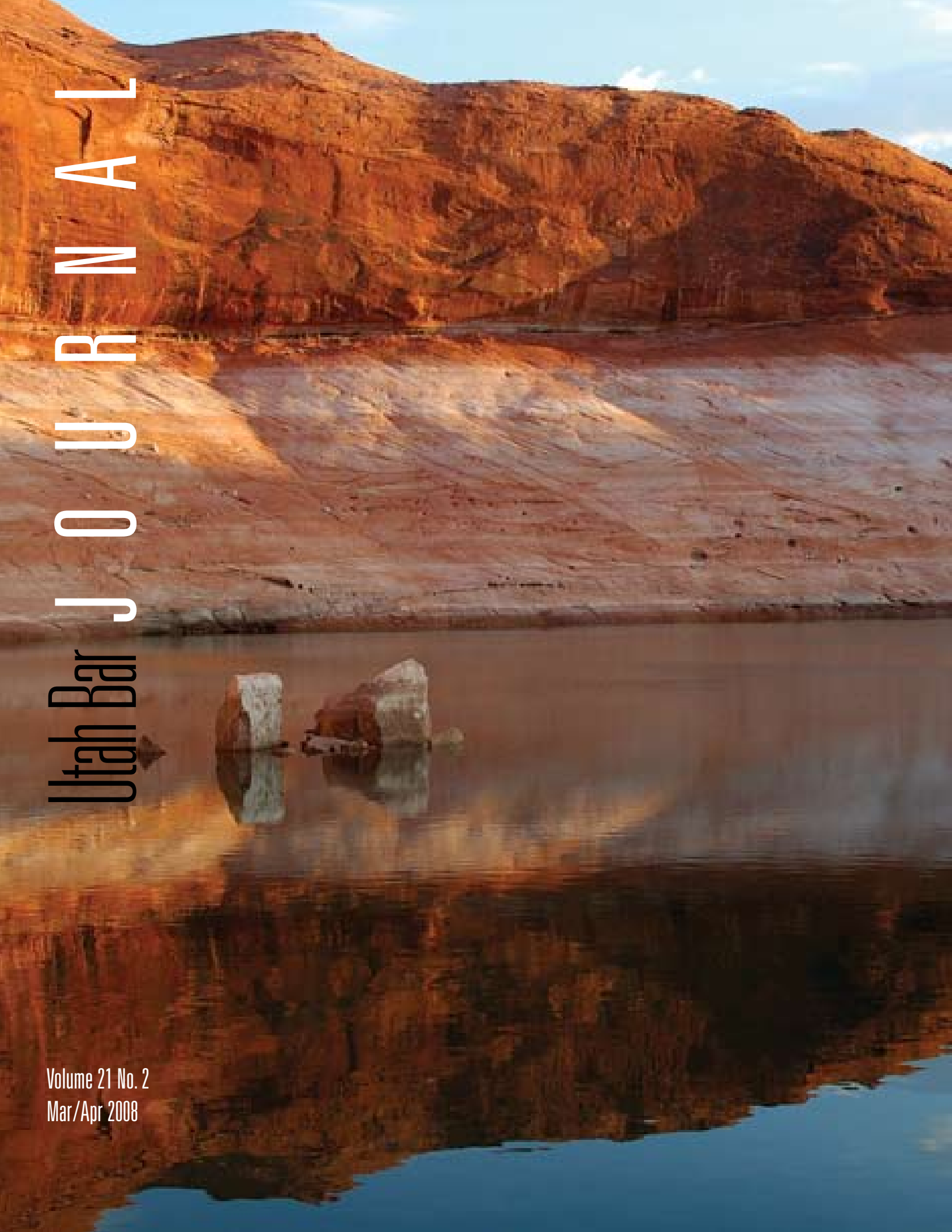

Utah Bar JOURNAL

Volume 21 No. 2
Mar/Apr 2008

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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 that advocates or opposes a particular candidacy for a political or judicial office or that 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.

Interested in writing an article for the Bar Journal?

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

If you have an article idea or would be interested in writing on a particular topic, contact the Editor at 532-1234 or write:

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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: *Escalante Canyon at Lake Powell, Utah,* by Steven Black of Alpine, Utah.

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

Utah Bar JOURNAL

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Letters to the Editor

Dear Editor:

I chime in re colleague Vetter's excellent suggestions to improve our bar, particularly regarding bar finances and lawyer referral.

1. In 1973, bar dues were a fraction of today's. The Justice Center made them jump many fold. Mandatory CLE added thousands to remain active. The Law Center is now paid. Bar dues should reduce. Isn't the bar's ideal to benefit the bar members as well as the public? Do not fall for the trap. The monster of bureaucracy has an insatiable appetite. However, please remember the little guy – the sole practitioner and foreign aliens with little English ability.

2. Utah Lawyer Referral died several years ago for a certain bar segment and certain society segment. For a few hundred dollars a year I received many immigrant inquiries in my solo international practice. Then in the guise of making lawyer referral "self sufficient," the human element was removed and a California computer service replaced it. Now attorneys pay many hundreds for one category listing, and computer illiterate and English illiterate are effectively excluded. It was a bad idea. I am glad to hear we are rethinking lawyer referral.

3. No service of the bar should be "self sufficient." Bar income should be divided by the commission between all services, lawyer referral included. Cannot the bar afford at least one receptionist to field referral inquiries? Nevada can. They not only have one receptionist – but three. And they receive on average 10 inquiries per month asking not for Nevada attorney referrals – but for lawyers in Utah! Does that tell you something about how lawyer referral in Utah has gone amiss? It sure does to me. There is a need not being met.

George M. McCune

Dear Editor:

Judge Reva Beck Bosone has served as a role model and inspiration to many Utah women who have desired to become lawyers. I was reminded of this recently and decided to write concerning my limited experience with Judge Bosone.

Judge Bosone became the first Judicial Officer in what was then the Post Office. Since that time the Postal Service became a semi-independent agency in the Federal Government.

I graduated from Stanford Law School in 1959, a time when it was extremely difficult for women to get employment in law firms or private business. Thanks to the Utah State Bar in 1998, I found out I was the 40th woman admitted to the Utah Bar. I was also admitted to the California Bar. To find employment I moved to the Washington, D.C. area and obtained positions with the Federal Government, including eight years on the Department of Interior's Board of Land Appeals and then in 1980 I moved to the Postal Service's Board of Contract Appeals within the Judicial Department.

I learned then that I was only the second woman employed as an Administrative Judge in that Department – Judge Bosone and myself. We were both from Utah. Some of our support staff had worked with Judge Bosone. They had very favorable comments about her work and about her as a boss.

I had the privilege of meeting Judge Bosone at a luncheon for graduates of the University of Utah's Law School to which I had been invited. Though Judge Bosone was very old then and quite frail she still had that indomitable spirit which marked her legal and legislative career. I feel privileged to have followed somewhat in her footsteps.

Joan Bear Thompson

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. Footnotes: Articles may not have footnotes. 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.

President-Elect and Bar Commission Candidates

President-Elect Candidates

STEPHEN W. OWENS

Personal

- Practice at Epperson Rencher & Owens, five-attorney firm in SLC
- Married with two daughters
- Six years on the Bar Commission (serving most recently on the Executive Committee)
- Training at Western States Bar Conferences (2007-08)
- Prior Young Lawyers' President

Past & Future

I have focused on five areas. If elected, I will continue to work diligently on these issues:

Close and Frugal Management of Bar Funds: Oppose any dues increase for active lawyers.

Lawyers in Crisis: Helped establish free, statewide, confidential mental health counseling, and a new OPC diversion program.

Fair and Independent Courts: Oppose encroachments by the other two branches of government and by public referendum.

Increased Public Relations Effort: Promote the good things lawyers do and their value to society.

New Blood: Bring in 12 new committee chairs and 50 committee members.

Statement of Candidacy:

I ask for your vote as President-Elect of the Utah State Bar. I am running because I genuinely like lawyers and feel that I can meaningfully contribute at an exciting time. I commit to you the necessary time, energy, and whatever talents I have to representing you. Thanks for your consideration.

SCOTT SABEY

Mr. Sabey is a shareholder at the law firm of Fabian & Clendenin. He focuses his practice in real estate, business law, and related litigation. Mr. Sabey is past Chair of the Real Property Section and past Chair of the Business Law Section of the Utah State Bar. He has served on the Bar's Governmental Relations Committee since 1997, and was its Co-Chair until this last legislative session. Mr. Sabey is also a registered lobbyist and has lobbied on behalf of the Bar on legislation affecting its members. He has received: the Distinguished Real Property Practitioner of the Year Award; the Distinguished Committee of the Year Award; and the Supreme Court's Amicus Curiae Award. He served on the Rules Committee for Small Claims Court, served on the Committee reorganizing the Judge Pro Tempore system, wrote the Small Claims Judge's Benchbook, and currently teaches the classes for new Small Claims Judges and Justice Court Judges. Mr Sabey is also the Bar's designated representative on the Supreme Court's Judicial Council.

Mr. Sabey received his Bachelor of Arts Degree from Brigham Young University, a degree from the University of Florence, Italy, and later his Law Degree from Golden Gate University School of Law in San Francisco, California.

Statement of Candidacy:

Thank you for the opportunity to serve. Fourteen years ago I began my service to the Bar when I was elected an officer of the Real Property Section (when no other candidate showed up!), and I have continued on in one capacity or another since that time. Among other positions, I've been: an officer and Chair of the Business Law Section and of the Real Property Section; on the Mid-Year and the Annual Convention Committees; and, Co-Chair of Governmental Relations Committee. For the last 2 years I've had the honor of being the Bar's appointee as the only non-judge on the Judicial Council. I point this out to show that I care, I'm interested in helping, and I know I can make a difference.

I want to serve as Bar President because I believe there are several issues that need addressing which I want to tackle. I think we need to improve our relationship with the Hill to protect and preserve the practice of law. While the Bar's relationship with the Legislature has improved over the last few years, we still face bills that seek to undermine the judiciary or affect our ability to practice law. This year's SB105 was drafted to take away the Court's ability to evaluate judicial performance and gave it to a newly created Committee made up of 13 political appointees, only 3 of which must be attorneys and no more than 6 of which can be attorneys. Every year we see bills that attempt to modify the Rules of Practice or Evidence by statute rather than by the Court's Rules Committee, or to make the judicial nomination process and the judicial review process more and more political. We

also see attempts to bring our profession under the Legislature's control through regulation by the Department of Occupational and Professional Licensing. The Bar Commission needs to be vigilant in defending our rights and I want to help.

I also think we can improve professionalism through better education of new lawyers, including mentoring programs and working more closely with the law schools. I'm currently serving on the Admissions Review Committee, where I see opportunities for the Bar to become more closely involved with the next generation of attorneys. I also hope to see a Mentoring program implemented to help new lawyers be better practitioners right from the start.

As I have said before, "It is your Bar. Please take the time to vote, and I hope I can count on your support." Thank you.

First Division Candidates

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

Herm Olsen is running uncontested in the First Division and will therefore be declared elected.

HERM OLSEN

I was admitted to the Utah State Bar in 1976 and the Navajo Nation Trial Bar in 1977. My education includes: B.S., magna cum laude from Utah State University; J.D. from the University of Utah. I am also a member of the District of Columbia Bar, Navajo Nation Bar, and the American Association for Justice. I serve on the Board of Directors for the Navajo Legal Aid Services, 1994–present. I was President of the Cache Chamber of Commerce, 2005-2006. My practice areas are personal injury, municipal law, and criminal defense. Prior to returning to Utah in 1980, I worked for the U. S. House of Representatives, Appropriations Committee, and for Congressman Gunn McKay.

Statement of Candidacy:

I have appreciated the opportunity of serving as a Utah State Bar Commissioner from the First Division. As a practicing attorney for over 30 years, I hope to bring to the Bar a sense of awareness for small firm practice. The Utah State Bar leadership has done an excellent job of keeping members informed and providing meaningful input to legislative initiatives. We must remain vigilant in protecting the rights of Utahns and ensuring access to the legal system from increasing attacks by special interest groups. Thank you for your support.

Third Division Candidates

SU CHON

Ms. Chon is an attorney in the Office of the Property Rights Ombudsman for the State of Utah. She mediates and arbitrates disputes between private property owners and condemning entities in the areas of eminent domain, relocation and takings. Ms. Chon brings a broad range of experience to her candidacy, having worked as legal counsel in a small corporation, small law firm, medium-sized law firm, non-profit, and government. Prior to entering the practice of law, she decided to pursue her interest in music by writing and editing for an internet music magazine where she met fun and interesting rock musicians. She received her JD (1994) and BA in English (1991) from Brigham Young University and is a trained mediator.

Ms. Chon has devoted time to serve the legal profession and to the community throughout her legal career. As the Co-Chair of the Communications and Membership committees of the Utah Minority Bar Association, she created the UMBA 411 and JobLert email listserv to provide members with professional and job opportunities and other pertinent information. In 2007 and 2008, she organized the Law Student Mentoring Marathon and worked with the Young Lawyers Division and judges to make the event a success. She has spoken to many groups about professional development, networking and mentoring. She has also organized Mentoring Socials bringing together attorneys, judges and law students for mentoring and networking. As the former Executive Director of the Multi-Cultural Legal Center, she brought the organization from a fiscal deficit to financial stability and ensured the provision of legal services to underserved communities. Ms. Chon has also worked with various community organizations to provide free legal seminars and referrals and to support the work performed by legal services providers. She is also volunteering as a mentor with the Village Project, through the Third District Juvenile Court.

The Utah State Bar has recognized her efforts in the community by awarding her the 2005 Pro Bono Lawyer of the Year Award and the 2008 Raymond S. Uno Award for the Advancement of Minorities in the Legal Profession.

Statement of Candidacy:

I am proud to be a part of the Utah State Bar. We have so many great sections, specialty bars and committees that provide innovative services and support that cater to every attorney. This year, I have felt strongly the desire to serve the legal community, and I would like to do so by becoming a Bar Commissioner for the Third Division. My goals as Bar Commissioner are to (1) promote fiscal responsibility and efficiency of the Bar's services; (2) ensure that the services offered by the Bar are responsive to the needs of its members; (3) create and support programs that encourage mentoring of law students and lawyers; (4) support programs that provide legal services to underserved and underrepresented communities; and (5) enhance the Bar's state and national reputation. In addition to my experience working with past and current Bar leaders, I bring an open mind, fresh ideas, and enthusiasm to this opportunity to serve. Please feel free to contact me at 801-530-6391 or at schon@utah.gov. I am grateful to all those who have supported my candidacy and respectfully ask for your vote in this election.

LAURIE GILLILAND

Bar Service

- Current ex officio bar commissioner
  - – Sections Liaison
  - – Access-to-Justice Committee
  - – 100% attendance
- 2007 Fall Forum co-chair
- 2006 Fall Forum committee

Women Lawyers of Utah

- Current Board member
- 2006-07 President
- 2005-06 President-elect/CLE Chair

Employment

- Since 2000, Lead Staff Attorney, Prisoner Litigation unit, federal court
- 1994-2000, Law Clerk, Judge Jackson, Utah Court of Appeals
- 1981-1991, Police Crime Scene Investigator, Southern California

Education

- 1994, J.D., BYU
  - – Cum laude
  - – Law Review
- 1989, B.S., Cal State Fullerton
  - – Summa Cum Laude

Statement of Candidacy:
Dear Colleagues:

As your Third District representative, I pledge the same burning enthusiasm, thoughtful participation, dedication to efficiency and common sense, and tireless work ethic I have brought to all my professional pursuits. My proven track record as a bar leader on the Bar Commission, Fall Forum committee, and Women Lawyers of Utah has well equipped me to deal with the policy, budgetary, and practical issues facing our bar.

Critical matters are on deck: Mentoring programs, public relations, member services, unbundled legal services, pro se litigants, dues, and legislative relationships. I look forward to bringing your perspectives to decisions on these subjects and others.

Please comment by e-mail (ldgill@gmail.com) or phone (801-870-1508). I respectfully ask for your vote. Thank you.

JAMES D. GILSON

James D. Gilson is a shareholder with Callister Nebeker & McCullough, practicing litigation. He graduated from the University of Utah (BA 1985, JD 1989). Mr. Gilson was a judicial law clerk to the Honorable J. Thomas Greene and later for the Honorable Dee Benson of the U.S. District Court; was an Assistant U.S. Attorney (D. Utah, Criminal Division); and was a shareholder at Van Cott, Bagley. During 2000-01, he served as President of the Utah Chapter of the Federal Bar Association.

Mr. Gilson is currently the Utah Bar's representative to the Rules of Procedure Committee of the U.S. Judicial Conference. He is also a Screening Panel member of the Ethics and Discipline Committee of the Utah Supreme Court.

Statement of Candidacy:
I would be honored to have your vote as a Bar Commissioner for the Third Division. Having practiced law here for nearly 19 years in various positions, I understand the challenges we face in our work. I desire to continue to contribute to and improve our honorable profession.

If elected, I would help build upon the Bar's programs to improve the public understanding of lawyers and the rule of law, and to improve the level of professionalism amongst members of the Bar. I would like to help facilitate more opportunities for members of the Bar to be involved in legal related service and education.

LORI W. NELSON

After serving on the Utah State Bar Commission for a little over 2 ½ years I have decided to run for reelection for several reasons and I would appreciate your vote.

First, there are several ongoing projects in which I am deeply involved and which I would like to see through to completion. Those projects include the "transition into law program," and the two-year management review.

I sit on the recruiting subcommittee of the Transition into Law Program. The two chairs, Rodney Snow and Margaret Plane have done a remarkable job on a Herculean project. Bar staff has also put in extra time and effort to bring the program into being. It has been an honor and privilege to work with them to bring about the Transition into Law program and to assist in creating an effective plan for recruiting able and competent "mentors" for those just entering the law. This program is not yet formalized and the work will be ongoing. I would very much like to continue working on this project, and my work on the Bar Commission will allow that to occur.

The Bar Commission has just begun a two-year operational review which has grown out of the Governance Review on the leadership and effectiveness of the leadership of the bar. The two-year operational review is being conducted by the commissioners to lower bar expenditures and to ensure the commission is thoroughly familiar with the working of the bar and its staff. Included in this review is an investigation into the security of the bar and its technology and how the information learned from that investigation can then be passed along to members of the bar to ensure that all members also have the tools needed to ensure their technology is sound and secure.

Also very important to me, and an area I believe is very important, is the area of members benefits and how the commission can better provide services to our members. The Commission is constantly attempting to ensure that the members of the bar are provided with top-notch member benefits at a reduced rate. The Commission has also made a commitment to being more transparent and available to all members of the bar to listen to and seriously consider areas of concern. The Commission spent extensive meetings developing a long-range plan to ensure that member's needs are being addressed and to find better ways to communicate with members so the Commission is aware of the issues facing our members.

I have been impressed with the emphasis the Commission has given the concerns of the members of the bar and how effectively it listens to those concerns and finds ways to address the issues raised by members. One way this has been addressed, and one of the projects of which I am most proud, is the new Diversion from Discipline Rule that just passed. Most other professions have a diversion rule, but Utah has not had one in place for attorneys. The new rule will assist attorneys in avoiding discipline for less serious offenses and get them the help they need to avert future problems. The rule provides attorneys with an opportunity to get help in the mental health arena, the law office management arena, and in areas of substance abuse as an alternative to formal discipline.

Statement of Candidacy:

From the time I began practicing as an attorney I have been tutored in the need to provide service to the bar. I began that service at the encouragement of Bert L. Dart, a former partner of mine. He frequently told me that service in the bar is the best way to give back to the profession, and I think he was right. I started my service as a member of the Family Law Section Executive Committee. From there I served on both the Annual Meeting and Spring Meeting Committees and the Governmental Affairs Committee. I was also chair of the Family Law Section Executive Committee and continue to serve as co-chair of the Governmental Affairs Committee. Serving as co-chair of the Governmental Affairs Committee and simultaneously as a bar commissioner has been a very effective way to monitor legislation that impacts attorneys without duplicating efforts.

I would like to continue my service to the bar as a commissioner for another term. For that reason I am requesting your vote. Thank you very much.

MARGARET PLANE

Professional experience:

Assistant Salt Lake City Attorney (current); Legal Director, ACLU of Utah; Judicial Clerk, the Hon. Judge Greenwood.

Education:

J.D., S.J. Quinney College of Law; M.A., University of Utah; B.A., Rollins College.

Statement of Candidacy

I will bring a fresh and enthusiastic perspective to the Bar Commission. Serving as an ex officio member of the Commission in 2006-07 exposed me to the many possibilities available to improve the Bar's offerings and its relationship with its members.

Currently, I am co-Chair of a Bar committee working hard

to develop a move away from one-size-fits-all NLCLE to a more tailored and experienced-based program focusing on mentoring new lawyers in professionalism and the practice. This initiative will be valuable for new lawyers as they begin practicing, and for the Bar in general as it works to perpetuate a standard of excellence. My other Bar activities include being past-president of Women Lawyers of Utah and a past chair of the Constitutional Law Section.

With your input and support, I am confident we can make the Bar a more valuable asset to our practices and improve the Commission.

RODNEY G. SNOW

I am a director at Clyde, Snow, Sessions & Swenson in Salt Lake. It has been a privilege to serve the Bar these past three years. Our Bar is growing younger at an amazing pace. It has been invigorating to see so many bright, young, talented lawyers participate in Bar programs. While we have made some improvements, we need to continue our efforts to enhance Bar services for all members. I am the co-chair of the Mentoring Committee, which is developing a new lawyer training program for first-year attorneys. Each new lawyer will select a mentor that has been approved by the Utah Supreme Court, and will receive counseling from this mentor for a one-year period. I hope to complete my work on this Committee. Other areas of interest include:

Improving relations and communications between the Bar staff and elected Commissioners.

Improving our Lawyers Helping Lawyers programs at all levels.

Continuing our efforts for fine, affordable malpractice insurance for all our members.

Assisting our access to justice programs to facilitate "low *bono*" and *pro bono* opportunities for Bar members and law students.

I will appreciate your support in April, and thank you for the privilege of serving the Bar.

RUSTY VETTER

Professional Experience and Bar Service
Ten years in private practice (shareholder at Parsons Behle & Latimer); nine years senior corporate attorney (American Stores, JPMorgan Chase); currently Senior Salt Lake City Attorney for two years. Utah State Bar Commissioner (2002-2005) and Commission Executive Committee Member (2004); Member and Chair of Bar Admissions, Character and Fitness, & Bar Examiners Committees (1991-2002).

Statement of Candidacy:
Through my work on several Bar committees and as a Bar Commissioner, I have observed the Bar's management and the Commission's operations closely over the past several years. I've seen that we can do a lot more to be valuable to Bar members and the public. Some of my ideas for positive change can be found in my article "Ten Ways the Bar Can be Improved" in the September/October 2007 edition of the Bar Journal, *which is available online in the* Bar Journal *archives.*

Recently, there has been some discussion concerning increasing Bar dues. Bar dues should not be increased without full understanding of current spending and clear evidence of need for additional revenue.

Please vote for me and other candidates who are committed to improving the Bar.

Thank you for your support.

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The Ethical Utah Lawyer: What Are the Limits in Negotiation?

by Michael H. Rubin

Editor's Note: *Mr. Rubin was the keynote speaker at the Utah State Bar's 2007 Annual Convention. His engaging presentation included a turn at the "baby grand," which unfortunately cannot be replicated here. This article otherwise draws heavily on his remarks in Sun Valley as well as on his prior publications.*[1]

The Lawyer as a "Zealous Advocate"

For over two hundred years, lawyers have been encouraged to be "zealous advocates" of their clients' interests.

While being a "zealous advocate" was a requirement of the Canons of Professional Ethics, that concept is no longer mandated. Variations of the phrase "zealous advocate" are currently relegated to mere aspirational statements in the Preamble to both the ABA Model Rules and the Utah Rules of Professional Conduct. In fact, "zealous advocacy" has not been a requirement of national lawyers' codes since 1983; yet, this has not stopped lawyers from using the phrase or courts from extolling it. At least five Utah cases since 1988 have used the phrase "zealous advocate" or "zealous advocacy" – one civil case and four criminal matters. *State v. Clark,* 2005 UT 75, 124 P. 3d 235; *State v. Harmon,* 956 P.2d 262, 276 (Utah 1998); *State v. Price,* 909 P.2d 256, 259 (Utah 1995); *State v. Holland,* 876 P.2d 357 (Utah 1994); *Error v. Western Home Ins. Co.,* 762 P.2d 1077, 1083 (Utah 1988) (concurring opinion).

Some believe that zealous advocacy has become too "zealous" and has resulted in an ill-mannered, overbearing, and unpleasant style of advocacy. The American Law Institute's Restatement of the Law Governing Lawyers warns that zealous advocacy is not a synonym for hardball tactics in litigating or negotiating.

Underlying the concept of a zealous advocate is the ideal of a lawyer who asserts the client's position to the extent permissible by the law, even if the client's views and goals do not coincide with the lawyer's personal, political, or social views. Some say that even the zealous advocate who is polite and courteous while protecting the client is merely a "neutral partisan" – a fighter who engages in a legal battle to protect the client regardless of the underlying moral principles that might otherwise influence the outcome. Others say that such roles allow lawyers to be "amoral technicians" – those who use the system for the client's benefit without concern for whether the client's moral views and the lawyer's moral views are aligned.

But isn't this too harsh a view of most lawyers? Aren't most lawyers merely trying to achieve worthwhile goals for their clients? Of course they are. This does not mean, however, that the pursuit of a client's interests frees a lawyer from moral tensions.

The tension that most lawyers face is not balancing their personal view of morality and justice with their clients' goals; rather, the tension is between protecting client confidences and revealing the "truth."

The Tension Between Client Confidences and the "Truth"

Client confidences are protected by the Utah Rules of Professional Conduct as well as applicable civil statutes, and for good reason. Lawyers cannot fully advise clients unless they know all the facts, and clients would be reluctant to reveal all the facts to their attorney unless they know that their confidences are protected. Yet, the protection of client confidences sometimes means that lawyers often cannot reveal the "truth" (assuming that there is an absolute, omniscient "truth") and often cannot correct misapprehensions that others may have and erroneous conclusions that others may draw.

MIKE RUBIN has an active commercial, transaction, and litigation practice and has lectured nationally on issues of ethics and professionalism. His writings on ethics have been used by law schools around the country. He is the Immediate Past President of the American College of Real Estate Lawyers and is a past president of the Louisiana State Bar Association. Mr. Rubin is not licensed to practice law in Utah.

The more the public, the press, federal regulators, and others demand that lawyers have some type of professional obligation to reveal matters that can cause losses to others, the less client confidences can be protected. Conversely, the more protection we give to client confidences, the greater the chance that results perceived as "unjust" may occur because of the muzzle placed on lawyers by the client confidentiality rules.

One cannot fully protect both "truth" and "client confidences"; absolutely favoring one eviscerates the other. The greater the protection one gives to client confidences, the less "truth" lawyers are able to reveal, for any revelation of a client confidence is a breach of that protection. On the other hand, the more one seeks to have lawyers disclose information that may prevent losses to non-clients, the less likely it is that clients will fully provide all pertinent information to their lawyers. A situation in which clients may not completely confide their secrets to their lawyers may lead to lawyers taking positions at odds with what their clients know to be the facts.

What Can a Lawyer Do in Negotiations?

What are the primary issues in any negotiation? Key are (a) the value of the property or settlement or damages at issue, and (b) the extent of the lawyer's authority. Yet, the comments to both the ABA Model Rule and Utah RPC 4.1 seem to define both of these issues as not "material" and thus not worthy of truthful disclosure.

Rule 4.1, relating to *negotiations*, differs from the rules regulating conduct before a tribunal. Utah RPC 4.1(a) prohibits a lawyer from making a "false statement of material fact." The comments to Utah RPC 4.1, however, note that under "generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. ***Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category ....***" In other words, two of the most critical issues are defined away as being not "material," and under the Rule there is no obligation to be truthful in statements about a fact that is not "material."

Contrast Utah RPC 4.1 with Utah RPC 3.3(a) dealing with a lawyer's obligation to a court: the latter mandates that a lawyer not make a "false statement of fact or law to a tribunal." Note the absence of the word "material" in section 3.3(a). In other words, before a tribunal, a lawyer is cautioned against making a misstatement of fact, regardless of whether it is material, while in non-tribunal negotiations only "material facts" cannot be stated falsely. Further, before a tribunal, Utah RPC 3.3(a) prohibits a lawyer from making a false statement about the law, while RPC 4.1(a) says nothing about statements of law.

Why Disclose Anything You're Not Compelled to Disclose?

The limited rules relating to negotiations, as opposed to the broader and more detailed rules relating to litigation, have been the subject of much commentary. Arguments have ranged from a defense of "puffing" as an effective and useful negotiation tactic to charges that even something as mild as "puffing" is, in essence, not merely a deflection of the truth but is, rather, a lie. There are those who contend that no law or code of conduct requires "fairness" in negotiations.

The development of the common law has been one of allowing enforcement of bargains made between experienced parties, even though one side has operated from a position of superior knowledge. Chief Justice Marshall, in *Laidlaw v. Organ,* 15 U.S. (2 Wheaton) 178, 179 (1817), held that there was no obligation to disclose facts that were "equally accessible to both parties." In *Laidlaw*, the issue was that one party knew a key fact while the other did not. In those pre-telegraph times, the fact was that the Treaty of Ghent had been signed, meaning that the price of the tobacco over which the parties were bargaining was about to dramatically rise. Chief Justice Marshall enforced the deal that the parties had reached, endorsing the view that a negotiator may remain silent about a key fact in negotiations. Since the issue in *Laidlaw* related to something that would affect the price of the item being sold, arguably even RPC 4.1 would treat this as a fact that was not "material."

Perhaps the UCC rules of good faith and fair dealing arose as a reaction to and a partial restriction upon the common law's enforcement of the "tough bargaining" approach; yet, it seems that the comments to the Rules of Professional Conduct acquiesce to misstatements, silence, and even incorrect statements about facts that are deemed not "material" as long as no fraud is being committed and no law is being broken.

Laidlaw further shows the common law's acceptance of misdirection. If one is not affirmatively asked a question, then remaining silent about a key (but not "material") fact is apparently acceptable. Misdirection, after all, involves hiding your bottom line from the other side. It can include either silence or a true but incomplete statement of facts. No matter how it occurs, however, misdirection is always designed to lead the other party to an erroneous conclusion about the facts, about your true position, or both.

If misdirection is not illegal and is not prohibited by the Rules of Professional Conduct, then why shouldn't we all do it? That is a moral and ethical question. Not "ethics," as in what is permitted by the Rules of Professional Conduct, but ethics in the broadest sense. In fact, the words "ethics" and "ethical" do

not appear in the black letter text of the Rules; rather, they are in the Preamble and comments. If the Rules permit lawyers in negotiations to puff, mislead, and make misstatements about facts that the public at large might consider both pertinent and critical (such as the value of the item over which the parties are negotiating), then some might argue it is a misnomer to refer to the Rules as a code of "ethics."

The moral and ethical question that "misdirection" poses is whether, if you know that the other side is under a misapprehension or misunderstanding of what you have said (even if that misunderstanding accrues to your client's benefit), you have a moral or ethical obligation to correct the other side's misunderstanding, or whether you instead have a moral and ethical obligation to your client to obtain the best deal possible?

More than 2100 years ago, Cicero wrote about this very issue in his letters to his son, arguing that

> holding things back does not always amount to concealment; but it does when you want people, for your own profit, to be kept in the dark about something which you know would be useful for them to know. Anyone can see the sort of concealment that this amounts to – and the sort of person who practices it. He is the reverse of open, straight forward, fair and honest: he is a shifty, deep, artful, treacherous, malevolent, underhanded, sly, habitual rogue.

Cicero, *Selected Works,* Translated by Michael Grant, Penguin Books, Copyright (1960), pp. 178-79.

It is this type of outcome, where sharp bargaining on behalf of one party obtains an advantage that would not otherwise be achieved without misdirection or silence on key issues, that can lead to a sense of injustice, no matter how "legal" the resulting agreement may be.

So, What Should a Lawyer Do?

There is no easy answer to the dilemma between (a) legally promoting the interests of our clients to the fullest extent permissible by law and (b) behaving in a manner that may be legal and that may not violate the Rules of Professional Conduct but which nevertheless raises difficult moral and ethical issues. What is clear, however, is that we should not be surprised if the public looks askance at lawyers and questions their "ethics" when even the ABA Model Rules seem to permit, in non-tribunal negotiations, misdirection, bluffing, and perhaps even lying (on "non-material" factual issues) in furtherance of the client's interest.

There is a constant tension between our duty to represent our

clients and our duty to the profession. There is a practical tension between our wanting to get the best deal possible for our side and the aspirational duty of ethical fair dealing. There is a discernible difference between conduct that is permitted outside of litigation and conduct that can lead to sanctions against lawyers during litigation.

I submit that, as difficult as these issues are, we as lawyers should strive to equate professionalism *with* ethics and to aspire, as the goal of the honorable legal profession, to have an even higher standard than the one under which our clients may operate. This view is reflected in *Virzi v. Grand Trunk Warehouse & Cold Storage Co.,* 571 F.Supp. 507, 512 (E.D. Michigan 1983), where the court noted that "[o]pposing counsel does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure, even though it might not be in the interest of the client or his estate." This same view was espoused by Judge Alvin B. Rubin in his famous article, "A Causerie on Lawyer's Ethics in Negotiations," 35 La.L.Rev. 577, 589 (1975).

While the ABA has rejected the *Virzi* dictum that a duty of candor exists in negotiations, *see* ABA Formal Op. 94-387, Sept. 26, 1994, the moral question is whether *Virzi* and other commentators have the ethical high ground.

One may not agree with those who contend that the ethical basis of negotiations (in all non-tribunal actions) should be one of truth and fair dealing. One may not agree that lawyers should refuse to participate in or accept a result that is unconscionably unfair to the other side. Yet, if one considers the differences in the Rules requiring higher standards of conduct before a court than in non-tribunal negotiations, and if one considers the lawyer's role as being more than a mere "neutral partisan" or "amoral technician," then another approach may be possible.

Perhaps a more practical formulation is needed to guide us in ethical negotiations, and I suggest the following for your consideration: ***If we wouldn't do something in a courtroom context, if we wouldn't make a misleading statement in a settlement conference with a judge, and if we wouldn't remain silent about a misstatement made by our client or partner during discussions in court chambers or in open court, then we shouldn't do any of these things in non-litigation negotiations of any kind.***

1. A portion of this paper consists of adaptations of the author's prior publications, including: "The Ethics of Negotiations: Are There Any?" 56 Louisiana Law Review 447 (1995); "From Screens and Walls to Screams and Wails: A Selective Look at Screening Among the Various Ethics Rules and Cases and A Consideration of Some Unanswered Questions," The ACREL Papers, Fall, 2001 (ALI-ABA); "Breaching the Protective Privity Wall: Expanding Notions of Real Estate Lawyers' Liability to Non-Clients," The ACREL Papers, Fall 2002 (ALI-ABA); "The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties," 26 The Construction Lawyer 12 (2006); "Labor Negotiations: Do Any Rules of Ethics or Professionalism Really Apply?" ALI-ABA Labor Seminar, Spring 2003, and "Ethics," The Construction Lawyer, Fall 2006.

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Bankruptcy Exemption Planning: Counseling in Shades of Gray

by Joel Marker

For a debtor's counsel, the easiest bankruptcy case involves a client with little or no non-exempt property. To quote Kris Kristofferson from his ballad "Me and Bobby McGee," "freedom's just another word for nothin' left to lose." But for many individuals who qualify for Chapter 7 relief in spite of the substantial hurdles imposed by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005 (those with incomes below the state median or whose debts are primarily business related), the issue of exemption planning remains important. Attorneys representing clients contemplating bankruptcy must be familiar both with state and federal exemption statutes, and with inconsistent case law, that may limit a debtor's ability to take full advantage of the protections to which the debtor is entitled.

As a general matter, upon the filing of a petition for bankruptcy, "all legal or equitable interests of the debtor in property" become property of the bankruptcy estate and will be distributed to the debtor's creditors. 11 U.S.C. § 541(a)(1). To help the debtor obtain a fresh start, the Bankruptcy Code permits the debtor to exempt from the estate certain interests in property, such as one's car or house, up to certain values. For counsel, the starting point in bankruptcy planning is a working knowledge of the exemption provisions.

Understanding the Exemptions Available under State and Federal Law

Under section 522(b), a debtor domiciled in Utah for the preceding two years may exempt individual retirement accounts, 401(k) accounts, and similar retirement funds, *see* 11 U.S.C. § 522(b)(3)(C), along with the property described in the Utah Exemptions Act, *see* Utah Code Ann. § 78-23-1 *et seq.* For example, in Utah a couple may exempt as their homestead, under section 78-23-3, up to $40,000 in equity of their jointly owned primary personal residence or (notice the disjunctive) $10,000 in value of jointly owned real property that is not their primary personal residence. Similarly, section 78-23-5 allows a debtor to exempt his interest in a laundry list of personal property, including:

a) a burial plot;

b) disability, unemployment, and medical and veterans benefits;

c) alimony, child support, and qualified domestic relation order assets;

d) household appliances, carpets, wearing apparel, and beds and bedding;

e) provisions sufficient for 12 months (this "food storage" allowance is apparently unique to Utah); and

f) life insurance benefits (not pledged as collateral) paid or payable to the debtor or his family.

Section 78-23-8 also protects, subject to dollar limitations, furniture, animals, books, musical instruments, heirlooms, tools of trade ($3,500), and one motor vehicle ($2,500).

From a planning standpoint, surely the most interesting and flexible exemption arises from the Utah Legislature's 2005 amendment to the Exemption Act, which repealed former section 78-23-7 and inserted in section 78-23-5(1)(a)(xiii) an exemption for "proceeds and avails of any unmatured life insurance contracts owned by the debtor, excluding any payments made on the contract during the one year preceding a creditor's levy or execution." This exemption for the cash value of a life insurance contract is unlimited in amount and, within the confines of the one-year lookback, should provide a remarkable opportunity for the prudent individual to shield assets from the reach of creditors, both in and out of bankruptcy.

A careful review of the statutes will help debtor's counsel to describe assets that are exempt, but only experience will enable an attorney to focus his client's attention on assets that are not exempt, and thus subject to administration by the trustee. Early in the planning process counsel should advise his client that the following are not protected and may be liquidated by the trustee: subject to the tracing provisions of section 78-23-9, cash; non-retirement financial accounts such as checking, savings, or brokerage accounts; contract claims; certain lawsuit claims; and the non-exempt value of otherwise exempt assets. Unlike the wildcard provision in the federal exemption scheme, section 522(d)(5),

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the Exemption Act does not protect cash in a debtor's checking or savings account on the petition date. Likewise, a trustee may sell a car or house, notwithstanding a proper claim of exemption, if the net sale proceeds after paying consensual liens, costs of sale, and the allowed exemption (returned in cash to the debtor) will provide a benefit to creditors.

Advising the Client of His Duties and All Available Exemption Claims

An effective exemption plan begins with the client's full, complete, and candid disclosure of all of his property, whether real, personal, or intangible. The attorney must advise the client of the client's duty under section 521 to disclose all assets and of the sanctions that may be imposed for failure to do so, including: 1) loss of an otherwise allowable exemption, *see* section 522(g); 2) loss of the right to a discharge, *see* section 727(a)(2); and 3) loss of liberty, *see* section 18 U.S.C. § 152.

Once the client has provided a complete list of assets, the attorney can begin to advise the client of strategies to use in obtaining an allowable exemption for as much property as possible. For example, since cash is not exempt, the attorney should counsel his client on the prudent purchase of exempt provisions to carry his family through the period following the filing of the petition. Assets with significant values above allowable exemption limits may be sold, with the net proceeds used to purchase needed exempt assets (to replace a worn-out refrigerator or stove, for example), or to pay down an otherwise nondischargeable obligation such as a tax debt, student loan, or child support arrearage. Keeping in mind that prebankruptcy sales and transfers must be disclosed, and that some transfers may be avoidable under section 547 (preferences) or section 548 (fraudulent conveyances), low-dollar exemption planning rarely results in the kind of scrutiny that leads to litigation. Nor should it.

Providing the Client with an Informed Understanding of Pre-Bankruptcy Planning Under Current Law

The real challenge arises with converting large amounts of non-exempt assets to exempt property. For example, a client with $200,000 of non-exempt equity in his homestead might ask if he can sell his house and purchase with the proceeds a single premium whole life insurance policy, claiming the policy as exempt under section 78-23-5(1)(a)(xiii). Although the attorney's response should be in the affirmative, case law addressing aggressive exemption planning requires a more deliberate approach because courts have been inconsistent in their attempts to describe the boundaries of permissible bankruptcy planning.

The analysis begins with the premise that "the conversion of non-exempt to exempt property for the purpose of placing the property out of the reach of creditors, without more, will not deprive the debtor of the exemption to which he would otherwise be entitled." *Marine Midland Bus. Loans, Inc. v. Carey,* 938 F.2d 1073, 1076 (10th Cir. 1991). *Carey* first cites the legislative history for the proposition that exemption planning permits the debtor to make full use of the exemptions to which he is entitled under the law. However, the Tenth Circuit then states that simple exemption planning can be found fraudulent when tested against the classic badges of fraud, such as whether the conversion was concealed or disclosed, whether the conversion took place "immediately before the filing of the bankruptcy petition," and the monetary value of the assets converted. The Tenth Circuit ultimately affirmed the lower court's determination that the debtor's systematic liquidation of non-exempt assets to pay down the mortgage on her homestead did not rise to the level of fraud necessary to deny her discharge or her exemption. It is interesting to note that Congress addressed the conduct complained of in Carey when it enacted new section 522(o), which imposes a 10-year lookback to recover increases in homestead value relating to transfers of non-exempt assets "with the intent to hinder, delay or defraud a creditor."

In *Bank of Oklahoma, N.A. v. Boudrot,* 287 B.R. 582 (Bankr. W.D. Okla. 2002), the bankruptcy court held that the debtors' liquidation of their non-exempt savings accounts, in the amount of $54,000, and use of the proceeds to pay down the mortgage on their exempt homestead was such as to warrant denial of their discharge. Noting the lack of a coherent body of law on

the subject, the court cited another source for the proposition that "fraud in bankruptcy planning appears to enjoy the same precise definition as pornography – the federal courts know it when they see it." *Id.* at 585.

And in *Mathai v. Warren (in re Warren),* Adv. No. 04-2671 (Bankr. D. Utah March 28, 2005) (unpublished memorandum decision, Boulden, J.), *aff'd*, 350 B.R. 628 (Table), 2006 WL 2882816 (10th Cir. B.A.P. 2006), the court noted the debtor's pattern of sharp dealing, consistent with "a scheme to liquidate each and every asset, no matter the loss, to prevent payment to his creditors." The court stated that although "some pre-bankruptcy planning is appropriate," there exists a "precarious balance" between the competing interests of debtors and creditors in pre-bankruptcy planning. The court was struck by the debtor's animosity toward the creditor and found the debtor abused pre-bankruptcy planning because his purpose was to place assets out of the reach of the creditors.

A different approach is suggested in *Murphey v. Crater,* 286 B.R. 756 (Bankr. D. Ariz. 2002), which draws a rational distinction between transfers of assets that are truly fraudulent and those conversions of non-exempt assets to exempt assets that do not support a finding of fraudulent intent. The court held that unless the creditor that seeks to deny a debtor's discharge based upon his pre-bankruptcy exemption planning shows some deception or concealment, an insider transaction, a fraudulent conveyance, a secretly retained possession or benefit, or debtor explanations that lack credibility, the presence of other badges of fraud that are not themselves intricately indicative of fraud (such as the timing of the transmutation or the amount at issue) are insufficient to shift to the debtor the burden of going forward, even if all of the debtor's non-exempt assets are converted into exempt assets just after the debtor is sued and just before the debtor files for bankruptcy.

Given the express Congressional statement that conversion of "nonexempt property into exempt property before filing a bankruptcy petition…is not fraudulent as to creditors, and permits the debtor to make full use of the exemptions to which he is entitled under the law," [1] one could easily argue that factors relating to timing or the amount converted from non-exempt to exempt assets are policy matters that should be left to the legislature. For example, under BAPCPA, Congress constrained the "Florida option" by imposing a 730-day residency requirement before allowing a debtor to claim the homestead of his new domicile, *see* section 522(b)(3)(A), and directly limited efforts to convert non-exempt assets into exempt homestead assets if made with the intent to hinder, delay, or defraud a creditor within ten years of the petition date, *see* section 522(o). The Utah Legislature has made similar policy determinations by providing for unlimited exemptions for individual retirement accounts, *see* Utah Code Ann. § 78-23-5(1)(a)(xiv) and unmatured life insurance contracts, *see id.* § 78-23-5(1)(a)(xiii), while at the same time limiting the protection to amounts contributed to such plans or contracts one year or more prior to bankruptcy or execution. Unfortunately, a rational policy argument is of small comfort to a client deciding whether to engage in otherwise lawful exemption planning, knowing that one risks offending a trustee or judge because one took advantage of an unlimited exemption shortly before filing a bankruptcy petition.

Incorporating Ethical Responsibilities

In light of the case law surrounding the issue of bankruptcy planning, how should attorneys advise their client? A review of an attorney's ethical duties provides some guidance. The preamble to the Utah Rules of Professional Conduct provides that "as advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Rule 1.1 requires that an attorney must provide competent representation to a client, and Rule 1.4(b) provides that a lawyer must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Further, Rule 1.2(d) provides that while a lawyer may not counsel a client to engage in fraudulent conduct, the lawyer "may discuss the legal consequences of any proposed course of conduct… and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." An attorney representing a debtor in bankruptcy thus has the following duties:

1. To understand the exemptions available under state and federal law;
2. To advise the client of the client's duty to fully disclose all property and prepetition transfers;
3. To assert for the client all available good faith exemption claims; and
4. To provide the client with an informed understanding of the client's ability to engage in exemption planning and to explain the practical implications given the current state of the case law.

Bankruptcy exemption planning is an area of law demarked by shades of gray rather than bright lines. A working knowledge of the exemption statutes and relevant case law will assist attorneys in leading their client to an informed decision of how to make best use of the exemptions to which the client is entitled.

The Mathai v. Warren *decision was recently affirmed by the Tenth Circuit. 2008 WL 62557.*

1. H.R. Rep. No. 595, at 361 (1977), as *reprinted in* 1978 U.S.C.C.A.N. 5963, 6317; S. Rep. No. 989, at 76 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5862.

HRO welcomes the following partners from the law firm of Pruitt Gushee who were voted in effective January 1, 2008. All will be resident in the Salt Lake City office.

Back row, left to right: A. John Davis, Angela L. Franklin, William E. Ward, and Shawn T. Welch

The firm would also like to congratulate the following attorneys on their admittance to the partnership effective January 1, 2008.

Front row, left to right: Michael J. Ziouras (Salt Lake City), Adam Brezine (San Francisco), Stephen P. Nash (Denver), J. Andrew Sjoblom (Salt Lake City), and Matthew J. Smith (Denver).

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Dealing with Metadata in the Non-Discovery Context

by H. Craig Hall, Jr.

I'm not exactly sure how this was done, but rumor has it that lawyers used to practice law without computers.

Word processing software, e-mail, spreadsheets, PowerPoint, and the like have become an almost essential part of the professional and personal lives of lawyers and their clients. Such technology can significantly enhance our communication capabilities and efficiency as lawyers. However, potential dangers abound for lawyers. Perhaps one of the most dangerous issues to be aware of is the existence of metadata in electronic documents.

The federal rules advisory committee has defined "metadata" as "[i]nformation describing the history, tracking, or management of an electronic file."[1] It is sometimes more generally described as "data that provides information about other data" or "data about data."[2] Metadata within electronic documents typically cannot be seen on the face of the document or when the document is printed, and generally is found only if specifically searched. As indicated in one ethics opinion, "[t]o the uninitiated, metadata is hidden and perhaps unknown, but to competent computer-users, the existence of metadata is well known and may be a simple 'click' away."[3]

Information that may be found within metadata includes:

- The time and date a document was last accessed and last saved.
- The identity of the computer that created the document, the date and time of the document's creation, and the identity of all those who revised the document.
- How much time was spent drafting and revising a document.
- How many times the document was revised.
- Where the document is saved on the author's computer.
- Hidden text.
- Redline changes. On the face of the document, as seen on the computer screen, redline changes may be easily viewable or discretely hidden. But even if hidden, the changes (and subsequently, prior versions of documents) can sometimes be easily retrieved and viewed by others.
- Prior versions of documents may also be viewed by others if the author uses the "Versions" feature of Microsoft Word which can automatically save a version of the document each time the document is closed.
- "Comments" by the author (or by others who reviewed the document) may be viewable and/or retrievable.
- Spreadsheets may include cells containing mathematical formulas not seen when printed but easily viewable in electronic form.
- E-mail normally includes the sender's I.P. address, which may reveal the identity of the computer, network, and geographical location from which one is sending the e-mail.[4]

Most metadata is irrelevant to legal transactions or proceedings. However, there may be times where metadata may lead to inadvertent disclosure of confidential information, waiver of a privilege, or breach of an ethical duty.

Take, for example, The SCO Group's slip-up where metadata revealed litigation strategy in a 2004 lawsuit filed against DaimlerChrysler. After the case was filed, a reporter received an electronic version of the Complaint in which the metadata revealed that earlier versions of the Complaint identified Bank of America as the defendant instead of DaimlerChrysler.[5]

Though not in a legal context, another embarrassing example involved, ironically enough, Microsoft, which posted a downloadable copy of its 1999 Annual Report on its website. The Report, which was drafted with Microsoft Word, contained metadata which revealed the document was written, at least in part, on a Macintosh computer.[6]

Metadata should also be of particular concern to attorneys billing by the hour. For efficiency's sake, lawyers often recycle (or at least start from) documents used in prior cases or transactions. Imagine the potential awkwardness when a tech-savvy client confronts his attorney with metadata in an electronic document prepared for the client that reveals the document took 25 minutes to draft (by a paralegal) rather than the two hours the client was billed (at the attorney's billing rate).

In the discovery context, attorneys are now required to produce

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electronically stored information in its original electronic format if requested. This has been the case in federal courts since December 2006, and is now also required in Utah state courts as of November 2007.[7] This article examines the Rules of Professional Conduct and (sometimes contradictory) ethics opinions from various jurisdictions that discuss the issue of metadata exchanged (deliberately or inadvertently) between adversaries, co-parties, or other third-parties in the non-discovery context. To date, the Utah State Bar has not issued an ethics advisory opinion on this specific issue, and no Utah state or federal court decision has addressed the issue.

The Sending Lawyer

Utah Rule of Professional Conduct 1.6 requires that "[a] lawyer shall not reveal information relating to the representation of a client" unless a specific exception applies or the client gives consent. Comments 16 and 17 to Rule 1.6 caution lawyers to "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure" and to "take reasonable precautions to prevent the information from coming into the hands of unintended recipients."

In 2004, the New York State Bar Association issued an ethics opinion which concluded that "lawyers have a duty under [New York's Rule 1.6 equivalent] to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets."[8]

> Likewise, a 2006 Florida ethics opinion advised: "It is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communications sent by electronic means to other lawyers and third parties and to protect from other lawyers and third parties all confidential information, including information contained in metadata, that may be included in such electronic communications."[9]

It is relatively simple to remove or "scrub" metadata from electronic documents. Perhaps the easiest method is to convert the document into a portable document file (PDF). This conversion essentially turns the electronic document into a photocopy that is viewable and printable by the recipient. The newly created PDF document no longer contains any metadata from the original document.[10] Third-party commercial products are also available for the removal of metadata. Further, Microsoft provides information to prevent metadata from being shared.[11]

Considering the relative ease with which most metadata can be removed, lawyers should take all reasonable steps to remove metadata from all types of electronic documents when communicating with other lawyers, clients, and third-parties. To date, it appears that no court has issued a ruling regarding the consequences

of disclosing confidential client information solely through metadata. However, it certainly would not be a stretch for a court to rule that disclosure of such information (1) is a violation of Rule of Professional Conduct 1.6, and/or (2) operates as a waiver of one or more legal privileges, including the attorney-client privilege.

The Receiving Lawyer

It also appears that no court has ruled on what a lawyer may or may not do when one *receives* an electronic document that contains metadata. At least two rules of professional conduct arguably apply when a lawyer receives an electronic document containing metadata.

On one hand, a lawyer may justify metadata examination under Utah Rule of Professional Conduct 1.3 and its comments, which mandate that the lawyer "shall act with reasonable diligence… in representing a client" and "must act…with zeal in advocacy upon the client's behalf." Indeed, one could argue that "reasonable diligence" and "zeal" would *require* the lawyer to search metadata for any relevant information.

On the other hand, Utah Rule of Professional Conduct 4.4(b) states: "A lawyer who receives a document relating to the representation of the [opposing] lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comment 2 under Rule 4.4 makes clear that "document" includes e-mail or any other electronic modes of transmission subject to being read or put into readable form.[12] Thus, Rule 4.4 may be used to assert that metadata examination should never occur.

Unfortunately, the ethics opinions from other jurisdictions offer no clear guidance on this issue, as they vary greatly in their conclusions. Remember that these opinions apply only to metadata examination in the non-discovery context.

OPINIONS CONCLUDING THAT METADATA INSPECTION IS NEVER PERMITTED

New York

In 2001, the New York State Bar Association issued an opinion examining the question of whether "a lawyer ethically may use available technology to surreptitiously examine and trace e-mail and other electronic documents."[13] The opinion discussed not only metadata, but also situations where someone deliberately and secretly plants a "bug" in an e-mail sent to another lawyer which enables the user planting the bug to learn the identity of recipients and senders, and to view the comments these persons make regarding the document, as long as they have not "bug proofed" their systems.

It certainly is not surprising that the opinion concludes that such "bugging" technologies are unethical and probably illegal. But the opinion failed to distinguish between this so-called bug-placing behavior and the simple inspection of ordinary metadata when it concluded that "a lawyer may not make use of computer software applications to surreptitiously 'get behind' visible documents [to view metadata] or to trace e-mail."

Alabama

The Alabama State Bar's March 2007 opinion relies heavily on the New York opinion and states: "the use of computer technology [for purposes of metadata examination] constitutes an impermissible intrusion on the attorney-client relationship in violation of the Alabama Rules of Professional Conduct."[14] The Alabama opinion also concludes that metadata examination violates Alabama Rules of Professional Conduct 8.4(c) and (d) which prohibit "dishonesty, fraud, deceit or misrepresentation" and "conduct that is prejudicial to the administration of justice."

OPINIONS CONCLUDING THAT METADATA INSPECTION MAY BE PERMITTED IN SOME SITUATIONS

Florida

The Florida State Bar counseled against metadata examination in its 2006 ethics opinion, which advises: "A lawyer receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who inadvertently receives information via metadata…should notify the sender of the information's receipt."[15]

There is difficulty with practical application of this opinion. Apparently, the receiving lawyer *may* review metadata if one knows the metadata is intended for the receiving lawyer. But how does the receiving lawyer know if the metadata is intended for the lawyer without first viewing it? Of course, the sending attorney could specifically inform the receiving lawyer that such communication is intended. But short of this specific disclosure, receiving lawyers in Florida are effectively prohibited from even attempting to obtain information from metadata.

District of Columbia

In September 2007, the District of Columbia Bar Association advised: "A receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent." [16] In all other circumstances, the receiving lawyer is free to examine the metadata.

The opinion cautioned, however, that actual knowledge may exist, not only when a receiving lawyer is told of the inadvertent disclosure before review of the document, but also when a

lawyer immediately notices upon review of the metadata that the information was obviously sent inadvertently. In footnote three to the opinion, the Ethics Committee warned that they "do not condone a situation in which a lawyer employs a system to mine all incoming electronic documents in the hope of uncovering a confidence or secret, the disclosure of which was unintended by some hapless sender."

OPINION CONCLUDING THAT METADATA EXAMINATION IS ALWAYS ALLOWED

American Bar Association

The ABA appears to stand alone in its conclusion that metadata may always be reviewed by the receiving lawyer (assuming the receiving lawyer does not obtain the electronic document in a manner that was criminal, fraudulent, deceitful, or otherwise improper).[17] In support, the opinion states: "Even if transmission of 'metadata' were to be regarded as inadvertent, [Model] Rule 4.4(b) is silent as to the ethical propriety of a lawyer's review or use of such information."

Model Rule 4.4(b), which is identical to Utah Rule of Professional Conduct 4.4(b), advises that when a receiving lawyer inadvertently receives a document, the *only* obligation created by Rule 4.4(b) is to notify the sender that the document was received. The Rule *does not* prohibit the receiving lawyer from reviewing the document. Indeed, Comment three of Rule 4.4 indicates that the receiving lawyer *may*, but is not required to, return the document unread.

Further, the ABA opinion specifically rejected the argument that a lawyer's search for, or use of, metadata violates Model Rule 8.4 (also identical to Utah's Rule 8.4), which prohibits lawyers from engaging in conduct "involving dishonesty, fraud, deceit, or misrepresentation" or conduct "that is prejudicial to the administration of justice."

In short, the ABA concludes that metadata may be reviewed by a receiving lawyer and that such review is not dishonest, fraudulent or deceitful.

Conclusion

It seems fairly apparent that a sending lawyer, in the non-discovery context, must take all reasonable precautions to either: (1) scrub all metadata from an electronic document before it is sent to an adversary, co-counsel, or some other third-party; or (2) be certain what metadata the document contains and that such metadata is intended to be sent to the recipient.

It is less clear what a receiving lawyer should do when one receives an electronic document that contains confidential information within the metadata. To date, there is no published court ruling regarding the issue. Ethics opinions vary widely in their conclusions from: "it is never acceptable to review metadata;" to "it is sometimes acceptable to review metadata;" to "reviewing metadata is always permissible." Further, the Utah State Bar has not yet issued an ethics opinion to give Utah lawyers specific guidance on this issue.

It is the author's opinion that unless Utah amends its Rules of Professional Conduct, the Utah Bar should adopt the ABA Opinion and advise that receiving lawyers may review metadata in electronic documents, even if such metadata is sent inadvertently. Although the Utah Rules regarding document disclosure require a receiving lawyer to "promptly notify" a sender of an inadvertently disclosed document, the Rules allow the receiving lawyer to fully review such a document. Inadvertently disclosed metadata should similarly be fully reviewable by the receiving attorney, especially since it is relatively simple to share electronic documents free of compromising metadata.

1. Fed. R. Civ. P. 26(f), 2006 Advisory Committee Note ¶ 26.
2. http://www.m-w.com/dictionary/metadata (last visited January 29, 2008).
3. D.C. Legal Ethics Comm., Op. No. 341, September 2007.
4. *See* examples of metadata and ways to control it at http://office.microsoft.com/en-us/help/HA011400341033.aspx (last visited January 29, 2008). One federal court opinion which is especially helpful in understanding metadata is *Williams v. Sprint/United Mgmt. Co.,* 230 F.R.D. 640, 646-47 (D. Kan. 2005).
5. *See* Jembaa Cole, *When Invisible Electronic Ink Leaves Red Faces: Tactical, Legal and Ethical Consequences of the Failure to Remove Metadata,* 1 Shidler J. L. Com. & Tech. 8 (Feb. 2, 2005), http://www.lctjournal.washington.edu/Vol1/a008Cole.html.
6. *See id.*
7. *See* Fed. R. Civ. P. 16, 26, 33, 34 and 45 (effective December 1, 2006); Utah R. Civ. P. 16, 26, 33, 34 and 45 (effective November 1, 2007).
8. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. No. 782 (Dec. 8, 2004).
9. Prof'l Ethics of the Florida Bar, Op. No. 06-2 (September 15, 2006).
10. One must be aware that PDF documents contain their own metadata, such as the name of the original file from which the PDF was created, the network and computer identification of the person who created the PDF, and when the PDF was created. *See* http://www.llrx.com/columns/fios6.htm (last visited January 29, 2008).
11. Third-party commercial products include iScrub, Metadata Sweeper, Workshare, and others. Information from Microsoft is available at http://www.microsoft.com/downloads/details.aspx?FamilyId=144E54ED-D43E-42CA-BC7B-5446D34E5360&displaylang=en and http://office.microsoft.com/en-us/help/HA100375931033.aspx (last visited January 29, 2008).
12. Utah Rule of Prof'l Conduct 4.4(b) and Comment 2.
13. N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. No. 749 (December 14, 2001).
14. Ala. State Bar, Office of Gen. Counsel, Op. No. R0-2007-02 (March 14, 2007).
15. Fla. Bar Prof'l Ethics Comm., Advisory Op. No. 06-2 (September 15, 2006).
16. D.C. Legal Ethics Comm., Op. No. 341, September 2007. It should be noted that this Opinion is based, at least in part, on District of Columbia Rule of Professional Conduct 4.4(b), which differs from the Model Rule of Professional Conduct in that the D.C. Rule specifically prohibits examination of inadvertently sent documents. *See* D.C. Rule of Prof'l Conduct 4.4(b), and Comments [2] and [3].
17. American Bar Association, Comm. on Ethics and Prof'l Responsibility, Formal Op. No. 06-442 (August 5, 2006).

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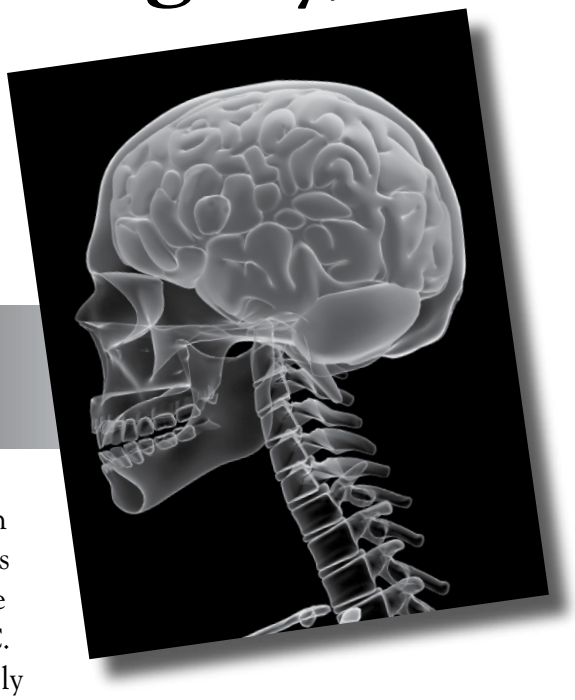

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Interpreting Rules and Constitutional Provisions

Remarks by Laura Dupaix, Linda Jones, and Christina Jepson Schmutz

Edited by John Bogart

Editor's Note: *At the July 2007 Convention of the Utah State Bar, the Appellate Practice Section sponsored a panel discussion on some recent developments and trends in decisions of the Utah appellate courts. The discussion focused on expert testimony and constitutional interpretation. What follows is a summary of the remarks by the panelists.*

I. Expert Testimony: *Rimmasch* and 702 Revisions.
A revised Rule of Evidence 702[1] came into effect November 2007, which makes this an opportune moment to consider the state of Utah law on expert testimony. The key case interpreting the old Rule is, of course, *State v. Rimmasch,* 775 P.2d 388 (Utah 1989). In *Rimmasch,* the Utah Supreme Court set out a three-part test for the admissibility of "novel scientific evidence."

> First *Rimmasch* requires a threshold showing that the scientific principles and techniques are 'inherently reliable.' . . . *Rimmasch's* second requirement is a determination that there is an adequate foundation for the proposed testimony, i.e., that the scientific principles or techniques have been properly applied to the facts of the particular case by qualified persons and that the testimony is founded on that work. . . . Finally, *Rimmasch's* third requirement is a determination that the scientific evidence will be more probative than prejudicial as required by rule 403 of the Utah Rules of Evidence.

State v. Butterfield, 2001 UT 50, ¶¶ 29-30, 27 P.3d 1133 (internal quotation marks and citations omitted).

Accordingly, "the *Rimmasch* test was not intended to apply to all expert testimony. Rather, *Rimmasch* is implicated only when the expert testimony is 'based on newly discovered principles.'" *State v. Adams,* 2000 UT 42, ¶ 16, 5 P.3d 642 (emphasis omitted).

Consequently, if the principles or techniques at issue did not involve novel science, but instead involve techniques or principles generally accepted by experts in the field, the proponent of the testimony is not required to make a particular reliability showing for admissibility.[2] Indeed, under the old Utah model, it appeared that if an expert relied on techniques or principles that are of the type reasonably relied upon in the field, that was sufficient for admissibility.[3]

Haupt v. Heaps, 2005 UT App 436, 131 P.3d 252 demonstrates the difficulty of determining whether testimony is "scientific" and thus triggers the inherent reliability test. In *Haupt* the Utah Court of Appeals affirmed the trial court's decision to exclude three expert witnesses. The plaintiff argued that the trial court erred in excluding three expert witnesses, two of whom planned to testify about the value of the stock on the date the former employee sold his stock back to the company. *See id.* ¶¶ 15-16, 28.

Dr. Paul Randle, an economist, planned to testify about the value of the stock using the "SLR Method," which plots the known value of the stock on two different dates, and "draws a line between those two points and assumes that the value of the stock changed at a consistent rate between those two data points." *Id.* ¶ 16. Dr. Randle admitted that he had never seen the SLR Method prior to his review of the company's financial statements. In addition, he did not consider it to be a "valuation method," *id.* ¶ 17, and he did not perform his own valuation of the stock. The trial court had ruled that under *Rimmasch*, Dr. Randle's testimony was "novel scientific evidence" and must be shown to be inherently reliable. The trial court then found that the plaintiff could not meet this burden. The appellate court agreed that Dr. Randle's testimony was "novel" but decided to "not resolve whether economic testimony is 'scientific' for purposes of *Rimmasch*." *Id.* ¶ 24. Instead, the court affirmed on an alternative basis that the testimony would not assist the trier under Rule 702 because it was more prejudicial than probative.

Likewise, the court of appeals affirmed the exclusion of Curtis Bramble, a certified public accountant, who was to testify about the SLR Method as well as a valuation technique using the stock price at a later date. The court again sidestepped *Rimmasch* and excluded the testimony under Rule 702 as not helpful to the jury. *See id.* ¶ 28. The trial court had also excluded the proposed testimony of Professor William Albrecht who was to testify that "the facts of this case are consistent with typical elements of fraud" based on his theory of fraud triangles. *Id.* ¶ 31. The trial court had noted that no previous court had found Professor

LAURA DUPAIX (an Assistant Attorney General in the Appeals Division) discussed Constitutional interpretation issues. LINDA JONES (an appellate attorney with the Salt Lake Defender Association) and CHRISTINA JEPSON SCHMUTZ (a legal partner at Parsons Behle & Latimer) presented remarks on Rule 702. JOHN BOGART (a partner in the Salt Lake City office of Howrey, LLP) moderated the panel and edited the panel remarks for publication.

Albrecht qualified to testify about his theory and counsel could not locate a single case in which the "fraud triangles" theory had been accepted as a reliable scientific method. The trial court excluded the testimony under *Rimmasch* and Rule 702. The court of appeals was reluctant to decide whether the economic testimony was "scientific." Instead, the court affirmed under Rule 702 because the testimony was not helpful and simply noted that it "was not an abuse of discretion to exclude that testimony." *Id.* ¶ 33.

In contrast, in *Balderas v. Starks,* 2006 UT App 218, 138 P.3d 75, the Utah Court of Appeals affirmed the trial court's decision to allow an expert witness on accident reconstruction. The defendant offered the testimony of an accident reconstructionist regarding "whether the forces generated in the accident could have caused the injuries claimed by Balderas." *Id.* ¶ 5. The expert did not personally examine the cars, but instead relied on interviews with both parties about the accident, damage to the vehicles, a repair estimate for plaintiff's vehicle, photographs of the vehicles, and literature about the vehicles. The expert then used a computer program called "PC Crash" to calculate momentum. Based on his analysis, the expert testified that there was "a low probability that anyone in the general population could have been injured in the accident." *Id.* ¶ 9. On appeal, the plaintiff argued that the expert should not have been allowed to testify about impact speed, change in velocity, or the likelihood of injury because the testimony was inherently unreliable under *Rimmasch* since he had not personally examined the vehicles. The court of appeals held that *Rimmasch* did not apply because computer-modeled accident reconstruction did not involve novel scientific principles. Accordingly, the court found that the expert need only rely on materials reasonably relied upon by other experts in the field.

The amendments to Rule 702 eliminate this problem by generally adopting the *Rimmasch* standards, but eliminating a distinction between scientific and non-scientific testimony. Obviously, there are not yet cases interpreting the new Rule 702, only the Committee Notes. The notes suggest that *Rimmasch* is no longer good authority, and that the Utah Rule now more closely resembles the Federal Rule. It would be a mistake, however, to treat all of the cases under the old Rule 702 as vitiated.

In addition to *Balderas*, which likely remains good law, in *Pete v. Youngblood,* 2006 UT App 303, 141 P.3d 629, the Utah Court of Appeals affirmed the trial court's decision to exclude a treating physician from giving expert testimony because he was not specifically identified as an expert by the plaintiff. *See id.* ¶ 36. The plaintiff identified a treating physician as a potential witness, but did not identify him as an expert. In response to the defendants' motion for summary judgment, plaintiff offered an affidavit from the treating physician in which the physician opined about the standard of care. The trial court struck the affidavit and granted the defendants' motion for summary judgment. The court of appeals held that the plaintiff was required to specifically identify the treating physician as an expert witness even if no report was required because the physician was not specially retained. The court rejected plaintiff's argument that she had "substantially complied" with Rule 26(a)(3)(A) of the Utah Rules of Civil Procedure because the physician was named as a fact witness and his records had been provided to the defendants. The court noted that formally identifying an expert witness was necessary in order to allow the opposing party to properly conduct discovery and prepare for trial.[4] *See id.* ¶ 17. The timely identification requirement has long been part of federal practice, and so *Pete v. Youngblood* is certainly still good law in Utah.

Similarly, the guidance of *State v. Rothlisberger,* 2004 UT App 226, 95 P.3d 1193, will remain vital. In *Rothlisberger* a police officer involved in arresting the defendant and investigating drugs in the car testified at trial to the amount of methamphetamine that would typify personal use for a charge of possession with intent to distribute. The defense objected to the officer's testimony on the grounds that it constituted expert evidence and the state failed to give pretrial notice of its intent to present the officer as an expert at trial.

The Utah Court of Appeals and the Utah Supreme Court both ruled that while the officer in *Rothlisberger* was a fact witness, he presented expert evidence when he testified to the amount of methamphetamine that would typify personal use. That testimony was based on specialized knowledge implicating Rule 702. Consequently, the state was required to qualify the officer as an expert witness, and it was required to give expert notice under the Utah rules.

Finally, we should note an area the courts are just beginning to come to grips with, and it is a puzzle common to both the Utah and Federal Rules. The problem of how to deal with changes in the relevant scientific standards, raised in *State v. Hales,* 2007 UT 14, 152 P.3d 321, is perplexing. In *Hales* the defendant was charged with the murder of a boy named Luther. In December 1985, Luther's mother left the 5-month-old infant in Mr. Hales's care while she went to the grocery store for half an hour. During that time, Mr. Hales "noticed that Luther was gasping for air and that his eyes had rolled back in his head." *Id.* ¶ 7. Mr. Hales tried to revive Luther, and when his efforts failed, he ran for help and called 911. Luther was taken to a hospital where technicians performed CT scans. " Doctors determined that Luther had brain swelling and retinal hemorrhaging and that his injuries were likely nonaccidental and caused by shaken baby syndrome." *Id.* ¶ 10. Luther remained in a vegetative state until he died in 1997. At that point, the Utah Attorney General's Office investigated the matter and in 2000 charged Mr. Hales with murder. The case went to trial in 2003.

The State's case relied in large part on an expert's interpretation

of the CT scans that were performed in 1985 and thereafter. The state's expert, Dr. Walker, testified that the scans and retinal hemorrhaging supported nonaccidental, violent force, shaken baby syndrome. According to Dr. Walker, the injuries "would have caused immediate unconsciousness with no possibility of a 'lucid interval.'" *Id.* ¶ 28.

The defense, on the other hand, relied on Mr. Hales's testimony of the events, and an expert qualified in shaken baby syndrome. Notably, the defense did not review the CT scans before trial, and the defense expert was not qualified to interpret CT scans. Thus, Dr. Walker's testimony for the state went largely un-rebutted. At the conclusion of the evidence, the jury convicted Mr. Hales of murder. Mr. Hales then acquired new counsel, filed a motion for a new trial, hired an expert to interpret the CT scans, and appealed.

According to Mr. Hales's new defense team, the original trial attorneys were deficient because they failed to properly investigate the CT scans. In addition, the new expert claimed that Dr. Walker's testimony was flawed and unfounded: nothing in the scans revealed the cause or the timing of Luther's injuries. In fact, the scans showed a change in brain cell structure that may have been initiated some six to twelve hours earlier. Based on that post-trial testimony and the timing of the scans, the evidence supported that Luther had a lucid period between the initiating event causing injury to the brain and unconsciousness. If believed, the evidence would establish that the insult to Luther's brain "most likely happened" several hours "*prior to the time*" that Luther was in Mr. Hales's care on the evening of December 5, 1985. *Id.* ¶ 31 (emphasis added).

The Utah Supreme Court agreed that the original trial attorneys were deficient in their investigation of the CT scans. It reversed Mr. Hales's conviction and remanded the case for a new trial. According to newspaper reports, the state has since taken a fresh look at the evidence and has decided "there [is] not enough there to successfully prosecute" Mr. Hales in a new trial. Linda Thomson, *Judge Dismisses 'Shaken-baby' Case,* Deseret Morning News, June 16, 2007, at B01. The evidence is "insufficient" to proceed. Stephen Hunt, *New Evidence Frees Inmate in Murder Case,* The Salt Lake Tribune, June 16, 2007.

That assessment appears to coincide with updated information now available on shaken baby syndrome. While Dr. Walker relied on a constellation of symptoms that experts have looked to for decades to support nonaccidental, violent force injury and abuse,[5] there are new reports on the issue. Within the past couple of years, studies have demonstrated that the symptoms Dr. Walker identified for shaken baby syndrome are indicative of other *nonviolent* events. The symptoms may be the residual effects of trauma during birth in a newborn infant, a reaction to a vaccine, or the result of an infection, a respiratory paralysis, trauma to the head hours earlier with a lucid period of up to 24 hours, or other diseases or disorders. *See id.*

In *Hales* the Utah Supreme Court declined to address whether Dr. Walker's expert testimony was unfounded and improperly admitted at trial. Indeed, according to the literature, the theories that Dr. Walker relied on for his testimony had been generally accepted as reliable in the medical field for many years. But what we may have here is a paradigm shift in the field. Courts in other states are dealing with the issue and applying a reliability assessment to reject expert evidence concerning the "classic signs" for shaken baby syndrome.[6]

What happens if traditional, generally accepted methods and principles are later questioned as unreliable in a particular expert field? Should we expect the jury to sort through the evidence in a battle of the experts in a murder trial? Or should the courts require the proponent of the evidence to establish that the traditional methods are reliable as a threshold for admissibility?

Under *Rimmasch*, the problem could not arise as a question of law. Because the old science could not, by definition, be "novel," the expert testimony would be admissible under the old Rule 702, at least presumptively. Whether the *Hales* scenario remains problematic under the new Rule 702 is unclear. The new Rule directs attention to factors which might give some guidance, assuming *Rimmasch* really has suffered a mortal wound. But notice that, to the extent that the new Rule 702 provides guidance,

it is limited. It does not dispose of the *Hales* scenario. The problem perhaps lies outside the Rules of Evidence. *Rimmasch* yielded absurd answers to the *Hales* scenario, while the new Rule provides tools to at least manage the problem.

II. Utah Constitutional Interpretation: Which Way Forward?

The preceding remarks presume a stable interpretive structure. That seems a reasonably safe bet for interpretation of the Rules, although not a certainty. To see why it is not a certainty, consider the recent history of the Utah Supreme Court's directions on interpretation of the state constitution.

For over twenty years, the Utah Supreme Court has pressed litigants to raise constitutional issues under our state constitution, particularly in criminal cases, encouraging parties briefing state constitutional issues to use a variety of sources, including historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials. *See, e.g., Soc'y of Separationists v. Whitehead,* 870 P.2d 916, 921 n.6 (Utah 1993). But two years ago, the supreme court expressly adopted an originalist approach to state constitutional interpretation in *American Bush v. South Salt Lake,* 2006 UT 40, 140 P.3d 1235. Then, last year, without acknowledging or citing *American Bush,* the court issued an opinion applying an entirely different approach to state constitutional analysis in *State v. Tiedemann,* 2007 UT 49, 162 P.3d 1106.

At issue in *Society of Separationists* was whether permitting prayer before city council meetings violated article I, section 4, of the Utah Constitution, which prohibited "public money or property" from being "appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment." *Society of Separationists,* 870 P.2 at 919 (quoting Utah Const. art. I, § 4. The Court held that it did not.

The result reached in *Society of Separationists* was not as important as what the Court said about how article I, section 4 should be interpreted. The city argued that the article's language had to be examined in light of its history and textual context. *See id.* at 920. The *Society of Separationists,* on the other hand, advanced a purely textual analysis, arguing that "any resort to history is inappropriate" and that "it is entirely proper to examine the constitutional language alone." *Id.*

The court rejected the city's "apparent contention that the language of the Utah Constitution is not the proper starting place for analysis and can be ignored." *Id.* It also rejected the Society's claim that the provision "should be limited to [its] literal meaning." *Id.* at 921. Rather, the court held, the language of article I, section 4 must be read in its entirety in light of "other [constitutional] provisions dealing with the general topic of freedom of religion and conscience" and "the unique history of church-state relations in Utah – relations that occupied center stage in our state's social and political history for the almost fifty years preceding adoption of the 1896 constitution." *Id.*

The opinion suggested that historical evidence of the framer's intent was critical to interpreting the state constitution. The court, however, stopped short of saying that this was the only source for determining the meaning of a constitutional provision. Rather, it suggested that sister state law and policy arguments would also be appropriate considerations:

> We have encouraged parties briefing state constitutional issues to use historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials to assist us in arriving at a proper interpretation of the provision in question. Each of these types of evidence can help in divining the intent and purpose of the framers, a critical aspect of any constitutional interpretation.

Id. at 921 n.6. (citations omitted). Thus, *Society of Separationists* stands for the proposition that the aim of state constitutional analysis is to divine "the intent and purpose of the framers," and that this is best done by reading the constitutional text in light of its history.

Issued thirteen years later, *American Bush*[7] stated expressly what *Society of Separationists* only implied – that sister state law and policy arguments are relevant in state constitutional analysis only to the extent that they assist in discerning the framers' intent. Justice Parrish, writing for a three-justice majority, adopted an interpretative framework for the Utah Constitution that can only be described as originalist in its approach. She wrote that interpreting Utah's constitution requires an analysis of "its text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting." *Am. Bush v. S. Salt Lake,* 2006 UT 40, ¶ 12, 140 P.3d 1235. This much is largely consistent with *Society of Separationists,* 870 P.2d at 921 n.6, and other prior caselaw interpreting the state constitution.

The *American Bush* court explained, however, that the goal of construing a state constitutional provision is "to discern [not only] the intent and purpose of. . .the drafters of our constitution," but "more importantly," to discern the intent and purpose of "the citizens who voted it into effect." *American Bush,* 2006 UT 40, ¶ 12. *American Bush* expressly and "intentionally excluded the consideration of policy arguments suggested by *Society of Separationists v. Whitehead*. . . ." *Id.* ¶ 12 n.3. The supreme court elaborated: "As is the case with statutory interpretation, [the court's] duty is not to judge the wisdom of the people of Utah in granting or withholding constitutional protections but, rather, is confined to accurately discerning their intent." *Id.* Thus, "[p]olicy arguments are relevant only to the extent they bear upon the discernment of that intent." *Id.* In other words,

under *American Bush,* our state constitutional guarantees are those which the framers and citizenry intended them to be in 1895, unless the provision has been amended.

Constitutional textual interpretation must therefore be informed "with historical evidence of the framers' intent," *id.* ¶10, which may include "the common law, our state's particular…traditions, and the intent of our constitution's drafters." *Id.* ¶ 11 (omission in original) (citation omitted). It may also include "court decisions made *contemporaneously* to the framing of Utah's constitution in sister states with similar…constitutional provisions." *Id.* (emphasis added). Finally, because the Utah Constitution was "adopted… against the background of over a century of experience under the United States Constitution," it is also appropriate to consider the history of the adoption of a corresponding federal provision. *Id.* (omission in original) (citation omitted). The majority opinion leaves no doubt that it intended to adopt a constitutional interpretative framework that aimed to divine the intent of the framers and ratifiers by looking primarily, if not exclusively, at historical evidence.

Justice Durrant wrote a concurring opinion explaining why the originalist approach adopted by the majority was, in his view, the best approach. The question, according to Justice Durrant, was where judges "should look for guidance when assessing the meaning of that text." *Id.* ¶ 73 (Durrant, J., concurring). Justice Durrant saw three possible approaches for interpreting constitutional text:

> (1) we can assign meaning to the text based on the attitudes and views of contemporary society (the "contemporary-context approach"); (2) we can assign meaning to the text based on our own individual attitudes and views (the "subjective approach"); or (3) we can assess the meaning of the text based on the understanding and intent of those who drafted and ratified the constitution (the "historical approach").

Id. ¶ 73 (Durrant, J., concurring).

Justice Durrant noted that all three approaches ask the same question – "what does the provision mean?" – but that they did so from very different perspectives. *Id.* ¶ 74. The contemporary-context approach asks "what *should* the provision mean in the context of our modern values and attitudes?" *Id.* The subjective approach asks "what *should* the provision mean according to the interpreting judge's own personal values and attitudes?" *Id.* The historical approach asks "what *did* this provision mean to those who drafted and ratified it?" *Id.* Under the latter approach, "the judicial enterprise is anchored to the text of the constitution as understood and intended by its framers and the voters who ratified it." *Id.* ¶ 83. He advocated for the historical approach, as adopted by the majority, because, under it, "judges are more

referees than players in the grand political game." *Id.* ¶ 84. This, Justice Durrant believed, would provide "stability to state government while remaining true to the principle that it is the people of this state who should ultimately determine how our society should be structured." *Id.*

Chief Justice Durham dissented. She saw the issue as interpreting the "plain language" of the state constitution of article I, section 1, which gives Utah citizens the "inherent and inalienable right… to communicate freely their thoughts and opinions, being responsible for the abuse of that right." *Id.* ¶ 114 (Durham, C.J., dissenting). Thus, in Chief Justice Durham's view, the issue was simply whether nude dancing falls within the meaning of "communicate." In concluding that nude dancing is "communicative in nature," *id.* ¶ 117, the chief justice relied primarily on a modern understanding of the term "communicate" and on the history of dancing as traced back to its ancient roots. *Id.* ¶¶ 117-18. While the chief justice did rely on some history, she faulted the majority for relying too much on it: "I believe that the point of relying on history and the common law in interpreting our constitution is to inform our result, not dictate it." *Id.* ¶ 133.

Although *American Bush* does not expressly state that parties must brief state constitutional issues using the historical approach, its express adoption of that interpretative framework suggests that parties wishing to be successful should use that formula. Certainly, under *American Bush's* holding, parties should, at a minimum, address the state constitutional text in light of its history, so as to show the framers' and ratifiers' intent.

About eleven months after *American Bush,* the Utah Supreme Court decided *State v. Worwood,* 2007 UT 47, 164 P.3d 397, a Fourth Amendment appeal brought by a party who did not properly preserve a separate state constitutional claim under our state search provision. The supreme court did not address the merits of the state constitutional claim, but pointedly instructed counsel on how to raise and brief state constitutional claims in search and seizure cases. "As with most legal arguments," the court stated, "there is no magic formula for an adequate state constitutional analysis. Arguments based, for example, on historical context, the constitution's text, public policy, or persuasive authority would all meet our briefing requirements." *Id.* ¶ 18.

Worwood's suggestion that "there is no magic formula" for adequately briefing state constitutional claims does not fit comfortably into *American Bush's* originalist interpretive model. For example, *Worwood's* invitation to brief "public policy or persuasive authority," *id.* seems at odds with *American Bush's* rejection of "policy arguments," except as they may "bear upon the discernment of [the ratifiers' intent]." *Am. Bush v. S. Salt Lake,* 2006 UT 40, ¶ 12 n.3, 140 P.3d 1235. The court did not address this apparent contradiction; and *Worwood* does not cite to *American Bush,* even though Justice Parrish authored both opinions. *Worwood's* apparent abandonment of *American Bush's* originalist model might have been explained away as mere dicta, but for the issuance of *State v. Tiedemann,* 2007 UT 49, 162 P.3d 1106, a week later.

Tiedemann, charged with three counts of aggravated murder, argued that the destruction of physical evidence by the police violated the due process clauses of both the federal and state constitutions. To prevail under federal law, Tiedemann had to show that the police acted in bad faith in destroying the evidence. Tiedemann argued that the supreme court should adopt a different test under the state constitution.

The state responded that Tiedemann had not adequately developed his state constitutional argument using "historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials to assist [the court] in arriving at a proper interpretation of the provision in question" *Id.* ¶ 32 (alteration in original) (citation omitted). The state noted that while Tiedemann had cited to sister state law, he had not analyzed his claim within "the unique context in which Utah's constitution developed." *Id.* (citation omitted).

Consistent with her dissent in *American Bush,* Chief Justice Durham, now writing for the majority, rejected any suggestion that "there is a formula of some kind for adequate framing and briefing of state constitutional issues before district courts and this court." *Id.* ¶ 37. The court noted that it had "on numerous occasions cited with favor the traditional methods of constitutional analysis." *Id.* It also noted that while "[h]istorical arguments may be persuasive in some cases,…they do not represent a *sine qua non* in constitutional analysis." *Id.* "In theory," the court continued, "a claimant could rely on nothing more than plain language to make an argument for a construction of a Utah provision that would be different from the interpretation the federal courts have given similar language." *Id.* The court concluded that independent state analysis "must begin with the constitutional text and rely on whatever assistance legitimate sources may provide in the interpretive process." *Id.*

Yet, Justices Parrish and Durrant concur in this portion of the Chief Justice's opinion. *Tiedemann's* language on this point does not appear to be dicta. After explaining the appropriate approach to state constitutional analysis, *Tiedemann* adopts a new state constitutional due process rule for when evidence has been destroyed in a criminal case. In so doing, *Tiedemann* neither begins with the text nor cites any historical evidence on what the framers or ratifiers intended. Indeed, *Tiedemann* does not quote the constitutional text. The *Tiedemann* majority instead informs its constitutional analysis by reference to a rule of criminal procedure, and by noting that several states have adopted different rules under their own state constitutions. Thus, Chief Justice Durham's opinion appears to dismantle the

originalist analytical framework erected by Justices Parrish and Durrant in *American Bush.*

The approaches used by *American Bush* and *Tiedemann* appear to be irreconcilable. Both *Worwood* and *Tiedemann* suggest that practitioners need not follow *American Bush's* interpretative framework in briefing state constitutional issues. But since neither case cites *American Bush,* that may be a risky proposition. Until the Utah Supreme Court adopts a single interpretive model, the safest course for practitioners would be to begin with the constitutional text and to use and rely on historical evidence as much as possible in interpreting the text. While *Tiedemann* suggests that historical evidence is not the "*sine qua non*" of state constitutional analysis, it does not reject historical evidence as a legitimate source for interpreting constitutional text. Practitioners may then bolster their historical analysis with reference to policy arguments, economic and social studies, and the law of other states.

1. The pre-November Rule 702 read: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Utah R. Evid. 702 (2005).

   The post-November Rule 702 reads:

   > (a) Subject to the limitations in subsection (b), if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
   >
   > (b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony if the scientific, technical, or other principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case.
   >
   > (c) The threshold showing required by subparagraph (b) is satisfied if the principles or methods on which such knowledge is based, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

   Utah R. Evid. 702 (amended effective November 1, 2007).

2. In *State v. Kelley,* 2000 UT 41, 1 P.3d 546, the Utah Supreme Court stated that if expert testimony is not based on novel scientific principles or techniques, "[t]he appropriate standard [for admissibility] is set forth in *State v. Clayton,* 646 P.2d 723 (Utah 1982)." *Kelley*, 2000 UT 41, ¶20. Under the *Clayton* standard, an expert must be qualified. Thereafter, the qualified expert may base an opinion on "reports or writings or observations not in evidence which were made or compiled by others, so long as they are of a type reasonably relied upon by experts in that particular field." *Clayton*, 646 P.2d at 726.

3. In *Kofford v. Flora,* 744 P.2d 1343 (Utah 1987), the Utah Supreme Court ruled that once the reliability of a scientific principle has been demonstrated, "judicial notice of that fact may be taken, and hereafter foundational evidence as to the validity of the basic principles may be dispensed with in this jurisdiction in the future. As we wrote in [*Phillips v. Jackson,* 615 P.2d 1228 (Utah 1980)], 'General acceptance in the scientific community…assures the validity of the basic principle." *Kofford*, 744 P.2d at 1348 (omission in original) (quoting *Phillips*, 615 P.2d at 1233). Also, the Utah Supreme Court has stated that once a technique has reached general acceptance, the party opposing the evidence may challenge its reliability on cross-examination, "but such challenge goes to the weight to be given the testimony, not to its admissibility." *Clayton*, 646 P.2d at 726.

4. It is important to note that the court of appeals reversed the summary judgment on the basis that the doctrine of res ipsa loquitur applied and no expert testimony was necessary. *Pete v. Youngblood,* 2006 UT App 303, ¶ 36, 141 P.3d 629.

5. *See* Harold E. Buttram, M.D., *Shaken Baby/Impact Syndrome: Flawed Concepts and Misdiagnoses (Based on a Review of Twenty-Two Cases),* (2002), http://www.woodmed.com/Shaken%20Baby%20Web%202002.htm (stating that for 30 years, a diagnosis for shaken baby syndrome has relied on a combination of subdural hematoma, retinal hemorrhage, and diffuse axonal injury).

6. More than ten years ago, a forensic pathologist in Wisconsin presented expert testimony of shaken baby syndrome to support a murder conviction against Audrey Edmunds. Edmunds was the last person with the child before the onset of the symptoms, and at the time of trial, "[t]he common wisdom in such 'shaken-baby' cases was that the last person with the child…was the guilty party." Allen G. Breed, *Sitter Hoping Latest Research Will Get Her a New Trial,* The Salt Lake Tribune, April 29, 2007. Edmunds is now serving an 18-year prison sentence. Today, that same forensic pathologist states he does not know what caused the child's head injury: "I'd say she died of a head injury, and I don't know when it happened. There's room for reasonable doubt." *Id.* In other states, courts are rejecting expert testimony founded on the "common wisdom" that has prevailed for years in shaken-baby cases. *Id.*

7. The *American Bush v. South Salt Lake,* 2006 UT 40, 140 P.3d 135, case grew out of a South Salt Lake City ordinance banning nude dancing in sexually oriented businesses. American Bush and other such businesses challenged the ordinance as violating article I, section 15 – Utah's freedom of speech provision. A majority of the court held that the provision did not protect nude dancing.

Ellis v. Estate of Ellis: *The Unequivocal Death of Interspousal Immunity in Utah*

by Stephen D. Kelson

On January 2, 2001, newlyweds Steven and Aimee Ellis were traveling by car on their honeymoon. Near Shelley, Idaho, Mr. Ellis lost control of the vehicle and crossed the center median into oncoming traffic, resulting in a collision with a two-ton Mitsubishi truck. Mr. Ellis died as a result of the accident. Mrs. Ellis was hospitalized with serious injuries, including a severe head injury, numerous broken bones, internal injuries, and emotional trauma. Four years later Mrs. Ellis filed a personal injury action against her husband's estate for negligence, in the Third District Court, Salt Lake County, State of Utah.[1] The Estate brought a motion to dismiss Mrs. Ellis's claim, in part, asserting that it was barred by the doctrine of interspousal immunity.[2] The district court granted the Estate's motion in part, dismissing Mrs. Ellis's claim of negligence and concluding with reluctance that interspousal immunity is abrogated in Utah only with respect to intentional torts. Mrs. Ellis appealed the decision.

While historically the court has allowed legal actions between spouses with respect to contract and property law[3] and for intentional acts,[4] many practitioners have argued that no Utah case had specifically permitted an action based on ordinary negligence. On September 21, 2007, the Utah Supreme Court issued its decision in the case of *Ellis v. Estate of Ellis,*[5] ending any dispute as to whether the doctrine of interspousal immunity still exists in Utah. In a unanimous decision, drafted by Justice J. Durrant, the court held that interspousal immunity has been abrogated in Utah with respect to all claims.

This article briefly examines the Utah Supreme Court's decision in *Ellis v. Estate of Ellis.* First it reviews the history of the doctrine of interspousal immunity. Second, it examines the "tortuous path" of the doctrine under Utah law and the arguable uncertainty and misunderstanding regarding its application. Finally, it examines the supreme court's grounds for its reaffirmation of the abrogation of interspousal immunity, effectively slamming the coffin lid on the doctrine of interspousal immunity in Utah.

The History of Interspousal Immunity

The doctrine of interspousal immunity is a creation of English common law, arguably based upon early Roman law and subsequent Biblical interpretation of marriage, where a husband and wife became "one flesh," united in purpose and spirit, making it illogical to place the spouse of an injured party in an adversarial position.[6] As stated in Blackstone's Commentaries on the Laws of England:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs every thing;…and her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.[7]

This "coverture" or "spousal unity" theory placed a married couple's legal identity in the husband, and prohibited one spouse from seeking a tort against the other for harm or injury, as the husband would legally have been both the plaintiff and the defendant in such litigation.[8] This concept of common law coverture was adopted in the American colonies and continued well into the nineteenth century.

In the United States, during the latter half of the nineteenth century, states began to pass Married Women's Property Acts (or "Married Women's Acts") which terminated the common law unity of husband and wife, and established by statute that married women could "sue and be sued in the same manner as if she were unmarried."[9] These Acts significantly increased

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the legal rights of women, allowing them to sue their husbands, defend their property interests, and make claims for fraud, trespass, conversion, and negligent injury to property.[10] However, state courts faced with legislative Married Women's Acts often turned to public policy-based argument in order to justify the continued affirmation of the interspousal immunity doctrine. These public policy considerations generally included a mixture of the following arguments: 1) immunity preserves marital harmony, and interspousal tort suits will disrupt marital tranquility; 2) husbands and wives will engage in fraud and collusion in order to recover from liability insurance policies; 3) doing away with interspousal immunity will create excessive and frivolous claims; and/or 4) injured parties should pursue alternative remedies such as divorce or criminal charges.[11] Although originally supported by many jurisdictions, courts throughout the twentieth century have abandoned these policy arguments.

From 1920 to 1940, courts increasingly read Married Women's Acts broadly, and the partial abrogation of interspousal immunity was a national trend. However, by the 1940s, a majority of jurisdictions still continued to recognize interspousal immunity.[12] The doctrine continued to erode nationwide so that by 1970, a majority of states allowed intentional tort actions between spouses. By 1989, only one-sixth of the states retained immunity in some form, stressing the public policy arguments of marital tranquility, fraud, and judicial deference concepts. However, these arguments continued to erode, so that by the end of 1993, thirty-nine states had completely abolished interspoual immunity in its entirety,[13] and by 1997, another six states joined the list.[14] As of 2008, Louisiana remains the only state that retains interspousal tort immunity in relation to any tort action between spouses.[15]

Where the Utah Supreme Court case of *Stoker v. Stoker*[16] in 1980, appeared to abrogate interspousal immunity in its entirety, subsequent case law dicta left it arguably unclear as to whether only intentional torts or the entire doctrine had been abrogated, leaving both practitioners and commentators unsure as to the precise status of interspousal immunity in Utah.

The "Tortuous Path" of Interspousal Immunity in Utah

In *Ellis*, The Utah Supreme Court recently acknowledged that the common-law doctrine of interspousal immunity has traveled a "tortuous path" in Utah case law.[17] Examining the history of Utah's case law on the doctrine, the Arizona Court of Appeals found that: "[b]etween 1954 and 1980, the Utah Supreme Court twice reversed its interpretation of the governing statutes on the subject, each time by a divided court; and since 1980 the court has three times avoided deciding how its previous cases should be read."[18] Each time the doctrine has been addressed by the court, it has been required to weigh the significance of Utah's Married Women's Act and its interpretation, against arguable public policies.

A. Utah's Married Women's Act of 1898.

In the revised statutes of 1898, the Utah Legislature joined other states in enacting the Married Women's Act ("the Act").[19] These statutes, in pertinent part, have remained unchanged since enactment, and can be found in principle part in Utah Code sections 30-2-2 and 30-2-4. Section 30-2-2 states:

Contracts may be made by a wife, and liabilities incurred and enforced by or against her, to the same extent and in the same manner as if she were unmarried.[20]

Section 30-2-4 states:

> A wife may receive the wages for her personal labor, maintain an action therefore in her own name and hold the same in her own right, and may prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried. There shall be no right of recovery by the husband on account of personal injury or wrong to his wife, or for expenses connected therewith, but the wife may recover against a third person for such injury or wrong as if unmarried, and such recovery

> shall include expenses of medical treatment and other expenses paid or assumed by the husband.[21]

Pursuant to the Act, the legal rights of wives were substantially expanded, permitting them to sue and be sued, enforce liabilities, and take action to protect their rights.

B. The Married Women's Act Versus Interspousal Immunity. The first case to address interspousal immunity pursuant to the Act occurred in 1954, in the case of *Taylor v. Patten,*[22] where a wife sued her husband for injuries arising from an intentional tort. By a 3-2 decision, the Utah Supreme Court reinstated the wife's intentional tort claim against her husband as a "sound public policy." In deciding that a wife could recover from her husband for intentionally inflicted injuries, the court noted that although Utah statutes did not expressly authorize such recovery, "a liberal construction with a view to effect their objects and promote justice indicates that such was the legislative intention."[23] Two members of the majority stated:

> Under modern Husband and Wife statutes, such as ours, [the] fiction [of coverture] has been completely eliminated and the wife has been completely emancipated from this inability to own, control and manage her property, and from her inability to sue and be sued for the protection of her property and personal rights.[24]

Although joining to form the majority, Justice Crockett limited his concurrence to claims arising during the interlocutory period of a divorce action, and expressed his support of the doctrine of interspousal immunity and misgivings of permitting spouses to sue one another, on the grounds that such suits created marital discord and would lead to collusive lawsuits.

Nine years later, the Utah Supreme Court overruled *Taylor* in the case of *Rubalcava v. Gisseman,*[25] by a 4-1 decision, holding that a wife could not sue her husband for a negligent tort arising during their marriage.[26] Drafting the majority opinion, Justice Crockett conceded that although "as a generality, the idea that the husband is master of the house exists more in theory than in fact," public policy continued to favor interspousal immunity. The court asserted "to allow interspousal actions 'encourages raids on insurance companies through unmeritorious claims which never would be instituted where the husband did not carry liability insurance,'"[27] and that the prospect of liability insurance acted as a temptation for collusion, which would subvert marital accord.[28]

The court further asserted that if the legislature had intended to abolish interspousal immunity in tort cases it would have explicitly done so, and therefore reinterpreted Utah's Married Women's Act strictly, abolishing interspousal immunity only as it applied to contract and property cases. This interpretation applied whether or not a spouse was alive or deceased, and whether or not the conduct was intentional or unintentional.

In 1980, the Utah Supreme Court revisited the issue of interspousal immunity in the case of *Stoker v. Stoker,*[29] a case that involved an intentional tort claim by a wife against her husband. This time, a three member majority of the court rejected and reversed its decision in *Rubalcava* in its entirety, and reaffirmed the prior lead decision in *Taylor*, stating:

> The [Married Women's Act] authorizes [a wife] to prosecute and defend all actions for the preservation and protection of her rights and property, as if unmarried. It speaks of rights and of property in the disjunctive, and, all actions for the preservation and protection of her rights would certainly include a right to be free from an intentional tort of her husband.[30]

The court further acknowledged that the Married Women's Act was enacted pursuant to article IV, section I, of the Utah Constitution, which states that "Both male and female citizens of this State shall enjoy equally all civil, political, and religious rights and privileges." The court also reiterated that the Utah Married Women's Act should be liberally construed so as to promote justice. The court concluded that:

> The old common law fiction [of coverture] is not consonant with the realities of today. One of the strengths of the common law was its ability to change to meet changed conditions. Here, the Legislature did not wait for the common law to change, it made the change for it; and did so at a time when a great many of Utah's sister states were enacting, or had previously enacted, Married Women's Acts. Our holding today reaffirms the Legislative abrogation of Interspousal Immunity.[31]

However, the Utah Supreme Court's flip-flopping from *Taylor* to *Rubalcava* and then to *Stoker* didn't settle the issue in the minds of Utah attorneys and commentators. Although *Stoker* did "reaffirm" the abrogation of interspousal immunity in Utah, it was an intentional tort case, and did not specifically address unintentional tort actions between spouses. Furthermore, after the *Stoker* decision, the Utah Supreme Court marginally commented on the issue of interspousal immunity in the unintentional tort context on three separate occasions, and appeared to identify that the issue was still unresolved.

In *State Farm Mutual Automobile Insurance Co. v. Mastbaum,*[32] the Utah Supreme Court found that a household exclusion clause absolved a liability insurer of the duty to defend a husband in

his wife's personal injury suit. In his concurring opinion, Justice Zimmerman stated: Inasmuch as there are no grounds for reversing the instant case, I think it unnecessary for us to decide at this juncture whether *Stoker v. Stoker,* 616 P.2d 590 (Utah 1980), abrogated interspousal immunity with respect to actions grounded in negligence as well as those grounded in intentional torts.[33]

In *Noble v. Noble,*[34] the Utah Supreme Court opined in a footnote that:

> In *Stoker*, this Court held that the doctrine [of interspousal immunity] had been abrogated with respect to intentional torts. *Id.* at 590, 592. We have never had occasion to decide whether this abrogation extended to negligence claims, and we do not do so in this case. It is unnecessary for us to reach that question because our disposition of [the plaintiff's] intentional tort action makes it a certainty that she will have a remedy for her injuries.[35]

These comments by the court in *Mastbaum* and *Noble* suggested that *Stoker* did not fully abrogate interspousal immunity. In the subsequent case of *Forsman v. Forsman,*[36] a plaintiff sued her husband and another individual in Utah for damages sustained as a result of an unintentional automobile collision. However, on appeal, the Utah Supreme Court found it necessary to apply the law of the domicile state (California), and did not discuss or comment on the issue of interspousal immunity under Utah law. The decisions in these three cases provided limited credence to arguments made by defendant insurance companies at the district court level that interspousal immunity still applied to unintentional torts in Utah.

Fifteen years after *Stoker*, in 1994, the Arizona Court of Appeals found it necessary to examine Utah law regarding interspousal immunity in a negligence case. In *Lucero v. Valdez,*[37] a wife brought suit against her husband for damages sustained in a vehicle accident that occurred while the couple was traveling through Arizona from their home in Utah. The court examined "whether the *Stoker* majority intended to limit its decision to the facts, rejecting interspousal tort immunity for intentional tort claims only, or whether it intended a wholesale rejection, not only in intentional tort claims but in negligence claims as well." The court concluded that the decision of *Mastbaum* and *Noble* held that the issue remained open in Utah. However, the court determined that the rationale set forth in *Stoker* articulated the rejection of interspousal immunity in all cases. However, noting that the Utah Supreme Court might again reverse its decision, the court held that Arizona law should apply and permitted the plaintiff's negligence claim.

In 2007, more than a quarter century after its decision in *Stoker*, the Utah Supreme Court was presented a case requiring it to address whether or not interspousal immunity applied to unintentional torts in Utah

The Reaffirmed Death of Interspousal Immunity.
The Utah Supreme Court's decision in *Ellis v. Ellis* specifically addresses whether or not Utah joined the list of states abolishing interspousal immunity in the 1980 case of *Stoker*, and if not, whether the doctrine should be upheld. The court concluded: "We now reiterate our *Stoker* analysis and hold that the common-law doctrine of interspousal immunity has been abrogated with respect to all claims."[38] Where the court acknowledged the tortuous path of the doctrine of interspousal immunity in Utah case law, it identifies that both majority opinions in *Rubalcava* and *Stoker* found no basis to distinguish negligence from intentional tort claims, stating:

> [I]n *Stoker*, after reversing course from *Rubalcava* and reaffirming *Taylor*, we made this broad, clear statement: "Our holding today reaffirms the Legislative abrogation of Interspousal Immunity." *Stoker* was meant to be our final pronouncement on the subject – interspousal immunity was now dead in Utah as to all claims.
>
> . . . .

> In sum, because we rejected in *Rubalcava* and *Stoker* any distinction, for the purposes of interspousal immunity, between negligent and intentional torts, and because in *Stoker* we rejected interspousal immunity for reasons that apply equally to negligent and intentional torts, we conclude that interspousal immunity has been abrogated in Utah with respect to all claims.[39]

The court's decision to reaffirm *Stoker's* abrogation of interspousal immunity is based on its conclusion that the two primary policy rationales previously used to justify the doctrine in its *Rubalcava* decision – marital discord and collusion – are without merit.

Doing so, the court found that it had no "penetrating insight" to determine the doctrine's effect upon a marriage, and that barring actions between spouses may cause as much marital discord as allowing them, and that it is doubtful that marital harmony can be "preserved or restored by refusing to redress a palpable wrong or compensate a genuine injury."[40] The court also rejected that the abrogation of the doctrine would create collusion, finding that the argument had previously been rejected in regards to household exclusion clauses in automobile insurance policies, and has never been accepted in Utah as grounds for endorsing the parent-child immunity doctrine.[41] Furthermore, as trial judges and juries examine evidence in order to arrive at proper verdicts, they "would naturally be mindful of the relationship and would be even more on the alert for improper conduct."[42] Refuting the public policy arguments long used to support interspousal immunity in Utah, the Utah Supreme Court's decision in *Ellis* ends any argument that the doctrine continues to exist in any form.

Conclusion

The doctrine of interspousal immunity has been dying across the United States throughout the twentieth century. For over a quarter century, legal practitioners have been waiting to learn its ultimate fate in Utah. The Utah Supreme Court's decision in *Ellis* has definitively set the issue to rest – the doctrine is entirely dead in Utah.

1. Due to a failure to file her claim within a year of Mr. Ellis's death, the Estate's liability was limited to Mr. Ellis's insurance coverage. *See* Utah Code Ann. §75-3-803(1)(a), (4)(b) (1993).
2. The Estate's motion also argued that the statute of limitations had run on Mrs. Ellis's negligence claim. The district court denied this argument and determined that lay affidavits were sufficient to establish a genuine issue of material fact as to Mrs. Ellis's mental incompetence for a time sufficient to toll the four-year statue of limitations, pursuant to section 78-12-36. *See* Utah Code Ann. §78-12-36 (2002).
3. Utah Married Women's Act, Utah Code Ann. §78-11-1, 30-2-2, 30-2-4 (1953, as amended).
4. *Stoker v. Stoker,* 616 P.2d 590, 590 (Utah 1980).
5. *Ellis v. Estate of Ellis,* 2007 UT 77 169 P.3d 441.
6. Laura H. Wanamaker, Note, *Waite v. Waite; The Florida Supreme Court Abrogates the Doctrine of Interspousal Immunity,* 45 Mercer L. Rev. 903. *See also Hatch v. Hatch,* 46 Utah 116, 148 P. 1096, 1099 (1915).
7. *Stoker,* 616 P.2d at 590-91 (quoting Colley's Blackstone, Volume 1, Book 1, Chapter 15, page 290 (1879)).
8. Carl Tobias, *Interspousal Tort Immunity in America,* 23 Ga. L. Rev. 359, 361-62.
9. *See* Utah Code Ann. § 78-11-1 (1953, as amended).
10. *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 122 (5th ed. 1984).
11. Wanamaker, *supra* note 6, at 906.
12. Tobias, *supra* note 8, at 423-25.
13. Wanamaker, *supra* note 6, at 907.
14. *See Interspousal Torts: A Procedural Framework for Hawi'i,* 19 U. Haw. L. Rev. 377, 381 (1997).
15. *See* La Rev. Stat. § 9:291.
16. *Stoker,* 616 P.2d at 592.
17. *Ellis,* 2007 UT 77, ¶ 99.
18. *Id. (quoting Lucero v. Valdez,* 180 Ariz. 313, 884 P.2d 199, 205 (Ct.App.1994)).
19. *See* Utah Revised Statutes § 1201 (1898).
20. Utah Code Ann. § 30-2-2 (1953, as amended).
21. *Id.* § 30-2-4 (1998).
22. *See Taylor v. Patten,* 275 P.2d 696, 698 (Utah 1954).
23. *Id.* at 696.
24. *Id.* at 697-98.
25. *See Rubalcava v. Gisseman,* 384 P.2d 389 (Utah 1963).
26. *See id* at 393.
27. *Id.* at 391-92 (*quoting Brown v. Gosser,* 262 S.W.2d 480, 485 (1953)(Sims, C.J., dissenting)).
28. *Id.* at 391.
29. *Stoker v. Stoker,* 616 P.2d 590 (Utah 1980).
30. *Id.* at 591.
31. *Id.* at 592.
32. *State Farm Mut. Auto. Ins. Co. v. Mastbaum,* 748 P.2d 1042 (Utah 1987).
33. *Id.* at 1044-45 (Zimmerman, J., concurring).
34. *Noble v. Noble,* 761 P.2d 1369 (Utah 1988).
35. *Id.* at 1375 n.7 (citations omitted).
36. *Forsman v. Forsman,* 779 P.2d 218 (Utah 1989).
37. *Lucero v. Valdez,* 884 P.2d 199 (Ariz. App. Div. 1 1994).
38. *Ellis,* 2007 UT 77, ¶ 21.
39. *Id.* ¶¶ 23-24 (citations omitted).
40. *Id.* ¶ 27 (*quoting* Keeton § 122, at 903 (5th ed. 1984)).
41. *See id.* ¶¶ 28-29.
42. *Id.* ¶ 29 (*quoting Farmers Ins. Exch. v. Call,* 712 P.2d 231 (Utah 1985)(internal quotation marks and citations omitted)).

Senior Attorneys for Low-Income Litigants

by Judge Sam McVey

I hope to generate a discussion in the *Bar Journal* and elsewhere of new ideas addressing an old problem – providing legal representation to litigants who can't afford attorneys and aren't among the few who get help from Legal Services, Legal Aid, or attorneys who do pro bono work.

Professor Richard Zorza recently presented a CLE entitled "Self-Represented Litigation." Professor Zorza called for judges to in essence remove the need for legal representation for poor litigants by operating in a mode of "engaged neutrality." "Engaged neutrality," as defined by Professor Zorza, means judges should be responsible to ensure all relevant facts are brought out in a case. The court would "engage the parties, as needed, to bring out these facts and their foundation." The court would thus advise and remind pro se litigants regarding how to fill in the holes left by their presentation of their case, and even go so far as to engage in extensive examination of witnesses, laying foundations, and authenticating documents.

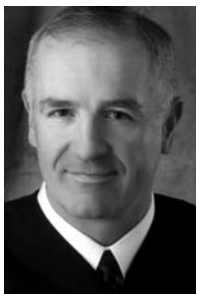
To me and most people I talked to after the presentation, it appeared "engaged neutrality" was simply another name for advocacy by the court. I did not think most Utah attorneys and other citizens would appreciate having to try their case not only against an unrepresented party but against the judge as well. While I can see directing pro se parties to the jury instruction web site, to the Tuesday Night Bar or to a court calendar where they might watch a trial, I can hardly see reminding them to offer testimony on a cause of action's missing element they forgot to present during their case in chief. I suppose the odds might be evened by doing the same for the party represented by counsel, but doing so seems to move the court from a neutral fact finder role to an advocate and interferes with counsel's tactics in presenting her or his case.

Rather than solving the unrepresented party problem by turning the court into a European inquisitor, I suggest another possible solution that assures these people have counsel using resources presently available. I am not proposing we provide representation to parties who do not trust attorneys and would not hire one regardless of their income, although they would benefit from "engaged neutrality." Nor would my suggestion cover pro bono help for the ballet or symphony. I'm also not suggesting we go back to some of the mandatory pro bono models discussed in the last 25 or so years which carried a stigma of violating the 13th Amendment. Instead, I believe we have a resource not only here in our state but throughout the United States available to be tapped to provide low- and no-income deprived parties with top-notch representation.

The president of the American Bar Association pointed out last year that something on the order of 200,000 attorneys will reach retirement age in the next five years. I'm sure that figure includes several hundred Utah attorneys and this is just the front of the baby-boomer retirement phenomenon. Many of these attorneys will retire and, of course, many will continue working full or part time but not necessarily for economic reasons. Rather, like some senior private practitioners, public servants and law professors, they either simply want to keep busy and love the practice or some of their clients beg them to stay around for the security they provide.

These men and women because of their experience are some of the best attorneys in the State. They are public-minded and many would be willing to devote a morning or two per week to service. Most would probably be willing to step up, go to their office or some local equipped office space staffed by a secretary, and take pro bono cases. I understand there are IOLTA funds that could provide regional office space at a few locations around

JUDGE SAM McVEY was appointed to the Fourth District Court in April 2004 by Gov. Olene Walker. He serves Juab, Millard, Utah, and Wasatch counties.



the state, staff help, and possibly professional liability premiums for pro bono work. Some protective professional liability legislation may also be enacted as a reward for their good deeds. Senior counsel may know retired legal assistants and secretaries willing to help on occasion. It may not be necessary for the Bar to hire a pro bono coordinator for them because they would enjoy forming a committee to handle administration themselves.

These attorneys know how to resolve disputes and could negotiate a number of resolutions short of trial. A substantial number may also be willing to appear in court with or file appeals for pro bono clients. My impression is most court cases encountered would not be lengthy affairs or involve deposition fees, transcripts and other high costs. Courts will grant in forma pauperis petitions and participating counsel could refer out fee-generating cases or keep them for their private practice. Implementation, publicity, and invitations to help with such a program would rest with our bar organizations as do current pro bono efforts.

Our senior attorneys are developing in numbers that provide an opportunity, finally, to solve the issue of people who cannot afford counsel. I hope to engage in such representation when I retire.

Blind Justice? A Review of Missing Witness

by Gordon Campbell

Reviewed by Betsy Burton

In theory, justice must be blind if it is to be fair; the same may be said of book reviews. If a critic is for some reason prejudiced for or against a book, the resultant review is likely to be biased. That being said, it is best to warn readers at the outset that this review is as far from blind as a review can be since (1) I'm not a critic but a bookseller, (2) I know and like Gordon Campbell, and (3) I feel about *Missing Witness* like a mother hen might feel about her favorite chick. The good news is that therein lies a tale (although not one I'm going to tell in this review). The bad news is you're unlikely to hear snide comments, plot quibbles, or literary character assassination from this source – although in fairness there are few reviews in this town or across the nation other than that in the Deseret News (a subject that I suspect had more to do with religion than reality) that were anything but wholly positive.

First things first: *Missing Witness* falls within the genre we in the book business call legal thrillers. Such books run the gamut from the plot-centric books of John Grisham to the thoughtful, character-driven work of Scott Turow. Campbell's book doesn't fall within that spectrum but rather rises above it; *Missing Witness* is more compelling than the best books by either of the above-mentioned authors, the writing is more evocative, and the issues that form the core of the book give it moral heft and an interesting ambiguity that make it that finest of things in the book world (at least in my opinion), a wonderful novel.

The setting of *Missing Witness* is Phoenix, Arizona, and its narrator, Douglas McKenzie, is a young man fresh out of law school who has returned to his hometown for one reason – to practice law with Dan Morgan, the pre-eminent criminal defense attorney in Arizona, if not the country. The year is 1973, and the book's plot revolves around a crime that is also a puzzle. A mother and her 12-year-old daughter walk into a small house on a large ranch and shots are fired. The daughter is hospitalized in a catatonic state and the mother is arrested for the murder although there is no way to be entirely certain who pulled the trigger. Dan Morgan is hired for the defense. Doug McKenzie is chosen to second the case, in part because he has personal ties to the family involved in the crime, and in part because he was at the right place at the right time.

So far, a typical-enough legal mystery with a meaty, if not unusual, plot. But Campbell is just getting started – and so is Morgan. We are first introduced to this supercharged attorney on the golf course where McKenzie is locked in mortal combat (golf-wise) with a doctor who is a star in the firmament of Phoenix society. A golf cart appears bearing two men, one of whom is unshaven, disheveled and tipsy, clearly on the tail-end of a spree. At first blush, not anyone's idea of Perry Mason, Morgan on a case becomes an entirely different animal – one who is focused, intense, intent on plans not apparent to those who watch him. As McKenzie follows Morgan's path through the possible murder scenarios and the various legal defenses they suggest, he not only learns the ABCs of trial law, he also discovers that Morgan's manipulative powers are not confined to the courtroom. And while McKenzie begins to find his own feet in that same courtroom, the reader sits waiting for Morgan to deliver the spectacular coup that is clearly in the offing. Although it would be unfair to readers to say what that coup is, it isn't unfair to point out that only two people were in the house where the shots were fired. Thus, when the mother is in fact declared not guilty, the shock isn't that the daughter is charged with the murder, the shock is that Morgan, who, at least by implication, proved her guilt, is hired to defend her.

The plot involves much more than the trials of first the mother and then the daughter for a murder one or the other must have committed (as if that weren't enough). The book is spangled with characters whose lives are intertwined and who come alive on the page, pulling us into 1970s Phoenix, into the case, and

BETSY BURTON is the owner of The King's English bookstore in Salt Lake City.

into the underbelly of a major law firm as McKenzie begins to (often painfully) discover its true nature. But the central issue isn't a plot issue at all. Nor is it character, as alive and lifelike as the characters are. For the real question isn't who pulled the trigger in the house, it's how an attorney can in good conscience free someone he knows to be guilty (and since one or the other committed the murder, Morgan is clearly bent on doing exactly that, as are all defense attorneys worth their salt). On one level this is an elementary question, one asked of lawyers over and over again by the "public," one they disdain since it is axiomatic that everyone deserves a fair trial, deserves the best defense an attorney can provide. But that's a legal answer to a question that also deserves a human response. And the human response is not necessarily so clear cut.

To say more would be telling; suffice it to say that this and other issues involved in the case, in Morgan's manner of handling it, and in McKenzie's responses to the facts as they unfold (and to Morgan) make this a wonderfully complex and ambiguous tale. The characters do spring to life for the reader – not just Morgan, alternately a hard-drinking roustabout and a brilliantly focused orator, but also his polished opposite number at the firm, a host of other attorneys, and the rancher whose daughter-in-law and granddaughter are suspects in the murder of his son yet who hires Morgan to defend them. Finally and most importantly, young McKenzie is the book's moral center in much the same way as the youthful narrator Jack Burden was in *All the King's Men.*

Missing Witness is a blistering read. Campbell is a born storyteller, one who'll stop you in the hall to tell you a story, who seems to have them spinning in his brain non-stop, who sees gathering strands of pattern where most of us see loosely tied facts, sees drama where most of us just plain miss it. He has a staggering narrative gift sharpened by an analytical legal mind, years of trial experience, and a canny perspective on law and on people. Critics from across the country, in reviews from such prestigious papers as The Boston Globe and the Chicago Sun Times to countless internet blogs, have compared *Missing Witness* not just to the best of Scott Turow but to the work of everyone from James Gould Cozzens to Robert Penn Warren. It made the New York Times best seller list right after publication and booksellers nationwide have loved it, loved hand-selling it to their customers; it's clearly going to have a long and happy life in paperback as well.

Campbell has already started writing another book and although he's so in demand promoting this one (not to mention being involved in a major case) that he hasn't found much time to write, he has the setting (Salt Lake City), the plot, and the characters firmly in mind. Campbell, the real thing in your world, a talented attorney who is finishing up a brilliant career in law, is also the real thing in mine – a wonderful novelist just setting out on a brilliant career in books.

Business and Commercial Litigation in Federal Courts, Second Edition

Edited by Robert L. Haig

Reviewed by Michael D. Zimmerman

Commercial litigation is a vast arena. In the course of practice, one is constantly confronted with new issues, often legal but perhaps more often practical. The many tactical and strategic questions that arise are every bit as subtle as any the courts address, and the answers appropriate to a particular situation are far less certain because of the varying and complex factual contexts in which they are encountered. An experienced litigator will have plumbed the depths of a number of substantive areas and will have addressed many practical problems of litigation tactics and strategy. However, no matter how sage, any such lawyer will find this eight volume treatise invaluable for its scope and depth, and for its down to earth practicality.

As might be expected from its title, this treatise treats the "how to" of the development of a federal court commercial or business case, from the decision to bring suit to the collection of the judgment after appeal. As might not be expected, the treatise includes in-depth chapters devoted to substantive areas common in federal commercial and business litigation. To me, the special achievement of this set, what makes it unique, is the wise counsel the authors offer throughout on practical matters of tactics and strategy, including day-to-day management of the litigation process.

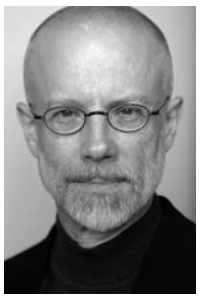
The organization of the volumes is intuitive. The first 60 chapters – most of the first five volumes – are organized around the chronology of a case, beginning with jurisdiction and venue, running through investigation of the case, preparation of pleadings, removal, all aspects of discovery, motion practice, pretrial, jury selection, all aspects of trial, jury instructions, remedies and damages, post-trial motions, attorney fees, sanctions, appeals, and enforcement of judgments. Also included are chapters addressing litigation management by law firms and by corporations, including useful supporting technologies, as well as chapters addressing ethical issues and civility concerns that can be critical in such litigation.

The remaining 36 chapters – more than three volumes – treat discrete areas of substantive law, but always with an eye to the practicalities of how cases in these areas may be shaped and presented. Included in each chapter is a discussion of potential defenses, procedural issues unique to the area, sample allegations for a complaint and answer, jury instructions, and practice checklists. Among the areas addressed are antitrust, securities, officer and director liability, mergers and acquisitions, professional liability, banking, communications, patents, trademarks, copyright, labor law, employment discrimination, ERISA, products liability, theft of business opportunities, competitive torts, commercial defamation and disparagement, governmental entity litigation, energy, environmental, and e-commerce.

As I browsed these books, more than once I found a discussion directly relevant to an issue I currently face in litigation. And in each instance, the clearly written text raised issues that deepened my consideration of the question and gave me fresh insight. Seldom have I read a set of books that is as practical and at the same time as scholarly and subtle in its analysis of the issues, a tribute to the fact that the authors are deeply experienced in business litigation.

I found intriguing Chapter 4, "Investigation of the Case." It is extraordinarily detailed in addressing the utility of, and ways of performing, investigations. Issues addressed include finding a reliable investigator and contractual and ethical guidelines for retention, planning for and controlling the investigation, potential sources of information, forensics, who should be present when potential witnesses are interviewed, whether to record or preserve notes of interviews, the legality and wisdom of making surreptitious recordings, performance of searches for assets, and searches of trash.

MICHAEL D. ZIMMERMAN is a partner at Snell & Wilmer in their Salt Lake City office where his practice consists of commercial litigation, mediation and arbitration, and appellate advocacy.



Another section that I found particularly useful is Chapter 5, "Case Evaluation." It suggests an analytic structure for evaluating the strengths and weaknesses of a case. Included are sections on estimating damages, determining client objectives and shaping client expectations, and the respective roles of client, in-house counsel, and outside counsel in the evaluation, both initially and as the case develops. The strengths and weaknesses of quantitative analysis are discussed at length. Use of this structured approach to thinking about a case both before it is brought and as it moves along certainly would go a long way to assuring that the client and their trial lawyer are on the same page, and that client surprises are avoided.

Related to the topic of case evaluation is Chapter 30, "Settlements." Most lawyers have intuitively developed approaches to settlement. That intuitive approach would almost certainly be enhanced by visiting this comprehensive discussion periodically, along with the chapter on "Case Evaluation." Included are discussions of how to elicit facts relevant to determining the client's objectives and alternatives, how to bring the client along, approaches for dealing with insurance carriers, and the necessity for assessing and reassessing the case as it develops, as well as discussion of factors relevant to the timing of settlement discussions. The potential for ADR techniques to facilitate settlement is addressed, along with tactical and strategic approaches that can be used in negotiation or mediation. Finally, there is an extensive treatment of settlement agreements, including a laundry list of possible provisions covering everything from nonsettling parties, confidentiality, collection, covenants not to sue to the enforcement, and the voiding of settlement agreements.

In the area of trial preparation, I found timely and comprehensive Chapter 22 on "Discovery of Electronic Information," authored by the Honorable Shira Scheindlin of the Southern District of New York and Jonathan Redgrave. The discussion of the duty of the client to preserve electronic data, and of counsel's obligation to understand the client's data storage and to guide the client in fulfilling its obligations to the court, is one that is essential if client and counsel are to avoid the harsh sanctions that may be imposed for failures to preserve or produce electronic documents. Also valuable are sections on the potential locations and sources of electronically stored data, on metadata, on prelitigation document retention strategy for clients, on implementing litigation holds, and on spoliation.

As a former appellate judge, I found particularly good the 175 page chapter on "Appeals to the Court of Appeals." Every appellate court is somewhat unique, and the federal courts of appeals are no exception. This chapter does a fine job outlining the occasionally arcane rules surrounding these appeals. But more fundamentally, the art of persuasion, the strategies and tactics that make for winning – and losing – arguments, are common in all appellate courts. The candid discussion of the appellate decision making process, of what appeals to judges and motivates them to decide in favor or against a position, within the range permitted by the law, rings true to my experience. And the section on standards of review, and how to formulate an appellate strategy in light of those standards, is one many appellate judges wish advocates who appear before them would read. Standards of review doom any number of appeals from the start. They should be taken into account in making the decision to appeal, and are critical in tailoring the client's expectations of what can realistically be achieved.

This treatise is a unique venture. It is a joint project of the ABA Section of Litigation and West, now Thomson-West, designed to put together a practical, in depth treatise on business and commercial litigation in federal courts. The first edition in six volumes was published in 1998. Robert L. Haig served as editor and brought together the authors, each of whom wrote a chapter on an area in which they are expert. Haig is a distinguished litigation partner with the firm of Kelley Drye & Warren in New York City who has written broadly in the field. The authors donated their time and work product, and all royalties from the sale of the treatise go to the ABA Section of Litigation. The first edition quickly earned a reputation as a superb resource. Developments in commercial litigation soon made it clear that a second edition would be appropriate. Haig again agreed to serve as editor, and almost all of the initial authors agreed to update and expand their sections. Additional authors were recruited to address new subjects.

The second edition has 199 authors, including 17 federal judges, drawn from the more recognized and accomplished members of the trial bar and bench. They include David Boies, Warren Christopher, Benjamin Civiletti, N. Lee Cooper, Patrick Lynch, the Honorable Margaret McKeown, John McElhaney, James Quinn, Patricia Refo, the Honorable Shira Scheindlin, Evan Tager, Jerold Solovy, Robert Warren, and Richard Wiley, to name a few. This new edition is substantially expanded. It is now eight volumes, up from six, and includes a separate appendix with tables of jury instructions, forms, laws and rules, as well as full citations of the cases discussed in the treatise in alphabetical order, and a CD containing much of the information in the appendix. The appendix and CD will be replaced yearly.

This is a treatise that any lawyer who practices in the area of business and commercial litigation will find invaluable. It is designed for the federal court practitioner, but much of it is equally applicable to the state court practitioner. The profound practicality of the materials, and their discussion of tactics and strategy, should make it a resource of first resort for any litigator, young or old.

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the January 25, 2008 Commission meeting held in Salt Lake City, Utah.

1. The Commission voted to hold the 2011 Annual Convention at a beach location other than the Newport Beach Marriott site.
2. The Commission confirmed David Bird's appointment to the Executive and Judicial Compensation Commission.
3. The Commission approved formal action for UPL case.
4. The Commission approved Constance Lundberg and Susan Peterson for the Brothers Award for Advancement of Women.
5. The Commission approved Su Chon for the Raymond S. Uno Award.
6. The Commission approved applicants for February Bar Exam, Admission by Motion and House Counsel Admission via consent calendar.
7. The Commission approved the December 2007 minutes via consent calendar.
8. The Commission approved the Southern Utah Bar Association (SUBA) for the Distinguished Service Award.
9. Commissioners continue to work on Bar Program Reviews and will present final reports at the March Commission Meeting.
10. The Mentoring Program Final Report will be presented at the July Commission Meeting.

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

Notice of Legislative Rebate

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

2007 Utah Bar Journal *Cover of the Year Announced*

The winner of the *Utah Bar Journal* Cover of the Year award for 2007 is Cristina Pianezzola, of Orem, Utah. Her photo, taken at South Fork in Provo Canyon, was featured on the cover of the September/October issue.

Cristina is one of 71 attorneys, or members of the Paralegal Division of the Utah Bar, whose photographs of Utah scenes have appeared on covers since August, 1988. Fifty percent of the cover photos in 2007 were submitted by first-time contributors.

Here is what Cristina had to say, when notified that her photo had won: "You made my mother's day. She was a professional photographer and a movie editor. Me obtaining a law degree was an ok achievement for her but that I got on the cover of the *Bar Journal* makes me finally amount to something. Of course, you made my day too."

Cristina immigrated to Utah as a young bride and later found herself a single mother, with two small children to support, and a 10th grade education. That is when she decided to obtain a Juris Doctor degree. After spending a year in remedial classes, she went on to receive the Presidential Scholarship at Utah Valley State College, the Presidential Scholarship at Texas Tech University, and the Harry S. Truman Scholarship for law school, at J. Reuben Clark. She worked for Utah Legal Services for several years, and is now Director of Annual Giving at Utah Valley University.

Congratulations to Cristina, and thanks to all who have provided photographs for the covers.

Utah Bar Foundation

Notice of Open Board of Director Position and Notice of Annual Meeting for the Utah Bar Foundation

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

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

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

Nomination forms must be received in the Foundation office no later than Friday, May 16, 2008 to be placed on the ballot.

The Utah Bar Foundation will be holding the annual meeting of the Foundation on Thursday, July 17, 2008 at 9:00am at the Sun Valley Lodge in Sun Valley, Idaho. This meeting is held in conjunction with the Utah State Bar's Annual Meeting.

Utah State Bar
2008 Annual Convention
July 16–19 • Sun Valley, Idaho
Reservation Request Form

Confirmed reservations require an advance deposit equal to one night's room rental, plus tax. **In order to expedite your reservation, simply call our Reservations Office at 1-800-786-8259.** Or, if you wish, please complete this form and return it to our **Reservations Office, P.O. Box 10, Sun Valley, Idaho, 83353.** A confirmation of room reservations will be forwarded upon receipt of deposit. **Please make reservations early for best selection!** If accommodations requested are not available, you will be notified so that you can make an alternate selection.

SUN VALLEY LODGE: (single or double occupancy)

Standard (1 queen-sized bed)	$190.00
Medium (1 king-sized bed)	$235.00
Medium (2 double sized beds)	$255.00
Deluxe (1 king-sized bed)	$275.00
Deluxe (2 queen beds)	$290.00
Lodge Balcony	$329.00
Family Suite	$415.00
Parlor Suite	$509.00

SUN VALLEY INN: (single or double occupancy)

Standard (1 queen-sized bed)	$165.00
Medium (1 queen-sized bed)	$175.00
Medium (2 double-sized beds)	$235.00
Deluxe (1 king-sized bed)	$245.00
Deluxe (2 double or 2 queen-sized beds)	$265.00
Junior Suite (king-sized bed)	$325.00
Family Suite (1 queen & 2 twin beds)	$325.00
Inn Parlor (1 king-sized bed)	$435.00
Three Bedroom Inn Apartment	$539.00

DELUXE LODGE APARTMENTS & WILDFLOWER CONDOS:

Lodge Apartment Hotel Room	$190.00
Lodge Apartment Suite (Up to 2 people)	$429.00
Two-bedrooms (up to 4 people)	$509.00
Three-bedrooms (up to 6 people)	$599.00

STANDARD SUN VALLEY CONDOMINIUMS:
Atelier, Cottonwood Meadows, Snowcreek, Villagers I & Villagers II

Studio (up to 2 people)	$189.00
One Bedroom (up to 2 people)	$249.00
Atelier 2-bedroom (up to 4 people)	$269.00
Two Bedroom (up to 4 people)	$299.00
Three Bedroom (up to 6 people)	$319.00
Four Bedroom (up to 8 people)	$369.00
Extra Person	***$15.00***

(These rates do not include tax, which is currently 11% and subject to change)

RESERVATION DEADLINE: This room block will be held until May 30, 2008. After that date, reservations will be accepted on a space available basis.

Cancellation: Cancellations made more than 30 days prior to arrival will receive a deposit refund less a $25 processing fee. Cancellations made within 30 days will forfeit the entire deposit.

Check in Policy: Check-in is after 4:00 pm. Check-out is 11:00 am.

ADDITIONAL HOUSING OPTIONS: Additional condominiums are available (first come, first serve) through the following companies. *Please indicate you are with the Utah State Bar when calling.*

- Premier Resorts (800) 635-4444; (10% discount)
- Resort Qwest Sun Valley (800) 521-2515; (10% discount)

If you need additional help in finding accommodations, contact High Country Property Rentals, (800) 726-7076, or the Sun Valley Ketchum Chamber and Visitor's Bureau, (800) 634-3347.

Recognition for Southern Utah Bar Association

The legitimate object of governments is to do for a community of people, whatever they need to have done, but cannot do at all or cannot, so well do for themselves – in their separate and individual capacities.

Abraham Lincoln

The same can be said for the legitimate object of the Bar, that is, to do for a community of people, that which they cannot do at all or so well for themselves. The Southern Utah Bar Association (SUBA) appears to have taken to heart the sentiments of Lincoln, forging a rich tradition of service to the community. SUBA has taken upon itself the mission to provide legal services to those most in need in their community.

For years, SUBA has sponsored a popular CLE program. Its December program drew approximately 160 attorneys in 2007. At least half of those in attendance haled from Northern or Central Utah. The proceeds of those programs are donated each year to a charitable organization. SUBA was able to donate nearly $10,000 this past year from their CLE program to those in need of legal services.

For many years, the Tuesday Night Bar program has provided free legal consultations for needy residents along the Wasatch Front. Southern Utah residents did not enjoy the same opportunity. The law firm of Snow Jensen & Reece offered a private program they called "Talk To A Lawyer" providing no cost 15-20 minute conversations with an attorney from their firm regarding common legal disputes. Last year, the eleven members of the Board of SUBA started to formulate a plan to sponsor a Tuesday Night Bar Program for Southern Utah involving lawyers throughout the community, offering services to a broader range of individuals in need. Soon the idea blossomed into the "Southern Utah Community Legal Center," a facility dedicated to providing pro bono legal services.

At first blush, the idea of a small regional bar establishing, funding and staffing a comprehensive legal clinic, seemed daunting. But under the assault of the combined energies of Adam Caldwell and Lowry Snow the project quickly took shape, gaining momentum and support. With the assistance of And Justice For All, the Bar Foundation and contributions from the Church of Jesus Christ of Latter-Day Saints as seed money the funding of the project became a possibility.

SUBA took on the task of raising the remainder of the funds necessary for the legal center. They sponsored a golf tournament and charity dinner. The event was a smashing success, raising over $30,000 to fund the center. The Southern Utah Community Legal Center was born. The Center has a full-time paralegal and provides attorneys interview rooms, a conference room, and is planning to make work space and internet access available to pro se litigants using the court's on-line program.

Besides providing the Tuesday Night Bar program to the community, the Center provides available offices, services and resources for a variety of pro bono legal services including, Utah Legal Services and The Disability Law Center. The Board of SUBA meets monthly to review potential pro bono cases, making case referrals to its members. SUBA members provide support through their consultation services at the Tuesday Night Bar, the handling of referred pro bono cases, and financial contributions.

SUBA's support for the community does not stop there. For this last year's Law Day program, SUBA sponsored a "Citizen's Bee" for Southern Utah high schools. They involved fourteen high schools and thousands of students. Adam Caldwell prepared a 100 question test administered to the students. The top 40 students from the schools were brought together in a public spelling bee format to respond to questions on government, history and politics. Over $10,000 donated by SUBA was awarded to the students.

As part of the court's pilot program in the Fifth District to provide assistance to pro se litigants, SUBA recruited 40 of its members willing to offer unbundled legal services as a resource to those litigants. They also prepared an information packet to be distributed to pro se litigants as part of the program.

In recognition of its many contributions to the community, SUBA has been selected as the recipient of this year's Distinguished Service Award. The Award will be presented to them at the Mid-Year Meeting of the Utah Bar.

SOUND THINKING. SOUND SOLUTIONS.

SOUND ATTORNEYS.

Prince, Yeates & Geldzahler is pleased to announce that during 2007 Wilford A. Beesley III, Christopher A. Jones, G. Troy Parkinson and James C. Swindler have become directors and shareholders, and that T. Edward Cundick, Erin M. Stone and Ryan R. West have joined the firm as associates.

Wilford A. Beesley

Bill joined the firm in 2003 after practicing with Beesley, Fairclough and Fitts. Bill's legal practice includes construction, real estate, entertainment and trademark law.

Christopher A. Jones

Chris joined the firm in 2006 and represents clients in real estate, mining, oil and gas, and general business matters. He is licensed to practice in Utah and California.

G. Troy Parkinson

Troy's practice focuses on bankruptcy, foreclosure, creditor rights, and commercial litigation. Troy joined the firm in 2002 and is licensed in Utah and Idaho.

James C. Swindler

Jim joined the firm in 2006 and has extensive experience in bankruptcy reorganization and litigation including complex receiverships. He is licensed in Utah and Nevada.

T. Edward Cundick

Ted recently returned to the firm after clerking for Chief Judge Bill Parker in the Federal Bankruptcy Court for the eastern district of Texas. Ted is licensed in Utah and Texas and will pursue a practice in commercial bankruptcy and related litigation.

Erin M.Stone

Erin joined the firm in 2007 after practicing as a Deputy District Attorney for the Salt Lake County District Attorney's Office. Prior to that Erin served as a federal law clerk for the Honorable J. Thomas Greene in the US District Court of Utah. Erin practices transactional law and commercial litigation.

Ryan R. West

Ryan's practice focuses in the areas of commercial real estate development, finance and corporate transactions. He joined the firm in 2007 and is licensed in Utah and Nevada.

PRINCE•YEATES

Sound Thinking. Sound Solutions.

Juvenile Law Section Organizational Meeting

Join us to elect officers and plan future CLE events. Martha Pierce of the Guardian Ad Litems Office and Carol Verdoia Assistant Attorney General Child Protection Division will provide a case law and legislative update.

April 23, 2008 • 12:00–1:00 pm
1 hour CLE (pending bar approval)
$15 Lunch will be provided
Register by April 18 by e-mail: sections@utahbar.org
or by fax at: (801) 531-0660

Notice of Ethics & Discipline Committee Vacancies

The Bar is seeking interested volunteers to fill four vacancies on the Ethics & Discipline Committee of the Utah Supreme Court. The Ethics & Discipline Committee is divided into four panels, which hear all informal complaints charging unethical or unprofessional conduct against members of the Bar and determine whether or not informal disciplinary action should result from the complaint or whether a formal complaint should be filed in district court against the respondent attorney. Appointments to the Ethics & Discipline Committee are made by the Utah Supreme Court.

Please send a resume, no later than May 2, 2008, to:

Utah Supreme Court
c/o Matty Branch, Appellate Court Administrator
P.O. Box 140210
Salt Lake City, Utah 84114-0210

2008 Annual Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2008 Annual Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, Utah 84111, no later than Friday, April 18, 2008. The award categories include:

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

Notice of Petition for Reinstatement to the Utah State Bar by Harold J. Dent

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 Respondent's Verified Petition Requesting Reinstatement to the Practice of Law ("Petition") filed by Harold J. Dent in In re Dent, Fifth Judicial District Court, Civil No. 040500436. 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 Fifth District Court.

Mandatory CLE Rule Change

Effective January 1, 2008, the Utah Supreme Court adopted the proposed amendment to Rule 14-404(a) of the Rules and Regulations Governing Mandatory Continuing Legal Education to require that one of the three hours of "ethics or professional responsibility" be in the area of professionalism and civility.

Rule 14-404. Active Status Lawyers
(a) Active status lawyers. Commencing with calendar year 2008, each lawyer admitted to practice in Utah shall complete, during each two-calendar year period, a minimum of 24 hours of accredited CLE which shall include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of ethics or professional responsibility shall be in the area of professionalism and civility. Lawyers on inactive status are not subject to the requirements of the rule.

Steve Kaufman Receives Lifetime Achievement Award

The Weber County Bar Association has awarded Ogden attorney Steve Kaufman its Lifetime Achievement Award for 2007 in recognition of his invaluable service to the legal community. During his 30 year career Mr. Kaufman has mentored many young attorneys, founded the largest law firm in Weber and Davis Counties, and has always been very active in bar functions. In addition Mr. Kaufman served as the 1981-82 Weber County Bar President, was a Utah State Bar Commissioner from 1992 through 1998, and was the 1996-97 President of the Utah State Bar.

"and Justice for all"

Law Day 5K Run & Walk

presented by Bank of the West

May 3, 2008 • 8:00 a.m.

S. J. Quinney College of Law at the University of Utah

50th Anniversary of Law Day

"Exercising the Rule of Law"

REGISTRATION INFO: Mail or hand deliver completed registration to address listed on form (registration forms are also available online at www.andjusticeforall.org). **Registration Fee:** before April 21 -- $22 ($10 for Baby Stroller Division), after April 21 -- $25 ($12 for the Baby Stroller Division). Day of race registration from 7:00 a.m. to 7:45 a.m. Questions? Call 924-3182.

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

DATE: Saturday, May 3, 2008 at 8:00 a.m. Check-in and day-of race registration in front of the Law School from 7:00 - 7:45 a.m.

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

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

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

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

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

RECRUITER COMPETITION: It's simple: the organization or individual who recruits the most participants for the Run will be awarded possession of the Recruiter Trophy for one year and air transportation for two on **Southwest Airlines** to any location they fly to within the U.S. To become the 2008 "Team Recruiter Champion," recruit the most registrants under your organization's name. Be sure the Recruiting Organization is filled in on the registration form to get competition credit.

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

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

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

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

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

REGISTRATION - "and Justice for all" Law Day 5K Run & Walk - presented by Bank of the West
May 3, 2008 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

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

First Name: _____ Last Name: _____
Address: _____
City, State, Zip: _____
Phone: _____ E-mail Address: _____
Birth Date: _____

Recruiting Organization:
_____
(must be filled in for team recruiters' competition credit)

Speed Competition Team: (must be received by April 21, 2008)
_____
(team name)

Shirt Size (please check one)

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

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

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

Baby Shirt Size (*baby stroller participants only*)

❒ 12m ❒ 18m ❒ 24m ❒ Child XS

Division Selection (circle only one division per registrant)

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

Payment

Pre-registration (*before 4/21/08*)	$22.00
Baby Stroller (*add to regular registration fee*)	$10.00
Long sleeved t-shirt	$ 6.00
Tank top	$ 6.00
Charitable Donation to "and Justice for all"	$_____
TOTAL PAYMENT	$_____

Payment Method

❒ Check payable to "Law Day Run & Walk"

❒ Visa ❒ Mastercard

Name on Card _____

Address_____

No._____ exp. _____

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

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

_____ _____

THANK YOU TO OUR MAJOR SPONSORS

Private Client Group

Utah State Bar Request for 2008-09 Committee Assignment

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

Name_____ Bar No._____

Office Address_____ Telephone_____

Committee Request
1st Choice:_____ 2nd Choice:_____

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

_____

_____

_____

_____

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

Committees

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

Detach & Mail by June 30, 2008 to:
Nate Alder, President-Elect
645 South 200 East • Salt Lake City, UT 84111-3834

Discipline Corner

ADMONITION

On December 17, 2007, the Honorable Anthony Quinn, Third Judicial District Court, entered an Order of Discipline: Admonition against an attorney for violation of Rules 4.4 (Respect of Rights of Third Persons), 1.3 (Diligence), 1.4(a) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney negligently made misrepresentations to the opposing party's counsel concerning a tape recording that did not exist. The misrepresentations served no other purpose than to delay or burden the opposing party.

In a second matter, the attorney failed to prosecute the clients' case which included timely notifying the clients of and responding to the opposing party's discovery requests and depositions. The attorney further failed to timely file a motion to withdraw from the case.

PUBLIC REPRIMAND

On December 20, 2007, the Vice-Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against James I. Watts for violation of Rules 1.4(a) (Communication), 3.3(a) (Candor Toward the Tribunal), 5.3 (Responsibilities Regarding Nonlawyer Assistants), 8.1(a) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Watts placed his notary and sworn statement on a financial declaration when the document was not signed in his presence and the document was signed by his legal assistant without the client's knowledge or permission. After Mr. Watts learned that the document had been falsified, he failed to inform the court. Mr. Watts failed to properly train his assistant to ensure that the assistant's conduct was compatible with his ethical obligations. Additionally, Mr. Watts failed to keep his client reasonably informed concerning the case status.

PUBLIC REPRIMAND

On December 20, 2007, the Vice-Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against James I. Watts for violation of Rules 1.4(a) (Communication), 1.5(a) (Fees), 1.15(a) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Watts charged an excessive flat fee on a case where he spent two hours on the client's case. This included one phone call discussion and three to four phone messages. In making those phone calls, Mr. Watts did not obtain any meaningful results on behalf of his client. Mr. Watts failed to respond to the client's request for information concerning his fee. Mr. Watts failed to properly safeguard his client's money by placing it in his client trust account and failed to provide an accounting to the client. Mr. Watts failed to protect his client's interests by failing to return the unearned fee.

DISBARMENT

On December 4, 2007, the Honorable Robin W. Reese, Third Judicial District Court, entered an Order of Disbarment disbarring Richard G. Hackwell from the practice of law for violations of Rules 1.2(c) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 1.15(a) (Safekeeping Property), 1.15(b) (Safekeeping Property), 1.15(c) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 4.1(a) (Truthfulness in Statements to Others), 4.1(b) (Truthfulness in Statements to Others), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In one matter, Mr. Hackwell made false statements to the adopting parents and an adoption agency about his client's health care status and failed to respond to the OPC's reasonable requests for information.

In a second matter, Mr. Hackwell assisted his client in demanding adoption fees in excess of fees permitted by statute and assisted his client in misleading a third party concerning his client's due date in order to obtain additional money from the third party. Mr. Hackwell collected unreasonable attorney fees and costs given the work performed in the matter. During the representation, Mr. Hackwell collected funds from the third party, to be distributed to Mr. Hackwell, his client and others pursuant to an agreement. Mr. Hackwell failed to provide a full accounting of those funds or provide a refund of the unearned funds. Further, Mr. Hackwell failed to hold the funds in his trust account separate from his own money until use of the funds was authorized. Mr. Hackwell failed to distribute the collected funds in accordance with the agreement. Mr. Hackwell failed to hold disputed funds separate in his trust account until the disputes were resolved and he failed to distribute funds to those with undisputed interests in the funds. Mr. Hackwell made false statements to a third party concerning the payment and status of the funds he collected and he failed to disclose the error in the birth mother's due date and fully disclose the status of the funds collected. Mr. Hackwell also failed to respond to the OPC's Notice of Informal Complaint.

In a third matter, Mr. Hackwell failed to diligently finalize an adoption. Mr. Hackwell failed to respond to the requests for information and failed to inform his clients of the work performed to allow the clients to make informed decisions. Mr. Hackwell failed to return unearned fees after his representation was terminated. Mr. Hackwell also failed to respond to the OPC's

Notice of Informal Complaint.

In a fourth matter, Mr. Hackwell failed to diligently represent his client in an immigration matter. Mr. Hackwell failed to respond to the client's requests for information and failed to inform his client of a hearing date to allow the client to participate. Mr. Hackwell also failed to communicate with the client's new counsel to protect his client's interests after he had been terminated from the representation.

In a fifth matter, Mr. Hackwell failed to diligently pursue the case on behalf of his client. Mr. Hackwell failed to respond to the client's request for information and failed to keep the client apprised of the case. Mr. Hackwell failed to return unearned fees and costs at the termination of the representation. Mr. Hackwell also failed to respond to the OPC's Notice of Informal Complaint.

In a sixth matter, Mr. Hackwell failed to diligently pursue an adoption on behalf of his client. Mr. Hackwell failed to respond to the clients' requests for information and failed to keep the clients apprised of the case status. Mr. Hackwell failed to refund unearned fees at the termination of the representation. Mr. Hackwell also failed to respond to the OPC's Notice of Informal Complaint.

ADMONITION

On December 17, 2007, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.8(e) (Conflict of Interest: Prohibited Transactions), 1.8(j) (Conflict of Interest: Prohibited Transactions), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney provided financial assistance to a client by providing housing to the client. The attorney also engaged in sexual relations with the client during the representation of the client in a divorce and a criminal matter.

ADMONITION

On December 17, 2007, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.7(a)(2) (Conflict of Interest: General Rule), 1.9(e) (Conflict of Interest: Former Client), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was hired to draft a codicil for the client's parent.

When the attorney obtained the parent's signature, the attorney failed to inform the parent that the attorney did not represent the parent and that the parent may hire their own attorney. The attorney should have informed the parent of this because the parent could have reasonably believed that the attorney was the parent's attorney. In subsequent representation concerning guardianship of the parent, the attorney had a conflict and the case was ultimately dismissed.

PUBLIC REPRIMAND
On December 13, 2007, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against C. Andrew Wariner for violation of Rules 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 4.1(a) (Truthfulness in Statements to Others), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Wariner was hired to represent a client in a personal injury action and a wrongful death action. Mr. Wariner accepted an insurance settlement offer without consulting with his client. Mr. Wariner failed to communicate with his client concerning the client providing medical releases to opposing counsel. Mr. Wariner falsely represented to an arbiter that his client approved the settlement and falsely represented to the insurance company's counsel that he was unable to reach his client.

PUBLIC REPRIMAND
On December 13, 2007, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against John D. Sorge for violation of Rules 1.4(a) (Communication), 1.5(b) (Fees), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Sorge was hired to file two petitions on behalf of his client with the Utah State Board of Pardons for an early release hearing. Mr. Sorge failed to keep his client informed and comply with reasonable requests for information. Mr. Sorge did not communicate in writing the basis or rate of his fee to his client. Mr. Sorge did not file a second petition on behalf of the client. After the termination of the representation, Mr. Sorge failed to refund the unearned portion of the fee.

ADMONITION
On December 6, 2007, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.15(a) (Safekeeping Property), 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), 8.1(b) (Bar Admission and Discipline Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney had an overdraft on the attorney trust account. The attorney failed to assure that the attorney's bookkeeper was trained and acted consistent with the attorney's professional responsibilities. The attorney failed to reconcile monthly bank statements and review individual client accounts. Further, the attorney failed to respond to requests for information from the OPC.

ADMONITION
On December 6, 2007, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 8.4(b) (Misconduct) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was convicted of failure to report abuse of a child by pleading no contest to the charge. The attorney was told about the child abuse on two different occasions, but failed to report it to the authorities. The attorney had prior experience with child abuse cases and should have known the attorney's obligation to report the abuse.

ADMONITION
On December 7, 2007, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 8.1(b) (Bar Admission and Disciplinary Matters) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney received OPC's requests for information and failed to timely respond to those requests for information.

PUBLIC REPRIMAND
On November 30, 2007, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Public Reprimand against Frank A. Berardi for violation of Rules 1.6(a) (Confidentiality of Information), 1.7(a) (Conflict of Interest: Current Clients), 3.7(a) (Lawyer as Witness), 4.2(a) (Communication with Persons Represented by Counsel), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Berardi represented a client in a criminal matter. One of the witnesses from whom Mr. Berardi planned to seek testimony was also a client of Mr. Berardi's in a civil matter. Mr. Berardi's civil client had also been indicted on drug charges, and was represented in the criminal matter by another attorney. Mr. Berardi met with his civil client to discuss the case against Mr. Berardi's criminal client, but failed to obtain the consent of the civil client's criminal defense attorney. Mr. Berardi used threats to obtain an affidavit from his civil client which, while helpful to Mr. Berardi's criminal client, Mr. Berardi listed the affidavit as an exhibit, and planned to impeach the civil client's testimony. Mr. Berardi had become a potential witness in the matter, based on the affidavit and the conditions under which it was obtained, and planned to cross-examine his own client.

Your Attendance is Requested

Paralegal's Day CLE Luncheon

honoring Utah Paralegals

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

Thursday, May 15, 2008 • 12:00 Noon to 1:30 p.m.
Little America Hotel • Ball Room B-C • 500 South Main Street, Salt Lake City, Utah

Keynote Speaker: Chief Justice Christine Durham, Chief Justice of the Utah Supreme Court

1.0 hour of Ethics credit

Register on-line by May 9, 2008 at http://www.utahbar.org/cle/events/registration/annual_paralegal.html

Questions regarding registration should be directed to Robyn Reynolds at the Utah State Bar 801-297-7032.

No Shows will be billed.
Pre-registration and payment required -walk-ins unfortunately cannot be accommodated.

Seeking Nominations

The Paralegal Division of the Utah State Bar and Legal Assistants Association of Utah are seeking nominations for "Distinguished Paralegal of the Year." Nomination forms and additional information are available online at http://www.utahbar.org/sections/paralegals or you may contact Suzanne Potts at spotts@clarksondraper.com. The deadline for nominations is April 25, 2008. The award will be presented at the Paralegal Day luncheon on May 15, 2008.

Join the Paralegal Division's team for the Law Day Run

Saturday, May 3rd, 2008
Runners, walkers, and cheering sections are welcome. If you are interested in participating, contact Sharon Andersen at:

(801)323-2059
sandersen@strongandhanni.com

The Paralegal Division will be sponsoring a Women's Professional Clothing Drive: March 28 – April 4th, 2008

Don't miss this opportunity to clean out your closets and donate your new and gently-used business attire to our sisters struggling to return to the workforce.

Be sure to contact neighbors, friends, family and co-workers about this very worthwhile event, and bring any suits, blouses, skirts, blazers, slacks and sweaters to the Utah State Bar Law & Justice Center 645 South 200 East, SLC, UT any time between 9:00 a.m. and 4:00 p.m., March 28th through April 4th, 2008.

Please contact Carma Harper at charper@strongandhanni.com, or
Shawna Powers at spowers@strongandhanni.com for further information.

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
03/20/08	**The Mechanics of Trial with Frank Carney and Friends.** The tools you didn't get in law school – but need for your first trial. Six sessions – one held every other month – on the basics of trial practice, from pre-trial conference through post-trial motions. 4:00 – 7:00 pm. $85 for attorneys within their first compliance term, $100 for all others. $500 for entire program.	3 CLE/NLCLE per session
03/27/08	**NLCLE: Court Procedure Civil Law.** 4:30 – 7:45 pm. Pre-registration: $60 YLD members, $80 others. Door registration: $75 YLD members, $95 others.	3 CLE/NLCLE
04/24/08	**NLCLE: Bankruptcy Collections.** 4:30 – 7:45 pm. Pre-registration: $60 YLD members, $80 others. Door registration: $75 YLD members, $95 others.	3 CLE/NLCLE
05/02/08	**Construction Law Spring CLE & Golf.** The Ledges Golf Course, St. George.	3
05/14/08	**The Mechanics of Trial with Frank Carney and Friends – Session Two.** 4:00 – 7:00 pm. $85 for attorneys within their first compliance term, $100 for all others. $500 for entire program.	3 CLE/NLCLE per session
05/22/08	**NLCLE: Criminal Law.** 4:30 – 7:45 pm. Pre-registration: $60 YLD members, $80 others. Door registration: $75 YLD members, $95 others.	3 CLE/NLCLE
06/06/08	**New Lawyer Required Ethics Program.** 8:30 am – 12:30 pm. $60.	Fulfills New Lawyer Ethics Requirement
06/26/08	**NLCLE: Administrative Law – Everything You Can Learn in 3 Hours on Utah Administrative Processes: DOPL Real Estate Division Consumer Protection.** 4:30 – 7:45 pm. Pre-registration: $60 YLD members, $80 others. Door registration: $75 YLD members, $95 others.	3 CLE/NLCLE
07/10/08	**The Mechanics of Trial with Frank Carney and Friends – Session Three.** 4:00 – 7:00 pm. $85 for attorneys within their first compliance term, $100 for all others. $500 for entire program.	3 CLE/NLCLE per session
07/16–19/08	**2008 Annual Convention.** Sun Valley, Idaho. More details to come.	TBA

Watch for the Annual Practice Updates. Sections begin their seminars in April & run them through the month of May.

To register 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.

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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.

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