Utah Bar JOURNAL

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Letters Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal,* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters which reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published which (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

Cover Art

Desert Flower, taken on Poison Spider Mesa above Moab, Utah, by first-time contributor John Lund of Salt Lake City, Utah.

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Guidelines for Submission of Articles to the Utah Bar Journal

The *Utah Bar Journal* encourages the submission of articles of practical interest to Utah attorneys and members of the bench for potential publication. Preference will be given to submissions by Utah legal professionals. Submissions that have previously been presented or published are disfavored, but will be considered on a case-by-case basis. The following are a few guidelines for preparing submissions.

Length: The editorial staff prefers articles of 3,000 words or fewer. If an article cannot be reduced to that length, the author should consider dividing it into parts for potential publication in successive issues.

Submission Format: All articles must be submitted via e-mail to barjournal@utahbar.org, with the article attached in Microsoft Word or WordPerfect. The subject line of the e-mail must include the title of the submission and the author's last name.

Citation Format: All citations must follow *The Bluebook* format, and must be included in the body of the article.

No Footnotes: Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial endnotes to convey the author's intended message may be more suitable for another publication.

Content: Articles should address the *Utah Bar Journal* audience – primarily licensed members of the Utah Bar. Submissions of broad appeal and application are favored. Nevertheless, the editorial board sometimes considers timely articles on narrower topics. If an author is in doubt about the suitability of an article they are invited to submit it for consideration.

Editing: Any article submitted to the *Utah Bar Journal* may be edited for citation style, length, grammar, and punctuation. While content is the author's responsibility, the editorial board reserves the right to make minor substantive edits to promote clarity, conciseness, and readability. If substantive edits are necessary, the editorial board will strive to consult the author to ensure the integrity of the author's message.

Authors: Authors must include with all submissions a sentence identifying their place of employment. Authors are encouraged to submit a headshot to be printed next to their bio. These photographs must be sent via e-mail, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

Publication: Authors will be required to sign a standard publication agreement prior to, and as a condition of, publication of any submission.

Giving Generously

by V. Lowry Snow

Bar meetings in Salt Lake City usually begin with a 4:30 AM alarm. My wife has become more accepting of my predawn rustling and rushing to shower and dress before heading out the door to catch the early commuter flight to Salt Lake City. Typically, I use the flight time in review of contracts, pleadings or correspondence – the things that I try to keep up with in a busy practice while still devoting a good measure of time to the fulfillment of my presidential duties. Instead this morning, I'm reflecting on the events of the past year and trying to identify what it is about this experience that has been so rewarding.

The answer lies not so much in my own service, but much more so in appreciating and observing at this level the dedication of so many in our profession who give generously of time and substance to preserve, improve, and promote our legal system. Bar members have logged thousands of volunteer hours by serving in positions of Bar leadership, as members of Bar committees and sections, and in many valuable lawyer organizations outside the umbrella of the organized Bar, including regional and specialty Bars and Associations. These are all made up of volunteers making important contributions to the quality of our profession. Bar operations, including core functions such as admissions, could not continue without dedicated volunteers. Additionally, lawyers donate many hours of service on Supreme Court Committees, Judicial Committees and Legislative committees, all directed and dedicated to the betterment of our system. Volunteer programs and initiatives sponsored by lawyers and paralegals across the state have had an immediate and direct impact in improving the lives of those in need. Pro bono projects, Wills for Heroes, Tuesday Night Bar projects from Logan to St. George, Professional Clothing Drive, Food Drives, Big Brothers and Sisters, and many more programs have improved the lives of many of our citizens. Outside of the mainstream of recognized Bar service, I am aware that lawyers volunteer in other capacities by serving on state boards and commissions, county, city and town boards and commissions, and countless other non-profit organizations and service clubs. Finally, I am mindful of the hundreds of thousands of dollars donated each year by lawyers to such worthy causes as "and Justice for all" to help fund the unmet need of those in our state unable to afford basic legal services.

My service has provided me the perspective of seeing on a much broader scale than I had previously contemplated the length and breadth of the generosity of those in our profession. This isn't to say that there is not more service required and more dollars that are needed, but all who have given so much should be recognized and appreciated. Winston Churchill reminds us that, "We make a living by what we get, but we make a life by what we give."

Thank you for allowing me to serve you and to stand at a place for a time where I have been able to see the good that you do. I encourage those who are so engaged to remain so. To others who have not yet taken the opportunity, I would encourage you to find your avenue of service. It has been an honor and a pleasure to serve with you and for you. I will always look back on this time in my career as one of the most significant and meaningful, and this is due in large part to those I have worked with. The profession of law is rewarding and honorable, and I am pleased and proud to be part of it.

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Drawing the Short Straw – Mortgage Fraud and Straw Buyers

by Brad R. Jacobsen and Michael Barnhill

I. INTRODUCTION

Mortgage fraud is a significant problem in Utah, and it is growing. The FBI listed Utah as one of the top ten hotspots for mortgage fraud in its 2006 Mortgage Fraud Report.[1] Recently, both state and federal agencies have increased their investigation of mortgage fraud and the enforcement of mortgage fraud laws. New Mortgage Fraud Task Forces have been created by state and federal agencies to tackle the problems created by these schemes and to stop those involved.[2]

Many Utah attorneys represent clients or have friends or acquaintances who may be tempted to engage in practices or invest in ventures that constitute mortgage fraud schemes or who may be the victims of such schemes. Thus, it is important for attorneys to understand mortgage fraud in order to help their clients and acquaintances avoid getting into trouble as perpetrators or victims of mortgage fraud. This article will address various forms of mortgage fraud schemes, the relevant statutes, available recourse for the victims of mortgage fraud, and tips on how not to become a victim of or an inadvertent participant in mortgage fraud.

II. DESCRIPTION OF MORTGAGE FRAUD

Though one may commit mortgage fraud by a single act, mortgage fraud usually involves a combination of bad acts. These acts may include use of inflated appraisals or false buyer information to inflate mortgage loans above the property value or beyond the ability of the buyer to repay, and taking unfair advantage of foreclosures and other financial distress situations. For example, an appraiser, usually acting in concert with another person, may provide an appraisal to the lender which contains a higher value than the property's actual worth; or a perpetrator may provide false buyer information to a mortgage lender or the seller of a distressed property by using a straw buyer or a stolen identity. The perpetrator's profit is then secured through property flipping or equity skimming. In any event, perpetrators of mortgage fraud usually target distressed properties to take advantage of the owners' dire financial situations. Mortgage fraud schemes come in many creative guises, often combining two or more of the acts described above.

A. Property Flipping

Property flipping occurs when property is purchased, fraudulently appraised for a higher value, and then sold at the inflated price. In property flipping schemes, loan documents and buyer information, as well as the appraisal, may be falsified. Further, since such a scheme usually requires several participants, profits from the scheme are shared among several parties, which may include any party that is part of the process.

B. Straw Buyers

Straw buyers are loan applicants who are used to obtain home loans but who do not intend to occupy the properties they are buying. The purpose of the straw buyer is to use the straw buyer's personal information and credit score to obtain a mortgage for a higher value than the property is actually worth, and the straw

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buyer will misrepresent his or her intention to live in the home on the loan application. Straw buyers may be knowing participants in the scheme; they may also believe they are simply investors, not knowing the true nature of the scheme; or they may believe they are helping people with poor credit obtain a mortgage who, without the straw buyer's personal information, would not be able to qualify for the mortgage.[3] Straw buyers may be approached by "friends" or acquaintances in the community and told of a creative means to make money. Assurances of the legality of the structure are often given by the perpetrators. Straw buyers may receive a flat fee to use their credit or a percentage of the final sale proceeds. They enter into contracts (or oral understandings) as to these payments which may aggregate a group of properties and a group of straw buyers. Such contracts may constitute investment contracts.

The straw buyer purchases the property according to whatever scheme the perpetrators are running. If the straw buyer is not aware of the scheme, thinking instead it is just an investment, the straw buyer may receive a fee from the perpetrator, but any other promises made by the perpetrator, such as paying the mortgage or dividing profits from the property with the straw buyer, may not be fulfilled, especially if the straw buyer's cooperation was fraudulently obtained. If the straw buyer knows of the scheme, profits may be split with the straw buyer. In some cases the straw buyer will be issued a promissory note for the excess loan proceeds by the perpetrator who promises high monthly interest payments (did someone say ponzi?). An alternative to using straw buyers is using stolen identities. In such schemes, the personal information of the person whose identity has been stolen is submitted with a loan application to secure the loan, and there is actually no straw buyer, duped or not.

C. Equity Skimming

Another form of mortgage fraud involves equity skimming. The basic scheme begins with a property in foreclosure. The skimmer contacts the property's owner and offers to help the owner improve his credit and avoid the foreclosure. The skimmer promises to make the mortgage payments by renting or selling the property and sharing the profits with the owner. The owner agrees to quitclaim the property to the skimmer. The skimmer then rents the property, collects a deposit and rent, but does not pay the mortgage. The property is then foreclosed, with the mortgage still under the owner's name, and the tenants are evicted.[4] In a similar scheme, the skimmer promises to help the owner stay in the home, and the owner quitclaims the property to the skimmer, stays in the home, and pays rent to the skimmer. The skimmer does not pay on the mortgage, the mortgage is foreclosed and the victim loses the property. In almost every case, such quitclaims in and of themselves are direct breaches of the underlying mortgage.

In a variation of these skimming schemes, the skimmer requires an upfront fee from the owner before assisting with the mortgage and credit.[5] In yet another version, the skimmer convinces an investor to purchase a home for a specific price but to obtain a loan for more than that price. The skimmer promises to provide the investor with a fund from the excess to pay the mortgage payments, and to invest the rest of the excess in a promissory note issued by the skimmer, or stocks, bonds, mutual funds, or other securities, usually with a high return and often controlled by the skimmer. Once the investor purchases the property and gives the excess funds to the skimmer, the skimmer may simply disappear, but in any event does not give any money to the investor.[6] The skimmer may initially make the high monthly interest payments in order to provide the skimmer with a referral source for additional victims. Such payments, however, almost always dry up, as all ponzi schemes eventually do. These descriptions are not exhaustive, as equity skimming seems to provide a limitless set of possible forms. The commonality is that the skimmer makes promises to help the owner or investor but does not perform (or only performs for a short time), leaving the owner or investor with an unpaid mortgage (far in excess of the real value of the related property) and facing foreclosure, while the skimmer keeps any money acquired for his own personal use.

III. CRIMINAL LIABILITY

Mortgage fraud in general is not specifically addressed by either federal or Utah statute. This does not stop prosecutors from bringing charges against perpetrators, nor does it prevent the victims of mortgage fraud from filing civil suits. A perpetrator's criminal liability is derived either from other fraud statutes or statutes that address specific types of mortgage fraud. Perpetrators who run mortgage fraud schemes may be charged with wire fraud, mail fraud, bank fraud, conspiracy, making false statements in loan applications, money laundering, or equity skimming.

A. Criminal Liability under Federal Statutes

Wire fraud is defined as devising or intending to devise a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, and transmitting or causing to transmit over wire, radio, or television communication in interstate commerce, writings, signs, signals, pictures, or sounds for the purpose of executing the scheme or artifice. *See* 18 U.S.C. § 1343. Wire fraud may be punished by a fine, up to twenty years of imprisonment, or both. If the wire fraud affects a financial institution, the person may be fined up to $1,000,000, and imprisoned for as many as thirty years, or

both. *See id.*

A person commits mail fraud under 18 U.S.C. § 1341, (i) who devises or intends to devise any scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations, or promises and (ii) who places in or takes from any post office or authorized depository for mail for the purposes of executing such scheme or artifice, any matter or thing whatever to be sent or delivered by the Postal Service or other interstate carrier. The punishment for mail fraud is a fine, imprisonment of no more than twenty years, or both. If the fraud affects a financial institution, however, the person may be fined up to $1,000,000, imprisoned for up to thirty years, or both. *See* 18 U.S.C. § 1341.

Bank fraud is committed when a person "knowingly executes, or attempts to execute a scheme to defraud a financial institution, or to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody of, a financial institution, by means of fraudulent pretenses, representations, or promises." *See* 18 U.S.C. § 1344. Bank fraud is punished by a fine of no more than $1,000,000, imprisonment of up to thirty years, or both. *See id.*

Conspiracy occurs when "[a]ny person who attempts or conspires to commit any offense under [Chapter 63, which includes the above referenced fraud statutes,]…, the commission of which was the object of the attempt or conspiracy." *See* 18 U.S.C. § 1349. The penalty for conspiracy is the same as the offense which was the object of the conspiracy. *See id.*

It is also illegal to make false statements on a loan application or to willfully overvalue property under 18 U.S.C. § 1014. The penalty for doing so is a fine of up to $1,000,000, no more than 30 years of imprisonment, or both. *See* 18 U.S.C. § 1014.

Under 18 U.S.C. § 1957, anyone who "knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 that has been derived from specified unlawful activity" has committed money laundering. It should be noted that Section 1957(c) specifically states that the prosecution does not need to prove that a defendant knew that "the offense from which the criminally derived property was derived was specified unlawful activity." Money laundering may be punished by a fine, imprisonment for no more than ten years, or both. *See* 18 U.S.C. § 1957(b)(1). "T]he court may impose an alternate fine…of not more than twice the amount of the criminally derived property involved in the transaction." *See* 18 U.S.C. § 1957 (b)(2).

Equity skimming, illegal under 12 U.S.C. § 1709-2, occurs whenever a person, with intent to defraud, purchases a one-to four-family dwelling subject to a loan in default that is secured by a mortgage or deed of trust insured or held by the Secretary of Housing and Urban Development or guaranteed or made by the Department of Veterans Affairs, fails to make payments under the mortgage or deed of trust, regardless of whether the purchaser is obligated on the loan, and applies or authorizes the application of rents from such dwellings for his or her own use. *See* 12 U.S.C. § 1709-2 (2006). The penalty for equity skimming is a fine of not more than $250,000, not more than five years in

prison, or both. *See id.* If the property is subject to a mortgage note made for supportive housing of the elderly or if the note is held or insured by a multifamily mortgage credit program, the fine may be increased to $500,000. *See* 12 U.S.C. § 1715z-19 (2006).

B. Criminal Liability under Utah Law

Under Utah law, mortgage fraud may, under appropriate circumstances, be treated as securities fraud, and involved realtors, appraisers and mortgage brokers may, in addition, face sanctions by their licensing divisions. In Utah, it is illegal for a person, in connection with the offer, sale, or purchase of any security, directly or indirectly to employ any device, scheme, or artifice to defraud; make any untrue statement of a material fact or omit a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person. *See* Utah Code Ann. § 61-1-1. The typical "security" involved in mortgage fraud is an investment contract. *See* Utah Code Ann. § 61-1-13()(x)(K) & R164-13-1(B)(1). Additionally, in some schemes, the perpetrators issue promissory notes, another security under the statute.

The perpetrators of an equity skimming scheme may be charged with a second degree felony if they knowingly accepted money representing equity in a person's home. *See* Utah Code Ann. 61-1-21(2)(b). If the property sought is worth more than $10,000, the crime is punishable by no less than three years and up to fifteen years in prison. *See* Utah Code Ann. § 61-1-21(c). To the extent securities are involved, a perpetrator may face the entire array of state and federal securities fraud charges and remedies as well.

IV. CIVIL LIABILITY

In addition to criminal charges that may be brought against perpetrators of mortgage fraud, there are also civil options open to the victims. In addition to recovery of damages reflecting monetary losses incurred, victims who are left holding a mortgage to a property for which they do not have a legal title may seek to recover the title.

The Utah Supreme Court has held that a deed that is fraudulently obtained belongs to the original owner. In *Doyle v. W. Temple Terrace Co.,* 152 P. 1189 (Utah 1915), Harry Lawrence purchased a parcel of real property at a tax sale and obtained a tax deed for the property. *Id.* S*ee also Doyle v. W. Temple Terrace Co.,* 135 P. 103, 104 (Utah 1913). He then conveyed the property to Franklin Lawrence, who initiated a proceeding to quiet title in his name. Lawrence obtained service by publication by saying Doyle, the prior owner of the property, was not a Utah resident. The district court quieted title in Lawrence. *See id.* On appeal, the Utah Supreme Court concluded that action was predicated on fraud because Doyle was indeed a Utah resident. *See id.* The court said, "[The defendant's] tax deed was void upon its face, which was well known. In order to overcome that defect a decree quieting title in its predecessor was obtained by fraud." *Id.* at 1183. The district court set aside the finding for Lawrence because the judgment quieting title in Lawrence's name was based on fraud, and the Utah Supreme Court agreed. *See id.* at 1181; *see also* 135 P. at 107. Thus, a deed fraudulently obtained rightfully belongs to the original owner.

Courts have also recognized this principle specifically with mortgage fraud schemes. In *Martinez v. Affordable Housing Network, Inc.,* 123 P. 3d 1201, 1203 (Colo. 2005), Martinez, the victim of an equity skimming scheme run by Affordable Housing Network, Inc. (AHN), was able to recover title to his property. AHN contacted Martinez because Martinez's property was distressed. *Id.* AHN promised to help Martinez with the mortgage if Martinez would enter into an option agreement providing that AHN could buy the property for a fee "equivalent to the amount needed to cure the mortgage deficiency." *Id.* At AHN's request, Martinez quitclaimed the home to AHM as "'protection' should the homeowners abandon the property once AHN cured the mortgage default." *Id.* Martinez decided to refinance without AHN's assistance, but AHN sold the home to a third party. *See id.* at 1203-04. Despite the third party's argument that it was a bona fide purchaser, the Colorado Supreme Court held that Martinez could recover title because the quitclaim deed was fraudulently obtained, and the third party was on inquiry notice that fraud may have been involved. *See id.* 1205-06, 1209.

The rule that a deed fraudulently obtained should be returned to the party from whom the deed was fraudulently obtained is stated by several treatises. A leading treatise on property says, "A deed procured by fraud may be either void or voidable." 11 Thompson on Real Property, Second Thomas Edition § 94.07(l) (David A. Thomas, ed.). American Jurisprudence states, "A deed may be set aside for fraud where the grantor knows the contents of the deed but was induced to execute it by fraudulent representation of the grantee or someone in privity with the grantee." 13 Am. Jur. 2d *Cancellation of Instruments* § 14 (2000). Thus, a victim of mortgage fraud who has transferred the property to one of the perpetrators may sue to recover the deed.

Because mortgage fraud may be deemed to involve securities fraud, the victim may have the right to seek rescission of the fraudulent transaction. *See* Utah Code Ann. § 61-1-22 (2005). Rescission damages (e.g., return of investment, plus interest from time of investment, plus attorneys fees and potential treble damages) are especially valuable to a victim because the victim may

be able to sue the individual principals, *id.* § 61-1-22(4)(a) (2005), and avoid having to go through any shell companies that may be dissolved or in bankruptcy.

V. AVOIDING MORTGAGE FRAUD

Avoiding involvement in a mortgage fraud scheme is easier than dealing with the consequences of such schemes. Victims of mortgage fraud may be seduced into these schemes with promises of high returns from investments. Clients should be reminded that if a deal sounds too good to be true, it probably is. Clients should be counseled to obtain referrals and confirm licenses of the mortgage professionals with whom they may work. Before engaging these professionals, one should also do one's own homework by checking comparable sales, just as an appraiser would do, to verify the property's value. Also, one should always read and re-read any documents one is asked to sign; if one does not understand those documents, one should check with an attorney. Clients should also be advised to make sure that there are no blanks on the documents, and that their personal information is correct. If anything on the documents is missing or wrong, clients should not sign the papers. The Division of Securities and the Division of Real Estate both have help lines and are available to give their input on proposed opportunities as well. These basic tips can help keep those targeted by mortgage fraud perpetrators from becoming victims or unwitting accomplices.

1. *See* http://www.fbi.gov/publications/fraud/mortgage_fraud06.htm
2. *See* http://deseretnews.com/article/1,5143,695221873,00.html
3. *See* Indictment of Bradley Grant Kitchen, et al at 6-7 (Dec. 5, 2007) (http://www.mortgagefraudblog.com/images/uploads/UtahIndictment.pdf) (describing what straw buyers were told); Indictment of James Roy Martin, et al at 3-4 (Sep. 20, 2007) (http://www.mortgagefraudblog.com/images/uploads/CAGalloIndictment.pdf) (describing the false representations made to straw buyers and the fraudulent actions taken on their behalf); Indictment of Cornelius Robinson, et al at 5 (Jan. 8, 2008) (http://www.mortgagefraudblog.com/images/uploads/TXrobinsonIndictment.pdf) (describing the "flip" of which the straw buyers would be a part).
4. *See* Indictment of Mark Neusch and Michael Davis (Mar. 30, 2006) (http://www.mortgage fraudblog.com/images/uploads/UT_Neusch_Indictment.pdf).
5. *See* Press Release, Office of the United States Attorney Southern Dist. of Cal. (May 31, 2005) (http://www.usdoj.gov/usao/cas/press/cas50531-1.pdf).
6. *See* Press Release, State of Utah Dep't of Commerce Div. of Securities, Equity Skimming Scam Yields Criminal Charges (Mar. 3, 2006) (http://www.securities.utah.gov/press/hurst.pdf).
7. *See* 18 U.S.C. § 1343.

The Commercial Loan Guaranty – Types & Techniques

by Rick L. Knuth

The guaranty agreement is often only an after-thought in a commercial loan transaction. Lenders tend to focus more on the collateral, and borrowers tend to assume that a guaranty's presented form is non-negotiable. As a result, no one pays much attention to the guaranty agreement – until the loan is in trouble, that is, at which point everyone suddenly becomes very interested in whatever recourse against the guarantors was agreed to back on that sunny, optimistic day when the loan was first made. The proposition of this article is that the guaranty agreement ought to receive a more thoughtful, flexible consideration than that; that it should not be treated just as another document-in-the-stack, but as a separate agreement of equal concern to all parties.

What is a Guaranty?

The guaranty is a contract, in its essence a very simple one: It is an agreement, made in advance, to pay the debt of someone else. In a commercial loan context, the guaranty provides the lender with recourse against the guarantor in the event the borrower defaults under its loan obligations. Guaranties are within the Statute of Frauds, *see* Utah Code Ann. § 25-5-4(1)(b) (1953), and so must be in writing and signed by the guarantor in order to be enforceable.

Protective Clauses and Waivers

The primary purpose of a guaranty can be served by a couple of simple sentences. So, one asks, why does the typical commercial loan guaranty agreement go on for page-after-single-spaced-page? Why this thick, sedimentary layering of verbiage overlaying so simple a concept? The answer is that all of that language is to account for the multitude of judicial defenses and exceptions that have evolved over the centuries as guarantors – and their astute and creative counsel – have marshaled every available argument against having to pay the debt of someone they believed would never default when they originally gave the guaranty. All the protective clauses, waivers, and "if-then's" are merely intended to bring the rights of the parties back to the place where the lender can require the guarantor to pay if the borrower does not.

Many forms used by commercial banks and their law firms employ quite general language that waives the more basic defenses, but neglects the detailed, explicit waivers that are required to protect the lender without overloading the document with over-reaching jargon, and yet also lets the guarantors know where they stand.

Consideration

Because it is a contract, a guaranty agreement must be supported by consideration, *i.e.,* a benefit or promise given by the creditor from the guarantor in exchange for the guaranty. *See Bray Lines, Inc. v. Utah Carriers, Inc.,* 739 P.2d 1115, 1117 (Utah Ct. App. 1987). For most commercial loan agreements, consideration is simply not a problem. The consideration flowing between a lender and a borrower is obvious. With guaranties, however, the consideration can be a little less obvious. Although consideration separate from the extension of the loan itself is unnecessary where the guaranty is given as part of the same transaction as the principal debt, *see Boise Cascade Corp., Bldg. Materials Distrib. Div. v. Stonewood Dev. Corp.,* 655P.2d 668, 669 (Utah 1982), problems can arise when a guaranty is delivered after the loan is made. If the guaranty is signed after the loan transaction is closed, it opens the potential for a lack-of-consideration defense. *See Yoho Auto., Inc. v. Shillington,* 784 P.2d 1253, 1255 (Utah Ct. App. 1989). Where the guaranty is executed after the closing, the lender should document that the loan was made in anticipation of the guarantor's guaranty of the primary loan transaction, which would not have been made absent the guarantor's undertaking. *See U.S. v. Lowell,* 557 F.2d 70, 72 (C.A. Mich. 1977). Alternatively, the lender can close a loan using a demand note, replacing it with a term note after the guarantor signs the guaranty, with the change in terms

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itself being the consideration for the guaranty. Where the guaranty agreement is used for additional security to prop up a shaky loan, the loan documents should be amended and restated, explicitly stating that the guaranty agreement is given to induce and enable the loan modification.

One more thing about consideration deserves mention: Section 3-408 of the Uniform Commercial Code provides that "no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind." U.C.C. § 3-408 (1990). So, if the guaranty of an antecedent debt is embodied in a negotiable instrument, no consideration is required. *See State Bank of Greeley v. Owens,* 502 P.2d 965, 966 (Colo. App. 1972).

Guarantee of Payment, or Collection?

A guaranty of *payment* requires the guarantor to pay the obligee, even before the obligee seeks to enforce against the primary obligor. By contrast, a guaranty of *collection* requires the creditor to pursue collection efforts against the primary obligor, *before* going against the guarantor. Collection guaranties are, therefore, conditional in nature. A collection guaranty can require the creditor to sue the primary obligor, foreclose on collateral, and exhaust available legal remedies, all before requiring the guarantor to pay anything. If the guaranty is of collection only, therefore, it is vital for the lender to make sure that the collection guaranty states in no uncertain terms the extent to which the creditor must pursue the primary obligor before the guarantor becomes immediately liable. *See Strevell-Paterson Co., Inc. v. Francis,* 646 P.2d 741, 743 (Utah 1982).

Amendments and Modifications

It is important to remember this: If the lender materially alters the loan agreement, the guarantor may be discharged. *See Clark v. Walter-Kurth Lumber Co.,* 689 S. W.2d 275, 278 (Tex. App. 1 Dist. 1985). The expressed rationale for this common law rule varies, but tends toward the view that the guarantor agreed to guarantee a certain loan with a certain risk and that it is unfair to require the guarantor to guarantee a different loan, particularly where the modification increases the guarantor's exposure. Thus, a well-drafted guaranty agreement should include a provision to the effect that the guaranty will not be affected by any relaxation of the lender's rights under the loan agreement, by any modifications, or by adjustments in the amount or timing of payments due the lender. *See Westcor*

Co. Ltd. P'ship v. Pickering, 794 P.2d 154, 156 (Ariz. Ct. App. 1990). Even instances where the guarantor is plainly not prejudiced may, if not consented-to by the guarantor, result in discharge. This sometimes merciless application of the rule makes it critical that the guarantor consent to all material changes, even to forgiving part of the guaranteed debt. *See Capital Bank v. Engar,* 545 So.2d 317 (Fla. App. 3 1989).

Likewise, any release of collateral for the loan or the discharge of any co-guarantor will, absent consent, discharge the guarantor's guaranty. *See Speight, McCue & Assocs., P.C. v. Wallop,* 153 P.3d 250, 256 (Wyo. 2007). This is because a guarantor, who pays the borrower's debt to the creditor, may become subrogated to the rights of the creditor in the collateral, and the guarantor also has contribution rights against co-guarantors of the same debt (this concept will be discussed in greater detail below). Release of collateral or the discharge of a co-guarantor may prejudice those subrogation and contribution rights and will be enough to discharge the guarantee obligation.

Another circumstance deserving the draftsman's attention is where the creditor fails to perfect (or to renew) a security interest. Accordingly, the well-drafted guaranty agreement will also have language giving the lender the right to deal with both collateral and co-guarantors without releasing the guarantor, or will provide that the guarantor's obligations will be unaffected by impairment of collateral, inadvertent or otherwise. In every case, the lender's counsel should carefully document every modification, extension, or collateral release or substitution relating to a guaranteed loan.

Invalidity

It is also standard for the commercial guaranty agreement to have a clause stating that the guaranty will not be affected by the invalidity of the primary obligation. This responds to the reasoning that says if the guarantor must pay what the primary obligor "owes" or what is "payable," and if that debt is not legally due, then no guaranty obligation arises. Therefore, if for some reason the primary obligor is not really obliged to pay, then this provision is designed to provide that the guaranty nonetheless remains enforceable against the guarantor.

Subrogation

Once the guarantor pays anything toward the primary obligor's debt, the guarantor acquires the rights of a subrogee. *See Aetna Cas. & Sur. Co. v. Goergia Tubin Co.,* 1995 WL 429018 (S.D.N.Y. 1995). The guarantor can assert rights in the collateral, or can claim contribution from co-guarantors. If the obligation has been paid in full, none of this matters. However, if the lender is still owed money, the subrogation rights can be a terrific source of confusion, expense and vexation, as the lender, the subrogee, the debtor, and co-guarantors each jostle for advantage. Accordingly, the well-drafted guaranty agreement will have a provision waiving rights of subrogation until the guaranteed obligation is paid in full.

Foreclosure

The Utah Supreme Court ruled in *Machock v. Fink,* 137 P.3d 779 (Utah 2006), that a guarantor who has guaranteed a loan secured by real property is entitled to the same protections the primary obligor enjoys under the Trust Deed Act, such as the "single-action" rule, *see* Utah Code Ann. § 78-37-1 (2002), and the anti-deficiency rule, *see id.* § 57-1-32 (Supp. 2007). Accordingly, where the debt is secured solely by real property, the guarantor must receive the same notices and opportunities to cure afforded the trustor under a trust deed, and the lender must proceed against the real estate collateral before commencing an action against the guarantor. *See Surety Life Ins. v. Smith,* 892 P.2d 1, 3 (Utah 1995).

Likewise, where the debt is secured by personal property, the guarantor falls within the definition of a "debtor" in Article 9 of

the Uniform Commercial Code, *see* U.C.C. § 9-102(28) (1990), and is entitled to all of the notices owed to the primary obligor. Failure to give the guarantor notice of dispositions of collateral can preclude the secured party from obtaining a deficiency judgment. *See Strevell-Paterson Co., Inc. v. Francis,* 646 P.2d 741, 743 (Utah 1982).

SPECIALIZED TYPES OF GUARANTIES

There is a whole menagerie of specialized types of commercial loan guaranties. What follows is a sampling of some of the most useful – and inventively named:

Full or Limited Payment/Duration

Obviously, the lender prefers a guarantee of the entire debt – every red farthing – the primary obligor owes. Also called a "hell-or-high-water" guaranty, this agreement assures the obligee that the guarantor will pay all the obligations of the debtor, no matter how or when they arise, and without conditions.

Sometimes, however, a guarantor will negotiate for a limit on the amount he is willing to stand for. For example, with accruals of interest, default interest, late fees, and attorney fees, the guarantor may want certainty on the topside of his obligation to the obligee. Sometimes the guarantor is simply not inclined to guarantee the totality of the primary obligor's debt. For example, a limited guaranty can guarantee only a specified amount or percentage of the obligation; only the principal of the debt; only the debtor's operating expenses or the debt service; only costs of collection, or a deficiency, or only for a limited period of time. Where the guaranty is limited as to time, care must be taken to ensure that obligation's termination point is clearly delineated, that is, the limited duration guaranty should say that the obligee must send a claim or file a lawsuit against the guarantor within six calendar months after the primary obligor fails to pay or respond to a judgment, and only at that point does the time period begin to run.

Reducing or "Burn-Down" Guaranties

This type of guaranty provides that the guarantor's potential liability will be reduced (or will disappear entirely) upon the occurrence of something other than the mere passage of time. For example, the guaranty could reduce in amount or proportion, if and when the primary obligor reaches certain revenue goals, sells a certain asset, perfects a patent, or some other occurrence. For purposes of drafting, it is imperative that the extraneous condition reducing the guaranty obligation be objective and relatively easy to ascertain, to avoid a dispute over whether the triggering event has actually taken place and the obligation has

thus been reduced.

Reducing guaranties are not uncommon in construction loans, where the lender is willing to look only to the primary obligor's credit and the value of the real property collateral, once the realty has been improved by the completion of construction. Until then, the lender wants the guarantor to have plenty of incentive to finish the project. Thus, the agreement should specify that the guaranty will not be reduced until the improvements are substantially complete in accordance with plans and specifications approved by the lender; a certificate of occupancy has been issued; or, a certain proportion of net leasable space has actually been leased.

Joint, or Joint and Several

Occasionally, a guarantor will bargain for only joint liability with a co-guarantor, as contrasted with joint and several liability. Where the guaranteed obligation is joint, the obligee must join all co-guarantors in a single action if he hopes to recover from them all. *See Othridge v. First Nat. Bank of Gainesvill,* 458 W.E. 2d 887, 890 (Ga. App. 1995). On the other hand, where the obligation is joint *and several* the obligee can proceed against less then all of the co-guarantors (or only one) for recovery of the entire guaranteed obligation. *See Finagin v. Arkansa Dev. Fin. Auth.,* 139 S.W.3d 797, 803 (Ark. 2003).

Springing or "Exploding" Guaranty

Related to the reducing guaranty is the exploding guaranty, one where the guaranty of the entire debt (or some agreed-upon amount) becomes effective if the primary obligor breaches certain specific covenants or takes or allows someone else to take certain actions. These covenants usually involve a falsity of the borrower's warranties and representations made in connection with the lender's credit extension or the bankruptcy of the primary obligor. Obviously, the exploding guaranty is most useful where the guarantor controls the primary obligor; it is designed to motivate the guarantor to intercede for the lender's benefit.

"Carve-Out" Guaranty

A carve-out guaranty is used where the loan is non-recourse except on occurrence of the specified events the lender wishes to discourage – such as bankruptcy, false representations or financial reporting, the wrongful transfer of collateral, or misappropriation of rents, security deposits, reserve accounts or insurance proceeds – in which event the guarantor's obligation becomes concurrent with the primary obligor's. Most commercial banks and insurance companies do not make non-recourse loans, but carve-out guaranties are frequently used in securitized secured loans to single-asset/single-purpose entities, which typically have few assets other than the collateral for the loan. Where there is no recourse, the lender's chief concern is that the borrower properly maintain the collateral and preserve its value, and refrain from bad acts such as fraudulent statements to the lender, misappropriation of insurance proceeds, failure to pay taxes, etc.

"Good-Guy Guaranty"

A perennial concern of lenders is that the repossession and disposition of the collateral be quick and painless. This worry can be abated by using a variation called a good-guy guaranty, where the guarantor is automatically released if and when the obligor transfers clear title to the collateral to the lender.

"Snap-Back" Guaranty

Once a guaranty has terminated and the guarantor is released, a snap-back agreement reinstates the guaranty if certain conditions or occurrences arise. For example, snap-back provisions can be used to resurrect a guaranty obligation that has been released by payment, if the lender is subsequently required to disgorge payments received to a bankruptcy trustee exercising the avoidance powers of 11 U.S.C. § 365.

"Upstream/Downstream/Cross-Stream" Guaranties

Upstream guaranties are the guaranties of a subsidiary's obligations by a parent entity, and downstream guaranties are the reverse. A cross-stream guaranty is one affiliate's guarantee of the debt of another affiliate of the same parent entity. The draftsman should carefully examine whether there is consideration for these kinds of guaranties as well as the potential ramification of the primary obligor's bankruptcy. Because the parent entity's equity interest in the subsidiary increases with payment of the subsidiary's debts, downstream guaranties offer less risk to the lender than either upstream or cross-stream guaranties.

Conclusion

The guaranty agreement deserves more attention than it often gets in the commercial loan transaction, where it can be effectively tailored to meet the desires of the guarantor while still ensuring that the lender has a guaranty that will meet its needs quickly and without protracted litigation.

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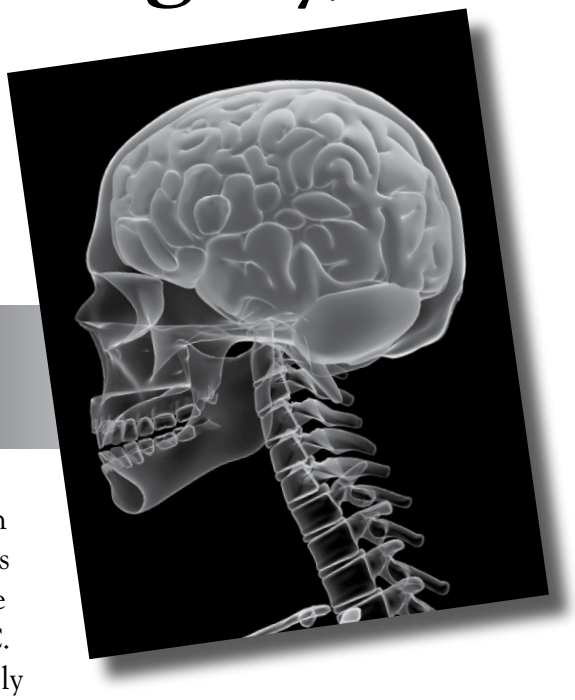

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An Enigmatic Degree of Medical Certainty

by Nelson Abbott and Landon Magnusson

Every profession uses its own jargon. Psychologists describe a client's "affect" while an acting coach describes a student's "expression." The use of jargon frequently causes difficulties when members of differing professions converse. For example, economists and accountants find themselves at odds over the meaning of terms like "capital" and "profit." In the legal profession, attorneys must also converse frequently with members of other professions. Misunderstandings and problems can be especially common when meaning is lost in the translation from "legalese" to plain English. For example, when professionals are required to give opinion testimony under Utah Rules of Evidence 702, such misunderstandings may result in testimony being wrongfully admitted or improperly excluded.

This article focuses on the misunderstandings and problems that arise in situations where health care providers are requested to testify to a "reasonable degree of medical certainty." Specifically, this article examines the origin of this problematic phraseology, how it evolved, and how it ultimately became engrained in traditional legal jargon. The article then demonstrates how the phrases "reasonable degree of medical probability" and "reasonable degree of medical certainty" adversely affect the admission of expert testimony in the courtroom, and concludes by making a case for the abandonment of these inherently flawed phrases in the law.

I. Definition, Origin, Evolution, and Usage

Attorneys have bandied about the phrase "reasonable degree of medical certainty" for years, and use it as though it is well-defined and well-understood. Unfortunately, such is not the case. Not only doctors struggle in applying the standard. Attorneys frequently struggle as well.

One of the authors of this article was in a deposition in which opposing counsel asked a physician to express his opinion regarding the likelihood that a certain event had a causal effect upon an injury. After the doctor offered his opinion, opposing counsel followed up by asking, "Can you testify to that with a reasonable degree of medical certainty?" The doctor hesitated as if he did not understand the question and was perhaps embarrassed to admit as much. At that point, the author interjected and asked opposing counsel to define the term "reasonable degree of medical certainty." The opposing attorney hemmed and hawed and then moved on, leaving the issue unresolved. Not only was the doctor uncertain of the meaning of the phrase, but so was the opposing attorney.

Deconstructing the phrase in hopes of finding its meaning proves futile. The words "certain" and "certainty" signify being "known or proved to be true," or, more simply, "indisputable." Merriam-Webster's Collegiate Dictionary 202 (11th ed. 2003). The phrase "reasonable degree," however, implies that there is a rational choice to be made among a range of differing options. The modification of the superlative "certain" by the word "reasonable" creates a contradiction within the phrase itself. The idea that there is a reasonable degree of certainty implies that there exists an unreasonable degree of certainty, or a lesser degree of certainty, or a lesser degree of being indisputable. This begs the question, at what point does something become so "indisputable" that it becomes reasonable? Obviously there is an inherent problem in the phrase and deconstructing it does not yield any useful definition.

Black's Law Dictionary defines "reasonable medical probability" as "a standard requiring a showing that the injury was more likely than not caused by a particular stimulus, based on the general consensus of recognized medical thought." Black's Law Dictionary 1273 (8th ed. 2004). Black's treats the term "reasonable medical certainty" as a synonym of "reasonable medical probability." Thus, Black's seems to subscribe to the view that "reasonable degree of medical certainty" simply means that, based upon generally accepted medical principles, the statement is more likely than not to be true. The definition as stated in Black's Law Dictionary is not universally accepted. Other sources explain the standard outlined by the phrases as "evidence from which a reasonable person could conclude that a[n action]…has probably caused a particular…kind of harm." *See Alder v. Bayer Corp.*, 2002

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UT 115, ¶ 73, 61 P.3d 1068. Yet others define the phrases as requiring a higher degree of probability. *See* Michael D. Freeman, *The Problem with Probability,* TRIAL, Mar. 2006, at 58-59.

This confusion can be traced to the first appearance of the phrase "reasonable medical certainty" in Illinois case law during the 1930s. *See* Jeff L. Lewin, *The Genesis & Evolution of Legal Uncertainty about "Reasonable Medical Certainty,"* 57 MD. L. REV. 380, 430 (1998). The cases in question involved actions in which plaintiffs claimed damages for disabilities that could have continued into the future as a result of the harm received. *Id.* The courts ultimately concluded that to recover for such injuries, plaintiffs needed to show with reasonable medical certainty that the disabilities would indeed continue in the future.

Since then, the ambiguity of the meaning of "medical certainty" has led to confusion and, as a result, inconsistent applications of the standard. In one Utah case, a physician was asked to provide testimony regarding the causality of an injury. The physician stated that he "*did not have any reason* to believe that any other incident, other than the accident" in question could have caused the plaintiff's condition. *Beard v. K-Mart Corp.,* 2000 UT App. 285, ¶ 19, 12 P.3d 1015, cert. denied, 20 P.3d 403 (Utah 2001) (emphasis added). The doctor's language appears to be very clear, even using the superlative "not…any" to express his professional opinion about the matter. During cross examination, the defense asked the medical doctor about alternative possibilities and then concluded by asking the doctor if he was willing to testify that, based upon a reasonable degree of medical certainty, no other possibility could have caused the trauma. The doctor responded that he could not provide such testimony and his testimony was deemed insufficient. *See id.*

In a similar case in Missouri, a medical doctor testified that he was ninety percent certain as to the causality of a condition. *See Bertram v. Wunning,* 385 S.W.2d 803, 807 (Mo. Ct. App. 1965), *appeal after remand,* 417 S.W.2d 120 (Mo. Ct. App. 1967). However, despite giving this high probability, he later retreated when asked to testify as to causation of the condition with "reasonable medical certainty." *Id.* In the end, notwithstanding the strong and "practically certain" testimony of the doctor, the Missouri court found the testimony to be insufficient because it lacked the "reasonable certainty" stamp of approval. *Id.*

While these medical professionals appeared to interpret "medical certainty" to require a very high degree of probability, others may not. Some cases even promote the contrary, stating that an "absolute," "unqualified," or even "scientific" certainty is not required of a medical professional's testimony in order for it to be admitted as evidence on causality. *See Sears, Roebuck, & Co. v. Workmen's Comp. Appeal Bd.,* 48 Pa. Cmwlth. 161, 166-167 (Pa. 1979). In *Galileo's Revenge: Junk Science in the Courtroom,* Peter W. Huber contends that a "clinician can testify to anything if he holds an M.D. and is willing to mutter some magic words

about 'reasonable medical certainty.'" Peter W. Huber, *Galileo's Revenge: Junk Science in the Courtroom,* at 176 (1993).

This notion is particularly alarming in criminal cases where a verdict may result in the incarceration of the defendant. In criminal cases, the burden of proof is raised to "beyond a reasonable doubt." But this begs the question whether the testimony offered as proof is given much more weight than is due. In a criminal case involving the sexual abuse and exploitation of a minor, a medical professional testified that "within a reasonable degree of medical certainty, it could be established that the females [on a video tape] were under the age of eighteen." *State v. Atkin,* 2003 UT App. 359, ¶ 13, 80 P.3d 157 (Utah Ct. App. 2003), *cert. denied,* 90 P.3d 1041 (Utah 2004). By this, did the doctor mean that it was more likely than not that the females were under the age of eighteen, was the doctor stating that he was certain beyond a reasonable doubt, or was the doctor testifying that he was absolutely certain that the females were under the age of eighteen? When the jury applied the physician's testimony to the facts of the case, it is likely that the jury gave the testimony a different weight than the doctor intended.

The Utah Supreme Court has weighed in on the definition of these phrases. In *Alder v. Bayer Corp.,* 2002 UT 115, ¶ 73, 61 P.3d 1068, the Supreme Court stated that the phrase "reasonable degree of medical certainty" was tantamount to the phrase "a reasonable person could conclude." *Id.* ¶73. It could be argued that the Utah definition requires even less certainty than the "more likely than not" standard, since a reasonable person might reach a conclusion that was not the most likely in some situations. The Utah Court of Appeals recognized that this language might create confusion stating that,

> [t]he clarity of the reasonable certainty standard…has been confounded by a confusing clutter of labels, such as "in all likelihood," "reasonably probable," "medically probable," "probable," "more probable than not," "a probability," "more likely than not," "greater than fifty percent," "reasonable medical certainty," or any combination of the above. These labels are used in an apparent attempt to shed light upon the degree of proof required of the burdened party. The net effect of this profusion of language is to leave one wondering whether the courts are discussing the same standard or standards of subtly different degrees.

Dalebout v. Union Pacific R.R. Co., 1999 UT App. 151, ¶ 21 n. 2, 980 P.2d 1194 (*quoting* David P.C. Ashton, Comment, *Decreasing the Risks Inherent in Claims for Increased Risk of Future Disease,* 43 U. Miami L. Rev. 1081, 1103-04 (1989) (footnotes omitted)).

II. The Admission of Expert Testimony in the Courtroom

In jury trials, the jury is the ultimate arbiter of fact. To fulfill their role, the jurors must weigh all of the facts as they are presented and then make their decision. In many cases, the factual issues presented to a jury can be very complex and jurors frequently lack the training and experience to properly evaluate the evidence. In such cases, jurors look to experts to provide methods and opinions or both to understand and interpret the evidence before them. *See* Utah R. Evid. 702. Experts assist the jury by testifying in one of two ways. First, experts may lay out scientific principles and methodology and then allow the jury to apply those principles to the facts of the case. Second, experts may apply the facts of the case to scientific principles and methodology and give opinions as to the conclusion to be drawn from the process.

Like their federal counterparts, the Utah Rules of Evidence require the trial judge to act as a "gatekeeper," determining what expert testimony may be admitted and what testimony must be excluded. *See* Utah R. Evid. 702 advisory committee's note.[1] The rationale for the "gatekeeper" function of the trial judge is the assumption that an expert's testimony may be given undue weight by members of the jury. Accordingly, the Supreme Court has held that the trial judge's role as a "gatekeeper" of expert testimony is to ensure that the claimed basis for scientific testimony is valid. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 597 (1993).[2] For example, allowing a phrenologist to give "expert" testimony may give the impression that as a witness, he or she has something credible to contribute to the case despite the fact that phrenology has long been a discredited pseudoscience. It is the court's responsibility to recognize problematic expert testimony, and to take necessary precautions to ensure that a jury is not improperly swayed.

The Utah Supreme Court has gone even further to note that even credible scientific testimony needs to be controlled, holding that "while often helpful, scientific testimony has the potential to overawe and confuse, and even to be misused for that purpose" and it is, therefore, the court's responsibility to "ensure the reliability and helpfulness of the evidence." *Alder v. Bayer Corp.,* 2002 UT 115, ¶ 56, 61 P.3d 1068. Therefore, when expert testimony is provided as an expert opinion, as opposed to testimony that merely lays out scientific principles and methodology for a jury to apply to the facts, trial judges must be especially vigilant that the ultimate trier of fact does not surrender its responsibility to an eloquent witness who provides "scientific-sounding" testimony. *See* Utah R. Evid. 702 advisory committee's notes.

Ultimately, expert testimony is supposed to help and not hinder the trier of fact in reaching a proper verdict. Therefore, the testimony provided must be clear, understandable, and not likely to confuse. If testimony is not clear enough for a lay juror to understand, a judge may simply exclude that testimony. *See State v. Gutierrez,* 753 P.2d 501, 504 (Utah 1988). Additionally, even if testimony is relevant to an issue, if the court feels that the testimony's probative value would be outweighed by the possibility that it would confuse and mislead the jury, the judge may also exclude that testimony.

See State v. Miller, 709 P.2d 350, 353 (Utah 1985). *Accord U.S. v. MacDonald,* 688 F.2d 224 (4th Cir. 1982); Utah R. Evid. 403.

III. Ending the Abuse of the Phrases "Reasonable Degree of Medical Probability" and "Reasonable Degree of Medical Certainty"

Because the phrases, "reasonable degree of medical probability," "reasonable degree of medical certainty," and the standards they purport to embody are so poorly understood and inconsistently used, courts should prohibit their use. Because these phrases are so inconsistently used, their value is small, while the likelihood that the finder of fact will apply a definition different than the expert witness is high. In other words, use of the phrases is confusing and not helpful to the finder of fact.

In many cases, lay jurors likely give too much clout to the phrases "reasonable degree of medical certainty" and "reasonable degree of medical probability." While the testifying physician may only mean that a reasonable person could reach the conclusion at issue, the lay jurors may assume that the physician is almost certain that his or her conclusions are correct. While one person may understand the phrases to be defined as "more likely than not" another may understand the phrase to mean eighty-five, ninety-five, or even one hundred percent certain, and lend more weight to the testimony than it deserves.

Moreover, attorneys should not assume that jurors will accord the proper weight to expert testimony framed in terms of "reasonable degree of medical certainty" or "reasonable degree of medical probability." If faced with a medical professional who is prone to use these phrases in testifying, attorneys must determine what that specific medical professional means when using the phrases, and assist the medical professional transforming the "magic words" into more universally understood terminology to ensure that nothing is misunderstood or lost in translation. Preferably, attorneys should ensure that all expert opinions be rendered as "reasonable probabilities." *See* Michael D. Freeman, *The Problem with Probability,* Trial, Mar. 2006, at 58-59. In other words, attorneys should find ways to compel opposing experts to compare the likelihood of the expert's opinion with other possibilities.

In the end, the phrases "reasonable degree of medical certainty" and "reasonable degree of probability" are simply not necessary in the court room, do more harm than good, and should consequently be eliminated from the legal lexicon.

1. The advisory committee's note indicates that the Utah rule has shadowed the federal rule in many respects as an answer to the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).
2. As noted above in footnote 1, the Utah Rules have been altered to better conform to the Supreme Court ruling in *Daubert*.

Winning Arguments Supporting the "Made Whole" Doctrine

by John F. Fay

THE PROBLEM

Your injured client has health insurance. During litigation against the tort-feasor, your client's health insurer pays some of your client's medical expenses arising from the injury. Later, when you settle with the tort-feasor, the health insurer wants 100% reimbursement of those medical expenses.

You believe, however, that the settlement has not made your client "whole." Accordingly, you argue that the insurer has no subrogation rights in the settlement monies. Alternatively, you may want to reimburse the insurer, but argue it needs to take less than a 100% reimbursement, i.e., in fairness, the insurer should pay its share of the client's attorney's fees and costs incurred in prosecuting the client's claim. But the insurer refuses, alleging it has a right of full subrogation under the policy provisions.

In these instances, you have a host of legal and equitable arguments in your favor. A typical insurer that has claimed subrogation for 100% reimbursement is the State of Utah's Public Employees Health Plan (PEHP). I use the PEHP as an example in this article, but most of the arguments you can use against PEHP are substantially operative against most other insurers making such subrogation demands. These arguments can be used both as a sword and as a shield.

The following arguments are best supported when your client has been left with uncompensated damages, even though you managed to settle with the tort-feasor for the policy limits of his insurance – i.e., your client was not made whole. Of course, there are usually good reasons when a client did not get the policy limit, e.g., your client needed the settlement monies quickly due to financial stress, comparative fault issues, or other pressing concerns. So, this point is not determinative. The following arguments stand formidable by themselves.

PETITION LACKS STANDING

Oftentimes, PEHP will bring a petition demanding full reimbursement against your client in a proceeding before the Utah State Retirement Board. In response, you point out that, pursuant to Utah Code section 49-20-105, PEHP's petition is well beyond the "purpose" of the Utah State Retirement and Insurance Benefit Act that created the Board. To wit: "The purpose of this chapter is to provide a mechanism for covered employers to provide covered individuals with group health, dental, medical, disability, life insurance,…and other programs requested by the state,…in the most efficient and economical manner."

Seeking to enforce subrogation rights is not "providing insurance" as encompassed by Title 49.

Additionally, the Board's "Adjudicative Hearing Procedures" states: "The executive director…may file a petition for a declaratory order determining the applicability of a statute, rule or order of the board…" The issue in contest, however, is the question of the validity of PEHP's subrogation rights against the client's "made whole" rights. The subrogation rights are found in a provision in the Master Policy. But under the Board's "Hearing Procedures," this dispute does not involve determining the applicability of a statute, rule or order. *See* Utah Code Ann. §63-45b-21(1) for the same direct argument. So you object that the petition addresses an issue completely outside the governing statute and the Board's own procedures.

Another argument is that Utah Code section §49-11-301(3) says the assets of the fund are for the exclusive benefit of the members and "may not be diverted or appropriated for any purpose other than that permitted under this title." Title 49 is silent on subrogation rights, save that a monthly disability payment "shall be reduced" for monies received by way of judgment or settlement from a third party liable for the disability. Utah Code Ann. §49-21-402. The powerful argument is that if the legislature saw fit to incorporate subrogation reimbursement provisions under a disability payment from the monies recovered from a liable third party, it could have inserted a like provision under the member claim's payment procedures but did not do so. Thus, you argue the legislature's

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failure to incorporate such a provision was intentional, i.e., that each term used in a statute is used "advisedly" and since the legislature "could have added" language but did not, it was intentional. *Harmon City v. Nielson & Senior,* 907 P.2d 1162, 1167 (Utah 1995); *Neel v. State,* 889 P.2d 922, 926 (Utah 1995).

OTHER ARGUMENTS

1. Facts Defeating Policy Provision Arguments

A close review of the PEHP, as well as many other "group" insurance plans, will reveal that when the client signed up, he and a group of other new state employees was told, "This is your insurance plan. Just date and sign on the last page." And your client signed as instructed. At no time did anyone from PEHP discuss in any way the plan's benefits, exclusions, subrogation rights, or other provisions. Importantly, you will discover that at no time during the enrollment time or subsequently did anyone from PEHP ever give your client a copy of the plan. *See Farmers Ins. Exch. v. Call,* 712 P.2d 131 (Utah 1985) (finding certain exclusions unenforceable because Farmers failed to furnish the policy containing those exclusions to its insured.) These findings can defeat or significantly help defeat the insurer's subrogation demands.

2. No Enforceable Subrogation Rights

Based on the following reasoned arguments, PEHP (or other group insurer) has no enforceable subrogation rights.

> Subrogation is an equitable doctrine and is governed by equitable principles. This doctrine can be modified by contract, but in the absence of express terms to the contrary, the insured must be made whole before the insurer is entitled to be reimbursed from a recovery from the third-party tort-feasor.
>
> When the insured settles with the tort-feasor before the amount of damages has been judicially determined, it is more difficult to ascertain whether the insurer is entitled to recover all or any of the amount paid on the policy to the insured.

Hill v. State Farm Mut. Ins. Co, 765 P.2d 864, 866 (Utah 1988) (citations omitted).

In equity, what is fair can and should outweigh what is right. PEHP will argue that the insurance contract has provisions equating to "express terms to the contrary" as contemplated in *Hill*. You reply that "expressed terms" require clear and unequivocal language, a difficult burden that PEHP needs to

prove but can only allege.

An insured's surrender of the made whole doctrine in favor of the insurer effectively acts like an "exclusion" of some of your client's rights and benefits as an insured. But recognizing such an exclusion is inconsistent with the fact that benefits were paid and therefore must have been "covered." If the insured has to pay back the benefit monies paid, then in reality there is "no coverage" for those benefits. As a limitation on coverage or on the benefits recoverable, such a provision needs to be identified early in the policy, and in simple terminology readily understood by a layperson. To surrender the made whole principle is to limit the "benefits recoverable" because your client understandably expects to get all the settlement money, but now he has to pay back his insurer. For all practicable purposes, such a "limitation" is an "exclusion." "Limitations on insurance coverage must be effected through an exclusion clause with language that clearly identifies the scope of the limitation to the reasonable purchaser of insurance."

Allstate Ins. Co. v. Worthington, 46 F.3d 1005, 1009 (10th Cir. 1995) (quoting *Draughton v. CUNA Mut. Ins. Soc.,* 771 P.2d 1105, 1108 (Utah Ct. App. 1989); *see also, U. S. Fidelity & Guaranty Co. v. Sandt,* 854 P.2d 519, 524 (Utah 1993).

In *Beck v. Farmers Insurance,* 701 P. 2d 795 (Utah 1985), the Utah Supreme Court has said that an insurer owes a duty of good faith and fairness in dealing with its insureds and that the "duty of good faith also requires insurers to 'deal with laymen as laymen and not as experts in the subtleties of law and underwriting' and to refrain from actions that will injure the insureds' ability to obtain the benefits of the contract." *Id.* at 801. Counsel should argue that using legalese or technical terminology or "hiding" the exclusion deep in the policy violates *Beck's* directives. A lay person can quickly and logically "assume" that if he must reimburse their insurer for the medical bills for which he has paid premiums to the insurer, that such a reimbursement is a "limitation on coverage."

Argue that the contract provisions at bar fail under *Beck's* requirements. That is, look for language that is not readily understood by the average Joe. The PEHP policy speaks in terms of:

> In the event that Eligible Benefits are furnished to an Insured for bodily injury or illness caused by a third party, PEHP shall be and is hereby subrogated (substituted) with respect to an Insured's right (to the extent of the value of the benefits paid) to any claim against the third party causing bodily injury or illness, regardless of whether the Insured has been made whole or fully compensated for the injury or illness. [A 73-word sentence.] In the event the Insured impairs PEHP's subrogation rights under this contract through failure to notify PEHP of potential third party liability, settling a claim with a responsible third party without PEHP's involvement, or otherwise, PEHP reserves the right to recover from the insured the value of all benefits paid by PEHP on behalf of Insured resulting from the third party's acts or omissions. [A 64-word sentence.]
>
> No judgment against any third party will be considered conclusive between the Insured and PEHP regarding liability of the third party or the amount of recovery to which PEHP is legally entitled unless the judgment results from an action of which PEHP has received notice and has a full opportunity to participate. [A 52-word sentence.]

PEHP Policy, at pp. 15-16

Argue also that the reasonable purchaser of insurance, the average layperson not versed in insurance vernacular, could not readily understand the plan terms. Point out the obscure terms:

A. **Eligible Benefits** are **furnished**

B. a third party or a **third party's liability**

C. PEHP shall be and is hereby **subrogated** (substituted) with respect to an Insured's right (to the extent of the value of the **benefits paid**)

D. regardless of whether the Insured has been **made whole or fully compensated for the injury or illness**

E. a failure to notify PEHP of **potential third party liability**

F. settling a claim with a **responsible third party without PEHP's involvement**

G. a **third party's acts or omissions**

H. no **judgment** against any third party will be **considered conclusive** between the Insured and PEHP regarding **liability of the third party** or **the amount of recovery to which PEHP is legally entitled** unless the judgment results **from an action** of which PEHP **has received notice** and has a full opportunity to participate

This language is more legal than lay. It is more insurance vernacular than common man. It is more confusing than clear. Lay people do not understand what is meant by the terms a "third party," to be "made whole," to be "legally entitled," or "an action." Nor, do they understand what is meant by a "third party's acts or omissions," by "considered conclusive between the Insured and PEHP regarding liability of a third party's," or by "the recovery to which PEHP is legally entitled."

The above provisions tie several undefined insurance and legal terms together in a single 73-word sentence. This is followed by several more undefined terms in two sentences, one a 64-word sentence and the second a 52-word sentence. Clearly, these sentences compound the confusion to the average purchaser of insurance.

While an insurer may exclude from coverage certain losses by using "language which clearly and unmistakably communicates to the insured the specific circumstances under which the expected coverage will not be provided," *Village Inn v. State Farm,* 790 P.2d 581, 583 (Utah Ct. App. 1970), that is not the case with the PEHP plan. The PEHP plan is convoluted, confusing and omits operative term definitions. Thus, it is not "clearly and unmistakably" communicating to its insured that he will need to pay PEHP back for medical bills it paid. Subrogation clauses that are written like the one above, with language that is not readily understandable by the average Utah purchaser of insurance, should be held to be an unenforceable limitations or exclusions under the principles stated in *Allstate, Draughton, Beck and Village Inn.*

Importantly, insurers such as PEHP cannot argue that operative terms are defined in the plan when they fail to actually furnish the plan to your client. Moreover, of the terms and phrases highlighted in "A" to "E," *supra*, only the terms "subrogation" and "eligible benefit" are defined in the plan. Furthermore, those definitions are not explanations clear to a layperson. *See* PEHP Policy at pp. 60-69, entitled, "Definitions."

Obviously, one cannot *knowingly* agree to provisions not understood. And if a layperson could not or would not understand the term(s), it is incumbent upon insurers such as PEHP as the contract drafters to explain the term(s) in understandable lay language. *See McCoy v. Blue Cross & Blue Shield of Utah,* 980 P.2d 694 (Utah Ct. App. 1999). Failure to define the operative terms of a policy is fatally defective to enforcement of the insurer's demands. "A policy may be ambiguous if it is unclear or omits terms." *Falkner v. Farnsworth,* 665 P.2d 1292, 1293 (Utah 1983). The PEHP omits term and is unclear.

3. Insurer's Failure to Furnish the Plan

When an insurer wants its insured to be bound by a policy provision, it needs to show that the insured has had the opportunity to review the insurance contract. *See McCoy*, 980 P.2d at 699. The legally imposed burden on the insurer in this type of situation is strictly imposed. "An insurer is required to strictly comply with all provisions that give an insured notice of the terms, conditions, limitations or changes to an insurance policy." *Id.* at 697. An insured cannot have "notice" of "terms, conditions or limitations" that are neither defined nor understood.

4. Adhesion Contract

Equally important, you may also argue that the plan is an adhesion contract. That is, if your client wanted to be a member of the Utah Highway Patrol, or in some other State employment, this is the insurance plan. He must take it or leave it. There is no room for negotiating the terms of the plan. An adhesion contract is defined as "a contract entered into between two parties of unequal bargaining strength, expressed in the language of a standardized contract, written by the more powerful bargainer to meet its own needs, and offered to the weaker party on a 'take it or leave it basis. . . .'" *Gray v. Zurich Ins. Co.,* 419 P.2d 168, 171 (Cal. 1966) (quoted in *Wagner v. Farmers Ins. Exchange,* 786 P.2d. 763 (Utah Ct. App. 1990)). Our Supreme Court has said, "insurance policies should be construed against the insurer and in favor of the insured because they are adhesion contracts drafted by insurance companies." *U. S. Fidelity & Guar. Co. v. Sandt,* 854 P.2d 519, 522 (1993).

In an adhesion contract context, the insurer is going to have problems asserting that your client gave a knowing waiver to a provision hidden in the middle of the contract. In the case of PEHP, the subrogation provision is tucked away on page 15 of a 78-page policy. This defect is fatal when the insurer cannot show that it ever presented the contract to your client. *See Christopher v. Larson Ford,* 557 P.2d 1009, 1012 (Utah 1976) (finding a warranty disclaimer invalid because it was "hidden" in the contract and not brought to the attention of the buyer). The law looks with disfavor upon semi-concealed or obscured self-protective provisions of a contract prepared by one party which the other is not likely to notice. *See id*. at 1012; *see also Bornhart v. Civ. Serv.,* 398 P.2d 873, 877 (Utah 1976) (arbitration clause rejected because "its meaning and effect were somewhat uncertain even to lawyers and judges," and stating, the insured is not required to read, nor to understand, nor to sign anything, but only to pay his premium).

Thus, one should look to the effect of enforcing the adhesion contract's provisions, keeping in mind that subrogation is an equitable doctrine governed by "fairness" principles. In this situation, basic equity mandates that: "Where the insured settles with the tort-feasor, the settlement amount goes to the insured unless the insurer can prove that the insured has already received full compensation." *Hill v. State Farm Mut. Auto. Ins. Co.*, 765 P.2d 864, 868 (Utah 1988).

This analysis requires insurers such as PEHP to show that your client's settlement made him whole. More pointedly, under Utah Code section 49-1 1-613(4), PEHP as the moving party, bears the burden of proof to show that, given the attorney's fees, the litigation costs, the past and future lost wages, the future co-pays on the medical bills expected, the client's whole person impairment, and the accompanying physical disabilities, the insurer cannot demonstrate your client was made whole. Likewise, the insurer cannot show that your client was fully compensated by his settlement monies when he suffers a XX% percentage whole-person impairment, and will continue to suffer such an impairment with its accompanying pain and functional disabilities for YY years, or the client's life expectancy.

5. Utah's Legal History Supports Your Position

Utah has not addressed the factual setting of whether a health insurance plan's contractual subrogation provisions violate long-standing public policy that an insurer cannot assert subrogation rights unless it shows the insured has been "made whole" by her settlement with the tort-feasor. Neither our legislature nor the courts have addressed contractual modification of this public policy in the context of liability insurance settlements. *Hill v. State Farm* speaks of possible contractual modification of the equitable principle, but *Hill* did not involve medical expense reimbursements. Thus, the precise issue of a contractual waiver of the made whole rule in a bodily injury liability settlement was not before the *Hill* court. This is important because your client "bought" the medical expense coverage benefits and the policy attempts to modify this "made whole" principle.

In similar contexts, however, Utah has protected the same made whole position. That is, in under insured and uninsured motorist statutes, our legislature has codified the principle that an insured needs to be made whole before the health insurer can recover for any benefits paid. By such direct action, our legislature clearly intended to foreclose all health insurers' attempts at contractual modification of this equitable principle. *See* Utah Code Ann. § 31A-22-305(4)(c)(iv) and 305(10)(c)(iv).

Importantly, our legislature created the modifications to the uninsured and under insured motorist after the *Hill* decision. Thus, there are good and substantial arguments that our legislature will not permit contractual modifications to defeat this made whole public policy. Our legislature prohibited modification of the made whole rule in the uninsured and under insured motorist laws, knowing full well that an insured *can waive* such coverages. It prohibited modification because the made whole doctrine is an important public policy. Given this legislative history, why would the legislature permit a contractual modification in the liability settlement context where an insured *cannot waive* his liability coverage? If it refused to permit modifications when a waiver of coverage was permissible, it surely would not permit modification on mandatory coverages.

Additionally, the legislature would presumably be stricter when an insurer seeks reimbursement for medical expenses that their

insured had paid premiums specifically so that the insurer would pay them. In the liability context here, there is an even greater public policy argument against permitting any modification to the made whole doctrine via new contractual subrogation rights.

Long subsequent to *Hill*, the Utah Insurance Department commented on the contractually created modification of the made whole rule. To wit:

> Many insurers file to amend policy language to provide "express terms to the contrary," thus, allowing insurers to be reimbursed before the insured is made whole. It is not in the best interests of Utah insureds to allow language that limits their ability to be made whole. An insured must first be made whole before an insurance company subrogates. It is understood that an insured is not entitled to double recovery, *but his initial recovery, to the fullest amount possible, should come before the insurer.* The doctrine of subrogation is equitable. Utah law gives insurer subrogation rights and obligations. However, those rights are not unlimited and do not supersede the right of the insured to be made whole unless the insured contractually relinquishes the right. To allow a policyholder to believe that his insurer has an unconstrained right to unidentifiable proceeds from a settlement would be inequitable and misleading. Policy provisions should include clear language reserving the right of subrogation to the extent that the insured actually receives a double recovery or relinquishes the benefit payment to the subrogated insurer. An insured must recover his due before payment of amounts to which an insurer makes claim will be allowed.

Utah Insurance Department Bulletin, 96-9, 10/23/96. The legislature and the courts should weigh heavily the State Insurance Department's advice, seeing the department as an independent source charged with protecting the rights of both insurers and insureds. The Bulletin talks in terms of insureds "allowing" language that limits their ability to be made whole. The allowing language suggests that Utah insureds have some "bargaining" powers to use in keeping their made whole rights intact. But when the insured has no bargaining powers or tools to negotiate with, the courts should not enforce the waiver because the insured has not "allowed" any language. Here, the insured did not "knowingly allow" these waivers provisions. Rather, insurers such as PEHP force them on their insureds.

6. Insurer's "Double Recovery"

The insurer demands 100% reimbursement of the medical bills it paid in your client's behalf. But remember, the insurer has received your client's insurance premium dollars. Your client paid those premiums to "insure" that the insurer would pay these same medical bills. Now comes the insurer wanting to keep both your client's premium dollars and still recover the full value of the benefits paid. Thus, to a certain extent, the insurer is improperly recovering twice.

7. The Contract Violates Utah's "Common Fund" Doctrine

Policies such as PEHP's violate another basic principle of equity. The insurer wants full reimbursement for the benefits your client purchase, all the while (1) keeping your client's premium monies, but (2) without contributing anything to the costs and efforts the client incurred to obtain the settlement monies now available to reimburse the insurer. In similar situations, insurers and others with a financial interest in the settlement monies must contribute to the insured's costs in securing the settlement or recovery fund.

To demand full recovery at the cost of the financial suffering of its insured violates Utah's "common fund" doctrine. This doctrine says the settlement monies from a tort-feasor constitute a common fund wherein those claiming a monetary interest in the client's claim look to the common fund for their recovery or reimbursement. Historically, when a party such as an insurer has a valid interest in this common fund, that party is required to contribute a fair share of the total fees and costs incurred by the plaintiff claimant

in securing the settlement, i.e., the common fund monies. To mandate such a contribution is inherently within the court's equitable powers "to do justice." The traditional common fund theory applies "to avoid unjust enrichment of those who benefit from the fund that is created by the litigation, and who otherwise would bear none of the litigation costs." *Barker v. Utah Public Serv. Comm'n,* 970 P.2d 702, 711 (Utah 1998). *See also Stewart v. Utah Public Serv. Comm'n,* 885 P.2d 759 (Utah 1994).

It is well settled in Utah that when an insured who has been made whole recovers money that rightfully belongs to a subrogee, that subrogee is required to pay its share of attorney's fees and costs before receiving any reimbursement. *See Laub v. So. Central Telephone Co.,* 657 P.2d 1308 (Utah 1982). And that is when the insurer has "enforceable subrogation rights" and the client has been made whole. In the present discussion, at best, the insurer has questionable subrogation rights, and the insured has not been made whole. It is inequitable for insurers such as PEHP to demand reimbursement without sharing the costs and fees incurred in securing the settlement.

Utah's worker compensation laws have a codification of this common fund principal. Under Utah Code section 34A-2-106, when a claimant's efforts and expenses secure monies from a third party, the worker compensation fund reduces its reimbursement lien proportionally by measuring the lien against the full settlement. Generally, the reduction is about 1/3 of its outstanding lien, together with sharing 1/3 of the costs the claimant spent in securing the settlement, award or verdict monies.

8. Recent Case Law

In the recent case of *Houghton v. Dep't of Health,* 125 P.3d 860 (Utah 2005), our supreme court again re-enforced the equitable principles underpinning the common fund doctrine. In *Houghton*, the state through Medicaid paid the class action plaintiffs' medical bills. The plaintiffs' attorneys secured the settlement monies without any state participation. The state then wanted full reimbursement and refused to share in the costs incurred by the plaintiff(s) in prosecuting their claims to recoveries. The court said the state must share in the costs of securing the settlement monies, whether it gets reimbursed from the tort-feasor or directly from the plaintiffs.

Similarly, the United States Supreme Court recently decided *Arkansas Dept. of Health & Human Servs. v. Ahlborn,* 547 U.S. 268 (2006), ruling that Arkansas' Medicaid program could get reimbursed only from that of the settlement that represents "payment for medical expenses." That is, Arkansas could not get reimbursed out of the lost wages or pain and suffering damages etc., contained in the settlement monies. Additionally, under the "equitable allocation theory" notwithstanding its lien amount, Medicaid could recover only a proportional share of the "medical expense monies." Specifically, Medicaid had paid $216,000 for the plaintiff's medical bills and the case had an agreed-to value of $3,040,000, but the total settlement was only $550,000. Accordingly, Medicaid's reimbursement was limited to one-sixth of its lien amount, or some $35,000.

So, both the local and national climates are to do justice to the parties involved. To do justice means the insurer will share in the costs of securing the settlement by limiting its reimbursement to a fair or proportional share that its lien has to the fair value of the claim.

9. Signing Enrollment Form

Some insurers such as PEHP may argue that your client signed an "enrollment form" that made reference to the policy, and that the form is sufficient to support enforcing the reimbursement provisions. But the enrollment form itself violates Utah insurance law, thus precluding this argument. Utah Code section 31A-21-106(1) states that no policy may incorporate by reference any provision not fully set forth therein. *See Cullum v. Farmers,* 857 P.2d 992 (Utah 1993). Arguing that the enrollment form itself binds the client to the provisions of an unattached policy violates this law.

10. Other Arguments to Proffer

Other arguments intertwined with some of the prior arguments, though distinguishable, are:

A. Policy Language Problems. Look at the reimbursement provisions. Are they set forth in terms of seeking reimbursement from monies recovered from "third parties"? If so, settlements from uninsured and under insured motorist claims are beyond the reach of such provisions. Do the provisions talk of getting reimbursed from the "medical expenses" of the settlement? If so, then only that part of the recovery identified as "past medical expenses" is subject to reimbursement rights. The past and future lost wages and the general damages are outside their reach.

B. Comparative Negligence. If the insured claimant was assessed some degree of comparative negligence, then you argue the amount of the subrogation lien needs to be reduced by the same percent. This argument is also available when the insured claimant's injury was superimposed upon a relevant apportionable, pre-existing condition. For example, assume a $10,000 recovery with a $2000 subrogation lien, $3000 in attorney's fees and $450 in costs. Assume also the insured was assessed 20% comparative negligence and had 20% apportioned out of the recovery for a pre-existing condition. Finally,

assume the subrogation provisions are not otherwise subject to defeat. First, appropriately reduce the $2000 to reflect the common fund principles, e.g., $1000 for attorney's fees and another $150 toward costs. Now, from the insurer's $2000 lien, deduct $400 for the comparative fault and another $400 for the relevant pre-existing condition. Deducting that $1950 leaves a lot more money in the client's hands.

C. Immune Defendant. Where an immune defendant is involved, take the percentage of fault attributable to the immune defendant and subtract that same percentage of money from the subrogation total. You may find the insurer objecting if you try to subtract out anything above 39%. *See* Utah Code Ann. § 78-27-39. But press forward, arguing other equitable made whole principles.

CLOSING CAVEATS

PEHP will argue that as a "self-insured" program it is beyond the parameters of Utah insurance law. The case authorities cited herein are based on principles of equity and "common sense." Therefore, a self-insured plan should not be able to circumvent their application as they reach well beyond the narrow confines of insurance law. Remember that subrogation is an equitable doctrine and generally subject to fairness and public policy. All contracts require that the parties deal with each other in good faith and fair dealings. *See Leigh Furniture v. Isom,* 657 P.2d 293, 304 (Utah 1982). Insurers need to deal with customers fairly and in good faith. The common fund doctrine reaches beyond insurance subrogation. Common sense dictates that undisclosed, hidden contract and undefined provisions are not enforceable. Likewise, wordy, incomprehensible provisions are inequitable. A court should penalize an insurer who fails to produce the policy to its policyholder. PEHP is not the renegade it asserts it is. It is not beyond the laws that dictate equity and common sense. Fortunately, other group insurers cannot make this PEHP argument. It is unique to PEHP as PEHP is a creature of the state.

ERISA-governed plans pose unique difficulties under the ERISA legislation itself and many onerous federal court decisions. Careful review and consideration of ERISA-specific precedent is essential when dealing with those plans.

CONCLUSION

The governing law charges the insurer with the burden of proof on its subrogation claim. Yet, you show that the insurer has presented only "self-serving" conclusions, conclusions void of any statutory or case law authority in support of its positions. Show that the insurer has not carried its affirmative burden to show that the settlement made your client "whole." Ultimately, argue that subrogation is an equitable remedy, and that the equities favor your client. "Subrogation is not a matter of right but may be invoked only in circumstances where justice demands its application." *Transamerica Ins. Co. v. Barnes,* 505 P.2d 783, 786 (Utah 1972). "Furthermore, subrogation must not work any injustice to the rights of others." *State Farm Mut. Auto. Ins. Co. v. N.W. Nat'l Ins. Co.,* 912 P.2d 983, 986 (Utah 1996).

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Skeptics at the Gate – The 2007 Revisions to Rule 702, Utah Rules of Evidence

by John R. Lund and Keith A. Kelly, with assistance from Richard Vazquez[1]

INTRODUCTION

On November 1, 2007, the Utah Supreme Court adopted a significantly revised version of Rule 702, Utah Rules of Evidence, as well as a substantive Advisory Committee Note. Revised Rule 702 overrules a substantial body of Utah case law that called for a bifurcated standard in admitting expert testimony, depending on whether the testimony involved "novel" or "non-novel" expert analysis.[2] Revised Rule 702 now provides a unified framework for determining the admission of expert testimony. The Advisory Committee Note explains the reasoning for these changes, while introducing the perspective of "rational skepticism" for a judge to take when keeping the gate for admission of expert testimony and emphasizing the instruction to focus on the "work at hand" when applying Rule 702.

This article first discusses the questions of who can be a testifying expert and the appropriate subjects of expert testimony. The 2007 amendment did not change Rule 702 on these issues. These questions are addressed by what is now subsection (a) of Revised Rule 702.

This article then discusses the newly added portions of the rule found in Subparts (b) and (c). These Subparts establish the criteria to be used by the court in admitting expert testimony. To be admissible, subpart (b) requires that the principles and methods underlying the expert's testimony meet a "threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case." Utah R. Evid. 702(b). Under subpart (c), any or all of these criteria can be met by showing general acceptance by the relevant expert community.

Revised Utah Rule 702 differs from its federal counterpart in several key ways. It is expressly not an adoption of Federal Rule 702 and federal case law interpreting Federal Rule 702.[3] Where appropriate, this Article compares and contrasts the Utah rule and the federal rule. For example, the Utah rule appoints the trial judge as the gatekeeper for expert opinion, as in the federal rule, but the foundational showing required under the Utah rule is only a "threshold showing." No such qualifier is found in federal rule. Further, since the Utah rule derives from the Utah precedent, this article focuses on Utah cases underlying Revised Utah Rule 702. Within the framework now codified by Revised Rule 702, these cases and the new Advisory Committee Note provide Utah lawyers and judges with guidance for dealing with experts and their opinions.

RULE 702(a): WHO CAN BE AN EXPERT, AND WHAT ARE APPROPRIATE SUBJECTS FOR EXPERT TESTIMONY?

Subpart (a) of Utah Rule 702 addresses who can be an expert and what are appropriate subjects for expert testimony as follows:

> [I]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Utah R. Evid. 702(a).

I. Who Can Be an Expert?

As explained in the 2007 Advisory Committee Note: "The fields of knowledge which may be drawn upon are not limited merely

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to the 'scientific' and 'technical,' but extend to all 'specialized' knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by knowledge, skill, experience, training or education." 2007 Note. This is not to say that the expert's qualifications are unimportant. As Chief Justice Crockett noted nearly a half century ago:

> In view of the importance of the function entrusted to the expert witness, it is of great importance that the court carefully scrutinize his qualifications to guard against being led astray by the pseudo learned or charlatan who may purvey erroneous or too positive opinions without sound foundation.

Webb v. Olin Mathieson Chemical Corp., 9 Utah 2d 275, 342 P. 1094, 1097 (1959).

The Utah Supreme Court explained in *Carbaugh v. Asbestos Corp. Ltd.* that the Rule 702(a) issue of expert qualifications is not changed by the 2007 amendment to Rule 702, 2007 UT 65, ¶18, n. 4, 167 P.3d 1063 (Aug. 24, 2007).[4] In *Carbaugh*, the Court confirmed its longstanding rejection of a rigid, formalistic approach for evaluating an expert's qualifications. Specifically, the *Carbaugh* court denied the argument that a medical expert witness was not qualified to testify because he was not licensed to practice medicine in Utah. *Id.* at ¶¶ 18-19 ("In many instances, the possession of appropriate Utah [medical license] credentials may be enough to qualify a proposed [medical] expert, but that is not to say that the lack of Utah credentials will automatically disqualify a potential expert witness.…Licensing standards [for physicians] are relevant to expert eligibility under rule 702 of the Utah Rules of Evidence but not determinative of it."). The Court more broadly considered the expert's background and expertise and held that the trial court did not err in permitting the expert to testify. *Id.*

Similarly, the Utah Supreme Court applied this broad-based approach to expert witness qualifications in *State v. Kelley.* 2000 UT 41, 1P.3d 546.[5] In *Kelley*, the defendant was charged with attempting to rape a mentally disabled woman. The prosecution called an expert to testify about the victim's mental capabilities and her inability to appraise the nature of a sexual relationship. The supreme court rejected defendant's argument that the expert was unqualified simply because he was not licensed to diagnose mental retardation. Rather the court broadly considered the expert's special education degree, his 27 years of work experience in the general area of his testimony, his specific work with persons with the same level of mental disability as the victim, his specific work with the victim, and his specific knowledge of the victim's level of understanding. *Id.* at 549-50.

Likewise, the Utah Supreme Court applied such a broad-based analysis of expert qualifications in *Patey v. Lainhart,* 1999 UT 31, 977 P.3d 1193.[6] In that case, the plaintiff in an automobile accident case called his treating dentist, a general dental practitioner, to testify about endodontic treatments the plaintiff had received. The defendant objected, claiming that since the witness was not an endodontist he was unqualified to testify. The supreme court disagreed, stating that "[a] person may be qualified to testify as an expert by virtue of experience and training; formal education is not necessarily required." *Id.* at 1196. The court added that the doctor demonstrated expertise "in general dentistry and endodontics," that "one-fourth of his dental education related to endodontics, that he had maintained an ongoing educational study of both general dentistry and endodontics by taking post-graduate courses," that he attended continuing medical education seminars, and that part of his medical practice involved endodontics. *Id.* at 1197. Finally, the Court noted the expert's experience in treating the plaintiff for most of her life. *Id.*

In *Carbaugh, Kelley* and *Patey,* the supreme court found that notwithstanding the absence of specific professional licensing, the witnesses had a wealth of experience, knowledge, skill, and both formal and informal education to qualify them as credible authorities on the areas of which they testified. This may not always be the case. In the absence of formal education or licensing, a court should closely scrutinize the opinion offered, as well as the complete history of experience, training, skills, and education the expert possesses. It may also be useful to focus on the particular opinion such an expert is proffering, that is, the "work at hand." *See* 2007 Note. For example, while the expert in *Kelley* was found qualified to testify about the mental capabilities of the disabled rape victim, he might not have been qualified to further testify about the appropriate psychotropic drugs needed to treat her as a result of the crime.

II. What Are Appropriate Subjects for Expert Testimony?

The rule governing who can be an expert necessarily reads in broad terms. This is because there can be no telling what special knowledge might be helpful to the trier of fact. In the 1992 film *My Cousin Vinny,* whether a '64 Buick Skylark or a '63 Pontiac Tempest had positraction and whether they both came in metallic mint green paint were useful facts for the fact finder to know and this specialized knowledge was supplied by an expert. However, the more limiting language of Rule 702(a) is that expert testimony must be about something that will "assist the trier of fact to understand the evidence or to determine a fact in issue." Utah R. Evid. 702(a).

The court can properly weed out unhelpful and confusing testimony by first focusing on the particular proposition the expert testimony is offered to support. If the testimony does not address an element of a claim or defense at issue or establish a relevant fact, it falls

outside the scope of the rule. In this vein, some part of the proffered testimony might be admitted while other parts are excluded as being of no assistance to the fact finder.

The Utah Supreme Court made this point in *State v. Holm,* 2006 UT 31, ¶¶88-90, 137 P.3d 726. In a prosecution for bigamy and sexual contact with a minor, the defendant attempted to introduce expert testimony on the history of polygamy in Utah, and on the social health of polygamous communities. The defense sought to rebut the notion that polygamous communities are rife with abuse and victimize children. The court held, however, that this testimony would not aid the trier of fact because it did not focus on the issues to be determined by the jury:

> Historical context and evidence as to the social health of polygamous communities have no bearing on the factual predicate for a bigamy or unlawful sexual conduct prosecution. The questions put to the jury were, in fact, only tangentially related to the broader concerns of history and social health. The jury was charged with the task of determining whether Holm purported to marry or cohabited with Stubbs while knowing he already had a wife, whether Holm engaged in sexual activity with Stubbs when she was sixteen or seventeen, and whether Holm is ten years her senior. Holm's proffered testimony as to the history and social health of polygamous communities, which spans nearly thirty pages of transcript, would not have aided the jury in determining the questions before it and would more likely have distracted and confused the jury.

Id.

The United States District Court in Utah provides another example in *Milne v. USA Cycling, Inc.,* 489 F. Supp. 2d 1283 (D. Utah 2007).[7] In *Milne*, the plaintiffs were injured in a bicycle race and alleged that the race organizers were grossly negligent in how they set up the race. In opposition to a motion for summary judgment, the plaintiffs offered the testimony of an expert in bicycle safety and bicycle law enforcement. However, the witness was not expert on the standards of care for organizing bicycle races and his testimony did not establish specific standards of care for bike race organization. Judge Stewart excluded his testimony because it did not address the relevant standard of care and thus ultimately would be unhelpful to the trier of fact. *See id.* at 1286.

RULE 702(b) AND (c): WHAT "THRESHOLD SHOWING" MUST BE MADE TO ADMIT AN EXPERT'S OPINIONS?
Subparts (b) and (c) of Utah Rule 702 address the three-part "threshold showing" requirements of (i) reliable principles and

methods, (ii) sufficiency of factual basis, and (iii) reliable application:

> (b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony if the scientific, technical, or other principles or methods underlying the testimony meet a threshold showing that they (i) are reliable, (ii) are based upon sufficient facts or data, and (iii) have been reliably applied to the facts of the case.
>
> (c) The threshold showing required by subparagraph (b) is satisfied if the principles or methods on which such knowledge is based, including the sufficiency of facts or data and the manner of their application to the facts of the case, are generally accepted by the relevant expert community.

Under Subpart (b), the party offering the evidence must make a "threshold showing" that the principles and methods underlying the opinion are reliable, have been reliably applied to the facts of the case, and are based on sufficient facts or data. Any "plausible" evidence that bears on reliability should be considered.[8] Subpart (c) provides an alternative method of meeting one or more of the three "threshold showing" reliability requirements of Subpart (b).

The Subpart (b) "threshold showing" requirement overrules the analysis of *State v. Clayton,* 646 P.2d 723, 726 (Utah 1982), which held that challenges to reliability of expert testimony go "to the weight to be given the testimony, not to its admissibility."[9] Now, in all circumstances, "Utah's rule assigns to trial judges a 'gatekeeper' responsibility to screen out unreliable expert testimony." 2007 Note.

Assuming the expert is qualified, most serious challenges to an expert's opinion will spotlight one or more of the three foundational requirements of Subpart (b). In determining whether the requirements are met, judges will be most often confronted with the guidance from the Advisory Committee Note to employ "rational skepticism." Since this term is both central to the court's Rule 702 role and a new concept, this article considers the meaning of this term.

There is paucity in the case law using the term "rational skepticism." However, the brief uses of it may be of some value. The term is found in *Lowenstein v. Newark Board of Education,* 171 A.2d 265 (N.J. 1961), where, in the context of reviewing the legality of dismissal of a school board member because of concerns he was a Communist, the New Jersey Supreme Court reasoned:

> Appellant is obviously a person of independent mind, not given to forming or expressing opinions without being conscientiously convinced of the soundness and accuracy of the underlying facts. His mental processes appear to be those of the scholar who does not jump to conclusions or accept a popularly held viewpoint without question and study. These answers clearly seem to be intellectually honest ones from a man who is reluctant to talk of matters about which he does not feel thoroughly qualified. We fail to see where they could possibly indicate any preference for Communism or induce a rational skepticism of his professions of loyalty.

Id. at 279.

So, unless there was good reason to believe Mr. Lowenstein was disloyal, it should not have been so concluded. Unless there is good reason to accept an expert's opinion, it would not be admitted by a rational skeptic.

This view is somewhat tempered by the observation from *U.S. ex rel. Foley v. Ragen,* 52 F. Supp. 265 (D. Ill. 1943), that: "There is a great difference between rational skepticism and arbitrary disbelief." *Id.* at 272.

A third and more pragmatic use of the term comes from *State v. Palumbo,* 327 A.2d 613 (Me. 1974), in which the Maine Supreme Court reviewed a jury charge in a criminal case. Explaining the presumption of innocence the trial court stated:

"[Y]ou as Jurors are writing on a clean slate, and the person accused of crime comes to Court with what we call the presumption of innocence, which teaches, among other things, an attitude of rational skepticism on your part – why should I believe this, why should I believe this." *Id.* at 617.

The query: "Why should I believe this?" comports with the dictionary definition of skepticism as: "1. doubting attitude: an attitude marked by a tendency to doubt what others accept to be true." *See* http://www.encarta.ca/dictionary_1861734786_1861734774/nextpage.html.

Hence, while the court should be open-minded to considering any plausible evidence bearing on reliability, the "threshold showing" is not met until enough is proven to give the rational skeptic good reason to believe the opinion. With that perspective at least somewhat elucidated, this article considers the three foundational requirements at issue.

Subparts (b)(i) & (iii): Reliable principles, methods and application. Whether there is a threshold showing that principles or methods underlying the proffered testimony are reliable, and have been reliably applied to the facts of the case.

Subparts (b)(i) & (iii) require a threshold showing that the expert testimony is based upon reliable principles and methods, and that they have been reliably applied to the facts of the case. This mandate reflects the reliability standards previously

developed in Utah Rule 702 jurisprudence. While Revised Rule 702(b) does not adopt the previous *Rimmasch* test that was formerly applied for novel or newly discovered principles, prior Rule 702 cases for guidance in application of Subpart (b)'s requirements on "reliability." The following case excerpts serve as a guide:

State v. Rimmasch, 775 P.2d 388 (Utah 1989):

> [T]he trial court should carefully explore each logical link in the chain that leads to the expert testimony given in court and determine its reliability. Only with such information can the overall decision on admissibility be made intelligently. In the absence of such a showing by the proponent of the evidence and a determination by the court as to its threshold reliability, the evidence is inadmissible.

Id. at 403.

State v. Butterfield, 2001 UT 59, 27 P.3d 1133 (Utah 2001):

> [A] foundational showing [of reliability] must explore such questions as the correctness of the scientific principles underlying the testimony, the accuracy and reliability of the techniques utilized in applying the principles to the subject matter before the court and in reaching the conclusion expressed in the opinion, and the qualifications of those actually gathering the data and analyzing it. . . .In the absence of such a showing by the proponent of the evidence and a determination by the [trial] court as to its threshold reliability, the evidence is inadmissible.

Id. ¶29.

'[P]ublished articles and books may. . .be used as evidence supporting the correctness of the general scientific principles and the accuracy and reliability of the methods utilized.' *Id*. ¶32 n.4

Simply put, when applying Subpart (b)'s "reliability" requirement, a court should analyze all evidence bearing on whether the methods and principles underlying the proffered opinion would make sense to a reasonable juror. At the conclusion of this analysis, if the court finds that the methodology is illogical, or yields an absurd result, then the court should exclude the evidence.

With expert evidence that is *not* generally accepted in the relevant expert community, the bar for a threshold showing is higher. In *State v. Crosby,* 927 P.2d 638 (Utah 1996), the defendant challenged the trial court's exclusion of testimony on polygraph results. During an evidentiary hearing on admissibility, neither proffered expert could detail any recent study that showed the reliability of polygraph examinations had recently increased. The court affirmed exclusion of the polygraph evidence, implying that building the requisite foundation for expert testimony based

on a disputed methodology would be greater:

> Given the paucity of information in the record before us, we cannot say that the trial court abused its discretion in refusing to admit the polygraph results. While we would be willing to reexamine this issue, we note that a future proponent of polygraph evidence should make a *detailed* foundational showing, *specifically* demonstrating how research or recent developments in the field have made polygraph evidence more reliable. The record in this case fails to meet this burden.

Id. at 643 (emphasis added).

The Supreme Court in *Crosby* noted that, in contrast to the federal standard in *Daubert*, the Utah standard in *Rimmasch* "provides a detailed and rigorous outline for trial courts to follow when making determinations concerning the admissibility of scientific evidence." *Id*. at 642. While Revised Rule 702(b) does not adopt the three-part *Rimmasch* test as articulated in *Crosby* and other Utah cases, its three-pronged reliability analysis is consistent with the general approach in determining reliability as illustrated in cases applying the *Rimmasch* test. Therefore, Subpart (b) requires a rigorous, logical analysis of all plausible evidence that supports an opinion's reliability. The Advisory Committee note states:

> Utah's rule assigns to trial judges a "gatekeeper" responsibility to screen out unreliable expert testimony. In performing their gatekeeper function, trial judges should confront proposed expert testimony with rational skepticism. This degree of scrutiny is not so rigorous as to be satisfied only by scientific or other specialized principles or methods that are free of controversy or that meet any fixed set of criteria fashioned to test reliability. The rational skeptic is receptive to any plausible evidence that may bear on reliability.

What type of evidence will merit the trial court's consideration when assessing reliability? This is indeed a gray area. Guidelines set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), such as evidence of whether the methodology can be tested, whether it has been subject to publication in a peer-reviewed journal, and evidence of rate of error or use of control groups all seem to merit a court's consideration when assessing reliability. But what of "lesser" indicia of reliability, such as discussion in a non peer-reviewed magazine? Or a methodology that was once demonstrated on a television show? The Advisory Committee Note once again provides guidance:

> That "threshold" requires only a basic foundational showing of indicia of reliability for the testimony to be admissible, not that the opinion is indisputably correct. When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Contrary and inconsistent opinions may simultaneously meet the threshold; it is for the factfinder to reconcile – or choose between – the different opinions.

Often, conflicting expert testimony will involve at least one opinion which is the subject of debate in the relevant expert community. The Advisory Committee Note seems to include room for such evidence to nonetheless be admitted. Following this guideline, the court should consider "any plausible evidence that may bear on reliability." 2007 Note. Specifically, the Note explains:

> That "threshold" requires only a basic foundational showing of indicia of reliability for the testimony to be admissible, not that the opinion is indisputably correct. When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Contrary and inconsistent opinions may simultaneously meet the threshold; it is for the factfinder to reconcile – or choose between – the different opinions.

However, while considered, all such evidence should be rigorously scrutinized to ensure that it logically supports the ultimate opinion offered.

Subpart (b)(ii): Sufficient facts or data.

Revised Rule 702(b) requires the trial court to consider whether the expert's testimony is "based upon sufficient facts or data." This analysis is usually dependent on the particular issue being considered. For example, medical experts commonly rely on examination of a single patient to opine about that patient's condition. On the other hand, a public opinion poll will not be reliable if the sample size is too small. Likewise appraisal testimony that is based upon comparable sales may not have a sufficient foundation if not enough comparable sales are available.

Subpart (c): Application of general acceptance for a "threshold showing."

Subpart (c) of Revised Rule 702 allows the proponent of expert testimony to satisfy the requirements of Subparts (b)(i), (b)(ii) and/or (b)(iii) by showing general acceptance "by the relevant expert community." This Subpart "retains limited features of the traditional *Frye* test for expert testimony." 2007 Note Subpart (c) was designed to replace the former *Clayton* analysis for non-novel expert testimony. The Advisory Committee Note explains: "The concept of general acceptance as used in section (c) is intended

to replace the novel vs. non-novel dichotomy that has served as a central analytical tool in Utah's Rule 702 jurisprudence." *Id*.

Thus, a proponent can meet one or more parts of the three-pronged test by showing general acceptance. For example, in the case of an accounting expert whose testimony on damages may reflect a potential calculation error, the evidence may show general acceptance of (a) the principles and methods of the accountant to calculate damages, and (b) the sufficiency of the facts or data used by the accountant in his or her analysis. But there may not be general acceptance of the application to the facts of the case, when there are questions raised about how the calculations are made. In such a case, a threshold showing of reliable application must then be made under Rule 702(b)(iii).

Put differently, any of the three reliability tests of Subpart (b) may be met by a showing of general acceptance. Failure to show general acceptance does not automatically result in exclusion of testimony. As the Advisory Committee Note explains: "The failure to show general acceptance meriting admission under section (c) does not mean the evidence is inadmissible, only that the threshold showing for reliability under section (b) must be shown by other means." *Id*.

Admission under subsection (c) will implicitly represent that the admitted testimony is sufficiently reliable and has adequate foundation under subsection (b). A procedure or test may be so generally accepted that is can be admitted based upon judicial notice. The Utah Supreme Court illustrates this point in *State v. Butterfield,* 2001 UT 59, 27 P.3d 1133 (Utah 2001). In *Butterfield*, the court found judicial notice of the reliability of DNA testing appropriate: "In view of the decisional law from other jurisdictions and the overwhelming endorsement by the relevant scientific and forensic literature, we conclude that judicial notice of the inherent reliability of the PCR STR method of DNA testing is appropriate." *Id*. ¶35. In *Butterfield*, both the scientific and legal communities praised the reliability of PCR STR DNA testing.

But what of those instances where, say, a ¾ majority of literature supports the reliability of a particular methodology? In these cases, the Advisory Committee Note once again provides guidance:

> The rule recognizes that an expert on the stand may give a dissertation or exposition of principles relevant to the case, leaving the trier of fact to apply them to the facts. Proposed expert testimony that seeks to set out relevant principles, methods or techniques without offering an opinion about how they should be applied to a particular array of facts will be, in most instances, more eligible for admission under section (c) than case specific opinion testimony. There are, however, scientific or specialized methods or techniques applied at a level of considerable operational detail that have acquired sufficient general acceptance to merit admission under section (c).

The more particularized the testimony, the less likely it should be admitted under subsection (c). The more generalized the testimony, the more likely that these general principles enjoy general acceptance in the relevant expert community. As such, expert testimony that qualifies for admission under subsection (c) should enjoy general acceptance among either relevant expert authorities in the field, or among courts that have considered its admissibility as applied to substantively similar facts. Acceptance of evidence under this subsection implicitly declares that the

three-prong standards regarding reliable methodology, sufficient foundation, and reliable application have all been met.

Does analysis under Rule 403 remain necessary?
The final prong of admissibility under the former Rule 702 under *Rimmasch* required a balancing test under Utah R. Evid. 403 to determine whether the proffered evidence's probative value outweighed its potential for unfair prejudice. Though this balancing test is not explicitly referenced in the text of the Revised Rule 702, the probative/prejudicial analysis will probably be included in some degree with the court's initial query under Revised Rule 702(a). Testimony whose danger of unfair prejudice outweighs its probative value will likely never be helpful to the trier of fact, and thus would likely be excluded at the outset under subsection (a). As a practice pointer, however, analysis under Rule 403 should always be either included in a 702 challenge, or raised as its own independent basis for challenging the admissibility of expert testimony.

CHECKLIST OF ISSUES TO CONSIDER IN ADMISSION OF EXPERT TESTIMONY:
In summary, the following is a checklist of issues to consider when seeking to admit expert testimony under Revised Rule 702:

- Does the proposed testimony consist of "scientific, technical, or other specialized knowledge"?
- What is the "work at hand"?
- Will the proposed expert testimony "assist the trier of fact"?
- Is the expert witness qualified by knowledge, skill, experience, training, or education?
- Do the principles and methods underlying the testimony meet a threshold showing of *reliability*? (This can be met by showing general acceptance.)
- Do the principles and methods underlying the testimony meet a threshold showing that they are based upon *sufficient facts or data*? (This can be met by showing general acceptance.)
- Do the principles and methods underlying the testimony meet a threshold showing that they have been *reliably applied* to the facts of the case? (This can be met by showing general acceptance.)

In conclusion, Revised Rule 702 requires the trial court judge to act as a gatekeeper in evaluating all expert testimony. Imposition of this requirement is not intended to prevent competing expert points of view from going to a jury, nor is it designed to take away the jury's ultimate role as finder of fact. But it is designed to impose a "threshold showing" of reliability before consideration by the jury.

1. Mr. Lund is the chair of the Utah Supreme Court's Evidence Advisory Committee, which worked with the Utah Supreme Court on the 2007 amendment of Rule 702. Mr. Kelly served as chair of the subcommittee that analyzed Rule 702 issues. This article is based, in part, on a presentation Mr. Lund and Mr. Kelly made on these issues at the Utah Judicial Conference in September 2007. This article reflects the opinions of the authors, and not of the Advisory Committee.
2. *See* Utah R. Evid. 702 Advisory Committee Note (2007) (hereinafter "2007 Note"). By adopting a gatekeeper requirement for all expert testimony, Revised Rule 702 overrules cases holding that challenges to reliability of expert testimony go weight, rather than admissibility. Examples of cases whose analysis is overruled on this issue are *State v. Clayton,* 646 P.2d 723, 726 (Utah 1982), and later cases to the extent that they adopted the *Clayton* standard for admissibility, such as *State v. Kelley,* 2000 UT 41, 1 P.3d 546, and *Green v. Louder,* 2001 UT 62, ¶¶ 27-29, 29 P.3d 638. (As discussed in notes 5 & 6 below, such cases are not overruled on the issue of expert qualifications under Revised Rule 702(a).)
3. Several years before adopting Revised Rule 702, the Utah Supreme Court expressly rejected adoption of the December 1, 2000 amendment to Federal Rule 702. *See* Order of Aug. 15, 2001, *In re Proposed Amendments to Rules 103, 404, 701, 702, 703, 803 and 902 of the Utah Rules of Evidence,* No. 20010570-SC. The Evidence Advisory Committee was split in its recommendations as to whether Utah should have adopted the federal counterpart to Rule 702: Some on the committee advocated adoption of Federal Rule 702 as the Utah rule, while others opposed adoption of the federal rule. Issues involving revision of Utah Rule 702 received wide commentary from members of the Utah State Bar, which commentary was carefully considered by the Utah Supreme Court prior to adopting the current rule.
4. The *Carbaugh* court explained: "A substantially revised [11/1/07] version of Utah Rule of Evidence 702 is currently pending [as of August 2007] before this court. If adopted, it will not alter the application of the issues raised in this appeal." *Id.* ¶ 18, n.4.
5. Revised Rule 702 overrules *Kelley* insofar as it adopts the rejected novel/non-novel dichotomy and the *Clayton* standard for admitting expert testimony. See 2007 Note. But Revised Rule 702 does not change the analysis of expert qualifications found in Rule 702(a). *See Carbaugh,* 2007 UT 65, ¶ 18, n.4.
6. Revised Rule 702 overrules *Patey* insofar as it adopts the rejected *Clayton* standard for admitting expert testimony. *See* 2007 Note. But Revised Rule 702 does not change the analysis of expert qualifications found in Rule 702(a). *See Carbaugh,* 2007 UT 65, ¶ 18, n.4.
7. The 2007 Utah Advisory Committee note to Revised Rule 702 cites *Daubert* for the directive in focusing on the "work at hand." Cases applying *Daubert* to the Fed. R. Civ. P. 702 should therefore be helpful in addressing this initial inquiry as to whether the proffered testimony aids the trier of fact.
8. The Utah Supreme Court recently discussed the meaning of plausible:

   > "Plausible" entered the English language from the Latin verb "plaudere," to applaud. Although the primary meaning of the word has evolved to mean likely or reasonable to a degree falling somewhat short of certainty, vestiges of its root live on in its connotation. In other words, to earn the designation of plausible, a notion, explanation, or interpretation must impart confidence in its credibility sufficient to merit our applause. A standing ovation is not required, a discreet collision of the palms will do, but there must be reason to applaud.

   Saleh v. Farmers Ins. Exchange, 2006 UT 20, ¶ 16, 133 P.3d 428, 433.
9. The following cases are arguably overruled to the extent that they adopted the "weight, not admissibility" analysis of *Clayton* (but they are not necessarily overruled as to other expert testimony issues): *State v. Kelley,* 2000 UT 41, 1 P.3d 546; *State v. Adams,* 2000 UT 42, ¶ 16, 5 P.3d 642; *Green v. Louder,* 2001 UT 62, ¶¶ 27-29, 29 P.3d 638; *Campbell v. State Farm Mut. Auto. Ins. Co.,* 2001 UT 89, ¶¶ 84-92, 65 P.3d 1134 (also overruled on other grounds in *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003)); *State v. Schultz,* 2002 UT App 366, ¶¶ 21-45, 58 P.3d 879; and *Balderas v. Starks,* 2006 UT App 218, ¶¶ 26-32 , 138 P.3d 75. As discussed below, the analysis of Subpart (c) of Revised Rule 702 applies a general acceptance test, which may apply in circumstances such as those in which the Clayton analysis was formerly applied.

Highlights from the 2008 Legislative Session

by Nancy J. Delacenserie

As in most years, the 2008 legislative session was full of controversy. Subjects as diverse as immigration and water were hotly debated. The following is a brief summary of a variety of bills that were enacted during the 2008 legislative session. With the volume of bills passed, no attempt is being made here to provide the reader with more than a taste of several bills of general interest to Utah lawyers. While the bills discussed herein may not directly affect your legal practice, they may very well impact your life in other ways.

Recodification and Revision of Title 78, Judicial Code
This past session the Utah Legislature revised and recodified Title 78, Judicial Code, with an immediate effective date of February 7, 2008. With the enactment of H.B. 78, the Utah Legislature reorganized Title 78 into the following separate titles: Title 78A – Judiciary and Judicial Administration and Title 78B – Judicial Code. Title 78A includes chapters which address the state courts, their administration, and judicial selection. Title 78B includes chapters governing juries and witnesses; statutes of limitation; actions, venue, procedure and evidence; and family and child support and protection acts.

Subsequent technical amendments to Title 78A and 78B were made with the enactment of S.B. 278 which, among other things, provides that the enactment of H.B. 78 shall result in no loss of rights, interruption of jurisdiction or prejudice to matters pending in any court on February 7, 2008. When citing the Judicial Code, cite either Title 78A or 78B, as appropriate. Except for purposes of matters pending in any court beginning February 7, 2008 through August 31, 2008, a citation to the previous Title 78 will be erroneous.

With the enactment of S.B. 205, *Utah Uniform Interstate Depositions and Discovery Act,* Chapter 17 was added to the new Title 78B - Judicial Code. S.B. 205 authorizes, and provides a process for, a non-resident party involved in a civil action in Utah to issue and serve subpoenas in Utah. Parties resident in another state, however, may not use the provisions of this bill unless their home state has also enacted this uniform act or provisions substantially similar thereto. While a request for the issuance of a subpoena under this bill does not constitute an appearance in a Utah court, nothing in this new chapter of the Judicial Code may be construed to exempt an attorney from otherwise complying with Utah law as it applies to the unauthorized practice of law or the requirements of the Utah Rules of Civil Procedure governing limited appearance. In applying and construing this Act, consideration will be given to the need to promote uniformity of the law among the states that enact it.

Water Rights
With the passage of H.B. 51, *Water Rights Amendments,* the Utah Legislature enacted a bill that will potentially affect almost every water user in the state. At issue is the potential forfeiture of water rights for nonuse. The primary purpose of H.B. 51 is to protect public water suppliers from forfeiture of water rights needed to meet the reasonable future water requirement of the public. This protected future water requirement is defined as the water needed for the next 40 years within the public water supplier's projected service area based on projected population growth or other water use demand. A community water system's projected service area is the area served by the system's distribution facilities and expands as those distribution facilities expand.

In addition to the exemption for public water suppliers, H.B. 51 also creates exemptions from forfeiture for: (a) water rights used according to a lease or other agreement, (b) water rights approved for use on land subject to an approved government fallowing program, (c) water rights that are subject to an approved change application that is diligently pursued, (d) water rights to store water in accordance with the Groundwater Recharge and Recovery Act, (e) water rights for water that is unavailable due to the priority of the water right, and (f) supplemental water rights when sufficient water is available under other water rights.

H.B. 51 also changes the time period after which a water right is subject to forfeiture for nonuse from five to seven years; clarifies that a water right may only be forfeited through judicial action;

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simplifies the nonuse application process; and allows a shareholder to file a nonuse application. H.B. 51 became effective May 5, 2008, and amended Section 73-1-4 of the Utah Code.

Immigration

During the 2008 session, the Utah Legislature also adopted S.B. 81, *Illegal Immigration,* an omnibus immigration bill covering a host of topics. Missing from S.B. 81, however, are provisions addressing the controversial state programs that offer in-state tuition and driving privilege cards for undocumented immigrants. A separate bill that would have repealed the in-state tuition waiver failed in the Senate. While driving privilege cards were also spared, more limitations were placed on those cards with the passage of H.B. 171. For example, under H.B. 171, the driving privilege cards cannot be used to verify age or establish identification or residence for such purposes as purchasing alcohol or firearms and will be revoked for uninsured drivers.

Taking a closer look at the new immigration law, the Utah practitioner will find that in the area of employment public employers and contractors that contract with public employers will be required to register with and use a "Status Verification System" to verify the employment eligibility status of new employees, and that it will be unlawful for any "employing entity" to discharge a U.S. citizen or permanent resident alien working in Utah and fill the discharged employee's position with an unauthorized alien. With regard to securing public benefits, S.B. 81 requires that an adult applicant for such benefits certify his or her legal presence in the United States under penalty of perjury and subject to other penalties for false statements. S.B. 81 also provides for the creation and issuance of identification documents and, subject to the availability of funding, for the establishment of a Fraudulent Documents Identification Unit to investigate, apprehend and prosecute individuals who sell fraudulent identification documents for persons unlawfully residing in the state. Under S.B. 81, transporting an illegal alien into or within the state for a distance of more than 100 miles for financial gain or commercial advantage, or knowingly concealing, harboring or sheltering an illegal alien for financial gain or commercial advantage will be a Class A Misdemeanor. In addition, local law enforcement personnel can expect to shoulder a heavier load when it comes to the enforcement of federal immigration laws as a result of S.B. 81. This new law further requires a county sheriff to make a reasonable effort to determine the citizenship and immigration status of a person confined to jail for a period of time. Finally, under S.B. 81, a person not lawfully present in the U.S. may not be issued a private club or restaurant liquor license.

Illegal immigration is complex and has far reaching implications for our state as well as our country. Fortunately, with a delayed effective date of July 1, 2009, there will be time for further consideration of immigration issues before S.B. 81 takes effect.

Town Incorporation Process Amendments

With the enactment of H.B. 164, the Utah Legislature addressed the inadvertent consequence of last year's H.B. 466, which allowed developers to create new towns with minimal public involvement and often without the support of area residents. Under H.B. 164, the process to incorporate a town is now initiated by the filing of a request for a public hearing that must be signed by the owners of at least five separate parcels of land, each owned by a different owner, located within the proposed area for the town. Within three months of the public hearing, a petition to incorporate may be filed. The petition must be signed by a majority of all registered voters within the proposed town and the petition's sponsors cannot own more than 40% of the private land to be incorporated. The county in which the proposed town is located also has the option under H.B. 164 to commission a financial feasibility study for the proposed town. Finally, unlike prior law, the initial officers of the newly incorporated town must now be elected rather than appointed.

Local Government

In the realm of local government law, newly effective S.B. 53, *Use of Initiative and Referendum for Administrative Land Use and Zoning Matters,* is already creating a stir. The bill prohibits the use of local initiatives for land use ordinances and changes therein and precludes the implementation of a land use ordinance

adopted by the local legislative body from being submitted to approval by the voters. In at least two counties, issues have been raised regarding the scope of S.B. 53 and whether it bans referenda on all local land use ordinances. If so, its constitutionality may be subject to challenge. Land use ordinances enacted as a legislative, as opposed to an administrative, act of a local governing body have been held to be subject to referendum in accordance with the Utah Constitution which provides that voters may initiate legislation and require new laws to be approved by referendum before they go into effect.

Real Property

H.B. 223, *Exemption from Licensure by Division of Real Estate,* grants an exemption from state licensure by the Division of Real Estate to a county employee when, on behalf of the county, such employee is engaged in acquiring or disposing of real property, providing property management services or leasing real property. This is an extension of the exemption granted last year to certain state and municipal employees.

The enactment of H.B. 323, *Eminent Domain Amendments,* clarifies that the right of eminent domain may not be exercised for the purposes of trails, paths and other ways for recreational use, including walking, biking, and equestrian use. In addition, while public parks are generally considered a public use for which the right of eminent domain may be exercised, H.B. 323 now excludes any park whose primary use is for a trail, path or other way for walking, hiking, bicycling, or equestrian use or as a connector to other trails, paths or other ways for such uses.

S.B. 92, *Real Property Recording Amendments,* makes certain changes to the laws governing the recording of real property documents and the duties and responsibilities of county recorders. S.B. 92 provides that the county recorder is required to endorse a document only upon acceptance, rather than upon receipt and forbids documents not conforming to the law from being presented for recording. In addition, S.B. 92 specifically authorizes the recording of a notice of acknowledgment and supporting affidavit purporting to establish or affect the state's property interest in a R.S. 2477 right-of-way.

H.B. 486, *Wrongful Liens and Wrongful Judgment Liens,* amends the Utah Code provisions related to the filing of and an action against a wrongful lien. Under H.B. 486, a wrongful lien is now defined to include a notice of interest and a person against whom a wrongful lien is filed may now recover a larger statutory damage amount.

Miscellaneous

Two bills amending the Notaries Public Reform Act were also enacted this past legislative session. H.B. 26 amends the definition of "satisfactory evidence of identity" to include a passport or other personal identification document issued by the federal government, any state government or a foreign government, but specifically excludes a driving privilege card. S.B. 114 allows an attorney who is named in a document to notarize the same provided that the attorney is listed in the document only as a representative of the signer or another person named in the document.

In the criminal law arena, the following two bills were enacted. Under H.B. 10, *Disclosure of Identity to Officer,* failure to disclose your identity to a peace officer upon demand after being stopped on reasonable suspicion that you committed, are in the process of committing or attempting to commit a crime will be a Class B Misdemeanor. With the enactment of H.B. 70, *Expungement Law Amendments,* a person who has received a pardon from the Utah Board of Pardons and Parole is entitled to an expungement of all pardoned crimes other than a capital, first degree or second degree forcible felony, a "driving while under the influence" felony, automobile homicide, and certain sex related offenses.

Conclusion

In closing, your attention is directed to www.le.state.ut.us., where the full text of the bills discussed herein and all the laws enacted during the 2008 general session can be found. The Utah State Legislature's website is a valuable resource that should be "bookmarked" on your personal computer.

No One Makes It Alone

by Andrew A. Valdez

Reviewed by J. Simón Cantarero

No One Makes It Alone (2006) was written by Andrew A. Valdez. Many readers will recognize the author as Judge Valdez of the Third District Juvenile Court. This book is Judge Valdez's first book and is an autobiographical story about a critical time in his youth. While the book may not win any awards for being a literary masterpiece, it should be required reading for practicing lawyers to remind them of the importance of having and being a mentor, not only for their chosen profession but for life. The book is worth at least 3 CLEs.

The book tells the story of young Andy Valdez and transports the reader to Salt Lake City as it was forty-five years ago, to the Liberty Park tennis courts in the 1960s, and to an old Chinese restaurant where Andy enjoyed Egg Foo Yong sandwiches for sixty-five cents. The descriptions of the places, people, and events are vivid to the reader and we feel like we are walking side-by-side with the protagonists or watching Andy swing a tennis racket.

No One Makes It Alone tells the story of Andy, a twelve-year-old newspaper boy laden with large saddle bags full of newspapers, standing on the corner of Main and 200 South hustling downtown businessmen to buy the afternoon paper. The boys would only earn a few cents per newspaper sold, and the more assertive ones would fare better. The story begins with Andy walking home with his brother on a dark and cold October evening after selling newspapers. Andy is happy to tell his brother that he has saved enough money to buy a new pair of pants because he was tired of wearing pants with patches. The brothers would walk through the "red light district," past the bars and across the railroad tracks on the way home.

It was during one afternoon when Andy asked Jack Keller to buy a newspaper from him. Andy's assertiveness impressed Jack enough to eventually offer the boy a job at his printing business in the basement of a downtown building. In addition to working at the shop, Jack also wanted the boy to play sports in order to get him off the streets and to teach the boy "how to behave, to follow rules, to get along with people." The sport Jack wants him to play is tennis and Andy agrees, despite his perception that tennis is a "sissy sport."

Lest we think Jack is a white knight, we learn that he was

> painfully aware he had a great talent for treating people badly, especially those he cared for. It wasn't that he really wanted to, or took pleasure in it, or that he was ignorant or oblivious to the fact that he was doing it. It was a come-and-go compulsion that blinded him to the feelings of others.

Despite this shortcoming, Jack demanded and expected discipline and hard work from Andy. Jack's influence on Andy to learn tennis and excel at the sport carried the boy forward and upward on the court, and later, in life.

The key lessons of life that Andy learns come in a roach-infested basement and on the tennis courts at Liberty Park. We learn that Andy's "world is pretty small," but with Jack's help, the boy's vision and goals are expanding. Through a series of setbacks on the court, at home, and with Jack, the boy learns that in order to get ahead in life, no one makes it alone. This simple and profound principle goes beyond the story. It not only impressed the boy Andy, I suspect it is a driving principle behind the Village Project, a volunteer mentor program sponsored by the Third District

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Juvenile Court serving court-involved youth in Salt Lake County.

The book contains amusing and entertaining stories as well as some graphic and violent scenes the boy witnessed. But throughout, the book maintains an honesty to a time when Andy was a twelve-year-old boy who was meeting new people and going to new places as he played in tennis tournaments. Andy played like a young, brown John McEnroe when his opponents served racial slurs and insults along with tennis balls. His temper was quick, and had it not been for the place and time, the tennis match would have turned into a bare-knuckled boxing match. We read about how Jack realized the breakthrough that Andy, as the only non-white in the entire place, was entering into a world that, only a few months earlier, was completely unbeknownst to the boy.

The transformation from a mouthy newspaper boy to an amateur tennis player is both subtle and drastic. Subtle by the ways the change comes about, by the seemingly simple things Jack introduces into Andy's life. The transformation is drastic by the path Andy is beginning to take and the lessons he is learning from a grumpy guy with whom he shares Egg Foo Yong sandwiches.

With Hope Across America A Father-Daughter Journey

by Bob Braithwaite

Reviewed by Cathy Roberts

Good books should make you want to get up and do something: eat a delicious meal, fall in love, or even travel with your not-so-small child through 37 states across America.

This book creates that desire to hit the road. Written by Bob Braithwaite, part-time U.S. magistrate, and former district court judge from Cedar City, it has little to do with the law, and everything to do with being a parent, and a child. Not that it is a parenting guide, mind you; rather, it is a guidebook to seeing the United States in a truck accompanied by a willing but skeptical family member.

Hope, Bob's youngest daughter and traveling companion, is ten when they begin their journeys following Bob's retirement in 2002. Hope reminds me a lot of my daughter eleven years ago – curious, outspoken, not afraid of criticizing me or her father, and infuriatingly able to support that criticism with indisputable facts. She was fearless when criticizing adults, and fairly oblivious to her own possible failings.

Accompanied by Hope's collection of stuffed animals, named after the state in which each one was purchased, father and daughter travel through Colorado, Kansas, Missouri, Illinois, Iowa, Minnesota, North Dakota, South Dakota, Wyoming, New York, Vermont, New Hampshire, Massachusetts, Connecticut, Pennsylvania, Maryland, West Virginia, Kentucky, Indiana, Illinois, Ohio, Washington D.C., North Carolina, Tennessee, Georgia, Alabama, Louisiana, Texas, New Mexico, Arizona, Nevada, California, Oregon, Washington, Idaho, Montana, and of course, Utah. The book is divided into chapters according to the geographical areas they visit over several trips. Bob's truck serves as sleeping and dining quarters many nights. They see famous sights, such as Mount Rushmore, Washington D.C., and Gettysburg, and also visit many off-the-wall locales. One of the things I liked best about the book is that Bob's itinerary includes some goofy sights such as the Kazoo museum in Eden, New York, the world's largest basket, and the Crayola "non-factory" tour.

Bob's plan for the trip was to allow Hope "to experience our travels without non-stop parental narration – to have her see things and think about them on her own – and to read her own books, play with the stuffed animals she'd brought along, and set her own car-time routine as much as possible."

He also wanted to "occasionally supplement these experiences with some education without being overbearing. That was the big concept anyway."

En route to see the Harry S. Truman Home, Bob writes,

> [W]e were listening to David McCullough's Truman, read by the author. We were about two-thirds of the way through the tapes when we got to Independence. As we got off the freeway, Hope said, 'What town is this?'
>
> I said, 'Independence, Missouri. It's the home of Harry –'
>
> 'I know, Dad. The home of Harry Truman. Whoop-de-freakin-do!'
>
> I immediately popped the cassette out. I'd obviously overdone the educational thing.

Having mostly given up on education through audio tapes, he learns to enjoy the simple pleasures of life on the road, such as sunflower seed-spitting, playing made-up car games like Name

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that Answer, and growing a goatee (a pleasure that elicits a fearless critique from Hope).

In addition to enjoying the drive and the sights, Braithwaite reflects on his life as a judge, describes his family, recounts his connections to earlier places, people and trips, and tells Hope's story. As young as she is, she has her own history, which makes their trip together all the sweeter.

I suspect this book will remind readers not only of their trips with other family members, but of their trips as children with their own parents. In 1960 our family relocated from Tennessee to California, and my father drove me and my younger brother across the country on Route 66. (My mother and even younger sisters took a plane.) We stayed in motels that my brother and I loved – the tackier the better (I remember one in Tulsa, Oklahoma that looked like Mount Vernon!) Dad drove our 1956 Chevy Nomad, hauling a Hillman Minx (a very small British car) full of belongings. My father's only criteria for choosing a motel each night was that it have a swimming pool. Dad had a cocktail, took a nap, and then joined us in the pool. Then we all ate dinner, went to bed and got up early the next day to set off across Oklahoma or Texas or wherever we were. (Lest the reader picture my father passed out on a bed in a sleazy motel, while my brother and I frolicked in the pool unattended, exposing ourselves to possible drowning and/or kidnapping, let me remind you that 1960 was a more innocent time.) Braithwaite's book captures the innocence of the long family road trip.

The book is structured so that Hope's reactions to the trip are a counterpoint to Bob's, as Bob used her journal to supplement his. Her misspellings are delightful, and, as her collection of stuffed animals grows, so does a unique understanding of the United States, seen from back roads, as well as from superhighways.

As gas prices climb, many families are reconsidering taking summer road trips. Readers of Braithwaite's book will know that not taking a family trip, and missing that snapshot of family members on vacation, is a shame. In conclusion, Bob writes, "Life's journey is like the trip planning process and the trip itself. When you put them all together – a mosaic of small pleasures, small failures and best-laid efforts gone whichever direction they choose to go – you have an overall portrait, of a trip and life worth living."

Hope's retrospective view of the trip is simple, and to the point: "I saw parents on vacation – my dad included – having a lot more fun than they like to admit, playing with their kids."

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the April 25, 2008 Commission meeting held in Logan, Utah.

1. Lowry Snow, Nate Alder, Rob Jeffs, Lori Nelson, and Steve Owens reported on their recent attendance at the Western States Bar Conference. Nate reported that he learned that the Bar's reserve could easily be depleted if an "issue" arose, e.g., citizens' referendum on judicial retention, which required our opposition. He also learned about the Nevada Bar's efforts to curb inappropriate lawyer advertising and would like to see something similar adopted here. Rob reported that he found that most lawyer referral programs have incorporated a *low bono* component. Lori reported that some bars are facilitating the availability of health insurance to their members. Steve reported that we should consider hosting a "Utah State Bar Day" to address prominent current legal issues. He further reported that some bars have term limits for their board members.

2. Lowry Snow and Joni Seko attended the recent Northwest Bar Consortium meeting. Consortium members include Washington, Oregon, Nevada, Utah, Idaho, and Montana. Lowry reported that a limited practice rule issue in Washington relating to document preparation in domestic relations area is currently before the Washington Supreme Court.

   He ended his report by observing that other states are quite interested in our mentoring program efforts.

3. Nate and Lowry recently met with all five Utah Congressional representatives for ABA Day in Washington D.C. They lobbied on behalf of stemming erosion of attorney/client privilege in prosecutions but the primary effort was lobbying for more federal funding for legal services. They further reported that he became aware that Utah's Access to Justice Council efforts have become a national model through ABA promotion.

4. John Baldwin reported that there was an unprecedented increase of 557 new lawyers with additional new lawyers being admitted during the May admissions ceremony. (We usually only have about 400 new lawyers per licensing cycle.)

5. John Baldwin reported that the March financial statement shows the Bar is $290,253 in the black. The projection at year end will be approximately $130,000 to the good in addition to our reserves. We've invested heavily in Commission education travel for meetings this year which will be more fully reflected on the year end financials. Lowry noted that the May 30th meeting is Commission's Budget meeting.

6. The Commission selected Judge Glen K. Iwasaki as Judge of the Year.

7. The Commission selected Charles R. Brown as Lawyer of the Year.

8. The Commission selected the Young Lawyers Division as Section of the Year.

9. The Commission selected the Admissions Committee as Committee of the Year.

10. The Commission voted to give the Young Lawyers Division $10,000 to purchase laptops for use in the Wills for Heroes program. Wills for Heroes offers free legal clinics to Utah's "first responders." The clinics will be held two times a year across the state, e.g., St. George, Provo, Ogden, Logan, and four times a year in Salt Lake; maintaining 10 laptops on site becomes important for the success of the program.

11. The Commission received the Pro Bono Committee Report. Herm Olsen reported that the new focus of the Bar's program has changed to "recruit, retain and reward" attorneys for their pro bono efforts. The Bar places cases in the areas of: habeas corpus petitions referred by judges, JAG program (military members on active service facing default judgments), and conflict cases with Utah Legal Services and similar organizations. In 2007, our efforts almost doubled with lawyers contributing 150,000 hours which amounts to approximately $144,000 in donations.

12. The Commission received the Paralegal Division Report. Sharon Andersen reported that the Paralegal Division has partnered with the Young Lawyers Division to participate in the Wills for Heroes event by soliciting notaries and witnesses. The Division also has instituted its own community service efforts by hosting the Professional Women Clothing Drive event. They would like this event to become an annual or biannual event by partnering with Junior League, Red Hanger, and Henries Dry Cleaners. The Division is also offering classes at the library for women to assist with resume building.

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

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 this rule.

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 Licensing@utahbar.org.

Lawyer Referral Service

On July 1, 2008, the Utah State Bar created a new directory for lawyer referrals. Participation in the introductory **"Find a Utah Lawyer Directory"** is voluntary and free of charge. The directory provides potential clients with an on-line listing of each lawyer's name, address, admission date, law school, and telephone number within specific geographic areas and practice types as identified by the search criteria. It includes a lawyer's email address only if specifically authorized. Lawyers are permitted to list up to five practice types. You may sign up for the **Find a Utah Lawyer Directory** at www.utahbar.org/LRS.

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: http://www.utahbar.org/members/awards_recipients.html

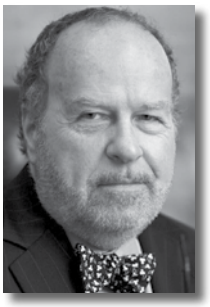
2008 Award Recipients

During the Utah State Bar's 2008 Summer Convention in Sun Valley, Idaho the following awards were presented:

JUDGE OF THE YEAR

Judge Glenn K. Iwasaki

LAWYER OF THE YEAR



Charles R. Brown

COMMITTEE OF THE YEAR
Admissions Committee
Judge James Z. Davis, Co-Chair
Steven T. Waterman, Co-Chair

SECTION OF THE YEAR
Young Lawyers Division
Stephanie Pugsley, President
Julie Ladle, Secretary
M. Michelle Allred, Treasurer
Karthik Nadesan, President-Elect

Thank You!

The Bar Commission wishes to acknowledge the efforts and contributions of all those who made this year's 50th Anniversary of Law Day a success. We extend a special thank you to:

"and Justice for all" Law Day 5K Run/Walk
Staci Duke, Development Coordinator, Law Day Run/Walk Committee and its members, and all those who participated.

Law Day Luncheon/Awards
Young Lawyers Division – Stephanie Pugsley, President
Gary Guelker & Tyson Snow, Co-Chairs

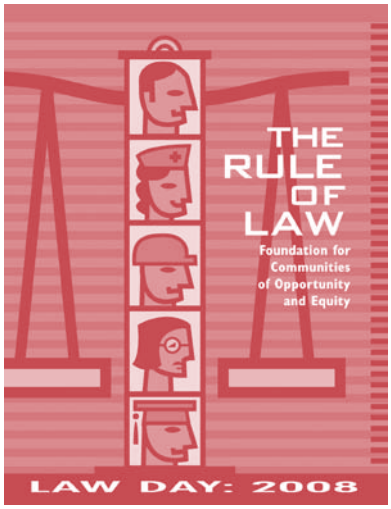
Congratulations to the following award recipients:

Young Lawyer of the Year
Margaret Plane

Liberty Bell Award (Non-Lawyer)
Darren Workman
Juvenile Court Mentor Program – "The Village Project"

Scott M. Matheson Award
(recognizing an individual(s) who has made outstanding contributions to law related education for youth in the state of Utah)
Judge Brendan P. McCullagh
West Valley City Justice Court

Mock Trial Competition
Utah Law Related Education project and all volunteer coaches, judges, teachers and students.



Minority Bar Association
"Essay Contest"

Salt Lake County Bar Association
"Art & the Law" project

Utah State Courts
"Judge for a Day"

Thank you to all the sponsors of the
2008 "AND JUSTICE FOR ALL" Law Day 5K Run & Walk

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Hale Centre Theatre
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Hilton Salt Lake City Center
Hires Big H
Hotel Monaco
Howrey
Lake Hill & Meyers
Mandarin
Midvale Mining Café
Mikado
Orbit Tanning Salon
Pei Wei
PricewaterhouseCoopers
Royal Eatery
Rubios
Salt City Sound
Salt Lake Running Company
Sawadee
Schiff Nutrition International
Skool Lunch
Springhill Suites Marriott
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SuperTarget
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Tsunami
Utah Arts Festival
Utah Office Solutions of Salt Lake City
Young Hoffman Strassberg & Ensor

Ethics Opinions

OPINION NO. 08-01
MAIN OPINION
Issued April 8, 2008

Issue: May an attorney provide legal assistance to litigants appearing before a tribunal *pro se* and prepare written submissions for them without disclosing the nature or extent of such assistance? If so, what are the attorney's obligations when full representation is not undertaken?

Opinion: Under the Utah Rules of Professional Conduct, and in the absence of an express court rule to the contrary, a lawyer may provide legal assistance to litigants appearing before tribunals *pro se* and help them prepare written submissions without disclosing or ensuring the disclosure to others of the nature or extent of such assistance. Although providing limited legal help does not alter the attorney's professional responsibilities, some aspects of the representation require special attention.

DISSENT

Dissents from a Utah Ethics Advisory Opinion are understandably rare because of the harmonious working relationship among Ethics Committee members and the shared objective: to provide well-researched and analyzed ethics opinions upon which Utah State Bar members can hopefully rely. It is, therefore, with some trepidation that I dissent from the main opinion. In my view, the main opinion is logically inconsistent with a Tenth Circuit decision that binds Utah lawyers in federal court; incompatible with judicial and ethics opinions in other jurisdictions; and potentially harmful to what I think should be the overriding ideal of all ethics opinions – to ensure justice for clients.

To begin, I believe the Committee's framing of the issue is overly broad. As the Opinion states the issue: "May an attorney provide legal assistance to litigants appearing before tribunals *pro se* and prepare written submissions for them without disclosing the nature or extent of such assistance?" The Committee's answer to that question is an unqualified "yes." Yet, I believe the Committee's categorical all-or-nothing, black-or-white answer, inclusive of "substantial" with "insubstantial" or quite limited legal services, is ill-advised and contrary to law. To me, the issue is not whether "insubstantial," unbundled legal assistance for pro se litigants is permissible and ethical. No one has ever disagreed that such assistance is permissible, ethical and encouraged. In fact, Rule 1.2(c) of the Utah Rules of Professional Conduct provides for this type of limited representation.[1] Instead, the issue for me, and most jurisdictions that analyze the issue, is whether undisclosed and "substantial" legal assistance, commonly called ghost-lawyering is ethical. Admittedly, the difference between "substantial and "insubstantial" can, in some circumstances, be ambiguous. Presumably, no one would argue that ghost-written appellate briefs or individualized complaints are "insubstantial" – or, to the contrary, that boiler-plate forms available to anyone on the Utah courts web-site (I assume written by lawyers) run afoul of current prohibitions against ghost-lawyering.

This dissent is subscribed to by Committee Member Maxwell A. Miller and two other Committee Members.

OPINION NO. 08-02
Issued March 11, 2008

Issue: Under what circumstances may an attorney who has represented a party in conjunction with a proceeding to appoint a guardian for an adult incapacitated person represent the guardian that is subsequently appointed as a result of that proceeding?

Conclusion: The representation of a court-appointed guardian by an attorney who has also represented one of the parties to the proceeding for the appointment of the guardian must be analyzed under Rules of Professional Conduct, Rules 1.7 and 1.9, the same way an attorney would analyze any conflict of interest between two current clients or between a current and former client. If the facts and circumstances of the case raise the specter of a direct or material adversity, or if the representation of another client creates a material limitation on the lawyer's ability to represent the guardian effectively in light of the fiduciary, statutory and court imposed obligations on the guardian, the attorney should either avoid the joint representation or exercise great care in obtaining the informed written consent of both affected clients. If there is an on-going proceeding involving both the former client and the prospective new client (the guardian), the conflict may not be waived and the representation of the guardian must be avoided.

For the full text of these and other Ethics Advisory Opinions go to: http://www.utahbar.org/rules_ops_pols/index_of_opinions.html

1. Rule 1.2(c) provides: "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

Attorney Discipline

ADMONITION

On May 19, 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 1.15(c) (Safekeeping Property) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

After several years of employment at a law firm, the attorney left, taking several clients. One of the clients had previously signed an agreement with the law firm giving the firm one-third of the most recent settlement offer prior to leaving the firm. The attorney obtained a settlement for the client. The law firm placed the attorney and insurance company on notice of their lien. The attorney instructed the insurance company to issue the settlement checks without the law firm name on them. The attorney failed to hold the disputed portion of the funds separately in the trust account. The attorney withdrew the funds before a severance or accounting occurred.

ADMONITION

On May 12, 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), 1.4(b) (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was hired to represent a client in divorce proceedings. Opposing counsel filed a Motion for Bifurcation and the attorney failed to notify the client of the motion or oppose the motion. The client was unaware that a divorce decree had been entered or that the proceedings had been bifurcated. The attorney did not diligently communicate with the client about the Motion to Bifurcate or the Decree of Divorce being entered. The attorney did not explain the ramifications of the bifurcation of the divorce in advance so that the client could make decisions about the issues in the case.

ADMONITION

On March 20, 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 1.15(a) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney wrote a check to a business partner for a personal transaction from his client trust account. The check was returned for insufficient funds. The attorney failed to respond to the OPC's Notice of Informal Complaint or provide any documentation to the OPC or to a Screening Panel when it was requested of him.

PUBLIC REPRIMAND

On April 30, 2008, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Christopher D. Greenwood for violation of Rules 4.1 (Truthfulness in Statements to Others), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Greenwood was representing a client in a post-divorce modification matter. After an agreement had been reached between the parties, Mr. Greenwood prepared a stipulation and order. The stipulation was sent to opposing counsel and signed. The Order was approved as to form. Mr. Greenwood then submitted a second Order with different terms to opposing counsel's client and to opposing counsel who had by then withdrawn. This second Order contained a material change. Mr. Greenwood sent no cover letter or explanation as to the change in the Order, thus amounting to a misstatement of fact.

PUBLIC REPRIMAND

On May 12, 2008, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Boyd K. Dyer for violation of Rules 8.2 (Judicial Officers), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Dyer filed a motion for summary judgment on behalf of his clients. The district court denied Mr. Dyer's motion and granted the opposing party's motion for summary judgment. Mr. Dyer filed a second motion for summary judgment that was also denied. Mr. Dyer appealed to the Utah Court of Appeals. The Court of Appeals unanimously upheld the trial court's decision. Mr. Dyer filed Petitions for Rehearing in both cases; the petitions were denied. Mr. Dyer filed Petitions for Writ of Certiorari with the Utah Supreme Court. Certiorari was granted in both cases. The Utah Supreme Court dismissed both appeals and struck the briefs in both cases. In its opinion, the Court stated that it had failed to reach the merits of the cases because, "petitioners' briefs in each case are replete with unfounded accusations impugning the integrity of the court of appeals panel that heard the cases below." The Court further noted, "[t]hese accusations include allegations, both direct and indirect, that the panel intentionally fabricated evidence, intentionally misstated the holding of the case, and acted with improper motives." The Court found Mr. Dyer in violation of rule 24(k) of the Utah Rules of Appellate Procedure.

Mr. Dyer recklessly made statements impugning the integrity of the Court of Appeals both in pleadings submitted to the Utah Supreme Court and arguments made before the Utah Supreme Court.

PUBLIC REPRIMAND

On May 13, 2008, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Richard S. Nemelka for violation of Rules 1.6 (Confidentiality of Information), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. Mr. Nemelka has filed a Petition for Review and a Motion for Stay with the Utah Supreme Court.

In summary:

Mr. Nemelka was hired to pursue a divorce. Mr. Nemelka provided opposing counsel with his client's unedited personal notes attached to his discovery responses without his client's consent. Mr. Nemelka refused to promptly provide his client with a copy of her file after she terminated representation. Mr. Nemelka later requested his client personally appear at his office to pick up the file. At that time Mr. Nemelka served his client with a complaint for unpaid attorney's fees. Aggravating factors that were considered were: a pattern of misconduct; multiple offenses; refusal to acknowledge the wrongful nature of the misconduct involved; vulnerability of the victim and substantial experience in the practice of law.

SUSPENSION and PROBATION

On May 5, 2008, the Honorable Ann Boyden, Third Judicial District Court, entered Findings of Fact and Conclusions of Law and Order of Discipline: Suspension and Probation against Cheri K. Gochberg, effective March 5, 2008. Ms. Gochberg is suspended for six months and one day and will be placed on 36 months probation.

In summary:

Ms. Gochberg pled guilty to Driving Under the Influence of Alcohol/Drugs (with priors) pursuant to Utah Code Annotated section 41-6A-502, a third degree felony.

Volunteer Opportunity

Interested in a very unique and rewarding legal experience?

Volunteer to spend two weeks in Ukraine teaching Ukrainian law students. The Leavitt Institute of International Development teaches approximately 200 Ukrainian law students about the American jury trial. Classes are in English. Each volunteer teaches for two weeks. Here's what one member of the bar had to say about the experience:

"My experience in Ukraine was, without a doubt, the highlight of my legal career as an attorney and judge. To witness firsthand the burgeoning freedoms of Ukraine, and the eager aspirations of hundreds of young law students, was a powerful experience." –Judge Daniel Gibbons, Holladay City Justice Court Judge

The program is partially self-funded. The approximate cost for the volunteer is $3000. CLE credit may be available for the teaching experience. To learn more go to www.leavittinstitute.org or contact Chelom Leavitt at chelom@nebonet.com

Congratulations Deb Calegory: Recipient of Utah's 2008 Distinguished Paralegal of the Year Award

by Sharon M. Andersen

On May 15, 2008, we celebrated Paralegal's Day at Little America in Salt Lake City, Utah. As many of you know, Paralegal's Day is a yearly event co-sponsored by the Paralegal Division and the Legal Assistants Association of Utah (LAAU). This year we were especially privileged to have Chief Justice Christine Durham of the Utah Supreme Court as our keynote speaker who spoke to us on the topic of *The Role of the Supreme Court, the Judicial Council, the Many Committees and the Ways We Administer the Court System.*

Brief Summary of Paralegal's Day History

Governor Norman H. Bangerter signed the first Declaration, declaring June 15, 1989 as Legal Assistants' Day in recognition of all Utah paralegals and their valuable contributions to the legal profession by assisting attorneys and making it possible to offer high quality legal services at the lowest possible cost. Not quite five years later, on May 19, 1994, with a few minor revisions to the original Declaration, Governor Michael O. Leavitt signed the second Declaration, declaring each third Thursday of May from that day forward to be designated as Legal Assistants' Day. Both governors encouraged the citizens of our state to participate in the declaration.

Exactly ten years later, on May 19, 2004, Governor Olene S. Walker signed our current Declaration, once again declaring the third Thursday of May – this time as "Paralegal's Day." The year prior, the National Association of Legal Assistants (NALA) officially changed their designation to include Paralegal/ Certified Paralegal as well as Legal Assistant/ Certified Legal Assistant. The Chair of the Division at that time, Sanda Flint, CP, saw it as the perfect opportunity to make a definitive distinction between the terms "legal assistant" and "paralegal" and, consequently, moved forward on two counts – first, to have the Legal Assistants' Division officially known as the Paralegal Division, and second, to have Legal Assistants' Day officially recognized as Paralegal's Day. Additional language added to the 2004 Declaration included the Utah Supreme Court's definition of a paralegal as well as the Utah State Bar's official recognition of the valuable contributions of paralegals in 1996 by creating a Paralegal Division.

Distinguished Paralegal of the Year Award

While Paralegal's Day has been around since 1989, this is only the third year for the Distinguished Paralegal of the Year Award. Danielle Price, CP, the 2005/ 2006 Chair of the Paralegal Division along with her Board of Directors and LAAU agreed that the time had come to expand the Paralegal's Day celebration to include a yearly award honoring a Utah paralegal "who, over a long and distinguished career, has by their ethical and personal conduct, commitment and activities, exemplified for their fellow paralegals and attorneys with whom they work, the epitome of professionalism; who has also rendered extraordinary contributions that coincide with the purposes of the Paralegal Division and/or the purposes of LAAU as set forth in the Bylaws of each organization."

Deb Calegory, 2008 Distinguished Paralegal of the Year

Thank you to this year's Nomination Selection Committee members – Judge Eric A. Ludlow, Billy Walker, N. Adam Caldwell, Paralegal Division Representative Suzanne Potts, and LAAU Representative Lorraine Wardle who, from an exceptional pool of exemplary candidates, selected fifth-generation St. George native, Deb Calegory.

On May 15, 2008, Kathryn Shelton, Immediate Past Chair of the Division presented Deb Calegory with the 2008 Distinguished Paralegal of the Year Award. It was an exciting day for Deb who had learned of her selection only a few days earlier. Without hesitation, Durham Jones & Pinegar, Deb's current employer arranged to fly her from St. George to Salt Lake City to receive the award. Present at the luncheon to honor Deb was Magistrate Judge David Nuffer. Deb had worked for Judge Nuffer for a number of years before he became a judge.

It is not surprising that a current and a past employer nominated Deb for this award. The comments in each of the nomination letters openly and honestly convey genuine respect, admiration, and appreciation for Deb's skills, talents, and contributions to the legal profession, their respective law practices, and the community. It is my honor and privilege to share the following excerpts from the nomination letters received in support of Deb's nomination as Utah's 2008 Distinguished Paralegal of the Year.

Nomination letter submitted by R. Daren Barney, Barney McKenna & Olmstead, P.C.

I have observed Ms. Calegory as a professional paralegal from the time that I originally moved to St. George and started practicing law in 1994.…She initially worked for Snow Nuffer (now known as Durham Jones & Pinegar) from 1982 – 2004. In June 2004, we were fortunate to hire Deborah as a paralegal for the law firm of Barney McKenna & Olmstead, and she was a wonderful asset to our organization from her first day of work. Her reputation as a professional and highly qualified paralegal is well deserved.

…Deborah engenders confidence and trust in all that she does. Perhaps one of her greatest strengths is her confidence and willingness to eagerly accept and learn new responsibilities and skills. As an attorney who relies on competent and qualified employees on a daily basis, I can say without hesitation that Deborah has the qualities that I look for in a paralegal. These are the undocumented elements found within a person's work ethic and their ability to grasp new concepts. These are some of the unique qualities that Deborah brings with her on a day-to-day basis to the workplace. In summary, Deborah Calegory is the definition of "Paralegal of the Year."

Deb Calegory, Paralegal of the Year

As a compliment to her skills as a paralegal, Deborah is committed to community service. She has served as the past Chairman of the Paralegal Division for the Utah State Bar and currently serves on the Board of Directors for Leadership Dixie. Her professional skills and community service have made her one of the most well-known and highly respected paralegals in Southern Utah.

I consider it a privilege to have worked with Deborah Calegory from June 2004 through October 2007, and offer this recommendation with great pleasure and without reservation. I believe that Deborah is uniquely qualified to be a recipient as Utah's 2008 Distinguished Paralegal of the Year.

Nomination letter submitted by Chris L. Engstrom, Durham Jones & Pinegar

…She is a highly trained, ethical professional and exemplifies the best of her profession. Deb is currently in her 26th year of service as a Paralegal. She began her career in 1982 for Snow Nuffer (which became Durham Jones & Pinegar) in St. George, Utah, where her main focus was in real property … and litigation. In addition to legal work at the firm, she supervised and trained other legal staff, passing along her work ethic and knowledge. She has fostered professional competence and excellence in her profession – both in her office setting, and also through community service.

…She was recognized for her work and community service as a Business and Professional Women's Young Careerist. Additionally, Deb helped "grow" the profession by presenting Paralegal workshops for Dixie College Career Days (1988, 1989, 2001)) and has prepared the curriculum and taught the Paralegal "Short Term Intensive Training Course" at Dixie State College (2002 – 2003).

Deb has served as a leader and worked to create opportunities for continuing legal education within her profession by serving as the Education Chairman, Southern Region, for the Legal Assistant Association of Utah (1995 – 1996). … she then served as the Director of the Southern Region Legal Assistant Association of Utah (1996 – 1997). She…continued her tireless leadership by serving for three years as the Director of the Region IV Utah State Bar Paralegal Division (1998 – 2001), followed in 2001 – 2002 as Chairperson of the…Division. Deb's focus during these years of leadership was to support her members' needs for education and the advancement of their skills. She channeled her boundless enthusiasm into building relationships in the legal community to advance the Paralegal career, provided forums for discussion of issues affecting the legal profession, and worked to establish unity with the State Bar.

Deb moved to Barney, McKenna & Olmstead in 2004, where she worked mainly in the areas of business structure and formation, transactional matters, and real property matters. By this time, she was helping residents in several states, having been trained in, and becoming familiar with laws and procedures in the States of Arizona, Nevada, and Utah. She was able to help reduce clients' costs by maintaining an independent caseload under the supervision of a licensed attorney.…In 2007, Deb returned to Durham Jones & Pinegar, P.C,…She inspires us with her happy attitude of service, commitment to professional excellence, civility, ethics, and respect for and understanding of the law. We present her without reservation as a person who thoroughly meets the purposes of the by-laws of the Paralegal Division of the Utah State Bar, and ask that you promote justice by honoring her as the Distinguished Paralegal of the Year.

Congratulations, Deb for your outstanding service and dedication to the legal profession and the community. Your example of excellence, professionalism, character, and leadership has distinguished you as one of the most highly esteemed professionals and mentors in our profession for the entire state of Utah.

Making a Difference in the Legal Profession and the Community

by Sharon M. Andersen

July is here and my term as Chair of the Paralegal Division has ended. For me it has been an extraordinary year, jam-packed with wonderful experiences, new and deepened friendships, and tremendous personal growth. I cannot begin to express how grateful I am to have had the opportunity to serve the Paralegal Division (Division) and its members. However, I know that I could not have accomplished anything without the hard work and unbelievable support of the Division's Board of Directors. What an exceptional group of paralegals! Their examples of commitment and dedication prove that individuals who work together with a shared vision, passion, and purpose can achieve remarkable results. Nevertheless, the leadership could not have realized any degree of success without the support from Division members and other paralegals that stepped up offering their personal time and resources to help with community service events. Together, we have shown that paralegals make a difference not only within the legal profession, but also within the community.

HIGHLIGHTS OF AN EXTRAORDINARY YEAR FOR COMMUNITY SERVICE

The year began with a four-hour retreat on a Saturday afternoon in mid August 2007 when the Board of Directors met to discuss and plan the general goals for the year. Thereafter, each third Wednesday of the month, we held Board meetings and continued discussing, planning, and preparing for upcoming projects and events in an effort to ensure another successful year for the Division. Little did we know that this would become a year full of new ideas and vision within the Division as well as the entire Utah State Bar.

I am proud to report that the Division and its members made tremendous strides towards distinguishing themselves as topnotch community-minded professionals within the sections of the Utah State Bar and the community. This year the Division's involvement in a number of community service activities has been truly amazing.

Wills For Heroes

The Young Lawyers Division (YLD) worked hard to bring the Wills for Heroes program to Utah and St. George was the launch site. Wills for Heroes provides free wills to first responders and fire fighters. The Division teamed up with YLD for the service project in St. George at the 2008 Spring Convention. Many attorneys donated their time to prepare the wills while the Paralegal Division provided witnesses and notaries to complete the wills. Volunteer witnesses and notaries included, among others, paralegals from Strong & Hanni and Christensen & Jensen as well as the staff from the St. George offices of Robert Debry & Associates. It was a successful event and a rewarding experience for all involved.

YLD and the Division teamed up again during Law Day Week on May 2, 2008, and brought the Will for Heroes program to Salt Lake City first responders and fire fighters. Again, many attorneys donated their time to prepare the wills. The Division's Community Service Chair, Carma Harper began weeks in advance recruiting and scheduling (two-hour shifts each) volunteers from members of the Division, the Legal Assistants Association of Utah (LAAU), and various law firms and corporations in Salt Lake City as notaries and witnesses to complete the wills. Strong & Hanni Law Firm through Executive Director Ron Mangone volunteered one of the firm's top legal secretaries Deb Swonson, also a notary to assist Carma throughout the day with training witnesses and notaries on the proper procedure for completing a valid will. This was another highly successful event in service to our community. YLD hopes to continue expanding and offering the program in other areas of the state as well. The next stop for Wills for Heroes is Logan and then Provo, Utah. When the program comes to your area, please consider volunteering as a witness or notary – they need your help.

Women's Professional Clothing Drive: The Division's First Community Service Event

Community Service Chair, Carma Harper and her Community Service Committee (CSC) worked tirelessly pulling together all

SHARON M. ANDERSEN works with Peter Barlow at the law firm of Strong & Hanni doing primarily personal injury defense. The end of June, Sharon completed her term as Chair of the Paralegal Division and Ex Officio member of the Bar Commission.

of the details for the Division's first independent community service project, the Women's Professional Clothing Drive. The Division sponsored the event in association with The Junior League and The Closet. The CSC recruited local support from Henries Dry Cleaners and Red Hanger Cleaners. The event ultimately expanded to outlying areas, which included the company and statewide support of SOS Staffing Service. Heather Roberson, a paralegal with SOS Staffing spearheaded the company's involvement thus assuring the event's success.

We had an enormous response to the clothing drive from all resources – far beyond any expectations with more than seven SUVs fully-packed with clothing, which was delivered to The Closet on Saturday, May 3, 2008. The CSC did an amazing job of involving paralegals, law firms, the media, and local businesses in an all-out effort to create a successful community service project that we hope to continue on an annual and possibly a biannual basis. The spirit that surrounds the coming together of human beings for a worthy cause is indescribable. We hope to maintain this spirit for years to come.

Many thanks go to SOS Staffing Services, Henries Dry Cleaners, and Red Hanger Cleaners for their unparalleled support. Kudos to the CSC members including Carma Harper (Committee Chair), Shawna Powers, Mary Stevens, CP, JoAnna Shiflett, CP, and Cheryl Jeffs, CP for their tremendous efforts. Special thanks to Shawna Powers for bringing her expertise in fundraising and community events to the committee.

MAKING A DIFFERENCE FOR DIVISION MEMBERS

Not only has the Division's Board been busy promoting community service, they have also been working to make a difference for our members. The following projects and more are currently underway.

Website/ Blog Redesigned – Domain Name Established

Our goal this year was to create easier access and also make a more user friendly website for Division members. Committee chair Tracy Lewis began by establishing a domain name www.utahparalegals.org. With assistance and direction from Lincoln and Brooke at the Bar, Tracy also redesigned the website. Currently, the website is quite basic and still in the infant stage of development. We are in need of knowledgeable and capable Division members who enjoy and/or have a knack for website design/ development to assist us in developing the best website possible. We hope to develop a website that will become an invaluable resource and tool for our members. We need your help and ideas so please consider signing up for the Website/ Blog Committee when you fill out and send in your 2008/2009 renewals.

Design a Logo Contest

A Design a Logo Contest has been underway since April and we are still looking for more submissions from which to choose. The logo entry that wins as a result of the Design a Logo Contest will be posted on our home page as the Division's authentic symbol, and will be used on future Division promotional items such as briefcases, mugs, t-shirts, etc. Please consider submitting your or your family's ideas. You never know – yours might be the one chosen to represent the Division for years to come. For more information, please contact one of the Board members listed on the Division's website at www.utahparalegals.org.

Salary Survey: Due to be released in the Fall 2008

The Division's Salary Survey Committee, Tracy Lewis, Karen McCall, and Aaron Thompson have been busy researching and developing a salary survey, which will be distributed shortly throughout the state through the Bar's Survey Monkey program. For the past few months, the committee has been reviewing national surveys as well as the Division's 2005 survey in order to develop questions appropriate to our region. We are also hoping for increased participation thereby giving a more accurate representation of salaries for the state. The survey will be distributed soon with the hope of releasing the results in the fall. Paralegals, please watch for the survey and participate with honest and complete answers. We encourage attorneys to support and encourage their paralegals' participation.

CONCLUSION

While there is only so much I can condense in to one article, more detailed reports from all of the committees, also provided at the June Annual Meeting, are available on the Division's website homepage. There are always opportunities for involvement on the committees if you are interested. We need your ideas and participation so please consider signing up for a committee when you fill out and send in your 2008/2009 renewals. Your renewal packets will include a committee sign up sheet. You can also find a committee sign up sheet on the home page at www.utahparalegals.org.

Finally, every day each of us (all paralegals) invest much of our time and energy to assist and make a difference in the legal profession. It is with much pride and gratitude that this year the Division, its Board of Directors and members, and many other paralegals made –not a small – but a large difference serving and enriching the community and the profession. My heartfelt thank you to each and every paralegal and their friends and family who participated to make this a tremendously successful year.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
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	 **Summer Convention – Sun Valley, Idaho**	**Up to 15 hrs.**
07/30/08	**OPC Ethics School.** 9:00 am – 4:00 pm. $150 before 07/23/08, $175. thereafter. Lunch is included.	6 Ethics incl. 1 hr Professionalism
08/14/08	**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
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
08/22/08	**Annual Securities Law Section Workshop.** Full day. Downtown Marriott. Cost TBA.	Approx. 7
08/22/08	**CLE & Golf, Cache Co. Logan River.** Full day.	3
09/02/08	**Poverty Law Series Part 2.** 1:30 – 5:00 pm. "Advance Directives and the Basics of Estate Planning" with Tanta Lisa Clayton, Utah Legal Services. "Basics of Guarndianships and Conservatorships" with Tanta Lisa Clayton, Utah Legal Services. "Dealing with Clients with Questionable Competency" with Sharadee Fleming, Office of Professional Conduct. Seminar is FREE.	3 CLE/NLCLE incl. 1 hr. Ethics
09/11/08	**The Mechanics of Trial with Frank Carney and Friends – Session Four.** 4:00 – 7:00 pm. $85 for attorneys within their first compliance term, $100 for all others.	3 CLE/NLCLE per session
09/12/08	**CLE & Golf, Utah County, Gladstan Golf Course, Payson, UT**	3
09/18/08	**NLCLE: Family Law – An Evening with Family Law Commissioners.** 4:30 – 7:45 pm. Pre-registration: $60 YLD members, $80 others. Door registration: $75 YLD members, $95 others.	3 CLE/NLCLE
10/16/08	**NLCLE: Water Law Litigation.** 4:30 – 7:45 pm. Pre-registration: $60 YLD members, $80 others. Door registration: $75 YLD members, $95 others.	3 CLE/NLCLE
10/17/08	**CLE & Golf, St. George, The Ledges.**	3
11/07/08	**New Lawyer Required Ethics Program.** 8:30 am – 12:30 pm.	3 CLE/NLCLE
11/13/08	**The Mechanics of Trial with Frank Carney and Friends – Session Five.** 4:00 – 7:00 pm. $85 for attorneys within their first compliance term, $100 for all others.	3 CLE/NLCLE per session
11/21/08	 **Fall Forum – Salt Lake City** **Salt Palace. A full day of CLE and networking for attorneys, paralegals and companies providing services and products to the legal community.**	**Approx. 7 incl. Ethics & Professionalism**
12/16/08	**NLCLE: Trial Advocacy – Foundation & Objections.** 9:00 am – 12:00 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

Classified Ads

RATES & DEADLINES

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.

Classified Advertising Policy: It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age. The publisher may, at its discretion, reject ads deemed inappropriate for publication, and reserves the right to request an ad be revised prior to publication. For display advertising rates and information, please call (801)538-0526.

Utah Bar Journal and the Utah State Bar do not assume any responsibility for an ad, including errors or omissions, beyond the cost of the ad itself. Claims for error adjustment must be made within a reasonable time after the ad is published.

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

CALLING ALL ARTISTS. Are you a paralegal, attorney, judge or policeman who is also a photographer, jeweler, potter or painter? The Canvas and Gavel art show is September 26 and will highlight people who work in the legal community and whose passion is art. Hosted by Mark & Associates, proceeds from the show will go to the artists and to "and Justice for all". Any interested artists may call Cynthia Maw at 531-1723 or email at Cynthia@markandassociates.com.

FOR SALE

Luxury Bear Lake cabin with breathtaking views and total seclusion. Fractional ownership opportunity at only $60k/share. Only 6 of 13 shares available. Can place cabin in rental pool if you do not occupy it during your allotted time. Great tax shelter investment opportunity as well as tax benefits such as depreciation, for gaining equity, and having a nearly free vacation getaway. Visit www.druproperties.com or call (801) 397-2223 for more info.

OFFICE SPACE/SHARING

Executive office suites available. We have two upper level suites with a window view and one lower level suite available. Located in South Bountiful with easy freeway access. Call Dru Properties at (801) 397-2223 and ask for Sean or Connie.

Excellent class A office share available in prime Sugarhouse location. Office space is approx. 14'x15' with enclosed storage closet, office furniture available. Excellent and plentiful parking, convenient freeway access from I-215. $900/month, available Sept. 1st. Contact Jim at (801) 463-2600.

Office Share: Small law firm looking to sublease one office space at 170 South Main, Salt Lake City. Contact Amy Winkler at awinkler@hegattorneys.com. Phone number: (801) 364-5600. Move in date: as soon as possible.

Class A Downtown Office Space. Share with four-six other attorneys. Receptionist, copier, fax, conference room, 12th floor views in prestigious tower. We practice real estate and business law. Small or large corner office available. Rental $1000–$2000/month depending on size of office and configuration. Call Julie at 521-3434.

POSITIONS AVAILABLE

Workers' Comp Claimant Attorneys – Supplement your practice without disrupting your office. Handle Federal Work Comp cases for our national organization as an affiliate attorney. This area of practice doesn't require licensing, but attorney skills are critical. We market, train, mentor, provide call support. Limited opportunites available. Call 877-655-2667.

ATTORNEY WANTED to help my corporation sue communist China on behalf of 100 Tibetans killed on March 15 2008. Must work on a contingency & front costs and want to promote civil rights and help the down trodden. 1-801-755-9744

The Board of Directors of Salt Lake Legal Defender Association is accepting applications for Executive Director. Applicants must be a member of, or eligible for admission to, the Utah State Bar and have extensive criminal experience. Significant experience of fiscal, management and personnel matters, and excellent interpersonal communication skills are required. Knowledge and understanding of the Utah State and Salt Lake County criminal justice systems will enhance applicant's resume. Submit resume with a cover letter detailing interest and qualifications to: D. Gilbert Athay, 424 East 500 South, Suite 300, Salt Lake City, UT 84111. (801) 933-8703. An Equal Opportunity Employer.

Homebuilding and real estate development company is seeking to fill an assistant in-house counsel position for its national operations. Areas of responsibility will include real estate, employment, risk management, and general corporate work. Three to five years experience required, with excellent academic credentials. Salary DOE. Please send resume to: Christine Critchley, Utah State Bar, Confidential Box #4, 645 South 200 East, Salt Lake City, UT 84111-3834 or e-mail ccritchley@utahbar.org.

PRODUCT LIABILITY ATTORNEY. (Salt Lake City) Snell & Wilmer is one of the largest law firms in the Western United States with more than 400 attorneys in six offices and five states. Our Salt Lake City office is seeking an attorney with two to four years of experience in litigation, including product, personal injury and commercial. Strong academic credentials and excellent writing skills are required. Utah bar membership preferred. Send resume to: Danielle Kalafat, Director of Attorney Recruiting & Development , Snell & Wilmer, One Arizona Center, Phoenix, AZ 85004 or dkalafat@swlaw.com.

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