Utah Bar JOURNAL

Volume 22 No. 2
Mar/Apr 2009

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Cover Art

Lake Blanch, Sundial Peak, Big Cottonwood Canyon, by first-time contributor Heather Finch, Provo, 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.

Interested in writing an article for the Bar Journal?

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

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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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 that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (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.

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

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

The Utah Bar Journal

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President-Elect and Bar Commission Candidates

President-Elect Candidates

ROB JEFFS

For almost six years, I have had the pleasure of serving the members of the Utah State Bar as a Commissioner. During that time, we have implemented many new projects, policies, and programs to improve the practice of law and the administration of the Bar, including Blomquist-Hale counseling services, a new diversion program for certain OPC cases, e-bulletins, web surveys, e-mail communications, a web-based lawyer referral program, the outside audit of the Bar, a comprehensive review by the Commission of all programs, operations and services, and the adoption of the New Lawyer Training Program.

In these difficult economic times, the Bar must be a community leader and develop ways to assist members in their practices. In addition, the Bar needs to serve as ambassador to the Legislature and the public. Programs like the Young Lawyers' "Wills for Heroes" serve the community and enhance the public's view of lawyers. We all benefit when the public appreciates the vital role of lawyers and the Judiciary in society. If elected President, I pledge to serve you by delivering services to assist your practice and programs to improve the profession's stature in the community. I would be honored to serve and ask for your vote.

FELSHAW KING

The Mission Statement of the Bar is "to represent lawyers and serve the public." The first duty of the Bar is to represent its members. During my time as a Commissioner the Bar has adopted Casemaker, improved the Lawyers Helping Lawyers/Blomquist Hale program, created the Mentoring Program and adopted a long range plan, which includes review and audit of each program of the Bar.

To remain vibrant and viable the Bar must build on the momentum created and utilize the skills of young lawyers, who are the life blood of the Bar, as well as support women lawyers, the minority bar, and other specialized bar groups. Sections should be independent while receiving support from Bar staff. We must continue to develop legislative relationships and support the judiciary. I will make these goals a priority.

Even though the country is currently undergoing difficult economic times, the Bar can fulfill its core responsibilities without an increase in Bar dues. I will not support any increase of dues and will oppose taxing of legal fees.

My experience as a legislator, president of a national organization, and years of service as a Commissioner qualify me to serve as President-Elect. I ask for your support.

Third Division Candidates

CHRISTIAN W. CLINGER

Dear Colleagues and Friends:

Thank you for your encouragement as I seek re-election as a Bar Commissioner for the Third District. During the past three years as a Commissioner, I have served on the following Bar Commission Committees:

1. Bar Executive Committee;

2. Bar Operational Review Committee;

3. Governmental Relations Committee;

4. Spring and Annual Convention Committees;

5. Mentoring Program Development Committee;

6. New Lawyer Continuing Education Committee;,

7. Law and Justice Building Review Committee (Chair); and

8. the Communications/Public Relations Committee (Chair).

I have also served as a Commission Liaison to the Litigation Section, the Business Law Section, the Dispute Resolution Section, and the Utah Minority Bar Association. I have come to appreciate the strength, integrity, and commitment to public service that members of the Utah State Bar share. I hope to continue in these traditions and increase the Bar's governmental relations, public relations, and membership activity.

Through my dedicated service, I have proven my experience and leadership. I am prepared to continue to represent you and lend your voice to the deliberations and policy decisions before the Bar Commission. I appreciate your support, and I ask for your vote this coming April.

JAMES D. GILSON

Mr. Gilson has been a Bar Commissioner since 2008. He chairs the committee tasked with reviewing the performance of the Office of Professional Conduct and the Consumer Assistance Program. During 2005-08 he was a Screening Panel member of the Ethics and Discipline Committee of the Utah Supreme Court.

Mr. Gilson practices law with Callister Nebeker & McCullough and is chair of its litigation section. He graduated from the University of Utah (BA 1985, JD 1989). Mr. Gilson was a law clerk to Judge Greene and later for Judge Benson of the U.S. District Court, was an Assistant U.S. Attorney, and was a shareholder at Van Cott, Bagley. During 2000-01 he served as President of the Utah Chapter of the Federal Bar Association.

Statement of Candidacy:

Serving on the Bar Commission this past year has enhanced my appreciation for the many opportunities and responsibilities that we as lawyers have to improve our profession. In these challenging economic times, I am committed to helping the Bar operate efficiently and effectively, improving OPC, keeping bar dues down, and supporting the judicial branch. Thank you for your support and for the privilege of serving the Bar.

DENVER SNUFFER

During my nearly 29 years as a trial attorney, I served on the *Utah Bar Journal* Committee (eleven years), on the Ethics Panel (six years – five as Chairman of the Panel), the CLE Committee (three years), and I supervised attorneys who were under probationary discipline (two years). For seven years I answered calls on a weekly call-in radio show on a wide variety of legal issues. Though calls were usually from the general public, members of the Bar, and on more than one occasion, Judges called as well. I view service with the Bar as a professional responsibility. Service on the Bar Commission will be an extension of that personal view.

My practice has been in a medium-sized firm now located in Sandy, Utah, which I originally founded. I am familiar with the courts, the community of trial attorneys, and the challenges we all face in solving disputes among the members of our community. The practice of law in its highest form is an opportunity to heal fractured relationships between members of the community. I believe the Bar should promote programs which benefit practitioners, and make this difficult profession more collegial, less stressful, and avoid needlessly combative tactics.

Fourth Division Candidate

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

Tom Seiler is running uncontested in the Fourth Division and will therefore be declared elected.

TOM SEILER

In the Utah State Bar Fourth Division we have been honored to have outstanding Bar Commissioners over the years. I have practiced in the Fourth Division since September 20, 1977. In that time, attorneys from our division have seen substantial growth in the numbers of attorneys, the breadth of practice and the diversity of occupational and life choices amongst attorneys in our division. Although my practice remains a traditional civil litigation practice, attorneys in our division fill many roles, as CEO's, company presidents, authors, and professors, as well as filling more traditional legal roles.

During my career, I have been involved in the American Inn of Court I (past President) and the national American Inn of Court movement (Utah State Liaison). I have served on the Advisory Committee to the Utah Supreme Court on the Rules of Evidence. I co-founded Law Help (Tuesday Night Bar) and I have been a board member of the Utah Association for Justice.

If you elect me to serve as the Bar Commissioner for the Fourth Division, I will work diligently to promote our division's interest inside the Utah State Bar Association and will work diligently to resolve problems of the Bar and the judiciary generally.

Fifth Division Candidate

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

Curtis Jensen is running uncontested in the Fifth Division and will therefore be declared elected.

CURTIS JENSEN

Thank you for the honor in serving these past three years as the Fifth Division Bar Commissioner on the Utah State Bar Commission. During my service this past term I have come to understand the importance of the Utah State Bar and the leadership and direction it needs to provide on critical issues affecting lawyers and their practices. As your Fifth Division Bar Commissioner I will continue to provide an active voice for the concerns and needs of lawyers living off the Wasatch Front. I will continue to dedicate myself to ensure the fiscal well being and sound operations of the Bar for all members. As a practicing attorney in the rural legal market, I understand the needs, challenges, and concerns experienced in day-to-day practice. I will continue to devote my time and energy in serving my colleagues in the Fifth Division and do my best to assure that the Utah State Bar is doing its best in serving you.

2009 Law Day Luncheon

Friday, May 1 • 12:00 noon

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A Legacy of Liberty: Celebrating Lincoln's Bicentennial

Awards will be given honoring:

Art & the Law Project (Salt Lake County Bar Association)
Essay Contest (Minority Bar Association)
Liberty Bell Award (Young Lawyers Division)
Pro Bono Publico Awards
Scott M. Matheson Award (Law-Related Education Project)
Utah's Junior & Senior High School Students Mock Trial Competition
Young Lawyer of the Year (Young Lawyers Division)

"…and that government of the people, by the people, and for the people, shall not perish from the earth."
Abraham Lincoln, November 19, 1863, Gettysburg Address

For further information, to RSVP for the luncheon and/or to sponsor a table please contact:
Gary Guelker, (801) 579-0800 or Tyson Snow, (801) 363-5678

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Change

by Nathan D. Alder

Even as I write this I know that the landscape will change by the time you read this. So much is happening right now. Bar leaders are working very hard to stay on top of all the issues and concerns we face as a profession; now more than ever we need member involvement. It is an honor to be able to serve you at this critical time.

I submit that the Utah State Bar must change as the world changes around us. We need to respond to this rapidly developing environment and make correct decisions that will serve the Bar's mission well into the future. Don't be fooled by the notion that our law practices, our profession, the courts, and the Bar will not be affected by what is happening around us. Please allow me to share some thoughts on a variety of issues.

Court Budget Cuts: The state courts received a 4% cut for this year's spending during a special legislative session last year. Then, just recently, the courts received another 4.5% cut for the remaining months of this fiscal year (ending June 30th) for a total 8.5% cut for FY '09. This is dramatic and very concerning. Compounding that is what lies ahead; proposals are being floated for an additional 11% to 19% cut for FY '10 which will only further erode our court system. I am deeply worried about this situation; we all are. I believe we need to focus on restoring funding in FY '11 to pre-cut FY '08 levels (or even greater) because the current situation is unacceptable long term. The courts have seen a dramatic rise in case filings with no corresponding budget increase. We can already see consequences from changes to our court system; we must soon reverse these negative effects. All of us need to be invested in this effort. Utah can ill afford to let our system of justice slip any number of notches below what the constitution and our democratic society requires and so rightly deserves. I encourage you to read Chief Justice Durham's State of the Judiciary Address which was emailed to all Bar members and has been posted at www.utahbar.org. I encourage you to discuss this situation with elected officials, decision makers, neighbors, and friends. Lawyers must give to and sacrifice for our system of justice if it is to work. We are its advocates. We have a significant challenge ahead from which we, as officers of the court, cannot shy away.

Governor's Proposal for a General Services Tax: The Utah Tax Review Commission (TRC) adopted a preliminary report on this in January and will soon begin an in-depth study of how to broaden the sales tax base, as well as determine which services to include or exclude and how to implement such a tax. I testified at the TRC hearing and indicated that our members will have significant concerns about this proposal. I have reiterated this position to numerous elected officials. Taxing a person who hires a lawyer raises many issues, including limitations on access to justice, practical considerations, hardships, confidentiality concerns during an audit, and basic rights of citizenship, to name a few. To me, it amounts to a misery tax. Our clients are already hurting when they come to ask for our help; the state would be taxing individuals and families at some of their toughest moments in life. Furthermore, the tax aims at a core right that has never before been taxed. Clients, not lawyers, would pay the tax. But it would certainly affect lawyers in various negative ways. We have posted an initial response to this issue on the Bar's website. Several other professional associations are concerned and will monitor the issue alongside us. We could see a formal proposal in the 2010 legislative session. Please take notice of this issue and become involved. You are welcome to contact me or the Bar's Executive Director, John Baldwin.

Utah State Bar Day at Capitol Hill: I said the Bar needed to change with the times. Here is an example. On February 5th, and for the first time in our history, the Bar sponsored a large scale meeting at the Capitol Building in order to bring critical issues to the attention of Bar members and to try to effect change in a positive way. We had 125 of our members (with a 50 person waiting list due to fire code limitations on the room) attend a three-hour CLE and learn from top presenters on a range of issues, including Hinckley Institute of Politics Director and U of U Professor Kirk Jowers on the current political climate and the need for more lawyers to serve in the legislature; the Governor's Deputy

Budget Director Phillip Jeffrey on the financial crisis facing the State; Bar leaders and legislative insiders John T. Nielsen, Scott Sabey, Matt Anderson, and David Bird on '09 legislative issues from the Bar's perspective; TRC member and tax lawyer Mark Buchi on the TRC's current study regarding the general services tax proposal; Utah State Court Administrator Dan Becker on the financial problems facing the courts; and lobbyists Frank Pignanelli, Doug Foxley, and Chris Kyler on how Bar members can more effectively communicate with legislators. It was one of the best CLEs I have attended. Lawyers have much to learn when it comes to understanding how the legislative process works and how we can and should communicate on the issues. Many of us also enjoyed networking with decision makers and officials while at the Capitol that day. We need to do more of this. Don't wait until we host the Second Annual Utah State Bar Day at Capitol Hill to make contact with elected officials and offer your support and insight on an issue. Lawyers can truly help society and our profession by communicating with decision makers and providing service to them.

Bar's Governmental Relations: Our governmental relations work is greater this year than it has been in recent memory. Next year will require an even greater amount of work. The issues are driving some of that but it is also the result of years of foundation building by Bar leaders, members, and staff as this is more of a priority. As an example, our Governmental Relations Committee (GRC) is proactive and quite effective; I have seen tremendous progress the last few years and am pleased with the GRC's current effort. I have been attending GRC meetings during this legislative session (Tuesdays at noon) and have been amazed at their dedication and effort on behalf of members, committees, and sections. The Bar Commission closely reviews the work and recommendations of the GRC, and carefully determines which issues to pursue on the Hill (within our court-prescribed Rules of Integration and Management). We are also working more closely with the Uniform State Law Commissioners and the Office of Legislative Counsel to find mutually beneficial areas of collaboration. I believe that we have had success this session in building relationships, particularly by being of service to legislators and decision makers on the Hill. We have appreciated the positive responses we have received from many on the Hill and we look forward to more opportunities to assist and serve.

Group Health Insurance for Bar Members: President-Elect Steve Owens has led an effort to find ways to create a group so that members can obtain health insurance. I am happy to report that his committee has made significant progress and is forming a group that will find coverage. If you are interested in joining this group, please contact Member Benefits Coordinator Connie Howard. No one should be without health coverage. We are pleased with this and compliment those who have brought this about.

Professional Assistance for Lawyers Facing Crises: It is humbling to be Bar President at a time when many in our profession are struggling with finances and other concerns. Many members have called me to talk through their concerns; I will always take your call and I am honored to be able to listen and offer help. To some I have encouraged contacting one of our two independent partner organizations to address their concerns. Lawyers Helping Lawyers (LHL) is a Utah nonprofit organization created by lawyers for lawyers. The Bar provides some financial assistance to LHL

because LHL has proven so successful in helping lawyers in crisis. LHL is peer to peer. When you call LHL, you will talk with a lawyer, and you can meet other lawyers who are concerned about you and are willing to help you through various issues. Blomquist Hale Professional Counseling (BHPC) is a Utah for-profit company that contracts with employers, agencies, and associations to provide professional counseling and therapy to employees and members in need of such services. The Bar Commission decided to provide LHL and BHPC as benefits to our members. If a family member is in crisis, BHPC can help your dependents as well. These benefits are funded by Bar dues. These are confidential services; the Bar, including OPC, does not know who receives these services. If you are in need, please don't hesitate. Call LHL at 1-800-530-3743 or BHPC at 1-800-926-9619. The Bar website has further information.

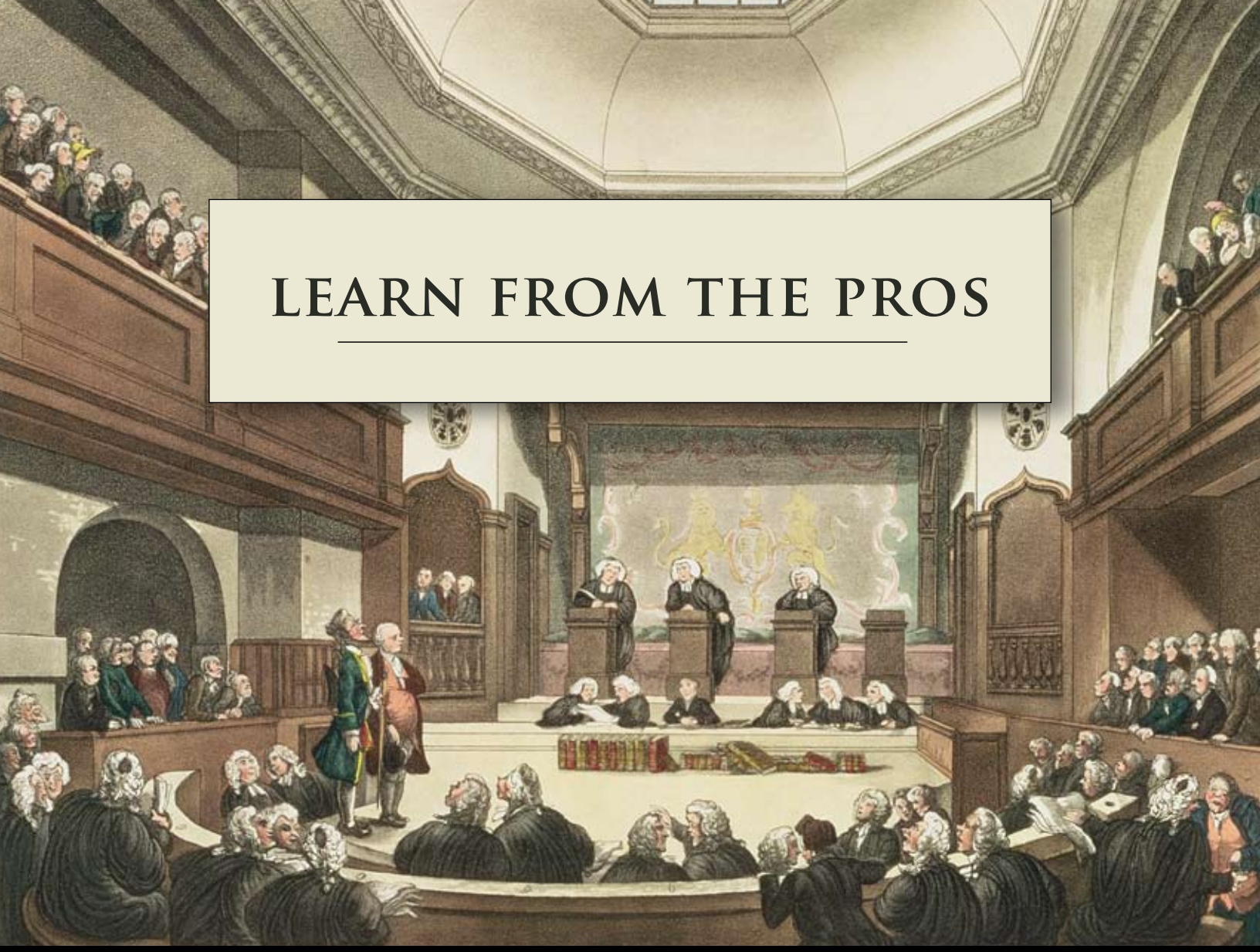
Leadership: This is the time for leadership. Never in my lifetime have I seen a greater need for leadership at all levels of society. Lawyers are among the most educated members of our nation, indeed the world; we are among its most privileged. We must lead. Just over a year ago Governor Huntsman spoke to the Bar and asked us to engage in public service. I reiterate his request. It is great to be involved in service, especially at a time like this when our community needs leaders, volunteers, and problem solvers. I applaud those in our profession who are doing more pro bono, who are serving in leadership capacities, and who don't shy away from challenges for which they can help craft solutions. I am grateful to Bar members who are serving on boards and commissions, leading committees, and promoting worthwhile causes. Thank you for your service. To that end, I recently sent a Bar-wide email encouraging you to consider applying for one of the many boards and commissions to which the Governor appoints. You should also consider serving on a court or Bar committee as part of your ongoing plans. And, if able, I encourage you to volunteer on a nonprofit board within your interest area; the Bar is a new member of the Utah Nonprofits Association and we know that many of our sister nonprofits are looking for leaders. Providing pro bono legal services, serving on a state board or commission, joining a nonprofit board, leading a cause, serving on a committee, or volunteering in any capacity greatly benefits all of us in society. We have posted links to these opportunities and organizations on the Bar's website.

Mentoring: This is a great way to serve. Mentoring is a tremendous bright spot for the Bar and Bench, partners in this New Lawyer Training Program. The Utah Supreme Court is currently seeking nominations of those who will train our incoming lawyers in this unique mentoring program. I have submitted several nominations and I encourage you to do the same. You are also encouraged to apply on your own, as well. We need approximately 150 mentors by May, and another 350 by October. Training for mentors will begin in late April. Judge Tacha of the Tenth Circuit will lead that training. The court and Bar are ready to implement this positive change. In this regard, 2009 will be a watershed for our profession.

Law Day: May 1st is Law Day. This year's theme is "A Legacy of Liberty – Celebrating Lincoln's Bicentennial." We are fortunate to claim President Lincoln, a lawyer, as one of our own. I encourage you to celebrate Law Day; join your county bar or affiliate bar organization in celebration, or join the Utah State Bar's traditional event and outreach efforts in Salt Lake City. If you are able, volunteer on May 1st through the Bar-sponsored and YLD-led effort with the Wills For Heroes Foundation where you will quickly learn the HotDocs software program and a half an hour later will write a will and other estate documents for a firefighter or police officer. For Law Day you could find a book on President Lincoln and reflect on his amazing contributions to society. You could also take a moment to share with someone your feelings about our constitutional democracy, our judiciary and the role of a judge in society, or perhaps the delicate but brilliant balance of power between the three branches of government via separation of powers, or simply, a conversation of the role of lawyer as problem solver in our community, or a discussion of the Bill of Rights. You could speak at your child's classroom on how important the rule of law is to society and how kids can succeed by understanding the law. You could share the legacy of Lincoln with someone you meet. Mark May 1st on your calendar and celebrate the law. Law Day information is on the Bar's website.

Sun Valley: While you are marking your calendar, call and make reservations at Sun Valley for the Bar's annual convention; this year will be special. I am pleased that Justice Sandra Day O'Connor has accepted our invitation to be our keynote speaker. As many of you know, she is leading a national effort to focus attention on sustaining our judiciary in uncertain times. We are excited to host her, and other top presenters, at our traditional gathering in the beautiful Wood River Valley. I hope you will join us there July 15th through the 18th.

Conclusion: There is much to be done. I hope we can each find a way to contribute our part to the greater whole. Thank you for serving our profession, and thereby providing an invaluable benefit to many in our society. I want to encourage and empower members to lead. If you need anything, please don't hesitate to call or email me. The Bar is a resource; leaders and staff want to serve you. I wish you the very best. I look forward to hearing from you and seeing you in action.



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Group Health Insurance Option

by Stephen W. Owens

One of the primary functions of The Utah State Bar is to identify and provide members with programs and services which improve opportunities and quality of life for our members. One of the most common frustrations for our membership has been the ever increasing cost of providing healthcare for attorneys, employees, and families.

With this in mind, the Bar set out to identify a health care alternative that had the potential to provide premium savings and a better sense of control, without subjecting our membership to unnecessary risk. Our search was comprehensive. I would like to thank Tom Schaffer, Pete Summerill, and Connie Howard for their efforts. We recognized early on that finding a solution that would work for everyone would be impossible, but we are optimistic that we have found a program that will be of great value to many of our members.

Groups such as The Utah State Bar present unique challenges when it comes to health insurance. The size of our membership is our greatest asset, but because of current legislation and Department of Insurance requirements, carriers are unwilling to support "association plans." We believe that with the help of Moreton & Company, Innovative Staffing, Inc. (ISI), and Altius Health Plans we have found a way to circumvent these challenges. The key to accessing this new program hinges on the way your payroll is handled.

ISI is what is known as a PEO. A **Professional Employer Organization** or (PEO) provides outsourcing of payroll, workers' compensation, human resources, and employee benefits administration. It does this by hiring a client company's employees, thus becoming their *employer of record.* It then leases them back under contract to the original employer. This practice is known as co-employment or employee leasing. It is important that you understand that the client company continues to direct the employees' day-to-day activities and does not sacrifice any control over their business.

In a co-employment contract, the PEO becomes the employer of record for tax and insurance purposes, filing paperwork under its own identification numbers. By simply allowing ISI to handle your payroll functions, you and your employees become eligible to participate in ISI's large group health plan. The ISI plan is underwritten by Altius Health (www.altiushealthplans.com) and has been functioning for more than nine years. The plan currently covers more than 700 employees and their dependents.

There are great advantages to participating in a large group health plan. Now instead of being underwritten solely as XYZ firm, you will be viewed as part of a much larger conglomerate. A significant percentage of the premiums any group pays goes toward administration costs. On a large group plan these costs can be negotiated down to much lower levels and the savings are reflected in premiums. Renewals also tend to be more stable and consistent for larger groups. Over the last nine years ISI's plan has enjoyed an average 9% annual renewal increase while the average small employer in Utah has been experiencing increases closer to 15%.

There are a number of medical plan designs and options available to you through ISI. In addition to the medical coverage, ISI also makes dental, vision, life, disability, cafeteria 125, and 401k plans available to its clients and their groups. A relationship with ISI can not only help your company save money, it can also reduce liability exposure and allow you to offer your employees the very best of human resource services. You can find a complete listing of ISI's services and pricing on the Utah Bar website under **"group health insurance for the Utah State Bar."**

The success of this program will rely in large part on the willingness of Utah Bar members to explore this option. The application process is a very simple one and consists mostly of having the members of your group complete and submit applications to Altius Health for underwriting. An ISI representative will then present you with the plan designs and pricing for your group. There is no

commitment required for any service until you have accepted a quote and put a policy into place. You can find a more detailed explanation of the application process, copies of the application, and a list of frequently asked questions on the Utah Bar website under **"group health insurance for the Utah State Bar."**

We recognize that there is a large portion of our membership that may not qualify for group coverage: solo practitioners with no employees (you must have at least two or more plan participants from your company who work more than 32 hrs/week.) Unfortunately, there is no escaping the fact that these members will have to continue to purchase individual policies for themselves and their families. However, Moreton & Company has worked closely with Altius Health and has received confirmation that they will give special consideration to those individuals who apply for coverage and are part of the Utah State Bar.

Individuals can apply by going to the Moreton & Company website (www.moreton.com) and clicking on the icon in the lower right hand corner that says "Altius Individual Plans." You will then be prompted to enter an email address and password and complete an application. A Moreton & Company representative will then contact you by phone or through email to discuss plan options and pricing with you.

We realize that many of you will have questions pertaining to eligibility, the application process, plan options, etc. We encourage you to contact one of the Moreton & Company or ISI representatives listed below for answers to your specific questions. Representatives will also be exhibiting at the Spring Convention in St. George in March.

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Recent Changes to Federal Employment Laws Will Affect Utah Companies: Examining the ADA Amendments and New FMLA Regulations

by Christopher Snow and Sarah Campbell

INTRODUCTION

Significant overhaul of both the Americans with Disabilities Act (ADA) and the Family Medical Leave Act (FMLA) means that businesses nationwide, including those in the state of Utah, must understand and implement new practices related to the interpretation of disability and requests for leave. Changes to these two laws went into effect at the beginning of 2009.

I. AMERICAN'S WITH DISABILITIES AMENDMENTS ACT OF 2008

Over the last decade, Congress has had a growing concern that the ADA of 1990 was not serving its intended purpose: to require state and local governments and private businesses with fifteen or more employees to provide reasonable accommodations to workers with disabilities and to eliminate workplace discrimination against the disabled. After watching a series of U.S. Supreme Court decisions limit the definition of "disability" under the ADA, Congress decided to act. On September 25, 2008, President Bush signed into law the Americans with Disabilities Amendments Act (ADA Amendments Act or the Act). The Act's purpose is to provide a "clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3554 (to be codified at 29 U.S.C. § 705). Employers must understand the key changes the Act makes to the ADA and implement best practices to avoid costly claims.

A. THE ACT

Effective January 1, 2009, the Act makes several important changes that broaden the definition of disability under the ADA.

Shifting Court's Focus to the Employer not the Employee

In *Toyota Motor Mfg., Kentucky, Inc. v. Williams,* 534 U.S. 184 (2002), the Supreme Court held that the terms "Substantially" and "Major" in the ADA's definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled." *Id.* at 196-97. Under the Act, Congress rejected this standard and expressly found that the *Williams* holding "has created an inappropriately high level of limitation necessary to obtain coverage under the ADA." ADA Amendments Act § 2(b)(5). Rather than focus extensively on the definition of disability, Congress instructs courts to focus on "whether entities covered under the ADA have complied with their obligations." *Id.* Employers should expect a decrease in the number of ADA cases dismissed on summary judgment on the basis that the plaintiff's impairment does not qualify as a disability.

Mitigating Measures Analysis Eliminated

Expressly rejecting the U.S. Supreme Court holding in *Sutton v. United Air Lines, Inc.,* 527 U.S. 471 (1999), the Act states that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative

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effects of mitigating measures." ADA Amendments Act § 4(a)(4)(E)(i). For example, an employee who is able to completely control his or her diabetes with medication would still be considered disabled under the Act if, without the medication, the employee is substantially limited in one or more major life activities. In other words, employees' impairments are to be considered in their natural state, without regard to any medications or devices used to minimize or control the effects of the impairment at issue. Consequently, human resource departments need to engage in the "interactive process" to determine the true nature of the employee's impairment, without the mask of mitigating measures. The Act does recognize, however, that the ameliorative effects of eyeglasses or contact lenses "shall be considered in determining whether an impairment substantially limits a major life activity." *Id.* § 4(a)(4)(E)(ii).

Episodic Impairments

Under the ADA, courts have consistently held that impairments that are periodic or episodic in nature were not the types of impairments Congress intended to cover under the definition of disability. The Supreme Court has repeatedly directed lower courts to avoid hypothetical inquiries as to the severity of inactive impairments. *See Williams,* 534 U.S. at 198; *Sutton,* 527 U.S. at 482. The Act rejects this jurisprudence and now brings impairments that are "episodic" or in "remission" within the purview of the ADA's definition of disability, so long as those impairments "would substantially limit a major life activity when active." ADA Amendments Act § 4(a)(4)(D). Employers should be aware that this amendment under the ADA could substantially increase the potential plaintiff pool for ADA claims.

Expanding List of Major Life Activities

To constitute a disability under the ADA, an impairment must limit one or more major life activities. The original version of the ADA did not include a definition of major life activities, but instead charged the Equal Employment Opportunity Commission (EEOC) with enforcing this concept. The EEOC never defined major life activities, but created a list of what it believed constituted major life activities – caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *See* 29 C.F.R. § 1630.2(i) (2009). The Act codified this list and added the following major life activities: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. *See* ADA Amendments Act § 4(a)(2)(A). The Act also adds a paragraph entitled "Major Bodily Functions" to its list of major life activities, which includes functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. *See id.* § 4(a)(2)(B).

Substantially Limits Language

Under the Act, Congress directed the EEOC to define the phrase substantially limits "to be consistent with this Act, including the Amendments made by this Act." *Id.* § 2(b)(6). The EEOC has yet to agree on a singular definition, but employers should anticipate a definition broad and reaching in scope.

The "Regarded As" Prong

A person was considered disabled under the regarded as prong of the ADA if that person was regarded as having an impairment that substantially limited a major life activity. A person who was regarded as or perceived as having such an impairment qualified as disabled, even if that person had no impairment at all, or an impairment that was not substantially limiting. Under the Act, an ADA plaintiff is no longer required to prove that the employer regarded the plaintiff as having an impairment that substantially limits a major life activity. Congress found this definition too restrictive. Now,

> [a]n individual meets the requirement of being regarded as having such an impairment if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity.*

Id. § 4(a)(3)(A) (emphasis added). So can someone with a common cold fall under the regarded as prong of the ADA if their employer perceives the cold as an impairment? The Act guards against these potential "flood gate" claims by limiting regarded as impairments to impairments that are not transitory or minor in nature, and that last or are expected to last six months or less. *See id.* § 4(a)(3)(B).

Reasonable Accommodation

The Act provides that reasonable accommodations are only required for individuals who can demonstrate that they have an impairment that substantially limits a major life activity, or a record of such impairment. Accommodations need not be provided to an individual who is only regarded as having an impairment.

B. BEST PRACTICES UNDER THE NEW ADA

The following tips will help ensure that Utah businesses comply with the ADA Amendments Act:

1. When management becomes aware, through the interactive process or otherwise, that an employee has an impairment, it should err on the side of caution in making the threshold decision of whether a physical or mental condition constitutes a disability under the ADA. Remember, Congress instructed courts not to over analyze the disability determination. Employers should act in line with this guidance, and focus on compliance.

2. Any determination of whether an employee has a qualified disability must be made without regard to mitigating measures, except in cases involving corrective lenses or contacts.

3. Under the Act, employees do not qualify for protection unless they can perform the essential functions of the job with or without reasonable accommodation. Management should engage in the interactive process to determine whether a requested accommodation is reasonable, and whether the employee is qualified to do the job.

4. Any employment decision must be based on legitimate business, non-discriminatory reasons. Such reasons should be supported by documentation to the extent possible.

5. Employment policies should be written stating that each employment decision involving an individual with a physical or mental impairment is decided on a case-by-case basis.

II. NEW FAMILY AND MEDICAL LEAVE ACT REGULATIONS

After reviewing nearly 20,000 public comments, the United States Department of Labor announced new regulations to the FMLA of 1993. These changes, effective January 16, 2009, aim to provide predictability and clarity to a law that is now fifteen years old. Employment law practitioners – as well as businesses and human resource directors – need to understand these changes, which will affect both employers and employees in Utah.

A. FMLA BACKGROUND

The FMLA "is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 C.F.R. § 825.101(a) (2009). As of last year, the Act also provides leave entitlements, and thereby job protection, for military families. *See* 29 U.S.C. § 2612(a)(1)(E) (West, Westlaw through P.L. Ill-2 approved 1-29-09).

The FMLA applies to companies that employ at least fifty people. *See* 29 C.F.R. § 825.104(a) (2009). The only exception to this threshold number is public agencies and schools, which are subject to the regulations regardless of numbers. *See id.* An employee is eligible

and has protection under the FMLA after working for twelve months and 1250 hours. *See* 29 C.F.R. § 825.110 (2009) (noting that the "12 months an employee must have been employed by the employer need not be consecutive months" but the hour requirement is calculated during the previous 12 months).

B. HIGHLIGHTED CHANGES

For those without time to read more than 700 pages published by the Department of Labor as its Final Rule, the following highlights identify the most notable changes to the FMLA this year.

Military Family Leave Entitlement

Military caregivers may take up to 26 weeks a year (instead of the usual twelve) to care for an injured service member. Leave is also available to a spouse, child, parent, or next of kin for any "qualifying exigency" related to active military duty including: short notice deployment, military events, child care, counseling, rest, etc. *See* 29 C.F.R. §§ 825.126-.127 (2009).

No Categorical Penalties

Under the FMLA, when an employee requests leave from work, the employer has a duty to give notice that the leave "is designated and will be counted as FMLA leave." 29 C.F.R. § 825.208(b)(1) (2009). An employer who fails to follow notification rules may be liable but is no longer subject to categorical penalties of providing an additional twelve weeks of leave. *Contra* 29 C.F.R. 825.700(a) ("If an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement."). This reflects the current law as stated by the United States Supreme Court in *Ragsdale v. Wolverine World Wide,* 535 U.S. 81 (2002), which invalidated the regulatory provision that would have required an employer to provide an additional twelve weeks of leave to an employee who had already taken thirty weeks that year. *See id.* at 86.

Light Duty

Time spent performing "light duty" does not count against FMLA entitlement. *See* 29 C.F.R. § 825.220(d) (2009). In other words, if an employee is performing a light duty assignment, the employee is not on FMLA leave.

Waiver of FMLA Rights

Employers may voluntarily settle or release FMLA claims without

court or department approval, contrary to the Fourth Circuit holding in *Taylor v. Progress Energy, Inc.,* 415 F.3d 364, 368 (4th Cir. 2005) (holding that an employee's release of her FMLA rights was unenforceable). This clarification clears up confusion caused by a previous regulation instructing that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA." 29 C.F.R. § 825.220(d) (2009). The change is also helpful for Utah attorneys because of the Tenth Circuit's lack of controlling authority on the waiver of FMLA claims. *See Jones v. Qwest Comm'ns Int'l,* 2008 WL 1902670, at *1–2 (D. Colo. Apr. 28, 2008) (declining to "approve, disapprove, or otherwise pass on the propriety of the settlement voluntarily entered into by these parties" because no apparent purpose would be served). Even so, prospective waivers are still prohibited. This is clarified by new language under 29 C.F.R. § 825.220(d) (2009).

Serious Health Conditions

The new regulations do not change any definitions of a "serious health condition," but do provide a specific timeline within which visits to a health care provider must occur. To find "incapacity and treatment," the first visit to a health care provider must take place within seven days of the first day of incapacity; and unless there is a regimen of continuing treatment, a second visit must take place within thirty days of the incapacity. *See* 29 C.F.R. § 825.800 (2009). Additionally, the "periodic visits" required to find a chronic serious health condition has been clarified to mean at least two visits per year for the same condition. *See id.*

Substitution of Paid Leave

FMLA leave is generally unpaid, but – if allowed or required by the employer – an employee can choose to substitute paid leave for FMLA leave. While an employee is always entitled to unpaid FMLA leave, the employee must follow company terms and conditions to substitute paid leave. *See* 29 C.F.R. § 825.207 (2009). All types of paid leave offered by an employer must be treated the same (whether sick leave or vacation leave or another). *See id.*

Perfect Attendance Awards

Employers are allowed to deny perfect attendance awards to employees who took FMLA leave as long as all leave-taking employees are treated the same. *See* 29 C.F.R. § 825.215(c)(2) (2009).

Employer Notice

The passage of new FMLA regulations consolidated the employer notice requirements into one section. Employers have a duty to post notice of the FMLA generally either through posters or employee handbooks. They also have five days (instead of two) after FMLA leave is requested to give employees notice of eligibility, rights and responsibilities, and designation. *See* 29 C.F.R. § 825.300 (2009).

Employee Notice

Employees needing FMLA leave must follow usual call-in procedures and no longer have up to two days following an absence from work to request FMLA leave. If FMLA leave is foreseeable, the employee must give at least thirty days notice; if leave is not foreseeable, the employee must give notice "as soon as practicable," which in most cases means the same day or next business day. 29 C.F.R. §§ 825.302-.303 (2009).

Medical Certification Process

The FMLA requires that employees submit a medical certification when they take leave because of their own serious health condition or the serious health condition of a family member for whom they give care. Pursuant to the new regulations, an employee's direct supervisor may not contact the employee's health care provider nor may employers ask for medical information beyond that required for the certification form. *See* 29 C.F.R. §825.307(a) (2009). Additionally, if an employee's certification is incomplete, the employer must give written notice and allow seven calendar days to cure the deficiency. *See* 29 C.F.R. § 825.305(c) (2009).

Fitness for Duty Certifications

An employer may require certification before an employee returns to work if reasonable job safety concerns exist. Additionally, such certification may specifically address an employee's ability to perform essential job functions. *See* 29 C.F.R. § 825.312 (2009). Where a fitness for duty certification is required, the employer must provide the employee with a list of essential job functions at the same time they designate FMLA leave. *See* 29 C.F.R. § 825.300(d)(3) (2009).

CONCLUSION

Due to recent legislative and regulatory changes, Utah businesses must be ever more aware of their responsibilities under both the ADA and the FMLA. Revised definitions, timelines, and procedures present challenges of compliance for employers, employees, and the lawyers who counsel them. Understanding these major changes and revisions will allow employment and business practitioners to properly counsel and advise their clients when inevitable compliance issues arise.

Living With Twombly

by John H. Bogart

On May 21, 2007, the United States Supreme Court handed down *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955 (2007). Just short of two years have passed since *Twombly* was decided, time enough to assess its impact on pleading and motion practice in the federal courts. We can now answer the question of whether *Twombly* was an antitrust pleading case or a federal civil pleading case.

The issue before the Supreme Court in *Twombly* was how much detail must a plaintiff allege in order to state a claim for conspiracy under Section 1 of the Sherman Act? May a plaintiff rest with allegations of parallel conduct by several defendants, or is a plaintiff required to allege something more in order to state a claim for conspiracy? In *Twombly*, the plaintiffs, based on a history of parallel conduct, had alleged a conspiracy among telecommunications companies not to compete against one another and to block entry of new local service providers.

The district court dismissed the complaint, finding that merely alleging parallel conduct was insufficient to state a claim for conspiracy. The second circuit reversed holding that allegations of parallel conduct standing alone were sufficient to state a claim and provided adequate notice of the nature of the conspiracy alleged as well as the basis for the claim.

In a seven to two decision, the Supreme Court reversed. Justice Souter's opinion for the majority held that "stating a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 1965. Specifically, "[a]n allegation of parallel [business] conduct…without some further factual enhancement…stops short of the line between possibility and plausibility." *Id.* at 1966. In reviewing the complaint before it, the Court found "nothing" that provided a "plausible suggestion of conspiracy," *id.* at 1971, where each of the defendants had a strong economic incentive to resist competition from new entrants and where a "natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing," *id.* at 1972. In the Court's view, "asking for plausible grounds to infer an agreement," *id.* at 1965, does not require factual allegations which make recovery probable, but does require "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement." *Id.* (alteration in original).

In revisiting the pleading standard, the Court expressly disapproved of the language and standard set out in *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99 (1957). Under *Conley,* dismissal under Rule 12 was appropriate only when it appears beyond doubt that the plaintiff could not prove any set of facts entitling it to relief. In *Twombly*, the Supreme Court characterized the "no set of facts," *Twombly*, 127 S.Ct. at 1969, test as "best forgotten as an incomplete, negative gloss on an accepted pleading standard," *id.*

Initial reactions to *Twombly* were quite varied. The predominant reaction was that *Twombly* would mark a significant reduction in antitrust litigation, and that it was a decision limited to the antitrust context. Less common, but still not at all uncommon, were suggestions that the holding would not be limited to antitrust actions, but would and should be applied to all federal civil cases.

The suggestion that *Twombly* was to be limited to antitrust cases was not just myopic narrow-mindedness. We should remember that *Erickson v. Pardus,* 551 U.S. 89, 127 S.Ct. 2197 (2007), came down shortly after *Twombly*. In *Pardus,* the Supreme Court expressly affirmed that notice pleading had not been altered by *Twombly*. That a combination of decisions suggested that *Twombly* might be confined to the antitrust context. If so, it would not be the only special standard applicable to antitrust cases. In the context of a Rule 56 motion, for example, conspiracy claims in antitrust are analyzed under a different and more demanding standard than applied elsewhere in civil law. Pardus therefore might have been read as a signal that the Supreme Court did not intend a revolution in pleading. The question really came to this: What was the import of the discussion of *Conley* in *Twombly*? The Supreme Court certainly sought change in Rule 12 pleading standards, but just what kind of change?

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The answer appears to be that the *Twombly* "plausible allegations" standard is the standard for analysis under Rule 12 of all civil complaints. Absent factual allegations sufficient to make the claims plausible, a complaint is to be dismissed.

What Has Happened in the Tenth Circuit?

The Tenth Circuit has directly addressed *Twombly* in a number of cases, but almost all of those cases are not antitrust cases. That breadth of context is important. The first thing to note is that the tenth circuit has not treated *Twombly* as solely about antitrust cases nor has the tenth circuit limited *Twombly's* application to complex civil cases; instead, it considers *Twombly* as applicable to all Rule 12 motions under Federal law.

Consider, for example, a couple of recent circuit court decisions. *Bryson v. Gonzales,* 534 F.3d 1282 (10th Cir. 2008), is a Section 1983 case based on allegations of false arrest and imprisonment. *See id.* at 1283-84 (demonstrating one example of an effort to remedy a remarkable pattern of prosecutorial misconduct and state efforts to block release of a wrongfully convicted man). In *Bryson,* the Tenth Circuit held that *Twombly* applies to all complaints; *i.e.,* that a complaint must allege facts creating a plausible basis for the claims asserted. The Bryson court's commitment to a broad application of *Twombly* is unmistakeable. *Bryson* is a Section 1983 case having nothing to do with antitrust law. The *Bryson* court expressly applies *Twombly*, and goes on to explain its understanding of *Twombly*. A complaint that alleges all of the elements of a claim necessarily is sufficient. But a complaint which omits some essential elements may still succeed so long as the missing elements are plausibly inferred from what is alleged. Allegations of otherwise innocent conduct are not likely to be plausible allegations of a claim. "Plaintiffs thus omit important factual material at their peril." *Id.* at 1286.

In *Patton v. West,* 276 Fed. Appx. 756 (10th Cir. 2008), the complaint alleged a conspiracy by Provo, various of its employees and a guardian ad litem to deprive the parents of custody of their children. The Tenth Circuit applied the plausibility standard of *Twombly* to the case. *Pace v. Swerdlow,* 519 F.3d 1067 (10th Cir. 2008), was a case arising under diversity jurisdiction which involved claims against an expert in a medical malpractice case. The district court had dismissed the complaint under Rule 12(b)(6). The circuit court reversed, finding that the allegations were sufficient to state a claim because they were factually sufficient to make the claim plausible. But, relevant here, the dissent by Judge Gorsuch cites *Twombly* as applying broadly to all federal cases and as changing the pleading standard. *See id.* at 1076. That portion of the dissent is picked up and cited with approval in *Bryson*.

These are not isolated or unusual cases. A quick survey of other cases in the circuit yields the same conclusion: The "plausible theory" standard of *Twombly* is the pleading standard in this circuit for all civil cases in the federal courts. In *Robbins v. Oklahoma,* 519 F.3d 1242 (2008), the Tenth Circuit affirmed dismissal of a complaint because the plaintiff had not pled facts sufficient to make the claims plausible. In *Robbins*, the parents of a child who died in a subsidized day care program asserted that the fatal injuries to their infant gave rise to a claim under Section 1983. The Court of Appeals went directly to *Twombly* and read that decision as announcing a new (or clarified) standard. *See id.* at 1247. The degree of specificity needed to get past the *Twombly* "plausibility line" applied here as well. Just where that line was to be drawn would vary, but plausibility was the standard: "specificity necessary to establish plausibility and fair notice…depends on context." *Id.* at 1248. More recently, the Tenth Circuit applied *Twombly* to dismiss a Medicare False Claims Act case in *U.S. ex rel. Conner v. Salina Regional Health Center, Inc.,* 543 F.3d 1211 (2008), and in *Carson v. Cudd Pressure Control, Inc.,* 2008 U.S. App. LEXIS 24033 (10th Cir. 2008), applied *Twombly* in reversing dismissal of an Americans with Disability Act claim.

What the Other Circuits are Doing

As suggested above, other circuits are interpreting *Twombly* in terms largely consistent with what the Tenth Circuit has done. They too have found that *Twombly* changed the pleading standard in antitrust cases of all kinds (not just conspiracy), and reaches all types of complaints coming before the federal courts.

The Ninth Circuit has held that there is a new pleading standard for antitrust cases. In *Kendall v. VISA U.S.A., Inc.,* 518 F.3d 1042 (2008), the Ninth Circuit held that a plaintiff must plead evidentiary facts sufficient to prove all three elements of a Section 1 claim: a contract or conspiracy, which is intended to harm trade, and which actually harms competition. In footnote five, the Ninth Circuit said: "At least for the purposes of adequate pleading in antitrust cases, the Court specifically abrogated the usual 'notice pleading' rule…." *Id.* at 1047 n.5.

There does not seem to be much dispute that all antitrust complaints face the plausibility standard now. Consider also *NicSand, Inc. v. 3M Co.,* 507 F.3d 442 (6th Cir. 2007), an antitrust case in the Sixth Circuit applying *Twombly* pleading standards, or, from the Third Circuit, *Phillips v. County of Allegheny,* 515 F.3d 224 (2008), a Section 1983 case holding that *Twombly* applied to all federal civil cases. The Second Circuit reached the same conclusion in *Port Dock & Stone Corp. v. Oldcastle Northeastern, Inc.,* 507 F.3d 117 (2nd Cir. 2007).

The Plausibility Standard

Although *Twombly* has raised the pleading standard for federal civil cases, the meaning of the new "plausibility" standard is not very clear. The courts have offered relatively little guidance. What the courts have said is that a "plausible" set of allegations depends on (and presumably varies with) the nature of the claim. That answer directs us to look for patterns of alleged facts which pass or fail muster in the various kinds of cases, and suggests that the district courts may have broad discretion in ruling on Rule 12(b)(6) motions. But it may also be that, like antitrust injury, it is just not feasible to offer bright line rules.

Import for Utah State Cases

Because *Twombly* was an antitrust case, it is natural to think that the most likely route for that case and its new pleading standard to enter into state opinions is via a state antitrust case. Although there is a dearth of antitrust cases in the state courts there have not been any decisions on antitrust claims from the Utah Court of Appeals or the Utah Supreme Court since *Twombly*. To be honest, I did not locate any antitrust cases in the last ten years. If *Twombly* has an influence on Utah law, it will be a long wait if confined to the antitrust context. With the federal courts taking *Twombly* as applicable in all Rule 12(b)(6) motions, it is more likely that *Twombly* will enter Utah law, if it does, through some other kind of case. Rules 8 and 12 of the Utah Rules of Civil Procedure essentially mimic the corresponding Federal Rules. The Utah case law to date follows the *Conley* approach to Rule 12(b)(6) – the defendant loses unless there are no facts which could support the complaint. The language of the Utah appellate decisions is quite close, if not identical, to the standard recitations of federal courts under *Conley*.

The question, then, is whether the Utah courts will follow on the path of *Twombly*. They do not have to. The line of cases interpreting Rule 12(b)(6) of the Utah Rules of Civil Procedure is independent of the federal Rule 12(b)(6) cases. The Utah line of cases, which aligns with *Conley,* can stand independently of the federal decisions. That relevant rules are virtually identical does not really give any guidance to what the Utah Supreme Court will do when it is faced with the issue. I do not just mean that there is a logically defensible separation of the authority between Utah and Federal cases. That is a formal argument about the sovereigns. There is also Utah precedent, and of recent vintage, indicating divergent interpretations of very similar, if not identical, civil rules.

The Federal Rule 56 and Utah Rule 56 are also virtually identical. Everyone knows that the governing case for Rule 56 motions under the Federal Rules of Civil Procedure is *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548 (1986). But *Celotex* is not law in Utah. *See Orvis v. Johnson,* 2008 UT 2, ¶¶ 15-16, 177 P.3d 600. In *Orvis,* the Utah Supreme Court expressly noted that Utah summary judgment standards differ from the federal standards. The Utah Supreme Court held that a moving party who does not bear the burden of proof at trial must still advance (presumably admissible) evidence negating an essential element of a claim in order to properly obtain summary judgment. This is contrary to the standard under *Celotex*. Whatever the wisdom of that holding – about which I have serious doubts – it makes clear that the Utah Supreme Court may adopt and defend its own interpretation of the Rules of Civil Procedure no matter how closely the text of the specific rule may appear to be to the corresponding Federal Rule.[1] What works for Rule 56 – interpretation grounded in the Utah committee and history – could work for Rule 12(b)(6) as well. Or not.

A driving force leading to the *Twombly* decision seems to have been pre-trial litigation costs. *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1966 (2007); *see also Bryson v. Gonzales,* 534 F.3d 1282, 1287 (10th Cir. 2008). The same consideration applies to state cases. The brouhaha over revising Rule 702 of the Utah Rules of Evidence showed a good deal of sensitivity about pre-trial litigation costs, in particular for plaintiffs in that instance. The same sorts of trends are pushing litigation costs in state cases as in federal cases. Electronic discovery, for example, is just as much a burden in state cases as in federal cases.

In any event, I note that a fairly recent decision from the Utah Court of Appeals makes no mention, one way or the other, of the "plausibility" standard or of *Twombly*. While not using the language of *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99 (1957), directly, the language the court of appeals did use is pretty close to the *Conley* standard: "if it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of its claim." *Williams v. Bench,* 2008 UT App 306, ¶ 21, 193 P.2d 640 (internal quotation marks omitted).

Conclusion

In federal court, plaintiffs should plead facts sufficient to make the claims plausible in all cases, not just antitrust conspiracy cases. Plausible is less than probable, but certainly more than bare notice of the claim. A higher standard, and plausibility certainly is a higher standard, means more frequent grants of motions to dismiss. The more interesting issue that remains is what the state courts will do, and when.

1. I think there are some interesting ties between the Utah Supreme Court's unsettled jurisprudence of constitutional interpretation, *compare Am. Bush v. City of S. Salt Lake,* 2006 UT 40, 140 P.3d 1235, and *Soc'y of Separationists, Inc. v. Whitehead,* 870 P.2d 916, 921 (Utah 1993) (calling for an orginalism), *with State v. Tiedemann* 2007 UT 49, 162 P.2d 1106 (ignoring completely the prior cases), and interpretation of the rules of civil procedure.

Utah's Justice Court System, a Legal Charade

by Mike Martinez

One December night a West Jordan City police officer was "trolling" cars parked at Wal-Mart. While randomly entering license plate numbers into her computer, the officer discovered Christopher Goodman's automobile was uninsured. When Goodman exited the store and drove onto a public street the officer ticketed him.

Goodman's trial was before the West Jordan City Municipal Judge. Goodman was found guilty and fined. That was not unusual. After canvassing numerous monthly reports filed by municipal courts with the Administrative Office of the Courts, Goodman discovered that city judges impose a fine on nearly every defendant appearing before them.

Goodman appealed his conviction, but not by challenging his ticket. Instead Goodman asserted that municipalities in Utah have no judicial branch of government. City judges are city employees, not members of the Utah judicial branch of government. Therefore, statutes that vest a mayor with the authority to empower a city employee to exercise judicial functions violate the separation of powers principles of the Utah Constitution.

This article will discuss Goodman's challenge of the constitutionality of the justice court system, and how the Utah Supreme Court, the Utah Judicial Council, and the 2008 Utah Legislature dealt with his arguments, legally, and politically.

City Judges Are Not Judicial Branch Members

In Utah, the judicial branch of government is a state-level organization consisting of courts, the Judicial Council and the Administrative Office of the Courts. The Judicial Council sets policy for the judiciary and is chaired by the Chief Justice of the Utah Supreme Court. Appellate and District Court judges are state employees, and are subservient to Judicial Council policy and supervision.

In Utah, 108 city judges preside over 138 municipal or justice courts. Mandatory monthly city reports filed with the Administrative Office of the Courts confirm that the majority of cases before city judges are traffic offenses. In 2008 there were 616,936 justice court dispositions. Traffic cases adjudicated numbered 506,522, or 82% of all dispositions. City judges adjudicate over 70% of all cases filed in Utah courts. The majority of city judges are not attorneys. *See Statewide Summary 2008 – Justice Courts,* http://www.utcourts.gov/stats/2008/justice/fy2008_summary.html (last visited Feb. 4, 2009).

Utah Code Annotated sections 78A-7-101 to 301 authorize municipalities to create justice courts. The sole requirement for establishing a justice court is that the municipality agrees to fund all costs of court personnel and facilities. *See e.g.,* Utah Code Ann. §§ 78A-7-207, -209, -211 (2008). The quid pro quo for this fiscal responsibility is that all court personnel, including the judge, are city employees. These employees are mandated to comply with all municipal rules, regulations, budgets and personnel ordinances. Non-compliance subjects the employees to discipline by the municipal employer. *See* Utah Code Ann. §§ 78A-7-210, 10-3-1105 (2008).

As an example, Salt Lake City operates Utah's largest municipal court system. City ordinance establishes the office of "judgeships." The Mayor appoints each judge, subject to ratification by the city council. The judges are supervised by the Mayor, through the Director of Management Services. The Utah Supreme Court, the Judicial Council, and the Administrative Office of the Courts lack statutory authority to hire, fire, supervise, pay, reappoint, or otherwise control a Salt Lake City judge.

In cities conviction rates translate into revenue. In an April 30, 2003 memorandum, the Chief Administrative Officer of Salt Lake City praised city judges for convicting 97% of all traffic defendants. *See* Brief of Defendant-Appellant at Appendix, Justice Court Revenue Compared to Projections, April 30, 2003, *West Jordan v. Goodman,* 2006 UT 27, 135 P.3d 874, No. 20040944, (Utah 2006). This, he wrote, was a great improvement over the paltry 66% conviction rate by Third District Court Judges, who decided Salt Lake traffic cases prior to the city implementing its own justice system. *See id.* The majority of the memorandum discusses additional revenue collected through the higher conviction rates. *See id.*

City judges are prime revenue generators. The Judicial Council estimates that in 2008 city judges doled out fines in excess of $84,000,000. *See Statewide Summary 2008 – Justice Courts,*

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http://www.utcourts.gov/stats/2008/justice/fy2008_summary.html (last visited Feb. 4, 2009). This is exclusive of revenue generated from traffic classes, drug testing, anger management programs, DUI counseling, and other court imposed requirements. *See id.*

Each fiscal year, the Salt Lake City court system is given a revenue goal. According to the Salt Lake City Office of Management Services website, projected court expenditures for fiscal year 2007-08 are $4,741,488. *See* http://www.slcgov.com/finance/2009budget/budgetbook09.pdf at 227 (last visited Feb. 3, 2009). The "Fines and Forfeitures" collections for fiscal years 2007-08 are $10,355,595. *See id.* at 225. To meet this anticipated revenue goal, Salt Lake City judges will each conduct 4100 criminal hearings each month, and it is anticipated the court system will process 204,500 cases in 2009. *See id* at 234-35.

Salt Lake City is not unique. All city courts have annual revenue goals to meet. Court revenue is often a city's second largest source of revenue, next to property taxes. Public deference to judicial authority, coupled with city police power to issue tickets, is the perfect symbiotic money machine.

A Constitutional Challenge to City Employees Exercising Judicial Power

The Utah Constitution states:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others.

Utah Const. art. V, § 1.

Constitutionally, any person exercising core judicial powers must be a member of the judicial branch of government. Core judicial powers are those powers "necessary to protect the fundamental integrity of the judicial branch." *Buck v. Robinson,* 2008 UT App 28, ¶ 8, 177 P.3d 648. Only constitutionally-authorized judicial bodies can "enter final judgments and orders or impose sentence," because such acts are "nondelegable" core judicial functions. *Salt Lake City v. Ohms,* 881 P.2d 844, 848 (Utah 1994). Goodman's argument in *West Jordan City v. Goodman,* 2006 UT 27, 135 P.3d 874, was straightforward. Goodman argued that neither the legislature, nor a municipality, may empower a mayor to authorize a city employee to exercise core judicial powers. The unanimous supreme court in *Goodman* characterized the issue as follows:

> Goodman raised a constitutional challenge to the statutory scheme authorizing municipal justice courts, arguing that it violates the separation of powers principles of the Utah Constitution. Goodman also argued that municipal court judges are biased and have an impermissible conflict of interest because they are employed and controlled by the municipalities that benefit from the fines they levy.

Id. ¶ 1 (footnotes omitted).

The supreme court noted that the district court applied the proper three-part test for this constitutional challenge, but that Goodman failed to meet the first prong of that test. *See id.* ¶ 27. Because Goodman failed the first prong of the test, the district court declined to analyze the two remaining prongs and ruled that: "the West Jordan justice court scheme did not violate constitutional separations of powers principles…because the *West Jordan City manager* is not charged with the exercise of powers properly belonging to the judicial branch of government." *Id.* (emphasis added).

Although it was reviewing the district court's ruling on a question of law presented by a constitutional challenge to a statute, *id.*¶ 9, the supreme court ultimately was required to "affirm the district court's ruling on the separation of powers claim because Goodman failed to brief it adequately," thereby failing to overcome "the presumption that statutes passed by the legislature are constitutional." *Id.* ¶¶ 29-30.

Although it foreclosed Goodman's challenge, the court encouraged future challenges to the statutory scheme:

> [W]e are not foreclosing future challenges to the validity of the justice court scheme and in fact we encourage the legislature to give serious consideration to some of the arguments raised [by the Utah Association of Criminal Defense Lawyers] in the amicus brief. It is *theoretically possible* that a justice court judge may be unable to exercise his judicial functions with the necessary impartiality because of pressure to generate revenue for his municipal employer or that a municipal government may exercise such control over its justice court so as to violate fundamental principles of separation of powers.

Id. ¶ 36 (emphasis added).

Theoretical or not, the Judicial Council took note of Goodman's allegations and evidence and commenced its own study to determine if city judges were independent arbiters or regulated employees. The result would be a showdown between the judicial branch and municipal executives, the outcome of which would be determined by the legislature.

The Judicial Council Plans Corrective Action

The Utah Judicial Council establishes policy for the judicial branch of government. It is comprised of fourteen members, including three justice court judges. The Court Administrator's Office is staff to the Council and all boards and committees

thereof. Chief Justice Durham and Associate Justice Nehring were members of the Judicial Council during the same time period when *Goodman* was pending before the Utah Supreme Court.

Goodman filed his appellate brief in March 2005. Judicial Council minutes reflect that the Judicial Council began discussion of justice courts on July 13, 2005. Utah Judicial Council Meeting Minutes, July 13, 2005, item 9, http://www.utcourts.gov/admin/judcncl/min-2005/min07-05.htm (last visited Feb. 4, 2009). The ninth item on the agenda of the July 13, 2005 meeting states that there would be "an overview of issues the Council needs to consider related to justice courts." *Id.* On November 28, 2005, after discussion of "issues the justice courts are presently addressing such as selection, retention, administration, jurisdiction, fiscal issues and the Council's role," Chief Justice Durham reported that a committee would consider the issues and "determine how the Council should move forward." Utah Judicial Council Meeting Minutes, Nov. 28, 2005, item 12, http://www.utcourts.gov/admin/judcncl/min-2005/min11-05.htm (last visited Feb. 4, 2009). At the January 30, 2006 Judicial Council meeting, Chief Justice Durham reported that she and "senior administrative staff met with house and senate leadership," and discussed, among other things, justice courts. Utah Judicial Council Meeting Minutes, Jan. 30, 2006, item 2, http://www.utcourts.gov/admin/judcncl/min-2006/min01-06.htm (last visited Feb. 4, 2009). There was discussion of "creating a committee to evaluate justice court issues." *Id.* item 4.

One month later, the February 27, 2006 Judicial Council minutes reflect that Justice Durham appointed Justice Nehring chair of the ad-hoc Justice Court Review Committee. *See* Utah Judicial Council Meeting Minutes, Feb. 27, 2006, item 6, http://www.utcourts.gov/admin/judcncl/min-2006/min02-06.htm (last visited Feb. 4, 2009). The committee's purpose was to "conduct a comprehensive review" of the justice court system, including, "1) selection [of justice court judges]; 2) retention; 3) court operations and administration; 4) jurisdiction; 5) fiscal implications; and 6) the Judicial Council's role." *Id.* The review was intended to "strengthen the justice court system by identifying issues that can be addressed with immediacy through rule making, and second, identifying the elements of a longer term agenda for the future of justice courts which may require more fundamental changes, such as jurisdiction, structure, and funding." *Id.*

The *Goodman* opinion was issued in April 2006. At the May 30, 2006 Judicial Council meeting, "the implications of *Goodman v. West Jordan*" (sic) were discussed. Utah Judicial Council Meeting Minutes, May 30, 2006, item 9, http://www.utcourts.gov/admin/judcncl/min-2006/min05-06.htm (last visited Feb. 4, 2009). Justice Nehring reported that the ad hoc committee had discussed "the perception of influence that financial gain has in the justice courts, the control of local governments over justice

courts, and the lack of equality of service in each justice court." *Id.* The committee was "working on what an ideal court of limited jurisdiction would look like and [would] then develop a system that could be realistically created." *Id.*

One year later, at the May 29, 2007 meeting, the Judicial Council was informed that the Justice Court Review Committee had met thirteen times and had concluded that "any meaningful changes to the justice court system would require legislation." Utah Judicial Council Meeting Minutes, May 29, 2007, item 7, http://www.utcourts.gov/admin/judcncl/min-2007/min05-07.pdf (last visited Feb. 4, 2009). The Committee issued a written Interim Progress Report and the Council voted to share the Progress Report with interested "community partners." *Id.*

On November 26, 2007, the Justice Court Committee made its "final report." Justice Nehring stated that the Committee goals for justice courts were: "judicial independence, public trust and confidence, and preserving the ability of local government to maintain local courts." Utah Judicial Council Meeting Minutes, Nov. 26, 2007, item 8, http://www.utcourts.gov/admin/judcncl/min-2007/min11-07.pdf (last visited Feb. 4, 2009). These goals would be met by, among other things, the following measures: (1) "uncoupling the money and the judge," through state-salaried justice court judges; (2) instituting a merit-based selection process, via a selection committee rather than continuing with mayoral appointment; (3) "reduc[ing] the opportunity for inappropriate political influence in the retention process," through public election every six years; (4) "[a]ssur[ing] public confidence in the fairness and competence of all justice court judges," by requiring justice court judges to have a four-year college degree. *Id.* Another recommendation advocated a change to the justice court system that would reduce the number of city judges from 108, full- and part-time, to 60 full-time state employees who would preside over multi-city jurisdictions. *See id.*

Succinctly, the Judicial Council, through draft legislation, sought to assure the public that city judges were competent, independent, accountable to the public, and not politically pressured to raise city revenue. But not every interested party was convinced there was a problem. The draft legislation was met with resistance from one politically-influential and very interested party – the Utah League of Cities and Towns.

Justice is Political and Provincial

Cities have, at minimum, $84,000,000 worth of reasons to retain control of their justice courts. As the 2008 legislative session approached, the Judicial Council and lobbyists for the Utah League of Cities and Towns disagreed on the need for justice court reform. In opposition to the Judicial Council's draft legislation the League passed Resolution 2007-03, "Justice Court Modifications." Utah League of Cities and Towns, Resolution 2007-03 (on file with author).

A League representative stated that their "biggest objection was the proposal for justice court judges to become state employees." Ted McDonough, *Judgment Day: The Legislative Plans to Fix City Justice Courts. Sort of.* Salt Lake City Weekly, (Feb. 21, 2008) available at http://www.cityweekly.net/index.cfm?do=article.details&id=37CDLCBE-14D1-13A2-9FB26E42B38397 (last visited Feb. 4, 2009). The League was adamant that "[c]ities and towns continue to be allowed to select their own judge[s] and the [such] judge[s]…remain city employee[s]." Utah League of Cities & Towns, Resolution 2007-03(1).

In an attempt to bolster support, Chief Justice Durham, in her January 21, 2008 State of the Judiciary message to the legislature, informed legislators that the Judicial Council had been working on Justice Court revisions for two years. *See* Christine M. Durham, Chief Justice Utah Supreme Court, State of the Judiciary, (Jan. 21, 2008), http://www.utcourts.gov/resources/reports/statejudiciary/2008-StateOfTheJudiciary.pdf (last visited Feb. 4, 2009). She informed them that the current structure did not work because of the rapidly increasing number of city courts, uncoordinated record keeping, pressure on judicial independence, and "public perception that justice courts are vehicles for generating revenue." *Id.* Justice Durham stated:

> [W]e want the public to perceive that their courts are fair and impartial. Without this perception, there cannot exist an essential element of our form of government – public trust and confidence in our judicial branch.…There is, in my view, no more pressing problem of public perception regarding Utah's court system than the justice courts.

Id. Justice Durham concluded by stating, "I urge you to seize this opportunity to reform a system in need of attention and to enhance the public's confidence in these courts." *Id.*

To buttress a sense of urgency to the legislature the Utah Court's 2008 Annual Report to the community, included a page entitled "Future of Justice Courts." 2008 Annual Report To The Community: Our Children, Our Future, Utah State Courts. The report informs the public that legislation would be proposed to provide "more judicial independence for justice courts." *Id.* at 7. Then, a la *Goodman,* the Report acknowledged that:

> [c]ities and counties that sponsor justice courts – unlike the state and federal governments – do not have an independent judicial branch of government. Although many cities and counties have implemented measures to insulate their justice courts from the influence of mayors, councils and commissions, *real separation of power is largely illusory*.

Id. (emphasis added)

Chief Justice Durham and the Judicial Council acknowledged that the entire judicial system is suffering a lack of public

confidence due to the perception, if not the reality, that cities are using their local courts as money spigots. They could no longer avoid the fact that 70% of all cases before "judges" were adjudicated by, mostly, non-lawyers, who are under pressure to raise revenue. The Judicial Council and the Utah State Courts informed legislators, directly, and through the Annual Report To The Community, that the justice court system is only an *illusion* of justice. *See id.*

In Conclusion: Money Talks; Justice Walks

In the end the legislature was persuaded to make some changes to the current system. After January 1, 2009, city judges must stand for countywide election every six years, retire by age 75, and be selected by a countywide committee. *See* Utah Code Ann. §§ 78A-7-202(7), -203(1) (2008). The salary of a justice court judge is limited to 85% of a district court judge. *See id.* § 78A-7-206. A high school diploma still qualifies anyone for appointment to be a city judge. *See id.* § 78A-7-201. There are still 138 city courts, but, based on their expansion over the last five years, many more will open for business. Legislators did not place city judges under state judiciary control. Nor did the legislature uncouple city judges from monetary goals and political pressure. City judges remain city employees, statutorily empowered through city mayors. *See id.* § 78A-7-210.

Ultimately Goodman's allegations were thoroughly investigated and found valid. The state judiciary tried to correct the injustices and was dispatched without meaningful change. I surmise that the reason Goodman failed before the Utah Supreme Court is the same reason the judiciary failed with the legislature. The supreme court realized that legislators would be annoyed if they did not have the opportunity to legislate a fix before cities were deprived of their income. But given the opportunity and despite strong encouragement from the judiciary, legislators were likewise unwilling to deprive cities of their revenue stream. Legislators understood that lost city revenues become state legislative budget issues.

After years of study, two questions remain to be answered: (1) Is the legislature the proper forum for policy regarding the exercise of core judicial powers? and (2) Does the legislative failure absolve the judicial branch and the attorneys who practice therein of their responsibility to ensure judicial independence?

The Utah Constitution is clear. There are three branches of government and no one branch can divest another of its core powers. The Utah Supreme Court, the only court in the state holding exclusive constitutional jurisdiction, can, of its own accord, correct acknowledged injustice and protect its jurisdiction. The Judicial Council, based on its findings, can pass judicial policy regarding practices that may be detrimental to the judiciary and the public. Pending a solution – the *illusion* of legitimacy continues to be exercised, 600,000 times a year. *Cha-ching!*

Got Trade Secrets? No? Guess Again.

by Thomas D. Boyle

What do restaurants, insurance companies, and technology businesses have in common? If they're successful, chances are good they all have trade secrets.

Like a king who secures the kingdom's greatest treasures deep inside the castle walls, so too must business owners protect trade secrets. Otherwise, business owners may lose the ability to protect the heart of their business because of a quirky statute of limitations issue that could easily go unnoticed.

What are trade secrets?

If a business owner has information about the business that the owner keeps from the competition, chances are good the business has trade secrets. A "trade secret" is information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. *See* Utah Code Ann. § 13-24-2 (1989).

Consider Fresh-Mex café, ABC Insurance, and XYZ Technology. Fresh-Mex has developed a tasty slate of recipes, entrees, and methods that have generated a tremendous following, including a slew of knockoff competitors. ABC Insurance has policy terms, premiums, renewal dates, and policyholder information that have proven to be very attractive to a competitor. XYZ Technology generates performance and product specifications, technical reports, plans, product designs and problems, and other sensitive information that three departing employees decided should leave with them.

Trade secrets are most at risk when employees leave unhappy or are lured away by a competitor. Sometimes departing employees will stay late to copy documents laden with trade secrets that just might be useful in their next job. A disgruntled manager may leave without taking documents, but still walks out with a wealth of trade secrets knowledge tucked safely away in memory only to be regurgitated later. Indeed, when the manager starts a new job with the old employer's rival, the disgruntled manager may well use and disclose the former employer's trade secrets. This concept is aptly labeled the "inevitable disclosure doctrine" and can be a basis for obtaining a temporary restraining order and preliminary injunction against the manager and the new employer.

Suppose a former manager was offended at a measly Christmas bonus and quits. Before long the former manager opens a shop and is blatantly misappropriating the former employer's trade secrets that took years and oodles of money to develop and perfect. And then, without explanation, the former manager suddenly shuts down the new business. The old employer breathes a huge sigh of relief, grateful not to have to hire a lawyer to stop the misappropriation. No harm, no foul. Right? The new competitor didn't stay open long enough to do any real damage. The trade secrets owner has learned that the former manager cannot be trusted. But at least the old employer doesn't need to spend the children's college fund on a lawyer.

If the trade secrets owner thought these things, the owner would be in good company; but just might be wrong. The owner may have lost the ability to protect and preserve vital keys to the business's success – trade secrets, especially if the disgruntled ex-manager waits three years and a day before renewing any plans to use the owner's genius to enrich a new business. The statute of limitations for misappropriation of trade secrets in Utah is three years. *See* Utah Code Ann. § 13-24-7.

There are two competing theories about the nature of trade secrets.

There is a split among the states in how to characterize the fundamental nature of a trade secret. This distinction has the potential of affecting both substantive rights of the owner in the trade secrets and when a trade secrets owner must act.

One theory treats trade secrets as a form of property. Under this theory, a trade secret has intrinsic value and can be damaged, sometimes repeatedly. Under this theory, each misappropriation of a trade secret gives rise to a new claim and, thus, a new limitations period. A 27-year-old Utah Supreme Court decision *Microbiological Research Corp. v. Muna (Muna),* 625 P.2d 690 (Utah 1981), held that trade secrets are a form of property. *See id.* at 696.

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The competing theory characterizes trade secrets as the product of a confidential relationship. Trade secrets, under this theory, have no intrinsic value. They exist only because the trade secrets owner and his or her employees jointly agree to keep them confidential. These trade secrets then are protected only as long as the owner vigilantly protects – and enforces – the sanctity of the confidential relationship. Once the confidential relationship is breached, the trade secrets owner must act within the applicable limitations period to enforce the owner's rights against the misappropriator. If the owner fails to demand and timely secure legal protection of the confidential relationship once the owner learns that the former employee cannot be trusted, the owner risks losing the ability to control the owner's trade secrets.

Despite *Muna's* conclusion that trade secrets are a form of property, ambiguities and questions remain about the fundamental nature of trade secrets and when one must act to preserve them. *Muna* predated by eight years Utah's adoption of the Uniform Trade Secrets Act (UTSA) and was not a statute-of-limitations case. *See* Utah Code Ann. § 13-24-1 (2005). No subsequent Utah appellate decision has addressed limitations in the context of the Utah UTSA.[1] The UTSA advocates the "confidential relationship" theory and, to confuse things even more, the supreme court in *Muna* went out of its way to highlight the fact that the trade secrets at issue there arose out of a confidential relationship. Indeed, the notion of confidential relationship permeates the *Muna* opinion.

Should a Utah court consider the issue of limitations in the trade secrets context, it seems hardly a stretch to suggest that the reviewing court would necessarily have to consider the issue in light of "property" considerations but also in light of the confidential relationship between the parties. It is settled that the limitations period in Utah for the misappropriation of trade secrets is three years. But if a Utah court is presented a limitations issue in the context of trade secrets limitations, the court will have to consider whether the limitation period begins anew with each misappropriation, i.e., the *property* theory or whether the limitations period is defined by a single point in time when the confidential relationship is violated – regardless of how many times a person later misappropriates the trade secrets. Either way, Utah practitioners must be on their toes because they don't want to guess wrong.

The issues become even more uncertain when there are "continuing misappropriations" or multiple misappropriators. Limitations may vary depending on the number of misappropriating parties involved. California's courts have dealt with these questions in recent years and offer insight. In *Cadence Design Systems, Inc. v. Avant! Corporation,* 57 P.3d 647 (Cal. 2002), the California

Supreme Court took the remarkable step of rendering a moot decision after the parties had settled because of heavy public interest in the issue. *See id.*

The issue in *Cadence* was, when does a claim for trade secrets infringement arise – only once, when the initial misappropriation occurs, or with each subsequent use of the trade secret? The California Supreme Court held that in a *single* plaintiff's action *against the same defendant,* the continued improper use or disclosure of a trade secret after defendant's initial misappropriation is viewed under the UTSA as part of a single claim of continuing misappropriation accruing at the time of the initial misappropriation.

The UTSA does not define "continuing misappropriation." But the *Cadence* court observed that "[i]t is the continuing use or disclosure of a trade secret after that secret was acquired by improper means or as otherwise specified in [the statute]." *Id.* at 651. Thus, for statute-of-limitations purposes, California considers a continuing misappropriation as *a single claim,* not multiple claims, each time the trade secret is misused or improperly disclosed. *See id.*

The *Cadence* court also distinguished "misappropriation" of trade secrets from a "claim" for misappropriation.

> A *misappropriation*…occurs not only at the time of the initial acquisition of the trade secret by wrongful means, but also with each misuse or wrongful disclosure of the secret. But a *claim* for misappropriation…arises for a *given plaintiff against a given defendant only once,* at the time of the initial misappropriation.

Id. (emphasis added). If there are multiple misappropriators, however, the court observed that a continuing misappropriation may constitute more than one claim, each having its own limitations period when multiple defendants/misappropriators are involved. *See id.* at 652. *See also PMC, Inc. v. Kadisha,* 78 Cal.App. 4th 1368 (Cal. App. 2000); *Global Compliance, Inc. v. Am. Labor Law Co.,* 2006 WL 1314171, *12-13 (Cal. Ct. App. 2nd, May 15, 2006) (Unpublished); *HiRel Connectors, Inc. v. United States,* 2005 WL 4942595, *3, (C.D. Cal., Jan 4, 2005) ("[T]here may be separate claims of continuing misappropriation among different defendants, with differing dates of accrual and types of tortuous conduct – some defendants liable for initial misappropriation of the trade secret, others only for later continuing use.").

Because Utah law in this area is uncertain and ambiguous, business people, and the professionals who advise them, must be vigilant. Here are four important considerations when dealing with the present *and future* protection of trade secrets:

Aggressively Prosecute Trade Secret Misappropriation. You snooze, you lose. If Utah's courts in the future apply the "property" theory of trade secrets and hold that each successive misappropriation is a discrete, self-contained wrong against the trade secrets owner, then the owner may get a second bite at a misappropriating former employee or other misappropriator. But if Utah's courts were to adopt the California approach – whereby a *claim* for misappropriation against a given person arises only once – then reliance on the so-called *property* theory would be misplaced. To ignore the first misappropriation because of its apparent insignificance may doom future efforts to protect valuable trade secrets. Second bites may be few at best. If the misappropriator waits out the limitations period, then the trade secrets owner may be powerless to stop a later theft, disclosure or use of the misappropriated information. Cease-and-desist letters, alone, may demonstrate the owner's intention to protect trade secrets and may get the desired results. But if the misappropriating conduct continues, it must be stopped with timely legal action.

Boomerang Settlement Releases are a Potentially Serious Problem for a Trade Secrets Owner – and Lawyer. Be careful in settlement agreements. Driven by a conscientious desire to be thorough and to protect their clients, good lawyers often draw settlement agreements to *forever* release and discharge the wrongdoer for, among other things, *known and unsuspected* damages, claims, demands, losses, and causes of action, past,

present, and *future*, without limitation – or some variant thereof. Be alert. Such promises by the trade secrets owner arguably – and almost surely – release the misappropriators from claims of *future* misappropriations of the same trade secrets. Such a settlement agreement, like a boomerang, may come back and hit you where it hurts.

Identify and Mark Your Trade Secrets.
Trade secrets are the business owner's treasures. Client, customer, and supplier lists, recipes, renewal dates, salaries, pricing, and a host of other things are or can be trade secrets. Even compilations of publicly available information gathered for a proprietary purpose can and should be protected as trade secrets. Employees must understand the collections of information that the business owner considers to be trade secrets. Once the trade secrets are identified, they should be marked with labels, headers, and footers, such as:

XYZ COMPANY
CONFIDENTIAL TRADE SECRETS
DO NOT DISCLOSE OR MISAPPROPRIATE

Leave no room for doubt or argument. Business owners should remind employees frequently and regularly of the information that constitutes trade secrets of the business.

Guard Your Trade Secrets.
Once the trade secrets are identified, build walls and motes around them. Lock them up – literally. They are the business's life blood. If the trade secrets must be used by employees to do their jobs, make sure the employees know that they are secrets and that when they are finished to lock them up, literally and figuratively. Although employees have a common law duty not to disclose trade secrets, many may not know that they have such a duty or even that they are privy to trade secrets of their employer, and will not hesitate to walk out the door with them. Some employees will not hesitate to open a competing enterprise with a business's hard earned secrets. Guard proprietary trade secrets with appropriate non-disclosure and properly tailored non-competition agreements. These are relatively simple documents that can be the first defense against trade secret theft.

Conclusion – Guard the Castle
A business's success sometimes breeds jealousy, justification, and rationalization among its employees. The temptation for some employees to steal trade secrets for personal gain is great. In some cases employees will not even recognize the value to the business or the confidential nature of the information they learn and work with in their jobs, much less their duties with respect to that information. Trade secret thieves will use a business owner's trade secrets again and again unless they are stopped. Business owners must be vigilant. If they are not, their trade secrets, earned with time, sweat, and money, may end up lining someone else's pockets.

Like sandcastles on the beach facing a rising tide, the stakes in today's economy for business owners are high. With modest planning, documentation, and a willingness to act promptly, legal practitioners can strengthen the positions of their clients and prevent the liquidation of their most valuable business assets.

Got trade secrets?

1. One Utah trade secrets case from the Utah Court of Appeals addressed limitations. Consistent with *Muna, Envirotech Corp. v. Callahan,* 872 P.2d 487,492-93 (Utah Ct. App. 1994), likewise predates Utah's adoption of the UTSA and relied on Utah Code Section 78-12-26(2), which states that a plaintiff must bring an action within three years of the "taking, detaining, or injuring personal property, including actions for specific recovery thereof." Utah Code Ann. § 78-12-26(2). Although this case pre-dates the UTSA, it is important because it involves tolling of the statute of limitations under the discovery rule and in light of fraudulent (though the case does not use that term) conduct involving the defendants "concealment" that they were using plaintiff's confidential and proprietary information. The Utah Court of Appeals stated: "The trial court's conclusion was legally correct under the concealment theory. Callahan and G&G Steel concealed their activity by covertly misappropriating EIMCO trade secrets and other confidential information and then copying such information. As a result, EIMCO was not able to discover the misappropriation until late 1987." *Callahan,* 872 P.2d at 493.

ERISA and Plan Administrator Conflicts – Analysis and Best Practices of the U.S. Supreme Court's Decision in Glenn

by Michael P. Barry

INTRODUCTION

In the health care benefits industry, plan administrators commonly fill the dual roles of evaluating benefit claims and paying claims. This scenario, however, can cause administrators to face an inherent conflict of interest. In 1989 the U.S. Supreme Court established the standard of judicial review for such conflicts in *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989). The *Firestone* Court found that under the principles of trust law, a conflict of interest is just one of several factors a court should weigh to determine whether an administrator has engaged in an "abuse of discretion." *See id.* 108-16.

In its most recently completed term, the Supreme Court again confronted the issue of a conflicted administrator in *Metropolitan Life Insurance Co. v. Glenn,* 128 S.Ct. 2343 (2008). This time around, the Supreme Court considered how much weight a conflict should receive on judicial review. This article will take an in-depth look at *Glenn*, and discuss the best practices for plan administrators, fiduciaries, and employers in light of this case.

FACTS AND PROCEDURE

Wanda Glenn was an employee of Sears, Roebuck & Company (Sears). *See id.* at 2346. During the time of her employment, Sears sponsored a long-term disability (LTD) plan administered by Metropolitan Life Insurance Company (MetLife) and operated pursuant to the Employee Retirement Income Security Act of 1974 (ERISA). *See id.* The terms of the LTD plan allowed MetLife (as administrator) discretionary authority to determine whether an employee's claim for benefits was valid, while allowing MetLife (as insurer) to pay valid benefit claims. *See id.*

In June 2000, Glenn applied for LTD benefits due to a "severe dilated cardiomyopathy," *id.*, a disease of the heart muscle that causes general fatigue and shortness of breath. MetLife initially granted Glenn a 24-month benefit after determining that she could not perform the material duties of her own job. *See id.* MetLife also directed Glenn to apply for Social Security disability benefits. *See id.* It deserves mention that MetLife would be entitled to receive some of these potential Social Security payments as an offset to its more generous benefits. *See id.* In April 2002, the Social Security Administration (SSA) granted Glenn permanent disability payments retroactive to April 2000. *See id.* at 2346-47.

Glenn subsequently applied for additional LTD benefits with MetLife beyond 24 months. *See id.* at 2347. But to qualify for these additional benefits, Glenn would need to satisfy a stricter standard – that she was incapable of performing not only her own job with Sears, but incapable of performing the material duties of "any" gainful job for which she was reasonably qualified. *See id.* MetLife, however, subsequently denied Glenn's application for the additional benefit. *See id.*

After exhausting MetLife's internal appeals process (or its "administrative remedies," in ERISA parlance), Glenn filed suit against MetLife in federal court in Ohio. *See id.* The district court denied Glenn's request for relief based on the administrative record. *See id.* But the Court of Appeals for the Sixth Circuit in 461 F.3d 660 (6th Cir. 2006), reversed and set aside MetLife's denial of benefits, in part, due to MetLife's conflict of interest. *See Glenn* at 2347. The Supreme Court granted certiorari to specifically consider the following issues: (1) whether a plan administrator who both evaluates and pays claims operates under a conflict of interest, and (2) how this conflict should be considered on judicial review. *See id.*

In a 6-3 decision, Justice Breyer wrote the opinion of the Court. Justices Stevens, Souter, Ginsburg, Alito, and Chief Justice Roberts joined him. Justices Kennedy, Scalia, and Thomas dissented.

COURT'S ANALYSIS

Determining a conflict of interest

The Court's analysis is quite straightforward here. A "'conflict of interest'" is defined as a "'real or seeming incompatibility between one's private interests and one's public or fiduciary duties.'" *Metro. Life Ins. Co. v. Glenn,* 128 S.Ct. 2343, 2348 (2008) (quoting Black's Law Dictionary 319 (8th ed. 2004)).

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Does MetLife's role as an evaluator of claims and payer of benefits create a conflict under ERISA? The Court answered in the affirmative.

In dicta, the Court indicated that a conflict is "clear" in scenarios where an employer both funds a plan and evaluates claims. *See id.* The Court explained why:

> [An] employer's fiduciary interest may counsel in favor of granting a borderline claim while its immediate financial interest counsels to the contrary. Thus, the employer has an "interest…conflicting with that of the beneficiaries," the type of conflict that judges must take into account when they review the discretionary acts of a trustee of a common law trust.

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

The Court conceded that although a conflict is "less clear" when the plan administrator, like MetLife, is a professional insurance company rather than an employer, "we nonetheless continue to believe that for ERISA purposes a conflict exists." *Id.* at 2349. The Court briefly touched an area that deserves further mention – the fiduciary duties ERISA imposes on plan administrators. *See id.* These duties pursuant to ERISA sections 404(a) and 503(2) include: (1) act solely in the interests of plan participants and beneficiaries; (2) act for the "exclusive purpose" of providing benefits; (3) defray reasonable expenses; (4) use care, skill, diligence, and prudence; (5) comply with the terms of the plan documents; and (6) provide "full and fair review" of claim denials. *See* 29 U.S.C. §§ 1104 & 1133.

The Court completely glossed over these duties. In fact, it cited only two of these six duties that are written into the text of ERISA. *See id.* at 2349-50. These fiduciary duties are significant since they provide additional built-in protections to further insulate participants and beneficiaries from the prejudicial effects of a conflict.

Weighing conflict

After establishing that a conflict exists for MetLife, the Court considered how such a conflict should be weighed on judicial review. *Firestone* provided clear guidance to the Court on this issue: "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) (quoting Restatement (Second) of Trusts § 187, Comment d (1959)).

Significantly, the conflict itself does not change the standard of review from deferential (i.e., an abuse of discretion) to de novo.

The Court described this standard as a "combination of factors," *Glenn,* 128 S.Ct. at 2351, method of review, since a conflict is "one factor among many, " *id.*, that a court should consider when analyzing an administrator's decision. It was not "necessary or desirable," *id.*, to create special burden of proof or evidentiary rules to examine a conflicted administrator. The Court reasoned:

> Benefits decisions arise in too many contexts, concern too many circumstances, and can relate in too many different ways to conflicts – which themselves vary in kind and in degree of seriousness – for us to come up with a one-size-fits-all procedural system that is likely to promote fair and accurate review. Indeed, special procedural rules would create further complexity, adding time and expense to a process that may already be too costly for many of those who seek redress.

Id.

Although the Court declined to overrule *Firestone* or establish a new procedural test for conflicts, the Court did provide some useful tips for reviewing courts. A conflict deserves closer scrutiny when a higher likelihood exists that it affected the benefits decision. An example of this – provided by the Court – is an insurance company administrator with a "history of biased claims administration." *Id.*

On the other hand, a conflict is less important (even to the "vanishing point," *id.*, the Court noted) when an administrator

takes active steps to reduce potential bias and to promote accuracy. Two means to do this are by (1) "walling off claims administrators" from those involved in firm finances, or (2) "imposing management checks that penalize inaccurate decisionmaking" irregardless of whom the inaccuracy benefits. *Id.*

Holding

Applying its "combination of factors" method of review, the Court held that MetLife's conflict alone was not determinative. However, several other factors were. First, MetLife initially encouraged Glenn to petition the SSA that she could not work, and then received the benefits for her success (through an offset) when the SSA granted her permanent disability payments. *See id.* at 2352. But MetLife later disregarded the agency's finding and rejected Glenn's claim for LTD benefits by concluding that Glenn could, in fact, perform sedentary work. *See id.* Second, MetLife conveniently emphasized in its internal review process a certain medical report that favored a denial of Glenn's claim while de-emphasizing other records that suggested a contrary conclusion. *See id.* And third, MetLife failed to provide its independent vocational and medical experts with all the relevant evidence pertaining to Glenn's case. *See id.*

Based on these factors, the Court affirmed the Sixth Circuit's decision to set aside MetLife's benefits denial. *See id.* In the end, MetLife's conflict itself wasn't the deciding factor, but its own sloppy and biased handling of Glenn's claim.

BEST PRACTICES

1. Plan administrators should take active steps to reduce bias, promote accuracy, and provide a full and fair review for participants in the claims adjudication process. This can be accomplished by including management checks and internal controls that penalize inaccurate decision making, reward claims processors for accuracy, or both. One way to determine this is by auditing initial claims decisions that were subsequently overturned on appeal. In addition, when vocational and medical experts are brought into the claims review process, they should be provided with the complete case file for their review.

2. Employees and corporate officers involved in company finances should not participate in the claims process. In fact, *Glenn* specifically recommends that the corporate claims and financial departments should be completely separated (or walled off). Companies should have clearly demarcated committees or subcommittees that handle either financial issues or claims. And to take *Glenn's* recommendation one step further, the total dollar amount of a claim should be deleted from the case file of appeals.

3. Legal counsel should ensure that the insurer's plan document and summary plan description include clear language granting the administrator or fiduciary discretionary authority to determine eligibility for benefits and to construe plan terms. Not only is this critical for a plan's own internal appeals process, but it will also allow administrators to receive a deferential standard of judicial review if a case is litigated. Otherwise, without this language, administrator decisions will be subject to greater judicial scrutiny under a *de novo* standard. Plan language was a significant factor in determining the standard of review in *Firestone*. *See Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115 (1989).

4. Employers should consider avoiding the evaluator/payor conflict by completing out-sourcing claims adjudication to another entity, such as a third party administrator. By contracting a third party to handle appeals, an employer will avoid the dilemma where its "fiduciary interest may counsel in favor of granting a borderline claim while its immediate financial interest counsels to the contrary." *Metro. Life Ins. Co. v. Glenn,* 128 S.Ct. 2343, 2348 (2008). If completely outsourcing claims adjudication is too costly, an alternative is to contract with an outside agency who selects medical experts to review denied claims on appeal. This agency, and its medical experts, should not have a financial stake in the result of the benefit determinations.

5. Internal documents, policies and procedures, and training materials should delineate the process to evaluate and adjudicate claims in a fair and impartial manner. For example, these documents can indicate that an evaluator will not consider finances when reviewing a claim, or that an evaluator should provide a well reasoned and written explanation for each of the claims decisions.

6. It is instructive to analyze how the federal circuits have handled conflicts after *Glenn*. In *White v. Coca-Cola Co.,* 542 F.3d 848 (11th Cir. 2008), the court held that a conflict of interest did not exist where "a participant's benefits are paid by [a] third-party administrator which is refunded by [a] trust." *Id.* at 858. In *Burke v. Pitney Bowes Inc. Long-Term Disability Plan,* 544 F.3d 1016 (9th Cir. 2008), the court determined that even when a disability plan's benefits are,:

> paid out of a [VEBA] trust, instead of directly by an employer, the employer has a financial incentive to deny claims because every dollar not paid in benefits is a dollar that will not need to be contributed to fund the Trust. Although this impact is indirect, and therefore a less significant conflict compared to plans with benefits paid directly by employers, a structural conflict of interest does exist.

Id. at 1026.

Researching Utah Administrative Law

by Jessica Van Buren and Mari Cheney

Your client may have violated a Department of Environmental Quality rule. As you investigate the situation, you discover that the department may have fined your client wrongly thirty years ago, but you are having a difficult time locating the agency's administrative rule as it existed then.

Researching administrative rules is not as complicated as it may first seem. Although it is true that it is easier to find information about a rule after 1987, do not give up hope if you need information about an older rule.

A Brief History

In 1973, the state archivist had responsibility for compiling and publishing the administrative rules. In 1985, the legislature created the Office of Administrative Rules as an office within the Division of State Archives. In 1987, the Legislature recreated the office as the Division of Administrative Rules, removing the agency from the umbrella of State Archives. The Division of Administrative Rules was elevated to division status within the Department of Administrative Services.

Today the Division of Administrative Rules is responsible for establishing rulemaking procedures, recording and publishing administrative rules, and enforcing the requirements of the Utah Administrative Rulemaking Act.

The Utah Administrative Rulemaking Act

The Administrative Rulemaking Act spells out when rulemaking is required by agencies, generally outlines rulemaking procedures, and provides for public hearings. *See* Utah Code Ann. §§ 63G-3-101 to 702 (2008). The Division of Administrative Rules promulgated rules to implement provisions of the act that appear under Title R15 of the Utah Administrative Code.

Rulemaking Process

The agency rulemaking process can be divided into six distinct areas:

- An agency is **authorized** to regulate by the Utah Constitution, Utah law, Federal law, or court order.
- In the **pre-proposal phase,** an agency identifies the need for a new rule or change to an existing rule that includes text for the proposed rule, a rule analysis and anticipated cost or savings.
- An agency **files the proposed rule** with the Division of Administrative Rules, and it is then submitted to the executive branch for review. The proposed rule is published in the Utah State Bulletin and a summary of the rule is provided in the Utah State Digest.
- During the **comment period,** interested persons and groups may submit comments to the agency, and the agency then considers the comments. In some circumstances, a hearing must be held.
- An agency provides notice to the Division of Administrative Rules of the rule's effective date – this is called the **adoption phase.** Then, the Division of Administrative Rules **publishes** the rule in the Utah Administrative Code (UAC).
- After the rule is effective, the agency **enforces** the new or modified rule.

How to Research Utah Administrative Rules

Pre-1973 Rules

Before 1973 there was no statutory process for enacting and amending administrative rules that applied generally to all state agencies, so researching rules from that time period can be

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challenging. The only source of information for those rules will be the files of the agency, kept by the Utah State Archives. Each agency keeps different records, so you may find nothing, partial, or complete rulemaking information.

Agency names can change over time, which can make it harder to track rules. The Utah State Archives maintains histories for some state agencies that may include information about the previous names an agency used.

1973–1985 Rules

With the passage of the Administrative Rule Making Act in 1973, a process was established for collecting and compiling administrative rules through a central state agency – today's Division of Administrative Rules.

All of the resources listed below are available at the Division of Administrative Rules and the Utah State Archives (the Archives). Unless otherwise indicated, the Division of Administrative Rules has the hard (or paper) copies of the resources and the Archives has microfiche copies.

Researchers should contact the Division of Administrative Rules to make an appointment to use their resources. The Archives has a public research room available. Information about hours of operation can be found on their website located at http://archives.utah.gov/index.html.

Follow the steps below when researching 1973–1985 rules:

- **Check the index card files, also called the card catalog.** The cards are organized by type of rule – either proposed or adopted – and within those categories they are organized by agency, and then by date.
- **Check the Rules Register.** The Rules Register, also called the Rules Filings Register, is a chronological list of rule changes. Checking this list requires scanning every page for the time period you are interested in to see if there are any listings for the agency you are researching.
- **Check the Utah State Bulletin.** The table of contents to the Utah State Bulletin lists rules by type and agency.
- **Use the file number(s) found in the above resources to find the rule filings on microfilm.**
- **Check the agency files for additional information, such as hearing minutes.** Some agencies are more likely to have information about their rulemaking process than others. For example, the Public Service Commission and the Tax Commission are more likely than the Department of Health to have additional information.

1987–Current Rules

In 1987 the UAC was completely reorganized, renumbered, and recodified. Researching rules after this recodification is much simpler than in previous years.

To trace the history of an administrative rule, consult the **annotated** administrative code and locate the history information provided after the text of the rule. The history information helps you determine when language was added to or deleted from the rule. The history information will also help you find the rule as it appeared before the version you are consulting. For example, the history information for rule 501-13-18 of the UAC is as follows:

Code Version	**History Information for R501-13-18**
UAC (Online)	Date of Enactment of Last Substantive Amendment April 15, 2000 Notice of Continuation November 5, 2007
UAC Annotated	History: 13692, NEW, 12/15/92; 14195, NSC 03/01/93; 20213, 5YR, 11/07/97; 22661, R&R, 04/15/2000; 25625, 5YR, 11/07/2002; 30678, 5YR, 11/05/2007.

The online (unannotated) version of the UAC provides only partial history information whereas the history notes from the annotated UAC contain abbreviations, which convey the following information:

- The rule was originally enacted in 1992. The number preceding the abbreviation is the file number;
- There was a nonsubstantive change to the rule in 1993;
- There was a notice of continuation after a 5-year review in 1997;
- The rule was repealed and re-enacted in 2000;
- There was a notice of continuation after a 5-year review in 2002; and
- There was a notice of continuation after a 5-year review in 2007.

In most cases the history line from the annotated UAC provides a complete history of the rule from its enactment (if 1987 or later) to its current version. However, rules can be renumbered, or repealed and re-enacted, and these actions are not always reflected in the history notes. If you think the rule existed before

the stated enactment date, consult superseded volumes.

Abbreviations used in *Utah Administrative Code Annotated* history notes

AMD	Amendment
CPR	Change in Proposed Rule
EMR	Emergency or 120-Day Rule
EXD	Expired Rule
EXP	Expedited Rule
EXT	120-Day Extension for Five-Year Review Filing
NEW	New Rule
NSC	Nonsubstantive Change
PRO	Proposed Rule (new or amended)
REP	Repeal
R&E or R&R	Repeal and Enact Repeal and Reenact
5YR	Notice of Continuation After Five-Year Review

A complete description of these abbreviations is provided before the Index of Changes, which is published in volume 10 of the UAC.

Utah Administrative Code

The UAC contains the regulations of all Utah agencies, arranged by department, board or commission, and then by title number. The UAC was completely recodified in 1987, and partially recodified in 1992. The UAC was not published in 1998 or 1999.

Effective 2003, the official version of the UAC, Utah State Bulletin, and Utah State Digest are published on the Division of Administrative Rules website.

Places to find the UAC:

- Utah's Law Libraries
  Unannotated UAC, 1987–1997
  Annotated UAC, 2000–present
- The Division of Administrative Rules
  Unannotated UAC, 1987–1997
  Annotated UAC, 2000–present

- Utah State Archives
  Series 83623, 1973–present

  According to the State Archives website, holdings prior to 1987 are "somewhat sporadic," and coverage is not complete. There are codes for 1974, 1976, 1977, 1980, 1981, and 1982.

- Division of Administrative Rules' Website
  1995–present

- LexisNexis
  2004–present

- Westlaw
  Current code (database: UT-ADC)

  Historic (2002–) (database: UT-ADCXX, where XX is the 2-digit year designator).

Utah State Bulletin

The Utah State Bulletin (the Bulletin) includes proposed rules, rule analyses, notices of effective dates, and review notices. It also includes public notices, and Governor's executive documents. It is Utah's equivalent to the Federal Register. The Bulletin became an exclusively online publication in 2003.

The print of the Bulletin has gone by various titles:

Utah Administrative Rule Making Bulletin (1973–1977);

State of Utah Bulletin (1978–1985);

Utah State Bulletin (CodeCo, June 1985–June 1986); and

Utah State Bulletin (Division of Administrative Rules,1985–2003).

Online:

- The Division of Administrative Rules' website
  http://www.rules.utah.gov

  1996–present http://www.rules.utah.gov/publicat/bulletin.htm

- LexisNexis
  1998–present

Utah State Digest

The Utah State Digest (the Digest) is a summary of the information found in the Bulletin. The primary difference between the Bulletin and the Digest is that the Digest does not contain the text of administrative rules or other documents. The Digest became an exclusively online publication in 2001.

Utah State Digest, 1985–2001 (print)

Utah State Digest, 1994–present (online), http://www.rules.utah.gov/publicat/digest.htm

OTHER DIVISION OF ADMINISTRATIVE RULES PUBLICATIONS

- Rulewriting Manual for Utah (1984–present; irregularly published)
  The Rulewriting Manual for Utah was originally a one-stop reference for administrators and rule writers. It contained an explanation of administrative law and administrative rulemaking, provided a brief history of rulemaking in Utah, and discussed the role of the legislature in reviewing agency rulemaking.

  Beginning in 2006, the Division of Administrative Rules began transitioning the Rulewriting Manual for Utah into three separate manuals:

  – Rulewriting Manual for Utah: Administrators, containing much of the information regarding rulemaking history and law in Utah, as well as the role of the Legislature. Not yet published.

  – Rulewriting Manual for Utah: Rulewriters, containing the style section and a brief discussion on certain practical aspects of the rulemaking process. Current edition available at http://www.rules.utah.gov/agencyresources/manual.htm.

  – Rulewriting Manual for Utah: Rulewriting and eRules, a users' manual for the eRules software used for submitting rulemaking actions for publication. Not yet published.

- Utah Administrative Rules Table of Changes, 1992–1993 (print)
  Superseded by Utah Administrative Rules Index of Changes.

- Utah Administrative Rules Index of Changes, 1994–1997 (print), 1998–present (online), http://www.rules.utah.gov/publicat/rulesindex.htm.

- William S. Callaghan, Utah Rulemaking: A Progress Report, 1985 (print).

- Administrative Rules Affect You! 1996 (print).

Division of Administrative Rules Records

Administrative rules index card files, 1973–1987

The index card file tracks the actions taken on each rule. The cards include code number, rule title, date filed, hearing date, and other information relating to the promulgation of rules. Held by the Division of Administrative Rules; microfiche copy

available at the Utah State Archives, Series 84550.

Administrative rules files, 1973–current. These files are the official copies of the administrative rules/proposals. Held by the Utah State Archives, Series 7192.

Nonsubstantive rule change files, 1987–1989. These files are the official copies of proposed changes to administrative rules/proposals. The files included in this series are only those proposals that do not alter the meaning of the existing rule but may serve to correct typographic errors or make slight language changes. Held by the Utah State Archives, Series 23021. This series was merged with "Administrative rule files" (Series 7192) in 1990.

Rules filings register, 1973–present. The rules filings register is a chronological list of rules submitted by state agencies as required by statute. The Utah Administrative Rulemaking Act requires the Division of Administrative Rules to "make the register, copies of all proposed rules, and rulemaking documents available for public inspection." Utah Code Ann. § 63G-3-402(1)(c) (2008).

- Paper copy (1973–present) held by the Division of Administrative Rules
- Microfiche copy (1973–1990) held by the Utah State Archives, Series 84327
- Online (2002–present) available on the Division of Administrative Rules' website at http://www.rules.utah.gov, select Research, Administrative Rules Register.
- The Rules Register from 1985–2001 are available in an electronic format (WordPerfect 5.1) at the Division of Administrative Rules but are not available online.

Research Guides

Division of Administrative Rules
http://rules.utah.gov/research.htm

Utah State Archives
http://archives.utah.gov/research/guides/admin-rules.htm

Thanks to Ken Hansen and Mike Broschinsky at the Division of Administrative Rules for their review of this article.

Workers' Compensation & Liability Lawyers Beware:

Section 111 of the MMSEA Imposes Significant New Penalties for Failing to Protect Medicare's Interests

by Mark Popolizio and Carrie T. Taylor

The following serves as an "update" to the information contained in an article published in the *Utah Bar Journal,* January, 2009, Vol. 22, No. 1.

As noted in the article, the Center for Medicare & Medicaid (CMS) is currently in the process of releasing its Mandatory Insurer Reporting (MIR) guidelines to implement the provisions of Section 111 of the Medicare, Medicaid & SCHIP Extension Act (MMSEA).

Subsequent to the preparation of the January article, CMS released its *"Revised" Interim Record Layout (12/5/08 Version)*. In addition, CMS held its fourth national "Town Hall" teleconference on January 22, 2009, which was followed by a "Question and Answer" session on January 28, 2009. CMS released this information in relation to Section 111 compliance regarding "liability insurance (including self-insurance), no-fault insurance and workers' compensation," which is collectively referred to under the MIR as "Non-Group Health Plans" (non-GHP or NGHP).

The authors provide the following update reflecting the new information:

"Revised" Interim Record Layout (12/5/08 Version)
The *"Revised" Interim Record Layout (12/5/08 Version)* amends CMS' *"Updated" Interim Record Layout* released in November 2008. The *Revised Layout* serves as CMS' *current* operating directives regarding the data fields and information that must be "captured and reported" under Section 111, along with amended written directives regarding same.

The following provides a non-exhaustive summary of key aspects of the *Revised Layout:*

- CMS revised and expanded the data fields for reporting outlined in the data layout replica contained on pages 15-77 of the *Revised Layout.*
- CMS provided additional information regarding the definition of the term "Responsible Reporting Entity" (RRE) and the use of Agents under Section 111.

  Under Section 111, determining exactly what party is the RRE is important as said party is the entity ultimately responsible for complying with Section 111. CMS discussed this concept in general and provided information regarding certain specific situations, including self-insured entities where payment of the deductible is made through the insurer; multiple defendants, RREs in bankruptcy; and situations involving reinsurance, stop loss insurance, excess and umbrella insurance, guaranty funds, and patient compensation funds. (*Revised Interim Record Layout* at p. 3-5).

MARK POPOLIZIO is the Vice President of Customer Relations for NuQuest/Bridge Pointe. He previously practiced law for ten years concentrating in the areas of workers' compensation defense and insurance defense litigation. Mark served as Vice President of the National Alliance of Medicare Set-Aside Professionals (NAMSAP) from 2006 to 2008. He remains active with the organization concentrating on educational and legislative matters.

CARRIE T. TAYLOR is a shareholder with Richards, Brandt, Miller & Nelson. Her practice focuses primarily on counseling and representation of employers and workers' compensation insurance carriers before the Labor Commission of Utah and Utah appellate courts.

- CMS reiterated that RREs may use Agents for reporting under Section 111 but that the RRE remains ultimately liable for proper Section 111 compliance. Furthermore, CMS restated that even if a RRE will use an Agent, the RRE must still complete and file the required initial registration under the MIR. (*Revised Interim Record Layout* at p. 5).

- CMS outlined several technical aspects of its reporting and submission requirements as contained under the subsections entitled *High Level File Submission Rules for Section 111 Reporting and General Requirements for File Submission* contained in the *Revised Interim Record Layout* at p. 5-6 and p. 6-9, respectively.

- CMS provided very detailed information regarding when an RRE is required to place Medicare on notice and submit the required information under the subsection entitled *What Triggers Reporting?* found at p. 9-14 in the *Revised Interim Record Layout.* CMS' "reporting triggers" are an important aspect of Section 111 compliance.

  In general, reporting under Section 111 is triggered upon (i) claim resolution (partial resolution) via a settlement, judgment, award or other payment on or after July 1, 2009, and (ii) situations where "the RRE has accepted Ongoing Responsibility for Medical payments," including claims for which "the RRE still has responsibility for ongoing payments for medical services as of July 1, 2009, regardless of an initial resolution (partial resolution) date prior to July 1, 2009."

  Discussion of the numerous and detailed directives regarding the "reporting triggers" is beyond the scope of this update. However, two directives of particular note involve "closed" or inactive files and claims pre-dating 12/5/80.

  With respect to files that a RRE may consider administratively "closed" or inactive due to inactivity or a return to work, CMS indicated that the RRE may still be considered to have "ongoing responsibility for medicals" if the claim is "subject to reopening or a further request for payment." In this instance, the RRE is required to report the case to CMS and would be precluded from filing a "termination report." (*Revised Interim Record Layout* at p. 13).

  CMS also addressed claims predating 12/5/80, which is the enactment date of the Medicare Secondary Payer Statute (MSP). With respect to workers' compensation claims predating 12/5/80, CMS indicated that same are within the ambit of Section 111 as Medicare has been

secondary to workers' compensation since the inception of the Medicare program in 1965. With respect to liability (including self-insurance) and no-fault, CMS indicated that reporting would not be required under Section 111 if the date of incident as defined by CMS was prior to 12/5/80. (*Revised Interim Record Layout* at p. 12-13).

CMS' Town Hall teleconferences January 22, 2009 & January 28, 2009

Following the release of the *Revised Layout,* CMS held national Town Hall teleconferences on January 22, 2009 and January 28, 2009.

The most significant new policy announcement made by CMS at the teleconferences was the introduction of a direct "Query Access" system in the NGHP context to assist RREs determine a claimant's Medicare entitlement status.

While Section 111 requires a RRE to "determine" a claimant's Medicare entitlement status, it does not provide a process to be followed to make such determination; nor does it provide an implied consent provision allowing a RRE to request this information or require a claimant to execute an authorization allowing the RRE to obtain this information. Accordingly, a legitimate concern has been raised regarding the likely situation where a RRE's efforts to determine Medicare entitlement status are thwarted by a lack of cooperation on behalf of the claimant and/or his or her counsel, inability to locate the claimant, or other reasons. In these situations, determining Medicare entitlement status may be difficult or impossible.

In response to this potential problem, CMS announced the establishment of an NGHP "Query Access" system. CMS advised the industry that the exact written directives governing the NGHP "Query Access" system will be contained in the forthcoming *NGHP User Guide* targeted for release sometime in February, 2009.

In the interim, CMS orally provided the following information regarding the key operating features of the forthcoming *NGHP Query Access* system:

- The system will be essentially "identical" to that utilized in the Group Health Context (GHP) area, with the exception that CMS will not provide as much information as is provided in the GHP context.
- CMS will issue HIPPA compliant (HUW) software to be used.
- Queries may be made on a monthly basis per RRE ID number(s).
- Testing of the system will commence on 7/1/09, which is also the start date of the general data exchange testing period under the MIR as previously announced.
- The system is basically designed to operate as a "single access" system; that is, it will accept a request from only one authorized party as part of the monthly request system. Thus, while a RRE and Agent may both have access to the system depending on account set-up, only one query file will be processed per month. CMS stated further that the RRE remains responsible for the "conditions and use" of the information obtained from the system.
- To obtain a Medicare entitlement status, the following information must be submitted:
  - Social Security Number (The SSN is the key required element)
  - Name
  - Date of Birth
  - Gender

If there is a "match" between the information submitted and the records contained in the Social Security Administration (SSA), CMS will issue a "response file" containing the applicable HICN number identifying that person as a Medicare beneficiary which should be used for reporting. However, the basis for entitlement or date of entitlement will not be provided due to privacy reasons. Likewise, information regarding whether the claimant has applied for social security disability (or the status of any such application) will not be provided.

CMS stressed that a "non-match" return should *not* be viewed as CMS"' confirmation" that the individual is not a Medicare beneficiary; rather, only that there was not a match "based on the information submitted." On a related note, a question was raised as to whether CMS would establish a "safe harbor" for RREs in situations where an RRE was unable to obtain a claimant's social security number (SSN). The question being whether CMS would establish safe harbor provisions if an RRE was unable to obtain the SSN after meeting a defined level of effort and activity. In response, CMS only indicated that it was still considering establishing a "model form" to assist in determining a claimant's SSN.

CONCLUSION

The foregoing provides updated information regarding Section 111 and CMS' MIR guidelines as of early February, 2009. The authors again remind the reader that the MIR process remains a "work in progress," and it is likely that certain information outlined herein may be modified (and in some cases even nullified) upon CMS' release of subsequent information either in writing through updates to the Interim Record Layout and the forthcoming NGHP User Guide, or via oral proclamation as part of CMS' several upcoming "Town Hall" teleconferences.

Accordingly, it is recommended that all interested parties regularly consult CMS' dedicated Section 111/MIR website at http://www.cms.hhs.gov./MandatoryInsRep for all pertinent updates. In addition, the authors welcome inquires and may be contacted as follows:

Mark Popolizio, J.D.; mpopolizio@nqbp.com; 786-457-4393.
Carrie Taylor, J.D.; carrie-taylor@rbmn.com; 801-531-2000.

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- Clarifies professional identity
- Increases advancement rates
- Promotes greater recognition and visibility
- Encourages career opportunities within the organization

New Lawyer Training Program

2009 Annual Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2009 Annual Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession. Award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org, no later than Friday, April 17, 2009. The award categories include:

Judge of the Year;
Distinguished Lawyer of the Year; and
Distinguished Section/Committee of the Year.

NOTICE

The Bar recently filed a Contempt of Court action against a long time violator of the Authorization to Practice Law rule. Mary Ann Lucero took money from "clients" on the pretense of being a licensed attorney. She represented herself as an attorney, used a business card identifying her as a "legal representative," frequently took money, and promised legal services, portions of which she actually performed. A hearing was held in late November 2008, and Ms. Lucero failed to appear because she could not be located. After a hearing with a sworn witness, the court found Ms. Lucero in contempt. She was sentenced to 90 days in jail and ordered to pay restitution to her "victims" and the Bar's attorneys fees. A bench warrant was also issued. Ms. Lucero's location remains unknown at this time.

Notice of Legislative Rebate

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

Pro Bono Honor Roll

Andres Alarcon – Family Law Clinic
John Anderson – Family Law Clinic
Nicholas Angelides – Senior Cases
Ken Ashton – Tuesday Night Bar
Justin Ashworth – Family Law Clinic
Thomas Barr – Guadalupe Clinic
Lauren Barros – Family Law Clinic
Mike Black – Tuesday Night Bar
Ryan Bolander – Tuesday Night Bar
James Brady – Adoption
Bob Brown – Tuesday Night Bar
Bryan Bryner – Guadalupe Clinic
Jeffrey Colemere – Habeas Corpus Case
David Cook – Bankruptcy
Ian Davis – Guadalupe Clinic
Mark Emmett – Bankruptcy
Anthony Famulary – Custody/Tribal Case
Stacy Ford – Family Law Clinic
Lorie Fowlke – Wage claim
Herbert Gillespie – Divorce/Tribal Case
Kathryn Harstad – Guadalupe Clinic
April Hollingsworth – Guadalupe Clinic
Kyle Hoskins – Farmington Clinic
Mark Kittrell – Tuesday Night Bar
Louise Knauer – Family Law Clinic
Dixie Jackson – Family Law Clinic
John Johnson – Habeas Corpus Case
Michael Langford – Guadalupe Clinic
Elizabeth Lisonbee – Family Law Clinic
Ramona Mann – Custody Case
Jennifer Mastrorocco – Family Law Clinic
Craig McArthur – Protective Order
James Morgan – Guadalupe Clinic
William Morrison – Bankruptcy
Rich Mrazik – Tuesday Night Bar
Rachel Otto – Guadalupe Clinic
Carolyn Pence – Family Law Clinic
Christopher Preston – Guadalupe Clinic
DeRae Preston – Family Law Clinic
Stewart Ralphs – Family Law Clinic
Anthony Rippa – Habeas Corpus Case
Brent Salazar-Hall – Family Law Clinic
Tom Schofield – Tuesday Night Bar
Lauren Scholnick – Guadalupe Clinic
Kathryn Steffey – Guadalupe Clinic
Brian Stewart – Family Law Clinic
Shawn Stewart – Tuesday Night Bar
Steve Stewart – Guadalupe Clinic
Linda F. Smith – Family Law Clinic
Virginia Sudbury – Family Law Clinic
Jory Trease – Bankruptcy
Steve Vuyovich – Tuesday Night Bar
Kenneth Wallentine – Adoption
Tracey Watson – Divorce Case/Family Law Clinic
Daniel Widdison – Habeas Corpus Case
Amanda Wilcox – Family Law Clinic
Camille Williams – Adult Guardianship
Matthew T. Williams – Family Law Clinic
John Zidow – Tuesday Night Bar
Attorney General's Office – Tuesday Night Bar
Fabian & Clendenin – Tuesday Night Bar
Holland & Hart – Tuesday Night Bar
Holme Roberts & Owen – Tuesday Night Bar
Kirton & McConkie – Tuesday Night Bar
Parr Brown Gee & Loveless – Tuesday Night Bar
Parsons Behle & Latimer – Tuesday Night Bar
Snell & Wilmer – Tuesday Night Bar

Mandatory CLE Rule Change

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

Rule 14-404. Active Status Lawyers

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

Mail List Notification

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

Licensing Department
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

Casemaker 2.1 – New tools, New Federal Libraries, New Services, New Look

Since 2004, Casemaker has provided the Utah State Bar (Utah Bar) members with free, unlimited access to legal research. From case law to codes to federal materials, Casemaker has become one of, if not the, most valued member benefit. And it is now better.

Over the last six months, several Casemaker Consortium States have been working with Casemaker to create and release a new version of the program. Casemaker 2.1, which is currently available in its beta phase to Utah Bar members, is more user-friendly, faster, and comprehensive than the current 2.0 version.

Users will see improvements to the interface, search tools, search format, and content. The final Casemaker 2.1 will far exceed any and all of its nearest competitors. Here's a sneak peek:

Stationary Bar Logo
Your Utah logo is located at the top left corner of your screen. This logo is stationary and will "follow" you no matter where you search on Casemaker. This logo is linked to http://www.utahbar.org.

Advanced Search Box
Several changes have been made to the advanced search box that will improve ease of use and search options.

The Case Name and Citation radio buttons have been removed within Case Law. You will now place either citation within the designated "Cite" field box and/or a case name within the designated "Case Name" field box.

Proximity and Word Form dropdown boxes have been removed from the advanced search box in all books (Case Law, General Statutes, Administrative Code, etc.). Using shortcuts, you may now utilize both of these functions in ALL search fields.

Search Tips
Within Casemaker 2.1, you will have access to a detailed search tips form. Located below each search box (in all libraries and books), is a listing of the various search functions that are available on Casemaker. These search functions are listed with descriptions and examples so that you can quickly and easily learn how to run relevant, high-level searches.

Casecheck
The Casecheck citator tool now features future cases from not only the state in which the original case is from, but also any federal court and/or other states that have cited the case.

Parallel Citations
You may enter either the state citation or the regional citation into the Cite field box. Both citations will produce your case. Regardless of which citation is searched, the case will be given as a result using the primary citation. For example, if you use a Utah citation within the Cite field box, the case will appear in your results page using the Pacific citation (Note: both citations will appear on the top of the case once a result is chosen).

New! Bread-Crumb Trail Navigation
An exploration trail is located under the dark blue navigation bar. This "bread-crumb trail" navigation indicates which state library you are searching, which book, whether you are "searching" or "browsing," results, and particular document. The bread-crumb trail navigation lets you know where you are within Casemaker, where you have been, and to easily navigate back for search modifications.

Coming Soon! CaseKnowledge
CaseKnowledge is a brand-new tool to Casemaker 2.1. CaseKnowledge provides downloadable secondary publications for your case law searches. To utilize CaseKnowledge, first run a search. Once your results are displayed, you will see, on the right side of your screen, CaseKnowledge. This search engine will provide Utah state publications (when available), ABA publications, and HeinOnline publications. All of the publications are available for purchase. Once purchased, the document is downloaded and stored to your computer. In addition to having access to secondary material at the exact point in time that it is needed, you will also have access to our CiteLink. CiteLink hyperlinks all state and federal case law citations within a publication back to Casemaker. By simply clicking on the link within your purchased document, you are taken to the exact location in Casemaker where the case is located. In the future, statutes will also be added to CiteLink.

New! Print Functions

Casemaker 2.1 provides various print formats, including HTML, .pdf, and Word. **Dual-column** printing is available in both .pdf and Word formats. By using the "Print" link on the webpage, all hyperlinking and highlighting of search terms will be removed for a clean copy of the document. The final version of 2.1 will also provide the ability to email a document.

New! Additional Federal Library Books

Casemaker has added eight new books to the Federal Library, including: *Court of International Trade, National Transportation and Safety Board (NTSB) Decisions, Court of Appeals – Armed Forces, Court of Appeals – Veterans Claims, Board of Immigration Appeals, Tax Court, Court of Claims, and Internal Revenue Service (IRS) Rule Filings.* Within the next several weeks, *Occupational Safety and Health Administration (OSHA) and Federal Mine Safety* will also be loaded into the library.

New! MultiBook Search

One of the most exciting new tools to arrive to Casemaker is MultiBook search. The MultiBook search tool will provide you with the option of searching all books within a library simultaneously. By selecting the MultiBook link on, for example, your Utah library page, a page listing all books within Utah appears, along with a search box. Once a search is inputted, the number of documents within each book is displayed on the left side of the screen. By choosing a desired book, you will see the specific results appear on the right side. Each set of results will be placed in separate windows so that you may easily peruse all book-results separately.

Coming Soon! Live Chat

Soon you will be able to connect to a live Casemaker Customer Support Representative via live chat. Available Monday through Friday from 8am-5pm EST, you will be able to ask questions and receive assistance from trained representatives in real-time.

Additional Casemaker Services

Casemaker-Medical: Casemaker-Medical links legal professionals to over 13 million documents located in the National Institute of Health's online database. Using conceptual search technology, Casemaker-Medical has the ability to identify and retrieve information based on concepts and ideas. Casemaker-Medical is a subscription product available to members of the Utah State Bar. Please visit http://medical.casemaker.us to learn more and to enroll in our free 30-day trial.

CasemakerX: One of Casemaker's newest products, CasemakerX connects law students attending ABA-accredited law schools to attorneys across the nation. Attorneys using the CasemakerX product may post jobs related to internships, pro-bono case assistance, and/or first-year associates positions. Utah attorneys may also search the CasemakerX database for students that fit their criteria. CasemakerX is a free product offering unlimited access. Access to CasemakerX is available at www.utahbar.org.

Casemaker, in partnership with your Utah State Bar, is constantly working to improve its libraries, tools, and content in order to maintain Casemaker as the most valuable member benefit. Your input is important to the development and future of Casemaker. Casemaker 2.1 Beta is currently available on http://www.utahbar.org and you are encouraged to take it for a "test-drive." You and your involvement are invaluable to the final version of 2.1. Let us know what you think! If you have any questions or want to receive your Casemaker login and password please email casemaker@utahbar.org. If you would like to learn more about Casemaker, download the latest Casemaker user guide and "cheat sheet," or sign up for a free Casemaker training webinar, please visit http://www.utahbar.org/casemaker/

We look forward both to hearing from you and to the future success of Casemaker 2.1.

Clarification

In a previous edition of the *Bar Journal,* a Notice of Petition for Reinstatement to the Utah State Bar for Charles C. Brown was published. He should not be confused with Charles T. Brown or former Bar President Charles R. Brown who are licensed and in good standing.

Attorney Discipline

PUBLIC REPRIMAND

On November 26, 2008, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Roy D. Cole for violation of Rules 1.8(a) (Conflict of Interest: Current Clients: Specific Rules), 1.15(a) (Safekeeping Property), 1.15(d) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Cole was hired by a client that gave Mr. Cole Power of Attorney entrusting items of personal property to Mr. Cole. Mr. Cole accepted property from his client without the proper safeguards in place; without keeping records; and without keeping the client's property separate from his property. Mr. Cole did not provide an accounting which was full, accurate, and timely to his client. Mr. Cole failed to take steps to protect his client's interests upon termination of the representation.

SUSPENSION

On November 26, 2008, the Honorable David L. Mower, Sixth District Court entered an Order of Discipline: Suspension for one year against Stony V. Olsen for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 1.5(b) (Fees), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Olsen was hired to represent a client's interests in a bankruptcy action by objecting to the debtors' discharge on the basis of fraud. Mr. Olsen was paid $1000. Mr. Olsen failed to provide his client with written notification of the basis or rate of his fee. Mr. Olsen attended the creditors' meeting but did not file the objection. Mr. Olsen did not inform his client that he did not file the objection and of the subsequent discharge. After the client received the notice from the bankruptcy court, the client attempted to reach Mr. Olsen but was not immediately successful.

Later, Mr. Olsen filed a lien against the debtors' property on behalf of his client even though the debtors had filed a bankruptcy action and their obligations had been discharged. The debtors' counsel sent a letter to Mr. Olsen and his client informing them that the lien was improperly filed and demanded its release. Mr. Olsen's client was at first unsuccessful in reaching him regarding the lien. Mr. Olsen did finally release the lien but did not return unearned attorney fees.

SUSPENSION AND PROBATION

On November 19, 2008, the Honorable Randall N. Skanchy, Third District Court entered an Order of Discipline: Suspension of two years and Probation of one year against Russell S. Hathaway for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.4(a)(2) (Communication), 1.4(a)(3) (Communication), 1.4(a)(4) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 1.15(b) (Safekeeping Property), 1.16(a) (Declining or Terminating Representation), 3.2 (Expediting Litigation), 3.4(c) (Fairness to Opposing Party and Counsel), 3.4(d) (Fairness to Opposing Party and Counsel), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

Lawyer Referral Directory

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.

In summary there are six matters:
The six matters involved representation in two post divorce matters; two civil matters; a civil litigation matter; and a Qualified Domestic Relations matter. In the Qualified Domestic Relations matter, Mr. Hathaway did nothing after approximately seven months of representation.

In the divorce matters, Mr. Hathaway had inadequate communication with his clients; he had none in one case and a failure to notify of discovery requests in the other case. He also failed to respond to the discovery requests and motion to compel in the one divorce case.

In the two post divorce matters he was less than diligent in his work on the cases and his communication with the clients. In one case he sent a demand letter to the defendant's wrong address and after having issues with an assistant, which affected his communication with clients and representation; he ceased work on the case; returned the file to the client but failed to return the retainer. In the second post divorce case, Mr. Hathaway mailed a demand letter but failed to communicate to the client on the status of anything else subsequent, including the failure to give an accounting.

In the civil litigation matters, Mr. Hathaway failed to file a counterclaim or answer in the case; failed to respond to discovery and failed to notify his client about the subsequent order compelling discovery and judgment for attorney fees. Mr. Hathaway's client learned of a Default Judgment entered in the case from the client's subsequent attorney.

In four of the six matters, Mr. Hathaway failed to timely respond to the Office of Professional Conduct's Notice of Informal Complaint.

CLARIFICATION
There are two Bruce Nelsons licensed with the Utah State Bar. In the last edition of the *Bar Journal,* the attorney discipline listed a Public Reprimand for Bruce L. Nelson, not to be confused with Bruce J. Nelson who has not been disciplined.

Utah State Bar Request for 2009–2010 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more of 17 different committees which participate in regulating admissions and discipline and in fostering competency, public service and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name_____Bar No._____

Office Address_____Telephone_____

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

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

_____

_____

_____

_____

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

Committees

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

Detach & Mail by June 30, 2009 to:
Stephen Owens, President-Elect
645 South 200 East • Salt Lake City, UT 84111-3834

"and Justice for all"

27th Annual Law Day 5K Run & Walk

presented by Bank of the West

May 2, 2009 • 8:00 a.m.

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

Celebrating Lincoln's Bicentennial

"of the People, by the People, for the People"

REGISTRATION INFO: Mail or hand deliver completed registration to address listed on form (registration forms are also available online at www.andjusticeforall.org). **Registration Fee:** before April 20 -- $22 ($10 for Baby Stroller Division), after April 21 -- $25 ($12 for the Baby Stroller Division). Day of race registration from 7:00 a.m. to 7:45 a.m. Questions? Call 924-3182.

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

DATE: Saturday, May 2, 2009 at 8:00 a.m. Check-in and day-of race registration in front of the Law School from 7:00 - 7:45 a.m.

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

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

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

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

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

RECRUITER COMPETITION: It's simple, the organization who recruits the most participants for the Run will be awarded possession of the Recruiter Trophy for one year and air transportation for two on **JetBlue Airways** for non-stop travel between Salt Lake and New York or any California city. To become the 2009 "Team Recruiter Champion," recruit the most registrants under your organization's name. Be sure the Recruiting Organization is filled in on the registration form to get competition credit.

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

SPEED INDIVIDUAL ATTORNEY COMPETITION (Sponsored by Workman Nydegger): New for this year, in addition to the overall top male and female race times recognized, the top male and female attorneys with the fastest race times will be recognized. To enter, an individual must fill in their State Bar number in the space provided.

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

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

REGISTRATION - "and Justice for all" Law Day 5K Run & Walk - presented by Bank of the West
May 2, 2009 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

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

First Name: _____ Last Name: _____

Address: _____

City, State, Zip: _____

Birth Date: _____ Phone: _____ E-mail Address: _____

OPTIONAL COMPETITIONS (Registrations must be received by April 20, 2009 to be entered in any of these):

Recruiting Organization:	Speed Competition Team:	Speed Individual Attorney:
_____	_____	_____
(must be filled in for recruiters' competition)	(team name)	(Bar number)

Shirt Size (please check one)

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

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

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

Baby Shirt Size (*baby stroller participants only*)

❒ 12m ❒ 18m ❒ 24m ❒ Child XS

DIVISION SELECTION (circle only one division per registrant)

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

☐ *Please check here if you do not wish to be timed during the walk/ run.*

Payment

Pre-Registration *(before 04/20/09)*	$22.00
Baby Stroller *(add $10 per baby)*	$10.00
Long sleeved t-shirt	$ 6.00
Tank top	$ 6.00
Charitable Donation to "and Justice for all"	$_____
TOTAL PAYMENT	$_____

Payment Method

❒ Check payable to "Law Day Run & Walk"

❒ Visa ❒ Mastercard

Name on Card _____

Address _____

No. _____ exp. _____

RACE WAIVER AND RELEASE: I waive and release from all liability the sponsors and organizers of the Run and all volunteers and support people associated with the Run for any injury, accident, illness, or mishap that may result from participation in the Run. I attest that I am sufficiently trained for my level of participation. I also give my permission for the free use of my name and pictures in broadcasts, video, web, newspapers, and event publications. I consent to the charging of my credit card submitted with this entry for the charges selected. I understand that entry fees are non refundable. **I agree to return the timing transponder and its attachment device to an appropriate race offical after the race. If I fail to do so, I agree to pay $95.00 to replace the timing transponder and attachment device.**.

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

_____ _____

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Utah State Bar
2009 Summer Convention
July 15–18 • Sun Valley, Idaho
Accommodations Information

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

SUN VALLEY LODGE: (single or double occupancy)

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

SUN VALLEY INN: (single or double occupancy)

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

DELUXE LODGE APARTMENTS & WILDFLOWER CONDOS:

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

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

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

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

RESERVATION DEADLINE: This room block will be held until May 28, 2009. After that date, reservations will be accepted on a space available basis.

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

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

ADDITIONAL HOUSING OPTIONS: Additional condominiums/rooms are available through the following companies. *Please indicate you are with the Utah State Bar when calling.*

- **Best Western Kentwood Lodge –** Ketchum, (208) 726-4114/(800) 805-1001. *First come, first served*
- **Clarion Inn, Ketchum –** (208) 726-5900/(800) 4CHOICE; $129.00; *Room block–30*
- **Knob Hill Inn, Ketchum –** (208) 726-8010/(800) 526-8010; $275.00; *Room block–10*
- **Premier Resorts –** (800) 635-4444; (15% discount). *First come, first served*
- **Resort Qwest Sun Valley –** (800) 521-2515; (15% discount). *First come, first served*

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

Nominations for 2009 Paralegal of the Year

The Paralegal Division of the Utah State Bar and the Legal Assistants Association of Utah are now accepting nominations for the 2009 Paralegal of the Year award. Each year this award recognizes an individual who represents excellence in our profession, and it will be presented this year at the Paralegals' Day luncheon on May 21, 2009. **The deadline for nominations is April 20, 2009.** Nomination forms and additional information are available at the Paralegal Division's new website, http://www.utahparalegals.org, or you may contact Suzanne Potts at spotts@clarksondraper.com.

Change in Paralegal Division Membership Renewal Dates

Beginning in 2009, the Paralegal Division of the Utah State Bar will change its membership renewal period from June 1st – 30th to May 1st – 31st, to better accommodate the processing of our applications through the Bar. Please be aware, however, that the annual membership activation date remains July 1st, and that our membership year continues to run from July 1st – June 30th. Thank you for your continued support, and look for your membership packages to arrive this spring!

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
03/12–14	**2009 Spring Convention in St. George**	Up to 9 incl. up to 2 hrs. Ethics, up to 3 hrs. NLCLE
03/18/09	**The Basics of Family Law – Part 2.** 11:45 am – 1:00 pm. Cost: $15 per session. The focus of this 3 part CLE series is to assist attorneys who volunteer at legal clinics. All attorneys wanting to increase their knowledge of basic family law are welcome.	1
03/26/09	**NLCLE: Wills & Trusts.** 4:30 – 7:45 pm. Pre-registration: $75 YLD members, $90 others. Door registration: $80 YLD members, $100 others.	3 CLE/NLCLE
04/15/09	**The Basics of Family Law – Part 3.** 11:45 am – 1:00 pm. Cost: $15 per session. The focus of this 3 part CLE series is to assist attorneys who volunteer at legal clinics. All attorneys wanting to increase their knowledge of basic family law are welcome.	1
05/28/09	**NLCLE: Criminal Law.** 4:30 – 7:45 pm. Pre-registration: $75 YLD members, $90 others. Door registration: $80 YLD members, $100 others.	3 CLE/NLCLE
06/12/09	**New Lawyer Required Ethics Course.** Registration: 8:15 am. Seminar: 8:30 am – 12:30 pm. This course is required for attorneys admitted prior to 2009 and fulfills your first compliance term ethics requirement. If you are admitted to practice in 2009 do not register for this class. You are subject to the New Lawyer Training Program (NLTP) and an ethics program will be made available to you in August.	Fulfills Ethics requirement for new attorneys admitted prior to 2009
06/25/09	**NLCLE: Personal Injury.** 4:30 – 7:45 pm. Pre-registration: $75 YLD members, $90 others. Door registration: $80 YLD members, $100 others.	3 CLE/NLCLE
07/15–18	**2009 Summer Convention in Sun Valley, Idaho**	TBA
09/24/09	**NLCLE: Family Law.** 4:30 – 7:45 pm. Pre-registration: $75 YLD members, $90 others. Door registration: $80 YLD members, $100 others.	3 CLE/NLCLE
10/29/09	**NLCLE: Business Law.** 4:30 – 7:45 pm. Pre-registration: $75 YLD members, $90 others. Door registration: $80 YLD members, $100 others.	3 CLE/NLCLE
11/13/09	**Fall Forum**	TBA
12/16/09	**NLCLE: Litigation.** 9:00 am – 12:00 pm. Pre-registration: $75 YLD members, $90 others. Door registration: $80 YLD members, $100 others.	3 CLE/NLCLE

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

Classified Ads

RATES & DEADLINES

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

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

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

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

OFFICE SPACE / SHARING

Executive Office Space in South Bountiful. $250/month – utilities and internet included, beautifully remodeled and easy on/off access to I-15. One upper office with a window view and five lower offices. Please visit www.druproperties.com or call 801-397-2223 for more information.

The prime, second story office suite of the Salt Lake Stock and Mining Exchange Building overlooking historic Exchange Place through floor to ceiling windows is now available for lease and includes seven separate office spaces with reception/secretarial area and individual restrooms – $5,000 per month. Also available, one large, main floor office 16' x 28' – $800 per month. Unsurpassed tenant parking with free client parking next to the building. Contact Richard or Michele at 534-0909.

POSITIONS AVAILABLE

Hansen Wright Eddy & Haws is looking for an associate/ partner to join its team. The firm has recently moved into a new spacious professional suite in north Utah County and is looking for a skilled and motivated attorney. Applicants for this position must have at least five years of legal experience. Additionally, the applicant must have an established client base. Hansen Wright Eddy & Haws provides a generous benefit package with this position. To apply or for more information, please contact Shusti at (801) 443-2380 or sdallin@centralutahlaw.com.

Growing Utah County firm seeks attorney with 2-3 years experience. Full time position with excellent benefits and great work environment. Salary DOE. Come see why the Deseret News voted our firm "Best in Legal Services 2008." Must be a member of the Utah State Bar. Please send resume to cardosol@provolawyers.com.

Salt Lake Legal Defender Association is conducting interviews for trial and appellate attorney positions. Eligible applicants will be placed on a Hiring Roster for present and/or future openings. Salary commensurate with criminal experience. Spanish-speaking applicants are encouraged. Please contact Patrick L. Anderson, Director, for an appointment at (801) 532-5444.

Dental malpractice trial attorney sought. Retired lawyer has malpractice case pending in Summit County which is prepared and ready for trial but doesn't want to act as his own trial attorney. Depositions have been completed, including that of expert witness. Seeking experienced trial attorney in the dental malpractice field. 435-655-3200

SERVICES

Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics: Consultant and expert witness. Charles M. Bennett, 257 E. 200 S., Suite 800, Salt Lake City, UT 84111; (801) 578-3525. Fellow, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.

Paralegals on Demand. Mark Solo Service, a division of Mark & Associates Litigation Support, has paralegals and law clerks available to assist solo practitioners and small firms on any size project in any specialty of law. Legal research, organizing documents, drafting pleadings, retrieving public records, creating trial presentations or assisting at trial – our experienced staff is ready to jump in at moment's notice. Call (801) 531-1723 or email info@markandassociates.com to find how employing contract paralegals can increase the profitability of your firm.

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