HB 65, "Special District Recodification," was well received by the special district component of the water community. This bill substantially revamps and recodifies the legislative structure of special districts to better match the language of the statute with actual practice. The bill standardizes various provisions relating to district authority such as taxing, bonding, eminent domain authority, district boards of trustees, and local district validation proceedings, among others. Additionally, the bill changes terminology relating to what was known as independent special districts (except for special service districts) so that they will now be known as local districts. The bill also provides an opportunity for local governments to adopt smaller assessment areas to fund smaller projects from the levying of property taxes levied on the areas receiving benefits from increased infrastructure. Due to the length and number of issues addressed in this bill, it is strongly encouraged that water law practitioners conduct a detailed review of this bill.

And I would be remiss if I did not mention HB 20, State Declaration of Water Week. This bill establishes the first full week of May as State Water Week to recognize the importance of water conservation, quality, and supply in the state.

Open Meetings Law

The legislature passed several new laws concerning the Utah Open and Public Meetings Act. HB 10, "Open and Public Meetings Act Amendments," clarifies the definition of public body. Now, the definition of public body under this Act includes a public body created by the Utah Constitution as well as by statute, rule, ordinance, or resolution. The bill also amends content requirements for written minutes and recordings of open meetings. In addition, the bill makes the judicial branch subject to the Act.

HB 204, "Modifications to Open and Public Meetings," clarifies that the notice provisions of an emergency meeting under the Act must include notice of the time, place, and topics of the meetings. The bill also provides that, at the discretion of the presiding member of the public body, topics raised by the public that are not included on the agenda may be discussed at the meeting as long as the public body does not take any final action.

Another bill of interest to the bar is HB 22, "Open and Public Meetings," which modifies the notice requirements in the Interlocal

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Cooperation Act to ensure that they are consistent with the requirements of the Open and Public Meetings Act. HB 222 also requires a public body to provide public notice of its meetings on the Utah Public Notice Website, unless the public body is a municipality or district that has a budget of less than $1 million. This law also prohibits a court from voiding a final action on the basis that the public body failed to post public notice on the Internet if (a) the public body otherwise complies with the provisions of Utah Code Ann. § 52-4-202 ; and (b) the failure to comply was a result of unforeseen Internet hosting or communication technology failure.

Local Government Law

The legislature also revived the issue of whether community development agencies should have authority to exercise the power of eminent domain. By passing HB 365S1, Eminent Domain Authority for Community Development and Renewal Agencies, the legislature restored a limited power of eminent domain to community development and renewal agencies. This marks a reversal of an earlier bill that stripped eminent domain authority from community development agencies. Now, community and renewal agencies may exercise the authority of eminent domain in an urban renewal project area if the agency board has made a finding of blight, and if certain conditions as set forth in Utah Code Ann. § 17C-2-601 are met.

HB 69, County and Municipal Land Use Provisions Regarding Schools, modifies county and municipal land use provisions relating to schools. The bill adds additional building inspections to a list of requirements that a county and municipality may not impose on school districts or charter schools and modifies the criteria for an improvement project for which a county and municipality may not require a school district or charter school to pay an impact fee.

The legislature also made significant modifications to the Land Use Development and Management Act's provision regarding the regulation of billboards. HB 352, "Local Government Regulation of Billboards," provides that a county or municipality is deemed to have initiated the acquisition of a billboard structure by eminent domain if the governmental entity prevents a billboard owner from structurally modifying or upgrading a billboard or relocating a billboard to another specified location. The bill also makes some technical changes to Section 10-9a-511.

Miscellaneous

HB 9, Health Care and Quality Data, modifies Utah Code Ann. § 26-33a-104 and authorizes the Health Data Committee to develop and adopt a plan for the collection of data relating to health care costs and to implement the plan, provided that sufficient funding exists.

HB 286, "School Discipline and Conduct," amended provisions of the State System of Public Education with regard to school discipline and conduct. This bill makes it unlawful for a school-age minor to engage in disruptive student behavior, and provides that a school-age minor who receives a habitual disruptive behavior citation is subject to the jurisdiction of the juvenile court. The bill also establishes the standards, procedures and administrative penalties for disruptive student behavior and makes it clear that the provisions apply to all schools, including charter schools.

HB 194, "Tampering with Evidence Amendments," clarifies the acts that constitute the offense of tampering with evidence. Now, a person who takes action to prevent "the production of any thing or item which reasonably would be anticipated to be evidence in the official proceeding or investigation" is guilty of tampering with evidence. The bill also establishes definitions for the terms "official proceeding" and "thing or item."

Lastly, the legislature modified the criminal code. HB 274, "Violent Crime In Presence of a Child," requires the judge or board of pardons and parole to consider that the defendant committed a violent criminal offense in the presence of a child. Under the statute, "violent criminal offense" includes any criminal offense involving violence or physical harm, or a threat or attempt to commit violence or physical harm. Persons younger than 14 years of age are deemed to be a child for purposes of this law.

Conclusion

I have only touched the tip of the iceberg with respect to the numerous changes to Utah laws that will affect members of the Utah State Bar. The legislature passed many, many more laws than what I have briefly discussed here. In addition, the short summaries I have provided should not replace a personal review of the text of the new laws. To do that, go the Utah Legislature's web site: http://www.le.state.ut.us.

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When Does a Skier Become a Trespasser?

by Gordon Strachan, Adam Strachan, and Kevin Simon

Many western states, including Utah, encourage the public's recreational use of open space by having Limitation of Landowner Liability ("LLL") statutes.[1] If a recreational user is injured, these statutes limit the liability of landowners by absolving the landowner of any duty to make the land safe, or even to warn of dangerous conditions. These statutes apply to a very broad range of recreational activities, including skiing, hunting, fishing, boating, river running and mountain biking. If, however, a landowner charges for recreational use of the land – as ski resorts do by selling lift tickets for skiing, snowboarding or for lift-served mountain bike access – the recreationist is considered a business invitee, and the LLL statutes do not apply. Instead, the general rules of negligence control. The question, then, is whether recreation providers who charge for their services have any protection under negligence law similar to that afforded by the LLL statutes. The answer is "yes" if recreationists become trespassers by exceeding the scope of their business invitations. In such situations, the recreation provider's only duty is to refrain from willful or wanton conduct.

Typical examples of recreationists exceeding the scope of their particular invitation include a ski resort user who enters a closed or roped-off area of the ski resort; a rider on a guided horseback tour who strays from the designated route; a patron of a theme park who enters an area restricted to "authorized personnel only;" or a snowmobiler or river runner on a guided excursion who disobeys the guide's instructions. Although one could imagine other examples in nearly every recreational context, there are surprisingly few Utah cases on the topic. It is clear, however, that Utah follows the Restatement (Second) of Torts ("Restatement") for issues concerning trespassers and corresponding landowner duties.[2] Non-Utah cases applying the Restatement uniformly hold that a business invitee can become a trespasser by exceeding the scope of the invitation.[3] These cases suggest Utah courts should almost always absolve defendant recreation providers from liability whenever plaintiffs become trespassers by exceeding the scope of their invitations to use the property. Thus, absent willful or wanton conduct, the skier who enters a closed area of the resort should be barred from suing as a trespasser, as should the horseback rider who strays from the designated route, or the theme park patron who enters an area restricted to "authorized personnel only."

Plaintiffs usually claim they were unaware of the boundaries of their invitation, or that they didn't know they had entered a closed area. In the ski resort context, this argument arises when plaintiffs contend they didn't see the rope designating the area as closed, or thought they could duck under it. This subjective misunderstanding is of no consequence under the Restatement.[4]

Even more dangerous is the person who believes his judgment about what is safe transcends posted signs, ropes, flags, or even verbal warnings. This scenario is sometimes seen when a skier attempts to access the back country from ski resort property. Because of the very high risk of injury or death, Utah ski resorts have historically posted stunningly clear signage to warn skiers of the dangers the back country poses. Some of these signs have drawn national media coverage when a tragedy occurs. Other Utah resorts outright bar access to the back country from their property. Since each resort in Utah has such different topography and snow safety/management requirements, the best rule seems to be that the Director of the Ski Patrol and senior management at each resort must exercise their own independent judgment about how access, if any, should be controlled by the particular ski resort.

GORDON STRACHAN (center), ADAM STRACHAN (right), and KEVIN SIMON (left) specialize in defending ski resorts and other recreation providers. Their firm, Strachan Strachan & Simon P.C., also provides general litigation services and is located in Park City, Utah.

Some local governments have attempted to govern this unclear area of the law by enacting ordinances that provide for criminal penalties if a skier enters a slope or trail that has been posted as "closed."[5] Prosecutors have utilized early season prosecution of egregious cases with severe sentencing to deter the skiing public, and show that rope line violations will not be tolerated. Both the Town of Alta and Summit County have prosecuted "closed sign" cases, sometimes with ski patrol members as special ordinance enforcement deputies, acting at the sheriff's discretion and direction.

In sum, recreationists must remember that recreation providers are not guarantors of their patrons' safety. Undoubtedly, recreation providers owe their patrons duties; however, *the patron's behavior* can change the scope and extent of those duties, regardless of anything the recreation provider does. Put another way, know before you go.

1. *See, e.g.,* Idaho Code § 36-1604; N.M. Stat. Ann. § 17-4-7; Wyo. Stat. Ann. § 39-19-103; Utah Code Ann. § 57-14-1.

2. *Pratt v. Mitchell Hollow Irrigation Co.,* 813 P.2d 1169, 1172 (1991).

3. *See, e.g., Oswald v. Hausman,* 548 A.2d 594, 595-96 (Pa. Super. 1988) (Man held to be trespasser where he wandered from public road onto unmarked private road – "A trespasser is one who enters the land of another without any right to do so or who goes beyond the rights and privileges which he or she has been granted by license or invitation"); *Gruetzemacher v. Billings,* 348 S.W.2d 952, 958 (Mo. 1961) (Woman attempting to rescue child in a neighboring yard held to be trespasser where she walked through flower bed and was injured on hidden garden stake – "Plaintiff must show not only that she had an invitation to enter the premises, but also at the time of the injury, she was in that part of the premises into which she was invited to enter, and was using them in a manner authorized by the invitation..."); *Miller v. General Motors Corp.,* 565 N.E.2d 687, 690 (Ill. Ct. App. 1990) (Summary judgment for defendant where plaintiff was injured trespassing into defendant's pump house – "[A] landowner is free to fix his own terms for consent"); *Hensley v. Salomone,* 2005 Ohio App. LEXIS 218, *12 (Ohio Ct. App. 2005) ("A landowner may give permission to another to enter part of his property at will, therefore, without giving the person free reign to enter all parts of the property. When guests are invited into one's home, they are not necessarily invited to rummage through the attic of the home without a separate and express invitation").

4. *See Oswald,* 548 A.2d at 598-599 ("In determining whether the person who enters or remains on land is a trespasser within the meaning of this Section, the question whether his entry has been intentional, negligent, or purely accidental is not material...").

5. Summit Co. Ord. 91; Salt Lake Co. Municipal Code §§ 13.12.010-060; Wyo. Stat. Ann. § 6-9-201.

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Unsworn Declarations in Lieu of Affidavits:

Increasing Efficiency of Practice Under the Utah Rules of Criminal and Civil Procedure and the Utah Rules of Evidence

by John H. Bogart and Scott D. McCoy

On April 30, 2007, Utah Code Annotated § 46-5-101, Self-authentication of documents, came into effect. Section 46-5-101 states:

(1) If the Utah Rules of Criminal Procedure, Civil Procedure, or Evidence, require or permit a written declaration upon oath, an individual may, with like force and effect, provide an unsworn written declaration, subscribed and dated under penalty of this section, in substantially the following form:

> "I declare (or certify, verify, or state) under criminal penalty of the State of Utah that the foregoing is true and correct. Executed on (date).
> (Signature)".

(2) A person is guilty of a class B misdemeanor if the person knowingly makes a false written statement as provided under Subsection (1).

Under the new law, in state court as in federal court,[1] litigants may use unsworn declarations in lieu of notarized affidavits under the Utah Rules of Civil and Criminal Procedure and the Rules of Evidence. The enactment of this section is intended to increase the efficiency of practice in Utah state courts, primarily in the context of motions for summary judgment pursuant to Utah Rule of Civil Procedure 56 and the authentication of documents pursuant to Utah Rule of Evidence 902.

Self-Authentication Under Rule 902 of the Utah Rules of Evidence

Utah Rule of Evidence 902 provides that "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required" with respect to certain documents, including certified domestic and foreign records of regularly conducted activity.[2] Subsections 11 and 12 of Rule 902 were modified in 2001 to track changes in the Federal Rules of Evidence, which set forth means by which litigants may authenticate certain records of regularly conducted activities through a written declaration of a foundation witness in lieu of live testimony from such a witness. The advisory committee notes to the federal rule confirm that a written declaration pursuant 28 U.S.C. § 1746 (the federal unsworn declarations under penalty of perjury statute) would satisfy the new amended rule.[3]

When Utah amended Rule 902 for the same purpose, no statutory equivalent to 28 U.S.C. § 1746 providing for unsworn declarations under penalty of perjury existed in the Utah Code.[4] Consequently, the drafters of amended Rule 902 built into the rule itself the requirements for declarations used under the rule. Unfortunately, since the changes to Rule 902 took effect, there has been some confusion in the application of the rule, and some courts have refused to admit records accompanied by such unsworn declarations.

The Legislature enacted Section 46-5-101, modeling it after the federal provision, in order to eliminate this confusion. With the newly enacted provision, it should be abundantly clear that unsworn declarations under this provision should satisfy the "written declarations" option under Rule 902 in Utah state courts.

The original intent of amending Rule 902 was to increase the efficiency of admitting important records in actions in state court, by eliminating the requirement of notarization or resort to live testimony for authentication. Enactment of Section 46-5-101 should buttress the "written declaration" provisions already included in Rule 902 and end any lingering confusion.

Motions for Judgment Under Rule 56 of the Rules of Civil Procedure

Motions for judgment under Rule 56 just got a little simpler. The legal standards remain unchanged, but it is now easier to present

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evidence in support of or in opposition to a motion for summary judgment. Parties are no longer required to obtain affidavits in support of or opposition to a motion for summary judgment. In place of affidavits, the parties may now rely on declarations. This change, which brings Utah law into line with the Federal Rules of Civil Procedure, should reduce the costs of summary judgment motions and significantly reduce the burden involved in presenting evidence in support of or opposition to such a motion.

One of the ways evidence may be presented to the court under Rule 56 is by affidavit. An affidavit requires notarization of signatures, which means that an affidavit requires more time to prepare and law firms must maintain notaries on staff. Maintaining notaries on staff has, over the last several years, become more expensive as the licensing and other requirements imposed on notaries have increased. More importantly, obtaining affidavits involved arranging for the affiant to appear before a notary, something often either inconvenient or time-consuming, particularly when the witness is not located nearby, is traveling, or when the final version of the statement arrives only shortly before the filing deadline. These sorts of problems are made easier by a change in state law permitting use of a declaration in place of an affidavit.

Under the newly enacted Section 46-5-101, declarations under penalty of perjury[5] may be used in place of affidavits. Such use can be a real boon in preparing or opposing a motion for summary judgment. Affidavits have played key roles in Rules 56(c), (e), and (f).[6] Under 56(c), in addition to "pleadings, depositions, answers to interrogatories, and admission" a party may now submit declarations rather than affidavits. The standards for affidavits set out in Rule 56(e) apply to declarations. The declaration must be made on personal knowledge, set out admissible facts, and demonstrate that the declarant is competent to testify to the matters set out. All that changes is the form of the document. Similarly, counsel can now set out the need for continuance under Rule 56(f) by way of declaration rather than affidavit, although the substantive requirements remain the same.

If all that changes is the form of the document, why care? Litigators should care because the change in the form of the document makes the preparation of summary judgment papers much easier. No longer will one need to track down a notary in a foreign city or state to notarize an affidavit. No longer will one need to either send the office notary off to a witness or cajole a witness into coming to the office during the middle of the day to have a signature notarized. By including the proper statutory language, the process can be handled by exchange of documents. The witness signs the declaration and returns it. That aspect of summary judgment motions is simpler and cheaper, whether moving or opposing.

Criminal Procedure Rule 6 and Warrants

Section 46-5-101 also has utility in the criminal law context. The process for obtaining a warrant under Utah Rule of Criminal Procedure 6 has been simplified. Under Rule 6, which governs issuance of warrants of arrest or summons, information may be accompanied by an affidavit that sets out a basis for finding that there is probable cause to believe that an offense has been committed and that the accused has committed it.[7] Section 46-5-101 allows use of a declaration in lieu of a notarized affidavit for such purposes. While the declaration still must be submitted to a judge for review, the substitution of declarations for affidavits promises a somewhat smoother process and will provide costs savings. The provision may be particularly helpful to law enforcement in rural areas where it may be difficult to locate a notary.

1. Section 46-5-101 was modeled after 28 U.S.C. § 1746, which governs practice in federal courts.
2. Utah Rule of Evidence 902(11) & (12).
3. Federal Rule of Evidence 902, Advisory Committee Notes to 2000 Amendments.
4. Utah Rule of Evidence 902, Advisory Committee Note ("The changes to the federal rules benefit from a federal statute allowing the use of declarations without notarization. Utah has no comparable statute. . . .")
5. The slight wording difference between the federal and state statutes does not mark a substantive difference. In either case, the declaration is a statement subject to penalty for perjury.
6. The sanctions for bad faith filing under 56(g) apply with equal force to bad faith declarations as to bad faith affidavits.
7. Utah Rule of Criminal Procedure 6.

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Synopsis of Recent Criminal Case Law Pertaining to Fourth Amendment Issues and Incredible Evidence

by Patrick Tan

One of the more common motions in criminal defense practice is the motion to suppress based on a constitutional violation of a defendant's Fourth Amendment rights. In 2006 and early 2007, appellate courts ruled favorably for the defense on certain subcategories of Fourth Amendment rights, including searches of residences, the scope of traffic stops for passengers, and detentions. Brief summaries of those cases follow. In addition, this article touches on a redefinition of the standard for bindovers of preliminary hearings.

Search of Residence – Who May Give Consent?

In *Georgia v. Randolph,* 547 U.S. 103 (2006) defendant Randolph was charged with possession of a controlled substance. His attorney moved to suppress the cocaine discovered in a search of the marital residence based upon Mr. Randolph's wife's consent to the search. The U.S. Supreme Court ruled that police may not search a residence without a warrant when a physically present resident refuses consent, but another resident grants consent. The ability to consent exceeds a person's property rights.

Along the same lines, in *State v. Udell,* 2006 UT App. 292, 141 P.3d 612, police were dispatched to defendant Udell's home to conduct a welfare check on his son. As Udell spoke with officers outside his house, his live-in girlfriend also stepped outside. The officers noticed that the girlfriend smelled of marijuana and exhibited other signs of recent drug use. They therefore asked to speak with her in private; in the meantime, Udell reentered his home. When the officers told Udell's girlfriend they suspected drug use, she admitted to recently using drugs and informed officers that drugs and drug paraphernalia were in the home. She also consented to a search of Udell's house. When the police entered the home to begin their search, Udell immediately objected to their presence in the residence and demanded that they leave and get a search warrant. The officers ignored Udell's demands and searched his home, inevitably finding drugs and drug paraphernalia. Udell was charged with Unlawful Possession of a Controlled Substance and Unlawful Possession of Drug Paraphernalia. His motion to suppress was denied, and he entered a conditional plea.

Applying *Randolph,* the Utah Court of Appeals reasoned that, because Udell was physically present and expressly refused to consent to a search of his home, a warrantless search of Udell's home, absent any exigent circumstances, could not be justified as reasonable on the basis that consent was given by Udell's live-in girlfriend. *Id.* at 613.

(However, a physically present resident such as that in *Randolph* is to be distinguished from the situation in *United States v. Matlock,* 415 U.S. 164 (1974), where the Court upheld a warrantless search when the police failed to give the defendant/resident an opportunity to object to another resident's consent even though the defendant was sitting nearby, detained in a police car).

The Odor of Burning Marijuana does not an Emergency Make

Another recent case refining and preserving Fourth Amendment protection is *State v. Duran,* 2007 UT 23, 156 P.3d 795 in which the defendant Bernadette Duran entered a conditional guilty plea in Seventh District Court to two counts of Unlawful Possession of a Controlled Substance and appealed.

The Utah Court of Appeals ruled that the evidence did not show that the trailer owner had common authority over the trailer in which defendant was present at the time of search; thus, the owner could not give valid consent to the search of trailer; officers could not reasonably believe that the owner had the authority to consent to a search of the trailer; the odor of burning marijuana emanating from the trailer did not create exigent circumstances that would allow the warrantless entry of the trailer by the officers; and the odor of burning marijuana provided officers with probable cause that a crime was being committed. *State v. Duran,* 2005 UT App 409, ¶23, 131 P.3d 246.

On certiorari, the Utah Supreme Court affirmed the Court of

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Appeals, holding that police officers who smelled an odor of burning marijuana emanating from a residence were not justified in searching the residence under the evidence-destruction aspect of the exigent circumstances exception to the warrant requirement.

The mere possibility that evidence may be destroyed is not enough to justify a warrantless entry based on exigent circumstances; rather, "police officers must have a reasonable belief that the destruction of evidence is sufficiently certain as to justify a warrantless entry based on exigent circumstances." 2007 UT 23, ¶8, 156 P.3d 795.

Moreover, "the detectable odor of burning marijuana is inadequate, standing alone, to support [a] reasonable belief" that "the destruction of evidence is sufficiently certain as to justify a warrantless entry based on exigent circumstances. " *Id.* That is to say, "the odor must be accompanied by some evidence that the suspects are disposing of the evidence, as opposed to casually consuming it, before law enforcement officials may be lawfully justified in claiming the benefit of the exigent-circumstances exception [to the warrant requirement]." *Id.*

Thus, police officers who smelled the odor of burning marijuana emanating from a residence were not justified in searching the residence under the evidence-destruction aspect of exigent circumstances exception to the warrant requirement because the defendant did not know that officers were aware of the presence of marijuana in the residence until they broke through the door, and, most significantly, nothing indicated that the police officers "engaged in any effort, much less a reasonable one, to reconcile their law enforcement needs with the demands of personal privacy." *Id.* ¶17.

Scope of Traffic Stops – Passengers

Moving from Fourth Amendment cases pertaining to residents at their homes, Tenth Circuit cases have provided guidance in 2006 as to the law pertaining to passengers in vehicles. Specifically, *United States v. Ladeaux,* 454 F.3d 1107 (10th Cir. 2006) and *United States v. Guerrero-Espinoza,* 462 F.3d 1302 (10th Cir. 2006) relate to the scope of traffic stops for passengers.

In *Ladeaux,* police officers ordered a passenger to exit a car and to roll up the car windows and open the air vents to facilitate the drug-sniffing dog. The Court remanded the case and opined that although passengers lack an ownership interest in a vehicle, they may seek the exclusion of evidence based on their illegal detention. However, to suppress this evidence, the passenger must show 1) an illegal detention, and 2) a factual nexus between the illegality and the discovery of the evidence. This nexus requires passengers to show that the police would not have uncovered

this evidence but for the illegal detention. *Id.* at 1111.

In *Guerrero-Espinoza,* the Court concluded that a police officer unlawfully seized a passenger in a vehicle after a traffic stop had ended. After pulling over the vehicle, the officer escorted the driver to the patrol car, issued the driver a citation inside the patrol car, and then opened the car door and allowed the driver to leave. At that point, the traffic stop ended as to the driver. Although the driver validly consented to additional questioning about his travel plans and relationship to the passenger, the passenger who remained inside the vehicle had no knowledge of these events. Thus, even though the officer and the driver both knew the traffic stop was over, the passenger did not. Furthermore, it was the passenger who owned the vehicle and was unable to locate the registration or insurance information. Under these circumstances, a reasonable person in the passenger's shoes would have believed that he was not free to leave the scene. The officer's failure to inform the passenger that the traffic stop was over and the passenger was free to leave, in essence, unlawfully detained the passenger. 462 F.3d at 1310.

Preliminary Hearings – Sufficiency for Bindover

Defense attorneys recognize that preliminary hearings at which witnesses appear generally result in the defendant being bound over for arraignment. However, there are those cases that are so lacking in evidence and testimony from the prosecution that bindover is inappropriate. Every now and again, a motion to quash the bindover is warranted to ask the assigned judge to reconsider the magistrate's decision.

State v. Virgin, 2006 UT 29, 137 P.3d 787, is a recent case that helps define a judge's role at a preliminary hearing; *i.e.,* to weed out groundless and improvident prosecutions rather than simply rubber-stamping the prosecutor's case. In *Virgin,* the defendant was charged with one count of aggravated sexual abuse of a child. Following a preliminary hearing, the Second District Court dismissed the case for lack of probable cause. The Utah Court of Appeals reversed and remanded, *State v. Virgin,* 2004 UT App 251, 96 P.3d 379. In particular, the Court of Appeals expressed concern that "[w]hile [the Utah Supreme Court] has held that 'the magistrate's role in this process ... is not that of a rubber stamp for the prosecution,' the very limited discretion afforded a magistrate under existing case law suggests otherwise." *State v. Virgin,* 2004 UT App 251, ¶ 20 n. 5, 96 P.3d 379 (quoting *State v. Clark,* 2001 UT 9, ¶ 10, 20 P.3d 300)

The Utah Supreme Court was asked to "revisit the narrow discretion afforded magistrates in determining whether to bind a defendant over for trial." *Id.*

On certiorari, the Utah Supreme Court reversed the Court of Appeals, holding that the trial court judge acted within his discretion in refusing to bind the defendant over for trial on charge of aggravated sexual abuse of a child. The Court reasoned that the only evidence that the defendant committed this crime came from the victim's statements, which were "inconsistent and contained a significant portion that was uniformly disbelieved," and further, testimony by witnesses established that the victim did not appear "disturbed or distraught at any time throughout the night" during which this incident of abuse allegedly took place. *Id.* ¶37.

It is noteworthy to focus on the language of the *Virgin* case in which the Court reiterated that, in order to bind a defendant over for trial, the State must show probable cause at a preliminary hearing by presenting sufficient evidence to support a reasonable belief that the defendant committed the charged crime. *Id.* ¶17. Probable cause is the same standard as the probable cause that the prosecution must show to obtain an arrest warrant. *Id.* ¶18. The probable cause standard does not constitute a "rubber stamp for the prosectution, but, rather, provides a meaningful opportunity for magistrates to ferret out groundless and improvident prosecutions." *Id.* ¶6.

Under the probable cause standard required to bind the defendant over for trial, the prosecution has the burden of producing at the preliminary hearing "believable evidence of all the elements of the crime charged," but this evidence does not need to be "capable of supporting a finding of guilt beyond a reasonable doubt." *Id.,* quoting *Clark.*

Magistrates may decline to bind a defendant over for trial "if the prosecution fails to present sufficiently credible evidence [at the preliminary hearing] on at least one element of the crime." *Id.* ¶21. They are free to decline binding a defendant over for trial where the facts presented by the prosecution provide "no more than a basis for speculation – as opposed to providing a basis for a reasonable belief." *Id.*

The key word is "reasonable." The prosecution is required to show a basis for a reasonable belief, rather a than mere belief. *Id.* ¶22. If, at some level of inconsistency or incredibility, evidence becomes "incapable of satisfying the probable cause standard," magistrates may deny bindover. *Id.*

They may also make "some limited credibility determinations" at the preliminary hearing. *Id.* ¶23. The extent of those determinations is limited to determining that evidence is "wholly lacking and incapable of" creating a reasonable inference regarding a portion of the prosecutor's claim. *Id.* ¶24. Magistrates may not weigh "credible but conflicting evidence" at a preliminary hearing, because that hearing is not a trial on the merits, but a "gateway" to the finder of fact (the jury, or, in a bench trial, the judge). *Id.*

When evidence becomes so "contradictory, inconsistent, or incredible" that it is unreasonable to base belief of an element of the prosecutor's claim on that evidence, judges need not give credence to that evidence. *Id.* at ¶39. The magistrate must view the evidence in a light most favorable to the prosecution, resolving all inferences in favor of the prosecution.

In a recent motion to quash filed in Third District Court, the charges of unlawful possession of a controlled substance and unlawful possession of a drug paraphernalia were dismissed following the defense's motion to quash the bindover, despite having been bound over at the preliminary hearing.

In this case, the defendant was a passenger in her boyfriend's car. The vehicle was pulled over by the police. The vehicle was registered to the boyfriend; the boyfriend admitted that the drugs and paraphernalia were his, and told the officer where the drugs were located in his vehicle (on the driver's side door panel and the behind the center console); and, most importantly, no drugs or paraphernalia were found on the defendant or in her personal belongings. There was no testimony or evidence provided at the preliminary hearing to show the defendant was in possession, constructive or otherwise, and not a scintilla of evidence was shown that the defendant had any intent or knowledge of the drugs in the vehicle. The prosecution asked the judge to "infer intent" to the defendant. However, the trial court ruled that the evidence could not pass muster when *State v. Virgin* was applied. To be sure, although the State could establish that an offense had been committed, it failed to satisfy the trial court that the defendant was the one who committed the offense. Accordingly, the motion to quash was granted and the possession charges were dismissed.

The above article is part of an oral presentation to the Utah Association of Criminal Defense Lawyers at the 2007 Annual Seminar at the Sundance Resort. A summary of criminal cases prepared for this presentation by Kent Hart at the Federal Defenders Office, and Ann Marie Taliaferro at the law firm of Brown & Moffat, may be requested by contacting Adria Swindle, UACDL Executive Director, P.O. Box 510846, Salt Lake City, Utah 84151; P: 801.363.2976 F: 801.363.2978, or www.uacdl.org.

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Juvenile Defense in Utah

by Paul Wake

Juvenile defense in Utah is largely handled pro se or by public defenders, since the stakes are usually too small to justify hiring a defense attorney. Still, attorneys should be ready for the call to defend a wayward youth. This article aims to help attorneys be prepared. Note that juvenile court deals both with delinquency cases and with child welfare cases. This article deals solely with delinquency.

Nonjudicial Resolution

Juvenile court is not adult criminal court. Children do not have the maturity to function independently, so they cannot vote, enter into contracts, and so forth. They have more of a custody interest than a liberty interest. Recognizing this, juvenile court was created as a civil forum for dealing with delinquent acts that would be crimes if committed by an adult. The goals of juvenile court are to rehabilitate the offender, restore the victim, and protect the community, not just to punish the child. To best accomplish these goals, the juvenile justice system is relatively informal.

In fact, many of the offenses dealt with in juvenile court – disorderly conduct, theft, alcohol consumption, and the like – never go before a judge. Minor offenses committed by children without a significant offense history may be handled informally during a meeting between the child, a parent, and a juvenile court probation officer assigned to intake. So long as the child is not claiming innocence, the child may be able to obtain a nonjudicial resolution that requires paying a small fine, doing community service, or taking a class, with the result that the offense does not become part of the child's record. This process is possible because police referrals go first to juvenile court rather than to the county attorney, so lawyers need not be involved in all cases. Sometimes the best service a defense attorney provides is no service at all, if a nonjudicial resolution would be best for a child. Note that if a child denies an offense, the probation officer may still want to meet with the family to gather social information so the probation officer may eventually make an informed recommendation to the judge. Some defense attorneys like to put off that preliminary inquiry.

Judicial Resolution

More serious offenses, and minor offenses not resolved nonjudicially, will be handled judicially. In some of these cases offenders will have been arrested and taken to detention. Such children will have a detention hearing within two business days, at which a juvenile judge will decide whether the child should be released, perhaps to a detention alternative program, or kept in detention. Bail is not a part of this process. Attorneys should be prepared to discuss with the judge whether release would jeopardize the community or create a flight risk.

Ultimately, cases continuing on a judicial track will follow a path starting with arraignment, followed by a pretrial conference, and, finally, the trial. There may be local variations such as waiver of arraignment, or combining arraignment and pretrial hearings.

Pretrials are the bread and butter of juvenile defense work. At pretrial the defense attorney should have already studied the petition (the charging document), the case history summary (juvenile rap sheet), and the police report, and should be prepared to discuss a plea agreement. Often, defense attorneys will get farther if they are prepared to discuss what would be best for the client, than if they simply dig in their heels and split legal hairs. Unless the juvenile prosecutor's case is weak, prosecutors will usually want to reform a child, and typically are in a strong position to try to do so. Defense attorneys should consider not only the weaknesses with the state's case, but also possible outcomes that might be in the child's long term interest. This may require a mix of admissions and dismissals, a plea in abeyance agreement with carefully considered conditions, or some other result.

The defense attorney should often discuss the ultimate disposition

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of the case with the probation officer rather than just with the prosecutor. Just as juvenile probation handles the intake process, the probation officer will also have much to say about the final disposition, since it is the probation officer who will likely present the judge with a formal dispositional recommendation when the judge adjudicates the case. This is why it is important for defense attorneys to get to know all the players in the system, not just the prosecutor.

Dispositions in juvenile court involve a regimen of graduated sanctions. *See* http://www.sentencing.state.ut.us/. At the low end, the judge may impose fines, community service, classes, and so forth. Then comes probation, involving checks on such things as school attendance and drug use, under the eye of a probation officer assigned to supervision. Intense probation – "state supervision" – follows. More offenses, or a serious first offense, could put a child in the custody of Juvenile Justice Services (formerly called Youth Corrections). Juvenile Justice Services has community placements such as proctor homes, wilderness programs, and sex offender treatment centers. It also runs secure confinement, which is the end of the line for juvenile offenders: long term lockup that can last until the individual is twenty-one.

The juvenile probation officer and the judge will use the disposition assessment matrix from the misnamed Juvenile Sentencing Guidelines to determine where in this system of graduated sanctions a child should probably go. Anywhere along this continuum there are other options, including placement in an Observation and Assessment center for intensive testing and evaluation prior to final disposition, or placement in the Genesis program so a child can work off restitution hours. Defense attorneys should familiarize themselves with the available programs, so they can argue for appropriate dispositions. Be aware of drivers license suspension provisions applicable to alcohol and drug charges, and of DNA collection requirements for felony and Class A misdemeanor level offenses. Some dispositions may necessitate attorney appearances later at review hearings. A concern on the horizon is the federal government's demand that states register children as sex offenders. The legislature took no action on that issue this year, but may discuss it in the future.

Many children overlook expungement. Once a person turns eighteen, and has stayed out of trouble for at least a year, the

individual can almost always have their juvenile record expunged. This requires completing a packet available from the juvenile court, and having a hearing before the judge so the judge can see what a good job the system did of rehabilitating the child. Individuals can usually handle this process on their own, but if the client is unsure or has a significant record, legal counsel can be helpful. At the least, defense attorneys should remind children at the conclusion of a case that they should remember expungement as a future possibility.

Trying Children as Adults

Occasionally a child will commit an offense so serious that the child may be prosecuted as an adult in district court. Cases involving sixteen or seventeen year olds accused of murder or of committing a felony after having been in secure confinement will be direct-filed in district court, and those defendants will not see juvenile court. Sixteen or seventeen year olds who commit one of the "ten deadly sins" – essentially most aggravated offenses – will be handled under the serious youth offender process in juvenile court. *See* Utah Code Annotated Section 78-3a-602.

This process involves a preliminary hearing in juvenile court. If there is probable cause to find that a crime was committed by the juvenile, the case is transferred to district court unless the child can show that all of three mitigating factors apply. *See* U.C.A. Section 78-3a-602(1)(b)(i)-(iii). That showing is usually not possible. Occasionally a prosecutor might try to certify a child, which involves filing both an information charging a child fourteen or older with a felony, and a motion to certify. Certification hearings involve preparation of a detailed report by the juvenile probation officer, a hearing, and a decision by the juvenile judge regarding whether the child is still amenable to rehabilitation in juvenile court, or should instead be sent to district court to be tried as an adult. *See* U.C.A. Section 78-3a-603.

Most children do not want to be tried as adults. Defense attorneys usually cannot do much to prevent a direct file, but may be able to prevent transfer under the serious youth offender process by either prevailing upon the prosecutor not to file a qualifying felony, or by quickly agreeing to admit to a lesser offense and to receive meaningful juvenile sanctions. Attorneys should not make the mistake of assuming they can get a charge reduced in district court, with the client then qualifying to have the case returned to juvenile court. Only an acquittal would put a child in a position to ever go back to juvenile court. Certification hearings have better odds than serious youth offender hearings, and in certification cases the defense attorney should carefully prepare to show the judge that the client is not a hardened criminal but instead can be helped by the juvenile court.

Conclusion

Juvenile court practice has the appealing quality of allowing an attorney to protect a client's due process rights while also making a positive difference in the child's life. Procedures are different enough from criminal practice that attorneys should familiarize themselves with the Juvenile Court Act (U.C.A. Section 78-3a-102 *et seq.*) and with the Utah Rules of Juvenile Procedure.

By evaluating whether to seek a nonjudicial resolution, by presenting a reasoned argument for release from detention, by working to develop a plea agreement that is in the child's long term interests, and by understanding dispositional alternatives well enough to properly respond to juvenile probation's dispositional recommendations, juvenile defenders will best serve their clients. It is often possible to work productively with the other players in the juvenile justice system, and positive relations generally yield positive outcomes.

Six good reasons for us to relocate.

On August 18 the old Key Bank Tower is coming down. We, however, are on our way up. When the dust settles you will find us at the Wells Fargo Center, safe and sound, on the 15th and 16th floors.

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Arbitration – In Trouble Again?

by Kent Scott

Arbitration, long a preferred method for resolving commercial disputes, is in trouble – again! I emphasize "again" because, two decades ago, arbitration experienced a great deal of criticism from the legal profession.

What it was like

In the 1980s, arbitrators were not exercising adequate control over the process. They were viewed as powerless referees who routinely granted postponements, refused to deal with dispositive motions and, my favorite, issued awards without providing a reasonable explanation.

Discovery was limited. Sanctions for failure to produce discovery were nonexistent. The enforcement of a subpoena ranged from the cumbersome to the impossible. Many arbitrations became trial by ambush. In short, arbitration was on its way to becoming a dinosaur.

The Federal Arbitration Act ("FAA") had not changed since its enactment in 1925. In 1985, Utah adopted the Uniform Arbitration Act ("UAA"), which was originally created in 1954. The Utah Judiciary's support of the arbitration process was not as evident as it is today. In the early eighties, lawyers were dealing with issues such as the constitutionality of including a pre-dispute arbitration provision in a contract. *Lindon City v. Engineers Construction Co.,* 636 P.2d 1070 (Utah 1981). In addition, both the Commercial and Construction Rules of the American Arbitration Association ("AAA") were long overdue for a major, if not a complete, overhaul.

What happened?

In response to the growing concerns over the integrity of the arbitration process, the AAA enacted a new set of arbitration rules that established a three-track system: fast track, regular track and large complex track. The rules, depending on the track used, expanded the power of the arbitrator over the management of the arbitration process.

In August of 2000, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") adopted the Revised Uniform Arbitration Act ("RUAA"). Utah was one of the first states to adopt the RUAA, which became effective May 15, 2003, as Utah Code sections 78-31a-101 through 131. The provisions of the RUAA were designed to bring arbitration law in line with judicial decisions interpreting and applying the principals of the old Uniform Arbitration Act. The provisions of the RUAA expanded the arbitrator's power to issue and enforce subpoenas, order discovery, apply discovery sanctions, handle dispositive motions, streamline the presentation of evidence, and award punitive damages and attorneys' fees.

Where are we today?

What does today's lawyer think about the arbitration process? Lawyers are increasing in their concern that arbitration has lost its luster for being fast, efficient and economical. Most of them will tell you that arbitration has become the mirror image of the "scorched earth" methods too commonly associated with traditional litigation. Is arbitration no longer relevant as an alternative dispute resolution mechanism? The consensus among lawyers today: arbitration is in trouble.

Lawyers and the judiciary – the foundation of our dispute resolution process

Our courts and the lawyers who serve as officers thereof, and as advocates of their clients' interests, remain the central focus of the way we as a society resolve disputes. That's the way it has been and will continue to be for the foreseeable future.

Without our current constitutional system of justice, there are no alternate dispute mechanisms. There is no mediation or arbitration; there is only social chaos. We are left with the "law of the jungle" where might becomes right. Let us always keep our respect and recognition of federal and state judiciaries foremost. They are the bedrock upon which our system of alternative dispute resolution rests.

The golden age of mediation – lawyers can make a difference

While arbitration is becoming less popular, mediation has enjoyed increased acceptance. The golden age of mediation has arrived,

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much to the credit of the lawyers who have demonstrated the courage and creativity to make mediation work.

And who couldn't be happy with mediation? Insurance companies promote it. Large companies and institutional contract committees write it into their contract documents. The Utah Legislature requires it in domestic and other matters. Courts have the power to order mandatory mediation, and they are doing so in increasing numbers.

Arbitration – let's not throw the baby out with the bathwater

The goal of arbitration as an alternative method for resolving disputes is to achieve a fair and just resolution with efficiency and economy. We lawyers no longer look upon arbitration as efficient and economical. And we know what we are talking about. We created Frankenstein, the arbitration monster. Now we want to kill our creation.

Arbitration is a creature of contract. Consequently, lawyers have options to design the process they will use to determine their dispute. Lawyers made arbitration what it was and is. Why do we feel compelled to make arbitration more complex and more like the litigation process? Are we, as a profession, addicted to rules and procedures (we just can't get enough of that which ails us)? It appears as though arbitration has caught the Over-Lawyering Virus Syndrome – "OLVS".

We took the newly adopted AAA Rules, the Federal Arbitration Act and the Revised Uniform Arbitration Act and created a mirror form of litigation. We want to take depositions, fact and expert, of everyone. We engage in discovery debates and file motions for sanctions. We file all kinds of dispositive motions accompanied with briefs that exceed what a judge would allow under the applicable rules of procedure. Most of all, we conduct long and laborious examinations of witnesses. Cross examination becomes just another discovery tool.

The courage to change the things we can – a few suggestions

The prevailing opinion among a growing number of practitioners is that the traditional complex commercial litigation process drains clients of both their resources and energy. The clients are required to pay a substantial sum of their capital resources to get to and through a trial. More important, our clients are not able to devote their time to what they do best, *i.e.,* provide services and products to their customers. Should not lawyers have a professional responsibility to be open-minded about using new and creative methods to solve problems?

Again, arbitration is a creature of contract. It is a consensual process that furnishes lawyers with the opportunity to design the management of a dispute and the presentation of the case. The

process can be custom made to fit the needs of the parties. The process is private. The parties choose the arbitrator, presumably someone with the expertise to understand the evidence and law that will be presented. The parties, together with the arbitrator, determine:

- the governing rules of procedure and evidence
- hearing locale and site
- the scope of discovery
- motion practice
- exchange of information dealing with witnesses and exhibits
- means and methods of presenting evidence at the hearing
- scope of submitting briefs and stipulated matters

Cooperation does not cost time or money

Civility and cooperation comes from the lawyers. Counsel should be accessible to one another. The parties deserve to receive the best from the process they bargained for. Arbitration emphasizes substance over form. It should not be overly adversarial or legalistic.

Priority should be given to keeping the process moving forward. Establish a means of communication that involves the parties and the arbitrator. Use e-mail on all communications, motions, and briefs.

Minimize the need for subpoenas. Voluntarily produce all relevant documents and witnesses under your control with discoverable information. The early production of documents and disclosure of witnesses is the key in allowing the parties to more capably assess the merits of their case. Openness and cooperation will also serve the parties in getting some or all of the issues resolved at an early date.

It works if you work on it

Counsel for the parties, together with the arbitrator, have the opportunity to shape and organize the arbitration process. "Fit the forum to the fuss." Use preliminary and scheduling conferences with the arbitrator to define and streamline the process. Create a case management schedule that, at a minimum, addresses the following:

- claims and claim amounts
- arbitration hearing time and place
- discovery plan
- schedule for briefing and arguing dispositive motions
- disclosure of witnesses
- handling of exhibits
- exchange of expert reports
- pre-hearing briefs
- procedures for the presentation of the evidence
- form of the award

Define the issues

Work with the arbitrator in the initial scheduling conference to define the issues in dispute and those matters of fact and law to which the parties can agree. Define in writing the nature and amounts of all claims and defenses. Make an early disclosure of witnesses. Before the hearing, discuss with the arbitrator which witnesses have information that will be pertinent to the process. Work on a stipulated set of facts and law that defines where the parties are in agreement and where they differ.

Address preliminary and dispositive issues

Work with the arbitrator to identify issues that need to be addressed to streamline the arbitration process. Where there is a statute of limitation or significant contract interpretation issue, get it handled right away. Does the contract prohibit consequential damages or limit damages? Are there conditions precedent that have not been met?

Group and bifurcate the issues

The arbitrator has the authority to hear the case in any particular order that would promote the fair, efficient and economical interests of the parties. The arbitrator may bifurcate the issues of liability and damages into two or more phases. For example, in a construction case, the arbitrator may group the case by issues or by parties according to the interests of their particular subcontracts or purchase orders.

Neutral fact finders

A neutral fact finder or special master may be appointed in complex matters where there are a lot of fact details or technical issues involved. The parties can jointly hire the neutral and share the expenses equally. The neutral fact finder would be an expert in the area for which he or she is hired. The neutral's findings would not be binding but would be subject to cross examination and rebuttal. Accordingly, the findings should be presented to the arbitrator and parties well in advance of the hearing.

The neutral fact finder would save the parties from each hiring their own expert, which arbitrators usually regard as another

layer of advocacy and enormous expense. Remember, you hired the arbitrator for his or her expertise. Your arbitrator should already have the background to cut through a lot of material for which you would take days in educating the judge and jury with your high priced expert.

Handling exhibits

The use and handling of exhibits can work wonders in saving time and costs in the preparation and presentation of your case. Work with the arbitrator and opposing counsel early on in the preliminary scheduling conference to determine how you will handle your exhibits.

The parties should exchange exhibit lists and work toward eliminating duplication of exhibits. A joint set of exhibits, indexed, tabbed, and contained in three ringed binders is preferred. Each panel member, yourself, opposing counsel and the witness should be provided with their own set of exhibits.

If you prefer, the lawyers can arrange so that the exhibits pertinent to each issue are grouped together. For example, the Claimant's exhibits on the issue of damages for a differing site condition could be numbered C1.A – C1.Z. This permits the addition of related exhibits and also helps the arbitrator locate information when preparing the award.

Consider providing documents on compact discs and having computer screens set up so everyone can avoid the time it takes to handle and refer to exhibits in notebook form. In cases in which a reporter is used, have the "real time" feature hooked into the screens of each arbitrator.

All objections to the exhibits should be handled prior to or at the beginning of the arbitration hearing. As a general rule, the arbitrator should rule that all exhibits not otherwise objected to will be admitted. Again, your arbitrator should have the knowledge and expertise to determine the evidentiary weight to be given to exhibits.

Expedite the presentation of evidence – fact witness panels

Make every effort to avoid serving a subpoena on every witness. Give advance notice of which witnesses will testify on which day so as to give opposing counsel an opportunity to prepare for cross examination.

Arrange to have witnesses testify via telephone. If necessary, arrange for a video of the deposition to be used so long as opposing counsel has adequate opportunity to cross-examine. Written statements or affidavits where the witness is not available for cross examination, as a general rule, will not be considered.

In lieu of direct examination, consider preparing written statements

summarizing the testimony of fact witnesses. All written statements are provided to the arbitrator and opposing counsel in advance of the hearing and must refer to the relevant portions of the exhibits cited. The statements are entered into evidence. The witness who authored the written statement (usually under the pen of the attorney calling the witness) will then be present at the hearing and subject to cross examination. Re-direct examination would follow.

Graphs, summaries and site visits – tell the story

A picture is worth a thousand words. Graphs and summaries that visually tell the story can be worth thousands of dollars. A project chronology of key events, documents and damages can assist the arbitrator in more effectively understanding the case. Organizational charts setting out key individuals, positions and titles are also helpful in understanding the case.

A site visit may also be helpful. Floor plans, diagrams, photos and three-dimensional digital productions serve as useful tools.

Expert witness presentation and panels

The adversarial system has come to depend on the use of experts. The cost of using an expert can be staggering. Consider using the services of a jointly appointed expert on technical or mathematical issues. For example, where accounting expertise will be necessary, consider hiring one independent accountant. The parties would each equally share in the costs of the joint expert. Where a technical issue is at hand, the same process can be used. This avoids the necessity of retaining two "hired guns," which usually serves only to add an expensive second layer of advocacy to the process.

Where each party is going to rely on its own expert, make your disclosures as soon as possible. Get any qualification, gateway or *"Daubert"* issues resolved up front. All experts should be pre-qualified early in the process so as not to spend valuable hearing time. Work with the arbitrator to determine deadlines for reports, depositions and all motions in limine. Clarify that the expert will not be allowed to testify outside of matters addressed in his report.

Consider presenting to counsel and the arbitrator in advance of the hearing a written summary of your expert's testimony, including all theories, opinions and the basis thereof. The summary and report would be entered into evidence and the opposing lawyer could proceed to cross-examine the expert at the hearing with re-direct to follow.

Where more than one expert is going to testify on the same topic, arrange to have them testify at the same time. All resumes, summaries and reports are exchanged ahead of time. The experts are first questioned by the arbitrator. The parties are informed about what the arbitrator is hearing.

After the arbitrator is finished with questioning all the experts, the attorney calling the experts will be allowed to question the experts. The experts are then cross-examined by opposing counsel. Thereafter, the experts can question one another and engage in an exchange of information.

The use of expert panels is an efficient and effective way to collect and track technical information on an issue by issue basis from multiple witnesses. It helps to clarify differences and forces the parties to be realistic in setting out their respective positions and the basis thereof. It also reduces the study time the arbitrator will later undertake in preparing the award and trying to make sense out of conflicting expert opinions.

The arbitration panel

Some cases have a panel of three arbitrators. In such case, one of the members will be appointed as the chair, usually the one with the most legal training and arbitration experience. The chair may also be appointed by the two party-selected arbitrators.

In either event, the parties and panel members should agree on a protocol where the panel chair handles matters such as issuing subpoenas, conducting administrative and scheduling conferences, hearing and ruling on all discovery disputes and

determining all non-dispositive motions. The parties may wish to provide an appeal procedure to the whole panel where they disagree with the chair's ruling.

"Chess clock" arbitration

At times it is necessary to monitor the time taken in the presentation of the case by both the claimant and respondent. When counsel or the arbitrator suspect that the case should be structured along these lines, a technique known as the "chess clock" is used to manage the hearing process. This method should be used only by consent of the parties, unless one or both parties are being unreasonable in the presentation of their case or where counsel is going beyond the bounds or propriety and needs to be "reeled in."

Conclusion: the wisdom to create a better way – do we have it in us?

Lawyers of the Utah Bar: We did it with mediation and we can do it with arbitration. We can do better than treat arbitration as a mirror image of litigation. Let us keep traditional litigation intact, but let us not create a mirror image of our judicial system and call it "arbitration, an alternative dispute mechanism."

Arbitration remains a valued asset in the pantheon of methods and means of resolving civil disputes. If arbitration is to survive, we need to think about how to better create an effective dispute resolution process and how to more efficiently present our cases. We need to make arbitration a user-friendly, efficient and effective process.

The AAA Rules, the Federal Arbitration Act and Utah's Revised Uniform Arbitration Act provide the legal profession with an opportunity to create more effective and cost efficient ways to resolve our clients' problems. We do not need more rules. We have the legislation we need in place. We have a good body of common law, much of which has been codified in the provisions of the Revised Uniform Arbitration Act. More will be developed down the road. What is currently needed is our willingness to think outside the box and the courage to do something other than accept arbitration as a mirror form of litigation.

Let us create an arbitration process that will live and grow to meet the needs of our clients. Let us accept the challenge to build an arbitration process that is known for its integrity, its efficiency and its economy. It is now time for a new beginning. May we, as members of the legal profession, have the wisdom and courage to meet the needs of our clients to find an alternate dispute resolution process that is fair, fast and efficient.

Thunder Over Zion: The Life of Chief Judge Willis W. Ritter

by Parker Nielson and Patricia Cowley

Reviewed by Todd Zagorec

A friend gave me a copy of *Thunder Over Zion: The Life of Chief Judge Willis W. Ritter* by Parker Nielson and Patricia Cowley. I knew almost nothing about Judge Ritter, and only an odd memory from high school kept the book from joining the dusty stack I really intend to read someday, but didn't actually pick out for myself. I remembered Willis Ritter as the crotchety old judge who declared the Salt Lake City parking ordinance unconstitutional and ordered Jake Garn to stop writing parking tickets. I like eccentrics, and that was enough to get me to open the book. I was surprised. There are plenty of sidebars about the quirky, grouchy judge, but there is also real drama in the flawed brilliance that made Ritter's life a Greek tragedy set against the law, politics, and personalities of Utah in the 20th century.

I am willing to guess that few members of the bar today would recognize the name 'Willis Ritter.' He served as U.S. District Judge for the District of Utah from 1949 until his death in 1978, and was one of the most controversial public figures of his time. He was respected, feared, and vilified by friends and enemies alike.

Patricia Cowley never knew Ritter personally, but became interested in writing his biography. She began conducting interviews and researching his life and career. She even started drafting, but health problems prevented her from continuing, so she approached Parker Nielson and asked him to take over the project. He had tried cases before Judge Ritter, and they had been casual acquaintances outside the courtroom. He agreed, and started reviewing boxes of material representing years of Patricia Cowley's work. A few more years of research and writing followed before the book was ready for publication.

Everyone who knew Willis Ritter has a few stories about the iron fist with which he ruled his courtroom. One example: the mail sorting room of the post office was in the basement of the old federal building at Fourth South and Main, and all the noise rattled up through the ductwork to a vent in the courtroom behind Ritter's bench. One day Judge Ritter became annoyed by the constant buzzing and clattering of a freight elevator used by the postal workers. Announcing that "it sounded like a bowling alley," he ordered the use of the elevator discontinued. When his order was ignored, he had the offending postal worker arrested. The noise continued despite the arrest, and each time the elevator rumbled into action, Ritter ordered another arrest. By the end of the day, he had 24 postal employees in custody.

Parker Nielson was kind enough to spend time with me discussing the book. He described appearing before the U.S. Supreme Court as "a piece of cake" compared to practicing in front of Ritter. Ritter used a "trailing" calendar. Litigators probably know exactly what that is, but for the benefit of lawyers like me who find a courtroom about as familiar as a corn maze, that means he would schedule several different trials to begin on the same date and time. He wanted to keep his courtroom busy. He didn't want any down time from cases settling – as they always do – just before trial. The result was, of course, tremendous inconvenience to trial counsel, litigants, and witnesses. Counsel were well advised to stay close to the courtroom even when the case was far down the list, as Ritter was not above selecting juries and starting trials regardless of whether counsel were present. Yes, there were some remands for new trials. No, that did not change the judge's behavior.

Ritter's iron fist wasn't reserved exclusively for the courtroom. These days, you don't often read about a judge punching out the owner of a private club, or getting into table-pounding arguments with the staff at Lamb's, or playing strip spin-the-bottle at Club Manhattan (and losing). Where have all the outrageous characters gone anyway? How did we all become so predictable and well-behaved?

Years ago, Gerry Spence came to our evidence class as a guest lecturer. He was supposed to talk about "the cross-examination of the expert witness." He started off at the chalkboard drawing a

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picture (it looked like a broom handle with a noose on the end – he called it his "witness stick" but never quite got around to explaining it), and over his shoulder he muttered, "Expert witnesses. I hate the mothers." Then he turned around, looked at us, and announced (after all these years this is not going to be verbatim, but it's close), "This is the biggest bunch of #%@$*& rule-followers I've ever seen all together in one place in my life. You people like to think you're so *^&%#$ original – nobody tells you what to do. Well you're not fooling me. There's nothing original about any of you. The only reason you're here is because you've learned to play the system for all it's worth." Nothing more was said about expert witnesses or their cross-examination.

I know, it was a bit of an act, but there's something to it. We all succeeded in college because we learned how to play the game by the rules. We went to law school to learn another game with even more rules. Because of that we make great committee members. But without those rules we struggle. Not the Ritters of the world – they thrive without rules. If they need one, they make it up. Whether that amounts to capricious activism or principled judgment is only a matter of perspective.

It would be a shame if Ritter were remembered as nothing more than a curmudgeon. He was also a serious jurist; and in many ways he was ahead of his time. As chief judge for the District of Utah, he handed down a bundle of controversial decisions. He ruled that Lake Powell had to be drained until water no longer encroached on the Rainbow Bridge National Monument. He ordered Salt Lake City to remove the Ten Commandments from the Metropolitan Hall of Justice. In a series of criminal cases he articulated the right to counsel and other rights of the accused that anticipated and very likely influenced subsequent rulings of the U.S. Supreme Court.

It is possible to argue with his decisions (he was no stranger to reversals from the 10th Circuit), but it would be unfair to dismiss them as arbitrary or politically motivated. He subscribed to the judicial philosophy of Oliver Wendell Holmes. He believed in the evolution of the common law to reflect the changing needs and values of the society. Like Holmes, he was no strict constructionist. He believed in a living constitution (a phrase which unfortunately has become practically "fighting words" in some quarters). He recognized that he was sacrificing a degree of stability and predictability in the interest of adaptability, but did so consciously because he thought it was worth the bargain.

As one might guess, he was a New Deal Democrat before ascending to the bench – not so rare a species in Utah then as one might imagine today. His nomination to the federal judiciary was at least in part attributable to his loyalty and efforts on behalf of the election campaigns of Senator Elbert Thomas. Thomas served as a U.S. Senator for the State of Utah from 1932 to 1950, and is an interesting figure in his own right – Google him sometime.

The account of Ritter's confirmation hearings is fascinating. It was a pivotal event in his life – protracted and accusatory at the instigation of his enemies (of which there were more than a handful) – and can be described as either a spirited inquiry or a degrading witch hunt, depending on the point of view. One can't help but wonder if the ability to withstand public humiliation is really the best way to measure judicial temperament.

Ritter's enemies and critics very nearly derailed his nomination – but only very nearly. As Judge Ritter took his place on the federal bench, however, his personal life seemed to become more unsettled. He became increasingly lonely and bitter. It is not clear whether the contentious confirmation process triggered changes in his personality (although it's easy to imagine that public attacks on one's patriotism and marital fidelity might have that effect), or whether his less admirable traits simply intensified with age. As time wore on, however, he became vindictive, erratic, dictatorial, and at times just plain mean and uncouth.

He seemed to take refuge in his courtroom, where he was shielded and empowered by his constitutional independence. That independence undoubtedly made him a better judge – able to rule as he saw fit and let the chips fall where they may – but

by giving full play to his autocratic inclinations, it did little to endear him to anyone.

He engaged in a long-running and petty feud with Judge Sherman Christensen, whose appointment Ritter took as a personal insult and threat. In Ritter's mind, the District's caseload did not warrant a second judge, and Christensen's appointment was nothing more than a political attack on his independence by diluting his power. As the senior judge in the District – and therefore, the "chief judge" – he refused to share any of the administrative responsibilities of the District with his "little helper." He made all the case assignments; he made all the court personnel decisions; and he refused even to meet with Judge Christensen. Not surprisingly, no case of any importance ever seemed to get assigned to the associate judge. An exasperated Judge Christensen appealed repeatedly to the Judicial Council, which eventually intervened and directed that case assignments be made by lottery. The lottery might not have been completely foolproof, however, as an uncanny statistical aberration continued to send all significant cases to Judge Ritter's docket. Parker Nielson told me that he used the phrase "Chief Judge" on the cover of the book, rather than simply "Judge," for a reason: he didn't want Ritter rising from the grave to hold him in contempt. I sympathize.

Ritter gradually succumbed to an incurable melancholy. Wary of his random outbursts of rage, friends increasingly avoided his social invitations. He responded by drinking alone in his chambers, and often, late at night, had to be helped across the street by the custodial staff to the room at the Hotel Newhouse where he lived.

Ritter's life story is not a happy one. When Willis was a teenager, his mother left his father, taking Willis's sister and two younger brothers with her. Willis had little or no contact with his mother after that. Initially, he remained with his father, but his father apparently wasn't up to the task, and Willis was soon taken in by foster parents. His father died a few years later. Willis emerged as a determined and brilliant young man, earning an LL.B. from the University of Chicago Law School, and an S.J.D. from Harvard Law School. He achieved a string of professional and political successes, but struggled with personal relationships. He had a sad marriage. He lost friends.

Adversity visits everyone. Whether and how we respond is the real story of our lives. The mystery and tragedy is why some people can't or won't. Parker Nielson and Patricia Cowley clearly admire Ritter's intellect and judicial principles, but don't hesitate to describe the flaws. The result is a kindly portrait, but not necessarily a glowing one, that memorializes a legendary Utah legal figure before he fades completely from public consciousness.

The Utah Supreme Court IOLTA Program Announces 2007-2008 Grant Awards

The Utah Supreme Court IOLTA (Interest On Lawyers Trust Accounts) Program is administered by the Utah Bar Foundation, a private non profit 501(c)(3) organization. While there is a close working relationship with the Utah State Bar, the Utah Bar Foundation is a completely separate entity. No funds from the Utah Bar Foundation go to support the Utah State Bar.

In May 2007, the Board of Directors for the Utah Bar Foundation reviewed grant applications for funding during the 2007-2008 year. The Utah Bar Foundation uses IOLTA funds to make grants in the following categories:

1. To promote legal education and increase the knowledge and awareness of the law in the community.
2. To assist in providing legal services to the disadvantaged.
3. To improve the administration of justice.
4. To serve other worthwhile law-related public purposes.

Since the first grants of IOLTA funds were awarded in 1985, the Utah Bar Foundation has awarded over $5 million for charitable, law related purposes.

The existence of IOLTA has allowed great progress to be made in serving the unmet legal needs of the poor and disabled for civil legal services throughout the state of Utah. The Foundation has also funded projects to improve the administration of justice and to provide law-related education for the public.

2007-2008 IOLTA GRANT RECIPIENTS INCLUDE:

- $75,000 Legal Aid Society of Salt Lake
- $60,000 Utah Legal Services
- $55,000 Utah Law Related Education
- $45,000 Disability Law Center
- $40,000 Southern Utah Community Legal Center
- $20,000 Holy Cross Ministries Outreach Immigration Clinics
- $20,000 Catholic Community Services Immigration Program
- $15,000 DNA People's Legal Services
- $15,000 Multi-Cultural Legal Center
- $15,000 International Rescue Committee Immigration Program
- $15,000 Utah Dispute Resolution
- $15,000 Access to Justice Project
- $10,000 Divorce Education Classes for Children

$400,000 TOTAL FUNDING PROVIDED

Utah Bar Foundation Fills Board Opening and Announces 2007-2008 Board of Directors and Officers

Ed Munson

Edward R. Munson has been elected to serve a three year term on the Board of Directors for the Utah Bar Foundation. Ed Munson is a shareholder at Jones Waldo. His practice includes both litigation and estate planning. From 1991 through 1996, Ed was a Foreign Service Officer with the Department of State and served at posts in Maracaibo, Venezuela and Madrid, Spain. He has served on the board of directors of Best Buddies of Utah and the Utah Planned Giving Round Table. The Utah Bar Foundation is pleased to have Ed join the Board.

The Utah Bar Foundation Executive Committee for 2007-2008 includes Lon A. Jenkins, serving as President. Mr. Jenkins is an attorney with the firm of Ray Quiney & Nebeker. Michael Bailey of Parsons Behle & Latimer was named as Vice President and Boyd L. Rogers with Ballard Spahr Ingersoll & Andrews was named as Secretary/Treasurer. G. Steven Sullivan of DeBry & Associates serves as Past President. In addition to those officers, other board members include Kim Luhn with Schimd & Luhn, Ralph C. Petty, Attorney at Law and the newest member appointed to the Board, Edward R. Munson with Jones Waldo Holbrook & McDonough. We thank each of these individuals for their volunteer service to the Utah Bar Foundation.

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 #5: Proceed With Caution in Seeking Sanctions

by Billy Walker

> *"Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose."*

Some may wonder why the Office of Professional Conduct would comment on the Standards of Professionalism and Civility adopted by the Utah Supreme Court on October 16, 2003 since these Standards are not the Rules of Professional Conduct. Well, it is true that unlike the mandatory nature of the Rules of Professional Conduct, the Standards are intended to be aspirational. And, it is true that the Office of Professional Conduct's primary investigative focus is the violation of Rules of Professional Conduct as a basis for possible discipline against an attorney. However, conduct by an attorney that does not comply with the Standards may only be one step removed from a violation of the Rules of Professional Conduct.

Standard #5 in its first part provides that "Lawyers shall not *lightly* seek sanctions…" One of the Webster's Dictionary's definitions for the word "lightly" is "without due care or consideration." Let me suggest that "lightly" not only means without careful consideration; it also means without a good faith basis. In this respect, the definitional difference between "careful consideration" and "good faith" is probably non-existent when you look at an attorney's reasons or motivation for seeking sanctions in hindsight. Attorneys are required by Rule 3.1 (Meritorious Claims and Contentions) of the Rules of Professional Conduct to not "bring or defend a proceeding, or assert or controvert an issue therein unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law…" Therefore, a lawyer could easily see his or herself on the other side of a Bar complaint alleging a violation of Rule of Professional Conduct 3.1 for "lightly" seeking sanctions against another attorney.

The second part of Standard #5 is that "Lawyers…will never seek sanctions against or disqualification of another for any improper purpose." "Improper purpose" as set forth in this part of Standard #5 complements the non-frivolous requirement of Rules of Professional Conduct 3.1. In other words, a finding that a lawyer does not have good faith basis in law and fact to seek sanctions or disqualification may lead to the conclusion that there was an improper purpose. However, there is another Rule of Professional Conduct that is also applicable and that is Rule 4.4 (Respect for Rights of Third Persons). Rule 4.4(a) of the Rules of Professional Conduct provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." When lawyers take actions for no substantial purposes other than embarrassment, delay or to burden, this is essentially harassment and violates the lawyer's duty as an officer of the court. So beware; a vindictively motivated request for sanctions or disqualification of another lawyer could lead to a violation of Rule 4.4 of the Rules of Professional Conduct.

It should also be noted that violation of the "good faith" principles of Standard #5 could also expose the lawyer to other penalties. *See* U.C.A. 78-27-56, and Utah Rules of Civil Procedure Rule 11. U.C.A. 78-27-56 allows the court to award reasonable attorney fees to a prevailing party if an action was without merit and brought in bad faith. And Rule 11 of the Utah Rules of Civil Procedure allows a court to impose sanctions when a case is "presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." So, if an attorney's personal makeup is such that he or she is not inclined to follow the guidelines of Standard #5 and the fear of a possible Rule of Professional Conduct violation is not incentive enough for that attorney to curtail his or her actions within the framework of Standard #5, further incentive should be provided by the possibility of monetary exposure.

The message is that the Standards of Professionalism and Civility, including Standard #5, are aspirational guidelines. However, some of the same conduct that breaches a Standard could also breach the Rules of Professional Conduct and come to the attention of the Office of Professional Conduct as part of a Bar complaint.

BILLY WALKER is Senior Counsel for the Utah State Bar Office of Professional Conduct.

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during their regularly scheduled April 27, 2007 Commission meeting held in Vernal, Utah.

1. The Commission awarded Judge of the Year to Judges Gregory K. Orme and Sandra N. Peuler. Oscar W. McConkie, Jr. was selected as Lawyer of the Year. Committee of the Year was awarded to the Bar Journal Committee and the Paralegal Division was selected as Section of the Year.
2. Brent Bullock was reappointed as the Bar's representative to Governor Huntsman's Deception Detection Examiner's Board.
3. The Commission voted not to take a position on proposed legislation but to allow the Family Law Section to take a position and represent that it is taking a position as long as Commission guidelines are followed.
4. The Commission deferred a final decision on adopting proposed language for Ethics Advisory Opinion Rules until the June meeting. Steve Owens was selected to develop proposed language for consideration to amend Ethics Advisory Opinion Rules and Procedures for June meeting.
5. Pending additional information, the Commission approved Lawyers Helping Lawyers' request for funds ($30,848).

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

Notice of Petition for Reinstatement to the Utah State Bar by J. Keith Henderson

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of a Verified Petition for Reinstatement ("Petition") filed by J. Keith Henderson in *In re Henderson,* Third District Court, Civil No. 040903585. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Retention Election Results

Nate Alder ran unopposed for the position of President-Elect of the Utah State Bar. Bar bylaws require that, in the event a candidate for President-Elect is unopposed, a retention election must be held. The results of the vote was 1,582 for retention, 79 against.

Mailing of Licensing Forms

The licensing forms for 2007-08 have been mailed. Fees are due July 1, 2007; however fees received or postmarked on or before August 1, 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 Jeff Einfeldt, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. You may also fax the information to (801)531-9537, or e-mail the corrections to Jeff.Einfeldt@utahbar.org.

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

2007 Utah State Bar Award Winners

The Annual Awards of the Utah State Bar were presented at the Bar's 77th Annual Convention by the Board of Bar Commissioners, on behalf of the entire Bar membership. Recipients are selected on the basis of achievement; professional service; and exemplification of the highest standards of professionalism. Awards given at the annual meeting were for Section of the Year, Committee of the Year, Judge of the Year, and Lawyer of the Year.

PARALEGAL DIVISION

Section of the Year

The Paralegal Division of the Utah State Bar has taken an active role in supporting the Utah State Bar and its members since the Division's creation in 1996. The Paralegal Division's mission statement reads: "The Paralegal Division of the Utah State Bar shall serve the legal profession by promoting and advancing professional competence and excellence throughout the legal profession." Although comparatively small, the Paralegal Division of the Utah State Bar is very active. It is led by a full board of directors that hold monthly board and executive committee meetings. All announcements and items of interest to members are sent via e-mail notice. In addition to other activities, the following is a list of some of the matters undertaken by the Board of Directors on behalf of the Paralegal Division over the last year:

- Formal membership drives in Salt Lake City and St. George, Utah which included presenting educational seminars about paralegals to the Association of Legal Administrators, various law firms, colleges and the SLC area managing partner's breakfast.
- Division membership committee is working on education and developing a continuing plan of action for recruitment and education.
- Formed new Community Service Committee which organized new service opportunities for paralegals including (1) a Holiday Open House in conjunction with a charitable donations drive and fundraiser to benefit The Road Home, (2) coordinated with YLD on a successful service project in St. George to benefit The D.O.V.E. Center (a shelter for abused women and children), and continuous participation with YLD with community service and fundraising activities.
- Formed a Licensing Trends Research Committee to research and obtain information relating to national licensing and regulation trends relating to paralegals.
- Drafted and approved Amended and Restated Bylaws for the Division.
- Updated the Division's Long Range Plan.
- Updated Paralegal Division informational brochure
- Promoted and presented 2nd Annual Distinguished Paralegal of the Year Award
- Updated Paralegal Division website, pending implementation of full blog format
- Distributed promotional materials to assist with education and recruiting efforts
- Implemented Blomquist Hale Counseling Services and Casemaker benefits from Bar
- The Division provides many social and CLE events for its Members including:
  - Monthly brown bag CLE seminars
  - Paralegal's Day
  - The Division Annual Meeting and full day CLE seminar
  - Law Day 5K run
  - Community Service opportunities as described above

The Paralegal Division, and its membership, take an active role in Bar activities and committees including the following:

- CLE committee: participation in all Bar Conventions including Annual convention, Fall Forum and Spring Convention
- Community Service Committee: Bar and YLD community service and fundraising activities.
- The Division supports other divisions of the Bar by making donations and attending functions sponsored by the Bar and other divisions of the Bar.
- Mock Trial event participation and judging
- Education drives with Bar Sections to admit paralegal associate members
- *Utah Bar Journal* article submissions
- Bar's governmental relations, *Bar Journal,* professional standards, ad hoc pro bono, and UPL committees

For additional information about the Paralegal Division, please refer to www.utahbar.org/sections/paralegals.

Kathryn K. Shelton, Chair (2006-2007)

UTAH BAR JOURNAL COMMITTEE

Committee of the Year

The *Utah Bar Journal* Committee endeavors to publish practical and informative articles on Utah legal issues and to provide a forum for the exchange of opinions and the discussion of views on matters relating to the Utah State Bar. Outside of the monthly editorial meetings, committee members spend countless hours planning, editing, and covering issues important to Bar members. The lengthy service of a number of committee members is admirable. Some members have served on the committee for more than 20 years. More junior members can boast over 10 years of service. There are those who attribute this longevity to dedication, while others claim it's the tasty lunches served at the monthly editorial meetings.

The *Utah Bar Journal* was first published in 1973. Under the leadership of Calvin Thorpe, the publication changed to its current format in 1988. Cal served as Editor until 1999 when he and his wife died in a motor vehicle accident while returning from the Bar's Mid-Year Meeting in St. George. William Holyoak has served as editor of the *Utah Bar Journal* since then.

A distinctive feature of the *Utah Bar Journal's* current format is its covers, which typically feature photographs of natural Utah taken by members of the Bar. Special distinctive covers were also featured this past year on an extra issue commemorating the 75th anniversary of the Utah State Bar and on a special issue focused on Civility and Professionalism.

The *Utah Bar Journal* is now available on the internet at the Bar's web site, www.utahbar.org. The site includes an archive of issues going back to 2001. This fully searchable resource will continue to improve as the committee looks for new and innovative ways to bring the *Utah Bar Journal* to the Bar's members.

The *Utah Bar Journal* committee consists of a number of dedicated legal professionals, including representatives from the Young Lawyer Division and the Paralegal Division, who provide important perspective and input. In addition, the committee is ably supported by Bar staff.

The *Utah Bar Journal* committee is as follows:

Editor: William D. Holyoak

Managing Editor: Todd Zagorec

Art/Design Editor: Randall L. Romrell

Articles Editors:
Robert Palmer Rees
Gretchen Lee

Departments Editor: Catherine E. Roberts

Utah Law Developments Editor: J. Craig Smith

Judicial Advisor: Judge Gregory K. Orme

Copy Editors:
John P. Ball
Hal Armstrong

Young Lawyer Representatives:
Peter H. Donaldson
Nathan C. Croxford

Paralegal Representative: Greg Wayment

Bar Staff Liaison: Christine Critchley

Advertising/Design Coordinator: Laniece Roberts

OSCAR W. MCCONKIE
Lawyer of the Year

Oscar W. McConkie is a founding partner of the law firm Kirton & McConkie, one of the major law firms in the Intermountain West. It consists of 93 lawyers and is among the fastest growing firms in the State of Utah.

He has significantly impacted the law in the area of Church and State. For instance, he argued cases in the Utah Supreme Court and the United States District Court in Utah wherein the courts broadened the meaning of the Utah statutory term "confession" in the clergy-penitent privilege, protecting certain communications from public disclosure, to include all communications between a cleric and parishioner that were intended to be confidential wherein the parishioner was seeking spiritual advice; and he has successfully drafted and sponsored legislation in legislatures from Jamaica to Mauritius and has created legal personalities in Africa.

Oscar W. McConkie was born 26 May 1926 in Moab, Utah, the fifth of six children born to Vivian Redd McConkie and Judge Oscar W. McConkie. He married Judith Stoddard in the Salt Lake Temple on 17 March 1951. They have eight children: Oscar W. III, Ann (Boyden), Daniel Stoddard, Gail (Evans), Clair (Evans), Pace Jefferson, Roger James, and Edward Stoddard McConkie. Six of the eight children are lawyers and members of the Utah State Bar Association. Ann Boyden has taken her grandfather's seat on the bench of the Third District in Utah.

He received his professional degree, Juris Doctor, from the University of Utah College of Law in 1952. He received his baccalaureate degree, Bachelor of Science, from the University of Utah Political Science Department in 1949. He graduated from East High School in Salt Lake City in 1944, a valedictorian of his class. He was in an officer training program (V-12) while in the U.S. Navy stationed at the University of New Mexico from 1944-46, during the Second World War. He played football for the University of New Mexico the year it won the Sun Bowl game.

McConkie has had a lifelong record of professional and community service. He served, first as a member and then as chairman, of the Advisory Committee on Revisions to the local Rules of Practice United States District Court for the District of Utah from 1998 to 2007. He was a member of the Utah State Bar Committee on Access to Justice, 1997-1999. He was a member of Citizen Committee on Judicial Compensation, 1997-2006, having been appointed thereto by the Chief Justice of the Utah Supreme Court.

McConkie was elected to and served as chairman of the Utah State Board of Education, January 1983 to January 1985. He served as co-chairman, Liaison Committee, Utah State Board of Education, and Utah State Board of Regents, 1983-1985.

He was elected to the Utah State Senate, and served as President of the Utah State Senate, 1965-1966. He was the first senator to be elected president in his first term, excepting the first Senate to sit. As President of the Senate, he served as Acting Governor of the State of Utah in 1965-1966 during brief concurrent absences from the State by the Governor and Secretary of State.

McConkie served as Vice-Chairman on the Commission on the Organization of the Executive Branch of Utah Government (popularly known as the Little Hoover Commission), 1965-1966. He was elected to the Utah State House of Representatives, 1955-1957. He served on the Judiciary, Revenue and Taxation, and Rules Committees. He served as County Attorney, Summit County, State of Utah, 1959-1963. McConkie was an instructor in Business Law, Stevens Henagar College, 1952-1967.

Oscar W. McConkie has authored six books, two of which were published in eleven languages.

JUDGE GREGORY K. ORME
Judge of the Year

Judge Gregory K. Orme was appointed to the Utah Court of Appeals by Gov. Norm Bangerter in January 1987. He graduated from the University of Utah in 1975 and received a law degree, with high honors, from George Washington University in Washington D.C. in 1978. Judge Orme served as a law clerk to Judge Monroe G. McKay, Tenth Circuit Court of Appeals, and was a partner in the law firm of VanCott, Bagley, Cornwall & McCarthy. Judge Orme served a two-year term as presiding judge, two terms on the Judicial Council, and six years as chair of the Ethics Advisory Committee and 10 years on the Judicial Performance Evaluation Committee. He is a past chair of the Court Commissioner Conduct Committee. Judge Orme currently serves on the Utah Supreme Court's Advisory Committee on the Rules of Appellate Procedure and its Advisory Committee on Professionalism. He is a member of the Utah Sentencing Commission. Judge Orme is also the judicial advisor to the *Utah Bar Journal* and a member of the executive committee of the Utah State Bar's Appellate Practice Section. He is a Fellow of the American Bar Foundation.

JUDGE SANDRA N. PEULER
Judge of the Year

Judge Sandra N. Peuler was appointed to the Third District Court in May 1994 by Gov. Michael O. Leavitt. She received a law degree from the University of Baltimore in 1977, and is a member of the Maryland State Bar and Utah State Bar. Prior to her appointment, Judge Peuler was a court commissioner in Third District Court for 12 years. She is a former member of the Children's Justice Center Advisory Board, the Utah State Bar Ethics Advisory Opinion Committee, and the Board of District Court Judges. Judge Peuler served on the State Commission on Criminal and Juvenile Justice for eight years. She is the immediate past-president of the David K. Watkiss-Sutherland II Inns of Court, and currently serves as presiding judge of the Third District Court. She is a Fellow of the American Bar Foundation.

Jest is for All…

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Utah State Bar Ethics Advisory Opinion Committee Opinion No. 07-02

Issued June 10, 2007

Issue: If an attorney guardian ad litem is appointed by a court for a person, may another attorney communicate with the person about the subject of the representation without the prior consent of the attorney guardian ad litem?

Opinion: When a person is represented by an attorney guardian ad litem, an attorney representing another party in the proceeding may not communicate with the person about the dispute, or arrange for the person to meet with a second attorney for such purpose, without the prior consent of the attorney guardian ad litem or authorization of the appropriate court, unless the represented person is independently seeking a second opinion or alternative representation from the attorney.

Facts: A minor is involved in a contested abuse/neglect proceeding. The minor is represented by an attorney guardian ad litem ("GAL")[1] appointed for the minor through the Utah Office of the Guardian ad Litem. With knowledge of the parent's attorney, one of the minor's parents asks a third attorney, who is a friend of the family, to interview the child, interview the child's therapist and file a notice of appearance for the child in the proceeding, along with an affidavit from the children's therapist, all without the knowledge or consent of the GAL.

We also consider the variation of a mature minor child in an abuse/neglect or custody case who has become dissatisfied with the representation being provided by the GAL and independently seeks to obtain separate representation or a second opinion from another attorney.

Conclusion: When a guardian ad litem is appointed by the court to represent a person in a judicial proceeding, another attorney may not communicate with the represented person about the subject of the representation unless the attorney first obtains the consent of the GAL or an appropriate order from a court of competent jurisdiction. Except, however, if a mature minor independently and voluntarily attempts to obtain a second opinion or independent representation from an uninvolved attorney, that attorney does not violate Rule 4.2 by speaking with the minor, even if the communication is without the GAL's prior permission or consent. Minors also have statutory and constitutional rights that are independent of the rights of their parents and guardians. Nothing contained in this opinion is intended to affect or modify any such rights. This opinion only addresses the ethical and professional responsibilities of Utah attorneys when the minor is represented by a GAL.

For the full text of this and other Ethics Advisory Opinions go to the "Rules, Policies & Opinions" link at www.utahbar.org.

1. This Opinion assumes that the guardian ad litem is an attorney. Situations in which the guardian ad litem is not an attorney require a different analysis, which we do not address here.

Discipline Corner

RESIGNATION WITH DISCIPLINE PENDING

On April 25, 2007, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Lona Monson Webb.

In summary:

Ms. Webb was associated with a business that engaged in direct mailings to the public to identify people who were interested in estate planning. After the business identified people non-lawyer agents would visit the potential customers. During the initial visit, the non-lawyer agents gave a presentation about the benefits and would recommend living trusts to potential clients. The non-lawyer agents also provided a brochure with Ms. Webb's name and phone number on it. If the potential client was interested, the non-lawyer agent presented an engagement letter drafted by Ms. Webb. The non-lawyer agent then forwarded the signed engagement letter and the client's information to Ms. Webb. The engagement letter did not disclose Ms. Webb's nature or terms of her relationship with the business. Ms. Webb would prepare estate planning documents. Ms. Webb would receive part of the money paid and turn over the majority of the money paid to the business. The non-lawyer agents would then present the estate documents to clients for signature. Ms. Webb knew that the non-lawyer agents would attempt to sell insurance products to her clients and that they received a commission for this.

ADMONITION

On April 5, 2007, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violations of Rules 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney borrowed money in the form of a cash advance on a credit card charge account. The attorney misrepresented the transaction to the bank and credit company by labeling the charge as legal fees. The attorney's response to the Informal Complaint was not in compliance with the Rule 8.1(b) of the Rules of Professional Conduct.

ADMONITION

On March 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 violations of Rule 1.8(h) (Conflict of Interest: Current Clients), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney entered into an agreement with an indigent client whereby the client waived all rights to file a Bar complaint and released the attorney from all other claims. Prior to the client signing the agreement, the attorney did not advise the client to seek independent counsel. The agreement interferes with attorney discipline oversight and undermines the integrity of the profession.

PROBATION

On November 27, 2006, the Honorable Joseph C. Fratto, Third Judicial District Court, entered Findings of Fact, Conclusions of Law and Order Sealing File against an attorney. The attorney was placed on a six-month probation and anger management counseling. Upon the successful completion of the probation and counseling, the action was dismissed with prejudice.

In summary:

An attorney engaged in inappropriate behavior and anger in an incident involving parking lot security guards.

Pro Bono Honor Roll

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

The Paralegal Division Supports Access to Justice and Recognizes its Distinguished Paralegal of the Year

by Kathryn K. Shelton, Chair

The Paralegal Division's mission statement as adopted by the Board of Directors is that "The Paralegal Division of the Utah State Bar shall serve the legal profession by promoting and advancing professional competence and excellence throughout the legal profession." The Division's objectives and long-range plan goals include, among other items, the following: 1) to assist the Utah State Bar with its mission to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of the Law; and 2) to assist the Utah State Bar in increasing access to lower cost, affordable legal services and, at the same time, protect the public from harm from unqualified persons seeking to provide legal assistance to unrepresented persons.

The Paralegal Division co-sponsored with Legal Assistants Association of Utah ("LAAU"), the annual Paralegal's Day luncheon, on Thursday, May 17th. Paralegal's Day was originally declared by Governor Mike Leavitt and redeclared by Governor Olene Walker to be on the third Thursday of May of every year. Our event's CLE speaker this year was Magistrate Judge Paul Warner who spoke about ethical problems he sees in his courtroom and how to avoid them, as well as addressing ethical issues of which paralegals and lawyers should be aware. We appreciated the educational messages that Judge Warner delivered and the contribution of his time to make Paralegal's Day such a successful event.

Last year, the Paralegal Division joined with LAAU to initiate the presentation of an annual Distinguished Paralegal of the Year award to be presented at each Paralegal's Day CLE luncheon. The criteria that nominees need to meet for this award indicate that the recipient should be a Utah paralegal who, over a long and distinguished career, has by his or her ethical and personal conduct, commitment and activities, exemplified for his or her fellow paralegals and the attorneys with whom he or she works, the epitome of professionalism and who has also rendered extraordinary contributions that coincide with the purposes of the Paralegal Division and/or the purposes of LAAU as set forth in the Bylaws of each organization. The nominees do not need to be members of either organization but must meet the criteria indicated. Nominations for the award are accepted from paralegals and attorneys but no self nominations are permitted. Suzanne Potts of the Paralegal Division has chaired this committee the past two years. Our Nomination Selection Committee consisted this year of three attorneys including Judge David Nuffer, Billy Walker, and N. Adam Caldwell, as well as Suzanne Potts of the Paralegal Division and Lorraine Wardle of LAAU. Our thanks go to the committee members for their willingness to carefully review the nominations that were received and to spend their valuable time on this important project. There was a wonderful pool of exceptional candidates for our committee to consider for this year's award. We appreciate each of the committee members and their commitment to excellence for the selection process and the ultimate decision regarding the award recipient.

Paralegals are involved in promoting and participating in access to justice and I am pleased to announce that this year's Distinguished Paralegal of the Year Award recipient is Gloria Larrea, a paralegal at Utah Legal Services. Gloria was nominated by an attorney at Utah Legal Services and exemplifies in every way the criteria for the Distinguished Paralegal of the Year Award.

Timothy J. Williams, the nominating attorney for Ms. Larrea, in a letter sent to the Nomination Selection Committee dated April 3, 2007, describes Gloria as follows:

KATHRYN K. SHELTON has been a paralegal for 12 years, including the last 9 years at Durham Jones & Pinegar where she works primarily in the corporate/securities section. Kathryn served as the Chair of the Paralegal Division from June 2006 to June 2007 and as an ex-officio member of the bar commission representing the Paralegal Division during that time.

…For the past 27 years she has worked for Utah Legal Services, dedicating herself to advancing the causes of the underprivileged. While undoubtedly she could make more money working for a private firm, her only interest lies in helping those less fortunate – to Gloria, these clients are her adopted family.

I do not think it would be an exaggeration to say that Gloria knows more about her area of practice – subsidized housing law – than any attorney or paralegal in the state of Utah. I am confident in this assessment, because time and time again, our knowledgeable staff of attorneys ultimately turn to Gloria for her knowledge of the law and regulations in this very complex and ever changing area. She maintains one of the most comprehensive data bases in this area that I am aware of, including a file cabinet full of marked up cases; advisory opinions; and letters issued by HUD. Her personal copy of the C.F.R. is not annotated by the publishers, but has become so through painstaking effort by Gloria. Often, I find myself amazed at her ability to cite from memory the specific relevant case law and regulation I need to support a client's position. More than once, I have spent hours performing research on what I believed to be a new and novel argument, only to find out upon presenting it to fellow staff, that Gloria already had the same idea and wrote a memorandum on the issue years before.

Gloria Larrea receives the Paralegal of the Year Award.

Her worthiness for your award, however, goes far beyond her dedication to her own professional development. She is respected by and has mentored numerous volunteers, paralegals, law students, and attorneys who have worked or volunteered with Utah Legal Services over the past quarter century. She has attended various meetings with local Housing Authorities in an effort to both educate them and help further our clients' causes.

…She also has a rare, but needed, empathy and compassion, to work with the disabled clients Utah Legal Services routinely represents. Finally, I would add, that through her efforts, conduct, and behavior, Gloria is an exemplary role model to all legal professionals with respect to professional civility and ethical behavior. Perhaps the greatest testament I can offer to Gloria's worthiness is the legacy she has created through her mentoring multiple generations of attorneys and paralegals and the inestimable list of clients she has successfully assisted.

As paralegals and professionals it is wonderful to recognize someone who has made a difference in our profession and in providing access to justice. Gloria's commitment to the profession and to the mission of the Bar and the objectives of the Paralegal Division are an example to us all.

As I reflect on the past year as Chair of the Paralegal Division, I realize that each of us can make a difference and contribute to the Utah State Bar's mission and our Division's objectives. Our contributions may come through community service, ensuring our own adherence to professional standards and civility, supporting our attorneys in their practice of law while delivering excellent service to them and to their clients, educating others about paralegal profession matters, and ensuring our own productivity and effectiveness while providing value and service to our employers and their clients. I have been privileged to see many examples of excellence and dedication to this profession and am surrounded with these kinds of examples as I work with the Board of Directors of the Paralegal Division of the Utah State Bar, the executive staff and employees of the Utah State Bar, and the leaders of the Bar including Gus Chin and other members of the Bar Commission.

No, we are not lawyers, but I believe all of us who are committed professionals can make a difference in the quality and delivery of legal services in our state. I am pleased that Gloria Larrea has been selected as this year's Distinguished Paralegal of the Year and pleased to recognize that there are many others who continue to make valuable contributions to this profession. As paralegals uphold professional standards, promote civility, provide excellent service, and assist with providing access to justice to all members of the community, we can each make a significant difference.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
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.** Sun Valley, Idaho. SEC Update, Recent Federal Securities Enforcement Issues, Current Utah Securities & State Regulatory Issues, Trends and Developments in the Proxy Process – How does it all work, M&A Deal Points, Delaware Law Update, Utah Law Update, Panel Discussion Regarding Controls & Procedures for Small Public Companies, Real Estate / Securities Issues, Going Private / Going Dark. $205 section members, $225, non-section.	7.5 hrs
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
08/17/07	**Construction Law Section CLE & Golf.** The Homestead Resort, Midway, Utah. 8:30 – 11:30 am CLE, 12:00 pm Golf.	3 hrs CLE/NLCLE
09/20/07	**NLCLE: Family Law – Enforcing Orders & Modifications.** 4:30 – 7:45 pm. Pre-registration $60 YLD members, $80 others. Door registrations: $75 YLD members, $95 others.	3 hrs CLE/NLCLE
10/18/07	**NLCLE: Litigation.** 4:30 – 7:45 pm. Pre-registration $60 YLD members, $80 others. Door registrations: $75 YLD members, $95 others.	3 hrs CLE/NLCLE
11/02/07	**New Lawyer Required Ethics Program.** 8:30 am – 12:30 pm. $55.00	Fulfills New Lawyer Ethics Requirement
11/16/07	**Fall Forum**	TBA
12/18/07	**NLCLE: Wills and Trusts II: Settling Estates Over $1.2 Million.** 9:00 am – 12:00 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.
If you have any questions call (801) 297-7036.

REGISTRATION FORM

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

Registration for (Seminar Title(s)):

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

NOTICE

Attention all Attorneys, we are looking for the attorney who did a will and estate planning for Robert Hans Herzog (Bob). Bob passed away on 4/19/07 and we cannot find his will, athough he mentioned having done one, and renewed it within this year. Please contact Ellen Redd (801)414-0452 if you have any information regarding Robert Herzog. Thank You.

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Madson & Austin, an intellectual property law firm located in downtown Salt Lake City, has openings for patent attorneys with 1-5 years of experience. An undergraduate or graduate degree in electrical or mechanical engineering is preferred, as is a license to practice law in Utah and before the USPTO. Excellent analytical and writing skills, and academic performance are essential. The firm offers a competitive salary and excellent benefits. If you have the experience and skills suited to this position, you may send your resume to rapp@maiplaw.com.

Rapidly growing law firm, with offices in St. George, Utah and Mesquite, Nevada is seeking an experienced Transaction Attorney (3+ years) licensed in Utah and/or Nevada for our St. George office. Strong academic credentials and excellent research and writing skills required. Business Transactions, Real Estate Law, and Construction Law. Competitive salary and benefits. Send resume to R. Daren Barney, dbarney@barney-mckenna.com; (435) 628-1711.

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