Volume 21 No. 3
May/June 2008

Summer Convention Registration Inside

Utah Bar JOURNAL

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The Editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea or would be interested in writing on a particular topic, please contact us by calling (801) 297-7022 or by e-mail at barjournal@utahbar.org.

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

Subway Trail, Zion National Park, Utah, by first-time contributor Trent Nelson, Kaysville, Utah.

Members of the Utah State Bar or members of the Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their photographs, along with a description of where the photographs were taken, to Randall L. Romrell, Esq., Regence BlueCross BlueShield of Utah, P.O. Box 30270, Salt Lake City, Utah 84130-0270, or by e-mail to rromrell@regence.com if digital. If non-digital photographs are sent, please include a pre-addressed, stamped envelope for return of the photo and write your name and address on the back of the photo.

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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.*

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

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Utah Bar JOURNAL

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Submission of Articles for the Utah Bar Journal

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

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

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

3. 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 at barjournal@utahbar.org, minimum 300 dpi in jpg, eps, or tif format.

President-Elect and Bar Commission Candidates

President-Elect Candidates

STEPHEN W. OWENS

Background & Bar Service

- Practice in five-attorney litigation firm in Salt Lake City, Epperson Rencher & Owens (1997-present)
- Elected Bar Commissioner (2002-present) (Executive Committee 2007-08)

Subcommittees: Lawyer Assistance, OPC Diversion, Public Affairs, Mentoring, Communications

Liaison: Litigation Section, Tooele County Bar, Cyber Law Section

- Training at Western States Bar Conferences (2007, 2008)
- Routinely represent pro bono clients
- Raised $1.25 million for U of U's Wayne Owens Endowed Professorship (2007)
- Ethics Advisory Opinion Committee Member (2006-present)
- Law-Related Education Teacher and Judge of Mock Trial Finals (1994-present)
- President, Utah Bar Young Lawyers Division (2001)
- Clerk Utah Supreme Court (Richard C. Howe) and Third District Court (1994-97)
- Law Degree from the University of Utah/S.J. Quinney College of Law (1994)
- Harry S. Truman National Scholarship for Leadership and Public Service (1989)

If Elected, Steve Owens Will:

Personally Go to All 29 Counties to meet with lawyers and judges to learn how the Bar can best serve them and how they feel about current issues facing our profession.

Oppose Any Dues Increase for active lawyers and promise that your funds will be frugally managed and spent.

Protect Our Fair and Impartial Courts from encroachments by the other two branches of government or by public referendum.

Get Free Referral Service Running at UtahBar.Org for all Utah lawyers to replace Legal Match and identify lawyers willing to do reduced-fee work to help access justice.

Investigate Group Health Insurance options for members.

Increase Public Relations Efforts to promote the good things lawyers do and their value to society, dispel the "Top Ten Myths About Lawyers."

Infuse the Bar with New Blood, energy, and ideas by bringing in 12 new committee chairs and 50 committee members.

Implement New Mentoring Program pairing new lawyers with seasoned lawyers to learn practical skills and professionalism.

Support the Women Lawyers of Utah and Minority Bar Association in their initiatives to diversify our Bar and increase opportunities.

Conduct Detailed Review of Office of Professional Conduct to ensure it functions fairly, efficiently, and effectively.

Steve Owens' Statement of Candidacy

One of our members said in a recent survey, *"The Bar would serve me best by staying out of my life."* This sentiment is understandable because the Bar involves forced membership, mandatory dues, disciplinary matters, and required continuing education.

I know that the Bar and its nearly 10,000 members can be a significant force for good. During my six years on the Bar Commission (the last on the Executive Committee), I have helped:

- Enact a new Diversion Program for minor licensing problems;
- Implement confidential statewide mental health counseling for lawyers and their families; and
- Improve communications to Bar members through monthly email bulletins and electronic surveys.

I commit to devote the required energy and time to represent you. I ask for your vote. Please call me at (801) 983-9800 or e-mail me at sowens@erlawoffice.com. Thanks.

SCOTT RANDALL SABEY

Thank you for your membership and participation in the Bar. We have a great Bar exemplified by the professionalism and volunteerism of its members. The election of our Bar Officers is important to maintaining that quality, and your participation by voting is critical to that process.

Serving as your Bar President is important to me because there are issues critical to the practice of law that need our attention now. We have had a terrible relationship with the Legislature in the past, but we have been working hard to improve it. This year again, however, we saw bills reducing the authority of the Court, and attacking the profession. A Senator not only attacked a judge on Senate letterhead, but his enrolled SB105 took away the Court's ability to evaluate judicial performance and gave it to a newly created Commission of 13 political appointees, no more than 6 of whom

can be attorneys. Worse yet, this new Commission was funded at less than half the amount necessary to make it work. Every year we see attempts to bring our profession under the Legislature's control. The Bar Commission needs to be vigilant in defending our rights, and having served on the Governmental Relations Committee for more than 10 years, I am equipped to deal with these problems.

Attorneys lament the demise of professional courtesy and civility within the profession. I would like to see a mentoring program instituted for new lawyers that will help improve professionalism in the practice. I would also like to see the Bar take a more active role in encouraging more professional and forthright relationships between the members of the Bar.

While I see no current need to increase Bar dues, there are several reasons I don't think it is appropriate to take a position now on future dues increases. First, we are in the middle of a 2 year audit of each department within the Bar to answer that very question. Second, there hasn't been a dues increase in almost 19 years – at some point it has to go up. Third, it is the Supreme Court who ultimately decides Bar dues, not the Bar Commission. We do retain roughly a Million Dollar cash reserve, but like a common non-profit budget, that is only equal to 4 months expenses. That is a conservative accounting practice when you consider that we collect the bulk of our budget in dues only once a year and have no other method to deal with emergencies.

For the last 14 years I have served our legal community. I care, I'm interested, and I know how to help because I have been working on the solutions. I believe that there are still areas where change and growth are needed, and I believe I can further those goals by serving as your Bar President.

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

Su is an attorney in the Utah Office of the Property Rights Ombudsman. She mediates and arbitrates disputes between property owners and government in the areas of eminent domain, takings and land use. Su 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 pursued an 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.

Su has devoted time to serve the legal profession and the community throughout her 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. In 2007 and 2008, she organized the successful Law Student Mentoring Marathon and worked with the Young Lawyers Division and judges. She has spoken to 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. Su 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.

Awards: 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 member of the Utah State Bar. We have so many great sections, specialty bars and committees that provide innovative services and support to every attorney. I have a strong desire to serve the legal community 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 our members; (3) create and support programs that encourage mentoring of law students and new lawyers; (4) support programs that provide legal services to underserved practice groups and sections; and (5) support programs that provide legal services to underserved and under-represented communities. 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 via email at sjchon@gmail.com. I am grateful to all those who have encouraged me to run for Bar Commission, and I respectfully ask for your vote in this election.

LAURIE GILLILAND

Biographical Information

Bar Service
- Current ex officio bar commissioner
- Liaison to Women Lawyers of Utah, Securities and Constitutional Law Sections, and Committee on Law and Aging
- Member of Public Relations and Access-to-Justice Committees
- 2008 Fall Forum committee member
- 2007 Fall Forum co-chair – best attended and biggest venue ever
- 2006 Fall Forum committee member

Women Lawyers of Utah
- 2007-08 Past President and Firm-Retention-Initiative Committee member
- 2006-07 President and Retreat Committee Chair
- 2005-06 President-elect and CLE Committee Chair

Employment
- Since 2000, Lead Staff Attorney, Prisoner Litigation Unit, U.S. District Court
- 1994-2000, Law Clerk to Honorable Norman H. Jackson, Utah Court of Appeals
- 1981-1991, Police Crime Scene Investigator and Fingerprint Analyst, California

Education
- 1994, J.D., J. Reuben Clark Law School, Brigham Young University
  – Cum laude
  – Law Review Note and Comment Editor
- 1989, B.S., California State University, Fullerton
  – Summa Cum Laude

Nominated By:
Lorin Barker, Kirton & McConkie
Christian Clinger, Third District Bar Commissioner, Clinger Lee Clinger
Kim Colton, VanCott, Bagley, Cornwall & McCarthy
Peggy Hunt, Ray Quinney & Nebeker
Constance Lundberg, Jones Waldo
Charlotte Miller, American Bar Association Delegate, Kirton & McKonkie
Annina Mitchell, Utah Attorney General's Office
Stephanie Pugsley, Utah State Bar Young Lawyers Division President, Rooker Rawlins
Lauren Scholnick, Strindberg & Scholnick
Lisa Yerkovich, Ray Quinney & Nebeker

Statement of Candidacy
Dear Colleagues:

Thank you for encouraging my candidacy for Third District bar commissioner. I have enjoyed your support in my many opportunities to serve the Bar.

As your representative to the Bar Commission, I pledge to bring the same burning enthusiasm, thoughtful participation, dedication to efficiency and common sense, and tireless work ethic I have brought to all my professional activities to date. I have a proven track record as a current bar leader on the Bar Commission, Fall Forum committee, and Women Lawyers of Utah. These experiences have taught me the underlying policy, budgetary, and practical issues facing all members of the Bar. I am well equipped to continue this work.

Current matters of great import to our members are on deck: Mentoring programs, improving public perceptions of our profession, the efficacy of certain member services (e.g., mental health counseling and referral databases), unbundled legal services, pro se litigants, membership reciprocity, and strengthening legislative relationships. I look forward to bringing your perspectives to debates and decisions on these subjects and others.

I welcome your comments and suggestions by e-mail (ldgill@gmail.com) or phone (801.870.1508). And, I respectfully ask for your vote.

Thank you,
Laurie Gilliland

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 for 19 years in various positions, I understand the challenges we face in our profession, and desire to contribute to improving the effectiveness and efficiency of the Bar, and to improve our profession.

The core functions of the Bar (admissions, CLE, discipline) are sound. Other important functions, including community outreach and member benefits, need greater participation from the over 4,500 members in the Third Division.

If elected, I will work for the following: (1) soliciting and expanding the involvement of more members in bar governance; (2) *pro bono,* lawyer referral, and other outreach initiatives to expand access to legal services; (3) education, public relations, and legislative efforts to improve the understanding and perception of lawyers and the courts. These services can be done more effectively and with *no increase in bar dues.* I am against any increase in Bar dues.

There are untapped opportunities for members of the Bar to participate in an organized way in current public policy debates that impact legal rights and services. For instance, the Bar could facilitate a speakers' bureau that educators, government, civic and private groups could utilize.

As lawyers we should do more to contribute in substantive, positive ways to the public discourse on many current topics of concern, such as criminal justice, immigration reform, mortgage foreclosures, and government programs and benefits. We need to pool our talents to help solve, or to at least help elevate the public dialogue, about important policy disputes. Through this process the public may better perceive that lawyers are problem solvers, instead of being the problem. As participants, we will gain increased satisfaction from our profession.

Thank you for considering my candidacy.

LORI W. NELSON

After serving my first term on the Utah State Bar Commission I have decided to run for reelection and I would appreciate your vote. I have been able to accomplish much in my first term but feel that the experience I have gained will enable me to accomplish even more in my second term.

I am working on several ongoing projects which I would like to see through to completion, including the "transition into law" or mentoring program, the two-year management review and legislative monitoring. I would also like to see the Bar develop ideas that promote advancement in the profession without sacrificing personal and family lives.

I sit on the recruiting subcommittee of the mentoring program. It has been an honor and privilege to assist in creating an effective plan for recruiting able and competent "mentors" for those just entering the law. The work on this project will be ongoing and I would very much like to continue this effort. My reelection to the Bar Commission will allow that to occur.

The Bar Commission has just begun a two-year operational review which is being conducted by the Commissioners to keep costs down 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. It is hoped the information learned from that investigation can be passed along to members of the Bar so all members have the information to ensure their technology is sound and secure.

Also very important to me are member benefits and how the Commission can provide better and more cost-effective services to our members. One of the member benefits of which I am most proud is the new Diversion Rule. The new rule will assist attorneys in avoiding discipline for less serious offenses and get them the help they need in the areas of, among others, mental health, law office management and substance abuse.

Statement of Candidacy:

From the time I began practicing law 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, who told me that service in the Bar is the best way to give back to the profession. I began 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

Dear Members of the Third Division,

Our Division is made up of lawyers practicing in diverse settings like those I have experience with: small firms, local government, judicial offices, and non-profits. It is important that the Third Division's representatives on the Bar Commission represent a wide variety of perspectives. Voting for me will help ensure that happens.

I am the only candidate who is a member of the Young Lawyers Division. In fact, the Division named me Young Lawyer of the Year for 2008. While I have fewer years of experience than other candidates, I will contribute valuable insights and points of view that might otherwise be missing from the Commission.

The Bar has a tremendous effect on our practice and we have the opportunity to work with the Bar to implement programs that work for the Bar's members. These programs need to work for all the Bar's members, who all need a voice at the table.

I have been active in the Bar my entire career. Currently, I am co-chair of a committee evaluating new lawyer training and working to develop a mentoring program for new lawyers that would truly ease the transition from law school into practice. The program aims to benefit the entire Bar, as it will perpetuate a standard of excellence among all lawyers. I am deeply committed to seeing through changes this committee will recommend and joining the Commission will help that happen.

Through my leadership roles in Bar sections and in Women Lawyers of Utah (WLU), I have helped collaborate with other sections to provide quality CLEs and programs that benefit the diverse interests and needs of the Bar. My other Bar experience includes:

- Ex-officio member of the Bar Commission;
- President of WLU;
- Chair and Co-chair of the Constitutional Law Section;
- Chair of WLU's Career Advancement and Development Committee;
- Volunteer Bar Exam reviewer.

With your input and support, I am confident we can make the Bar a more valuable asset to our practices. If you have any questions for me, don't hesitate to email or call me to discuss my ideas with you or to hear your ideas. (Margaret.plane@slcgov.com or 535-7610). Please vote for me.

Yours,
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 (Winter Park, FL).

RODNEY G. SNOW

Rod Snow is the President of Clyde Snow Sessions & Swenson. He was inducted as a Fellow in the American College of Trial Lawyers in 1993 and in 2003 received the Distinguished Lawyer of the Year award from the Bar. Rod is a Master of the Bench in the American Inns of Court I and is a past president of the Inn. He is also a past president of the Federal Bar association. Rod served on the Commission of Criminal and Juvenile Justice for eight years and is now a member of the Crime Victims Reparations Board. He has served on the Governor's Commission for Women and Families. Rod has been a Federal Prosecutor, Special Prosecutor as appointed by the Utah Supreme Court, a Special Assistant Attorney General in cases involving the investigation of elected officials, and a Bar Prosecutor. His true love is defense work and litigation. Recently Rod has mediated and arbitrated select cases, upon request, and is enjoying this new addition to his practice.

Statement of Candidacy

Dear Bar Members:

Thank you for the privilege of serving this past three years on the Commission. I am impressed with the work of the Commission and their sensitivity to the divergent needs of our members. I appreciate the Bar staff and their efficient administration of our programs. The number of talented young lawyers who continue to swell our ranks is encouraging and promising. I invite all new attorneys to assist in our efforts to develop a Bar that responds to the different needs of our members and serves the public interest.

When I ran for the Commission three years ago, I was recovering from throat cancer and grateful to enjoy time with family and grandchildren. I also wanted to give back to a profession that had been fulfilling and exciting. Serving the Commission helped satisfy that goal. I am a co-chair of the new lawyer training program. We hope to provide each new attorney a Supreme Court approved mentor for their first year of practice to teach professionalism and provide practice ideas in substantive areas of the law, as appropriate. I would like to see this program implemented in 2009 and assist in adjustments as the mentoring concept progresses. I also serve on the Benefits Review Committee which has finished a study of Bar benefits and filed a report with our President. As a liaison to the Admissions Committee, I recognize the challenges we face in maintaining the quality of our profession as the number of applicants continues to increase. As liaison to the Federal Bar and the Appellate and Dispute Resolution Sections, I have learned much from their excellent work.

No one has the right to expect your vote. I would be honored to serve for the next three years and sincerely solicit your support.

Very truly yours,
Rodney G. Snow

RUSTY VETTER

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.

Here are the ten suggestions that I detailed in my article:

1. Recognize that the Bar is a Quasi-Governmental Entity and Operate with Greater Transparency
2. Develop and Implement a Strategic Plan
3. Improve Communications with Bar Members
4. Change the Make-up of the Commission
5. Curtail Commission Expenditures
6. Separate Commission Expenses from CLE Programs and Reduce the Cost of CLE Programs
7. Adopt a Code of Ethics for the Commission and Bar Staff
8. Conduct a Preliminary Audit of Bar Operations
9. Revive Programs that Benefit Bar Members and the Public
10. Bar Members Should Get Involved

After the article appeared in the Bar Journal, I received many calls and emails of support for my suggestions. Several Bar members asked me to run again for the Bar Commission in order to help implement changes to the Bar. I believe that I can help improve the Bar as a Bar Commissioner.

It is encouraging to see the diverse group of Bar members running for Bar Commission from the Third Division this year. Please vote for me and other candidates who have new ideas and are committed to improving the Bar.

Thank you for your support.

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).

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Utah Supreme Court Establishes Professionalism Counseling Program

by The Honorable Christine M. Durham and Marilyn (Matty) Branch

During the Utah State Bar 2008 Spring Convention in St. George, Justice Ronald E. Nehring announced the issuance of Utah Supreme Court Standing Order No. 7, [1] establishing a program of professionalism counseling for members of the Utah State Bar. Standing Order No. 7 became effective April 1, 2008. It represents a further effort by the Supreme Court to draw attention to the Utah Standards of Professionalism and Civility and to encourage adherence to them. The text of Standing Order No. 7 and the Utah Standards of Professionalism and Civility are found at the end of this article.

By order dated October 16, 2003, the Utah Supreme Court approved the Utah Standards of Professionalism and Civility. A brief history of the Standards, culminating with the Supreme Court's issuance of Standing Order No. 7, follows.

In March of 2001, then Chief Justice Richard Howe and several Utah lawyers attended a conference in California sponsored by the ABA's Center for Professional Responsibility and by the Conference of Chief Justices. The conference was designed to encourage the Chief Justices in each of the fifty states to implement an action plan on lawyer professionalism. Following the conference, Chief Justice Howe asked several lawyers to informally survey practicing lawyers as to whether they felt there was a problem with professionalism in Utah. The feedback reported to Chief Justice Howe was that nearly all practitioners surveyed felt there was a significant problem.

On October 1, 2001, in response to the plea made by the Conference of Chief Justices and to feedback from Bar leadership and Utah attorneys, the Utah Supreme Court voted to create an advisory committee on professionalism in the practice of law and appointed Justice Matthew B. Durrant to chair the committee. The Court then appointed twenty judges, attorneys and law professors to serve on the committee.

At the first committee meeting, held on January 15, 2002, Justice Durrant advised that the Court was increasingly concerned about the erosion of civility and professionalism in the practice of law, and that it wanted the committee to examine the nature and extent of the civility problem within the state and to make recommendations as to how professionalism might be enhanced.

Early in the committee's deliberations, it became apparent that many jurisdictions had hoped to increase civility in the legal profession by promulgating codes of civility. The committee reviewed more than a dozen different codes of civility in place in different parts of the country and decided to craft one of its own to recommend to the Utah Supreme Court.

Minutes of the committee's meetings indicate that the committee did not want to add rules governing attorney conduct simply for the sake of adding rules. Additionally, the committee made clear to the Supreme Court that it did not believe that the Court's formalization of a code of civility would, by itself, halt the decline in civility among Utah lawyers. The committee did believe, however, that the adoption of a code would provide guidance to new lawyers and a reminder for experienced ones of the higher standard of behavior expected of all lawyers. After lengthy deliberations, the committee unanimously agreed upon a preamble and twenty standards of professionalism and civility. By order dated October 16, 2003, the Utah Supreme Court approved the twenty standards

HON. CHRISTINE M. DURHAM is the Chief Justice of the Utah Supreme Court and Presiding Officer of the Utah Judicial Council.

MARILYN (MATTY) BRANCH is the appellate court administrator with management responsibilities for the Utah Supreme Court, the Utah Court of Appeals, and the State Law Library.

recommended by its committee.

The question of enforcement of the Utah Standards of Professionalism and Civility has been a difficult one. To date, the Standards have been viewed essentially as aspirational. However, the Utah Supreme Court expects the Standards to operate as behavioral norms for the profession, and it has regularly urged state court judges to encourage lawyers practicing before them to adhere to the Standards or risk the consequences. Implementation of Standing Order No. 7 creates a further consequence for failure to adhere to the Standards, and one that extends beyond the courtroom to all interactions between attorneys.

Standing Order No. 7 establishes a board of five counselors to counsel and educate members of the Bar concerning the Standards of Professionalism and Civility. As stated in the standing order, the duties of the counselors are: (1) to counsel members of the Bar in response to complaints by other lawyers or referrals by judges, (2) to provide counseling to members of the Bar who seek advice on their own obligations under the Standards, (3) to provide CLE on the Standards, and (4) to publish advice and information relating to the work of the counseling board.

The Utah Supreme Court has appointed five attorneys to serve as counselors under Standing Order No. 7. Robert S. Clark, who has served on the Court's professionalism committee since its inception, will chair the counseling board. Thomas Berggren, William B. Bohling, Ellen M. Maycock, and Gayle F. McKeachnie will also serve. The Court believes these five attorneys exemplify the highest standards of personal courtesy and professional integrity, and it expresses its sincere gratitude to each of them for their willingness to participate in this new program.

The Court expects the counseling board to develop its own procedures based upon its experience and upon the purposes for which the program is established. If a lawyer wishes to lodge a complaint with the counseling board concerning the conduct of another Bar member, the complaint must be in writing and signed by the complainant. It should be directed to Matty Branch, Appellate Court Administrator, Utah Supreme Court, P. O. Box 140210, Salt Lake City, UT 84114-0210. Complaints may also be submitted to Ms. Branch by email at mattyb@email.utcourts.gov. Please refer to Standing Order No. 7 for further information as to operation of the professionalism counseling program.

1. All of the Utah Supreme Court's standing orders may be viewed at the court's website, http://www.utcourts.gov/resources/rules/urap/Supctso.htm

In the Supreme Court of the State of Utah
Standing Order No. 7

(As to establishment of a program of professionalism counseling for members of the Utah State Bar)

Effective April 1, 2008

The Court intends to establish a board of five counselors (hereinafter the "Board") to counsel and educate members of the Bar concerning the Court's Standards of Professionalism and Civility (hereinafter the "Standards"). Specifically, the Board's purposes are: (1) to counsel members of the Bar, in response to complaints by other lawyers or referrals from judges; (2) to provide counseling to members of the Bar who request advice on their own obligations under the Standards; (3) to provide CLE on the Standards; (4) to publish advice and information relating to the work of the Board.

Board Composition
Appointees shall serve on a volunteer basis and will be appointed based upon stature in the legal community and experience in legal professionalism matters. A minimum of one of the five appointees shall have transactional experience, and at least one attorney shall have small firm or sole practitioner experience. Board members shall serve for staggered terms of no fewer than three years for continuity and so that each Board member has the opportunity to develop expertise on the Standards. The Court will appoint one of the Board members as chair. The Board shall generally sit in panels of three to deal with issues presented to the Board.

Submission of Complaints and Questions to the Board
The Board is authorized to consider complaints by lawyers concerning the professionalism of other lawyers, referrals from judges, and questions about professionalism from practicing lawyers. The Board shall not consider questions or complaints from clients or members of the public.

If a lawyer wishes to lodge a complaint with the Board concerning the conduct of another member of the Bar, the complaint must be in writing (i.e., by letter or email) and signed by the complainant. The Board shall not consider anonymous complaints about lawyers. Questions or requests for counseling from a lawyer concerning his or her own conduct need not be in writing but may be made by telephone or a personal visit with members of the Board. Referrals from judges may be directed by telephone.

Procedure
The Board is authorized to develop its own procedures based upon this Standing Order, the purposes for which the program is established, and upon the Board's experience. Adherence to formal rules of procedure or evidence is not required.

Panels should generally resolve complaints about the conduct of an attorney within thirty days of the complaint. Resolution may be by written advisory to the lawyers involved or by a face-to-face meeting with the lawyers. Written advisories should reference individual Standards.

Confidentiality
The contents of any statement, communication or opinion made by any participant in the program shall be kept confidential except that members of the panel are permitted to communicate directly with lawyers or clients involved in the dispute concerning the application or interpretation of the Standards. Also, the panel is permitted to disclose the general nature of the situation (without identifying names or facts) and its advice to the members of the Bar and the public in reports and *Bar Journal* articles. Additionally, the members of the panel may communicate with supervisors in firms and agencies whose lawyers have been the subject of a complaint.

The Duty of Good Faith
Attorneys seeking the assistance of the Board shall do so only in good faith and not for the purposes of harassment or to attain a strategic advantage. The Board is authorized to terminate any proceeding or referral that it believes has been initiated or utilized in bad faith or for an improper purpose.

Publication
The Board shall report annually to the Court concerning its operation, the Standards it has interpreted, the advice it has given, and any trends it believes important for the Court to know about. It should also make suggestions to the Court as to needed changes to the Standards.

The Board shall periodically publish selected portions of its advisories in the Utah Bar Journal for the benefit of practicing lawyers. Published advisories shall be redacted to eliminate the names and identifying factual details of the cases considered by the panels. Also, the Board shall maintain a web page under the auspices of the Court or the Bar that provides a database of its advisories.

FOR THE COURT:

January 9, 2008

Christine M. Durham
Chief Justice

Complaints should be sent to Matty Branch, Appellate Court Administrator, Utah Supreme Court, P. O. Box 140210, Salt Lake City, UT 84114-0210; email address mattyb@email.utcourts.gov

Utah Standards of Professionalism and Civility

(By order dated October 16, 2003, the Utah Supreme Court accepted the report of its Advisory Committee on Professionalism and approved these Standards.)

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.
2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.
3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.
4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.
5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.
6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.
7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.
8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.
9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.
10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.
11. Lawyers shall avoid impermissible *ex parte* communications.
12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.
13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.
14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.
15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.
16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.
17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.
18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.
19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.
20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

- Birth Injuries: Fetal Distress & Hypoxia
- Defective Tires
- Police Brutality & Misconduct
- Misdiagnosis & Surgical Errors
- Nursing Home
- Medical Malpractice
- Dangerous Products
- Brain Injuries
- Severe Spinal Cord Injuries
- Wrongful Death
- Motor Vehicle Accidents
- Auto Defects
- Nursing & Medication Errors

Sometimes even the good guys get it wrong

The men and women of the police forces have a difficult job protecting the safety and freedom of their fellow citizens. That is why it can be so damaging when someone in their ranks violates the freedoms guaranteed to all of us. In these cases, it is the responsibility of the law and civil rights attorneys to stand up for the people against police misconduct.

- **Illegal Searches & Seizures –** Illegal entry and warrantless searches violate the 4th Amendment and threaten the sanctity of our homes. It is a violation of our basic freedoms.
- **Excessive Force –** Even a lawful arrest can be a civil rights violation if excessive force was used.
- **Prisoner Rights –** It is a basic right under the 8th Amendment not to be subjected to cruel and unusual punishment.

Robert B. Sykes and Associates are well known in the civil rights field. We have achieved significant settlements for our clients and are willing and able to try cases in court that do not settle fairly. Over a 33-year period, Robert B. Sykes & Associates, P.C., a three-attorney firm, has successfully litigated or tried to jury verdict dozens of complex cases involving a variety of personal injuries and wrongs arising from traffic accidents, medical malpractice, defective products, industrial accidents, unsafe pharmaceuticals, birth injuries, police misconduct, and civil rights. The firm has successfully appealed many cases to the Utah Supreme Court and the Tenth Circuit. Consider adding our experience and expertise to your client's civil rights case.


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Well, What Did You Expect? The Utah Supreme Court Discusses "Accidents"

by Mark W. Dykes

If you borrow your neighbor's cabin, build an excessively festive fire in the hearth, and burn the place down, your liability insurer will defend you against the ensuing lawsuit and indemnify you against payment of any judgment.[1] But if you intentionally torch the place, you are out of luck, because liability insurance normally only applies to accidents, not the outcome of deliberate acts.

The term used in most modern policies is "occurrence" (some policies say "event"), a change made to ensure that damage that happens over a long period of time can still be accidental. Thus, we normally get something like this: "An 'occurrence' is an accident, including repeated exposure to the same or similar harmful conditions." Notwithstanding the use of the term "occurrence," however, the definition of "accident" remains the critical question.[2] And therein lies the rub.[3]

The Utah Supreme Court has long held that the "natural and probable consequences" of an action cannot be an accident. If you roll a large rock toward a parking lot full of cars, it's not an accident when a fender is dented. If you aim a loaded gun at someone and pull the trigger, it's not an accident when bodily injury results. We are talking here of course about the results of *intentional*, not negligent actions, a distinction that is often difficult to draw, given that all acts are in some sense "intentional."[4] But we presumably can all see the difference, for example, between the construction worker who fails properly to tap in that last nail that would have stopped the wall from falling down and crushing other property, and the insured who points a loaded gun into a crowd and pulls the trigger.

In *N.M. ex rel Caleb v. Daniel E. & Safeco Prop. & Cas. Ins. Co.,* 2008 UT 1, 175 P.3d 566, (Safeco), the Utah Supreme Court revisited the definition of "accident," yielding a sometimes problematic decision.

Standing and Ripeness

Daniel, who was insured with Safeco, "swung a hockey stick at Caleb, striking him in the head and causing serious injuries." *Id.* ¶ 1. Next, "Caleb filed a claim against the policy for his injuries, but Safeco denied coverage. Caleb then filed suit against Safeco, seeking a declaratory judgment that Safeco must provide coverage to Daniel for any legal liability arising out of the incident." *Id.* ¶ 4. But under the standard "no-action" clause contained in most liability policies, a victim of an insured's act cannot sue the liability insurer (we have no "direct-action statute" in Utah) absent a final judgment against the insured after trial or a settlement to which the insurer has agreed.[5] Given Safeco's reference to coverage for "any" legal liability, it is clear that Daniel's fate had not yet been decided when the opinion issued. Caleb thus had no standing to sue Safeco, at least without Safeco's consent, an issue on which the court's prior decisions have been abundantly clear.[6]

This is not just a standing issue: it's a *ripeness* issue, for as the court has previously noted, an insurer is not required to indemnify even its *own insured* until a judgment issues or the insurer agrees to a settlement,[7] and there is normally no point in issuing an advisory opinion that, if there is liability, then the insurer must pay. Indeed, given that Daniel had yet to be adjudged liable, the only insurer duty at issue in *Safeco* was the duty to *defend* (the court's reference to "Safeco's duty to indemnify Daniel[,]" *id.* ¶ 6, is premature), a duty that Caleb, who was not the insured, had no standing to enforce.

While there have been cases in other jurisdictions where a victim's declaratory judgment action against an insurer has been allowed prior to entry of an underlying judgment against the insured, they have arisen on rare facts.[8] *Safeco's* facts, while tremendously important for Caleb and Daniel, are common in coverage disputes. One answer to all this is that Safeco must have decided to waive the standing issue, and likely had very good reasons for doing so. The problem is that, notwithstanding clear precedent on the standing/ripeness issues, and the court's inherent power to question the justiciability of cases before it, *Safeco* simply never addresses the question one way or the other, perhaps leaving future litigants unclear on whether the rules have changed.

Was There an Accident?

Safeco prevailed at trial: "The question before us is whether the district court properly concluded in a summary judgment adjudication that this event was not an accident for the purposes of insurance coverage. We reverse the district court and hold that summary judgment was improper." *Id.* ¶ 1. The insurer argued that Caleb's injuries were no accident, given that Daniel had intentionally swung the hockey stick. The court reiterated a holding that reaches back to an old life insurance case:

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> The word [accident] is descriptive of means which produce effects which are not their natural and probable consequences. . . . The probable consequence of the use of given means is the consequence which is more likely to follow from their use than it is to fail to follow. An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds.

Id. ¶ 6 (alterations in original) (quoting *Richards v. Standard Accident Ins. Co.,* 58 Utah 622, 200 P. 1017, 1023 (Utah 1921).

For a while, *Safeco* strongly hints that things looked grim for Daniel:

> [W]e turn to the…question of what degree of harm must be intended or expected in order for an event to be deemed nonaccidental. Daniel argues that someone of his tender age could not have expected that the act of swinging the hockey stick would result in a skull fracture and serious brain injuries. He contends that because the degree of injury was unintended and unanticipated, the harm was accidental in nature. We disagree.

Id. ¶ 12. Thus, "[a]lthough we look to whether the injury in general is accidental . . . . the specific type of injury suffered need not be intended or expected by the insured." *Id.*

That sounds like the game is over. Daniel said that, because he did not intend the severity of the harm at issue, the ultimate injury was an accident. The Court disagreed, which seems to mean that no matter what degree of harm Daniel intended to inflict, the harm was not an accident. Yet that apparently is *not* what the court meant: "Only where the injury suffered is completely disproportionate to the injury intended or reasonably expected would the actual injury be considered accidental in nature. Therefore, in examining the case before us, we analyze whether Daniel intended or expected to inflict some sort of nontrivial injury on Caleb." *Id.* ¶ 12 (footnote omitted). What the court seems to be saying, although the earlier quoted language arguably belies this conclusion, is that even though some injury was not an accident, injury that was grossly disproportionate to the act undertaken *could* be an accident.

Safeco criticizes two decisions from the Utah Court of Appeals, *State Farm Fire & Casualty Company vs. Geary,* 869 P.2d 952 (Utah Ct. App. 1994), and *Fire Insurance Exchange v. Rosenberg,* 930 P.2d 1202 (Utah Ct. App. 1997),[9] not for the results reached (no coverage for someone who pointed a shotgun and pulled the trigger in *Geary*; ditto for a cherry bomb thrower in *Rosenberg*), but instead for their statement of the "accident" test, which *Geary* provided as follows:

> To recover under a policy insuring against death or injury by accidental means, (1) it is not enough that the *result* was accidental, unexpected or unforeseen, but it must appear

> that the *means* was accidental; and (2) *accident is never present when a deliberate act is performed, unless some additional, unexpected, independent, and unforeseen happening occurs which produces or brings about the result of injury or death.*

Geary, 869 P.2d at 955 (quoting *Safeco Ins. Co. of Am. v. Dotts,* 685 P.2d 632, 633-34 (Wash. App. 1984).

Rosenberg, however, noted that even in the case of intentional actions, intervening forces can render the result accidental, and "[t]hus our holding today and the holding in *Geary* do not stand for the proposition that any injury caused by an intentional act cannot be an occurrence under the policies at issue." *Rosenberg*, 930 P.2d at 1206. *Safeco* nonetheless "reject[ed] the approach taken by the Utah Court of Appeals in these two cases because it conflicts with this court's clear precedent[,]" *Safeco*, 2008 UT 1, ¶ 11, stating that "we have clearly held that we do not examine whether an act is intentional or deliberate, but rather whether the result was intended or expected." *Id.*

But under the court's precedent, reaffirmed in *Safeco*, the act *is* the very first thing we look at, for if the act was intentional, and the natural and probable results followed, there is no accident. The court has further elsewhere eschewed reliance on "actual subjective intention"[10] in deciding if results are accidents, holding that "it can be inferred that the [insured] intends the natural and probable consequences of his acts."[11]

Regardless, a difference that makes no difference is not a difference, and although *Safeco* and *Geary* use different words, they in fact apply substantially the same test: *Safeco* reaffirms that the natural and probable consequences of an intentional action are not an accident. *Geary* says that if one undertakes a deliberate action, the results are not an accident absent the intervention of an unexpected event, that is, the kind of event that would render the consequences neither the natural nor probable results of the initial deliberate conduct.

Safeco further criticizes *Geary* for the latter's citation of "foreseeability," *see id.* ("We have clearly held that 'the test is not whether the result was foreseeable, but whether it was expected.") (citation omitted), but again, what are the "natural and probable consequences" of an act if not the foreseeable consequences?[12] And elsewhere, *Safeco* itself seems to adopt the foreseeability test, just (again) in different words. *See id.* ¶ 7 ("[H]arm or damage is not accidental if it is the natural and probable consequence of the insured's act or should have been expected by the insured.").

Safeco's explanation for getting rid of the word "foreseeable" is that "foreseeable" is also the word used when we say that the perpetrator of a negligent act is liable for the "foreseeable harm" of her negligence. Thus, the court reasons, use of the word foreseeable in the coverage context would render coverage for negligence illusory, because the insurer could simply say that because the harm was foreseeable, and the insured thus liable under tort law, the harm was not an accident. *See id.* ¶ 11 n.7. Several truly unfortunate Tenth Circuit decisions have in fact approved similar reasoning.[13]

While there is something to this argument, it is also true that words can have different shades of meaning in the law, and that "foreseeable," when used as a term of art in deciding whether liability for negligence exists, is not the same "foreseeable" we use in deciding if there should be insurance coverage for the same act that caused the harm.

Has Safeco Converted Factual Questions into Legal Issues?

Daniel testified at his deposition that he meant to hit Caleb's shoulder pads but missed. *Safeco* remanded Caleb's suit against the insurer for trial, holding that Daniel's age had to be taken into account in deciding whether Daniel could have realized that he would miss the pads and hit the face. In so holding, the court noted:

> There are…two independent methods by which bodily injury or property damage may be deemed nonaccidental. First, harm or damage is not accidental if it is the result of actual design or intended by the insured. Second, harm or damage is not accidental if it is the natural and probable consequence of the insured's act or should have been expected by the insured. The first category presents a factual question as to what the insured intended. *The second category generally presents a legal question as to what the average individual would expect to happen*

under the circumstances.

Id. ¶ 7 (emphasis added) (footnote omitted). But in many cases – certainly not all; no one would say that a person who points a loaded gun and pulls the trigger doesn't expect to cause injury – what "the average individual would expect to happen under the circumstances," *id.,* would seem to be a factual question, not a legal one. *Safeco* nonetheless applied its holding as written: "Because of lack of experience, an eight-year-old is less likely than an adult to appreciate the potential danger of hitting an unintended area. Therefore, the average eight-year-old would not expect that nontrivial bodily harm would be the natural and probable result of such an act." *Id.* ¶ 14. The result?

> We conclude that there is a genuine issue of material fact as to whether Daniel intended to inflict nontrivial harm upon Caleb. We also hold that an average eight-year-old would not anticipate anything more than a minor injury as a result of a hockey stick striking the padded shoulder of another child. We therefore reverse the district court's entry of summary judgment and remand the case for further proceedings consistent with this opinion.

Id. ¶ 16. Although it is difficult to reconcile the first and second sentences of the holding, it appears that the only issue for trial is whether Daniel was *lying*, and that he really did intend to hit Caleb in the head. *See also id.* ¶ 14 n.10 ("At trial,…the fact-finder may choose to disbelieve Daniel's testimony and determine that a different version of events actually occurred."). Presumably, if the jury so decides, then Safeco is off the hook.

What result, though, if Daniel admits at trial – if he really thought about the act at all, as opposed to just impulsively flailing out with the stick – that he knew that swinging a hockey stick at what *had* to have been high velocity (a light tap would not have caused "serious injuries that required hospitalization and brain surgery," *id.* ¶ 2) carried a substantial risk of missing the target and causing serious injury, even if he allegedly had no subjective intent to hit the head? Would that factual testimony overcome the court's ruling that, as a matter of law, Daniel could not have expected the injuries? Daniel did testify at his deposition that "he knew hitting someone with a stick could cause injury," yet the court dismissed the testimony because it did not carry the indicia of "certainty necessary to suggest that the injury was either intentional or expected." *Id.* ¶ 15. Isn't that up to the finder of fact to decide?

Finally, concerning the matter-of-law test, what happens when we are faced not with actions of individuals, but instead the often complex fact patterns raised by corporate insureds?[14]

Conclusion

Given the clarity of the court's prior decisions on the standing/ripeness issues, it is likely unwise to read *Safeco* as marking a dramatic shift in deciding when suits for declaratory judgment against insurers are justiciable in Utah and who can bring them. On the issue of "accident," *Safeco* may raise more questions than it answers.

1. *See* Mark W. Dykes, *Occurrences, Accidents, and Expectations: A Primer of These (and Some Other) Insurance Law Concepts,* 2003 Utah L. Rev. 831, 871 – 78 (Article) (discussing the duty to defend).
2. *See id.* at 838.
3. *See id.* at 831-32 (discussing difficulty of defining "accident").
4. *See id.* at 846-47.
5. *Auerbach Co. v. Key Sec. Police, Inc.,* 680 P.2d 740, 743 (1984).
6. *Utah Farm Bureau Ins. Co. v. Chugg,* 315 P.2d 277, 281 (Utah 1957) ("The tort victim has no present legal interest in the insurance contract"; the court "want[ed] to repel any inference" that victim was a proper party to a declaratory action under the policy); *State Farm Mut. Ins. Co. v. Holt,* 531 P.2d 495 (Utah 1975) (victim of tortfeasor bypassed suit against tortfeasor and successfully sued tortfeasor's insurer; judgment reversed, victim had no standing prior to entry of final judgment to sue insurer); *Auerbach Co.,* 680 P.2d at 743 n.3 ("Since Auerbach lacks privity with [the insurer], it cannot sue in its own right.").
7. *Aurebach,* 680 P.2d at 743.
8. A cite-check of the leading case, *Bankers Trust Co. v. Old Republic Ins. Co.,* 959 F.2d 677 (7th Cir. 1992), will reveal a host of cases distinguishing that decision, but also a few following it, including *Cmty Action of Greater Indianapolis, Inc. v. Indiana Farmers Mut. Ins. Co.,* 708 N.E.2d 882 (Ind. App. 1999). *Cf. Farmers Ins. Exch. v. Dist. Court,* 862 P.2d 944 (Colo. 1993) (holding victim had no standing to litigate policy amounts prior to obtaining judgment against insured).
9. *See* Article at 845-46 (discussing *Geary* and *Rosenberg*).
10. *Deseret Fed. Sav. & Loan Ass'n v. United States Fid. & Guar. Co.* 714 P.2d 1143, 1146 (Utah 1986).
11. *Id.*
12. *See* Article at 862–66 (discussing concept of community knowledge in determining what is expected from a given action).
13. *See id.* at 847 n. 54 (discussing *Midland Const Co. v. U.S. Cas. Co.,* 214 F.2d 665 (10th Cir. 1954), *Neale Constr. Co. v. U.S. Fid. & Guar. Co.,* 199 F.4d 591 (10th Cir. 1952), and *Albuquerque Gravel Products Co. v. Am. Employers Ins. Co.,* 282 F.2d 218 (10th Cir. 1960)).
14. *See e.g. id.* at 867–71 (discussing cases on proving corporate knowledge and use of experts in particular industries).

Going Green in a Red State

by Lisa McGarry & Margaret Olson

The offices of Hobbs & Olson, LC and Hobbs Mediation are committed to environmentally responsible office practices. All it takes is awareness, a desire to reduce, and a commitment to try. In this article, we share our energy policy with members of the bar in the hope that others will follow.

Have you ever stopped to think about the amount of paper your law office uses and discards? It is an average of 15 tons per year (for a 30 person firm).[1] This translates into 300 tons of CO2 emissions per year for production and disposal.[2] That's just the paper. How about ink, electronics, and electricity? We readily purchase shredders and shredding systems to protect our clients' confidentiality, but are we as willing to adopt environmentally responsible business practices that benefit us all?

Inspired by the initiative and iron will of our founding member, we at Hobbs & Olson, LC and Hobbs Mediation have embarked on an office-wide commitment to reduce consumption and promote conservation with our office practices. The process of identifying and defining how and what to reduce, reuse, and recycle has been fun and contagious. Our staff, clients, and friends are catching on. Through simple policies and procedures, the prevailing consumptive law office culture can be changed with amazing results. We would like to share our "Green Policy" with members of the bar and challenge others to implement similar (or better yet, even more aggressive) energy and resource-saving procedures:

WASTE REDUCTION (REDUCE, RECYCLE, AND REUSE)

Goal 1: To reuse and recycle 90% of paper generated

- All desks will have a paper shredding bin that will be processed by a shredding company;
- All desks will have a paper recycling bin that will be processed by Salt Lake City;
- Scrap paper will be used for notes when appropriate.

Goal 2: Reduce the amount of paper used

- Documents will be retained and reviewed in an electronic format whenever possible;
- Double-sided copies, scanning, and email will be utilized whenever possible and appropriate;
- Employees will use personal hand towels in restrooms.

Goal 3: Reduce the amount of kitchen and general office waste

- Kitchen and copy rooms will have a recycling bin for card board, plastic, newspaper, magazines, phone books, aluminum, tin, paper board, etc.;
- Batteries, electronic equipment, toner, and CFL bulbs will be properly recycled (employees are welcome to bring these specific items from home and other locations to be recycled).

Goal 4: Purchase supplies with increased post consumer recycled content

- Strive for 90% of paper supplies (letterhead, copy paper, envelopes) to contain 30% post consumer recycled content;
- Strive to purchase supplies that are printed with vegetable based inks.

Goal 5: Reuse office furniture and equipment

- The office will purchase and/or donate used furniture when appropriate.

ENERGY REDUCTION

Goal: Decrease consumption by 10% per year

- The firm will purchase a minimum of 10% green power;
- Lights and electronic equipment will be turned off nightly (with the exception of the fax machine);

LISA MARCY McGARRY specializes in hospitality and employment law at Hobbs & Olson, LC. She is a faculty member and team lead with the National Institute of Trial Advocacy ("NITA").

MARGARET H. OLSON specializes in general litigation, probate litigation and criminal defense at Hobbs & Olson, LC. Ms. Olson is a proud member of the Utah Association of Criminal Defense Attorneys.

- Computers will be set to sleep mode after 15 minutes of non-use;
- Regular lights will be replaced with CFL bulbs;
- Overhead lighting tubes will be of T8 or T5 efficiency;
- Staff and clients will be challenged to explore/utilize alternative modes of transportation, including human-powered, carpooling, and public transportation;
- Clients who use energy saving transportation, including human-powered, carpooling, or public transportation will be provided with discounted fees for services provided at the offices of Hobbs & Olson.

WATER REDUCTION

Goal: To reduce the amount of water used

- Landscaping will be appropriate for the area.

EARTH FRIENDLY CHALLENGES/PLEDGE

Goal: To share knowledge of conservation choices with staff and clients

- Staff will be encouraged to become E2 Citizens (citizens who are committed to reducing their environmental impact); go to www.slcgreen.com for program information;
- Staff will be encouraged to analyze and attempt to reduce their personal carbon footprint;
- The firm will continue to seek endorsements and memberships to continue learning and reducing its carbon footprint.

We followed, to the extent possible, the ABA EPA Law Office Climate Change Challenge. For details go to www.abanet.org/environ/climatechallenge/overview. We have also followed Salt Lake City's program for becoming an E2 business. For details go to www.slcgreen.com. We believe we are the first law firm in Utah to achieve these certifications. By the end of 2008, we hope to exponentially increase this number in Utah and among members of the bar. Come on over, we'll show you how it's done!

1. *See* Amy Dvorak, Going Green, 26 *ALA News,* August-September 2007, at 12.

2. *See id.*

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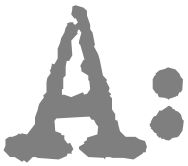

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2007 Case Summaries

Presented by Associate Chief Justice Michael J. Wilkins and Judge Carolyn McHugh

Editor's Note: *Supreme Court Associate Chief Justice Michael J. Wilkins and Court of Appeals Judge Carolyn B. McHugh addressed some of last year's important Utah appellate decisions at a Salt Lake County Bar Luncheon on January 31, 2008. Although the information will be of more limited utility for those not in attendance, the* Utah Bar Journal *thought its readers might find the case summaries, distributed as handouts during the presentations, to be of interest. Accordingly, the handouts are reprinted here, with the speakers' permission. Especially because readers will not have the benefit of the commentary provided by the speakers, readers are cautioned that the summaries should not be relied on for any purposes other than calling attention to these opinions and explaining what each case generally involves.*

Supreme Court of Utah 2007 Decisions

CIVIL CASES[1]

Pratt v. Nelson, 2007 UT 41, 164 P.3d 366 (Remanded) MBD*[2] When the defendant was 16 years old, her father allegedly forced her to marry her uncle. She subsequently filed suit against plaintiffs and others, alleging that they had ties with a polygamous organization and that they were negligent and had assisted, encouraged, conspired, or knew of and failed to prevent or report, the abuses alleged to have been committed by her father and uncle. Plaintiffs filed suit against defendant, alleging that she had defamed plaintiffs at a press conference and through the resulting publicity. The court held that through excessive publication, the defendant's statements lost any immunity they might have otherwise enjoyed under the judicial proceeding privilege. The court also held that the group defamation rule did not preclude plaintiffs' defamation claim.

Carbaugh v. Asbestos Corp. Ltd., 2007 UT 65, 167 P.3d 1063 (Reversed and Remanded) REN* The court held that the "expert testimony" exception to Utah's medical licensing statutes allowed experts who were licensed to practice medicine in other states but not in Utah to conduct pre-testimony medical evaluations in preparation for their forthcoming testimony as expert witnesses. While the doctor undoubtedly practiced medicine in Utah without a license when he held himself out as a physician, he performed those "practices or acts" as "an individual providing expert testimony in a legal proceeding" and thus did not violate the Act.

Colosimo v. Roman Catholic Bishop, 2007 UT 25, 156 P.3d 806 (Affirmed) JNP* Two brothers alleged that their former teacher, who was also their priest, sexually abused them on repeated occasions from approximately 1970 to 1975. In 2002, they filed suit, alleging that defendants knew that the teacher had sexually abused children but deliberately concealed it from them to protect their own interests. In affirming the dismissal of the brothers' action, the court held that the students' action was barred by the one to four years' statute of limitations provided by Utah Code Ann. § 78-12-25(3), 78-12-26(3), 78-12-29(4) (2002). The discovery rule provided in section -26(3) did not apply because the students knew that they had been abused by the teacher and that the teacher was employed by defendants; this knowledge was sufficient to trigger a duty to inquire into claims against defendants.

Munson v. Chamberlain, 2007 UT 91, 2007 Utah LEXIS 199 (Reversed and Remanded) JNP* Defendants argued that a notice of intent and opinion letter submitted to a pre-litigation panel were transformed into confidential documents by virtue of being presented to the panel. The court held that neither the plain language of Utah Code Ann. § 78-14-12(1)(d) nor the statutory purpose supported the broad interpretation of the confidentiality requirement that the court had recognized in that previous case law. Because the patient had independent access to the notice of intent and the opinion letter, their use in the pretrial proceeding did not render them confidential. The court overruled the last paragraph of *Doe v. Maret,* 984 P.2d 980 (Utah 1999) because it erroneously suggested that all documents submitted to a pre-litigation panel were confidential.

Rothstein v. Snowbird Corp., 2007 UT 96, 2007 Utah LEXIS 219 (Vacated and Remanded) (J. Wilkins dissenting) REN*, CMD, JNP—concur in REN's opinion. MJW*, MBD – dissenting An expert skier sustained serious injuries when he collided with a retaining wall while skiing at the resort. The resort claimed that the skier waived his ability to sue the resort for its ordinary negligence when he purchased two resort passes that released the resort from liability for its ordinary negligence. The court concluded that the release and indemnify agreements the skier signed were contrary to the public policy of the State of Utah and were, therefore, unenforceable. The court also held that the core purpose of Utah's Inherent Risks of Skiing Act, *see* Utah Code Ann. §§ 78-27-51 to -54 (2002 & Supp. 2007), was not to advance the cause of insulating ski area operators from their negligence, but rather to make them better able to insure themselves against the risk of loss occasioned by their negligence.

Berry v. Greater Park City Co., 2007 UT 87, 171 P.3d 442 (Affirmed in part/Reversed in part) REN* Before being allowed to participate in a ski race, a skier was required to sign a release of liability and indemnity agreement. The court held that the release was enforceable. Assuming that skiercross racing was an abnormally dangerous activity, the skier's role as a participant in that activity also excluded him from eligibility to recover under a theory of strict liability.

Mountain W. Surgical Ctr. v. Hosp. Corp. Of Utah, 2007 UT 92, 2007 Utah LEXIS 212 (Affirmed) MBD* To block construction of a new medical complex adjacent to the hospital, the hospital filed a lawsuit against the property owner and recorded a notice of lis pendens on the property. The company claimed that by filing the first lawsuit and the lis pendens, the hospital caused the complex to be built in a different location, resulting in increased costs and delays. The court noted that the company offered no testimony other than the affidavit of an employee, that the lis pendens caused them to refuse to proceed with the sale of the property. Instead, the employee's affidavit was insufficient because: (1) it was not based on the employee's personal knowledge, as required by Utah R. Evid. 602, and (2) even if a proper foundation for the employee's statements were assumed, they were factually insufficient to establish causation.

Moss v. Pete Suazo Utah Athletic Comm'n, 2007 UT 99, 2007 Utah LEXIS 222 (Affirmed) JNP* Decedent's sister sought to recover damages from the Pete Suazo Utah Athletic Commission for negligently allowing her brother to fight in a boxing match, even though his physical condition and boxing record violated certain commission rules. The court held that the commission was immune from suit under Utah Code Ann. § 63-30-1 to -38 (2004), the Utah Governmental Immunity Act, because the actions in question fell within the exception articulated in section 63-30-10(3). Section 63-30-10(3) states that immunity is not waived for "the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization." Since petitioner's allegations of negligence were directed to "licensing decisions" for which immunity had not been waived, her claim failed.

Utahns for Better Dental Health-Davis v. Rawlings, 2007 UT 97, 2007 Utah LEXIS 220 (Reversed and Remanded) CMD*, MBD, JNP–concur in CMD's opinion MJW*, REN–dissenting The court held that de novo review is the appropriate standard of review for attorney fee awards under the private attorney general doctrine. Further, the court held that an award of attorney fees was appropriate in this case because it involved vindication of a strong or societally important public policy concerning the misuse of the constitutionally-based initiative power and the integrity of a public election.

Bilanzich v. Lonetti, 2007 UT 26, 160 P.3d 1041 (Reversed and Remanded) JNP*, MBD, CMD–concur in JNP's opinion MJW*, REN–dissenting In an action seeking to have a personal guaranty declared unenforceable, petitioner guarantor filed a motion seeking his attorney fees under Utah Code Ann. § 78-27-56.5 (2002). Petitioner argued that the statute allowed an award of attorney fees pursuant to a contract, where a party successfully claimed the same contract was unenforceable due to the failure of a condition precedent. The court held that Utah Code Ann. § 78-27-56.5 granted the district court discretion to award attorney fees and costs to a prevailing party if the writing that formed the basis of the lawsuit provided attorney fees for at least one party. Although the guaranty itself was rendered unenforceable by the failure of a condition precedent, the statute focused on the provisions of the writing rather than its legal effect. Under the statute, it was immaterial that events outside of the writing rendered the guaranty ineffectual because the guaranty allowed at least one party to recover attorney's fees.

Quaid v. U.S. Healthcare, Inc., 2007 UT 27, 158 P.3d 525 (Reversed and Remanded) JNP*, MJW, MBD–majority REN*–concurring with separate opinion. MJW–joining in REN's concurrence The adoptive parents appealed summary judgment in their action involving benefit coverage for their newly adopted son. U.S. Healthcare argued that it was not liable for covering the medical expenses of the newly adopted child because he was also covered under his birth parents' HMO policy provided by the health insurer. The court held that the health insurer's policy coverage of the son effectively ceased when the parental rights of his birth parents were terminated. Consequently, the benefit plan's coordination-of-benefits (COB) provision did not operate to deny the son coverage.

Youngblood v. Auto-Owners Ins. Co., 2007 UT 28, 158 P.3d 1088 (Affirmed) MJW* The insured was struck by an automobile as he walked across a parking lot. He later claimed that his damages exceeded the amount obtained from the driver's insurance company and sought additional coverage under the underinsured motorist provisions of his insurance policy, which was written in the name of the insured's corporation. Even though the policy excluded coverage because the insured was a pedestrian, he contended that equitable estoppel should extend coverage based on representations made by the insurance agent in selling him the policy. The court noted that in some factual circumstances, principles of equitable estoppel may enlarge the scope of an insurance policy's coverage where the company's agent materially misstates the scope of coverage prior to the purchase of the policy.

Grappendorf v. Pleasant Grove City, 2007 UT 84, 2007 Utah LEXIS 187 (Reversed and Remanded) JNP* The court held that atmospheric conditions, such as gusts of wind, heat from the sun, or fog, did not fall under the natural condition exception to the waiver of governmental immunity, *see* Utah Code Ann. §63-30-10(11) (repealed 2004). Considering the plain language of the statute, the appellate court concluded that a natural condition "on" the land had to be topographical in nature, that is, in physical contact with the land, supported by the surface of the land, or part of the land.

Jones v. Egan, 2007 UT 85, 2007 Utah LEXIS 190 (Reversed and Remanded) JNP* The insured, an eight-year-old, struck the injured party with a hockey stick. The insurer refused to pay. The court determined that the term "accident" in relation to the policy described means which produced effects that were not their natural and probable consequences and that the insured's age was relevant in this determination because this was judged from the insured's perspective. Furthermore, the court focused on the resulting injury, rather than the actions of the insured, as being accidental in nature. The test was not whether the result was foreseeable, but whether it was expected.

Bissland v. Bankhead, 2007 UT 86, 171 P.3d 430 (Affirmed) REN* The residents wanted to overturn an ordinance, but the city refused to approve a proposed referendum for placement on the ballot for the November 2007 vote. The city recorder determined that the residents failed to submit their petition within 45 days of the passage of the ordinance. The court held that because the ordinance completed the deliberative process required of the city council on October 24, this was the date of the ordinance's passage. Furthermore, the court determined that there was no evidence that the city council failed to comply with or circumvented any of the requirements. Thus, passage occurred when three of the five members of the city council voted for the annexation ordinance, not when the law was posted or signed on November 15. Accordingly, the events of the October 24 meeting triggered the forty-five-day time line contained in Utah Code Ann. §20A-7-601(3)(a). Finally, the October 24 meeting imparted adequate notice, and the twenty-one-day span between the November 16 posting and the December 8 deadline was adequate.

Duke v. Graham, 2007 UT 31, 158 P.3d 540 (Affirmed) JNP* Two of the members of an LLC were expelled and one member, who was also a manager, was removed as a manager. The members argued that the arbitrator had exceeded his authority by expelling the members and the manager, pursuant to Utah Code Ann. §§ 48-2c-710(3) and 48-2c-809(1), which provided that only a court could remove members and managers of an LLC. The court concluded that although sections -710(3) and -809(1) provided for judicial

removal of members and managers, the legislature did not forbid removal through other means. Accordingly, members and managers could be removed through arbitration.

Tschaggeny v. Milkbank Ins. Co., 2007 UT 37, 163 P.3d 615 (Affirmed) JNP* The parties were unable to agree on the insurer's obligation to cover certain medical expenses. The insurer's motion in limine to exclude medical expenses that were written off by the insured's health insurance policy was granted. The court held that Utah Code Ann. § 78-27-44 (2002) did not require the trial court to award prejudgment interest for the period after the pretrial payment was made. A new trial under Utah R. Civ. P. 59 was denied for the written-off medical bills because there was no legal error at trial. Finally, the supreme court refused to review the denial of a new trial on the issue of replacement services because the insured failed to marshal the evidence.

Wasatch Crest Ins. Co. V. LWP Claims Adm'rs. Corp., 2007 UT 32, 158 P.2d 548 (Affirmed) MJW* In granting the corporation's motion for summary judgment, the trial court determined that although the corporation was an affiliate of the subsidiary, the liquidator could not recover on behalf of the holding company and its subsidiary for the claims handling services the corporation provided. The court held that although Utah Code Ann. § 31A-27-322 allowed a liquidator to recover "distributions" made to "affiliates that controlled" a liquidating insurer, the corporation was not an affiliate that controlled the holding company or its subsidiary because the corporation did not control either the subsidiary or the holding company as required by Utah Code Ann. § 31A-27-322 (2005), and the payments were fees for services rendered, not distributions within the meaning of the statute. Furthermore, the term "distributions" referred only to dividends or other transfers of equity, not to payments for services.

United States Bank Nat'l Ass'n v. HMA, L.C., 2007 UT 40, 169 P.3d 433 (Affirmed) REN* A company deposited a check and then wrote a check to pay obligations owed to a third party. The bank paid that check. Meanwhile, the maker of the check that the company deposited stopped payment. When the check was returned to the bank, the bank swept remaining funds from the company's account and subseqently filed suit. At issue on appeal was the company assertion that the bank was prohibited from charging-back the check and placing its account in an overdraft condition because the check's paying bank failed to timely return it to plaintiff bank. The court held that the paying bank was not prohibited from charging-back the check and was eligible for an extension of the midnight deadline pursuant to 12 C.F.R. § 229, because the paying bank used a "highly expeditious" means of transporting the check. In addition, venue was proper in Salt Lake County pursuant to Utah Code Ann. § 78-13-1 (2001) because the action sought foreclosure on property that was located in Salt Lake County.

Wilcox v. Anchor Wate, Co., 2007 UT 39, 164 P.3d 353 (Affirmed in part/Reversed in part) JNP* The insured received payments from a settlement under an insurance policy, and various reinsurers indemnified the insurer for the payments. After the liquidator placed the insurer into involuntary liquidation, the insured received partial payment of its claim. The court held that the payments constituted a voidable preference because the insured had no direct claim to the reinsurance proceeds or any cause of action against the reinsurers. Also, the earmark doctrine was inapplicable because the transfer of funds diminished the insurer's estate and the insurer had the right to disburse the funds to whomever it wished.

Sill v. Hart, 2007 UT 45, 162 P.3d 1099 (Reversed and Remanded) CMD* The parties contracted regarding the construction of a residence, and the owner subsequently filed a breach of contract claim. The contractor responded with a counterclaim, which included a request to foreclose on a mechanics' lien. The court held that Utah Code Ann. § 38-1-11(4)(a) (2001) was not triggered when the contractor sought to enforce a lien by filing a counterclaim, rather than an initial complaint. Further, since the owner had no rights available under

the Utah Residence Lien Restriction and Lien Recovery Fund Act, *see* Utah Code Ann. §§ 38-11-101 to -302 (amended 2005 & Supp. 2006), compliance with the notice requirements of section -11(4)(a) was not required.

Elder v. Nephi City, 2007 UT 46, 164 P.3d 1238 (Affirmed) REN* A widow's husband was killed when the truck he was driving was hit by a freight train. The widow asserted that her husband's line of vision was obscured by a line of trees located parallel to the tracks, and the he would not have died if they had not been there. The trees were located on land owned by the city, and the railroad had no recorded property interest in that land. Instead, the railroad only owned the tracks and operated the train. The court held that the ground over which the railroad's tracks passed had already been granted to the city at the time the tracks were laid; thus, the property was not subject to transfer under the Railroad Rights of Way Acts, ch. 152, 18 Stat. 482. Further, the court would not permit the widow to claim a prescriptive easement on the railroad's behalf so that she could hold the railroad liable for her husband's death.

Crestwood Cove v. Turner, 2007 UT 48, 164 P.3d 1247 (Affirmed) JNP* The client's property was sold at a sheriff's sale to satisfy a judgment. When the client was given notice to quit the property, it retained an attorney to handle the case. The client entered into a settlement agreement to retake the property, but then it filed a legal malpractice case. The court held that the client had not abandoned the right to pursue its malpractice action when it settled the redemption lawsuit before the appeal was completed. The court also declined to adopt a categorical rule foreclosing malpractice suits arising from cases where a party settled instead of pursuing an appeal.

Progressive Cas. Ins. Co. v. Ewart, 2007 UT 52, 167 P.3d 1011 (Affirmed) MBD*, MJW, REN–majority CMD*, JNP–dissenting As the result of a car accident in which he was involved, the injured party was disabled and left unable to perform the types of jobs that he held before the accident. The other driver's policy had a limit of $25,000 for bodily injuries. The driver's wife contended that an additional $25,000 of coverage should have been available to cover her loss of consortium claim. The court determined that the mandatory liability coverage obligation in Utah Code Ann. § 31A-22-304 was tied to the number of persons who sustained a bodily injury or died in an accident involving a motor vehicle, not the number of claims that arose from that accident. Because the wife's loss of consortium claim under Utah Code Ann. § 30-2-11 (2005) arose from the injury suffered by her husband and did not involve a bodily injury to her, her claim was subject to a single $25,000 limit and did not have its own $25,000 limit over and above that covering her husband's claim.

Bluffdale Mountain Homes, L.L.C. v. Bluffdale City, 2007 UT 57, 167 P.3d 1016 (Affirmed) MBD* The city refused to disconnect certain property. Two property owners then filed a petition seeking disconnection in the district court under Utah Code Ann. § 10-2-502.5 (2003). The court noted that the disconnection was viable and that the city failed to marshal the evidence on the issue of whether the disconnection materially increased the cost of providing municipal services. Also, the disconnection did not make it unfeasible for the city to function as a municipality. As to the justice and equity requirement under Utah Code Ann. § 10-2-502.7(3)(b), substantial deference was the standard of review, but not so much that a decision was reversed only if it was clearly erroneous.

O'Connor v. Burningham, 2007 UT 58, 165 P.3d 1214 (Reversed and Remanded) REN* After being fired from his position as the high school basketball coach, he sued the parents for defamation. The court held that the coach was not a public official because high school athletics could claim no "apparent importance," as the policies and actions of the coach of any high school athletic team did not affect in any material way the civic affairs of a community. Therefore, he was not required to show that the parents made their statements with actual malice.

Nicholas v. A.G., 2007 UT 62, 168 P.3d 809 (Affirmed) REN*, MBD, JNP–majority MJW*, Judge Russell Bench (for CMD)–dissenting The court concluded that the self-care provision of the FMLA under 29 U.S.C.S. § 2612 (a)(1)(D) was unconstitutional and an invalid attempt to abrogate states' Eleventh Amendment immunity. Congress' stated purpose in passing the self-care provision of the FMLA was to protect the disabled against discrimination. Because the provision was not clearly directed at remedying past gender discrimination, the U.S. Supreme Court's decision in *Nev. Dep't of Human Res. v. Hibbs* did not apply. In addition, Congress failed to establish the requisite history of state discrimination against the disabled necessary to pass prophylactic legislation intended to curb such discrimination. Accordingly, the provision could not rest on § 5 of the Fourteenth Amendment and was therefore invalid.

Snow v. Office of Leg. Research & General Counsel, 2007 UT 63, 2007 Utah LEXIS 147 (Challenge rejected and Petition for Extraordinary Writ) MJW* Citizens argued that a ballot title was patently false because it gave no clear indication of whether the referendum vote on House Bill (HB) 148 would prevent the implementation of a voucher program under HB 174. Because the court found no patent falsity or clear bias in the ballot title presented by the Office of Legislative Research and General Counsel, it stated that it need not strain to reach an accommodation between the clear restrictions of Utah Code Ann. § 20A-7-308 and the desire of the parties that the court exceed those restrictions. The court determined that HB 174 was intended by the legislature to amend HB 148, not supplant it. Nothing in the ballot title was substantively false; nothing in the title suggested bias; and nothing need be added to reflect the impact of HB 174.

Egbert v. Nissan N. Am., Inc., 2007 UT 64, 167 P.3d 1058 (Certified questions of law answered) MBD* The parents were involved in a car accident and the mother, who was pregnant, went through the windshield and sustained serious injuries; as a result, the child was born with a brain injury. The parents argued that the child's brain injury was proximately caused by the accident, and they filed a products liability action in federal court based on the failure to use laminated glass in the windshield. The federal court certified two questions to the court. The court determined that the jury should have been instructed as to the presumption established by Utah Code Ann. § 78-15-6(3)(2002) and that the jury should have also been instructed that a preponderance of the evidence was sufficient to rebut this presumption. The fact that this same burden was already imposed by common law did not mean that the Utah Legislature intended to impose a higher burden when it enacted section -6(3). The statute was not rendered a nullity because the presumption highlighted the significance of compliance with federal standards. Finally, the supreme court noted that Utah recognized the "enhanced injury" theory of liability.

Tabor v. Metal Ware Corp., 2007 UT 71, 168 P.3d 814 (Certified question of law was answered) CMD* The court determined that the general rule of successor liability, together with the four exceptions provided by the Restatement (Third) of Torts § 12, afforded adequate protection to consumers, and it declined to expand the exceptions. Utah did impose an independent post-sale duty on successor corporations to warn customers of defects in products manufactured and sold by the predecessor corporation as outlined in the Restatement (Third) of Torts § 13. The federal court had to apply the duty to warn standard outlined in § 13. If a successor corporation had a duty to warn under § 13, one factor in determining whether a successor corporation had discharged its duty to warn was whether it provided warning to the end user, not just an intermediary like a distributor or retailer.

Emergency Physicians Integrated Care v. Salt Lake County, 2007 UT 72, 167 P.3d 1080 (Reversed and Remanded) JNP* The court concluded that Utah Code Ann. § 17-50-319 (2005) rendered the county liable for the cost of inmates' medical care. Medical care was logically included in subsection (c)'s broad requirement that the county pay the expenses "necessarily incurred in the support" of pretrial or convicted inmates.

Fordham v. Oldroyd, 2007 UT 74, 171 P.3d 411 (Affirmed) REN*, CMD, JNP, MBD–majority MJW*–concurring and dissenting In concluding that the driver owed no duty to the state trooper who he hit with his car, the court inquired into whether the injury was derived from the negligence that occasioned the professional rescuer's response, and whether the injury was within the scope of those risks inherent in the professional rescuer's duties. The court determined that where it was beyond dispute that the trooper's presence at the accident

scene satisfied both inquiries, the driver owed the trooper no duty of care.

Ellis v. Estate of Steven Ellis, 2007 UT 77, 169 P.3d 441 (Affirmed in part/Reversed in part) MBD* The court held that interspousal immunity had been abrogated in Utah with respect to all claims, including claims for negligence. The court also concluded that the statute of limitations on the wife's claim was tolled by Utah Code Ann. § 78-12-36, which tolled the statute if a person was "mentally incompetent," which the wife demonstrated she was.

Hoggan v. Hoggan, 2007 UT 78, 169 P.3d 750 (Affirmed) JNP* The brother argued that a 2002 trust amendment was invalid. The court held that the decedent retained the right to amend the trust amendment where she had reserved the right to amend, modify, or revoke the trust. She could not amend the trust to completely divest one of the beneficiaries of his or her interest without first revoking the trust. The court found that because the brother's interest in the trust was not completely divested but only modified, the amendment did not violate the terms of the trust and was therefore not valid.

Ivers v. Utah Dept. of Transp., 2007 UT 19, 154 P.3d 802 (Affirmed in part/Reversed in part) MJW* UDOT condemned a portion of private property for the construction of a frontage road adjacent to a highway. The construction of the frontage road was part of a larger project to widen and elevate the highway. The State condemned a portion of a restaurant's lot. UDOT agreed to pay the restaurant for the condemned property. The court held that property owners have no protectable property interest in visibility and therefore, the restaurant was not entitled to damages for loss of view or visibility because the raised highway was not built on condemned land, unless the use of the condemned land was essential to the construction of the raised highway.

Wintergreen Group, L.C. v. Utah Dep't of Transp., 2007 UT 75, 171 P.3d 418 REN* The court determined that the district court erred in granting UDOT's motion to dismiss because the dismissal was premature. The property owner sufficiently alleged six claims for inverse condemnation. The court held that the district court erred when it dismissed the claims based solely on the fact that UDOT had already filed direct condemnation actions, which had been consolidated to more accurately account for severance damages.

Swenson v. Erickson, 2007 UT 76, 171 P.3d 423 (Affirmed) REN* The landowners argued that the time for an effective vote to terminate the restrictive covenants was limited to the sixty seconds after the beginning of 2004 but before the automatic extension of the covenants at 12:01 a.m. The court found that hyper-attentiveness to automatic renewal and voting eligibility rendered the covenants impossible to modify and therefore offended the clear intentions of the parties to the covenants. The court indicated in the first appeal that it assumed that the property owners could modify or terminate the covenants on January 1, 2004. The property owners had twenty-four hours available to them every ten years to conduct the business associated with modifying or terminating the covenants.

Massey v. Griffiths, 2007 UT 10, 152 P.3d 312 (Affirmed) CMD* At all times, defendants or their predecessors occupied the land up to a fence that separated two properties for at least twenty years before plaintiffs filed their complaint. In addition, defendants or their predecessors timely paid and discharged all real property taxes that were levied upon their properties. The legal description of the property conveyed by the tax deeds purportedly straddled the fence line establishing the boundary between two properties. On appeal, the court held that defendants successfully rebutted the presumption of Utah Code Ann. section 59-2-1351.1(9)(b) (2004) that plaintiffs' tax deeds were valid. Once defendants rebutted the

presumption, plaintiffs failed to produce evidence that the tax sales were valid by showing that there was a tax delinquency on the property they claimed under the tax deeds.

Brigham Young Univ. v. Tremco Consultants, Inc., 2007 UT 17, 156 P.3d 782 (District Court's Supplemental Order Vacated) REN* Brigham Young University developed a software product, and then entered into a series of licensing agreements with the judgment debtor. The judgment debtor was later dissolved and its stock was acquired by a word processing corporation. The consulting firm signed an indemnification agreement with the judgment debtor. In an earlier opinion, the court held that the university could not summarily extend liability to the consulting firm for the judgment. In this case, the court held that the university could not pursue the associates for the debt of the judgment debtor using only post-judgment collection procedures. Those procedures did not afford the associates a constitutionally permissible degree of due process of law.

Duncan v. Fourth Judicial Dist. Court, 2007 UT 18 REN* In conjunction with the Tremco case above, the court granted consolidated petitions brought under Utah R. Civil P. 65B, vacating a supplemental order and ordering the cessation of collection activities by BYU against the Petitioners.

Glew v. Ohio Sav. Bank, 2007 UT 56, 2007 Utah LEXIS 135 (Affirmed) REN* The debtors acquired a bridge loan from a lender, who also provided the financing for a mortgage on their new home in the form of a 30-year note. At the closing, the lender executed, in favor of the bank, assignments of the trust deeds that secured the bridge loan and the 30-year note. Despite receiving payment from the bank for the bridge loan, the lender did not forward the bank the final payment of the loan. The bank commenced a non-judicial foreclosure of the trust deed on the bridge loan against the debtors' former home. The new owners of the home demanded that the bank release the trust deed. The bank refused, and plaintiffs sued. The court held that in the area of equitable estoppel and apparent authority, it did not matter whether the bank expressly instructed the debtors to pay the lender or whether it merely insisted on multiple occasions that payment not be directed to it and that the debtors should contact the originating lender for more information; the debtors reasonably relied on the bank's communications.

CRIMINAL CASES

State v. Barzee, 2007 UT 95, 2007 Utah LEXIS 218 (Affirmed) CMD* with REN concurring in entire result MBD*–writing for majority, with JNP and MJW joining him MJW–concurring with majority, but writing separate opinion Defendant was charged with six felony offenses, each potentially punishable by life sentences, and one second degree felony, punishable by up to 15 years in prison. Thus, she was charged with serious crimes creating an important State interest in timely prosecution that was not undermined by her confinement in the state hospital. Experts in the case found that treatment with antipsychotic medication was appropriate. Although certain side effects were possible, the administration of such medication was unlikely to produce side effects that would interfere with her right to a fair trial and less intrusive means of treatment were unlikely to accomplish the restoration to competency. The court held that finding that the administration of antipsychotic medication was substantially likely to render defendant competent to stand trial was not clearly erroneous; the testimony of the defense experts was not ignored; the State's experts did not disregard defendant's particular case; and the district court's decision was well-reasoned and supported by the record.

State ex rel Z.C., 2007 UT 54, 165 P.3d 1206 (Reversed and Remanded) JNP*, CMD, MBD, REN–majority MJW–concurring in result only Two children under age 14 engaged in consensual intercourse and delinquency petitions were subsequently filed for sexual abuse of a child under Utah Code Ann. § 76-5-404.1 (2003). The court held that although the plain language of section 76-5-404.1 allowed the child to be adjudicated delinquent for child sex abuse, applying the statute to treat her as both a victim and a perpetrator of child sex abuse for the same act lead to an absurd result not intended by the legislature. Like all sexual assault crimes, section 76-5-404.1 presupposed a perpetrator and a victim; thus, the court's holding was narrowly confined to apply to situations where no true victim or perpetrator could be identified.

State v. Gallegos, 2007 UT 81, 171 P.3d 426 (Reversed) CMD* Both defendants were bound over by a magistrate on charges of child endangerment, which arose from their alleged exposure of children to drugs. They sought review of those decisions. The court reversed, holding that the "exposed to" language of Utah Code Ann. § 76-5-112.5(1)(2003) required a real, physical risk of harm to a child. The child had to have the reasonable capacity to access the substance or paraphernalia or to be subject to its harmful effects, such as by inhalation. The exposure had to go beyond visual or auditory exposure because the child must have had a reasonable capacity to access the substance in order for real harm to exist. To the extent that *State v. Nieberger,* 2006 UT App 4, 128 P.3d 1223 held differently, it was overruled.

State v. Williams, 2007 UT 98, 2007 Utah LEXIS 221 (Reversed and Remanded) REN* The court considered and clarified the scope of the *Shondel* doctrine, *see State v. Shondel,* 22 Utah 2d 343, 453 P.2d 146 (Utah 1969), and concluded that the court of appeals erred in applying the doctrine in defendant's case. As evidenced by the intention of the legislature, Utah's felony possession statute and misdemeanor possession of paraphernalia statute do not sufficiently overlap to trigger the protections afforded by the *Shondel* doctrine. The statutes were obviously intended to be fully and separately enforceable.

State v. Rodriguez, 2007 UT 15, 156 P.3d 771 (Reversed) REN* A blood sample was taken from defendant while she was being treated at the hospital, which revealed that she had a blood-alcohol level of nearly five times the legal limit. The court held that the totality of the circumstances justified the extraction of blood from defendant without a warrant, and therefore the court of appeals' decision was reversed. The evidence supported the conclusion that probable cause existed to believe that defendant was intoxicated at the time of the accident was overwhelming: (1) a vodka bottle was found in defendant's vehicle; (2) the officer noted that defendant had slurred speech, bloodshot eyes, and smelled of alcohol when he encountered her in the hospital; (3) the likelihood that the blood draw would detect alcohol was great; and (4) the passenger was expected to die of her injuries. The court declined, however, to grant per se exigent circumstances status to warrantless seizures of blood evidence.

Lafferty v. State, 2007 UT 73, 2007 Utah LEXIS 176 (Affirmed) JNP* The inmate was convicted for the slitting the throats of the two victims, his sister-in-law and her 15-month-old daughter. The inmate later appealed on several grounds. The court held that trial counsel was not ineffective for failing to request that the jury be sequestered because the inmate offered no support for his proposition that reasonable counsel "surely" would have moved to sequester the jury in such a high profile case. The fact that an initially sympathetic juror was excused did not establish prejudice. Furthermore, the court rejected the inmate's claim that trial counsel was ineffective for failing to conduct an adequate mitigation investigation because the inmate presented no proof of evidence tampering or undiscovered exculpatory evidence that would have resulted from a more extensive mitigation investigation. Finally, the court held that trial counsel was not ineffective for failing to object to the prosecutor's statement that punishment for the murder of a 15-month-old baby should be greater than that for murdering an adult.

State v. Eyre, 2007 UT 94, 2007 Utah LEXIS 213 (Reversed and Remanded) MBD*, CMD, JNP, REN–majority MJW*–dissenting The court held that to prevail on a felony tax evasion claim, the State needed to show that a tax was, in fact, due and owing; merely establishing income did not suffice. The existence of a tax deficiency was an element of felony tax evasion under Utah Code Ann. § 76-8-1101(1)(d)(I) (2003 & Supp. 2007). Furthermore, defense counsel was ineffective for failing to object to the absence of a jury instruction identifying a tax deficiency as an element of tax evasion, and the defendant was prejudiced because his defense at trial was that he failed to file his tax returns, not because he was trying to evade a tax but rather because he did not believe he had any tax due and owing. Reversed and remanded for new trial.

State ex rel K.M., 2007 UT 93, 2007 Utah LEXIS 214 (Reversed and Remanded) REN*, CMD, MBD, JNP–majority MJW*–concurring in the result with opinion The petitioner, a juvenile, gave birth to a child and then placed him in her window well. The juvenile court subsequently accepted an admission by petitioner to child abuse homicide. The court held that Utah R. Juv. P. 25, upon which the juvenile court relied in accepting petitioner's admission, failed to afford due process of law to juveniles because it did not mandate that the juveniles understood the nature and elements of the offense to which they were admitting. The inadequate communication of the nature and elements of the offense, which Rule 25 permitted, led the juvenile court to accept a plea that was at odds with the contents of petitioner's admission – she never admitted that the baby was born alive – and was therefore not entered into knowingly. Because the juvenile court did not take steps to ensure an understanding of the nature and elements of the offense and because petitioner did not obtain such an understanding, her admission was not knowing and voluntary.

State v. Haltom, 2007 UT 22, 156 P.3d 792 (Affirmed) REN* Defendant was convicted of distributing material harmful to a minor when he sold an adult video to an underage customer without using "reasonable care in ascertaining the proper age of [the] minor." Utah Code Ann. § 76-10-1206 (2000). The court held that Utah Code Ann. § 76-2-101 allowed the Legislature to specify a mental state that was different from the most commonly used ones like knowing, reckless, or criminal negligence. The Legislature exercised this power legitimately when it inserted the "reasonable care" standard into the text of Utah Code Ann. § 76-10-1206. The domain of ordinary negligence was not limited to civil actions.

State v. Duran, 2007 UT 23, 156 P.3d 795 (Affirmed) REN*, CMD, MBD, JNP–majority MJW*–dissenting Police were called to a complaint that people were smoking marijuana in a trailer. As the officers approached, they were able to detect a faint smell of marijuana. The officers entered without obtaining a warrant because they determined that the evidence was being destroyed since it was being smoked. The court held that the detectable odor of burning marijuana was inadequate, standing alone, to support a reasonable belief that the destruction of evidence was sufficiently certain as to justify a warrantless entry. The aroma of burning marijuana had to be accompanied by some evidence of destruction, as opposed to just casual consumption.

State v. Santana-Ruiz, 2007 UT 34, 2007 Utah LEXIS 70 (Affirmed) REN* Defendant and the victim were quarreling at a party, and the argument resulted in an exchange of blows. Defendant stabbed the victim multiple times, killing him. At trial, defendant's attorney attempted to argue that defendant was legally justified in using deadly force against the victim because he was acting in self-defense. Counsel engaged in misconduct by, inter alia, referencing the victim's excluded toxicology report, referring to nonexistent threats of violence, and attempting to tear a piece of evidence during closing argument. The supreme court determined that defendant did not receive ineffective assistance of counsel under the Sixth Amendment because counsel's actions did not prejudice defendant. Counsel's misconduct (1) was offset by the overwhelming nature of the quality and quantity of evidence presented against defendant, (2) was diminished in its effect because the trial court took great care not to censure counsel before the jury, (3) did not make the State's evidence stronger, but rather improperly bolstered the defense, and (4) did not evoke a reaction from the trial judge that impaired his impartiality.

State v. Reber, 2007 UT 36, 171 P.3d 406 (Reversed and Remanded) MJW* Defendant's son shot and killed a deer and Defendant was convicted of aiding and assisting in the wanton destruction of protected wildlife. The court concluded that defendants were non-Indians who committed victimless crimes within Indian country but not on Indian land and that, therefore, the State had jurisdiction over defendants. Although defendants' crimes took place in Indian country, the land on which those crimes took place was not owned by any Indian or Indian tribe. Because the Ute Tribe neither had, nor claimed, authority to regulate hunting on the land within Indian country at issue in the case, and because the Tribe had no

protected property interest in wildlife, the Tribe was not a victim. Defendants failed to establish that they were Indians. Although defendants claimed to be members of the Uintah Tribe, under federal law, the Uintah Tribe did not have a separate existence apart from the Ute Tribe.

State v. Worwood, 2007 UT 47, 164 P.3d 397 (Reversed) JNP*, CMD, MBD, REN–majority MJW*–dissenting An off-duty highway patrolman stopped defendant's vehicle on suspicion that he was driving under the influence of alcohol. The patrolman detained defendant in the patrolman's truck, drove defendant to the patrolman's home, and conducted field sobriety tests. When defendant failed the tests, the officer arrested him. Although the patrolman's initial stop of defendant was justified under reasonable suspicion, the subsequent detention was needlessly extended when defendant was confined in the truck. Accordingly, the court held that under the Fourth Amendment, the scope of the patrolman's detention exceeded the bounds of a constitutional investigative stop. Because the field sobriety tests were discovered because of the unconstitutional detention, the test results had to be suppressed.

State v. Tiedeman, 2007 UT 49, 162 P.3d 1106 (Affirmed) CMD* MBD*, JNP, REN–writing separately and concurring, but joining all other parts of CMD's opinion MJW*–dissenting Defendant was charged with three counts of murder. The court held that during his interrogation, the officers did not use coercive tactics to gain defendant's Miranda waiver and although he was admittedly intoxicated at the time and was later found to be incompetent to stand trial, his mental state alone, absent some abuse by the officers, was not enough to render his waiver invalid. Defendant's reinvocation of his right to remain silent was ambiguous and the officers were entitled to seek clarification; however, as to the topic about which defendant made it clear that he wanted to remain silent, any statements made in response to questions about that topic were suppressed.

State v. Greuber, 2007 UT 50, 165 P.3d 1185 (Affirmed) CMD* The court held that defendant was not prejudiced by his counsel's failure to investigate certain evidence that might have militated in favor of accepting a plea bargain. Furthermore, defendant suffered no prejudice because he received a fair trial and the trial court did not clearly err in finding that he would not have accepted a plea to murder even if the evidence had been fully investigated. The court found that defendant was aware of the facts that counsel failed to uncover and that his attorneys testified that they did not believe that he would have accepted a plea because he expressed that he did not want to plead guilty to murder and dropping the kidnapping charge would have had only a nominal impact on his sentence.

Benevenuto v. State, 2007 UT 53, 165 P.3d 1195 (Affirmed) MBD* An inmate, a Uruguayan citizen, shot two people, killing one. While in police custody, he confessed to the crimes, but at no point did he inform authorities that he was Uruguayan because he believed he was a U.S. citizen. He was later sentenced to life in prison without parole. In 2002, he learned he was not a U.S. citizen and sought post-conviction relief, which was denied. On appeal, the court held that the inmate's post-conviction request was procedurally barred under the Post-Conviction Remedies Act, Utah Code Ann. §§ 78-35a-101 to -304 (2002 & Supp. 2006). Furthermore, the inmate's trial, post-plea, and appellate counsel were not ineffective under the Sixth Amendment because a reasonable capital defense attorney would not have investigated the inmate's citizenship status, absent the slightest indication that he might not have been a U.S. citizen. Further, the inmate failed to show prejudice, i.e., that, but-for not being notified he could exercise his rights under the Convention, he would have not pleaded guilty.

State v. Austin, 2007 IT 55, 165 P.3d 1191 (Affirmed) CMD* The court determined that the jury instruction given at defendants' trials, read as a whole, properly conveyed the concept of reasonable doubt. There was not a reasonable likelihood that the jury understood the instruction to allow conviction based on proof below beyond a reasonable doubt. Although the court did not think the terms "eliminate" and "obviate" were advisable, their use within an instruction that, taken as a whole, properly communicated the concept of reasonable doubt did not create a constitutional error.

State v. Gardner, 2007 UT 70. 167 P.3d 1074 (Affirmed) REN* Defendant claimed entrapment relating to his conviction for participating in a scheme to smuggle drugs into a prison where he was an inmate. A portion of an informant's cross-examination was missing from the record on appeal. The court of appeals conducted a sufficiency review of the case, despite the fact that some of the record was missing, and did not refer to a reconstructed record under Utah R. App. P. 11(h). After his conviction was affirmed, defendant filed another appeal. The court affirmed and held that the court of appeals did not err in reviewing the case for sufficiency of the evidence without reference to the reconstructed record because the missing evidence was, at best, contradictory impeachment evidence, rather than substantive evidence.

State v. Alinas, 2007 UT 83, 171 P.3d 1046 (Affirmed) MJW* Defendant was convicted of seven counts of Sexual Exploitation of a Minor after he downloaded child pornography on a public computer at the University of Utah Marriott Library. Defendant appealed on several grounds. The court held that the jury instructions were proper in that they only allowed conviction upon a finding that the pornographic pictures contained actual, and not virtual, children. The court also concluded that the images possessed by defendant were clearly of real children, far below the age of majority, and that the pictures were being distributed for the purpose of sexual arousal. Furthermore, the court held that the definition of "sexually explicit conduct" contained in the jury instructions was not erroneous. Additionally, the court held that the prosecution properly limited the scope within which the jury was to consider the adult exhibits; that they were only there to show defendant's sexual attraction to women, contrary to his testimony. Finally, the court held that enlarging the exhibits, while prejudicial, was helpful to the jury in determining whether the subjects were real and were they minors.

State v. Ross, 2007 UT 89, 2007 Utah LEXIS 193 (Affirmed in part/Vacated in part) CMD*, MBD, JNP–concurring in CMD's opinion REN*, MJW–concurring in REN's opinion Defendant was convicted for shooting and killing his ex-girlfriend and shooting and injuring her boyfriend. The court held that when the jury convicted defendant of aggravated murder, the attempted murder of the boyfriend, a necessary element to prove the aggravated murder, merged with the capital felony. Therefore, defendant could only be convicted of aggravated murder, and his conviction of attempted aggravated murder was vacated. The court held that Utah Code Ann. § 76-5-202(1)(b) (2003) was not unconstitutionally vague as applied to defendant because its language was sufficiently clear to give defendant notice that the behavior engaged in was prohibited.

Bluemel v. State, 2007 UT 90, 2007 Utah LEXIS 194 (Reversed and Remanded) MBD* Petitioner pleaded guilty to supplying alcohol to a minor and three counts of rape. Two years after sentencing, petitioner filed an untimely petition for post-conviction relief, claiming that the conviction obtained by the guilty pleas was unlawfully induced because she was taking a number of medications. The court held that error in the Utah R. Crim. P. 11 colloquy during the plea proceeding did not cause the petition for post-conviction relief to fall within the interests of justice exception to the one-year statute of limitations because the failure to strictly comply with Rule 11 was not sufficient to prove that a guilty plea was unconstitutional.

State v. Hales, 2007 UT 14, 152 P.3d 321 (Defendant's conviction vacated and new trial ordered) MBD* Defendant was convicted for shaking the victim, a five-month-old infant, causing him severe brain injuries. Defendant was charged 14 years later, two years after the victim died. On appeal, the court held that defendant's trial attorneys provided ineffective assistance of counsel in failing to retain a qualified expert to examine CT scans of the victim's brain injuries and that failure was prejudicial; therefore defendant was entitled to a new trial. The expert the attorneys called, a forensic pathologist, who was not qualified to testify regarding the CT scans as he admitted that he did not read CT scans in his work. The expert defendant subsequently found opined that the CT scan showed a change in cell structure that took time to develop; if believed by a jury, this evidence would establish that the victim's

injury occurred before he was in defendant's care and may have happened while he was in his mother's care.

State v. Ferguson, 2007 UT 1, 169 P.3d 423 (Affirmed) JNP* A previously uncounseled conviction imposing a suspended sentence could not have been used to enhance a subsequent criminal charge unless defendant had knowingly and intelligently waived his right to counsel. The previous conviction was presumed valid unless defendant was able to rebut it by offering evidence that he did not validly waive the right to counsel.

State v. Norris, 2007 UT 6, 152 P.3d 293 (Affirmed) MJW* The court held that the Communications Fraud statute, Utah Code Ann. § 76-10-1801 (2003), was neither overbroad nor vague. In order to be actionable, the statute required that the communication be made intentionally, knowingly, or with reckless disregard. Further, the statute required that the communication be made in connection with and for the purpose of executing or concealing a scheme or artifice to defraud another, a type of speech not protected by the First Amendment. The court held that not all false speech was criminalized, only speech both knowingly false and part of a scheme to defraud.

State v. Mattinson, 2007 UT 7, 152 P.3d 300 (Reversed and Remanded) MJW* The court found that defendant's knowingly false or fraudulent statements "for the purpose of executing or concealing" a scheme to defraud another did not enjoy any constitutional protection. Therefore, the Communications Fraud statute was not unconstitutionally overbroad. The court held, however, that Utah Code Ann § 76-10-1081(1)(e) was impermissibly vague so as to leave an individual without knowledge of the nature of the activity that was prohibited, and was therefore unconstitutional. The court found problematic the language "other than the obtaining of something of monetary value" in that it was unable to determine what activities or conduct this language was intended to encompass.

Grimmet v. State, 2007 UT 11, 152 P.3d 306 (Affirmed) JNP* The *Johnson* nunc pro tunc resentencing remedy, which was no longer available to criminal defendants, did not permit the inmate to file a motion to withdraw a guilty plea after the jurisdictional deadline established by Utah Code Ann. § 77-13-6(2)(b) (2003). Because the inmate's motion to withdraw was untimely under section 77-13-6(2)(b), the court lacked jurisdiction to consider his challenge to the validity of his guilty pleas.

Taylor v. State, 2007 UT 12, 156 P.3d 739 (Affirmed) CMD* Death row inmate appealed the grant of summary judgment to the State on the inmate's petition for post-conviction relief from his guilty pleas to two counts of criminal homicide. The inmate argued, inter alia, that trial counsel was ineffective for failing to conduct an adequate mitigation investigation. Although the court agreed that trial counsel was ineffective, the error was harmless given the horrendous circumstances of the crime. It was not likely that the jury would have concluded that the mitigating circumstances outweighed the aggravating circumstances.

State v. Spillers, 2007 UT 13, 152 P.3d 315 (Affirmed) CMD* The defendant shot a victim and later argued that he was entitled to have the jury instructed on imperfect legal justification manslaughter. The court held that there was evidence from which a jury reasonably could conclude that defendant was under the influence of extreme emotional distress at the time of the shooting. This evidence included defendant's testimony that he felt nervous and that a blow to his head left him feeling cloudy, dazed, uncomfortable, and scared. Based on the evidence, a jury could choose to believe defendant's version of events and conclude that he was experiencing extreme emotional distress at the time of the shooting for which there was a reasonable explanation or excuse. The failure to instruct on the lesser included offense presumptively affected the outcome of the trial and undermined the court's confidence in the verdict.

State v. Beck, 2007 UT 60, 165 P.3d 1225 (Affirmed) MJW* Defendant was convicted by a jury on three counts of forcible sexual abuse and other lesser charges. The court held that in questioning the defendant about weak points in her testimony in front of the jury exceeded the range of discretion permitted by the rules of evidence and case law. Accordingly, the court held that the trial court committed obvious error by engaging in extensive questioning of defendant before the jury that cast doubt upon defendant's credibility and compromised the judge's role as an impartial, neutral official.

State v. Rhinehart, 2007 UT 61, 167 P.3d 1046 (Affirmed) REN* Defendant argued that the ineffectiveness of her trial counsel caused her to enter her plea and to fail to bring a timely motion to withdraw it. The court found that the relevant statutory requirement contained in Utah Code Ann. § 77-13-6 (2004), i.e., that an attempt to withdraw a guilty plea on appeal must be preceded by a motion before the district court, was constitutional and had jurisdictional effect. Claims of ineffective assistance of counsel raised in the context of challenges

to the lawfulness of guilty pleas were governed by section 77-13-6, and the court was without jurisdiction to consider defendant's claim.

State v. Powell, 2007 UT 9, 154 P.3d 788 (Affirmed) MBD* The court rejected each of defendant's three arguments on appeal. First, the court held that the erroneous jury instruction given at trial was harmless error. The uncontested evidence demonstrated that defendant attacked a woman with the specific intent to kill. The uncontested evidence would allow the jury only one reasonable conclusion: that defendant intentionally attempted to cause the woman's death. Second, the court held that the district court properly refused to grant defendant's request for a lesser included offense instruction because the State's evidence overwhelmingly supported an attempted murder conviction, so there was no rational basis in the evidence presented at trial for the district court to grant the request for a lesser included offense instruction for assault or aggravated assault. Finally, the court held that there was no cumulative error.

ADMINISTRATIVE CASES

Sindt v. Retirement Bd., 2007 UT 16, 157 P.3d 197 (Reversed and Remanded) CMD* The constable argued that he was entitled to participation in the state retirement system for all years in which he acted as an elected or appointed constable for the county. The court held that constables were eligible for participation in the state retirement system under the Utah Public Employees' Retirement Act (1965 Act), Utah Code Ann. §§ 49-1-32 to -73 (Supp. 1965, repealed 1967), if they received "compensation," as defined in the act.

Dep't of Human Servs. v. Hughes, 2007 UT 30, 156 P.3d 820 (Reversed and Remanded) MBD* Department of Human Services employee was fired after it was determined that he violated the Hatch Act by running for a seat on the Utah House of Representatives while working for the department. The court found that the Department may voluntarily comply with the Hatch Act and make personnel decisions accordingly, and the State Board had authority to review such decisions made by the Department or any other state agency. The Hatch Act contained no explicit statement that reflected an intent to preempt state law, and the Department did not have to first obtain an advisory opinion from the Office of Special Counsel officially determining that the employee had violated the Hatch Act before terminating employment.

Martinez v. Media Paymaster, 2007 UT 42, 2007 Utah LEXIS 107 (Reversed and Remanded) JNP* In reviewing a disability action, the court concluded that the proper standard for reviewing the Commission's findings that the employee could perform the essential functions of his prior employment and that other work was reasonably available to him was a "substantial evidence" standard. Further, the court held that under the plain language of Utah Code Ann. section 34A-2-413(1), the employee bears the burden of proof because, when section 34A-2-413(1)(b) and (c) were read in context, it was clear that section 34A-2-413(1)(c) delineated the elements an employee was required to prove to meet his section 34A-2-413(1)(b)(ii) burden of establishing that he was permanently totally disabled.

In re Questar Gas, 2007 UT 79, 2007 Utah LEXIS 184 (Affirmed) MBD* Petitioners filed their request to intervene over a year after the parties initiated proceedings and after they entered into a settlement agreement, and their failure to intervene earlier was not for lack of knowledge or notice of the proceedings. The court held that the Public Service Commission properly denied petitioners' motion to intervene under Utah Code Ann. section 63-46b-9(2) because petitioners' request would materially impair the interests of justice and the orderly and prompt conduct of the Commission's proceedings. Furthermore, the court concluded that the petitioners lacked appellate standing to challenge the stipulation and therefore their petition was dismissed because: (1) although ratepayers were aggrieved by the increase to their gas bill resulting from the Commission's decision, they lacked appellate standing because they had no pecuniary interest in the public utility under Utah Code Ann. section 54-7-15(1) and therefore did not fall within the classes of persons to whom standing was granted; and (2) the stockholders lacked appellate standing because they were not aggrieved or substantially prejudiced by the Commission's decision.

Salt Lake City Corp. v. Ross, 2007 UT 4, 153 P.3d 179 (Affirmed) REN* A police officer's participation in the take-a-car-home program conferred sufficient benefits on the city to make participating officers eligible for workers' compensation benefits under most circumstances, and those benefits had not ebbed away by the time the officer's patrol car struck another vehicle outside the boundaries of the city.

Ameritemps, Inc. v. Utah Labor Comm'n, 2007 UT 8, 152 P.3d 298 (Affirmed) MJW* The court held that a finding of permanent disability under Utah Code Ann. § 34A-2-413 (2004) constituted a final agency action for purposes of appellate review. Specifically, the court concluded that although a Commission finding pursuant to section -413 of permanent total disability was not final under that statute until certain second-step proceedings took place, such a finding did constitute a final agency action within the meaning of Utah Code Ann. section 63-46b-14 for purposes of appellate judicial review.

PROCEDURAL CASES

State ex rel S.M., 2007 UT 21, 154 P.3d 835 (Affirmed) MBD* Because of abuse and neglect, the mother's 11 children were removed from her custody. Nine of the children were subsequently returned to her. On appeal, the Guardian ad Litem (GAL) contended that the juvenile court applied the wrong legal standard and erred by excluding an expert witness. The court first determined that the permanency order was final for purposes of appellate review because it terminated the custody of the state agency over the children and awarded custody to the mother. With respect to the legal standard, the court agreed with the GAL that the juvenile court was required to determine in accordance with Utah Code Ann. section 79-3a-312(2)(a) whether the children could safely be returned to the mother. Finally, the court held that the juvenile court erred in excluding the GAL's expert witness as untimely under Utah R. Juv. P. 20A(h)(1), but that the error was harmless and not a violation of the children's due process rights because the testimony was cumulative.

Aaron & Morey Bonds & Bail v. Third Dist. Court, 2007 UT 24, 156 P.3d 801 (Petition Denied) JNP* A notice of non-appearance was sent to the surety regarding a bail bond that had been posted. The notice, however, did not contain the fax number of the prosecutor's office. The surety argued that this was required under Utah Code Ann. § 77-20b-101(1)(b) (2003). The court determined that section 77-20b-101(1)(b) merely required substantial compliance with its terms; the fax number requirements set forth therein were directory rather than mandatory. The statute's plain language did not require that number in the notice, the provision requiring the number was not in the section dealing with relief from the obligation, and the fact that alternative notice was permitted showed that strict compliance was not necessary to fulfill the statute's purpose.

Olseth v. Larsen, 2007 UT 29, 158 P.3d 532 (Certified question answered in the affirmative) MBD* Appellant was shot by a police officer while trying to steal his police vehicle. Appellant claimed an alleged 42 U.S.C.S. § 1983 violation based on her allegation of unlawful use of deadly force. On certification from the Tenth Circuit, the court determined that the plain language of the tolling statute, Utah Code Ann. § 78-12-35 (2003), provided that the applicable statute of limitations was tolled where a defendant had left the state, or was absent. As a result, the tolling statute did toll the four-year statute of limitations even where the officer was amenable to service of process pursuant to Utah's long-arm statute.

Beddoes v. Giffin, 2007 UT 35, 158 P.3d 1102 (Affirmed) MBD* The court held that a motion for an award of costs, filed after the entry of judgment, delays the entry of judgment for the purposes of appeal until the motion is resolved.

Code v. Dep't of Health, 2007 UT 43, 162 P.3d 1097 (Reversed) CMD* The court held that the order signed by the district court was the entry of final judgment for appeal purposes. The plain language of Utah R. Civ. P. 7(f)(2) (2006) required that an order be filed, unless a court explicitly directed that no order needed to be submitted. Accordingly, no finality was ascribed to a memorandum decision or minute entry for purposes of triggering the appeal period.

State ex rel A.F., 2007 UT 69, 167 P.3d 1070 (Affirmed) CMD* The court held that the juvenile court's order terminating reunification services and setting a permanency goal of adoption was not a final, appealable order.

State ex rel C.L., 2007 UT 51, 166 P.3d 608 (Reversed) JNP* The court held that a failed adoption did not qualify as "newly discovered evidence" because it was not evidence of facts in existence at the time of trial. Future developments relating to predictive testimony given at trial were facts occurring subsequent to trial and therefore could not constitute a basis for a rule 59(a)(4) motion for a new trial.

Gardner v. Galetka, 2007 UT 3, 151 P.3d 968 (Affirmed) MBD* An inmate was convicted of, inter alia, first-degree murder. The trial court wrongly defined the term "knowingly" in a jury instruction about mens rea, but the inmate failed to raise the issue until he filed a federal habeas corpus petition where he claimed that his counsel was ineffective for failing to challenge the instruction. The court held that in 1990, the inmate's successive post-conviction claim regarding the ineffective assistance of counsel would have been procedurally barred because it could have been brought in the prior post-conviction proceeding. The good cause common law exceptions to the procedural bar were unavailable to the inmate because his successive post-conviction claim was facially implausible and therefore would have been summarily dismissed without substantive review on its merits.

FAMILY LAW CASES

Jones v. Barlow, 2007 UT 20, 154 P.3d 808 (Reversed) JNP*, MJW, MBD, REN–majority CMD*–dissenting Defendant and plaintiff, who were domestic partners, had a child through artificial insemination. They later ended their relationship. Defendant objected to the district court's order granting plaintiff visitation of defendant's daughter because plaintiff had no biological or legal relationship with the child, and therefore had no standing to seek visitation. The court held that the doctrine of in loco parentis, as recognized by Utah courts, did not independently grant standing to seek visitation after the in loco parentis relationship had ended. The court also declined to extend the common law doctrine of in loco parentis to create standing where it did not arise out of statute. The supreme court accordingly overturned the grant of visitation rights and held that the common law doctrine of in loco parentis did not independently grant standing to seek visitation against the wishes of a fit legal parent.

In re Connor, 2007 UT 33, 158 P.3d 1097 (Affirmed in part/vacated in part) MJW* The court held that the trial court acted within its discretion when it concluded that the father had strictly complied with the requirements of Utah Code Ann. § 78-30-4.14 (2003) and that he therefore had standing to contest the adoption. The court also concluded that absent a determination that the father was an unfit parent, he had a right to full legal and physical custody of the child that was superior to rights of the adoptive parents. With the status of failed-adoptive parents, the adoptive parents became legal strangers to the child, and the trial court had no authority to vest in them anything other than the most transitory custody and guardianship of the child.

State ex rel B.R., 2007 UT 82, 171 P.3d 435 (Vacated the opinion of the Court of Appeals) CMD* The mother had her parental rights terminated due to neglect and unfitness resulting from her struggle with methamphetamine abuse. The court found that the juvenile court acted within its discretion in terminating the mother's parental rights. The court also held that the juvenile court's use of the clear and convincing evidentiary standard at the permanency hearing was proper.

Thurnwold v. A.E., 2007 UT 38, 163 P.3d 623 (Affirmed) MBD*, JNP, REN, Judge William A. Barrett (for CMD)–majority MJW*–dissenting The parties' child was born prematurely on Saturday morning of Labor Day weekend, and the mother relinquished the child for adoption on Sunday morning. The father did not file his paternity petition and register notice prior to the child's birth, and was unable to do so after the birth until Tuesday because the court offices were closed for the holiday. The court held that unwed fathers had a constitutional right to a post-birth opportunity to assert paternity. The court held that Utah R. Civ. P. 6 applied to enlarge the filing period until the end of the next business day in cases where the unwed father would not otherwise receive a full business day to file post-birth because part or all of the 24-hour period fells on a holiday or weekend.

PROFESSIONAL MISCONDUCT CASES

In re Discipline of Crawley, 2007 UT 44, 164 P.3d 1232 MBD* The court declined to adopt specific guidelines regarding the use of probation as a sanction for attorney disciplinary matters because the district courts had the discretion to impose probation as they saw fit under the Standards for Imposing Lawyer Sanctions. The court concluded that the the standards permitted flexibility and creativity in assigning sanctions.

Fugal v. Howard, 2007 UT 88, 171 P.3d 451 (Per Curiam) The court held that because other legal remedies were available, the petition for a writ of extraordinary relief was denied.

Peters v. Pine Meadow Ranch Home Ass'n, 2007 UT 2, 151 P.3d 962 MBD* Petitioners' counsel accused the court of appeals panel of judicial misconduct. The court noted that to make bald and unfounded accusations of judicial impropriety in briefs filed with the court was not the appropriate avenue should a lawyer be faced with genuine judicial misconduct. Counsel's unfounded accusations regarding the supposed improper motives of the court of appeals panel were irrelevant to the questions upon which the court granted certiorari. Further, those accusations were scandalous in that they were defamatory and offensive to propriety. Counsel's briefs included a substantial amount of material that was offensive, inappropriate, and disrespectful, and his conduct violated Utah R. App. P. 24(k) and warranted sanctions.

1. Case summaries are provided for the convenience of the reader, to identify what each case generally involves. They are not a definitive statement of the court's holding, nor can they substitute for a careful reading of the opinion.
2. Asterisk indicates the author of the opinion. Chief Justice Christine M. Durham–CMD, Associate Chief Justice Michael J. Wilkins–MJW, Justice Ronald E. Nehring–REN, Justice Jill N. Parrish–JNP, Justice Matthew B. Durrant–MBD. Unless otherwise noted, all decisions are unanimous.

2007 Decisions from the Utah Court of Appeals

CRIMINAL

State v. Davis, 2007 UT App 13 (Improper Jury Instructions and Improper Testimony as to Statutory Elements of the Crime) Defendant was convicted of possession of drugs and drug paraphernalia, and for possession of a dangerous weapon by a restricted person. Acting on a tip from an informant, agents of Adult Probation and Parole went to a hotel room in St. George, Utah. The agents found drug residue, drug paraphernalia, and an unloaded SKS assault rifle – but no ammunition – in the room. Defendant was present in the hotel room and admitted to using drugs and that his fingerprints would be on the gun, although it was not his. After a jury trial, defendant was convicted of all three offenses. Defendant's sentence was enhanced because the drug crimes were committed in a "drug free zone." *See* Utah Code Ann. § 58-37-8.

On appeal, defendant claimed, among other things, that the trial court erred: (1) by instructing the jury that a bicycle path is a "public park" as a matter of law; and (2) by allowing defendant's parole officer to testify that defendant's handling the riffle met the definition of "possession" for purposes of the criminal statute.

The Utah Court of Appeals agreed that the jury should have been permitted to decide whether the predicate drug crime occurred in a protected area as defined by the statute. Consequently, it was improper to instruct the jury, as a matter of law, that the bicycle path was a public park and the appellate court reversed the enhancement of defendant's drug convictions. The court of appeals also agreed with defendant that the trial court had exceeded its discretion by permitting the parole officer to render an impermissible legal conclusion related to the statutory definition of "possession" of the firearm. By testifying that defendant's fingerprints on the riffle "obviously mean he handled it" and that possession is "to hold or to have it in your hands under your control," the officer applied the facts of the case to the statutory elements of the crime and rendered an improper legal conclusion.

Disposition: Reversed and remanded for a new trial on all three charges.

West Valley City v. Fieeiki, 2007 UT App 62 (Rule 410, Utah Rules of Evidence) This is the first Utah case to establish the proper standard of review when considering a trial court's decision whether statements were made "during plea discussions" for the purposes of Utah Rule of Evidence 410. The Utah Court of Appeals concluded that it would defer to the trial court's factual determinations but grant no deference to the ultimate conclusion. Thus, the trial court's decision that statements were or were not made during plea discussions is reviewed for correctness.

This is also a case of first impression for how a court should analyze whether statements were made during plea discussions. The court of appeals adopted the *Robertson* test, which holds that whether a statement is made during plea discussions turns on "[1] whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and [2] whether the accused's expectation was reasonable given the totality of the objective circumstances." *See United States v. Robertson,* 582 F.2d 1356, 1366 (5th Cir. 1978). The less apparent a defendant's subjective intent is under the test's first prong, the more carefully the court must review whether the defendant's expectation was reasonable under the second prong. The court of appeals agreed with the trial court – that defendant did not show an actual subjective expectation of plea discussions – and therefore did not reach the second prong, the reasonableness of defendant's expectation.

Disposition: Affirmed.

Pleasant Grove City v. Orvis, 2007 UT App 74 (Jurisdiction from Justice Court) Orvis was convicted in a justice court of operating a business without a license. The trial court affirmed. Orvis then appealed to the Utah Court of Appeals. He argued the city had selectively enforced the ordinance in violation of the Fourteenth Amendment and Section 24 of the Utah Constitution.

The court of appeals dismissed for lack of jurisdiction. Under Utah Code section 78-5-120(7), the court of appeals only has jurisdiction over proceedings originating in the justice court if the constitutionality of the ordinance is at issue. Orvis's appeal did not challenge the city's ordinance. Instead, it "challenged only the constitutionality of the City's" *enforcement*. Accordingly, the court of appeals lacked jurisdiction.

Disposition: Dismissed.

State v. Doran, 2007 UT App 119 (Custodial Interrogation) Defendant was convicted of aggravated sexual abuse of a child, based in part on his own confession. On appeal, defendant claimed the trial court erred when it refused to exclude his confession on Fifth Amendment grounds. The Utah Court of Appeals upheld the trial court's ruling, specifically concluding that the confession was not obtained during custodial interrogation. The court emphasized that defendant had voluntarily entered the police station, was interviewed in an unlocked room by a plain-clothes officer, was asked only a few clarifying questions, and was free to leave after the interview.

Disposition: Affirmed.

State v. Cabrera, 2007 UT App 194 (Right to Counsel) Defendant pleaded guilty to two counts of Driving Under the Influence (DUI) with injuries, a class A misdemeanor. At sentencing, the trial court suspended the majority of the jail time and placed defendant on probation for thirty-six months. The conditions of probation included a requirement that defendant pay restitution. Defendant was represented at all times, except for a final restitution hearing.

On appeal, defendant argued that the trial court violated his Sixth Amendment right to counsel by going forward with the final restitution hearing despite his lack of counsel. The court of appeals emphasized that sentencing is a critical stage of the criminal proceedings and that restitution hearings are part of sentencing. Accordingly, the court ruled that "a criminal defendant has the right to counsel at a separate restitution hearing when restitution is ordered as part of a sentence that also includes actual or suspended jail time." The restitution order was, therefore, held invalid.

Disposition: Affirmed in part, reversed in part, and remanded.

State v. Vos, 2007 UT App 215 (Cert. Denied) (Miranda) Defendant was suspected of murder, retained an attorney (Butcher), and surrendered to the police. Defendant was not questioned or given *Miranda* warnings at the time of his arrest. Five days later, Butcher informed the police that defendant wanted to make a statement and was waiving his *Miranda* rights. Defendant then confessed to the murder. He subsequently obtained new counsel and moved to suppress the confession under *Miranda*. The judge denied suppression, and

defendant was convicted of murder.

The court of appeals affirmed. *Miranda* limits police use of statements obtained during custodial interrogation. However, the court recognized that "*Miranda* warnings" are not the only means of safeguarding an individual's protected rights. Another sufficient safeguard is the presence of legal counsel. In this case, defendant's counsel was present during the custodial interrogation. Accordingly, defendant's rights were protected and suppression was not necessary.

Disposition: Affirmed.

State v. Mitchell, 2007 UT App 216 (Rule 24(b), Utah Rules of Criminal Procedure) Defendant was convicted of theft and filed a one-paragraph motion for a new trial. He did not support his motion with affidavits or other documentation. One month later, defendant filed a request for an extension of time in order to submit evidentiary support. He then submitted two affidavits. The trial court denied defendant's motion, based in part on its untimely filing. Defendant appealed.

The court of appeals concluded that defendant failed to comply with rule 24 of the Utah Rules of Criminal Procedure and, therefore, affirmed. Rule 24(b) provides that "a motion for a new trial…shall be accompanied by affidavits or evidence." Additionally, "[a] motion for a new trial shall be made no later than 10 days after entry of the sentence." A party can seek an extension of the ten-day period, but must do so prior to its expiration. Defendant filed a motion that lacked the evidentiary support dictated by Rule 24(b). He then failed to request an extension until weeks after the deadline had passed.

Disposition: Affirmed.

Salt Lake City v. Christensen, 2007 UT App 254 (Defining Instances When Assault of an Off-Duty Police Officer Will Constitute a Crime) The Utah Court of Appeals reviewed whether an officer – who was privately employed as a hospital security guard – was acting within the scope of his authority as a peace officer at the time he was assaulted by defendant – who had come into the emergency room as a result of a domestic violence incident. The court concluded that the officer was acting within the scope of his authority at the time. In so doing, the court rejected a bright-line rule and adopted the test that there is a strong presumption that if a person assaults a uniformed officer, he or she will be responsible under Utah Code section 76-5-102.4. Specifically, the court reasoned that when defendant took a defensive stance, clenched his fists, and threatened violence, the officer's role as a hospital security guard changed into that of a peace officer. He was acting as an officer when he subdued defendant and stopped things from escalating – even though he was "off duty" – because his response was meant to preserve law and order, and to prevent the occurrence of a crime.

Disposition: Affirmed.

State v. Biggs, 2007 UT App 261 (Reasonable Articulable Suspicion for a Traffic Stop) This case presented the issue of whether a computer check revealing the possibility that one's car is uninsured sufficiently supports the necessary "reasonable, articulable suspicion" under the Fourth Amendment that allows an officer to stop that vehicle. Defendant – the owner who was riding as a passenger in her car at the time of the incident – argued that the officer did not have reasonable suspicion because the computer check did not reveal whether the

then – unknown driver was legally insured by way of an operator's policy.

The Utah Court of Appeals disagreed, holding that Utah law requires a car owner to maintain an owner's insurance policy on his or her car, regardless of whether the driver of said car has an operator's insurance policy. *See* Utah Code Ann. §§ 31A-22-303(1)(a), 41-12a-301(2)(a), -302(1)-(2). Therefore, the officer had a reasonable, articulable suspicion that owner defendant had committed an offense based on the fact that the computer check – which has an accuracy of up to approximately 98% – revealed that she most likely did not have an owner's insurance policy. The fact that the officer was uncertain about whether defendant was driving her car or whether the driver had an operator's policy only meant that the officer did not have probable cause. Despite the uncertainty, reasonable, articulable suspicion did exist to support the officer's level – two investigatory stop of defendant's car so that the officer could dispel or confirm that suspicion.

Disposition: Affirmed.

State v. Wengreen, 2007 UT App 264 (Cert. Denied) (Defendant's Motions Based Upon Failure of Alleged Victim to Produce Medical Records) Defendant was convicted of sexual abuse of a minor (K.S.). On appeal, defendant claimed that the trial court erred in denying, among other things: (1) his motion for compelling compliance with a subpoena duces tecum seeking K.S.'s medical records, and (2) his motion for a new trial based on newly discovered evidence.

The Utah Court of Appeals decided that defendant could not compel production of K.S.'s medical records because he did not meet the reasonable certainty test – that (1) records existed, and (2) they were reasonably certain to contain exculpatory material – based upon defendant's general claim that the evidence in K.S.'s medical records might be exculpatory. The court also determined that the test for new evidence, *see State v. James,* 819 P.2d 781 (Utah 1991), was not met even though some of the evidence could not have been discovered with due diligence before trial – prong one of the *James* test – and there was no indication that the evidence would have been cumulative – prong two of the *James* test. However, the third prong was not satisfied because the evidence defendant was seeking would not make a different outcome probable upon retrial.

Disposition: Affirmed.

State v. Dennis, 2007 UT App 266 (Reasonable Articulable Suspicion for Search of Purse) Officers saw a black truck roll through a stop sign at 3:00 a.m. The truck had previously been at a motel frequented by drug dealers. Officers stopped the truck and ran warrant checks on the driver and the passenger (defendant). Neither occupant had a warrant, although both had been involved in previous drug and burglary offenses. When the officers returned to the truck, they noticed a disconnected stereo amplifier, rolling papers, a drug pipe, and loose baggies. Defendant also concealed a black item that looked like the handle of a gun or knife. Officers then ordered defendant out of the truck and obtained the black item – a coin purse full of marijuana. Defendant moved to suppress the evidence obtained during the stop. The trial court denied the motion, and defendant appealed.

The court of appeals ruled that "officers may permissibly detain a stopped driver for investigative questioning unrelated to the traffic stop if the further detention and questioning is supported by reasonable suspicion of more serious criminal conduct." The court acknowledged that, viewed separately, the facts in this case would not create reasonable suspicion. However, when taken in combination they could support a finding of reasonable suspicion. Nevertheless, the court did not determine whether probable cause actually existed in this case because defendant failed to adequately brief the issue. Accordingly, the trial court's ruling was affirmed.

Disposition: Affirmed and remanded.

State v. Cahoon, 2007 UT App 269 (Cert. Granted) (Double Jeopardy) The State charged defendant with aggravated sexual abuse of a child. Defendant then filed a motion to dismiss based on the running of the applicable statute of limitations. The trial court dismissed these charges with prejudice, but also allowed the State to file an amended information, which charged defendant with simple sexual abuse of a child, a lesser included offense for which the statute of limitations had not run based on the very same conduct. Defendant then pleaded guilty.

On appeal, defendant argued that the charges in the amended information should have been dismissed on grounds of due process and double jeopardy under the Utah and United States constitutions. The Utah Court of Appeals agreed, holding that under double jeopardy jurisprudence, the dismissal of the original information "was a decision of substantive law" and the acquittal on the originally filed charges barred later prosecution of the lesser included offenses.

Disposition: Reversed.

State v. Leber, 2007 UT App 273 (Cert. Granted) (Rules 404 and 405, Utah Rules of Evidence) Leber was convicted of child abuse, a second degree felony. On appeal, defendant claimed that the trial court exceeded its discretion by admitting his prior crimes and bad acts in response to defendant's introduction of evidence concerning the victim's propensity for violence. In addressing the question of whether the trial court complied with the requirements of Utah Rule of Evidence 404(b) before admitting testimony of defendant's prior bad acts under rule 405, the Utah Court of Appeals explained that defendant misunderstood the relationship between rules 404(a) and (b), and 405(a) and (b). Because this was an issue of first impression for Utah, the court of appeals referred to federal cases interpreting rules 404 and 405. *See State v. Webster,* 2000 UT App 238, ¶ 22 n.1, 32 P.3d 976. The court determined that there is no requirement that the trial court engage in a rule 404(b) analysis prior to addressing rule 405 where evidence is admitted under rule 404(a).

Disposition: Affirmed.

State v. Irvin, 2007 UT App 319 (Victim in a Robbery Must Be a Person) Defendant was convicted of two counts of aggravated robbery for holding up a convenience store. He took money and small items from the store, as well as the store clerk's car keys. He then fled in the clerk's car. The trial court ruled that two robberies had occurred because one form of property belonged to the convenience store, and one form belonged to the store clerk. Thus, there were two victims and two acts of aggravated robbery.

On appeal, the Utah Court of Appeals agreed with defendant that only one robbery occurred because the victim in a robbery must be a person. The robbery statute, Utah Code Ann. § 76-6-301, requires that property be taken from a person's "immediate presence" and "against his will." Further, a person or robbery victim must suffer "force or fear," and a convenience store cannot. The court also rejected the State's argument that two aggravated robberies occurred because two separate aggravating circumstances were met. Specifically, defendant used a dangerous weapon and took an "operable motor vehicle." *See id.* § 76-6-302. The court noted that "the fact that a defendant may commit more than one aggravating act does not mean that two aggravated robberies occurred."

Disposition: Reversed.

State v. Worthen, 2007 UT App 370 (Cert. Filed) (Rule 506(b), Utah Rules of Evidence) Defendant was charged with sexual abuse of his adoptive daughter. He denied that he had committed the crime and requested that his daughter's privileged mental health records be reviewed by the trial court in camera, which was granted. The State appealed the trial court's ruling, contending that (1) the court failed to determine that the records fell within an exception to the physician-patient privilege, (2) the records do not in fact pertain to an element or claim of the defense and therefore are not excepted under Utah Rule of Evidence 506(b), and (3) defendant did not establish with reasonable certainty that the records contained exculpatory material evidence.

The Utah Court of Appeals held that the trial court correctly followed *State v. Cardall,* 1999 UT 51, 982 P.2d 79, which requires that a defendant show an exception to rule 506(b) and establish with reasonable certainty that the records contain exculpatory evidence. The court next concluded that a motive for daughter to fabricate the abuse was an element of defendant's defense because it would bring doubt to the State's contention that he committed the crime, even if such a motive is not an element of the offense charged and even though defendant may have been seeking the records for impeachment purposes. Also, the court explained that it is more likely than not that the evidence of motive exists and the records will contain exculpatory evidence favorable to defendant.

Finally, the court held that defendant does not have to prove that the evidence he seeks is material, he merely has to show that the records he seeks exist and more likely than not contain favorable exculpatory evidence.

Disposition: Affirmed (except that the trial court should personally review the records).

CIVIL

Bluffdale City v. Smith, 2007 UT App 25 (Rule 7(c)(3)(B), Utah Rules of Civil Procedure) Bluffdale moved for summary judgment. In contravention of rule 7(c)(3)(b) of the Utah Rules of Civil Procedure, Smith's memorandum in opposition "failed to contain a verbatim restatement of Bluffdale's stated facts…and did not cite to any relevant materials, such as affidavits or discovery materials." Accordingly, the trial court accepted Bluffdale's statement of facts and granted summary judgment. Smith appealed.

The court of appeals acknowledged that rule 7 violations are deemed harmless when the "disputed facts [a]re clearly provided in the body of the memorandum with applicable record references." However, Smith's memorandum failed to provide "a coherent explanation" of any factual dispute and also failed to provide citations to supporting affidavits or evidence. Accordingly, Smith's violations of rule 7 were not harmless, and the trial court's grant of summary judgment was affirmed.

Disposition: Affirmed.

White v. Randall, 2007 UT App 45 (Failure to Object/Admission by Acquiescence) White owned the lower portion of a thirty-seven-acre area; Randall owned the upper portion.

White's irrigation water flowed across Randall's land. Randall's land also contained a pond in which White used to store his irrigation water. Randall removed the pond, and White sued for violation of his easement rights. The trial court ruled in Randall's favor. However, the court relied on maps that had not been introduced by either party. White appealed.

On appeal, the court cautioned that a trial court cannot go outside of the evidence when making its findings. In this case, however, White consented to the trial court's use of the maps. The trial judge had expressly informed the parties of the maps and intimated that an objection from either party would be sustained. White did not object and, in fact, used the maps to present his arguments during the hearing. Because of White's acquiescence, the trial court's ruling was affirmed.

Disposition: Affirmed.

Woods v. Zeluff, 2007 UT App 84 (Rule 403, Utah Rules of Evidence) After an unsuccessful foot surgery, defendant (doctor) told plaintiff (patient), "I jumped the gun," "I've missed something," and "I don't think we should have done this surgery." Doctor requested that patient's testimony about these statements be excluded at trial, and the trial court granted doctor's motion pursuant to rule 403 of the Utah Rules of Evidence.

The Utah Court of Appeals reversed, on the ground that the testimony regarding the statements was not *unfairly* prejudicial and was highly probative. Furthermore, the statements would not likely shift the fact finder's attention toward an improper method or reason for making its determination, i.e., based on bias or emotion. *See State v. Maurer,* 770 P.2d 981, 984 (Utah 1989). Thus, there was no more than a slight risk of unfair prejudice, which did not substantially outweigh the evidence's clear probative value. Given that the statements were central to patient's case, the error in excluding them was prejudicial.

Disposition: Reversed and remanded for a new trial.

Smith v. Bank of Utah, Inc., 2007 UT App 89 (Negligence/Duty of Care) The issue in this case was whether defendant (bank) owed Smith an affirmative duty to ensure that its customers' use of a drive-through exit did not create an unsafe condition for those using the sidewalk. The Utah Court of Appeals addressed whether the special-use driveway duty – that an abutting landowner has a duty to keep a public sidewalk safe for the public when it makes special use of that sidewalk – applied to the bank.

The court concluded that the special-use driveway duty did not apply where it was the bank's customer's negligence that caused injury rather than an actual physical sidewalk defect created or maintained by the bank. Therefore, the bank did not have a duty to keep Smith safe from its customer's negligence where no special relationship between Smith and the bank existed.

Disposition: Affirmed.

Sachs v. Lesser, 2007 UT App 169 (Cert. Granted) (Finder's Fee for Sale of Real Estate Company's Stock Through Unlicensed Broker) Sachs brought an action claiming he was entitled to a finder's fee for a transaction culminating in the purchase of all the outstanding stock of a publically-traded company involved in leasing, developing, and selling real property. The trial court granted summary judgment in favor of defendants, in part, on the grounds that Sachs's action was barred by the Utah Real Estate Brokers Act (UREBA), Utah Code Ann. §§ 61-2-1 to -27, because he was not licensed as a Utah real estate broker at the time of the sale. The trial court concluded that the company's only significant assets were real property and therefore only a licensed real estate broker could collect a commission related to its sale. The trial court also granted summary judgment on the alternative ground that the commission claim was barred by the statute of frauds. *See* Utah Code Ann. § 25-5-4(1)(e) (stating that "every agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation" is "void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement").

The Utah Court of Appeals agreed with the trial court that an express contract for a finder's fee was not enforceable where the parties did not have a meeting of the minds on the essential term of the commission or fee to be paid and that summary judgment was appropriate on that claim. The appellate court held, however, that summary judgment was inappropriately granted on the claim for contract implied in fact because, taking the evidence in the light most favorable to the nonmoving party, the disputed facts could support each of the elements of that claim: (1) defendants requested performance, (2) Sachs expected to be paid, and (3) defendants knew or should have known that Sachs expected to be compensated. The court of appeals also held that the breach of contract claim was not barred by UREBA, which did not apply to a transaction involving the sale of corporate stock as opposed to real property. Likewise, because corporate stock is personal rather than real property, the court of appeals held that Sachs's claim for a finder's fee was not barred by the statute of frauds.

Disposition: Affirmed in part, reversed in part, and remanded.

Volvo Commercial Fin., LLC v. Wells Fargo Bank, NA, 2007 UT App 209 (Cert. Denied) (Lowest Intermediate Balance Rule) Volvo financed Debtor's purchase of vehicles and obtained a security interest in the vehicles and the proceeds. Debtor's funds, which included the vehicle proceeds, were held in a Wells Fargo account. Debtor experienced financial difficulties and transferred a total of $2,000,000 from the Wells Fargo account to a different bank. Debtor later transferred $900,000 back into the Wells Fargo account to cover a negative balance. Volvo filed suit against Wells Fargo, claiming a secured interest in the $900,000 transfer.

The trial court granted Wells Fargo's motion for summary judgment on the ground that the Lowest Intermediate Balance Rule (LIBR) generally presumes that funds withdrawn from a commingled account are the trustee's personal funds. Accordingly, the trial court found the $2,000,000 transferred out of the Wells Fargo account and the $900,000 which was transferred back into the account were not identifiable as proceeds belonging to Volvo. The court of appeals reversed and ruled that the LIBR is not applicable when the withdrawn funds remain in the trustee's control.

Disposition: Reversed and remanded.

Evans v. Langston, 2007 UT App 240 (Cert. Denied) (Rule 32, Utah Rules of Civil Procedure) The Evanses brought a wrongful death claim against Langston, a certified registered nurse anesthetist. At trial, the court denied the Evanses' request to read from the deposition of their designated expert because they had the responsibility of bringing the witness to court. Langston, however, was permitted to read from the same witness's deposition transcript because the witness was "unavailable" to Langston. The trial court also refused to allow a second expert to testify on causation of death for the Evanses.

On appeal, the Evanses claimed that the trial court erred by (1) by refusing to allow them to read from the deposition of their expert, and (2) by precluding a second expert from testifying on causation. The Utah Court of Appeals disagreed. First, under rule 32 of the Utah Rules of Civil Procedure, a party may not use a deposition if "it appears that the absence of the witness

was procured by the party offering the deposition." Here, the Evanses had "affirmatively caused their expert witness not to appear." The court noted that this holding comported "with a trend among courts interpreting rule 32 of the Federal Rules of Civil Procedure…to require litigants to make a reasonable effort to bring out-of-state expert witnesses to trial." Second, the trial court did not err by precluding the Evanses' expert witness from testifying on causation. The witness was an anesthesiologist, and the decedent died of a "cardiac event." The court followed the general rule that "a practitioner of one school of medicine is not competent to testify as an expert in a malpractice action against a practitioner in another school."

Disposition: Affirmed.

Eldridge v. Farnsworth, 2007 UT App 243 (Cert. Denied) (Lis Pendens Not a Wrongful Lien) The buyers signed a real estate purchase contract to purchase the sellers' ranch contingent on obtaining financing. Buyers claimed that the agreement later changed to an oral lease with an option to buy, because the buyers could not get a favorable loan. Before either the sale or the lease took place, the sellers sold the ranch to a third party at a higher price. The buyers recorded a lis pendens against the ranch and sued for specific performance or damages. The sellers counterclaimed for damages, arguing that the lis pendens was a wrongful lien.

On appeal, the Utah Court of Appeals upheld the trial court's finding that, by their actions, the parties had abandoned the original sales contract, making specific performance, damages, and attorney fees unavailable. The appellate court also affirmed the trial court's conclusion that the statute of frauds barred the buyers' claim for specific performance of the oral lease option and further held that the trial court properly denied as untimely the buyers' third motion, under Utah R. Civ. P. 15(b), to amend the pleadings to conform to the evidence. Finally, the court of appeals rejected sellers' argument that sections 78-40-2 and 78-40-2.5 of the wrongful lien statute conflict, explaining that section 78-40-2 applies from the time the complain is filed until a lis pendens is initially recorded and that section 78-40-2.5 governs lien removal after that point. Finally, the court held that the lis pendens was authorized because the requirements under section 78-40-2 had been met: (1) there was an action pending, which (2) affected the title to or possessory right of the property. Therefore, the lis pendens was not a wrongful lien and the sellers were not entitled to treble damages, attorney fees, or costs.

Disposition: Affirmed.

Tom Heal Commercial Real Estate, Inc. v. York, 2007 UT App 265 (Real Estate Commission Under Lease-Purchase Agreement) Defendants entered into a listing agreement with Heal to sell or lease a commercial property. The agreement provided that if "the Property is sold to a tenant during the term of the lease," defendants were to pay Heal a 6% commission. Two years into its lease, Mountainland Advanced Technology Center (MATC) decided to purchase the property. However, MATC did not have legislative authority to own property, so Alpine School District (Alpine) actually made the purchase. Alpine then leased the property to MATC on a lease-to-own basis. Heal filed suit seeking a 6% commission from the sale. The trial court ruled in Heal's favor, determining that MATC was, in substance, the actual purchaser of the property. York appealed.

The court of appeals agreed that MATC was, in substance, the purchaser of the property. MATC acted as the party purchasing the property by: negotiating the terms of the purchase, asking Alpine to act as financier, facilitating the purchase through the Lease-Purchase Agreement with Alpine, etc. On the other hand, Alpine's actions were consistent with those of a financier. For example, Alpine never exercised a possessory right in the property. Accordingly, the trial court's ruling was affirmed.

Disposition: Affirmed.

Suazo v. Salt Lake City Corp., 2007 UT App 282 (Governmental Immunity Act) Suazo fell and was injured while hiking on city property. In an effort to comply with the Governmental Immunity Act (the Act), Suazo mailed notice of the claim to Rowley – the agent listed by Salt Lake City (city) with the Utah Department of Commerce (department). However, three days before Suazo's notice was served, the city designated a new agent with the department. The city moved to dismiss Suazo's claim under the Act. The trial court denied the motion, and the city appealed.

The court of appeals reversed. The Act mandates that "[a]ny person having a claim against a governmental entity…shall file a written notice of claim with the entity before maintaining an action." Utah Code Ann. § 63-30d-401(2). Under the Act, notice may be sent either to the city clerk or to the city's agent, as listed in the department's database. If sent to the agent actually listed with the department, the city cannot claim notice was sent to the wrong person. However, Rowley was not the city's designated agent at the time Suazo's notice was served. Accordingly, the court reversed and directed the trial court to dismiss the action.

Disposition: Reversed and remanded with directions to dismiss.

Maak v. IHC Health Servs., Inc., 2007 UT App 244 (Cert. Denied) (Duty to Pay Coinsurance) Maak received $11,396.11 worth of treatment at one of IHC's hospitals. IHC billed Maak's insurance, Regence, which paid IHC $12,310.36 pursuant to an existing reimbursement contract. IHC then billed Maak $986.63 as a coinsurance payment. Maak paid IHC under protest and then filed suit for, inter alia, breach of contract. The trial court found IHC was entitled to recover Maak's coinsurance amount and, therefore, granted IHC's motion for summary judgment.

The Utah Court of Appeals reversed. The court examined the contract between IHC and Maak, the contract between Maak and Regence, and the contract between Regence and IHC. After construing any ambiguities in these contracts against the drafting party, the court held "that as a matter of contract law, IHC could not bill Maak for medical services after it had collected the full amount chargeable for those services from Maak's insurer." Accordingly, the trial court's grant of summary judgment on this issue was reversed.

Disposition: Reversed in part and affirmed in part.

Olsen v. Olsen, 2007 UT App 296 (Social Security Benefits as Marital Assets) After a twenty-five-year marriage, the Olsens divorced. The trial court included the present value of wife's social security benefits as a marital asset. Wife appealed.

The Utah Court of Appeals held that while Congress preempted state courts from including social security benefits as a marital asset, trial courts may still consider the benefits along with the other marital circumstances when determining a property division. In other words, trial courts may consider "social security benefits when fashioning a property division, although they [cannot] classify and divide the social security benefits as marital property." Because the trial court classified and divided wife's social security benefits as marital property, the court reversed and remanded.

Disposition: Reversed and remanded.

Centennial Inv. Co. v. Nuttall, 2007 UT App 321 (Cert. Filed) (Notice of Interest/Wrongful Lien) A formerly married couple owned property in joint tenancy. The former husband entered into a Real Estate Purchase Contract (REPC) with buyer. The former wife (wife) was not involved in the negotiations and did not execute the REPC. Nevertheless, the former husband (husband) represented to buyer that he had the authority to enter into the contract on behalf of his wife. When buyer learned that the parties had divorced, it tried unsuccessfully to obtain former wife's signature on the REPC. Subsequently, husband and wife sold the property to a third party at a slightly higher price in a transaction that paid a real estate commission to husband's sister. Buyer sued for fraud and breach of contract against both of the former spouses and filed a notice of interest against the property. Wife filed a motion to dismiss the complaint and also sent a letter to buyer's counsel demanding release of the notice of interest.

The trial court treated the motion to dismiss as one for summary judgment, entering judgment in favor of both former spouses on the breach of contract claim and in favor of wife on the fraud claim. The court also granted wife's motion to nullify the notice of interest as a wrongful lien pursuant to Utah Code Ann. § 38-9-7, awarding wife treble damages and attorneys fees. Upon certification of the order in favor of wife as final under rule 54 of the Utah Rules of Civil Procedure, buyer appealed.

The Utah Court of Appeals affirmed the trial court's judgment on the breach of contract claim, explaining that buyer offered to purchase and husband offered to sell the joint interest in the property. Consequently, the REPC was ineffective to convey that interest without wife's signature and therefore no binding contract was formed. The court of appeals also agreed with the trial court that the notice of interest was a wrongful lien because buyer filed a notice claiming an interest in the entire property rather than an interest only in husband's divided interest.

With respect to whether wife was entitled to treble damages and attorneys fees, the court of appeals panel was split. The majority held that service of notice to remove the lien on counsel for buyer was sufficient to trigger treble damage and attorneys fees. *See* Utah Code Ann. § 38-9-4(2). The dissent would not have awarded treble damages or attorneys fees because the letter requesting removal of the notice of interest was served on counsel for buyer, rather than "delivered personally or mailed to the last-known address of the lien claimant." *Id.*

Disposition: Affirmed.

Specht v. Big Water Town, 2007 UT App 335 (Standing) The Pyles applied for and obtained a variance of certain zoning requirements in order to construct a garage. Shortly thereafter, the town revised one of its zoning ordinances without publishing notice of the town meeting. Specht filed suit, challenging both the Pyles' building permit and the new ordinance. However, Specht did not allege or prove that he suffered a distinct injury. The Utah Court of Appeals ruled that ownership of property located in the municipality, by itself, did not confer standing and dismissed the appeal.

Disposition: Dismissed.

Ward v. IHC Health Servs., Inc., 2007 UT App 362 (Cert. Denied) (Circular Indemnity and Lack of Meaningful Relief) Ward's husband suffered brain injuries while undergoing an operation. Ward settled with the anesthesiologist's employer, Mountain West. As part of the settlement, Ward agreed to indemnify Mountain West for any future claims regarding the operation. Ward then brought claims against the hospital, which were based on the anesthesiologist's negligence. The hospital filed a third-party complaint against Mountain West, seeking indemnity. Mountain West moved for summary judgment, claiming that the two indemnity agreements made it so Ward could not obtain meaningful recovery. The Utah Court of Appeals affirmed the trial court's grant of summary judgment after determining that "[w]hen such circular patterns of indemnity develop…courts resolve the matter by denying recovery to [the] plaintiffs."

Disposition: Affirmed.

Markham v. Bradley, 2007 UT App 379 (Objective Reasonableness Standard for Covenant of Good Faith and Fair Dealing) This is the first case to address the extent to which the express language of a seller-financing provision in a real estate purchase contract negates the protections afforded by the covenant of good faith and fair dealing. Where such a provision gives the sellers discretion to reject the buyers' financial information, but does not provide any express standard for exercising that discretion, the Utah Court of Appeals held that the covenant imposes an objective standard of reasonableness. Thus, the trial court correctly applied that standard when it determined that sellers breached the covenant by refusing to accept buyers' financial information the day before it was due to sellers under the parties' contract. The court also held that the trial court did not exceed its discretion in denying sellers' motion for a new trial because the unchallenged findings of fact supported the trial court's conclusion that sellers breached the covenant when they first refused buyers' financial information and later evaluated but still rejected it as a pretext to cancel the contract.

Disposition: Affirmed.

Nature's Sunshine Prods., Inc. v. Watson, 2007 UT App 383 (Trust Deed Dragnet Clause) This is the first case to address the extent to which a trust deed's dragnet clause will secure new indebtedness. The dragnet clause in defendant's First Trust Deed (original trust deed) secured "payment of all obligations now or hereafter arising pursuant to or otherwise related or connected to [the original trust deed]."

The Utah Court of Appeals concluded that the dragnet clause – when read with the modification clause – clearly limits the right to modify the original trust deed and, thus, subsection 7.0(b) of the Restatement (Third) of Property: Mortgages applied rather than subsection 7.0(c). Therefore, the court held, when the debtor entered into a new loan with a new lender in an amount more than sixteen times greater than the original home equity line of credit, it was too remote from the original trust deed to be considered a mere extension or modification. Because the new loan was not related to the original trust deed, nor did it arise pursuant to the original trust deed, that new loan did not have priority over either the original trust deed, or plaintiff's trust deed (which was subordinate to the original trust deed). The court reached its conclusion by applying section 7.0(b) of the Restatement (Third) of Property because the new loan was outside the scope of the modification clause and materially prejudiced plaintiff.

Disposition: Affirmed.

Fox v. Brigham Young Univ., Inc., 2007 UT App 406 (Rule 803(4), Utah Rules of Evidence) Fox fell down the stairs located at BYU's Harman Building. Fox indicated to BYU's emergency medical technicians (EMTs) that she felt her right knee go out and that she had previously been diagnosed with osteoarthritis. These statements were transcribed in a report, which Fox signed. Fox brought suit against BYU, and the parties disagreed about the admissibility of the EMTs' reports.

On appeal, the court acknowledged an inconsistency between Utah Code section 78-27-33, which limits an adverse party's ability to obtain a statement from an injured person, and Rule 803(4) of the Utah Rules of Evidence. Because the supreme court has the constitutional authority to adopt rules of evidence, the court of appeals determined that section 78-27-

33 was repealed to the extent that it was inconsistent with the Utah Rules of Evidence. Accordingly, the court held that the statements Fox made for the purposes of medical diagnosis and treatment were admissible.

Disposition: Affirmed.

ADMINISTRATIVE

Merrill v. Labor Comm'n, 2007 UT App 214 (Cert. Granted) (Workers' Compensation Offset Provision Is Constitutional) As a matter of first impression for the Utah appellate courts, the Utah Court of Appeals reviewed the constitutionality of an offset provision of the Workers' Compensation Act. Petitioner (Merrill) became permanently disabled before he turned sixty-five. At that time, Merrill's social security disability benefits automatically converted to social security retirement benefits, although the amount he was receiving remained the same. However, in August 2007, Merrill was set to receive $550 less in combined workers' compensation and social security benefits. *See* Utah Code Ann. § 34A-2-413(5) (requiring that after six years, workers' compensation disability benefits must be reduced by half of the dollar amount of social security retirement benefits received by the individual during the same period).

Merrill then filed a Motion for Review concerning the constitutionality of Utah Code section 34A-2-413(5), which the Utah Labor Commission denied. He argued that section 34A-2-413(5) is only triggered by a disabled individual's receipt of social security retirement benefits at age sixty-five and, therefore, it reduces workers' compensation benefits based solely on age.

The court affirmed the Commission's denial, holding that section 34A-2-413(5) does not violate the equal protection clause of either the Federal or Utah Constitution because (1) it creates a reasonable classification given that disabled sixty-five-year-olds receive overlapping wage replacement awards for one lost wage, and employers fully contribute to fund workers' compensation and contribute equally with employees to fund social security; and (2) that classification is rationally related to legitimate legislative objectives – i.e., avoiding duplication of disability benefits and reducing employers' workers' compensation insurance premiums.

Disposition: Affirmed.

Blauer v. Dep't of Workforce Servs., 2007 UT App 280 (Requests for Reconsideration and Time for Appeal) In 2004, DWS terminated Blauer's employment. A DWS hearing officer and the Career Services Review Board (CSRB) both reviewed and affirmed Blauer's dismissal. Twenty-two days after CSRB issued its final decision, Blauer submitted a request for reconsideration which was denied as untimely. Five days after this denial, and thirty-four days after CSRB's original order, Blauer filed a petition for judicial review.

On appeal, Blauer argued the court had jurisdiction because Blauer filed his petition for judicial review within thirty days after receiving the denial of his request for reconsideration. The court of appeals acknowledged that requests for agency reconsideration generally toll the time period for seeking judicial review, but ruled that an untimely request for agency review will not be given this same effect. Accordingly, Blauer's petition was dismissed as untimely.

Disposition: Affirmed and dismissed.

Prosper, Inc. v. Dep't of Workforce Servs., 2007 UT App 281 (Clarification of the Residuum Rule) After her termination from employment, Katrina Iversen filed for unemployment benefits, which were denied on the ground that her employer showed she was fired for just cause. Iversen appealed, and the administrative law judge reversed and awarded benefits. The Workforce Appeals Board subsequently approved the award of benefits, refusing to consider employee testimony and written records as evidence of customer complaints against Iversen on the basis that such evidence was hearsay.

The Utah Court of Appeals held that such evidence was not hearsay because it was not introduced for the truth of the matter asserted, but merely to show that customers had in fact lodged complaints. The evidence therefore should have been considered by the Appeals Board in determining whether the employer had met its burden of proof. The court clarified the residuum rule announced in *Mayes v. Department of Employment Security,* 754 P.2d 989 (Utah Ct. App. 1988), as follows: "findings of fact 'cannot be based exclusively on *inadmissible* hearsay evidence' because admissible hearsay evidence is" sufficiently competent. *Prosper,* 2007 UT App 281, ¶ 11 (quoting *Mayes,* 754 P.2d at 992). Because the complaints were admissible and not offered for the truth of the matter asserted, they did not violate the residuum rule.

Disposition: Reversed and remanded.

Pinnacle Homes, Inc. v. Labor Comm'n, 2007 UT App 368 (Workers' Compensation/Statutory Employer) Glen Ebmeyer was injured while working on the roof of a house owned by Pinnacle, who contracted with Platinum Builders to roof the house. Neither company had workers' compensation insurance, but the Utah Labor Commission's administrative law judge decided that both were responsible for paying Mr. Ebmeyer's workers' compensation claims. The Commission's Appeals Board affirmed that decision. The issue on appeal was whether the Appeals Board correctly determined that Pinnacle was Mr. Ebmeyer's statutory employer under the Utah Workers' Compensation Act. *See* Utah Code Ann. § 34A-2-103(2)(a).

First, the Utah Court of Appeals concluded that Pinnacle's directors were employees under section 34A-2-104(4)(c), because it never provided written notification to its insurance carrier that it did not want to include them as employees, and that therefore Pinnacle was a statutory employer. The court's decision was based on sections 31A-21-104(9), 34A-2-104(4), and 34A-2-103(7), which, read together, ensure that organizations do not use the corporate form to shield themselves from their responsibilities under the workers' compensation system.

Second, the court concluded that Mr. Ebmeyer was Pinnacle's employee for the purposes of workers' compensation benefits. The court refused to apply the "right to control" test, stating that it is not appropriate when considering whether an employer is a statutory employer. Instead, the test is whether Pinnacle retained supervisory power over Platinum's ultimate performance per *Bennett v. Industrial Comm'n,* 726 P.2d 427, 432 (Utah 1986), an inference of which is created where "a subcontractor's work is a part or process of the general contractor's business." *Id.* The court determined that Mr. Ebmeyer was Pinnacle's employee because Pinnacle hired Platinum as a subcontractor and Mr. Ebmeyer was Platinum's employee. The inference that Pinnacle had supervisory control over Platinum arouse because Platinum's roofing work was "a part or process" of Pinnacle's business, and the record established Pinnacle's supervision and control over Platinum and Mr. Ebmeyer. Thus, the Appeals Board correctly compelled Pinnacle to – along with Platinum – pay Mr. Ebmeyer's workers' compensation claims.

Disposition: Affirmed.

For many of these cases, Judge McHugh was not the author or even a member of the panel that issued the opinion. The actual decisions are the best statement of their facts and holdings. Judge McHugh acknowledges the invaluable assistance of her law clerks, Therese Huhtala, Mitchell Stephens, and Noah Hoagland in preparing these summaries.

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	/ /	☐ Yes ☐ No	
	/ /	☐ Yes ☐ No	
	/ /	☐ Yes ☐ No	
	/ /	☐ Yes ☐ No	

Area(s) of Practice (List % of Each)

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Arbitration/Mediation	___	Estate/Probate/Wills/Trusts	___	Copyright/Trademark	___
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During the last 5 years have any Professional Liability claims been made against the firm or any of its members? ☐ Yes ☐ No If yes, please provide details to include expenses and indemnity paid, description of allegation.

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Notice of Legislative Rebate

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

2008 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2008 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, September 15, 2008. The award categories include:

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

View a list of past award recipients at: www.utahbar.org/members/awards_recipients.html

Mail List Notification

The Utah State Bar sells its membership list to parties who wish to communicate via mail about products, services, causes or other matters. The Bar does not actively market the list but makes it available pursuant to request. An attorney may request his or her name be removed from the third party mailing list by submitting a written request to the licensing department at the Utah State Bar.

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.

Pro Bono Honor Roll

Andres Alarcon – Family Law Clinic
Kenneth Allsop – Divorce Case
Erin Arnold – Guadalupe Clinic
Lauren Barros – Family Law Clinic
Jonathan Benson – Guadalupe Clinic
M. James Brady – Divorce Case
Janell Bryan – Consumer Case
Bryan Bryner – Guadalupe Clinic
Steven Burt – Foreclosure Scam Case
William Carlson – Family Law Clinic
Carol Castleberry – 2 Family Law cases
David Castleberry – Guardianship case
David S. Dolowitz – Custody case
L. Mark Ferre – JAG default eviction
Robert Froerer – Divorce Case
Chad Gladstone – Family Law Clinic
Jason Grant – Protective Order Calendar
Steven Gunn – Child Custody Case
Kathryn Harstad – Guadalupe Clinic
Lou Harris – Bankruptcy Hotline
Rori Hendrix – QDRO
April Hollingsworth – Guadalupe Clinic
John Holt – Custody Case
Kyle Hoskins – Farmington Clinic
Jarrod Jennings – Family Law Clinic
Nathan Jeppsen – Debt Collection Case
Anthony Kaye – Foreclosure Scam Case
Louise Knauer – Family Law Clinic
Catherine Labatte – Divorce Case
Suzanne Marelius – Family Law Clinic
Leilani Marshall – Guadalupe Clinic
Craig McArthur – Adoption Case
Sally McMinimee – Family Law Clinic
Stacy McNeill – Guadalupe Clinic
Lillian Meredith – Spanish Provo Clinic
Jennifer Neeley – Protective Order Calendar
Matthew Olsen – Divorce Case
Todd Olsen – Family Law Clinic
Brandon Owen – DV Divorce Case
Doug Owens – Habeas
Jeffrey RobRoy Platt – Divorce Case
Robin Ravert – Family Law Clinic
Stewart Ralphs – Family Law Clinic
Victoria Ryder – Family Law Clinic
Brent Salazar-Hall – Family Law Clinic
Roy Schank – Bankruptcy Hotline
Lauren Scholnick – Guadalupe Clinic
Kathryn Steffey – Guadalupe Clinic
Steven Stewart – Guadalupe Clinic
Linda F. Smith – Family Law Clinic
Virginia Sudbury – Family Law Clinic
Travis Terry – Spanish Provo Clinic
Pamela Thompson – Family Law Clinic
Aaron Tillmann – Guardianship Case
Carrie Turner – Family Law Clinic
Huy Vu – Family Law Clinic
Murry Warhank – Guadalupe Clinic
Frank Warner – Housing Case
Renon Warner – Family Law Clinic
Tracey Watson – Family Law Clinic
Curtis White – Divorce Case
James F. Wood – Estate matter

Utah Legal Services and the Utah State Bar wish to thank these volunteers for taking a case or helping at a clinic in the last four months. Call Brenda Teig at (801) 924-3376 to volunteer.

Mailing of Licensing Forms

The licensing forms for 2008-09 have been mailed. Fees are due July 1, 2008; however fees received or postmarked on or before July 31, 2008 will be processed without penalty.

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

If you need to update your address information, please submit the information to Jeff Einfeldt, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. You may also fax the information to (801)531-9537, or e-mail the corrections to Jeff.Einfeldt@utahbar.org.

Notice of Petition for Reinstatement to the Utah State Bar by Russell T. Doncouse

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 for Reinstatement and Affidavit of Compliance ("Petition") filed by Russell T. Doncouse in *In the Matter of the Discipline of Russell T. Doncouse,* Second Judicial District Court, Civil No. 020900608. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 2008 and ends June 30, 2009. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its May 30, 2008 meeting.

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

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

Telephone: (801) 531-9077
Email: jbaldwin@utahbar.org

Tenth Circuit 2008 Bench & Bar Conference The Broadmoor • September 4 – 6, 2008

The Honorable Carlos F. Lucero, Circuit Judge for the United States Court of Appeals for the Tenth Circuit, is pleased to invite you to attend the *Tenth Circuit 2008 Bench & Bar Conference*.

The 2008 Bench and Bar Conference will be held the week of Labor Day, **September 4-6, 2008**, in Colorado Springs, Colorado at the Broadmoor Hotel. The block for hotel reservations is not yet open, but an announcement will be posted as soon as it is open with favorable room rates for the conference.

- The conference will offer you an opportunity to earn approximately 14 to 16 hours of CLE credits including two hours of ethics credit.
- A welcoming reception will be held Thursday evening at the Penrose House.
- The conference will feature appearances by Justice Stephen Breyer, Jeffrey Rosen, Jan Greenburg, Stuart Taylor, Erwin Chemerinsky, Stephan Saltzberg, Douglas Berman, and many other professionals and experts in their fields.
- The program will offer substantive sessions on: Electronic Discovery Islamic Law, *Daubert* Issues, Indian Law, Developments in Constitutional Law Bankruptcy, Criminal Procedure Criminal Sentencing, The New Tenth Circuit Electronic Judicial Misconduct, Filing Requirements
- Please check our website periodically for updates on the program and other details: http://www.ca10.uscourts.gov/judconf/index.php.

If you have any questions, please call the Judicial Resources team at the Tenth Circuit Office of the Circuit Executive: 303.844.2067 or call these individual team members: Julie 303.335.2826 • Kaitlin 303.335.3038 • Sheila 303.335.3014

Discipline Corner

SUSPENSION
On January 30, 2008, the Honorable Steven L. Hansen, Fourth Judicial District Court, entered an Order of Discipline: Six-Month Suspension suspending Charles W. Hanna from the practice of law, effective February 29, 2008, for violation of Rules 1.5(a) (Fees), 1.5(c) (Fees), 1.7(b) (Conflict of Interest: General Rule), 1.8(a) (Conflict of Interest: Prohibited Transactions), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Hanna represented a client in several matters. Mr. Hanna represented the client on a contingency basis without a written agreement. Prior to the client's death, the client named Mr. Hanna as the personal representative to the client's estate and trustee on the trust for the client. Mr. Hanna also represented the client's company. The client named Mr. Hanna as sole director of the company. Mr. Hanna claims that he and the client also entered into an oral agreement that Mr. Hanna would receive all settlements, if any were obtained by the company from a lawsuit, as payment for his services for the company and personal assistance to the client. The agreement was never put in writing. Mr. Hanna claims that he also loaned the client money although the client did not consent to the terms of the loan in writing. Mr. Hanna did not advise the client about seeking independent counsel concerning the terms of the loan. After the client's death, Mr. Hanna failed to probate the client's will and fund the trust. Mr. Hanna made some distributions but did not complete the estate in accordance with the will or trust. The company received the settlement from the lawsuit after the client's death. Mr. Hanna received the entire amount of the settlement from the litigation. To the extent that the settlement was fee compensation for Mr. Hanna, the fees were excessive as there was no evidence that it was earned. Mr. Hanna failed to timely notify heirs and beneficiaries of the client about the settlement. Mr. Hanna made a misrepresentation by failing to notify an heir of its interest in the estate. Mr. Hanna participated in a settlement that required the client's children to request the withdrawal of the complaint filed with the Office of Professional Conduct by the children's previous attorney as part of a global settlement of a civil lawsuit.

SUSPENSION
On February 21, 2008, the Honorable Stephen Henriod, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Discipline: Suspending Larry G. Reed from the practice of law for 30 days, effective February 21, 2008, for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(b) (Fees), 1.16(d) (Declining or Terminating Representation), 3.2 (Expediting Litigation), 3.3(a)(1) (Candor Toward the Tribunal), 3.4(d) (Fairness to Opposing Party and Counsel), 4.4 (Respect of Rights of Third Persons), 5.1(b) (Responsibilities of a Partner or Supervisory Lawyer), 5.1(c) (Responsibilities of a Partner or Supervisory Lawyer), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In one matter, a client's case was transferred to Mr. Reed's firm. The associate who originally took on the case left Mr. Reed's firm and did not take the client's case. Mr. Reed received all pleadings and correspondence from opposing counsel and failed to respond to a motion for partial summary judgment. Judgment was entered into against the client. The client was notified of the judgment after opposing counsel sent the client a letter stating that the opposing party was pursuing a debt collection action against the client based on the judgment. Mr. Reed told the client he would file a motion to set aside the judgment, which he failed to do. The client was served with a writ of execution. Mr. Reed again told the client that he would file another motion to set aside and an objection to the writ of execution. The client did not receive any documents from Mr. Reed and Mr. Reed did not file any pleadings on behalf of the client.

In a second matter, Mr. Reed failed to cooperate with opposing counsel in setting his client's deposition prior to the client's criminal trial. Opposing counsel made two motions to compel. After the first Motion to Compel was granted because Mr. Reed failed to appear for the hearing, Mr. Reed filed a Motion to Reconsider Order on Motion to Compel and for Sanction. The court reset the matter for another hearing, which Mr. Reed failed to appear for. The court imposed the original order on the original Motion to Compel, which required Mr. Reed and his client to appear for a deposition and granted attorney fees and costs. Mr. Reed and his client failed to appear for the court ordered deposition. Subsequently, opposing counsel sought additional attorneys fees and costs which the court awarded. Thereafter, Mr. Reed filed a notice of withdrawal. Mr. Reed also failed to respond to the Office of Professional Conduct's Notice of Informal Complaint.

In a third matter, Mr. Reed was hired to obtain a TRO to restrain the issuance or registration of shares of stock by a transfer company. Mr. Reed informed the client that the TRO could be obtained within a short amount of time. The client began calling Mr. Reed for status updates after the TRO had not been issued. Many of the calls went unanswered although some communication was done through email. After the TRO was served, the client continued to call Mr. Reed for status updates, many of which went unanswered. The client received an email from Mr. Reed's former secretary that Mr. Reed had moved out of the office and referred the client to another attorney. Thereafter, Mr. Reed filed a withdrawal of counsel. Mr. Reed also failed to respond to the Office of Professional Conduct's Notice of Informal Complaint.

Mr. Reed's misconduct was directly and causally related to a substance abuse problem for which Mr. Reed has had a meaningful period of rehabilitation.

PUBLIC REPRIMAND

On February 25, 2008, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against David VanCampen for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. VanCampen failed to appear at two hearings on behalf of his client, and did not inform his client that he would not be appearing. Mr. VanCampen failed to communicate to the client the basis of his attorney fees, fee arrangement, and the terms of the representation. Mr. VanCampen failed to respond to his client's requests for information and failed to advise the client of the current status of his case so that the client could make informed decisions regarding the representation. Mr. VanCampen failed to adequately communicate to the client or to the court that he was withdrawing and failed to file a withdrawal notice.

RECIPROCAL DISCIPLINE

On January 9, 2008, the Honorable Anthony B. Quinn, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Reciprocal Discipline: Reprimand and Suspension suspending D. Bruce Oliver from the practice of law for a period of one year, effective February 8, 2008, for violation of Rules 3.1 (Meritorious Claims and Contentions), 3.2 (Expediting Litigation), 3.4 (Fairness to Opposing Party and Counsel), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. Subsequent to the order of discipline being entered by the Third District Court, Mr. Oliver filed an appeal with the Utah Supreme Court, which included a

request that his suspension be stayed pending the appeal. The appeal is still pending, however, the Supreme Court denied the motion to stay Mr. Oliver's suspension on February 19, 2008.

In summary:
On April 4, 2007, the United States District Court through its disciplinary process entered a Public Reprimand and Disciplinary Order publicly reprimanding and suspending Mr. Oliver for one year. In at least 18 different cases before the United States District Court, Mr. Oliver violated Rules of Professional Conduct. In some of the cases, Mr. Oliver violated Rule 3.1 and 8.4(a) by filing frivolous complaints, claims and/or contentions. And in other cases Mr. Oliver violated Rules 3.2, 3.4, and 8.4(a) by failing to respond to orders to show cause, failing to respond to proper discovery requests, and failing to withdraw frivolous claims either upon request by opposing counsel or when dispositive motions were filed relative to those claims. Based upon the findings of the U.S. District Court Disciplinary Panel, the Third District Court entered its order of equivalent reciprocal discipline.

PUBLIC REPRIMAND
On February 14, 2008, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against David VanCampen for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In a criminal matter, Mr. VanCampen was hired to help the client enter a plea and file an appeal. Mr. VanCampen failed to communicate to the client the terms of representation, termination, and fee arrangements. Mr. VanCampen failed to notify the client that he would not file the appeal on behalf of the client. Mr. VanCampen did not inform the client of the case status to allow the client to make informed decisions regarding the representation. Mr. VanCampen failed to keep records evidencing any communications or notifications to his client that he was terminating the representation. Mr. VanCampen failed to file a notice of withdrawal. Mr. VanCampen failed to protect and preserve the client's file during an office move in which it was destroyed. Mr. VanCampen also failed to respond to the Office of Professional Conduct's requests for information.

ADMONITION
On February 6, 2008, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was hired to represent a client in a bankruptcy in which an adversary proceeding was initiated against the client. The attorney failed to respond to the client's requests for information or promptly participate in settlement discussions with opposing counsel to protect the client's home from foreclosure. The attorney also failed to respond to the Office of Professional Conduct's requests for information.

PUBLIC REPRIMAND
On February 6, 2008, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Justin K. Roberts for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.16(d) (Declining or Terminating Representation), 3.2 (Expediting Litigation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In divorce proceedings, Mr. Roberts failed to take any action for several months to move the client's case forward. Mr. Roberts failed to communicate with the client. Mr. Roberts failed to include a disgorgement provision in his fee agreement. Mr. Roberts failed to return the unearned portion of the flat fee, failed to return the client's file, and failed to file a notice of withdrawal.

DISBARMENT
On January 25, 2008, the Honorable Glenn K. Iwasaki, Third Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Disbarment disbarring H. Russell Hettinger from the practice of law, effective January 25, 2008, for violation of Rules 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 1.15(d) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In one matter, Mr. Hettinger was hired to represent a client in divorce proceedings. Mr. Hettinger failed to promptly respond to the client's requests for information. Mr. Hettinger informed the client that the divorce could be completed within a short period of time, however, Mr. Hettinger failed to take the necessary steps to finalize it. Mr. Hettinger overcharged his client for the amount of work that he performed. Mr. Hettinger failed to return funds to the client and failed to withdraw in a timely manner. After the client retained a new attorney, Mr. Hettinger failed to communicate with the attorney. Mr. Hettinger also failed to respond to the Office of Professional Conduct's ("OPC") Notice of Informal Complaint ("NOIC").

In a second matter, Mr. Hettinger was hired and paid to prepare a will. After the client paid Mr. Hettinger, no work was performed and the client left several messages for Mr. Hettinger with no return call. Mr. Hettinger also failed to respond to the OPC's NOIC.

In a third matter, Mr. Hettinger was hired to represent a client in a divorce. A month after Mr. Hettinger was hired, the client was unable to contact or communicate with him. The client was forced to hire another attorney. Mr. Hettinger also failed to respond to the OPC's NOIC.

Further, the aggravating factors substantially outweighed the mitigating factors in this case which included Mr. Hettinger failing to participate in the disciplinary proceedings before the district court.

PUBLIC REPRIMAND
On January 24, 2008, the Honorable Judge Randall N. Skanchy, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Discipline: Public Reprimand against Christopher S. Hall for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In a divorce proceeding, the court ordered Mr. Hall to prepare and file an order after a show cause hearing. Mr. Hall failed to prepare and file the order with the court. Mr. Hall failed to promptly reply to requests for information from his client. On it's own motion, the court issued an order to show cause, which Mr. Hall failed to appear. The court dismissed the case. Mr. Hall failed to inform his client of the dismissal. After the client found out the case was dismissed, the client went to Mr. Hall's office to request the client file. Mr. Hall told the client to come back at a later date. Mr. Hall also failed to respond to the Office of Professional Conduct's Notice of Informal Complaint.

ADMONITION
On January 21, 2008, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Admonition against an attorney for violation of Rules 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 3.2 (Expediting Litigation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In a DUI case, the attorney failed to request a hearing with the Drivers License Division within the required time in order to protect the client's commercial license. The attorney led the client to believe that a hearing had been requested. The client's license was suspended for one year. The attorney ultimately refunded the client's fee.

INTERIM SUSPENSION
On March 5, 2008, the Honorable Sandra Peuler, Third Judicial District Court, entered an Order of Interim Suspension Pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability, suspending Cheri K. Gochberg from the practice of law pending final disposition of the Complaint filed against her.

In summary:
On November 2, 2007, Ms. Gochberg pled guilty to and was convicted of Driving Under the Influence of Alcohol/Drugs (with priors) – 3rd Degree Felony, Utah Code Annotated § 41-6a-502 (1953, as amended). The interim suspension is based upon this felony conviction.

SUSPENSION AND PROBATION
On February 6, 2008, the Honorable John Paul Kennedy, Third Judicial District Court, entered an Order of Discipline: Suspension and Probation placing Angela Stander on suspension for a period of two years with a one year probation period to follow, effective March 7, 2008, for violation of Rules 3.3(a) (Candor Toward the Tribunal), 3.4(a) (Fairness to Opposing Party and Counsel), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Ms. Stander falsified a reply memorandum and a declaration due to the court by using the court's night drop box and date-stamping the first pages of the documents. She then edited the documents and filed them at a later date, which led the opposing party and counsel to believe that the documents were filed on the earlier date. The court discovered the back dated documents. After Ms. Stander's employer conducted an internal investigation and determined that the documents were edited after the date stamped date, Ms. Stander misrepresented to her employer that she had filed the documents on the date of the date stamp.

DISBARMENT
On March 13, 2008, the Honorable James L. Shumate, Fifth Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Discipline: Disbarment disbarring Anthony D. Woolf, effective March 13, 2008, from the practice of law in the State of Utah for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(b) (Fees), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Woolf was hired to pursue a malpractice action against a dentist. Mr. Woolf filed his notice of appearance and also sent interrogatories on behalf of his client. Thereafter, Mr. Woolf did not file anything else on behalf of his client and the case was dismissed. Mr. Woolf did not inform his client of the dismissal, advise the client to seek new counsel, and did not return unearned fees to his client. Mr. Woolf failed to respond to the Office of Professional Conduct's Notice of Informal Complaint. Additionally, Mr. Woolf abandoned his law practice as a whole, which included abandoning numerous public defender cases, which caused serious harm to the administration of justice.

ADMONITION
On March 17, 2008, 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 1.4(a) (Communication), 1.15(c) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was retained to represent the client in a divorce action. The attorney's fee agreement was at the least misleading. The attorney failed to place part of the retainer in the attorney's trust account and failed to account for the retainer. For a three-month period the attorney failed to return the client's telephone calls. At the end of the representation, the attorney failed to promptly return the unearned portion of the retainer.

PROBATION
On March 14, 2008, the Honorable Roger S. Dutson, Second Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order placing Stuwert B. Johnson on probation for a period of one year, effective, March 14, 2008, for violation of Rules 1.15(a), (b), and (c) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Johnson failed to keep client property separate from his own. In this respect, Mr. Johnson failed to maintain an attorney trust account. By failing to have a trust account, Mr. Johnson failed to safeguard his client's property. Additionally, Mr. Johnson failed to promptly deliver funds to a third party as well as his client and failed to hold disputed funds in a trust account until the dispute was resolved.

SUSPENSION
On March 12, 2008, the Honorable Wallace A. Lee, Sixth Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Discipline: Suspension suspending Richard L. Musick for a period of one year, effective March 12, 2008.

In summary:
On February 14, 2007, the Court entered Findings of Fact and Conclusions of Law and Order of Discipline placing Mr. Musick on a one-year probation with conditions in lieu of suspension. Mr. Musick failed to meet the conditions of his probation and respond to requests for information from the Office of Professional Conduct.

Wills for Heroes – Providing Valuable Community Service to First Responders

The St. George Wills for Heroes Event
On March 14, 2008, members of the Utah State Bar donated their time and talents to create wills and other estate planning documents for police officers, firefighters, and other first responders in the St. George area through a new pro bono program instituted by the Young Lawyers Division and the Wills for Heroes Foundation®.

Standing: Officer Bangerter, St. George Police Chief Marlon Stratton, Officer Stratton, and Utah Bar Commission members Lori Nelson, Scott Sabey, Steve Owens, Rob Jeffs, Karthik Nadesan, co-founder of Wills for Heroes Foundation, Jeff Jacobson, Nate Alder. Seated: COPS Rocky Mountain Trustee Jan Blaser UpChurch, YLD President Stephanie Pugsley, YLD Exec. Member Michelle Allred, YLD Committee Member Rachel Terry, and Deacon Haymond

Using laptop computers and software on loan from Ballard Spahr Andrews & Ingersoll, LLP, and LexisNexis, as well as document templates created by estate planning attorneys Deacon Haymond of Jones, Waldo, Holbrook & McDonough and Mark J. Morrise of Callister Nebeker & McCullough, attorneys met one-on-one with first responders and their spouses or domestic partners at the St. George Police Station to prepare free basic wills, health care directives, and financial power of attorney documents. Members of the Paralegal Division were also on hand to notarize and witness documents completing the process. Over forty participants left with finalized estate planning documents.

Wills for Heroes Foundation co-founder Jeffrey Jacobson attended Utah's first Wills for Heroes program and praised the YLD for putting on a "flawless event." Said Jacobson, "I watched as the first responders, some hesitant at first, one by one left the event with a clear sense of relief and gratitude knowing that their loved ones are now protected in case the unthinkable should occur."

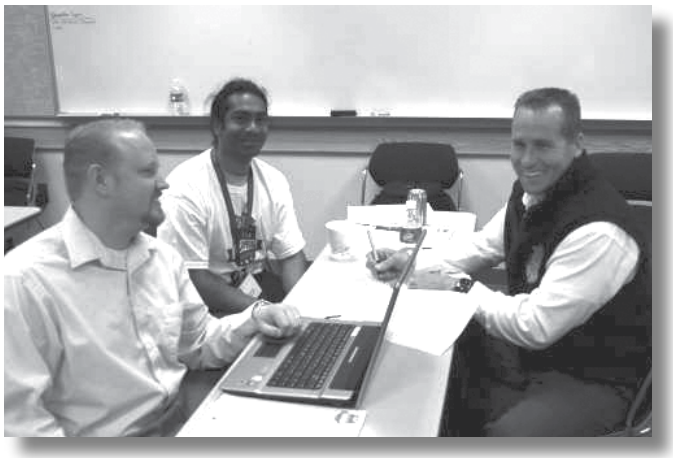
St. George Police Officer Tyrell Bangerter: "This is an awesome program. I've been married for two years and I've thought about doing a will but it was more money than I could spend at the time. This way we get the service for free with no strings attached. The fact is we could be gone any moment, no one knows, and now my estate is at least taken care of if that does happen."

In celebration, St. George Mayor Daniel D. McArthur proclaimed March 14, 2008 as "Wills for Heroes" Day, by presenting a formal Proclamation to Bar President V. Lowry Snow, on behalf of the Young Lawyers Division. A copy of the Proclamation is posted on the YLD Wills for Heroes website.

The Wills for Heroes Foundation®
The Wills for Heroes Foundation® was co-founded by Anthony Hayes and Jeffrey Jacobson following the events of September 11, 2001, after Hayes learned that many of the first responders who died did not have wills. Jacobson explained at the Spring Convention in St. George that experientially, fewer than 80% of all first responders have wills. Since 2001, Wills for Heroes programs have provided more than 7,000 estate planning documents to first responders nationwide. The Wills for Heroes Foundation, a 501(c)(3) charitable non-profit organization, provides support, services, financial assistance and supplies to qualified first responders and their families in the United States. These first responders include firefighters, police officers, paramedics, corrections and probation officers from federal, state, county, city and town departments and agencies, whether actively employed, retired, or serving as volunteers. The Wills for Heroes Foundation

The St. George Police Department training room was the site for the WFH event.

provides the tools, knowledge and relationships with national first responder organizations to help establish Utah's Wills for Heroes program which is sponsored and administered by the Young Lawyers Division of the Utah State Bar. The Wills for Heroes Foundation has an exclusive agreement with LexisNexis to provide free HotDocs® software and development services to all bar associations participating in the program. More information about the Wills for Heroes Foundation is available at www.willsforheroes.org.



WFH volunteer, Karthik Nadesan, YLD President-Elect, and Ivins Police Chief Wade Carpenter

What is a Wills for Heroes Event?

Wills for Heroes programs are unique because they bring pro bono service events directly to the first responders. The Wills for Heroes program pairs attorneys, notaries, witnesses, and first responders at a department training facility or station, on a pre-determined date. A department's limited responsibilities include providing the meeting room and coordinating first responder appointments. Prior to the event, participants download from the YLD website an estate planning questionnaire and bring it completed to the event. Completing the questionnaire ahead of time allows participants to discuss and contemplate important decisions related to their estate plans before the event.

Upon arrival at the event, first responders sign in and execute a waiver. First responders are then assigned to individual attorneys who review the completed questionnaire and input the information into laptops preloaded with the HotDocs® software. The attorney and first responder review the documents together to ensure the person understands and agrees to what they are executing. Once finalized, the documents are signed, witnessed, and notarized in a formal ceremony. In Utah, the entire process usually takes about forty-five minutes to complete. The Wills for Heroes program does not keep a copy of the participant's documents or information.

HotDocs®, Wills for Heroes, and the Morrise Family – a Utah Connection

Wills for Heroes events rely on volunteer attorneys for their success, most of whom have limited estate planning experience or expertise. Thus, a valuable part of the Wills for Heroes program is the training provided to volunteer attorneys in basic trusts and estates law, and a brief training session on the LexisNexis HotDocs® software. HotDocs® takes the complex estate planning templates and transforms them into an easy-to-use "interview" which guides the volunteer attorney through the process to produce an automatically filled-in will or other document. The templates for the Utah trusts and estate documents were painstakingly created with careful attention to the recent 2008 Utah State Legislative session, which passed laws affecting some of these documents as recently as one week before the St. George event. As a result of these changes, HotDocs® was updated to conform to these changes. The Utah State Bar has approved CLE and NLCLE credit for this training.

HotDocs® software's origins date back to a pioneering research project by an undergraduate computer science student, Marshall Morrise. The J. Reuben Clark Law School hired Marshall in 1979 as a programmer on a project to try to bring computers from law firm back-offices to attorney desktops. Marshall and the two professors he worked for, Larry C. Farmer and Stanley D. Neeleman, developed an early-but-high-powered document assembly product called CAPS. In 1987, the dean of the law school invited Marshall to take the CAPS technology and make a commercial go of it. With Farmer and two computer programmers as partners, Marshall launched Capsoft Development. Matt Morrise, Marshall's brother who worked with him at Capsoft, came up with the idea of developing a very simple product that would run inside of WordPerfect (and later, Microsoft Word). Capsoft developed this groundbreaking technology, and HotDocs®, was first released in the fall of 1993. The Morisse brother's company and the HotDocs® technology was subsequently acquired by LexisNexis. Marshall continues to manage the development team that produces HotDocs and other products, all from his Utah home base.

Mark J. Morrise, YLD President, Stephanie Pugsley, WFH Event Co-Chair Rachel Terry and YLD committee member Kurt Hawes

The relationship between Wills for Heroes, HotDocs, and the Morrise family has grown together in an interesting way. When Anthony Hayes began the Wills for Heroes movement shortly after 9/11, the first wills he produced were based on modified versions of his law firm's HotDocs templates. Once Jeffrey Jacobson partnered with Hayes, Jacobson approached LexisNexis seeking a contribution of both HotDocs software and development assistance. At that time, Marshall Morisse's son, Matt Morrise (not to be confused

YLD member Michelle Allred taught the HotDocs portion of the attorney training.

with Marshall's brother Matt), worked for LexisNexis on the HotDocs consulting team and received the assignment to do the Arizona Wills for Heroes documents under Jacobson's direction. After the younger Matt Morrise left LexisNexis to complete his physics degree and prepare for law school (he is now a first-year student at the J. Reuben Clark Law School), Marshall Morrise became the LexisNexis Wills for Heroes point of contact and has since worked closely with Jacobsen and Hayes performing extensive software and template development work.

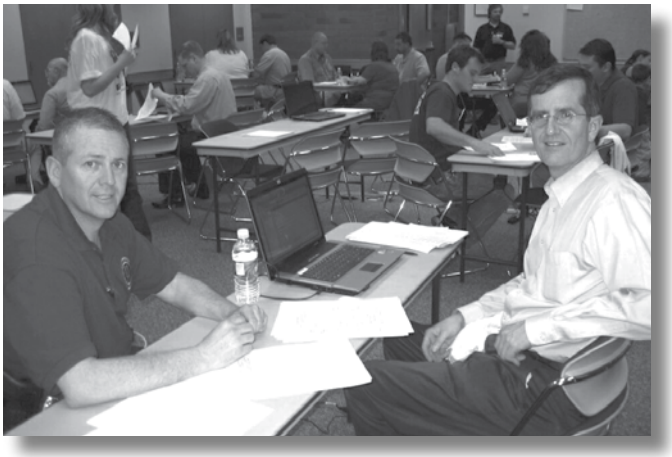
Yet another Morrise is also intimately involved with Wills for Heroes: Mark J. Morrise, a trusts and estates attorney at Callister, Nebeker and McCullough in Salt Lake City. Mark Morisse, a fellow with the American College of Trust and Estate Counsel, past chair of the Estate Planning Section of the Utah State Bar, and member of the Salt Lake Estate Planning Council, was intimately involved in the creation of the HotDocs trusts and estates templates, sample documents and the first Utah Wills for Heroes event. Mark Morrise worked closely with Deacon Haymond in preparing Utah's Wills for Heroes documents, which are being heralded as the new gold standard for new Wills for Heroes programs across the country.

The Morrise family's service is not limited to that of the men. Marshall's daughter Jenny, a recent graduate of BYU with a degree in secondary math education, worked as an intern for LexisNexis and converted the Arizona Will template from HotDocs format to the model document.

Looking Forward – More Utah Wills for Heroes Events. With the ease of use of HotDocs®, attorneys do not need to be trusts and estates specialists to volunteer for a Wills for Heroes event. As such, the Utah YLD is committed to spread Wills for Heroes across Utah as long as attorneys are willing to donate their time and first responders are interested in receiving this service.

Rachel Terry, one of the organizers of the St. George event said, "It's a really great feeling to be able to serve those who serve us. As we take this program across the state, we will be able to use our legal skills to make a tangible impact on the lives of our first responders." The Young Lawyers Division appreciates the leadership of Rachel Terry, Emily Smith, Stephanie Pugsley, and Michelle Allred in getting this monumental project off the ground in Utah. The YLD also appreciates the tremendous support of the Utah State Bar, the Utah Bar Commission, and the Utah State Bar support staff for their commitment to the Utah Wills For Heroes program. The YLD appreciates the generous donations, supplies, and technical support from Ballard Spahr and LexisNexis which made it possible to launch the Wills for Heroes Foundation in Utah.

In recognition of the time spent drafting the trusts and estate documents for Utah's Wills for Heroes program, the Young Lawyers Division created the Mark J. Morrise and Deacon Haymond Wills for Heroes Volunteer Service Award. Recipients are chosen at each Utah Wills for Heroes event for contributing outstanding service and forwarding the purpose of the program. Recipients are recognized on the Young Lawyers Division website. The first four recipients were named during the opening remarks at the Spring Convention in St. George on March 14, 2008. They included: Rachel Terry, Emily Smith, Michelle Allred, and Marshall Morrise for their instrumental contributions in bringing the first Wills for Heroes event to Utah.



St. George first responder and Salt Lake trusts and estates attorney Mark J. Morrise

Attorneys and paralegals interested in volunteering at future events, or for a list of Wills for Heroes events and information, visit the YLD Wills for Heroes website www.utahbar.org/sections/yld/willsforheroes/Welcome.html

If you have a question that was not addressed on the website please contact: Tiffany Brown at tbrown@dadlaw.net or Sarah Spencer at sarahspencer@chrisjen.com

All other Wills for Heroes questions should be directed to YLD President, Stephanie Pugsley at stephanie.pugsley@gmail.com

Contributing: Stephanie Pugsley, Jamie Nopper, Marshall Morisse

Photos: Rachel Terry, Stephanie Pugsley, Lori Nelson

Notary Public Issues

by Fran Fish

As a government commissioned official, the notary public ensures the integrity of a document's execution. A notary who diligently insists on proper identification from and appearance by signers and witnesses, and who follows correct procedures will generally not have any cause to worry about lawsuits. However, notaries could face liability for untruthful or inaccurate statements made in the notarial certificates they complete.

The best safeguards for notaries are accurate record keeping and meticulous adherence to state notarial guidelines. Generally, the notary's responsibility begins and ends with the statements made in the notarial certificate. Exceptions are when notaries know a document they notarize contains false statements or they instigate the execution of documents they know are false.

Recent Changes to Notary Law

The Utah State Legislature made a few changes to the notary code, found in Utah Code Title 46, during its 2008 general session. Specifically, in Senate Bill 114, the Legislature clarified the law to allow a notary public who is also an attorney to notarize a document if the document names the attorney only as representing a signer or another person named in the document. Under prior law, a notary could not notarize any document that named the notary within its text.

House Bill 26, expanded the definition of "satisfactory evidence of identity" to include a passport or other identification issued by the United States government, any state within the United States, or a foreign government. However, the amendment reminds notaries that a driving privilege card is not satisfactory evidence of identity.

Thanks also to House Bill 26, notaries need only notify the lieutenant governor of address changes. Under prior law, notaries bought a new seal whenever they changed addresses. After July 1, 2008, notary seals will include the notary's commission number rather than the notary's address. However, notaries commissioned before July 1, 2008, may continue to use their current seals until their commission expires or an address or name change necessitates purchasing a new seal.

Common Notary Problems

Even the most careful notary faces difficult requests and is often unaware of how to proceed in order to avoid fraud. Notaries familiar with the situations described in this section will be prepared when asked to perform an improper notarization.

Omissions. Many people feel that the notary's signature and seal are sufficient to notarize a document. However, the law requires a notarial certificate that includes specific information for each of the permitted types of notarizations: jurat, acknowledgment, copy certification, and credible witness acknowledgment. Without the certificate, the document becomes unclear raising questions such as: Did the notary witness the signature? When and where did the notarization occur? And, if the document includes multiple signatures, which of the signatures was notarized?

Deceptive certificates. Sometimes, when a document signer's personal appearance before the notary seems too inconvenient, another person will try to add his or her own statement and signature to a document and try to convince the notary that it is OK just to witness the second signature. While the notary has no way to know the authenticity of the original signature, this practice may lead others to incorrectly believe that the document is properly notarized.

FRAN FISH is a Special Assistant to Lieutenant Governor Gary R. Herbert and has worked as the Notary Public Administrator for the State of Utah for the past 21 years.

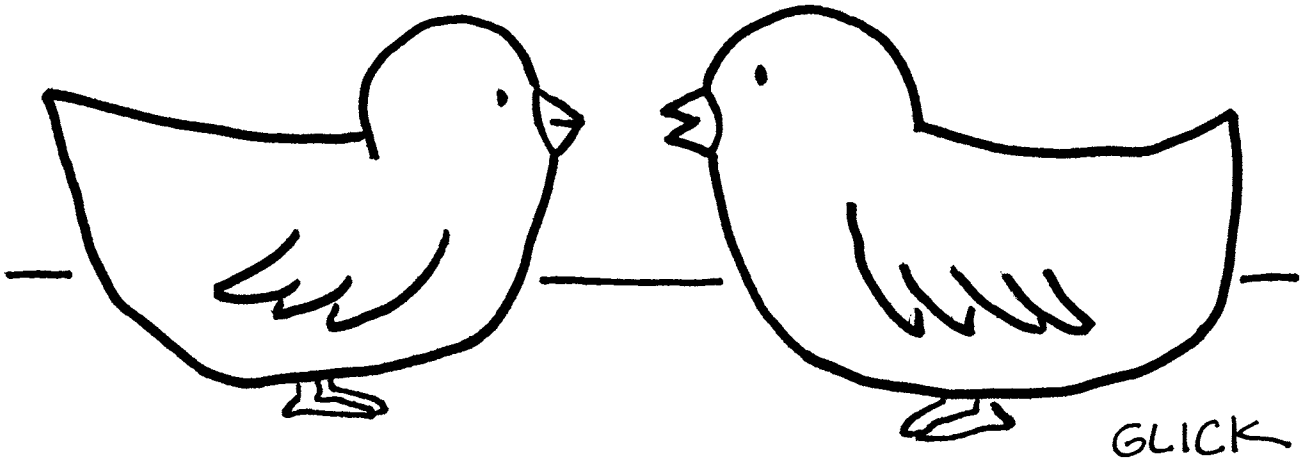
Excessive certification. Employers sometimes ask notaries to certify the information contained in documents. However, notaries certify only the signatures affixed to documents not the content.

Cautions for Notaries

Finally, notaries may find this "do and don't" list helpful in performing their tasks well:

- Don't perform a notarization if the document signer does not appear in person before you at the time of signing. You should not base identification merely upon your familiarity with a signer's signature.
- Don't notarize a document when you are also a signer of the document.
- Don't notarize a document when your name appears in the document unless you are also an attorney and named only as representing a signer or another person named in the document.
- Don't notarize documents or transactions in which you have a disqualifying interest. If you are a beneficiary of or have some financial or other interest in the transaction, ask someone else to provide the notarial service.
- Do feel confident notarizing documents when acting in a professional capacity such as a professional advisor, counselor, agent, or attorney.
- Don't execute a notarial certificate containing false or deceptive statements.
- Do remain an impartial witness to any transaction you notarize.
- Do serve anyone who makes a lawful and reasonable request for notarization.
- Do remember that a notarization does not prove the truthfulness of a document, validate a document, or render it legal.
- Do remember that a notarization provides verification of a document signer's willingness to sign, and that the signer is the person identified by the signature.
- Don't notarize a document if you have any doubt about the signer's identity.
- Do strike and correct and initial any errors you may encounter when completing a notarial certificate on a document.

Jest is for all



"It's not always possible to prepare for what's going to happen at court, but I'm good at winging it."

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
05/06/08	**Poverty Law Series: Part 1.** Cost: Free	3 CLE/NLCLE
05/07/08	**Annual Labor & Employment Seminar** 8:30 am – 12:00 pm. $70 section members, $80 others.	3 including 1 Ethics
05/08/08	**Annual Spring Corporate Counsel Seminar.** 8:30 am – 1:30 pm. $30 section members, $100 others. Location: Utah State Capital, Boardroom.	4 including 1 Ethics
05/13/08	**Annual Banking & Finance Seminar.** 12:00 – 4:00 pm. Cost: TBA	TBA
05/13/08	**Teleseminar – Networking through Facebook™: How to Use Facebook to Advance your Legal Career.** Using Facebook to get to contacts you might not otherwise have.	TBA
05/14/08	**Annual Business Law Seminar.** 8:30 am – 12:00 pm. Cost TBA.	3
05/14/08	**The Mechanics of Trial with Frank Carney and Friends – Session Two.** Salt Lake City Library Auditorium, 4:00 – 7:00 pm. $85 for attorneys within their first compliance term, $100 for all others.	3 CLE/NLCLE per session
05/15/08	**Annual Real Property Seminar.** 8:00 – 1:00 pm. Judicial Update, Legislative Update. $70 section members, $100 others.	5 including 1 Ethics
05/16/08	**Annual Family Law Seminar.** Case Law & Legislative Updates with Sen. Lyle Hillyard and Rep. Lorie Fowlke. Dynamics of Blended Families – a panel discussion with judges and commissioners. 8:00 am – 4:15 pm. $130 section members, $160 others, $80 Paralegal members.	6.5 including 1.5 Professionalism & .5 Ethics
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 Summer Convention – Sun Valley, Idaho** **See brochure in center of this *Journal* for agenda & registration information.**	**TBA**
08/21/08	**NLCLE: Juvenile Law.** 4:30 – 7:45 pm. Pre-registration: $60 YLD members, $80 others. Door registration: $75 YLD members, $95 others.	3 CLE/NLCLE

For further details regarding upcoming seminars please refer to www.utahbar.org/cle

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Bar Member Rates: 1-50 words – $50 / 51-100 words – $70. Confidential box is $10 extra. Cancellations must be in writing. For information regarding classified advertising, call (801)297-7022.

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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.

NOTICES

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