Utah Bar JOURNAL

Volume 21 No. 5
Sep/Oct 2008

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

Letters Submission Guidelines:

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

Cover Art

Fall in Mueller Park, by first-time contributor Sam Newton of Salt Lake City, Utah.

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

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

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

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Letters to the Editor

Dear Editor,

I would be grateful if you would inform your readers that in my article that appeared on page 14 of the July/August 2008 edition, entitled *The Commercial Loan Guaranty – Types and Techniques,* I misstated the holding in *Machock v. Fink,* 137 P.3d 779 (Utah 2006). There, although the Supreme Court ruled that a guarantor is protected by the anti-deficiency statute (Section 57-1-32), it affirmed that the single-action rule does not apply to guarantees. I apologize to all and sundry for any inconvenience my error may have caused.

Also, between the time I submitted the article and its publication, the Judicial Code (former Title 78) was re-numbered. Accordingly, the single-action rule now appears as Section 78B-6-901(1).

Thank you,
Rick L. Knuth

Dear Editor,

Two years ago, the Appellate Practice Section sponsored an appellate haiku and limerick contest. Fully expecting our efforts to be met with gales of laughter and no submissions of actual poetry, we billed it as the "first (and maybe last)" poetry contest. As it turned out, we received quite a few submissions and the contest was great fun.

Much to our surprise, many people have asked us to hold the contest again. Although "deafening clamor" would be a slight exaggeration, we have, in fact, become weary of rejecting so many worthy and beseeching poets. So, back by popular demand, I'm pleased to announce the 2008-2009 Appellate Haiku and Limerick Contest. As before, spectacular prizes await the winning wordsmiths, as well as a small measure of fame and literary immortality.

For complete details and to see the previous submissions, go to the Section's website at http://www.utahbar.org/sections/appellatepractice/section_events.html (contest rules) and http://www.utahbar.org/sections/appellatepractice/assets/haiku_limericks.pdf (previous winners).

Tawni Anderson
Appellate Practice Section, Executive Committee

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.

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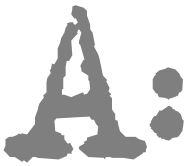

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Professional Relationships

by Nathan D. Alder

"No road is long with good company."
– Turkish proverb

Good relationships make a big difference in our profession. We benefit from many wonderful, cordial, and professional relationships as lawyers. These professional relationships often lead to friendships that extend well beyond the closing of a file. We have the opportunity to handle matters, even litigation, with lawyers we consider to be good friends. Often, we can resolve cases sooner, and to our client's improved satisfaction, because of our professional relationships.

We are surrounded by good people in our profession who are enjoyable, interesting, entertaining, civil, and who are concerned about one another. We are particularly fortunate to have a relatively small Bar in Utah where we will see each other on matters again and again. The close nature of our Bar contributes to our desire to be concerned for each other as professional colleagues.

However, the Utah Bar is growing in number and we face challenges to the nature of our professional relationships. Many young lawyers report, and a study confirms, that due to the amount of work, the billing pressures, and various other professional demands, they have been unable to cultivate a mentor relationship with someone who can take the time to guide them through the first several years of practice. They also report that the negativity in counsel communications, as competitive and adversarial in nature, is often a factor in driving them away from a long term commitment to the law. Even at large firms where there are, presumably, training efforts and programs, younger lawyers nationwide are reporting that they are not always satisfied with the firm lifestyle or the profession in general.

The ABA's recent "After the JD" study showed a significant amount of dissatisfaction among certain segments of the lawyer community regarding aspects of law practice, but it was particularly noticeable among those attorneys who are six to nine years out. Many respondents indicated that they would feel differently if earlier in their career they had had a mentor, more relevant professional experience, institutional investment in their development, and more opportunities to provide meaningful public and pro bono service. Our Bar Commission has closely watched this developing issue, reviewed the study, and has considered institutional options available to us here in Utah. Thus, we are proposing to the Court a New Lawyer Training Program (NLTP) as a means of developing mentoring relationships and addressing other issues that are affecting newly admitted lawyers. The long term success of the Bar, and private and governmental legal institutions, as well, depends on the ability to retain and develop younger lawyers.

The Utah Supreme Court wisely stepped into this arena earlier in the decade and created an Advisory Committee on Professionalism which has now been chaired by three of our five Justices. From that large and diverse committee emerged the Standards of Professionalism and Civility which the Court adopted on October 16, 2003. *See* Rule 14-301, Rules Governing the Utah State Bar. Many of our members have pointed to that effort, as well as the Court's instituting a newly revised Oath of Attorney, and recent jurisprudence regarding professionalism issues, as positive steps in the right direction. The Court and many members of the Bar are making an effort to build a community of lawyers who care about each other professionally, and who care about the nature and quality of our profession. To new lawyers starting out, and, of course, for all of us, I highly recommend becoming acquainted with the Standards of Professionalism and Civility. Likewise, please take note of the Oath of Attorney to which each of us pledge at our annual licensing renewal.

I am encouraged, as a Utah lawyer, to be part of a professional community that cares for one another, that has civility and professionalism as hallmarks, and that looks for and recognizes opportunities to build good professional relationships with one another even though we represent different or competing interests. Time and again I have seen good lawyers go out of their way to cultivate these relationships, and I applaud these efforts. I am particularly grateful to veteran lawyers who mentor, train, and show younger lawyers "the high road," as so many have done for me. I encourage you to find ways to mentor a younger lawyer over a sustained period of time. For this and many other reasons, I greatly appreciate your service to our profession.

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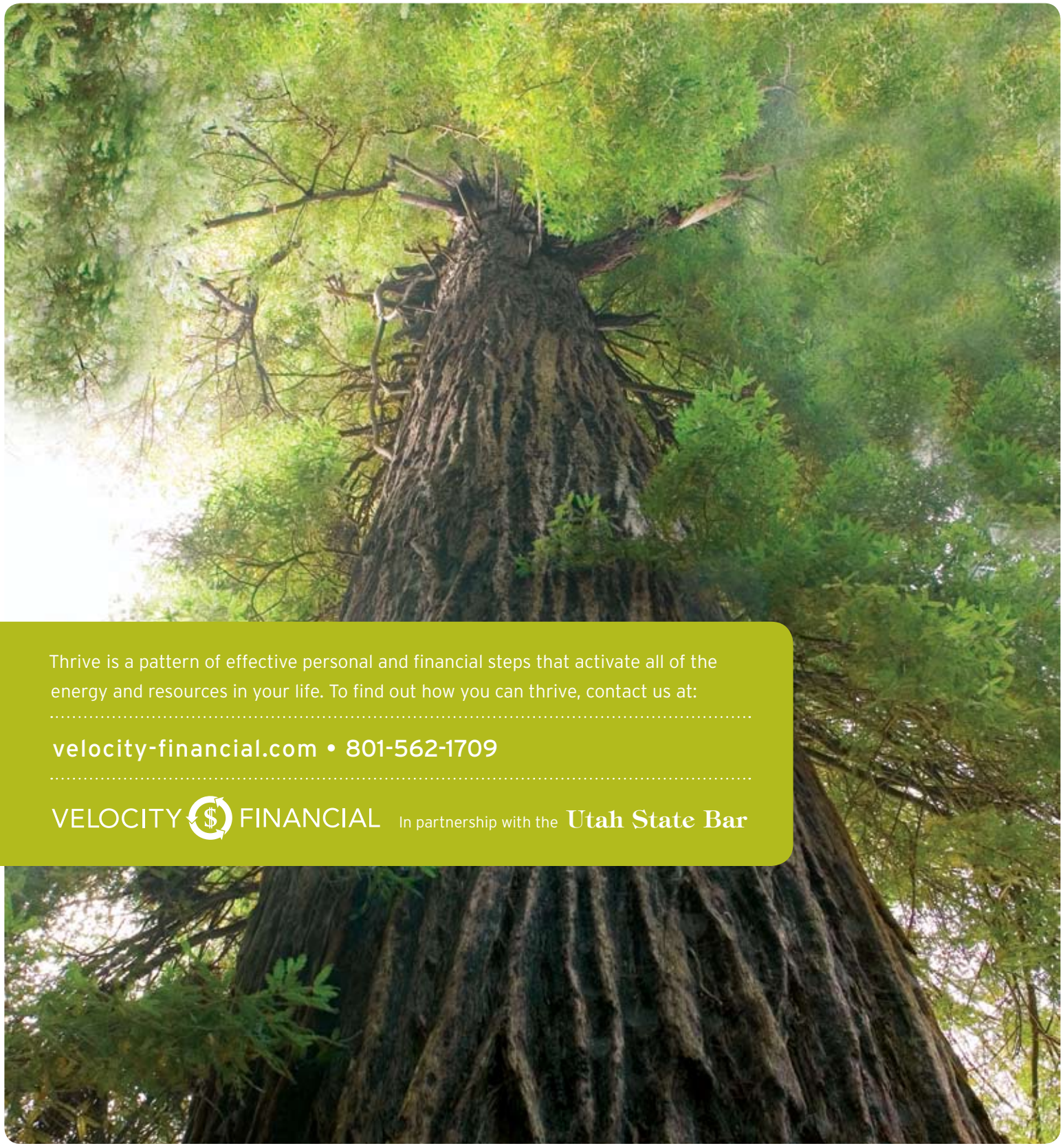

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Riding High With Your Mediator: The Do's and Don'ts of Effective Mediation Advocacy

by Tracy L. Allen

Perhaps it's age; maybe it's experience. Name the cause but the result is all the same. There are just certain things lawyers should and shouldn't do when mediating. While nothing is absolute, what we're about to discuss should be "the norm," not "the exception."

As lawyers, we pride ourselves on being ahead of the curve, out in front, ready to catch and throw whatever comes our way. We think we know just about everything there is to know about our cases and our clients, and we'd like to believe we are right. Humility left many of us after we walked through the law school doors and some haven't ever bothered to look back. Using a mediator to settle or negotiate is something many feel is an unnecessary, time-consuming, and expensive exercise. But here we are, a sea of mediators with daily work, so there must be something to this mediation thing after all.

Assuming you are about to enter into a mediation process, is there a cookie cutter methodology you can follow to "win" in mediation? The short answer is no. There are, however, some tools and tricks for working with the mediator that will make the event less tedious, more productive, and less trying on you, your client, and the pocketbooks around the table. It's really very simple. By making a few minor adjustments in your negotiation style, the rewards will be bountiful.

To put it as succinctly as possible, we can organize the concepts into easily usable coaching points: "Do's" and "Don'ts" of working with your mediator. Here's a primer for the experienced litigator, advocate, and counselor.

Do Your Homework Before You Select the Mediator

By this we mean think about the style and process that you and your client will find most helpful and then figure out the same formula for your opposition. Select a mediator who can deliver what you need. Research the mediator's past. Interview the mediator. Find out the word on the street on a potential mediator. Do you need a heavy hand or dark robe? Is the common settlement conference style of a retired judge what your case needs or do you need a different pace, attitude, or presence in the mediator's chair? Do you need subject-matter expertise? From the defense or plaintiff's perspective? What type of person will have instant credibility with your opposition as well as your client? As mediators, we market trust. How fast do you need it and how soon can you get it in place with a given mediator? Mediators aren't quite yet a dime a dozen. We are diverse and chameleon-like, but we are not all things to all people. Be thoughtful about your selection so that the rest of these suggestions will bring home the value you seek.

Do Prepare Your Mediator

Living in the dark is mostly for bats. Mediators tend to gravitate toward light, hence we prefer enlightenment. Mediator "magic" doesn't come from sterile pleadings, lack of information, or guesswork. It comes from intuition and knowledge. The knowledge is what you have and we need to learn about you, your client, and the opposition in the roles you assume in the conflict. We naturally seek the legal "picture" of the dispute, but what drives conflict is not what's on the surface. Believe it or not, trying to convince us that the matter has been more than amply "lawyered," by sending us pleadings, motions, and briefs, is not all that helpful. We would rather that you tell us what we couldn't possibly know otherwise about the human pieces of the conflict. It's these nuggets that are usually below the surface that create opportunity. Aside from a written summary that has more than deposition transcripts and case briefs, tell us "the story." Call us before the mediation. Let us hear what's troubling you about the case, your client, the opposition. Give us some clues on where you see the hurdles, the barriers, and the minefields.

TRACY L. ALLEN is a partner in the Detroit office of Bodman LLP where she concentrates her practice in the areas of international and national dispute resolution, including complex and multi-party cases.

We can't address what we don't know.

Do Help Us Help Your Client

Good mediators respect you and the job you want to do for your client. We see our work with you as teamwork. We are not your adversary and we are not out to hurt you, your client, or your case. We want to know your client. We want to listen to your client. We need to hear what's circulating in your client's mind and soul so that we can work with the demons inside that could crater the negotiations. Allowing or directing your client to hide behind you is to live in a fairy tale. The opponent will get to the client sooner or later (if it hasn't happened already). Engaging your client in dialogue with the mediator will not cause the case to implode or fall apart. Such conversations usually bring the matter much closer to settlement. There's always more to learn. The information, expectations, desires, anger, resentment, regret, sorrow, and hopes of your client are important to us. Allow us to find out what they are. Often these are the areas where mediators can change the landscape, create value for your client, and move your case toward resolution.

Do Strategize With Your Mediator

The most successful mediation advocates come into mediation with a negotiation plan. It is a flexible plan, but a plan nonetheless. The trick is to craft your plan both before and curing the mediation to maximize your results. It is also a great idea to allow the mediator to help craft your plan before the mediation and during the course of negotiations. The mediator usually has some sense of what is developing with your opposition. Work in concert with the mediator to test your theories, your ideas, and your approach. What's the risk? So you and the mediator don't agree, but at least you know there is another perspective that you can factor into your strategy. Maybe you make a modification, maybe you don't, but how are you harmed by having the opportunity to test your first move and each successive move thereafter?

Do Listen to Your Mediator

Mediators are hired to do a job. Like lawyers and judges, we like you to listen to us. We add value to your situation only if and when you hear and seriously consider our suggestions and recommendations. We use open ended questions to plant concepts, to suggest risk or weakness, and to explore possibilities. When we suggest an alternative tactic, a different number, or sideline a topic, we are sending you a message, and the message is usually based on information we are collecting from your opposition. When we brainstorm with you and your client, we are testing theories and looking for windows of opportunity. We know you send us signals and you will benefit if you recognize and consider

the signals we are sending back to you. Help us find the right path and at least consider our ideas before summarily discarding them. Remember, we are trying to help you unlock the impasse, not throw gasoline on the fire.

Don't Make More Work for Yourself or the Mediator

We know lawyers have to perform for their clients. We realize you want your clients to believe you will help them "win" in mediation. We understand that in negotiations you start "big" if you are the plaintiff and "small" if you are the defense. But you must consider the consequences and reactions of your (opening) settlement bids. When you begin with unrealistic demands or responses, you are admitting your failure to understand the risk analysis of your opponent. We know you don't agree with your opponent's assessment of the case and we aren't asking you to. We just want you to factor into your negotiation strategy the opponent's perspective. When you don't, and you operate in extremes, you make much more work for yourselves with your clients, and for the mediator. This approach adds at least one to two hours to the mediation process because the mediator has to pull people off the wall, up from the floor and back into the game. By adopting extremist positions, you fail to realize that your client's expectations become anchored in the extremes. If you must go this route, at least discuss it with the mediator in advance. This gives the mediator an opportunity to set the stage for your opponent so your offer can be presented in a fashion that offers some hope of a response that is helpful to moving the negotiations forward.

Don't Draw Lines in the Sand

Standoffs only work if you have a much bigger, and quicker gun. Rarely do absolutes bring desired reactions. In fact, it often comes as a surprise to many that once you draw a line in the sand, you have surrendered control of the negotiations to your opponent. The mediator's eyes see more than you do. We don't like to work backwards. Drawing lines in the sand requires us to work extra hard to save your face and get you out of a hole. You don't know how much higher you have to climb, but we usually do, or at least we have a sense of it. Don't quit the race. There's always time for the stand-off at a later date. Do give us the "heads up" before you get to the end of your game. Let us know you are reaching your outer limit. But don't forget that we have a much better sense of timing because we are seeing all sides of the situation. We can better determine when you should play the final card in the deck. Let us help you with that timing so it has maximum impact and effect.

Don't Use Language with the Mediator You Won't Tolerate in return

Lighten up. Mediators don't react well to shouting, threats, intimidation, and disrespectful conduct. It doesn't help you, your client, or your case. It's like asking the defense lawyer in front of his client, "how do you like representing a crook?" and then expecting the defendant to write a big fat check to the plaintiff. You hired us. We didn't create this mess, but we want to help you get yourself and your client out of it. If your case doesn't settle, we won't be living with it tomorrow, but you will. If you want us to go the extra mile for you, especially in the tough, later hours, don't beat us up trying to get you there.

Don't "Lie" to your Mediator

It's all in the definition. We know you don't share everything with us. We know you bluff. We know you will try the case if you have to. We know there are limits to checkbooks and bank accounts. We know there is risk in every case. There is no perfect case and good cases can go bad. We are well-aware that the puffing and the huffing are part of the mediation game, but a bold face lie or misrepresentation will cost you more than the mediation fee. Where are you going with it anyway? What do you hope to accomplish by lying to perhaps the only person in the mediation who really is trying to get a "victory" for you and your client? It's just not smart.

Don't Assume the Mediator Revealed your "Secret"

Often someone thinks they have the smoking gun. Almost equally as often, it's full of blanks. How sure are you the other side doesn't already know about your secret fact or strategy? Just because you told it to the mediator doesn't mean we shared it. In fact, mediators hold confidentiality as a hallmark of the process and the job. When you tell us to keep it confidential, we do. But that doesn't mean it's unknown to your opposition. And while we're on the subject of withholding information, give careful consideration when a mediator suggests that the time has come to share it. Work through the advantages and disadvantages of withholding information with the mediator and see if you come to the same conclusion about whether or not to continue to keep something secret after this analysis.

Conclusion

There is so much constructive and positive synergy that can be created in a mediation when people work as a team. If you've done your homework, you've hired a mediator you can trust. Spend your energy and design your negotiation template to capitalize on the resources the mediator brings to the conflict. We feel privileged to be able to serve you and we want mediation to be successful for your client and for you. It's the simple concepts of quid pro quo, yin and yang, and "do unto others" that are the exceptional ingredients you and the mediator bring to the table to produce the desired (and better) results. It's much more fun and greatly rewarding for everyone when you can use all of these elements to master the mediation.

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ERISA: License to Cheat, Lie, and Steal for the Disability Insurance Industry

by Loren M. Lambert

INTRODUCTION

There is an increasingly popular notion that modern litigation is an evil that must be stamped out at all costs. This belief has not only been propounded by the uninformed, but has been championed by some of our leading legal scholars, judges, and legislators. They have sought to rarefy litigation by creating unnecessary legal complexity, stripping litigation of its essential components, gutting administrative agencies of staff and money, limiting attorneys fees, and completely eliminating adjudication of some claims.

This trend is reminiscent of individuals who desire optimum physical health without exercise or moderate consumption. All that is needed is a bit of surgery, some electrical stimulation, copious amounts of cellulite reducing cream, and the latest magic pharmacopoeia. This same approach is applied to litigation. The power brokers propose that optimum justice can be obtained through radical surgery, intellectual sophistry, copious amounts of judicial neglect, and a magic statutory bullet here or there. The problem is that, just as optimal physical health requires consistent physical activity and disciplined consumption; adequate justice also requires vigorous intellectual labor and disciplined processes. This will be true as long as imperfect beings live in a defective world.

Hence, litigation, while less than perfect, should not be a byword to be whispered in quiet places beyond the hearing of the young, weak, and uneducated. Moreover, in the long run, modern litigation is neither inefficient nor evil. Litigation is the machine of justice, exquisitely crafted, well oiled, and highly refined through centuries of evolution and fine tuning. Many of its components are necessary elements in our modern world. Contrarily, trial by ordeal, used in past centuries, though quick to churn out resolutions, was inefficient, brutal, and arbitrary. To the other extreme, the dismantling and disfigurement of our modern system of litigation into some effete, feeble but seemingly more efficient administrative or arbitrative process controlled by insurance corporations or governmental agencies, is, in the long run, as inefficient, brutal, and arbitrary as was trial by ordeal except that the deepest pocket, and not the more cunning combatant, usually wins.

As will be argued, ERISA (the acronym for the misnamed, Employee Retirement Income Security Act) has created a brutal, arbitrary, and inefficient administrative process that is controlled by the insurance industry. ERISA governs employee welfare benefit programs, see 29 U.S.C. § 1001 et seq., that consist of "any plan, fund, or program…established or maintained by an employer," 29 U.S. C. § 1002 (1), to provide benefits through an insurance policy, *see Donovan v. Dillingham,* 688 F.2d 1367, 1371 (11th Cir. 1982). This article concerns ERISA's application to employment short term and long term disability plans (Plans). Supposedly, Congress created ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans and to protect contractually defined benefits," *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 113 (1989) (internal quotation marks omitted); see also 29 U.S.C. § 1001 (listing the congressional findings and declaration of policy regarding ERISA); *Dixon v. Life Ins. Co. of N. Am.,* 389 F.3d 1179, 1184 (11th Cir. 2004) ("ERISA's purpose [is] to promote the interests of employees and their beneficiaries."). However, this federal legislation would be more aptly named the "Enforcement of Revenues for Insurance Companies Security Act." The fact is ERISA does not secure employees' rights to disability benefits. Instead, it is ill-conceived legislation that gives insurance companies the opportunity to cheat, lie, and steal.

ESSENTIAL COMPONENTS OF MODERN LITIGATION

Adequate adjudication of a conflict has several essential fundamental components including: (1) the availability of the discovery process; (2) the right to probe the materiality, competency, and credibility of evidence; and (3) the right to present a dispute for resolution to an impartial fact finder. The elimination of any of these components in litigation invites deception and produces injustice.

DISCOVERY UNDER ERISA

Under ERISA, the insurance company has unfettered access to information regarding a claimant when evaluating his or her

LOREN M. LAMBERT is a sole practitioner at Arrow Legal Solutions Group, PC. His law practice focuses on disability, employment, family, criminal and personal injury law, and general litigation services.

application for disability benefits. This information includes medical records through requests, peer-to-peer contacts, medical record reviews, medical evaluations, medical examinations, medical testing, employment record requests, Social Security record requests, and surreptitious surveillance.

Contrarily, the claimant is mostly barred from obtaining any information through discovery about the insurance company's decision-making process. A claimant challenging a denial of benefits is only permitted to obtain what the Plan Administrator, the insurance company, or both designate as the administrative file. Hence, the first disfigurement to the machine of justice in an ERISA case is its jettison of the discovery process.

Importance of Discovery

"The objectives (of discovery) are to enhance the truth-seeking process…, to eliminate surprises…. Its legitimate function is to furnish evidence, and the ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts which might be admitted into trial." 27 C.J.S. Title Discovery § 2b (1999).

The Standard of Review in ERISA Administrative Appeals

When a claimant appeals an insurance company's denial of disability benefits under ERISA, the Federal District Court reviews the claimant's cause of action under either: (1) an arbitrary and capricious standard of review, (2) a "sliding scale/conflict of interest" arbitrary and capricious standard of review, or (3) a de novo standard of review. In *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989), the Supreme Court held that "a denial of benefits…is to be reviewed under a de novo standard unless the benefit plan gives the administrator…discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. If discretionary authority exists, which is usually the case (due to the case law established in *Firestone*, most insurance companies through the Plan Administrators have, by the stroke of a pen, granted themselves discretionary authority and it is rare that the de novo standard of review, which allow the claimant more parity, applies), then the proper standard of review is abuse of discretion. *See id.*

In *Lunt v. Metro. Life Insurance Co.,* 2007 U.S. Dist. LEXIS 47967 (D. Utah June 29, 2007), Judge Tena Campbell of the Federal District Court of Utah, in a memorandum decision, stated, "[b]ecause the Tenth Circuit has been 'comparatively liberal in construing language to trigger the more deferential standard of review under ERISA," plan language which requires a claimant to offer proof of disability satisfactory to the [P]lan [A]dministrator [and thereby the insurance company] triggers the arbitrary and capricious review." *Id.* (citation omitted).

Consequently, any language in the Plan indicating that the Plan Administrator (and thereby the insurance company) has discretion to interpret and apply the Plan creates this rather lenient standard of review.

1. Arbitrary and Capricious Standard of Review

Under the arbitrary and capricious standard of review, the court's review is limited to the evidence and arguments that were presented during the administrative claim and appeal process with the insurance company, *see* e.g., *Allison v. UNUM Life Ins. Co. of Am.,* 381 F.3d 1015, 1021 (10th Cir. 2004); *Chambers v. Family Health Plan Corp.,* 100 F.3d 818, 823-24 (10th Cir. 1996); *Sandoval v. Aetna Life & Cas. Ins. Co.,* 967 F.2d 377, 380-81 (10th Cir. 1992). "In effect, a curtain falls when the fiduciary completes its review, and for purposes of determining if substantial evidence supported the decision, the district court must evaluate the record as it was at the time of the decision." *Id.* at 381. The Tenth Circuit has justified this bar to discovery, stating:

> A primary goal of ERISA was to provide a method for workers and beneficiaries to resolve disputes over benefits inexpensively and expeditiously. Permitting or requiring district courts to consider evidence from both parties that was not presented to the [P]lan [A]dministrator would seriously impair the achievement of that goal.

Id. at 380.

Consequently, when the appropriate standard of review is arbitrary and capricious, a claimant's right to discovery is limited to the administrative record, which record the claimant, the insurance company, and Plan Administrator generate prior to litigation. Most short-term and long-term disability plans have a two- to three-step administrative appeal process.

Ostensibly, one may surmise that an adequate remedy to any discovery deficiencies would be to submit any information during the administrative process that was arguably supportive of a claim for disability and to also request discovery information from the insurance company and the Plan Administrator. Although there are exceptions, in practice, this strategy is inadequate for several reasons.

Most claimants do not hire an attorney during the administrative process (to increase the probability of success, a claimant should provide all helpful medical information, obtain expert evaluations by medical and vocational specialist, submit videotaped interviews, and, when relevant, obtain employment records). They intuitively believe that, like most disputes, if they can't work it out on their own they can later hire an attorney and sue. Also, when disabled and forced to leave work on disability, many claimants quickly become bankrupt. Consequently, they cannot afford to obtain adequate medical and vocational support for their disability application and surmise that legal representation is beyond their reach even though many attorneys are willing to take these cases on a contingency basis. Claimants often have the misguided impression that, as long as they submit their own physician's opinions and a few medical records supporting their diagnosis, they will obtain benefits. Although in an obvious disability case this is true, when there is any dispute regarding a diagnosis or impairment and its disabling effects, the insurance company usually resolves that doubt in its favor. It does this by taking advantage of the claimant's naivety and by using the exclusive power ERISA has given it to exercise its discretion to develop a reasonable excuse for its denial.

Once this is done, even when claimants do obtain legal representation, it is extremely difficult to contest the insurance company's denial. While competent legal advocacy increases the chances of a successful outcome, a reasonably sophisticated and careful insurance company can summarily deny almost all appeals and immunize their decision from reversal in federal district court. This is true because under ERISA, regardless of the merits of a disability claim, to prevail a claimant must show that the insurance company's decision was unreasonable, only supported by more than a scintilla of evidence, or both.

In other words, under the arbitrary and capricious standard, "the [insurance company's] decision will be upheld so long as it is predicated on a reasoned basis." *Adamson v. Unum Life Ins. Co. of Am.,* 455 F.3d 1209, 1212 (19th Cir. 2006). In essence, "[t]he Administrators' decision need not be the only logical one nor even the best one. It need only be sufficiently supported by facts within their knowledge. . . ." *Woolsey v. Marion Labs., Inc.,* 934 F.2d 1452, 1460 (10th Cir. 1991); *see also Adamson,* 455 F.3d at 1212 ("A lack of substantial evidence often indicates an arbitrary and capricious decision. Substantial evidence is of the sort that a reasonable mind could accept as sufficient to support a conclusion. Substantial evidence means more than a scintilla, of course, yet less than a preponderance.") (citations omitted). Courts "will not substitute [their] judgment for the judgment of the [Administrators] unless 'the actions of the [Administrators] are not grounded on any reasonable basis.'" *Woolsey*, 934 F.2d at 1460 (second and third alteration in original) (quoting *Oster v. Barco of Cal. Employees' Ret. Plan,* 869 F.2d 1215, 1218 (9th Cir. 1988)). Rather, "[t]he reviewing court 'need only assure that the administrator's decision falls somewhere on a continuum of reasonableness – even if on the low end.'" *Kimber v. Thiokol Corp.,* 196 F.3d 1092, 1098 (10th Cir. 1999) (quoting *Vega v. Nat'l Life Ins. Servs., Inc.,* 188 F.3d 287, 297 (5th Cir. 1999)).

Under this standard during the administrative process an insurance company can usually create a reasonable, and therefore legally irrefutable explanation for its denial of benefits. This is especially the case because, if the claimant requests discovery information during the administrative process to try to uncover evidence demonstrating that the evaluation process is arbitrary, the Plan Administrator and its insurance company will deny the discovery request. It will argue that the very same federal case law prohibiting discovery in an ERISA claim during litigation, bars such requests.

Currently, except as noted below, there is scant federal case law regarding the right to discovery during the administrative process. As a consequence, attempting discovery during the administrative process does not catapult the claimant into a position to use discovery during litigation to expose shoddy, underhanded, or dishonest insurance practices that are implemented to deny claims.

2. The "Sliding Scale" Standard of Review

In two seminal cases, *Jones v. Kodak Medical Assistance Plan,* 169 F.3d 1287 (10th Cir. 1999), and *Kimber v. Thiokol Corp. Disability Benefits Plan,* 196 F.3d 1092 (10th Cir. 1999), regarding actual conflicts of interest, stated, that "[b]efore applying the sliding scale, a court must decide whether there was a conflict of interest," *Jones*, 169 F.3d at 1289, and, "there must first be evidence of a conflict of interest," *Kimber*, 196 F.3d at 1092. To determine whether a conflict of interest exists, *Jones* directs the District Court to consider whether: "(1) the plan is self-funded; (2) the company funding the plan appointed and compensated the Plan Administrator; (3) the Plan Administrator's performance reviews or level of compensation were linked to the denial of benefits; and (4) the provisions of benefits has a significant economic impact on the company administering the plan." *Jones* at 1291. *Jones* further states that, "[i]f the court concludes that the Plan Administrator's dual role jeopardized his impartiality, his discretionary decisions must be viewed with less deference." *Id.*

In *Fought v. UNUM Life Insurance Co. of America,* 379 F.3d 997 (10th Cir. 2004), the Tenth Circuit held that where an insurer is both funding and administering claims, it is operating under an inherent conflict of interest. Consequently, the district court is to review the plan administrator or insurance company's decision with a lesser degree of deference to the insurer's decision. The court in *Fought* stated: "The district court must take a hard look at the evidence and arguments presented to the [P]lan [A]dministrator to ensure that the decision was a reasoned application of the terms of the plan to the particular case, untainted by the conflict of interest." *Id.* at 1006. However, the Plan Administrator or insurance company's decision is to be given even less deference if the Plan Administrator is also shown to have a serious, actual conflict of interest.

Then, in *Allison v. Unum,* 381 F.3d 1015 (10th Cir. 2004), the Tenth Circuit Court stated that even though the lessened deference is required in such circumstance, "In reviewing a [P]lan [A]dministrator's decision under the arbitrary and capricious standard, we are limited to the 'administrative record' – the materials compiled by the administrator in the course of making his decision." *Id.* at 1021 (internal quotation marks omitted).

Consequently, in the Tenth Circuit, discovery is not allowed, even when there is an inherent or actual conflict of interest. This bar to discovery is in direct contradiction to additional Tenth Circuit Court pronouncements about these sliding scale reviews.

The Tenth Circuit has adopted a two-step approach for dealing with conflicts of interest in ERISA cases. (There is one medical benefits denial case in which a Utah Federal District Court judge did allow discovery in a sliding scale standard of review ERISA case.) In *Nichols v. Wal-Mart Stores, Inc.,* 259 F. Supp. 2d 1213 (D. UT 2003), the Utah federal district court allowed discovery on the issue of conflict of interest in a sliding scale arbitrary and capricious standard of review case when the plaintiff had requested discovery during the claim review process and defendant refused to answer. In *Nichols* the court stated, "Plaintiff is permitted,…to seek discovery on the narrow issue of *whether a conflict of interest exists* between the Plan Administrator of the plan and Wal-Mart Stores, Inc., the plan sponsor." Id. at 1221-22.

First, the court must determine whether a conflict of interest exists because "[t]he possibility of an administrator operating under a conflict of interest…changes the [arbitrary and capricious] analysis." *Fought*, 379 F.3d at 1003; *see also Adamson v. UNUM Life Insurance Co. of America,* 455 F.3d 1209, 1212 (10th Cir. 2006) ("We do note that where a 'standard' conflict of interest exists, the [P]lan [A]dministrator's decision is entitled to less deference, and the standard conflict is regarded 'as one factor in determining whether the [P]lan [A]dministrator's denial of benefits was arbitrary and capricious.'") (quoting Fought, 379 F.3d at 1005). As the Supreme Court noted, "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989) (alteration in original) (quoting Restatement (Second) of Trusts § 187 cmt. d (1959)). Second, if there is a conflict of interest, the court must decide what reduction from the arbitrary and capricious standard is warranted. "The reduction correlates with the extent to which the conflict jeopardized the administrator's impartiality." *Lunt v. Metro. Life Ins. Co.,* 2007 U.S. Dist. LEXIS 47967 (D. Utah June 29, 2007); *see Fought,* 379 F.3d at 1004 ("[T]he reviewing court will always apply an arbitrary and capricious standard, but the court must decrease the level of deference given to the conflicted administrator's decision in proportion to the seriousness of the conflict.") (quoting *Chambers v. Family Health Plan Corp.,* 100 F.3d 818, 825 (10th Cir. 1996)).

Under this second step, the claimant bears the burden of proving that the impartiality was jeopardized. "The fact that [defendant] administered and insured the group term life insurance portion of this plan does not on its own warrant a further reduction in deference." *Adamson*, 455 F.3d at 1213. Rather, "[s]ome proof (supplied by the claimant) must identify a conflict that could plausibly jeopardize the [P]lan [A]dministrator's impartiality." *Id.*

The schematic set forth in these cases begs the question: how can a claimant, who is barred from conducting discovery, provide proof that the inherent or actual conflict jeopardized the Plan Administrator's impartiality? Granted, while there are the rare cases when evidence of a serious conflict is readily available in the administrative record as in *Flinders v. Workforce Stailization Plan of Phillips Petroleum Co.,* 491 F.3d 1180 (10th Cir. 2007), this is a rare event. Under usual circumstances, is the insurance company going to offer up, as part of the administrative record, evidence that in order to save revenues it pressures its agents to deny claims by basing their promotions, pay, and bonuses upon claim denials? Is it going to voluntarily provide information that it deliberately selects and manipulates expert witnesses so that they invariably support its denials? Is it going to divulge its procedures and protocols that indicate that certain claims are denied due to arbitrary impairment duration guidelines? No. Although this practitioner has also found evidence of such practices in the rare cases that discovery was allowed or in non-ERISA cases, this will only happen when ERISA is amended to allow discovery.

3. De Novo Standard of Review

Most circuits have adopted rules allowing the admission of additional evidence in de novo cases in limited circumstances such as when there was a conflict of interest. *See, e.g., DeFelice v. Am. Int'l Life Assurance Co. of N.Y.,* 112 F.3d 61, 65-67 (2d Cir. 1997) (allowing the use of extra evidence if the Plan Administrator has a conflict of interest); *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan,* 46 F.3d 938, 943-44 (9th Cir. 1995) (allowing the use of extra evidence where the Plan Administrator incorrectly interpreted the plan); *Casey v. Uddeholm Corp.,* 32 F.3d 1094, 1098-99 (7th Cir. 1994) (allowing a district court to consider additional evidence where the Plan Administrator has made no fact-finding himself); *S. Farm Bureau Life Ins. Co. v. Moore,* 993 F.2d 98, 101-02 (5th Cir. 1993) (allowing the admission of extra evidence with regards to plan interpretation by the administrator, but not with

regards to the finding of historical facts by the administrator); *Donatelli v. Home Ins. Co.,* 992 F.2d 763, 765 (8th Cir. 1993) (leaving the question of whether to admit extra evidence to the discretion of the district court where there is "good cause" to admit additional information in order to provide "adequate" review); *Quesinberry v. Life Ins. Co. of N. Am.,* 987 F.2d 1017, 1021-27 (4th Cir. 1993) (en banc) (leaving the question of whether to admit extra evidence to the discretion of the district court when it finds that exceptional circumstances have been met and listing some of those circumstances); *Luby v. Teamsters Health, Welfare, & Pension Trust Funds,* 944 F.2d 1176, 1184-85 (3d Cir. 1991) (stating that the decision to admit additional evidence is within the district court's discretion and was permissible in this case because there was no evidentiary record). The most thorough explanation of this position has been provided by the Fourth Circuit in *Quesinberry, see* 987 F.2d 1017, which held that allowing a district court to exercise its discretion to admit additional evidence in de novo cases under certain circumstances best reconciles ERISA's competing purposes of efficiency and fairness, *see Id.* at 125-26.

In, *Jewell v. Life Insurance Co. of North America,* 508 F.3d 1303 (10th Cir. 2007), the Tenth Circuit Court of Appeals stated:

> A party seeking to introduce evidence from outside the administrative record bears a significant burden in establishing that he may do so. In particular, (1) the evidence must be "necessary to the district court's de novo review"; (2) the party offering the extra-record evidence must "demonstrate that it could not have been submitted to the plan administrator at the time the challenged decision was made"; (3) the evidence must not be "[c]umulative or repetitive"; nor (4) may it be "evidence that `is simply better evidence than the claimant mustered for the claim review.'" *Hall [v. UNUM Life Insurance Co. of America],* 300 F.3d [1197, 1203 (2002)] (quoting *Quesinberry*, 987 F.2d at 1027). Even then, "district courts are not required to admit additional evidence when these circumstances exist because a court `may well conclude that the case can be properly resolved on the administrative record without the need to put the parties to additional delay and expense.'"
>
> *Id*. at 1309 (first alteration in original) (footnote omitted).

For guidance in evaluating the necessity of extra-record evidence, we listed in *Hall* several examples of the "exceptional circumstances" which "could warrant the admission of additional evidence." Those situations include claims that require consideration of complex medical questions or issues regarding the credibility of medical

experts; the availability of very limited administrative review procedures with little or no evidentiary record; the necessity of evidence regarding interpretation of the terms of the plan rather than specific historical facts; instances where the payor and the administrator are the same entity and the court is concerned about impartiality; claims which would have been insurance contract claims prior to ERISA; and circumstances in which there is additional evidence that the claimant could not have presented in the administrative process. These are not exceptions to the *Hall* rule; they are merely examples of circumstances that might militate in favor of a finding of necessity. The existence of one or more of these circumstances does not make extra-record evidence automatically admissible, for if it did, then supplementation of the record would not be limited to unusual cases or extraordinary circumstances. This would "undermin[e] the goal of not making district courts `substitute plan administrators.'" District courts must conduct analysis case-by-case to determine whether all four prongs of the test are met.

Id. (alteration in original) (citations omitted).

[T]he term "necessary," as we used it in *Hall*, must be "harmonized with its context." We are guided by our qualification in *Hall*, following the Fourth Circuit's opinion in *Quesinberry*, that extra-record evidence may be admitted when "`necessary to conduct an *adequate* de novo review of the benefit decision.'" If, for instance, the administrator based its decision on information not in the record – perhaps on principles generally known within the medical community – the district court likely could not meaningfully review the decision without the admission of that evidence. Or if the court cannot understand abstruse medical terminology central to the issues of a case, the claimant may supplement the record with explanatory evidence. Likewise, if the administrator simply neglected to include in the record exhibits the claimant had submitted to it, those may be offered to the district court. (Even "necessary" evidence, however, may only be admitted if the other three prongs of the *Hall* test are satisfied. The consequences of a record insufficient to allow meaningful review will be borne by the party responsible for the insufficiency.)

Id. at 1311 (citation omitted).

In *Hall v. UNUM Life Insurance Co. of America,* 300 F.3d 1197 (10th Circuit 2002), the district court held a bench trial in which the scope of review was expanded beyond the administrative record. In its review of that decision the 10th Circuit Court of Appeals sustained the district court, stating that additional discovery is allowed, "when circumstances clearly established that additional evidence is necessary to conduct an adequate *de novo* review of the benefit decision." *Id*. at 1202.

In a similar case, the U.S. District Court for the Southern District of California allowed discovery in a de novo case on: "(1) information necessary to demonstrate 'the manner in or extent to which the conflict of interest affected UNUM's decision-making process' and 'address any shortcomings in the record or decision-making process caused by the conflict [of interest],' and (2) information regarding the independence or neutrality of the physicians utilized by Unum for medical opinions relative to [Plaintiff's] disability claim." *Waggener v. UNUM Life Ins. Co. of Am.,* 238 F.Supp.2d 1179, 1187 (S.D.Cal. 2002). The court reasoned, "These categories of information appear reasonably related to the claims and defenses in this case, and may lead to evidence that the District Judge may permit to be admitted at the time of summary judgment or trial." *Id*.

In *Leahy v. Bon, Inc., 801 F. Supp.* 529 (1992) this Utah Federal District Court, applying a de novo standard of review stated, "[w]here the decision-maker stands to gain from a denial of benefits, there may be incentive to base the denial on less than all of the available evidence. Under such circumstances, courts should be hesitant to limit the scope of review to the evidence considered by the decision-maker." *Id*. at 540. Although it appears this case has not been directly overturned, in view of *Jewell*, its applicability is questionable.

Therefore regarding the de novo standard of review and discovery, while the authority may seem to provide a glimmer of fairness for claimants, this limited allowance of discovery is rare. This is so because the disability insurance industry has, by the stroke of the pen, quickly modified most plans to grant the plan administrators discretionary authority. Moreover, even in de novo cases, the federal judge has discretion to allow discovery. That discretion is exercised sparingly.

Essential Topics for Discovery

In summary, discovery is, for all intents and purposes, rare in ERISA cases. Discovery is, however, essential in all ERISA disability cases when disability benefits have been denied. In such cases a claimant should be allowed discovery to obtain: (a) the guidelines and other criterion used by Plan Administrators/insurance company to evaluate a claimant's disabilities and application for benefits; (b) information about the compensation and manner that medical and vocational experts are selected; (c) the qualifications and competency of selected medical and vocational experts; and (d) information regarding the way the claims adjustors are evaluated in conjunction with their denial and approval rate of claims.

1. Guidelines and Criterion

In evaluating particular illnesses, diseases, syndromes, and injuries that are known to cause disabilities, insurance companies often use various guidelines that allegedly predict the severity and duration of particular disabling conditions. These guidelines are often applied by rote to disability claims without regard to the individual circumstances of the particular claimant. For instance, if a particular illness or disease has an average disabling duration among the general population of six months, insurance adjusters will arbitrarily apply that period of time to determine how long a claimant should receive disability benefits. Without access to this information, a claimant cannot demonstrate that a guideline is obsolete, incorrect, or does not apply in their case. Under such circumstances, this is relevant information that would demonstrate the arbitrariness of the insurance company's reliance thereon, but is nevertheless not allowed to be discovered.

2. The Compensation, Selection, and Qualifications Of Medical and Vocational Experts.

Most attorneys and legal experts recognize that if one party in a legal dispute has the exclusive ability to select experts to render opinions regarding any particular disputed matter and those selected experts are given irrefutable and controlling weight in the dispute, such a process will invariably lead to a result-oriented selection of experts with predictable outcomes. Under ERISA this is, in fact, what happens. During the administrative process, the insurance company selects the medical and vocational experts that evaluate the claimant's disability. In so doing the insurance company is able, through the power of the pocket and the protections of ERISA, to select those experts whose dispositions and philosophies are most closely aligned with the insurance company's interests and who consistently support the Plan Administrator and/or insurance company's denial. Although during the administrative process a claimant may provide their own expert's opinion rebutting the insurance company's experts' opinions, such submissions are usually futile.

This is true for several reasons. First under the arbitrary and capricious standard of review, discovery is not allowed to probe the unreliability, incompetency, or bias of the Plan Administrator and/or insurance company's experts' opinions. And second, pursuant to all standards of review in ERISA cases, so long as the Plan Administrator and/or insurance company's experts' opinions has some modicum or semblance of validity, it rules the day. As set forth above, ERISA has no mechanism to independently resolve medical disputes of fact and opinion. To the contrary, the plan administrator and insurance companies' decisions and its selected experts are given the benefit of the doubt in any

dispute and therefore the district court upholds any plausible denial of benefits.

As the Supreme Court explained, "courts have no warrant to require administrators automatically to accord special weight to the opinions of a claimant's physician; nor may courts impose on [P]lan [A]dministrators a discrete burden of explanation when they credit reliable evidence that conflicts with a treating physician's evaluation." *Black & Decker Disability Plan v. Nord,* 538 U.S. 822, 834 (2003). Hence, as long as the plan administrator, insurance company, or both finds some doctor or vocational expert somewhere, no matter how competent they are or reliable their methods, that concludes the claimant is not disabled and able to work, benefits will be denied and the decision is not subject to reversal.

Empowered by this unfair schematic under ERISA, Plan Administrators and their insurance companies have, in fact, set up their own expert witness pools that they exclusively use for result oriented denials. Often these experts cursorily review the medical evidence, cherry pick only that information which supports a denial of benefits, have underlings conduct the examinations using their signature stamp, do not physically examine or evaluate the claimant themselves, and apply outdated medical criteria and testing. Many of these experts are either directly or indirectly under the supervisory influence of the insurance company. The vast majority of these experts earn millions of dollars of income from providing these evaluations and yet supposedly have full-time jobs in the medical industry to such an extent that it is improbable they are competently and fairly conducting these expert evaluations.

The reality of human nature is that what can go wrong will go wrong. There is no human being, organization, or entity that is perfect or incorruptible. If the lights of the discovery process are therefore not shown upon the process that insurance companies use to evaluate claims, they can and will act deceptively because insurance companies are as prone to imperfection as the general population. These insurance corporations and their agents will and do commit errors because of the motive to maximize profits, bias, prejudices, human error, ego, simple slothfulness, and sometimes outright fraud. Without the indispensable cog of discovery in the machine of justice, rarely, if ever, will claimants uncover such injustices.

RIGHT TO PRESENT EVIDENCE IN OPEN COURT AND TO CONDUCT CROSS-EXAMINATION

As set forth above, under ERISA there is no court trial of a denial of disability benefits. The claimant therefore never presents expert or lay testimony in open court about their limitations, pain, or fatigue to an independent, impartial fact finder or cross examines the insurance company's agents and experts. The judge only considers the administrative record.

Cross examination is invaluable as a test of the accuracy, truthfulness and credibility of testimony. *See Aluminum Indus. v. Egan,* 22 N.E. 2d 459, 462 (Ohio 1938). "Cross examination is a fundamental trial right in our judicial system and is an essential element of a fair trial and the proper administration of justice." 81 Am Jur 2D Title Witnesses § 771 (2004). "The right to cross examination has been called absolute and not a mere privilege. This right is also basic to our judicial system; its preservation is essential to the proper administration of justice; and it is a valuable fundamental and substantial right; to be jealously guarded." 98 C.J.S. Title Discovery § 44 (1999). Dean Wigmore characterizes cross-examination as "beyond any doubt, the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, Evidence, § 1367 (Chadbourn Rev.1974). Moreover, since at least the time of Blackstone, it has been felt that the goal of evidentiary reliability can best be assured by testing the evidence in the "crucible of cross examination." *Crawford v. Washington,* 541 U.S. 36, 61-62 (2004).

If this is true, why do we, the American public, and we, as members of the bar, accept without a fight this gutting of our administration of justice, and blithely give in to the argument that efficiency for the insurance industry is more important than basic fairness?

RIGHT TO AN IMPARTIAL DECISION MAKER

As set forth above, in reviewing a denial of a claim for ERISA benefits, in litigation, the Federal District Court Judge resolves the dispute through motions practice and not a trial. In reviewing these motions, "the court does not examine defendant's motion under the traditional summary judgment standard.…Instead, the court acts as an appellate court and evaluates the reasonableness of a [P]lan [A]dministrator or fiduciary's decision based on the evidence contained in the administrative record." *Panther v. Synthes,* 380 F. Supp. 2d 1198, 1207 n.9 (D. Kan. 2005). Hence, the federal judge does not sit to adjudicate the case; the judge merely determines if the insurance company's denial metaphorically stinks so bad that it cannot be tolerated.

This point is highlighted when, in *Roach v. Prudential Insurance,* Civil No. 2:00-CV-00239, Utah Federal District Court Judge Dee Benson, in reviewing Prudential's request to dismiss the case stated, "I may be tempted in a case like this to find that [Ms. Roach] in my view is disabled, candidly. It seems like there is a very good case here to be made for her disability, but in light of this standard…my job is only to see if there was some rational basis to support this even if I don't agree with it.…[I]t seems like this system is harsher than our judicial system…[I]t would be nice in an ideal world if someone could go back to Prudential

and say 'do you want to take another look at this? I don't think she is faking it here.'"

Prudential's own attorney, Mr. Jon C. Martinson, of Fabian and Clendenin, stated, "[W]e need to remember that under [ERISA's] arbitrary and capricious standard the Court affords the administrator's discretion in their review based on the administrative record. We are not here to determine whether [Ms. Roach] was disabled under our understanding. . . .I don't think any of us does not sympathize with [Ms. Roach]. . .The law requires us to make a counterintuitive decision in this case. . .It is not our call and it is not the District Court's call and it is not the Tenth Circuit's call. . . .[T]he way [ERISA] is now we're going to have to trade unfortunate and hopefully rare situations like this for overall efficiency." (Quotes from oral argument transcript.)

Therefore, in most cases, as noted in local attorney Brian S. King's, "How ERISA Plan Administrators and Fiduciaries Make a Plaintiffs Lawyer's Life Easier," Utah Trial Journal, Volume 30, No. 3. page 6-8, in order to litigate and win a denial of benefits, it is more a matter of exploiting mistakes, and not whether "the claimant [is] disabled."

This is a curious thing. It is probable that insurance company's would never tolerate a system to resolve disputes between them and their insured in which the insured had the exclusive right to resolve the dispute and be upheld so long as the insured's decision was reasonable. Why is it then fair to allow insurance companies this same pleasure? It is hard to imagine how any person, entity or government would ever find such a system to be acceptable. It is most likely that this has been allowed under ERISA because few care about or find themselves a member of this small underclass and politically powerless group of individuals who are disabled and denied benefits.

ADDING INSULT TO INJURY

What the Plan Administrator, Insurance Company, or Both Giveth, It Taketh Away

To add insult to injury, under ERISA employers are allowed to cancel insurance programs outright even after an employee has worked for years for a company, paid premiums for disability coverage through their employment, and gone out on disability. ERISA allows companies to terminate disability benefits because they are neither vested nor accrued, *Phillips v. Amoco Oil Co.,* 799 F.2d 1464, 1471 (11th Cir.1986), cert. denied, 481 U.S. 1016 (1987). Unlike pension benefits, welfare benefit plans neither vest nor accrue. *See* 29 U.S.C. § 1051(1); *Vasseur v. Halliburton Co.,* 950 F.2d 1002, 1006 (5th Cir.1992); *Hozier v. Midwest Fasteners, Inc.,* 908 F.2d 1155, 1160 (3rd Cir.1990). This is because Congress determined that vesting requirements for welfare plans, "would seriously complicate the administration

and increase the cost of plans whose primary function is to provide retirement income." H.R.Rep. No. 807, 93rd Cong., 2d Sess. 60, reprinted in 1974 U.S.C.C.A.N. 4639, 4670, 4726; S.Rep. No. 383, 93rd Cong., 1st Sess. 51 reprinted in 1974 U.S.C.C.A.N. 4890, 4935. Instead, Congress intended employers to be free to create, modify, or terminate the terms and conditions of employee welfare benefit plans as inflation, changes in medical practice and technology, and the costs of treatment dictate. *See Moore v. Metro. Life Ins. Co.,* 856 F.2d 488, 492 (2nd Cir. 1988); *see also Metro. Life Ins. Co. Arrow v. Massachusetts,* 471 U.S. 724, 732, (1985) (ERISA "does not regulate the substantive content of welfare-benefit plans").

Purchasing Swamp Land on Mars

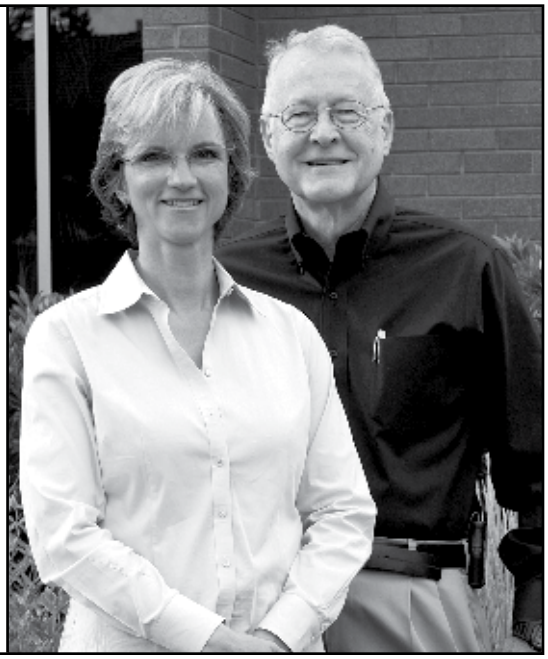
The final injustices in ERISA disability plans are their offset provisions. Most, if not all ERISA Plans offset any benefit awarded by entitlements from other sources. For instance, if a claimant gets $1000 a month in Social Security Disability benefits, this amount will offset the monthly ERISA plan disability benefit. Consequently, if the monthly disability benefit is $1000 or less, no disability benefit will be paid unless there is a plan provision that provides for a minimum benefit. Some plans have such minimums (usually $100) but many do not. Hence, many employees' premiums may as well have been spent buying real estate on Mars.

CONCLUSION

It is hard to conceive of any knowledgeable advocate who would voluntarily agree to submit a client's dispute for determination in a process in which the opponent was granted all the advantages that ERISA gives insurance companies in a disability benefits dispute. So why does any respectable member of the bar, legislature, or judiciary subscribe to any notion that ERISA is anything more that an abomination and affront to our collective sense of justice and in effect a license to cheat, lie, and steal for the disability insurance industry?

Some may cry that this article sets unnecessarily alarmist tone. However, a recent Georgetown University Health Policy Institute conducted a study found that under the arbitrary and capricious standard of review, the insured prevailed in only 28.4% and when the court applied a de novo standard of review, the insured prevailed 65.9% of the time. Also, not surprisingly, as discussed in a law review article, "Trust Law as Regulatory Law: The Scandal and Judicial Review of Benefit Denials Under ERISA," Northwestern University Law Review, Vol. 101, p. 1315 (2007), Professor John H. Langbein, Sterling Professor of Law and Legal History, Yale University, at page 1321; http://www.law.northwestern.edu/lawreview/vl01/n3/1315/LR101n3Langbein.pdf, a 1995 internal memorandum from Provident Insurance Company revealed that ERISA provided huge economic advantages to the insurance industry, especially due to the application of the deferential standard of review, and that had ERISA applied to12 claims that were settled for $7.8 million in the aggregate, Unum's liability would have been between zero and $0.5 million. There are also, hundreds of punitive damage cases that have demonstrated the insurance companies will go to great lengths to manipulate claims to defraud their insurers. None of these cases would have likely come to light under ERISA.

To restore justice to this area of law, I call upon all fair minded members of our citizenry to end that injustice before you or someone you know or love is the next victim of its efficiency.



A Primer on the National Vaccine Injury Compensation Program

by Christopher J. Rogers

In recent months, you may have seen various news stories debating an alleged connection between childhood vaccines and autism.[1] These news stories have raised the specter of vaccine injury nationwide. Vaccine injury claims are distinct from traditional tort actions and this article is an effort to help navigate the legal minefield of vaccine injury claims.[2]

Before a lawsuit may be filed against a vaccine manufacturer, federal law requires the submission of a claim under the National Vaccine Injury Compensation Program (the Program). *See* 42 U.S.C. §§ 300aa-1 et seq. The Program was created by the National Childhood Vaccine Injury Act of 1986 (Public Law 99-660). It is a no-fault system that provides an efficient forum for individuals to be compensated for vaccine-related injuries directly from a federally-established fund instead of vaccine manufacturers.

The Program provides some basic protection for vaccine manufacturers by compensating those relatively few individuals injured by vaccines while allowing the manufacturers to maximize their energies on new and current vaccine development for the betterment of society as a whole. The Program involves three distinct federal government offices:

- The U.S. Department of Health and Human Services – the respondent in all vaccine injury claims and the "guardian" of the vaccine fund;
- The U.S. Department of Justice – the legal counsel for the respondent; and
- The U.S. Court of Federal Claims – the court that receives the petition and decides if the claim will be paid.

In general, a vaccine injury claim must be filed within three years after the first symptom of the vaccine injury. *See* 42 U.S.C. § 300aa-16(a). A vaccine related death claim must be filed within two years of death *and* within four years after the first symptom of the injury from which the death occurred. *See* 42 U.S.C. § 300aa-16(a)(3).

A vaccine claim begins with the filing of a petition with the U.S. Court of Federal Claims in Washington, D.C. All vaccine cases are filed electronically and are assigned to a special master who makes all factual and legal findings in the case. There are no juries in the Program. Once a vaccine petition is filed, there are two phases of the claim: **Entitlement** and **Damages**.

In the Entitlement phase, the special master receives evidence to determine if, by a preponderance of evidence, the vaccine injuries claimed were caused in-fact by the vaccine. *See* 42 U.S.C. § 300aa-13(a). If the injuries are determined to have been caused by the vaccine, entitlement is awarded. If not, entitlement is denied and no award of damages is reached.

Under the Program some vaccine injuries, such as anaphylactic shock, are presumed to have been caused in-fact by a vaccine if they occurred within a certain timeframe from the administration of the vaccine. As a result, the Program has established a vaccine table for injuries that have a legal presumption of causation. *See* 42 U.S.C. § 300aa-14.[3] This is commonly referred to as a "Table Injury." It is not fatal to your case if your vaccine or injury is not listed on the table. It only means that there is no presumption of causation and that you will need to prove causation in-fact through expert opinion. Expert opinion is then required to determine the causal connection between the vaccine and the alleged vaccine injuries. Similar to traditional litigation, the special master will also encourage settlement discussions between the parties before an entitlement decision is rendered.

After the petition is submitted, the Department of Justice will file a report with the court, typically with expert opinion disputing causation, among other defenses. This is referred to as a Rule 4 report. *See* Rule 4, Vaccine Rules of the United State Court of Federal Claims. The special master then renders a decision on entitlement. Only after a decision of entitlement is granted does the court move on to the next phase – Damages.

In the Damages phase, the court receives evidence concerning the damages related to the vaccine injury and decides the amount of damages to award. For vaccine *injury* cases, there is no cap

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on the amount of damages that can be awarded. However, punitive damage awards are prohibited and there is no collateral source rule under the Program. *See* 42 U.S.C. § 300aa-15. For example, if your client has health insurance coverage for past medical expenses related to the vaccine injury, the Program will not compensate any expenses that those collateral sources will cover, whether past or future expenses. The court will only award past and future *nonreimbursable* medical, custodial care, and rehabilitation costs, and related expenses. In vaccine related *death* cases, the award is capped at $250,000 under the Program.

Because the Program is a no-fault system, each year approximately 60% of the petitions for entitlement are granted.[4] The average damages award in 2007 was approximately $1,000,000. Under federal law, attorneys are prohibited from taking a contingent fee on the damages awarded to the petitioner under the Program. *See* 42 U.S.C. § 300aa-15(e). Instead, the Court will make a separate award of attorney's fees and costs based on a reasonable hourly rate considering the experience of the attorney, the actual time incurred, and the difficulty of the matter. This requires that attorneys keep extremely detailed and accurate time logs. Additionally, as long as the claim was made in good faith with an appropriate factual basis, attorneys may still receive an award of attorneys fees even if entitlement is denied.

In 2007, the average award of costs and attorneys fees was about $50,000 for compensated claims.[5] The average attorneys fees award for non-compensated claims was about $26,000.[6] Costs are reimbursed to the attorney as long as the incurred costs are related to the prosecution of the vaccine claim.

Even after winning entitlement and receiving an award of damages, you may still elect to decline the damages award, leave the Program, and file suit against the vaccine manufacturer under the traditional tort system. *See* 42 U.S.C. § 300aa-21. An election to take the award completes your journey through the Program and precludes a suit against the vaccine manufacturer. If you decline the award and withdraw from the Program, you are no longer bound by the restrictions of the Program. For example, you may now enter into a contingency fee agreement with your client.

In addition to the general procedures mentioned above, there are a few things every attorney litigating vaccine cases should know that differ from the traditional tort process:

First, vaccine cases can take a very long time to complete, longer than the traditional tort process. Even if a case settles before experts are retained, it may take over three years to receive any funds. More complicated or disputed cases can take five to seven years or more to resolve. Additionally, if the client were to

die before the vaccine injury claim is completed in the Program, the $250,000 cap would then apply to the claim and limit the damages award.

Second, discovery is "front-loaded." Most, if not all, of the fact discovery is completed before the petition is even filed with the court. In vaccine cases, the client's past medical records are the most critical records to both parties. As such, the Program requires the submission of complete medical records of the injured party at the same time the petition is filed. The records submitted are more extensive than in traditional medical malpractice litigation. In most cases, even if the injury occurred later in life, production is required of virtually every medical record in existence since the birth of the injured party, including pre-natal medical records.[7] If a record cannot be located, an affidavit is required from the records custodian accounting for its absence. Incomplete records and the acquisition of medical records are the main reasons these cases take such an excruciatingly long time to prosecute under the Program.

Third, locating experts familiar with the Program is difficult. Not only is it difficult to locate immunology experts who are unbiased toward lawyers and will actually be willing to opine to causation of a vaccine injury, but it is also difficult to find life care planners that are familiar with what the Program will and will not compensate. These difficulties increase both the cost and complexity of vaccine cases.

As even the most seasoned personal injury attorneys are often not familiar with the intricacies of the Program, it is important for attorneys practicing personal injury litigation to at least be familiar with the basic procedures of the Program so as to properly advise their clients and evaluate their potential claims under the Program.

1. *See* MSNBC, Court investigates vaccine link to autism, at http://www.msnbc.msn.com/id/19168291 (last modified June 11, 2007).
2. Currently, autism-related vaccine cases are treated and categorized differently in the National Vaccine Injury Compensation Program. This article is a general primer on non-autism vaccine claims. *See* U.S. Court of Federal Claims, Autism Update, at http://www.uscfc.uscourts.gov/sites/default/files/autism/autism_7_08_08.pdf (last visited July 20, 2008).
3. *See* U.S Department of Health and Human Services, Vaccine Table, at http://www.hrsa.gov/vaccinecompensation/table.htm (last visited July 20, 2008).
4. *See* U.S Department of Health and Human Services, Statistics Reports, at http://www.hrsa.gov/vaccinecompensation/statistics_report.htm (last visited July 20, 2008).
5. *See id.*
6. *See id.*
7. *See* U.S Department of Health and Human Services, Filing a Claim with the VICP, at http://www.hrsa.gov/vaccinecompensation/filing_claim.htm (last visited July 20, 2008).

An Open Letter to the Newly Established Utah Supreme Court Professionalism Counseling Program Board

by Eric K. Johnson

INTRODUCTORY NOTE: *At the Utah State Bar 2008 Spring Convention in St. George, the Utah Supreme Court announced issuance of Utah Supreme Court Standing Order No. 7 (effective April 1, 2008), establishing a program of "professionalism counseling" for members of the Utah State Bar, overseen by "a board of five counselors (the Board) to: (1) counsel members of the Bar, in response to complaints by other lawyers or referrals from judges; (2) provide counseling to members of the Bar who request advice on their own obligations under the Court's Standards of Professionalism and Civility (hereinafter the "Standards"); (3) provide CLE on the Standards; and (4) publish advice and information relating to the work of the Board."*

Members of the Board:

Before proceeding further, full disclosure: while I endorse professionalism and civility (in lower case letters), I dislike the "Standards of Professionalism and Civility" (the Standards). I wrote an article in the *Utah Bar Journal* on the subject, "Standards for Standards' Sake: Questioning the Standards of Professionalism and Civility." You can review it on the Utah State Bar's website at this link: http://webster.utahbar.org/barjournal/2005/06/standards_for_standards_sake.html

I realize that there are few who publicly disagree with the party line regarding (1) the alleged sorry state of professionalism and civility in the legal profession; and (2) the proclaimed crucial need for improvement, but I believe my sentiments actually reflect, at least for the most part, the private opinions of most active attorneys in Utah.

Allow me to clarify my critique of the Standards and the newly created professionalism Counseling Program and Board in greater detail by revisiting portions of my article and by posing some questions that the Standards raise in my mind.

The Standards consist of twenty normative, yet aspirational provisions. While I respectfully submit that most of these provisions are duplicative of existing norms governing Utah attorneys and/or sophomoric[1] *see* Standard No. 11: "Lawyers shall avoid impermissible ex parte communications," some are either beyond reproach, *see* Standards No. 12 and 20, or truisms not worthy or in need of further discussion (or any discussion, come to think of it; *see* Standard Nos. 2 and 7). Accordingly, I will question only those Standards I perceive to be most substantially flawed and/or accepted without much thought.

Standards 1 and 3

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

Questions:

Is it inherently discourteous, undignified, demeaning or disparaging, hostile, humiliating, or otherwise improper:

- to express to opposing counsel your honest belief that their case is frivolous, without merit, or filed or pursued in bad faith?
- to state to opposing counsel your honest belief that their behavior is dilatory, burdensome, unduly expensive, or harassing?
- to tell opposing counsel honestly that if the attorney does not withdraw the false representations in their pleadings you will seek Rule 11 and/or other sanctions?

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If so, when did litigators, who chose a profession based on an adversarial system of conflict resolution, become so thin-skinned that arguing – even heated arguing – over such points between them became unprofessional?

How does one address the misconduct of the opposing side without either risking running afoul of Standards 1 and/or 3 or being a wimp?

Where does one man's honesty and candor become another's incivility and offensiveness, especially if the ostensibly "offended" party can make hay out of it?

Are Standards 1 and 3 akin to the U.S. Supreme Court Justice Stewart's standard for identifying hard-core pornography?, i.e., "I know it when I see it." *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964). If not, then what is it?

Won't the Professionalism Counseling Program Board take every complaint it receives and lavish on each one "serious" and "careful" consideration merely by virtue of its being made?

You know what I mean: to avoid being labeled insensitive or inattentive to the supposedly wretched state of professionalism and civility in the profession and to justify the Board's existence,[2] won't you feel compelled to treat everything but the most obvious and petty alleged affronts as worthy of solemn consideration? And how will you then resist the temptation to view every situation with self-righteous 20-20 hindsight and offer advice as to how the accused "might have handled the situation better" irrespective of whether you conclude they violated a Standard?

While quotations such as, "Credibility is often directly tied to civility and professionalism," *Peters v. Pine Meadow Ranch Home Ass'n,* 151 P.3d 962, 967 (Utah 2007), sound Lincolnesque, they are as misleading as "Perception is reality." Credibility is a matter of being honest and reliable; one can be a boorish jerk, yet be perfectly credible. By the same token, "killing them with kindness" is still murder, albeit with a healthy dose of civility.

If you are angered or wronged by a fellow attorney or the actions of her client, what are you to do?[3] Hug it out? Mediate? Increasingly, if you are frustrated and correspond with counsel to express that frustration or outrage, you are dismissed as uncivil and/or unprofessional (or Thomas Paine). Where lawyers (particularly litigators) operate within an adversarial system civility frequently must take a back seat to the messy, intransigent pursuit of truth and justice.

The way to diminish and marginalize you and dismiss your message these days is to label you uncivil. Labeling one uncivil

is a clever, effective, and virtually effortless way to destroy one's message, or at least divert attention from the message to the messenger. One successfully painted as uncivil is seen (or not seen at all, as the case may be) as a mindless savage not worthy of consideration.[4]

One need only call a fool a fool to be attacked for being an uncivil extremist.[5]

Standard 4

4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

Questions:

How can one ever effectively and reliably determine/conclude that opposing counsel "knowingly":

- attributed to other counsel a position or claim that counsel has not taken? or,
- sought to create an unjustified inference that other counsel took a position or claim that counsel has not taken?

Just try to call opposing counsel on this during a hearing or in a memorandum and see how the judge reacts, you arrogant, whiney upstart.

And even if you were to prove such misconduct, what are the odds of that attorney being effectively sanctioned (as opposed be being merely "counseled") for it? After all, don't you now have Standards 3 and 5 to contend with when contemplating making a complaint?

Standard 5

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

Questions:

Isn't it hard enough to earnestly seek and obtain sanctions for any proper purpose without Standard 5 throwing up additional barriers?

If you add to the sorry state of doormat attorneys the new rule of Standard 5, do you not provide but more defenses for the hacks? Imagine this not so hypothetical scenario:

> Your Honor, opposing counsel's request for sanctions on the ground that I counseled my client to lie under oath are lightly sought and for an improper purpose, in violation of Standard 5. Unless opposing counsel can prove otherwise, I ask that the request for sanctions be dismissed and counsel admonished for disparaging and humiliating me in violation of Standard 3.

How would you handle such a situation, if you were the judge?

I'll tell you (because I've experienced similar situations, as I am sure many of us have) you would likely do very little.

Would you not hesitate, if not outright refuse, to stick your neck out, call a spade a spade, or take a position as to which attorney was in the wrong, and admonish and/or sanction the wrongdoer?

Or would you instead (be honest), on the pretext of maintaining that ever-so-paramount image of impartiality and detachment:

- admonish both attorneys equally for being unprofessional – and even then not for inappropriate behavior, but for simply not getting along and causing you to address thorny matters you'd prefer to avoid?

and then

- direct both attorneys not to bring their "personal disputes" before you?

and then

- make it clear to the poor attorney who had the guts to complain

that counsel should think twice before ever seeking redress before you again?

If so, how will your approach as Board members differ from that of the hypothetical judge, who is right there in the thick of it, but refuses to take any substantive action to remedy the problem?

Standard 6

6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

Questions:

How and why did the second clause of this Standard arise?

Can you give me an example of a promise or agreement that one could objectively identify as "reasonably implied by the circumstances or by local custom?"

Quick, within 30 seconds, can you

- describe any "commitment reasonably implied by local custom?"
- identify any "local custom" by which "commitments are reasonably implied?"

If an attorney who is not a local does not infer what the local customs are, is that attorney nevertheless bound by "commitments reasonably implied by local custom" and worthy of admonition if they inadvertently fail to follow them? What if that attorney deliberately rejects them as provincial or obsolete?

While the second clause of Standard 6 is well-meaning, isn't it so amorphous and subjective as to be

- the equivalent of "I know it when I see it?," and as a consequence,
- have the same normative force, i.e., virtually none?

Finally, when do "commitments reasonably implied by the circumstances or by local custom" hold sway over the universal and mandatory provisions of statutes and rules?

Standard 9

9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

Questions:

Can any new rule or combination of rules ever do away with this time-tested trick?

Would any savvy attorney suggest that an offer of settlement was used against them to hold up discovery or delay trial?

Would any judge take seriously an allegation that settlement (the all-important objective of litigation in the 21st century) could ever be broached for any improper purpose?

Doesn't the potential for a legitimate settlement – no matter how remote it may be – always exist? Who has the guts to brand a settlement offer a sham (after all, if you do that, aren't you violating Standards 1 and 3)?

Thus, even in the most hotly contested matters is it not virtually impossible to show that a lawyer held out the potential of settlement for illegitimate purposes?

Isn't a violation of Standard 9, as with the other Standards, on a practical basis virtually impossible to identify, much less sanction?

I mean really, who would ever accuse another lawyer of acting unprofessionally because he offered to settle? The complainant would catch more heat than the attorney complained of, no?

Standard 10

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

Question:
Can you find the "obvious" flaw in this rule that renders it all but completely impotent? This is not a rhetorical question.

Standard 13

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

Questions:
Should an attorney ever be formally admonished under the Standards for following the letter of the law? If so, what effect would such a policy have on respect for the rules? How can one fairly be found at fault for following the letter of the law?

Furthermore, if compliance with rules constitutes "incivility" or unprofessional conduct, what does that mean for the rule of law generally?

Are we to place civility above compliance with and enforcement of court rules and the law? If so, to what degree and to what end?

Standards 14 and 15

14. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

15. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

Questions:
"Lawyers shall never request an extension for the purpose of delay or tactical advantage?" Yeah, right. And throwing cigarette butts on the ground is littering. Which of these offenses – littering or violating Standard 14 and/or 15 – is likely to be punished first?

(And did you notice the peculiar wording of Standard 14, "Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage." So does this mean that if you have a legitimate reason for seeking an extension you can tack on delay and/or tactical advantage? Why include "solely" in the wording at all?)

Have you ever asked an attorney claiming to have a scheduling conflict to provide corroborating evidence of the scheduling conflict? Most of you will probably answer, "No." But why?

I'll tell you why: because a convention has arisen that if an attorney claims a scheduling conflict, we are to accept it as gospel, and somewhere along the line it became received wisdom challenging a claimed scheduling conflict is worse than exploiting a fellow attorney's good will by lying about a scheduling conflict.

Now many (if not all) of us know when we're being hustled by a chronic scheduling-conflict-claiming shyster, but we've been taught (or more accurately, shamed into accepting) that challenging a request for an extension is worse than simply giving in and granting continuance after ill-gotten continuance. What principled basis is there for this?

Unless a lawyer is willing to ferret out false claims of need for extensions or schedule changes, are Standards 14 and 15 of any practical benefit anyway?

Standard 16

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

Questions:
(Actually, a comment first: To its credit, here's a standard that, if violated, has at least a better than even a chance of being proven it was violated.)

What's so terribly wrong about defaulting a party worthy of default, and doing so without flagging the inattentive opposing attorney?

Besides, Rule 4 of the Utah Rules of Procedure already provides, in subparagraph (c)(1): The summons…shall state the time within which the defendant is required to answer the complaint in writing, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant. Utah R. Civ. P. 4(C)(1) (emphasis added).

Why, when Rule 4 already mandates notice to the defendant of the possibility of default, was it necessary to create essentially

another notice requirement with Standard 16?

Additionally, does Standard 16 create a possible conflict between it and Utah Rule of Civil Procedure 55, which contains no requirement that notice be given to opposing counsel in advance of seeking default?

If so, why not repeal Standard 16 and amend Rule 55 to include a notice provision?

Moreover, wouldn't obeying Standard 16 basically allow an ethically bankrupt opposing side to delay proceedings by failing to participate in the case and relying on the opposing attorney's Rule 16 obligation of "notifying other counsel," in advance, at which point the scheming "lazy" attorney finally files his responsive pleading so that the case is decided on the precious merits?

Rule 55 is already honored in the breach. Did we really need to eviscerate it even more with Standard 16?

Standards 17, 18, and 19

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

Questions:

With respect to Standards 17 through 19, lawyers are already subject to provisions of the Utah Rules of Civil Procedure, the Utah Rules of Evidence, and even the Utah Code when engaging in the discovery process, and these rules already arguably prescribe the same conduct (and proscribe misconduct) for which Standards 17 through 19 were promulgated, do they not?

Moreover, would you not agree that Standards 17 through 19, like the rules of civil procedure and evidence, are so vulnerable

to self-serving interpretation and construction that promulgating even more subjective rules on discovery abuses will do nothing more to curtail discovery abuses than the Rules of Civil Procedure and the Rules of Evidence already do (or don't, as the case may be)?

I've seen attorneys rail against those who serve 26 interrogatories, who serve 80 requests for admission, and request a copy of a party's driver license (front and back). Who's right? Who's wrong? Is it a question of deciding on a case by case basis? If so, then what good are general standards in a case-by-case setting?

And just what is an "artificially restrictive manner" anyway? Is that Justice Stewart I hear?

This new Professionalism and Civility Board is one of those things that every attorney will agree is needed, but for other attorneys, not for themselves. Such sentiments give rise to a stone thrower's paradise. Am I wrong? Let me know if and when a member of the Bar complains of himself to the Board.

With due respect, yet candidly, any time anything is organized for "others' benefit" (read: "Well, guys, how can we describe ourselves and our purpose without using the term 'busybodies'?") you're – we're – in trouble.

I've gone on record before, and I'll state it again:

"In reviewing the Standards of Professionalism and Civility, I see no pre-existing need that is filled by their passage, no flaw in the existing rules of professional conduct that the Standards remedy." "Standards for Standards' Sake: Questioning the Standards of Professionalism and Civility," Utah Bar Journal, June 2005.

The same can be said of the Board.

> Most, if not all, of the Standards, as currently constituted, do little to lead good lawyers or bad lawyers to be any better than they would have been in their absence. In this regard the Standards of Professionalism and Civility do little to address or cure any lack of professionalism and civility in the profession.

Id.

The same can be said of the Board. There's no point in sugar-coating it.

Why is all this attention being focused on professionalism and civility when there are so many other issues more worthy of our attention as lawyers? I could contend (sincerely) that the fashion sense of Utah attorneys is deplorable and needs to be addressed and rehabilitated by having the Supreme Court and/or Bar establish:

> a program of "dress and grooming counseling" for members of the Utah State Bar, overseen by a board of five stylists to: (1) to counsel members of the Bar in response to complaints by other lawyers or referrals from judges or attorneys who wear belts with suspenders (ahem – braces), brown shoes with blue suits, too much perfume, fishnet stockings, etc.; (2) provide counseling to members of the Bar who request advice on their own fashion blunders; (3) provide CLE on contemporary tie widths and hairstyles; and (4) publish advice and information relating thereto.

I mean, come on. Some "problems" are best left to themselves because the cure is worse (or at least no better) than the disease. And just as it won't kill me if I see another crew neck sweater and tie combination, will the profession really suffer a fatal blow if I criticize or disagree in the strongest terms without fear that it will be taken as disrespect or a personal attack?

In all seriousness, the Standards of Professionalism and Civility are about as effective a means of fostering the principles of Professionalism and Civility as are warning labels on cigarettes as a means of discouraging smoking. Professionalism and Civility problems do not stem from a lack of rules or counseling, for Pete's sake.

If your best solution to the perceived professionalism and civility problem – and such a "problem" is insoluble on so many levels – turn your attentions and energies toward more pressing and substantive matters. Before we get any more caught up in professionalism and civility concerns, let's focus on justice and equity for all first, and then see how much attention professionalism and civility still need.

Please don't take this personally, Board (your intentions are pure, but your means are wanting). If you do, such is an indictment of the Standards of Professionalism and Civility. If satire is deemed violative of the Standards, then satire and the Standards cannot co-exist, and one must be discarded. Don't let the door hit you on the way out, Standards.

1. To borrow from the field of intellectual property, I utilize this word as "merely descriptive" and not for any other purpose. I considered "oxymoronic" in place of "sophomoric," but that term does not express the full, precise meaning I wish to convey.
2. On what objective evidence does everyone who bemoans the professed decline of professionalism and civility base their conclusion?
3. http://www.tremonter.com/node/1144
4. http://www.tremonter.com/node/1144; *Peters v. Pine Meadow Ranch Home Ass'n*, 151 P.3d 962 (Utah 2007).
5. http://www.tremonter.com/node/1144

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John Hill, Public Defenders' Long-Time Leader, Retires

In the landmark Supreme Court case of Gideon v. Wainwright *372 U.S. 335 (1963), the Court concluded that the Sixth and Fourteenth Amendments required states to provide an attorney to indigent defendants in cases involving serious crimes. Nine years later in* Argersinger v. Hamlin*, 407 U.S. 25 (1972), a unanimous Court extended that right to cover defendants charged with misdemeanors who faced the possibility of a jail sentence. To guarantee fairness in trials involving potential jail time, no matter how petty the charge, and to avoid the danger of "assembly-line justice," the Court found that the state was obligated to provide the accused with counsel.*

Since 1965, the Salt Lake Legal Defender Association (LDA) has provided criminal defense attorneys to represent indigent defendants in Salt Lake County. John Hill, the group's executive director and one of its early felony attorneys, announced his retirement this summer after thirty-seven years with LDA. Attorneys and staff members, known more for their smart aleck comments during staff meetings than for their attentiveness, were struck dumb. "John certainly has a gift for the dramatic," commented one attorney. Hill may have developed that gift during his career trying well over fifteen murder cases to Utah juries, several of them high-profile. "As a trial lawyer, he is as good as or better than anybody who has ever done it," says Gil Athay, current chair of the LDA Board of Directors.

John Hill

It may surprise some that Hill started his legal career as a Salt Lake City prosecutor. That didn't last long. After two years with the city, he was approached by Athay, a lawyer he admired and director of LDA, and was invited to join the group. LDA had a staff of six: four lawyers and two secretaries. Hill soon found himself in the midst of a "very colorful time."

"Salt Lake was a mini-New York in a kind of way that it isn't now," Hill recalls. Lawyers, police, and prosecutors gathered in the area of West Second South after the Salt Lake City establishments closed. "We saw many a sunrise and had a great deal of fun. It was a big part of my learning experience about the culture of being a lawyer and how real defense lawyers thought and practiced."

When Athay left LDA, he offered the director's job to thirty-one year old Hill. Not only was Hill director of the office, which had grown to include misdemeanor lawyers following the *Argersinger* decision, but it was his job to try all major cases in the office.

Hill was assigned all the murder cases, some of which made important law on appeal. *State v. James,* 512 P.2d 1031 (Utah 1973), decided in light of *Furman v. Georgia,* 408 U.S. 238 (1972), established the defendant's right to be tried by a twelve-man jury rather than an eight-man jury in a murder case. In *State v. Cloud,* 722 P.2d 750 (Utah 1986), the court's admission of gruesome photographs of a homicide victim was found to be reversible error absent showing that the photographs had "essential evidentiary value" which outweighed the potential for unfair prejudice. That case also established the obligation of the jury to convict the defendant of manslaughter if there was reasonable doubt as to which degree of homicide he had committed.

Some cases Hill handled involved lurid facts: in *State v. Bolsinger,* 699 P.2d 1214 (Utah 1985), a woman was asphyxiated during sex with her boyfriend. The Utah Supreme Court reversed the conviction because the defendant's confession that he pulled on the cord around her neck did not support an inference beyond a reasonable doubt that the defendant intentionally or knowingly killed the victim or intended to cause her serious bodily injury. The Court called the incident "part of a consensual act of intercourse between two intoxicated persons in an atmosphere of tranquility," and entered a conviction for manslaughter because the defendant was aware of and consciously disregarded a substantial risk of death. *Id.* 1218-19.

The case of *State v. Gaxiola,* 550 P.2d 1298 (Utah 1976), has a plot straight out of Agatha Christie's *Murder on the Orient Express.* Hill's client was one of several prison inmates who stabbed another inmate, the prison's boxing champ, to death. The jury refused to convict Gaxiola of capital murder, and instead convicted him of second degree murder, as there were so many knife wounds, even the pathologist could not tell whether the lethal wound was inflicted by Hill's client.

At that point in his career, however, Hill seriously considered moving over to the prosecution side when David Yocum offered him a position as deputy district attorney. As he still preferred defense work, before deciding to move, Hill went to the LDA Board of Directors to see if the office, which up to that time had

been a training ground for criminal defense lawyers, could become a career office. Hill wanted LDA to be "a place that young lawyers could be hired and trained and could practice their art and expect to become very good trial counsel." Following the *Furman* decision, Hill recalls, Utah re-enacted the death penalty and the complexity of cases required experienced lawyers for indigent criminal defendants. (After *Furman*, Utah enacted laws requiring bifurcated trials, with separate guilt-innocence and sentencing phases.)

LDA's board shared Hill's foresight, and Hill began to implement the changes he envisioned by applying for federal grants. LDA became the first public defender group in the U.S. with federal funding to deal with career criminals. They also hired their first social worker and opened an office in St. George.

As Hill attempted to make the office more professional, he drew upon his college background in banking and finance and learned how to draw up budgets, obtain funding, develop better facilities in the office, and lower case loads. His next task was to convince his more experienced attorneys to become supervisors. From a group of heretical, nonconformist, rule-averse lawyers, he drew his team leaders. Hill sought to hire lawyers "that really cared about the client, who had a presence in the courtroom, and the ability to make a jury believe that they were sensible and that they believed in their client."

Next, he vigorously pursued money for training: national trial academies for the new lawyers, capital case training for more experienced lawyers, and paid memberships to the Utah Criminal Defense Association of Lawyer for every lawyer. When he had hired the best people he could find, and put supervision in place, he "got out of the way." His philosophy: "If the lawyers are here to represent people, they better have your support." To provide this support, LDS has hired social workers, investigators, and polygraph examiners, and regularly funds expert witnesses. The office also provides Spanish lessons for attorneys and staff members.

"I always like to think that no lawyer ever walked out of this office feeling that they had been denied what they needed to do their case," Hill says. Still, some requests for support must have been hard to swallow. When LDA attorney Ralph Dellapiana asked Hill to pay for an investigative team, including a certified court reporter, a certified interpreter and an investigator to accompany him to the middle of Chihuahua, Mexico, to look for a witness in a murder case, Hill did not hesitate to provide the resources. All Dellapiana knew was that the witness lived somewhere in a small town with dirt roads and no street names, but he also knew where the town's nerve center would be – the panadería. When they walked in the door of the small bakery, the witness was there, buying bread. "We saved the client from a wrongful conviction," remembers Dellapiana. "That trip to find the witness made all the difference."

In addition to supporting his attorneys, Hill brought diversity to the office before that became a legal requirement, consistently

hiring "people of diverse cultures and people of color." His hiring practices led to his recognition by the Minority Bar Association, who gave Hill their Raymond Uno award in 2003.

In 1987, Hill responded to the increasing number of criminal appeals and the formation of the Utah Court of Appeals by creating an appellate division. That appellate division has handled many of the first impression criminal cases issued by Utah appellate courts since 1987.

The most recent phase of his career has been his commitment to restorative justice. "In the old days," he recalls, "we'd finish the trial on Friday and the following Monday morning we'd see them back in jail and have to start all over again." Drug courts, mental health courts, and homeless courts all are aimed at breaking the cycle of recidivism. Hill created the first felony drug court with Bud Ellet, deputy district attorney at the time, with former Third District Court Judge Dennis Fuchs presiding.

Hill the former trial warhorse believes that one of the challenges of drug court is that it has "confused" the roles of the prosecutor, judge, and defense attorney significantly:

> The judge now has to be compassionate and caring, which is very uncomfortable, and a different position than they usually take. The prosecutor has to stand up and applaud when someone graduates. The defense attorney sometimes has to ask for jail time because they think the client is more likely to succeed if they're sober in the program,

a position he finds ethically "very difficult." He remains committed to the concept, however, as Salt Lake County struggles to find alternatives to incarceration of non-violent offenders. "I think it's opened up a whole new avenue for our clients and our friends and relatives as well," he adds.

As he retires, Hill believes the greatest need for reform and improvement in the area of criminal defense lies with capital murder laws. In addition, he finds that the sentencing enhancement statutes have become "confused. Even the best lawyers have difficulties at times keeping up with all the sentencing changes. We certainly aren't sending clear messages, if that is what the legislature intends to do, to our citizens, as to what the elements of offenses are."

Hill considers "developing great attorneys and giving them a chance to practice in an environment where they could be successful" to be his greatest accomplishment. Athay adds that under Hill's leadership, LDA has earned nationwide attention. Recently, a federal appellate judge requested that LDA be presented as a model office in a national federal defender program.

LDA has grown from four lawyers and two secretaries during Hill's tenure to sixty-nine lawyers and thirty staff members. The office represents 80 to 90% of the defendants charged with felonies in Utah's most populated county, and provides a training ground for some attorneys, and a career office for others. As LDA continues to develop in size and complexity to address the needs of an even more complex criminal justice system, Hill will be spending his winters in St. George and his summers in Island Park, Idaho, working on conservation law issues, especially those affecting water law and fly-fishing.

An open house will be held to honor John Hill on September 24, 2008, 11:00 a.m. to 3:00 p.m, at the offices of Salt Lake Legal Defender Association, 424 East 500 South, Salt Lake City.

LDA attorneys Joan Watt, Cathy Roberts, Ralph Dellapiana, Sam Newton, Andrea Garland; LDA Board director Gil Athay, and staff member MerriLyn Diaz all contributed to the preparation of this article.

FALL FORUM

Masters in Mediation Advocacy: Pepperdine Comes to Utah

Sharpen your skills in mediation and absorb cutting edge tips for effective mediation advocacy. At the Fall Forum on November 21, 2008, two professional mediators will teach five sessions in a track entitled "Masters in Mediation Advocacy." Tracy Allen and Eric Galton will enlighten advocates on the latest strategies and techniques for succeeding in mediation. Faculty with Pepperdine University's Straus Institute on Dispute Resolution, and Fellows of the International Academy of Mediators, Tracy and Eric are committed to providing the highest quality commercial mediation services and training to advocates. Whether you are an advocate or the mediator, advanced mediation training focuses on skills we may not have learned in our lives.

"I can recommend Tracy Allen and Eric Galton without hesitation to anyone with an interest in mediation."

– Hon. William B. Bohling (Ret.), Professional Mediator and Pepperdine University attendee, June 2008

"Having taught mediation advocacy with Tracy and Eric for the International Academy of Mediators, I am confident attorneys will appreciate the rare opportunity to peer into the mind of professional mediators."

– Karin S. Hobbs, Professional Mediator and Vice President, International Academy of Mediators

What is the International Academy of Mediators?

The International Academy of Mediators (IAM) is a collegial "by invitation only" group of the highest quality commercial mediators from a variety of countries. The Academy fosters the highest standards of integrity and competence in the mediation of commercial disputes. Promoting the study and understanding of the mediation process, and educating the public, courts and legislative bodies on effective and appropriate uses of mediation are at the core of IAM's mission. The Academy also encourages friendly association among the members of the profession and cooperation with other organizations, institutions and societies interested in mediation. An IAM goal is the general acceptance of the concept of mediation as a separate discipline and profession distinct from other fields. The mission of the IAM is "to define standards and qualifications for the professional mediator of commercial disputes and to promote the mediation process as the preferred means of resolving disputes. "

IAM members frequently present at mediation conferences throughout the world. For more information, visit iamed.org.

Do you want to learn to adeptly handle potentially volatile opening sessions? Or suggest mediation without sounding weak, persuade inexperienced participants to mediate, skillfully negotiate with competitive attorneys or douse highly emotional situations?

A variety of strategies can help you in these situations. Focus on your strengths. Train yourself on your weaknesses. And, to fill the gaps, hire a professionally trained mediator to guide you through the most difficult conversations and to bridge the most impassible gaps between the parties. Many attorneys assume a mediator's primary ability or efficacy is his or her insight in "valuing the case." However, attorneys are skilled at valuing the case and one or both attorneys often astutely identify the strengths, the weaknesses, and the appropriate settlement range. Excellence in mediation requires attorneys to move beyond valuing the case and proceed to advancing their skills, including learning subtle cues, and allowing the mediator to work the mediation process.

When cases come to mediation, they are at impasse. The parties may be stuck due to emotions (fear, anger, revenge, high or low tolerance for risk), financial issues (need for money, ability to pay to fight, ability to pay large verdicts), or practical concerns (failure to fully understand the case, lack of information, inadequate explanation of counsel). Attorneys may or may not know the problem but can often verbalize their impressions of the issues. Through carefully listening, making well placed comments, attorneys and mediators help parties move beyond these barriers. If parties decide to continue to litigate, at least they understand their reasons.

A professional mediator plants seeds, reframes the issues, coaches and otherwise assists with the negotiation process. The mediator knows the temperature in both rooms and can guide the conversations to settlement. Inexperienced mediators may jump to an evaluation prematurely when the parties are not ready or may try to stress only the weaknesses of both sides. Timing is one of the keys to successful mediation. Attorneys can assist with this process by understanding the nuances of mediation, the mediator's role and by enabling the mediator to do his or her work. Join us on November 21, 2008 at the Fall Forum while some of the country's best mediation advocacy trainers and professional mediators share their tips on achieving excellence in mediation advocacy.

Report from 7500 Feet

by Justice Michael J. Wilkins

The National Conference of Commissioners on Uniform State Laws (who?) met in Big Sky, Montana in July. Big Sky is a ski resort town with beautiful mountains, about one third of the charm of Utah's ski areas, and very very thin air. Oh, and no directional signs for finding the hotels. Even my computerized guidance system gave up about three miles short of the target. "No further guidance will be provided," she said. With raindrops the size of small fists hitting my windshield and overwhelming my wipers, I eventually blundered my way into the Big Sky Ski Resort area at 7500 feet. The hotels and resort buildings all face the mountains, and frame a breathtaking view (literally). They also occupy nearly all of the available flat ground. Parking is an issue. I recommend the SmartCar for your visit. I, of course, drove the Sequoia (a large SUV of Japanese ancestry that has yet to adjust adequately to the fuel price crisis). The drive from Salt Lake took a mere 6 hours. I had arrived for my first annual conference of the NCCUSL, also known as the Uniform Law Commission.

Last winter I was appointed to the Utah Commission on Uniform State Laws by Governor Huntsman. The appointment was a bit of a surprise, since I didn't know I was up for it, nobody asked me, and I heard about it after my appointment had been confirmed by the Senate. Don't get me wrong: I am delighted to have the opportunity; just surprised. Unfortunately, at the time of my appointment I had a rather limited understanding of what a commissioner on the Utah Commission on Uniform State Laws did. Now I know. I thought it might be useful to share my newly acquired knowledge with others who encounter uniform state laws periodically.

Each state decides how, and if, it will sponsor a commission on uniform laws. Most states have done so by statute, as has Utah.[1] Commissioners are required to be lawyers, and are appointed by the Governor. One is drawn from the House, one from the Senate, and two from the general bar. The Legislative General Counsel is automatically a commissioner. State commissioners exist for two primary purposes: First, they assemble annually with the commissioners from the other states to consider and recommend to the individual states the enactment of uniform state laws in areas of common interest and concern, which they may have helped to draft as part of a drafting committee. Second, they mobilize the effort to have proposed uniform acts adopted by their home state legislature.

The expressed purpose of the national organization, the Uniform Law Commission (ULC), is to "promote uniformity among the several States on subjects as to which uniformity is desirable and practicable."[2] The selection of issues for uniform law consideration is made at the combined national level of the organization, and drafting and approval is a function of national subcommittees and the annual meeting. Much to my surprise, the annual conference is engaged in review and debate on proposed uniform act language to a remarkable extent. Sessions of the conference meet seven or eight hours each day as a 'committee of the whole' for line by line reading of any new or amended language, followed by spirited debate. Friday, Saturday, a half day Sunday, and all day Monday, Tuesday, Wednesday, and Thursday are devoted to that careful and informed review. Each proposed uniform act is presented at two annual meetings in a row. The first year it is presented for broad discussion and general direction to the drafting committee. The second year a proposed act is presented in something akin to final form, and essentially defended by the drafting committee from questions and concerns of the other commissioners during the committee of the whole meetings. Both readings and votes of approval are required before commissioners move an act toward legislative action in the states.

The "national" decision-making bodies are composed entirely of state commissioners. The drafting committees are composed of commissioners with the occasional help of experts in the field, who may serve as part of the drafting committees, along with advisors from the relevant ABA sections. In this world of

JUSTICE MICHAEL J. WILKINS has been a member of the Utah Supreme Court since 1999.

electronic communication, much of the drafting is done without meeting. However, periodic meetings of committees to actively debate critical issues, and to hammer out proposed language, are a critical part of the process.

The history of the ULC is long, and distinguished. Membership has included legislators of distinction, law professors, members of the state and federal judiciary (including at least two United States Supreme Court members, Rehnquist and Brandeis), and practitioners expert in their fields. Formed 116 years ago as an offshoot of the American Bar Association, it has attempted to provide states with nonpartisan, well-conceived, well-written legislation on topics of common need and application. Generally, only areas of law already addressed by states are subject to ULC action. The primary effort is to clarify existing law, not lead the states into new areas of policy. The Uniform Commercial Code is a prime example of the ULC's work, as is the Uniform Probate Code. Both are the subjects of current refinement by the ULC.

Each state commission is asked to consider the pending uniform and model acts approved by the conference, and select those appropriate for action in their own jurisdiction. With a senior member of the Utah Senate, Senator Lyle Hillyard, as chair of the Utah delegation, and with House Speaker Greg Curtis as the other legislative member appointed by the Governor, the Utah commission has an enviable record of moving uniform legislation along. Each year, the Utah commission members meet to identify those measures thought worthy of legislative attention.

As a result of the July meetings in Big Sky, the Utah Commission on Uniform State Laws is considering action on the Uniform Limited Liability Company Act, the Revised Uniform Limited Partnership Act, the Revised Limited Partnership Act, revisions to the Uniform Interstate Family Support Act, the Uniform Principal and Income Act, the Uniform International Wills Act, the Uniform Foreign Country Money Judgments Recognition Act, the Uniform Real Property Electronic Recording Act, the Uniform Trade Secrets Act, and the Uniform Debt Management Services Act.[3] Each of these was considered in detail at the July conference. Our commission will ask appropriate bar sections and court committees to examine the proposed acts for Utah-specific consideration. With that review, most of these uniform law proposals will likely see introduction in the legislature, and ultimately adoption as part of our state law. Such has been the history to date.

You may find the work of the ULC interesting. You may not. But I'm confident you will encounter the end product in everyday practice. I am honored to be a part of the effort. I know the other Utah commission members are as well. Please feel free to direct your comments and thoughts to any one of them. I'd take your call, but I'm still trying to catch my breath.

1. Utah Commission on Uniform State Laws, Section 68-4-1, et seq., Utah Code. Our current commission members are Senator Lyle Hillyard, chair; Speaker Greg Curtis, Reed Martineau, myself, Legislative General Counsel John Fellows, and life-member (more than 20 years service) Gay Taylor-Jones.
2. The Constitution, National Conference of Commissioners on Uniform State Laws, Article I, Section 1.2.
3. Copies of these are available from the ULC at www.nccusla.org under the "final acts and legislation" tab.

Statements of Material Fact: Increasing Effectiveness and Avoiding Pitfalls

by Judge Anthony B. Quinn and Joanna E. Miller

Utah Rule of Civil Procedure 7, is a precise rule with clear consequences for noncompliance. However, the current practice with respect to rule 7 is anything but clear or precise. From a trial court's perspective there are two explanations for this lack of clarity: Utah attorneys have become adept at avoiding the intention of the rule and Utah appellate decisions have not been clear about the discretion a trial court has to deem facts admitted for a failure to comply with the rule. This article seeks to clarify the purpose of rule 7, to outline the appellate confusion about its application and to present at least one judge's view of how the rule should operate.

THE REQUIREMENTS OF RULE 7

Rule 7 requires a memorandum supporting a motion for summary judgment to set forth facts the movant claims are undisputed in separate numbered paragraphs with references to the record. *See* Utah R. Civ. P. 7(c)(3)(A). An opposition memorandum must include a verbatim restatement of any disputed facts with an explanation of the dispute, supported by citations to the record. *See* Utah R. Civ. P. 7(c)(3)(B). If parties do not controvert facts in this fashion, rule 7 makes clear that they are deemed admitted for purposes of summary judgment. *See* Utah R. Civ. P. 7(c)(3)(A).

Rule 7's procedural requirements were formerly in Utah Rule of Judicial Administration 4-501(2)(A) and (B). Rule 4-501 was repealed November 1, 2003, and the procedures for summary judgment were moved to rule 7. The Rules of Judicial Administration were intended to make Utah's judicial system more efficient and transparent. *See* Chief Justice Gorden R. Hall, Utah Code of Jud. Admin., Oct. 1988, (v). Rule 4-501(2)(B), which is now rule 7(c)(3)(B), created a precise means for trial judges and reviewing courts to decide whether genuine issues of material fact precluded summary judgment. In 2001 the rule was substantially amended and the "verbatim restatement" requirement became a part of the rule. *Amendment Notes,* Utah R. Jud. Admin. 4-501 (2002). Both versions of the rule established a bright-line: controvert the facts appropriately or they will be deemed admitted.

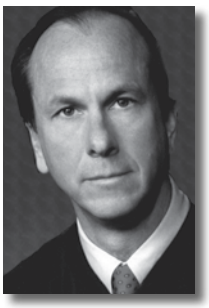
UTAH APPELLATE COURTS ON THE CONSEQUENCES OF A FAILURE TO COMPLY WITH RULE 7

Rule 7 clearly sets forth the consequences of a failure to controvert facts with citations to the record, yet certain decisions from Utah's appellate courts have made a trial court's discretion to admit those facts far less clear. Trial courts traditionally had discretion to deem such uncontroverted facts admitted, but after the Utah Supreme Court's decision in *Salt Lake County v. Metro West Ready Mix, Inc. (Metro West)*, 2004 UT 23, 89 P.3d 155, the extent of that discretion was questioned. The Utah Court of Appeals has questioned the meaning of the *Metro West* decision and expanded it through several cases addressing the consequences of a party's failure to comply with rule 4-501 or rule 7.

Utah Trial Courts Traditionally Had Discretion to Deem Facts Admitted

Before *Metro West,* Utah's trial courts clearly had discretion to deem facts admitted for noncompliance with rule 4-501. Both of Utah's appellate courts affirmed the trial court's decision to deem facts admitted and grant summary judgment for failure to comply with 4-501. *See Fennell v. Green,* 2003 UT App 291, ¶ 8, 77 P.3d 339 (citing *Lovendahl v. Jordan School District,*

JUDGE ANTHONY B. QUINN has been a judge of the Third District Court since 1997.



JOANNA E. MILLER served, until recently, as a law clerk in the Third District Court. She is now with Kruse, Maycock, Landa & Ricks.

2002 UT 130, 63 P.3d 705). The Utah Court of Appeals upheld the rule and its requirements:

> [A] trial court may exercise its discretion to require compliance with the Rules of Judicial Administration, particularly rule 4-501, without impairing a party's substantive rights. In this case, we do not believe the court abused its discretion in requiring compliance with rule 4-501 and thus ruling that the facts, as stated in Defendants' motions and supporting memoranda, were deemed admitted.

2003 UT App 291, ¶ 9. The *Lovendahl* and *Fennell* cases affirmed the rule and a trial court's discretion to require compliance with the rule.

How *Metro West* Changed a Trial Court's Discretion to Deem Facts Admitted for Non-Compliance with Rule 7. A footnote in *Metro West* arguably limited a trial court's discretion to require compliance with the rule or deem facts admitted. In *Metro West* the trial court granted summary judgment and the Utah Court of Appeals affirmed. 2002 UT App 257, ¶ 17, 53 P.3d 499. The Utah Supreme Court then reversed the summary judgment. *Metro West*, 2004 UT 23, ¶ 28. In a footnote, Justice Durrant found:

> Metro West asserts that the County's failure to set forth in its opposing memorandum 'a statement of facts it claims are in dispute as [required by] rule 4-501(2)(B) of the Utah Code of Judicial Administration' should result in our finding that Metro West's facts 'be deemed admitted for purposes of summary judgment and this appeal.' It is true that the County's opposing memorandum did not set forth disputed facts listed in numbered sentences in a separate section as required by the Utah Rules of Judicial Administration. *See* Utah R. Jud. Admin. 4-501(2)(B). However, given that the disputed facts were clearly provided in the body of the memorandum with applicable record references, **we find the failure to comply with the technical requirements of rule 4-501(2)(B) to be harmless in this case.** *See Hall v. NACM Intermountain, Inc.*, 1999 UT 97, ¶¶ 19-21, 988 P.2d 942 (noting the failure to specifically set forth a legal basis for the award of attorney fees in compliance with rule 4-505 of the Utah Code of Judicial Administration was a harmless error because the court and both counsel always knew the purpose behind and the basis for the proposed award of fees)…

Id. ¶ 23 n.4 (emphasis added). This language prompted several subsequent decisions by the Utah Court of Appeals questioning whether *Metro West* changed the clear mandate of rule 7 and the trial court's discretion to enforce it. However, before addressing the Court of Appeals' interpretation of this language, it is important to consider the context of the trial court's decision in *Metro West.* This context makes it clear that the footnote was not intended to limit the discretion of trial courts.

The case began in the Third District Court, where the trial court issued a two-page ruling granting the moving party's motion for summary judgment on the merits. *Salt Lake County v. Metro West Ready Mix, Inc.,* Case No. 990901915, 1999. The first and most important thing to understand about *Metro West* is that the Utah Supreme Court did *not* reverse the trial judge for deeming facts admitted because the opposing party failed to comply with rule 4-501(2)(B). *See Metro West,* 2004 UT 23, ¶ 23. The trial judge did not even refer to rule 4-501 in the order. *See generally Metro West,* Case No. 990901915. The decision of the Court of Appeals, affirming the trial court's summary judgment, also makes no mention of a violation of rule 4-501. *See* generally 2002 UT App 257. Rather, the Court of Appeals determined, "[t]he dispositive issue on appeal is whether the trial court correctly granted Metro's motion for summary judgment, holding that Metro is a BFP meriting protection under the Recording Statute even though the Tingeys never had legal title" and not whether the facts were properly deemed admitted under rule 4-501. *Id.* ¶ 5. In subsequent proceedings before the Utah Supreme Court, there was only a single short mention of rule 4-501 in the entire briefing to that court. In what comes across as a side note in its

brief, Metro West Ready Mix mentions: "In support of its motion for summary judgment, Metro West set forth several numbered paragraphs of undisputed fact. The county did not dispute any of Metro West's facts as required by Rule 4-501(2)(b) of the Utah Code of Judicial Administration."

Brief of Defendant-Appellee, at 24, *Salt Lake County v. Metro West Ready Mix, Inc.,* 2004 UT 23 (No. 20020701). This suggests an understanding that the rule is discretionary, and seems to say to the Utah Supreme Court, "even if you disagree with us on the merits, you can affirm the summary judgment because of Salt Lake County's failure to comply with rule 4-501." Rule 4-501 was clearly not the focus of their claim, and neither party, nor the Utah Supreme Court, referred to rule 4-501 at oral argument. *See* Transcript of Oral Argument, *Salt Lake County v. Metro West Ready Mix, Inc.,* 2004 UT 23 (No. 20020701). This consideration of the entire record casts *Metro West* in a very different light than if the trial judge had been reversed for requiring strict compliance with rules 7(c)(3)(B) or 4-501(2)(B).

The Utah Court of Appeals Interprets *Metro West* to Require a Harmless Non-Compliance Test for Trial Courts to Deem Facts Admitted.

In cases decided after *Metro West,* the Utah Court of Appeals has seemingly interpreted the case as if the Utah Supreme Court reversed the trial court for deeming facts admitted for a violation of rule 4-501(2)(B). For example, in *Gary Porter Construction v. Fox Construction,* 2004 UT App. 354, 101 P.3d 371, the Utah Court of Appeals determined that the trial court *had not* abused its discretion to deem facts admitted under *Fennell* and *Lovendahl* because the opposing party did not properly controvert the facts, but it *had* abused its discretion after *Metro West* because those facts were controverted in other parts of the briefs with citations to the record. *See id.* ¶ 15. The Court of Appeals affirmed the trial court, because the "additional facts" – found in the briefing with citations to the record – still did not raise genuine issues of material fact. *Id.* ¶ 22. In a footnote, the Utah Court of Appeals addresses its dissatisfaction with the *Metro West* rule:

> Although we are bound by the Utah Supreme Court's most recent interpretation of rule 4-501(2)(B), we respectfully note that the rule announced by the court leaves it unclear what remedies are available to trial courts for a party's failure to follow the procedure outlined in rule 4-501(2)(B)…. If compliance with former-rule 4-501(2)(B)…is anything other than a mere suggestion, then it seems that a trial court must have the discretion to grant summary judgment in instances where it would not otherwise be sanctioned by rule 56(c) alone. In other words, if failure to comply with the rule is 'harmless' as long as a disputed fact can be gleaned from the opposition papers, then the rule would seem to add nothing to what rule 56 already requires.

Id. ¶ 15 n.2 (internal citation omitted). The Court of Appeals continued, stating "it currently is unclear whether granting summary judgment, because facts are admitted as undisputed that otherwise would not have been, is ever within the trial court's discretion for failure to comply with the rule" and asked "the Utah Supreme Court to clarify the scope of remedies under rule 7(c)(3)(B) to guide trial courts." *Id.* This pointed footnote suggests the Utah Court of Appeals' dissatisfaction with *Metro West* and its view that *Metro West* created uncertainty about the effect of noncompliance with the rule. The Utah Supreme Court did not immediately respond to this footnote, and the Utah Court of Appeals has continued to interpret *Metro West* to limit trial courts' discretion without actually reversing them.

In 2005, the Utah Supreme Court addressed the effects of a failure to comply with rule 4-501 in a footnote in *Anderson Development Co. v. Tobias,* 2005 UT 36, 116 P.3d 323, noting:

> [D]istrict courts have "discretion in requiring compliance with rule 4-501." *Gary Porter Constr. v. Fox Constr., Inc.,* 2004 UT App 354, ¶ 10, 101 P.3d 371 (quoting *Fennell v. Green,* 2003 UT App 291, ¶ 9, 77 P.3d 339). While the district court could have granted [Appellant's]… motion for summary judgment on the basis of [Appellee's]…

noncompliance with rule 4-501, it exercised its discretion to address the motion on its merits, and we are unpersuaded that doing so constituted an abuse of that discretion.

Id. ¶ 21 n.3. *Anderson* was, in part, an interlocutory appeal from a decision denying a motion for summary judgment. *See id.* ¶¶ 1, 16. *Anderson* parallels *Metro West* because in both cases, despite a technical failure to comply with rule 4-501, the trial court considered the merits of an opposition to summary judgment and was upheld on appeal. The Utah Supreme Court also considered the merits of the motion for summary judgment, despite clear violations of rule 4-501, and did not deem facts admitted in either case.

In several cases decided after *Anderson*, the Utah Court of Appeals continued to apply the harmless noncompliance rule it extrapolated from *Metro West,* but declined to use it to reverse trial courts for an abuse of discretion. *See e.g. Utah Local Gov't Trust v. Wheeler Mach. Co.,* 2006 UT App 513, 154 P.3d 175. In *Wheeler*, the trial court did not deem facts admitted based on a violation of rule 7, but rather on its view that the material opposing the motion for summary judgment did not comply with rule 56(e). *Id.* ¶ 7. The trial court in *Wheeler* had "noted its hesitation in granting summary judgment based on noncompliance with rules 7 and 56 of the Utah Rules of Civil Procedure, stating that appellate courts do not always enforce these rules." *Id.* ¶ 7 n.4. While the *Wheeler* Court "sympathize[d] with the trial court's frustration…[it] determine[d] that summary judgment was inappropriate because the City did produce sufficient admissible evidence to demonstrate the existence of genuine issues of material fact." *Id.* ¶ 7 n.5. The Court of Appeals also addressed the confusion raised by *Metro West,* stating, "[w]e recognize that the Utah Supreme Court has, using harmless error analysis, reversed a summary judgment that was based on noncompliance with the technical requirements of rule 7." *Id.* (citing *Metro West*, 2004 UT 23, ¶ 23 n.4). However, as discussed above, the *Metro West* trial court was *not* reversed for granting summary judgment based on deeming facts admitted for noncompliance with rule 7.

In two other cases decided after *Metro West*, the Utah Court of Appeals found a party's noncompliance enough to affirm the trial court's summary judgment on facts deemed admitted. *See Bluffdale City v. Smith,* 2007 UT App 25, ¶ 11, 156 P.3d 175; *Johnson v. Dept. of Transportation,* 2004 UT App 284, ¶ 7 n. 2, 98 P.3d 773. In *Bluffdale*, the Court of Appeals made patent its belief that *Metro West* imposed an additional requirement on trial courts' discretion, when it stated, "we must determine whether the trial court abused its discretion in admitting as uncontroverted the facts submitted by Plaintiff in support of its request for summary judgment, which were not addressed

by Defendants in accordance with rule 7(c)(3)(B)." 2007 UT App 25, ¶ 7. The court affirmed the trial court's decision but noted, "[e]ven had we determined that Defendants substantially complied with rule 7(c)(3)(B), we would still affirm the district court's order granting summary judgment on the alternate ground of unjust enrichment." *Id*. ¶ 11 n.2. These cases illustrate the Utah Court of Appeals' belief that *Metro West* changed trial courts' broad discretion to deem facts admitted under rule 7, and that court's reluctance to apply its interpretation of *Metro West* to reverse trial courts.

This review of the Court of Appeals' decisions on rules 4-501 and 7 demonstrates that a party before that court may fail to comply with the procedural requirements of rule 7, and still avoid having facts admitted against them. The Utah Supreme Court, however, has affirmed a trial court's broad discretion to deem facts admitted for a failure to comply with rule 7.

A trial court or litigant before that court may be asking what to make of these somewhat confusing decisions. Here are some facts that may help both:

1. No Utah trial court has *ever* been reversed for granting summary judgment based upon facts deemed admitted for failure to comply with rule 7.
2. The Utah Supreme Court has consistently affirmed the trial court's discretion to require strict compliance with rule 7.
3. The Utah Court of Appeals has interpreted *Metro West* to limit trial courts' discretion to strictly enforce rule 7. However, that court has also expressed hostility to the rule it extrapolated from *Metro West* and has never reversed a trial court for deeming facts admitted for violating rule 7.
4. If a trial judge waives strict compliance with rule 7 and entertains the merits of a summary judgment motion, appellate courts are likely to also waive the violations of rule 7 and consider the merits of the motion.
5. Trial courts may consider a harmless noncompliance test to support their decision to deem facts admitted, but even without this test, a trial court has discretion to rigorously apply rule 7.

HOW UTAH ATTORNEYS CAN AVOID PITFALLS AND SUCCEED IN SUMMARY JUDGMENT PRACTICE

Utah attorneys have become adept at avoiding the clear intent of rule 7 and summary judgment. Summary judgment is a process intended to distill the facts; for summary judgment to be appropriate there must be no genuine dispute of material facts and the undisputed facts must entitle the moving party to judgment as a matter of law. *See* Utah R. Civ. P. 56(c). Yet attorneys regularly file statements of uncontroverted facts that are longer than necessary, use undisputed facts to tell complex narratives rather than distill the issues to those relevant to judgment as a matter of law, and fill memoranda with disingenuous disputes of facts.

To ease the burden on Utah's trial courts, decrease the expense of summary judgment motions for all parties, reform wasteful practices, and conform summary judgment motions to the clear purpose of the rule, attorneys should consider the following when moving for or opposing summary judgment:

Statements of Undisputed Material Facts Should Set Forth Only Material and Critical Facts.

Statements of fact in motions for summary judgment are often excessive and replete with facts that are either irrelevant or immaterial to the question of law on summary judgment. On summary judgment, a moving party's job is to simplify the case to its core undisputed issues. There must be no dispute of material fact, which does not mean a party should include every single, undisputed fact. Elaborate statements of facts or narratives told through such facts are wasteful and distract from the relevance of critical facts. Further, the more facts a party sets forth, the greater the opposing party's opportunity is to dispute those facts. Limit statements of fact to the critical issues that are truly undisputed. Simple and concise statements of core material facts are all a party should include when moving for summary judgment.

Problematic summary judgment motions are also present at the federal level, where neither Federal Rule of Civil Procedure 7 nor Federal Rule 56 contain the requirements that Utah's Rule 7 does. Instead, it is a matter of local discretion whether to require a separate statement of undisputed facts. The Federal Judicial Center is considering amending Federal Rule of Civil Procedure 56 to require a statement of undisputed facts to accompany motions for summary judgment.[1]

The proposed amendment would require a moving party to "state in separately numbered paragraphs only those material facts that the movant asserts are not genuinely in dispute and entitle the movant to judgment as a matter of law" and an opposing party would have to separately address those facts.[2] The proposed amendment makes clear that the intent of a separate statement is to identify those facts critical to the case. New York's federal courts have such a requirement and the courts interpreting it have stressed that the purpose of a separate statement of undisputed facts is to "**streamline** the consideration of summary judgment motions by freeing district courts from the need to hunt through voluminous records without guidance from the parties." *Holtz v. Rockefeller & Co.,* 258 F.3d 62, 74 (2d Cir. 2001) (emphasis added).

If a fact is not necessary to the court's decision, it should not be included in a statement of core undisputed facts. Undisputed facts should closely follow the specific elements of a claim or defense. If a string of narrative facts is necessary to make a

position clear, express it as a narrative in a separate section of the memorandum. Separate numbered paragraphs are, in any event, a poor vehicle for writing a compelling narrative.

Opposing Parties Should Not Obfuscate Facts for the Sake of Obfuscation.

Again, the purpose of a summary judgment motion is to focus the litigation on the disputed issues that a trier of fact needs to resolve. When a party opposes summary judgment by introducing disingenuous and irrelevant disputes, it works as a red flag for the court. Parties should focus on the material facts, and admit when facts are undisputed. A common, but improper response to facts is "admitted but immaterial," followed by a paragraph or two of argument as to why the fact is immaterial. Argument on the effect of a fact belongs in the argument section of a brief, if a fact is undisputed leave it at that.

The Material Cited to Show a Material Fact is Undisputed Should Clearly Show the Fact is Undisputed.

It is utterly unhelpful for a party to support a claim that a fact is either disputed or undisputed with a source in the record that does not clearly support the party's position. Parties should ensure that supporting material is admissible and that it truly supports the undisputed nature of your facts. It does not help your case if the court must "hunt through voluminous records" in search of a supporting citation that does not say what the party claims it does. That is a red flag to the court and undermines the credibility of your entire position.

CONCLUSION

The conclusion is simple: when moving for or opposing summary judgment, follow the clear procedural rules and consider the purpose of summary judgment. Think in terms of rifle shots, not shotgun blasts. When simplicity and clarity become the hallmark of all summary judgment pleadings, trial courts will rarely have to use our discretion to deem facts admitted for a failure to comply with rule 7. Until that day, our discretion remains broad and trial courts should not hesitate to use it.

1. Thomas E. Zehnle, *FJC Weighs Changes to Summary Judgment Rule: Moving Parties in all Federal Courts May Soon Have to File a Statement of Uncontested Material Facts,* A.B.A. Litigation News, at 4, Vol. 33, No. 4, May 2008, available at http://www.abanet.org/litigation/litigationnews/2008/june/0608_article_fjc.html.

2. Joe Cecil & George Cort, *Initial Report on Summary Judgment Practice Across Districts with Variations in Local Rules,* at 1, Nov. 2, 2007, available at http://www.fjc.gov/public/pdf.nsf/lookup/insumjre.pdf/$file/insumjre.pdf.

Convictions: A Prosecutor's Battles Against Mafia Killers, Drug Kingpins, and Enron Thieves

by John Kroger

Reviewed by Ralph Dellapiana

I am going to start this review with a disclaimer. I am biased, particularly against prosecutors. I am a public defender, and through years of trench warfare I have wounds enough to have learned to have a healthy skepticism about the difficulty of getting "justice" in the criminal justice system. And I blame a lot of the problems on prosecutors. More than one prosecutor has told me he or she can't do the right thing, or doesn't care if my client is innocent, or if the police are lying to make a bad arrest stick.

But in *Convictions: A Prosecutor's Battles Against Mafia Killers, Drug Kingpins, and Enron Thieves,* John Kroger reveals his own misgivings about the morality of the federal prosecutor's job. He writes of a "darker side" of his job and the "ethical obstacle course" that he had to try to navigate. He saw how the FBI kept Mafia members on the government's payroll and looked away as they continued to commit crimes; and how the DEA allowed a big drug cartel player to stay in business as long as the DEA was allowed to skim ten-fifteen percent off drug money shipments. Kroger discloses how he "secretly grew disgusted" at the moral ambiguity of the job. He became concerned about the vast power the prosecutor wields in the federal criminal system, noting that one federal judge complained that "Congress has cast the federal prosecutor in the role of God."

Kroger adds,

> we want to be idealistic, but in the end we accomplish our jobs through threats. You threaten to send your target to prison for life unless they cooperate; you threaten to send our witnesses to prison if they don't tell the truth; you threaten your defendant's spouse with indictment unless your defendant pleads. Over time the suffering witnesses and the suffering you cause begin to change you.

Kroger's frank acknowledgment of the ethical problems in the system gives him instant credibility with me. In fact, in the end, there are enough ethical dilemmas explored in the book to justify giving three hours of CLE credit simply for reading Kroger's book.

The scope of *Convictions* is greater than the title entails. It is not just a memoir of Kroger's key prosecutions. It is also an autobiography that reveals how Kroger grew up in a dysfunctional family, was an alcoholic teenager and one-time thief. It describes how he joined the Marine Corps and became a Recon Special Ops member, then went to Yale and earned a Masters Degree in Philosophy. After the Marines, Kroger also spent time in politics as a means to fulfill a heartfelt desire to contribute to society though public service. He was a congressional aide, and became a policy advisor to Bill Clinton, but he was troubled by the moral and political compromise. Then, finally, he went to Harvard Law School and became an Assistant United States Attorney for the Eastern District of New York. There, he prosecuted some of the most significant criminal cases in American history. Eventually, burned out by the weight of the caseload and ethical burdens, he went on a two-month cross-county bicycle trek that led to a life-altering epiphany, culminating in a decision to become a law school professor. Not surprisingly, his favorite subject is jurisprudence, or legal philosophy, where he tries with his students to understand the nature of justice.

But the heart of Kroger's book is clearly the discussion of his key criminal prosecutions. And he draws the reader into the drama inherent in big-time crime right from the beginning. In the very first paragraph, Kroger has the bones of Sal "The Hammerhead" Cardacci in a cardboard box on his desk, and he is waiting for a verdict in a mafia prosecution. Kroger describes in fascinating detail the investigation of heinous mob crimes and the courtroom drama involved in mob prosecutions. But he

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doesn't stop there. He also describes the social and historical circumstances that led to the growth of the Mafia in the first place. He first states the well-accepted premise that Prohibition created the initial incentive for illegal organizations, but then goes on to place direct blame on J. Edgar Hoover for failing to act against organized crime, suggesting that Hoover avoided time-consuming and potentially fruitless investigations against organized crime in order to bring respect to his organization by focusing on "communists" instead. This self-interested allocation of resources resulted in the tremendous growth and power of mob organizations.

Then Kroger goes on to explain "How we beat the mob." Kroger credits the Racketeer Influenced Corrupt Organizations Act (RICO), with making successful mob prosecutions easier by allowing indictment of all defendants who belonged to the same "enterprise." In addition, the extremely long federal sentences RICO authorized helped federal prosecutors finally break through the Mafia's code of silence. The Witness Protection Program also made it easier to recruit cooperating witnesses, because they could get new identities and be relocated instead of just waiting to get whacked for their betrayal. The development of wiretapping also helped the feds get evidence to corroborate cooperating witnesses. Kroger also credits broad socio-economic changes to contributing to the mob's downfall. He points out that easy consumer credit and payday loan businesses cut into the mob's loansharking business, government lotteries supplanted the numbers racket, and competition from Latin-American cartels displaced the mob's European drug sources.

Drug prosecutions are also a big part of the book. In a chapter called *The Dark Side,* Kroger explains that "as a narcotics prosecutor I was forced to live in a murky world of moral ambiguity." For example, he discloses that the DEA skimmed drug money from a cartel while allowing the cartel to stay in business, and used illegal wiretaps to gather evidence. Kroger writes that, "My talent was to use fear, pressure, and psychological ploys to trick, manipulate and break down suspects," and turn them into informants. But, he felt conflicted about knowingly putting these informants at risk of facing a gruesome death at the hands of the cartel and eventually grew disgusted at what he saw, and what he did.

But again, Kroger goes beyond the specifics of his drug prosecutions and waxes philosophical. He explains, "How to win a war on drugs." Kroger points out that the government's 30 billion dollar a year efforts to reduce drug use by attempting to stem supply have failed. Adjusting for potency, Kroger notes that drug prices are down and demand is up since 1992. Kroger also explains that arresting one dealer or cleaning up one neighborhood is not really "success" because new dealers step in or traffickers just move to the next neighborhood. Kroger concludes that if the United States really wants to reduce drug abuse, "we have to develop a rational, well-funded national drug treatment plan." Kroger notes that presently, however, treatment programs are chronically underfunded and politically unpopular.

The prosecution of ENRON criminals is the third major case category in *Convictions*. Kroger explains how he struggled initially to determine how to handle "the most significant white collar case in history." The problem was initially the mere scale of the company. Enron and its related subsidiaries had a complex financial structure, and the FBI had seized some ten million documents. Out of necessity, Kroger and his team decided to focus on a few specific transactions, and the Enron Broadband Services (EBS). Enron executives had stated publicly that they had developed intelligent network control software analogous to Microsoft Windows and told analysts that EBS was worth 36 billion dollars. But, there was no software. EBS was just a shell. Kroger explains that to short-cut the investigation he decided to apply the same techniques he had used with mob and drug prosecutions, trying to get "flips." Kroger acknowledges that "I made a fool of myself." Kroger explains that corporate executives are very different from street criminals. They have more money and are better educated, and their sense of empowerment makes them less susceptible to government tricks and coercion. Plus, white collar defense

attorneys know that if a case goes to trial, rather than ending early in a plea, their fees will be much higher. Consequently, Enron CEO Jeff Skilling's lawyers reportedly billed him 54 million dollars. Eventually, however, Kroger's work resulted in the indictment of seven key executives on 221 counts of fraud, insider trading, and money laundering. Those eventually convicted included Enron CEO Jeff Skilling and founder Ken Lay.

In the chapter "Getting Away With Fraud" Kroger goes beyond the details of the ENRON prosecution to describe the political and economic circumstances that allowed such a gigantic fraud to occur in the first place. According to Kroger, the major institutional players that should have acted to stop the fraud failed. Independent auditor Arthur Anderson failed because of greed. Members of Enron's Board of Directors were screened and ineffectual. Wall Street stock analysts were threatened with losing Enron's business; one analyst was fired for recommending changing Enron to a hold from a buy. The SEC had inadequate resources and poor management. The SEC management goal was to maximize the number of filings reviewed, so analysts chose simpler, easier to meet targets. Even when the SEC caught a business doing something wrong, its enforcement strategy was to file and settle as soon as possible for small fines.

Regarding the ability of the system to deter fraud Kroger ultimately says, "Now I know it is hopeless." What is not hopeless to Kroger, however, is having the will to keep fighting for justice. *Convictions* clearly refers not only to the court judgments entered against the criminal defendants Kroger prosecuted, but also to his own deep-seated feelings about the importance of his own public service.

Those readers intrigued by *Convictions* may also enjoy *Indefensible*, by David Feige, subtitled *One Lawyer's Journey Into the Inferno of American Justice.* Feige was a public defender in New York's state courts for 15 years. Near the end of the book that describes the drama and travails of his work in the Bronx courts, Feige writes: "There is something about the struggle of being a public defender that feels right…like the last bulwark between freedom and incarceration, the last hope of a population that no longer believes in hope or help." But Feige also describes the struggle against burnout that is seemingly the almost inevitable result of a public defender's massive case load, and front row view of persistent injustice. Of this struggle, Feige writes: "But what I still don't know is when it's acceptable to turn your back, to walk away from an indefensible system, to close your eyes to injustice, to surrender. What I do know though, is that while I wonder and until I'm sure, I'll be uptown."

FALL FORUM

Creative Green Law Practices Featured at Fall Forum

by Karin Hobbs, co-chair, Fall Forum

Utah lawyers are going green with enthusiasm and creativity. Take Adam Price, an attorney with Jones Waldo, who has been the focus of enormous creative energy due to the "337 Project." Adam and his wife, Dessi, a graphic artist, bought a building on 337 South and 400 East, and, before demolishing the building, allowed 143 artists to create art inside and outside the building. Not only have they generated creative energy, they will also be saving energy and creating a sustainable building by replacing the old structure with a seven story mixed use condominium made of recycled steel crates. The materials used to construct the building will be fifty percent recycled, by weight.

The "337 Project" was filmed and is now the subject of a documentary film. The documentary film will be shown on Thursday, November 20, 2008 at the Salt Lake Arts Center as the opening feature of the Fall Forum.

Then, add Jon and Phil Lear, with Lear & Lear, who has been renovating an historic mansion on South Temple in Salt Lake City into a green building that uses little to no public utilities due to several seldom used, but readily accessible, technologies. Both of these lawyers will be discussing their green building practices and their interplay with the law. In Adam's case, he is working with various other professionals to minimize energy use, and will be developing legal documents for his mixed use condominium project that will encourage sustainability. In Jon's case, he now is urging others to change the rules and the regulations to create incentives for green building practices and to allow citizens from all incomes levels to be green.

Adam and Jon, along with other lawyers with green law practices, will be featured on the Green Law Practices track at the Fall Forum on November 21, 2008.

How to Build and Manage an Estates Practice, Second Edition

by Daniel B. Evans, Esq.

Reviewed by Nathan C. Croxford and Andrew L. Howell

If his most recent publication, *How to Build and Manage an Estates Practice,* is any indication, author Daniel B. Evans must have been a master issue-spotter in law school. In just 205 pages, inclusive of appendices and index, Evans manages to identify and discuss, in clean, economical, and very readable prose, nearly every conceivable issue, problem, or challenge that an attorney might encounter in building and maintaining an estates practice. Coverage ranges from client-generation in the Internet age, to ethical considerations in modern estates practice, to office technology and automation, innovative client communications and billing practices, and more.

Interested potential readers and even casual observers should not be deceived by the title of Evans' book, which may seem directed only to small firm and solo estates practitioners. This subset of practitioners will undoubtedly benefit from Evans's book, but so will others. Both reviewers began their legal careers at large regional law firms and eventually migrated to small firm estates practices. We agree that practitioners in similar large-scale practice environments will also find useful, practical information that can be readily applied to trusts and estates departments at large firms. Furthermore, Evans adeptly addresses issues arising from both estate planning, as well as estate administration practices, making his book, now in its second edition, a great read for all estates practitioners, as well as any other attorney in need of a better understanding of this increasingly technical area of law.

We noted several high points that merit further discussion. First, Evans is a recognized authority on the burgeoning innovations in office management and practice automation in the area of estate planning and estate administration practice. Among his several other publications, Evans is the author of *Wills, Trusts, and Technology: An Estate Lawyer's Guide to Automation* (ABA Product Code 5430448), a joint publication of the Law Practice Management and Real Property, Trust and Estate Law Sections of the American Bar Association, now also in its second edition, which focuses exclusively on technology and automation in estates practice. In *How to Build and Manage an Estates Practice,* Evans skillfully weaves timely and relevant information regarding technology and automation into his discussion of nearly every other issue, including new client generation, file management, forms usage, and document drafting.

Indeed, in the new second edition, Evans has completely revamped and updated his treatment of the Internet, World Wide Web, and related ethical issues to account for the drastic changes in these areas since he published the first edition in 2000. Interestingly, despite his informative exploration of the latest in technological advances, Evans concludes that the dream of the "paperless office" has yet to be realized, and that in many ways technology has made estates practice more complicated. Even so, Evans recognizes the inevitable forward march of progress and argues in compelling fashion that estate practitioners will benefit from embracing advances in technology, not shunning them.

Next, Evans's issue-spotting skills come in handy again as he surveys

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the multiple and varied ethical concerns arising from modern estates practice. Furthermore, as a long-time practitioner laboring in the trenches of estate planning and administration, Evans possesses a depth of wisdom, experience, and insight that is readily evident in his excellent discussion of common conflicts of interest or potential conflicts of interest arising from joint representation of husbands and wives, multiple generations within the same family, and fiduciary-beneficiaries, among others. Evans also provides a succinct commentary on keeping client confidences in estates practice, including how to avoid inadvertent and seemingly harmless disclosures to the client's close family members who are not clients, which can result in serious breaches of client trust.

Finally, we both made immediate changes in our respective practices as a result of Evans's highly practical discussion of retainer agreements and billing practices. The form retainer agreements and other materials contained in the appendices to Evans's book are among the best either of us has ever seen, and are alone worth the purchase price of the book. Moreover, each form is contained in Word Format on a CD-ROM included with each copy of the book, making it possible to adopt or adapt and use any of Evans's forms in minutes. We wasted no time implementing the masterful retainer agreement located in Appendix B in our own practices.

And while Evans is certainly not the first to encourage attorneys to transform their lifeless "bills" into client-friendly status reports that reflect the value created for the client and encourage prompt payment of fees, he is one of the best we have encountered. We have both begun the process of transforming once sterile and mundane invoices into meaningful communications with our clients. The results have been marked and immediate.

How to Build and Manage an Estates Practice can be purchased by calling the ABA Service Center at 1-800-285-2221, or by visiting the ABA Web Store at www.ababooks.org, and requesting Product Code 5110591.

7TH ANNUAL ADR ACADEMY

Mediation Gone Wild

SEPTEMBER 12, 2008 – Save the Date

Concerned about mediation confidentiality? Trying to enforce a mediated settlement? Come to the 7th Annual ADR Academy on September 12, 2008 where Mike Young, a professional mediator from California will kick off the ADR Academy with an entertaining presentation on how three minutes in a confidential mediation can land a client in jail. Mike Young's discussion of mediation confidentiality begins with a "not so confidential" mediation involving Joseph Francis, creator of "Girls Gone Wild" videos. As a result of Francis' unusual conduct and outrageous settlement offer at a "confidential" mediation session, the 34-year-old Francis was first held in contempt for failure to participate in mediation in good faith, compelled to disclose mediation communications, and finally placed behind bars in federal prison.

With the Utah Supreme Court's decision in Reese v. Tingey *(2008 Utah 7) on mediation confidentiality, this seminar is extremely timely and will set the stage for a lively and informative discussion of mediation confidentiality in Utah.*

Francis' unusual mediation odyssey is an interesting story, if a bit tawdry and salacious. But for lawyers and other students of alternative dispute resolution, it also raises fundamental – and captivating – questions dealing with the amorphousness of mediation "confidentiality," the meaning of negotiation "bad faith," clever lawyering, difficult clients, and the power of angry judges to control private mediation and imprison its participants. The case may even challenge the notion of "voluntariness," a generally sacrosanct aspect of mediation. Mike Young is a Southern California mediator who was recently interviewed by E! True Hollywood Story on the Joe Francis legal saga. Mike's presentation will set the stage for a lively discussion of mediation confidentiality in Utah, the Utah Uniform Mediation Act, recent case law developments, and strategies to use to enforce mediated settlements.

Michael Young is a Fellow and Board Member of the International Academy of Mediators and mediates with Judicate West, Los Angeles, California. Mike's mediation practice focuses on resolving intellectual property and other complex business and commercial disputes.

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the July 16, 2008 Commission meeting held in conjunction with the 2008 Summer Convention in Sun Valley, Idaho.

1. The Commission approved the minutes of the May 30, 2008 Commission meeting by consent.
2. The amendments to Senior Bar Section By-laws to permit membership at age 55 were approved by consent.
3. The Commission approved the inception of a new Mentoring Program and asked the General Counsel, Katherine Fox, to work with the Mentoring Program Subcommittee to prepare a petition to the Utah Supreme Court. The mentoring plan includes core legal and professional concepts, lawyering skills, activities and experiences designed to bridge the gap between law school and the "real world" of legal practice.
4. Commissioners postponed action on a request for a new Communications Law Section.
5. The Commission approved the creation of a new staff position to handle Member Benefits and Public Services. This new position will assist in the administration of a Utah State Bar *Pro Bono* program by placing cases as requested by the court and will provide logistical support for the Young Lawyer service programs such as Tuesday Night Bar and Wills for Heroes. In addition, the new position will provide administrative support to companies that are providing products and services to assist members of the Utah State Bar.
6. Commissioners instructed Bar staff to review and revise the contract with Blomquist Hale.
7. A formal annual evaluation process for the Bar's Executive Director was approved.
8. The Commission appointed James D. Gilson to fill the remaining year of Nathan Alder's term as 3rd Division Commissioner pursuant to Mr. Alder's resignation.
9. The following *ex-officio* representatives were approved to serve on the Commission: Dean of the J. Reuben Clark Law School; Dean of the S. J. Quinney College of Law; Bar's Representative to the ABA House of Delegates; Utah ABA Members' Delegate to the ABA House of Delegates; Past Bar President Lowry Snow, Representative from Women Lawyers of Utah; Representative from Paralegal Division; Representative from Utah Minority Bar Association; Representative from Young Lawyers Division.
10. The following members were selected to serve on the Executive Committee: Nathan Alder, Stephen Owens, Lori Nelson, Christian Clinger, Rob Jeffs and John Baldwin. A resolution was also adopted allowing the Executive Committee to sign Bar checks.

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.

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:

Distinguished Community Member Award
Pro Bono Lawyer of the Year
Professionalism Award

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

President-Elect and Bar Commission Election Results

Steve Owens

Steve Owens was elected President-Elect of the Utah State Bar. He received 1,674 votes to Scott Sabey's 1,048 votes. There were 2,748 ballots cast for President-Elect out of 7,245 mailed out to active lawyers.

Rodney Snow, Lori Nelson, and Rusty Vetter were elected to the Commission in the Third Division with 947 votes, 855 votes, and 802 votes respectively. With 740 votes, James Gilson was elected to fill the unexpired term of Nate Alder. There were 1,810 ballots for commissioner cast from 4,261 sent in the Third Division.

Herm Olsen ran unopposed in the First Division and was, therefore, re-elected.

Rodney Snow

Lori Nelson

Herm Olsen

Rusty Vetter

James Gilson

Law Firm Retention and Advancement of Attorneys

Law firms, despite efforts over the last ten years to provide better maternity/paternity leave, part time schedules, and the like, are increasingly frustrated by the constant departure of their attorneys. Many perceive the departures to be mostly of women attorneys. Others believe the attrition results from generational differences and unwillingness to work the number and type of hours a private firm requires.

Various bars, firms, and organizations throughout the country have begun to study the issue of retention and advancement of attorneys. These studies, combined with our own observations, inspired Women Lawyers of Utah (WLU) to begin its own initiative to study the issue in Utah.

A Utah study is necessary to determine whether Utah is following the national trends in this area or if Utah has different issues altogether. As a general matter, Utah lacks significant data about the attorneys who make up the Bar. To get at whether an issue exists and what the parameters of the issue are, we decided to start with a survey.

We are surveying all people admitted to the Utah Bar between 1985 and 2005. The survey will be completely anonymous. It asks attorneys questions about their current and past job satisfaction, discrimination, and experience. Additionally attorneys are asked to provide basic information about themselves and their immediate families. People who complete the survey will be eligible to participate in a random drawing for 15 gift cards worth either $50 or $100.

In preparing this survey we have enlisted the help of Professor Vaughn Call from Brigham Young University to help make it statistically sound. The next step is up to you. Please complete the survey if you are in the target group. If you are not, please encourage anyone you know who is in the group to complete the survey. The validity of the survey depends on the number and quality of responses made to it.

Once the survey is complete, WLU will host two symposia to discuss the findings and develop proposed best practices to address the issues raised. The symposia will include experts to present the demographics, issues, and strategies both locally and nationally. We are particularly excited to have Cynthia Thomas Calvert, Assistant Director of the Project for Attorney Retention (PAR) participating in the symposia. PAR is an initiative at the University of California Hastings College of the Law that works to stem unwanted attrition of attorneys from law firms by promoting work/life balance.

Following the symposia, WLU will compile and publish a report of its findings both from the survey and the symposia. This report will assist law firms and lawyers with understanding what issues exist and what solutions are possible in choosing a career with a private firm.

To best address the problems and develop solutions that will help law firms retain and promote their best associates, we have drawn and continue to draw on the support of much of the legal community – the law firms, the law schools, the Bar. Additionally many individuals have given their personal time to make this initiative the best it can be. We are incredibly grateful to our sponsors, advisory board members and committee members.

The key to the success of this initiative is the honest sharing of ideas, experiences, and beliefs. Please be a part of it. If you would like to participate in this initiative, please contact Evelyn Furse at evefurse@yahoo.com or Melanie Vartabedian at VartabedianM@howrey.com.

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.

"And Justice For All" Receives Prestigious Award

Left to right: ACTL Fellow Janet Smith, Joseph Cheavens, Chair of the Emil Gumpert Committee, Kai Wilson, Executive Director of "And Justice For All," and Mikel Stout, President of The American College of Trial Lawyers.

The American College of Trial Lawyers presented its 2008 Emil Gumpert Award to "And Justice For All" for its truly unique program. This prestigious award, consisting of a $50,000 grant, recognizes programs whose principal purpose is to maintain and improve the administration of justice. The Gumpert Award recognizes the incredible leadership of Utah's legal community that led to the success of And Justice For All. During the past decade, the number of disadvantaged Utahns helped by the participating programs has increased from 16,280 in 1998 to more than 34,000 last year. According to the American College of Trial Lawyers:

> This extraordinary organization is a collaboration of Utah's three primary providers of legal aid, all committed to identification of issues related to increasing access to justice for the disadvantaged. With a goal of developing a web-based legal clinic program, access to legal services will be provided to low-income individuals in rural areas through "one-stop" shopping.

And Justice For All is a collaborative effort of Utah Legal Services, the Disability Law Center, and Legal Aid Society of Salt Lake and is supported in large part by the generous annual donations of Utah lawyers. Together these agencies address a range of substantive issues including domestic violence, domestic relations, elder law, consumer law, disability rights, discrimination, housing, immigration, migrant workers, Native American law, and public benefits.

The Gumpert Award will fund eight web-based legal clinics to increase access for disadvantaged individuals in rural areas of the state. Last year, low-income households in Utah faced more than 80,000 civil legal problems without any legal help. This problem is particularly acute in the more isolated areas of the state. The first three test sites will be located in Beaver, Richfield, and the Uintah Basin and are expected to be operational by the end of November.

Currently, low-income clients in Utah must access services via the telephone or at the limited number of clinics. Rural residents are at a disadvantage. The telephone has significant limitations for clients, and rural clinics are costly, often requiring an advocate to drive up to five hours each way. Web-based clinics will increase client communications and comprehension and save money by reducing travel time and travel costs.

The American College of Trial Lawyers is an invitation-only organization composed of the best of the trial bar from the United States and Canada. Founded in 1950, the College is dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the profession. The Gumpert Award is an important part of that effort.

Pro Bono Honor Roll

Fred Anderson – Guadalupe Clinic
Andres Alarcon – Family Law Clinic
Jeremy Atwood – Family Law Clinic
Lauren Barros – Family Law Clinic
Janell Bryan – Consumer Case
Bryan Bryner – Guadalupe Clinic
Danielle Dallas – Guadalupe Clinic
Julie Edwards – Tax Issue for Non-Profit DV Matter
Jared Fields – Housing Case
Lisa Fine – Family Law Clinic
Craig Galli – Protective Order Case
Kass Harstad – Guadalupe Clinic
Rori Hendrix – QDRO Case
April Hollingsworth – Guadalupe Clinic
Kyle Hoskins – Davis County Legal Clinic
Julian Jensen – Adoption Case
Jay Kessler – Divorce Case
Louise Knauer – Family Law Clinic
Michael Langford – Guadalupe Clinic
Leilani Marshall – Guadalupe Clinic
Sally McMinimee – Family Law Clinic
Stacy McNeill – Guadalupe Clinic
Aimee Nielson-Larios – Family Law Clinic
Todd Olsen – Family Law Clinic
Rachel Otto – Guadalupe Clinic
Stewart Ralphs – Family Law Clinic
Brent Salazar-Hall – Family Law Clinic
Lauren Scholnick – Guadalupe Clinic
Linda F. Smith – Family Law Clinic
Kathryn Steffey – Guadalupe Clinic
Charles Stewart – Family Law Clinic
Steven Stewart – Guadalupe Clinic
Virginia Sudbury – Family Law Clinic
James Taylor – Guadalupe Clinic
Pam Thompson – Family Law Clinic
Carrie Turner – Family Law Clinic
Murry Warhank – Guadalupe Clinic
Tracey Watson – Family Law Clinic
Mary Jane Whisenant – Family Law Clinic
Amanda Williams – Farmington Protective Order
Abigail Wright Grissom – Park City Protective Order

Attorney Discipline

ADMONITION

On June 23, 2008, the Vice-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 3.2 (Expediting Litigation), 3.3(d) (Candor Toward the Tribunal), 7.3(a) (Direct Contact with Prospective Clients), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney solicited professional employment from a person in a nursing home without invitation and without contacting the person's family members. The attorney filed an Ex-Parte Motion for Appointment of Counsel along with a Request for Guardianship and Conservatorship for the person in the nursing home. The attorney did not disclose all material facts to the tribunal in his ex-parte communications including how the attorney was in contact with the client; the fact that Adult Protective Services (APS) was not investigating all of the children of the client, and that his client was not in imminent harm. The attorney continued to fight over the appointment of counsel with his client's children after APS determined there was no exploitation. The attorney's response to the OPC and personal attacks toward his client's children were unprofessional and detrimental to the administration of justice.

Mitigating factor: isolated incident and not a pattern.

ADMONITION

On May 22, 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 4.4(a) (Respect for Rights of Third Persons), 8.4(e) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney's client, a government agency, inadvertently sent confidential information to a person who had an open case with the agency. When the person did not return the documents on request, the attorney called the person leaving a message that threatened to have the police come to retrieve the documents, to seek criminal charges or to get a warrant in order to affect the return of the documents, however the attorney had no creditable legal recourse for these threats. The Committee determined that the attorney's voicemail was inappropriate and unprofessional.

PUBLIC REPRIMAND

On May 12, 2008, the Honorable Robert P. Faust, Third District Court, entered an Order of Discipline: Public Reprimand against Jeanne T. Campbell Lund for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.16(a) (Declining or Terminating Representation), 3.2 (Expediting Litigation), 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
On or around October 2002, Ms. Lund and her husband were retained to pursue a personal injury case. On April 17, 2003, the Utah Supreme Court accepted her husband's resignation with discipline pending from the Utah State Bar. Ms. Lund's husband became her office manager and/or legal assistant. Ms. Lund did not timely pursue settlement or litigation of her client's personal injury case. During the representation, Ms. Lund failed to timely communicate with her client concerning the status of his case. At the end of 2003 or the beginning of 2004, Ms. Lund left the practice of law to work in the mortgage business. Ms. Lund failed to notify her client that she was not pursuing his personal injury case. Ms. Lund did not notify the insurance company for the opposing party that she was withdrawing as counsel from the case. After Ms. Lund began working in the mortgage business, she failed to supervise her husband's access to the client's file. In or around March 2004, her husband engaged in settlement negotiations with the insurance company in the personal injury case. Her husband accepted a settlement offer for the client, but did not inform the client of the settlement offer. Her husband did not receive the client's authorization for the settlement offer prior to accepting the final settlement. On or about March 16, 2004, the insurance company issued a settlement check payable to Ms. Lund's husband and the client. Although the settlement check was endorsed and cashed the client did not endorse the settlement check and did not receive any of the monies from the settlement check. At the time of the settlement negotiations with the insurance company, Ms. Lund did not directly supervise her husband's work.

RECIPROCAL DISCIPLINE

On May 12, 2008, the Honorable Eric A. Ludlow, Fifth District Court entered a Reciprocal Order of Discipline: Public Reprimand against Rulon J. Huntsman for violation of Rules 1.3 (Diligence), 5.3 (Responsibilities Regarding Nonlawyer Assistants), 5.5 (Unauthorized Practice of Law), and 8.4(a) (Misconduct) of the Rules of Professional Conduct, based upon his conduct in Nevada.

In summary:
Mr. Huntsman and a non-lawyer presented to the public as a single business entity, being housed in the same building and lacking signs indicating that they were separate businesses. One client hired the non-lawyer believing that the non-lawyer was an attorney. When the client requested his attorney appear on his behalf, Mr. Huntsman appeared, but was not familiar with the

case. Mr. Huntsman relied on the non-lawyer to collect the fee and prepare documents for the client.

On September 6, 2007, a Public Reprimand was issued in Nevada by the State Bar of Nevada Southern Nevada Disciplinary Board. Based on the findings of the Nevada Board, the Fifth District Court entered an order of equivalent discipline.

SUSPENSION

On May 30, 2008, the Honorable Sandra N. Pueler, Third Judicial District Court, entered Findings of Fact and Conclusions of Law and Order of Discipline: Suspension against Frank J. Falk for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 3.2 (Expediting Litigation), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The suspension is effective June 30, 2008. Mr. Falk is suspended for three years.

In summary:

In one case, Mr. Falk was hired to initiate an action against Salt Lake County (County) for injuries his client sustained in an automobile accident. The client hired Mr. Falk on or around January 2, 2003. During four years of representation, Mr. Falk had infrequent contact and did not routinely make himself available for telephone calls from his client. Mr. Falk failed to consult with his client concerning the process of the case, settlement of the case or what was necessary for trial. He also failed to prepare her case and to prepare her to testify. When an offer was made, Mr. Falk failed to notify his client who eventually found out from a third party months later.

In another matter, Mr. Falk was retained to handle some collection matters. Mr. Falk was the responsible attorney on the cases. During the course of Mr. Falk's representation, Mr. Falk handled at least 11 cases. Mr. Falk received checks for fees and costs to be performed on the cases. The files were removed by the client because of inaction and failure to communicate. In some cases the statute of limitations were missed due to the inactivity of Mr. Falk.

DISBARMENT

On June 24, 2008, the Honorable Judith S. Atherton, Third Judicial District Court, entered a Reciprocal Order of Disbarment disbarring Dennis F. Olsen from the practice of law in Utah based upon his disbarment in Washington.

In summary:

On September 19, 2006, the Supreme Court of Washington ("Washington") entered an Order disbarring Mr. Olsen from practicing before that court based on his conduct in violation of Rules 1.1, 1.3, 1.4, 3.2, 8.4(b), 8.4(c), 8.4(i), and 8.4(l).

The findings of the Washington adjudicatory body are summarized as follows:

Mr. Olsen knowingly withheld taxes from an employee but did not remit the withheld taxes to the proper federal and state agencies. Mr. Olsen also committed theft by not remitting the withheld taxes to the proper authorities in that he did not return the money to the employee. After Mr. Olsen fired the employee, Mr. Olsen attempted to coerce the employee into taking a case, using the withheld taxes as leverage. Thereafter, the employee filed a complaint with the Washington State Bar. During the investigation of the Bar complaint, Mr. Olsen attempted to mislead the Bar concerning his wrongful conduct with regard to the taxes.

Nominations Sought for the Peter W. Billings Sr. Award for Excellence in Dispute Resolution

To honor the memory of Peter W. Billings, Sr., a pioneer and champion of alternative dispute resolution in our state, the Dispute Resolution Section of the Bar annually awards the Billings' Award for Excellence in Dispute Resolution. The DR Section is seeking nominations for this award, which will be presented at the Fall Forum. The award may be given to a person or an organization.

Past recipients of this prestigious recognition are Gerald Williams, Michael Zimmerman, William Downes, Hardin Whitney, James Holbrook, Diane Hamilton, Karin Hobbs, Palmer DePaulis, Brian Florence, and Paul Felt.

Please submit nominations by Friday, September 19, 2008 to Joshua F. King at jfking@kingmediation.com.

Relax from the stresses of the practice of law and start enjoying this wonderful get-a-way cabin!

FOR SALE: $55,000; 1/13 Fractional Ownership Interest in Beautiful Bear Lake – Less than 2 hours from Salt Lake City! 5 bedrooms, 2.5 baths, 2 living rooms, laundry, garage, storage shed, decks, best views around, and seclusion! National Forest for a backyard with thousands of acres for horsebackriding, ATVing and hiking. High Speed Internet, 52" HDTV, DirectTV, hot tub, fully furnished, minutes from the lake and ready to enjoy! Each owner entitled to 4 weeks use per year, on a rotational basis (one week per season). Build equity while also enjoying significant tax benefits. Cabin can be placed in rental pool to pay for ongoing maintenance costs if owner elects not to use his/her time.

Call 397-2223 or visit www.DruProperties.com for more information and pictures

Introducing the Paralegal Division's New Officers and Directors for 2008-09

by Julie L. Eriksson, Chair

(Front row) Joanna Shiflett, Carma Harper, Bonnie Hamp, Heather Finch, Karen McCall, Tracy Lewis
(Back row) Thora Searle, Sanda Flint, Deb Calegory, Julie Eriksson, Aaron Thompson, Robyn Dotterer, Anna Gamangasso, Sharon Andersen, Cheryl Jeffs

As we begin the fall season, it is time to reflect on our personal and professional accomplishments. It doesn't seem possible, but soon we will be toasting a new year and begin setting goals for the upcoming year. As you start thinking about your goals, take time to reflect upon the impact you have on others in your family, in your firm, within the Paralegal Division, and within our paralegal profession. Maybe it is time to change your impact by volunteering or taking on a new project. It is often said that you receive more than you give. How about you -- what can you give?

As the new Chair of the Paralegal Division, I am pleased to introduce the Paralegal Division's new Officers and Directors for 2008-09. They are all talented, professional, and highly motivated paralegals who have chosen to serve you, the members of the Paralegal Division. They give their time and efforts to further the Division's goal to serve the legal profession by promoting and advancing professional competency and excellence. We look forward to working with our members and the Utah State Bar to continue in our goal to make a difference in our profession. Please feel free to contact any member of the Board and visit the Paralegal Division's website at http://utahparalegals.org.

Chair and Ex-Officio Member of the Bar Commission, Representing the Paralegal Division, Julie L. Eriksson – Julie has been a paralegal for 16 years, the last nine with Christensen & Jensen, specializing in personal injury and civil litigation. She received an Associate's Degree in Paralegal Studies from Phillips Junior College in 1992. She has chaired the Division's Continuing Legal Education Committee for the past two years and is a past president of the Legal Assistants Association of Utah (LAAU).

Director-at-Large, Chair-Elect, Governmental Relations Committee, Aaron Thompson – Aaron is a paralegal and Ad Hoc Risk Manager employed by the in-house legal department of Headwaters, Inc., in the areas of business and commercial law as well as contracts. He earned his degree in Paralegal Studies from Westminster College. Aaron has been involved in local and national Democratic Party politics for several years and has worked on political campaigns of Al Gore and Bill Richardson.

As Chair-Elect, Aaron is set to take over as Chair of the Paralegal Division for 2009-10.

Region I Director, Community Service Chair, Young Lawyers Division Liaison, Carma Harper – As Region I Director, Carma serves the counties of Davis, Morgan, Weber, Rich, Cache, and Box Elder. She works for Strong & Hanni in the areas of insurance defense, personal injury, construction litigation, and product liability. She received her paralegal certification from Wasatch Career Institute in 1989. Carma has been very active in the Paralegal Division's Community Service Committee, having worked on Wills for Heroes as well as the Women's Professional Clothing Drive.

Region II Director, Membership Lead Co-Chair, Thora Searle – As Region II Director, Thora serves the counties of Salt Lake, Tooele, and Summit. She has worked in the legal field since 1972 and is currently a Judicial Assistant for the Honorable William T. Thurman at the United States Bankruptcy Court for the District of Utah. She previously worked for Judge Thurman for 21 years while he was practicing at McKay, Burton & Thurman.

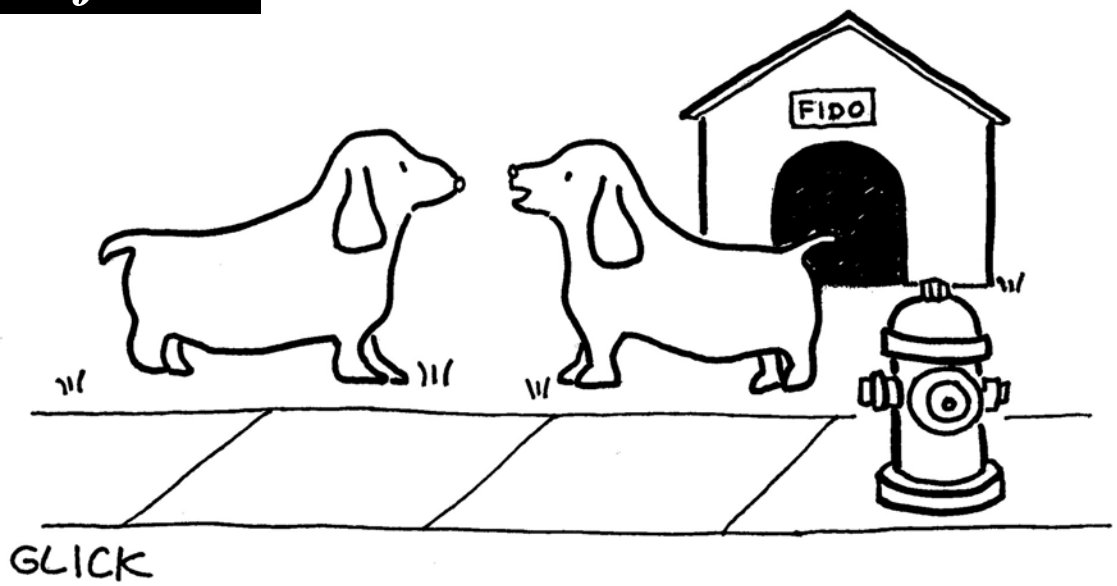
Region III Director, Membership and Utilization Task Force, Heather Finch – As Region III Director, Heather serves the counties of Daggett, Uintah, Duchesne, Wasatch, Utah, Juab, and Millard. She is with Howard, Lewis & Petersen, where she works in the areas of civil litigation, plaintiffs' medical malpractice, plaintiffs' personal injury, and plaintiffs' product liability. Heather has been a paralegal for 18 years and earned her degree in Paralegal Studies from Wasatch Career Institute. She is also a member of LAAU.

Region IV Director, Paralegal of the Year Chair, Ethics, Suzanne Potts – As Region IV Director, Suzanne serves the counties of Carbon, Sanpete, Sevier, Emery, Grand, Beaver, Wayne, Piute, San Juan, Garfield, Kane, Iron, and Washington. Suzanne has been a paralegal for over 15 years and is currently with Clarkson Draper & Beckstrom in St. George, working primarily in civil litigation. Suzanne is also a mediator and serves in this capacity for the Juvenile Court Victim Offender Mediation Program. She has served as Southern Regional Director for LAAU.

Director-at-Large, Community Service Co-Chair, YLD Liaison, J. Robyn Dotterer, CP – Robyn has worked as a paralegal for almost 20 years and is currently with Strong & Hanni, specializing in insurance defense. She earned her Certified Paralegal (CP) designation in 1994. Robyn is a past president of LAAU and has served in many capacities in the Paralegal Division, including overseeing its first salary survey.

Director-at-Large, CLE Co-Chair, Sanda Flint, CP – Sanda is a paralegal at Strong & Hanni, working primarily in the areas of insurance defense, personal injury, construction litigation, and product liability. She graduated from the School of Paralegal Studies, Professional Career Development Institute with a specialty in litigation, and achieved her CP designation in 1998 from the

Jest is for all



"The best part is it came with an easement to the hydrant."

National Association of Legal Assistants (NALA). Sanda is a past Chair of the Paralegal Division and has served in many other capacities. She has presented seminars on civil litigation practice for paralegals and teaches preparatory courses for CP exams.

Director-at-Large, CLE Lead Co-Chair, Anna Gamangasso – Anna has spent much of her paralegal career in government service, first with the Utah Attorney General's Office and now with the Salt Lake County District Attorney's Office, where she screens adult criminal cases. She received her Associate's Degree in Paralegal Studies from Phillips Junior College in 1992.

Director-At Large, Finance Officer, Job Announcements, Bonnie K. Hamp, CP – Bonnie began her legal career in 1978 and is currently with Parsons Kinghorn Harris. She attained the designations of Certified Legal Assistant and CP from NALA. Bonnie is beginning her third year as Finance Officer.

Director-at-Large, Membership and Utilization Task Force, Cheryl Jeffs, CP – Cheryl is a paralegal at Strong & Hanni, where she works in insurance defense and personal injury. Cheryl has been a paralegal for 15 years, having received her Paralegal Certificate from Wasatch Career Institute in 1990. She earned her CP designation from NALA in September 2005.

Director-at-Large, Secretary, Marketing & Publications Chair, Salary Survey Co-Chair, Karen McCall – Karen works at Richards Brandt Miller & Nelson in the areas of asbestos litigation and insurance defense, and she has been a paralegal for eight years. She is beginning her second year as Secretary and serves as the paralegal representative on the *Bar Journal* Committee. She has had one *Bar Journal* article published and hopes to do more in the future. Karen has a Bachelor's Degree in Communications from California State University, Fullerton and received her Paralegal Certificate from Fullerton College in December 1998.

Director-at-Large, JoAnna Shiflett, CP – JoAnna has worked as a paralegal at Strong & Hanni since 2005 in the areas of litigation and insurance defense. She has spent over 20 years in the legal profession, working as a legal secretary, legal assistant and firm administrator. JoAnna holds a degree in Political Science and received her CP designation from NALA in February 2008.

Parliamentarian, Deborah Calegory – Deborah works for Durham Jones & Pinegar in St. George. She has worked in the legal field for 27 years and has vast experience in litigation, business and transactional law, and real estate. Deb became certified as a paralegal in 1986 through the American Paralegal Association. She has held several leadership positions in the Paralegal Division, including serving as a past Chair. Deb was selected as the 2008 Distinguished Paralegal of the Year.

Ex-Officio Director (Immediate Past Chair), Sharon M. Andersen – Sharon has been a paralegal/legal assistant for 17 years and is currently with Strong & Hanni. She graduated from the Legal Assistant Program at Westminster College in 1990 and spent several years working for the in-house legal departments of several corporations. Sharon served for two years as Co-chair of the Paralegal Division's Continuing Legal Education Committee and participated in several Bar conventions.

Utah State Bar Paralegal Division Announcement of 2008 Salary Survey

The 2008-09 Board of Directors of the Paralegal Division of the Utah State Bar is conducting its 2008 Salary Survey. The survey will be sent via email to all paralegals and legal assistants in the state in the coming weeks, and we strongly encourage all of you to take a few minutes and complete it.

Your responses to our survey will be compared to and compiled with those of other paralegals and legal assistants throughout the State of Utah as well as other states, with the goal of making and keeping the compensation, benefits, job environments, and working conditions of Utah's paralegals and legal assistants competitive nationwide.

For more information on the Division and this survey, please visit our website:
http://utahparalegals.org

Thank you,
Salary Survey Committee
Paralegal Division, Utah State Bar

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
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	**Seventh Annual ADR Academy – Mediation Gone Wild!** 8:20 am – 2:00 pm. $120 YLD and ADR Section members, $135 others. $25 section membership dues for lawyers or $35 membership dues for nonlawyers. Lunch will be served.	5 incl. 2.5 hrs. Ethics
09/12/08	**CLE & Golf, Utah County, Gladstan Golf Course, Payson, UT.** Panel Discussion: The Nuts and Bolts of Juries. From the selection and voir dire process through trial, instructions and deliberations. CLE only: free to Litigation and CUBA members, $75 for others. CLE & Golf: $25 to Litigation and CUBA members, $113 to others. Golf only: $38.	3
09/18/08	**NLCLE: Family Law – An Evening with Family Law Commissioners and Seasoned Practitioners.** 4:30 – 7:45 pm. Pre-registration: $60 YLD members, $80 others. Door registration: $75 YLD members, $95 others.	3 CLE/NLCLE
10/14/08	**Utah Land Use Institute.** Red Lion Hotel and Conference Center. Details TBA.	TBA
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.** CLE only: free to Litigation and SUBA members, $55 others. CLE & Golf: $45 to Litigation and SUBA members, $145 others. Golf only: $95.	3
11/07/08	**New Lawyer Required Ethics Program.** 8:30 am – 12:30 pm. No admittance after 9:00 a.m. Attorneys arriving after 9:00 a.m. will be required to register for the next New Lawyer Required Ethics Program. $60.	Fulfills New Lawyer Ethics Requirements
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
11/20/08 evening 11/21/08 all day	**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. 9 incl. Ethics & Professionalism**
12/05/08	**Annual Lawyers Helping Lawyers Ethics Seminar**	3 Ethics includes 1 hr Professionalism
12/11/08	**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
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
12/19/08	**5th Annual Benson & Mangrum on Utah Evidence.** 8:15 a.m. – 4:15 pm. $230 (includes book $107).	6.5 incl. 1 hr. Professionalism & Civility
01/15/09	**The Mechanics of Trial with Frank Carney and Friends – Session Six.** 4:00 – 7:00 pm. $85 for attorneys within their first compliance term, $100 for all others.	3 CLE/NLCLE per session
01/21/09	**OPC Ethics School.** 9:00 am – 4:00 pm. $175 early registration before 1/14, after $200.	6 Ethics including 1 hr Professionalism

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.

FOR SALE

1/13 FRACTIONAL OWNERSHIP interest in luxury cabin in Bear Lake. Gorgeous views! Secluded area. Year round fun. Great tax shelter. Could put in rental pool if not occupied. $55,000 per interest. Each interest =4 weeks use per year. Five interests available. Visit www.DruProperties.com or call 1-801-397-2223 for more information.

OFFICE SPACE/SHARING

Class A Office Space in Beautiful Historic Downtown Provo Building. Ten member law firm has several spacious offices available on an office share arrangement. Call Gary or Laura at (801) 373-4912, or email at lcabanilla@esplinweight.com.

A-1 Office Space Available. Growing eight attorney firm is looking to lease a portion of their unique and beautiful newly constructed office space in Holladay. Excellent easy to access location from anywhere in the Salt Lake Valley. Beautiful views of Mt. Olympus. Three large offices with large windows, work room, and private entrance with reception area; approximately 1288 square feet of rentable space. Plenty of parking available. Full service rental including janitorial services Must see to appreciate. Please call Jeff Skoubye of Olsen Skoubye & Nielson, LLC at 801-365-1012.

Virtual Law Office. An Arrangement For Estate Planning, Tax, Business, Real Estate, and Probate Litigation Attorneys. Beautiful Salt Lake City downtown offices, conference rooms, and experienced staff for rent. Convenient parking. Synergy and networking opportunities among virtual office holders. For options, rates, photos, and appointments call Amy 1-800-422-0627.

Office share in Draper: Looking to sublet first rate offices in office suite. Each has storage closet attached. Newer building with 9 ft. ceilings. Internet access, copier use, fax use included in price. Month to month rent. $550 per month per office (two available). Call Justin at (801) 783-7484.

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POSITIONS AVAILABLE

The Utah Environmental Congress (UEC) is seeking a staff attorney based in Salt Lake City, UT. The UEC is a 10-year old statewide grassroots advocacy organization working to protect and preserve the National Forests and wildlife throughout Utah. We are seeking an attorney with experience in environmental law – esp. NEPA, NFMA, ESA and CWA. Prefer experience/knowledge of US Forest Service policy and procedures, administrative appeals, comments, etc. Salary up to $40K DOE; provide individual health insurance policy; and a generous vacation package totaling 30 days paid leave per year. For additional information about UEC go to www.uec-utah.org.

APPLICANT FOR CRIMINAL CONFLICT OF INTEREST CONTRACT. The Salt Lake Legal Defender Association is currently accepting applications for several trial and appellate conflict of interest contracts to be awarded for the fiscal year 2009. To qualify for the trial conflict of interest contract, each application must consist of two or more attorneys. Significant experience in criminal law is required. Please contact Lisa Freebairn, (801) 532-5444.

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

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.

Jones Waldo seeks a bankruptcy/creditor's rights associate for the firm's Salt Lake City office. Candidate needs 1 to 4 years experience with commercial bankruptcy cases, particularly representing both secured and unsecured creditors. Experience representing Chapter 11 debtors, committees, or trustees, and handling cases involving secured transactions is a plus. Excellent academic records and interpersonal and writing skills required. Please email cover letter and resume (including your final law school class ranking) to Blake Terry at bterry@joneswaldo.com. (No telephone calls please.)

Workers' Comp Claimant Attorneys – Solo & small firms are significantly increasing income with minimal investment. Handle Federal Work Comp cases for our national organization as an affiliate attorney. Projected revenue of $50,000 – $100,000 in most territories. We market, train, mentor and provide call support. Call Federal Employees Advocates 877-655-2667.

CIVIL AIR PATROL VOLUNTEER RECRUITMENT. Utah Wing of Civil Air Patrol seeks one or more volunteer Legal Officers interested in serving their fellow citizens in Utah and the United States. To qualify you must be a member of the bar in good standing. Duties would include rendering legal advice and opinions about CAP activities; participating in safety investigations; and reviewing contracts and other agreements relating to CAP activities. Send a cover letter and resume to: Utah Wing Legal Officer, Headquarters, Utah Wing, United States Civil Air Patrol, 640 N. 2360 W., SLC, UT 84116-2956; FAX 801-532-0229; or email vphippen@cap.utah.gov.

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