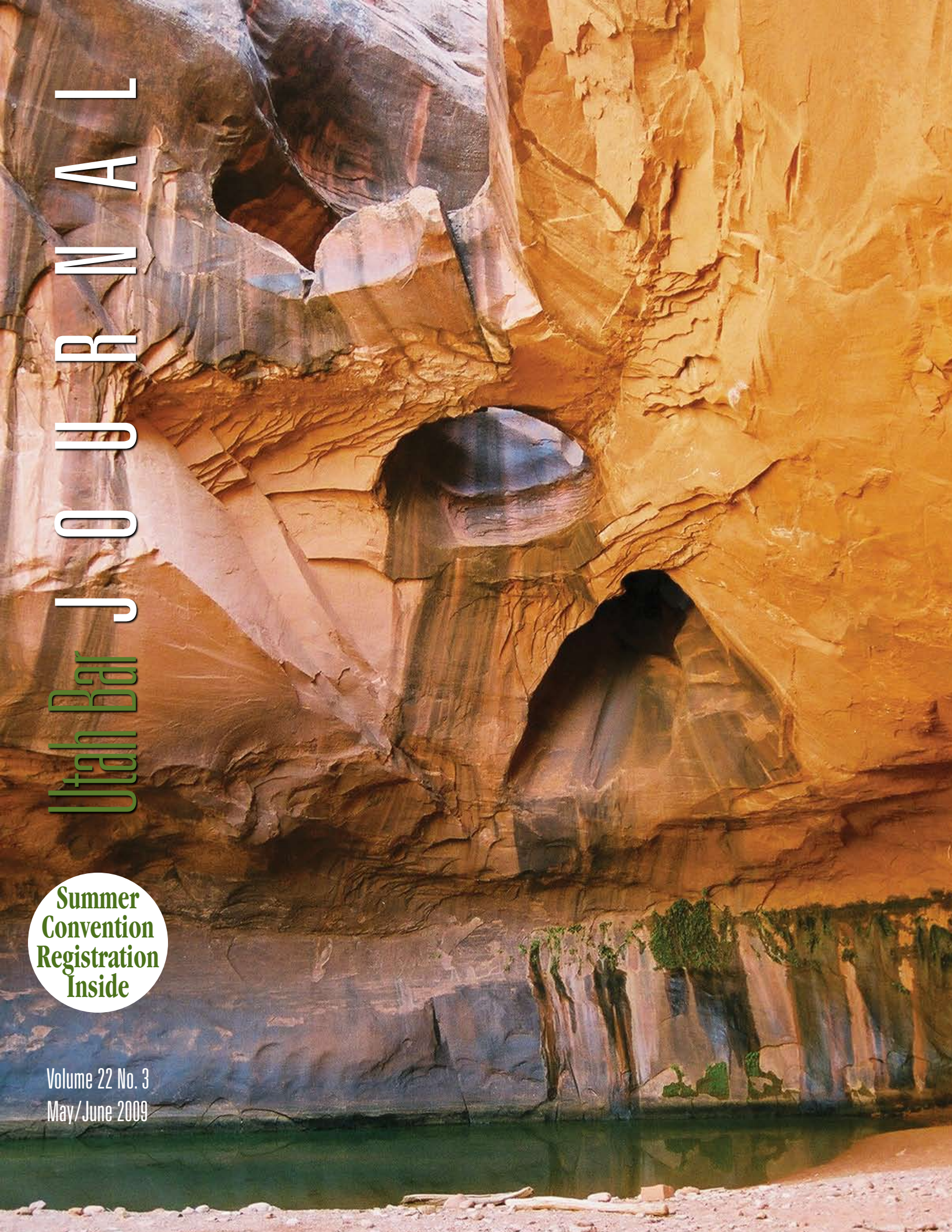

Utah Bar JOURNAL

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Volume 22 No. 3
May/June 2009

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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 head shot 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.

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Letters to the Editor

Dear Editor,

Recently, there was a *Bar Journal* article critical of the legislative process arising out of the appeal of a justice court traffic case: *West Jordan City v. Goodman,* 2006 UT 27, 135 P.3d 874. The appeal failed primarily because the "briefing on the constitutional claim was inadequate," *id.* ¶1, and the defendant "failed to offer any probative evidence in support of his conflict of interest claim." *Id.*

The perceptions raised in *Goodman* resulted in SB 72 in the 2008 Legislative session. Two significant and material changes came from SB 72. First, justice court judges are no longer subject to termination by their sponsoring entity (city or county), but are now subject to retention elections every six years. Justice court judges are now appointed in a manner very similar to district, juvenile, and appellate court judges. Second, there was a compromise reached regarding a formula for a justice court judge's salary based on a weighted caseload.

With regard to the criticism that justice court judges don't have to have a college degree, there are quite a few absolutely brilliant people who have only a high school diploma. Conversely, there are quite a few not-so-brilliant people with college degrees.

With regard to the conviction rates in justice courts, ninety percent or more of the defendants are self represented and make the determination of their guilt on their own, at the arraignment.

With regard to the fact that citations generate revenue, judges don't write citations, police officers do. Traffic laws are going to be enforced and revenue collected no matter what form justice courts take. The bottom line is that justice courts continue to perform exemplary service to the State of Utah.

Joseph M. Bean
Syracuse City Justice Court Judge

Dear Editor,

Alicia Cook's letter in the January/February *Bar Journal* is a good object lesson in the distinction between ethics and civility. Although in Salt Lake County the criminal bar enjoys a high degree of professionalism on both sides of the podium, no one who has practiced for long can deny that over the years there have been occasional ethical indiscretions by cops, prosecutors, and yes, even defense attorneys, which have prejudiced the opposition. Based on Ms. Cook's letter, however, complaining about unethical conduct by your opponent after the fact appears to be considered a violation of the rules of civility.

In addition, it is important to note that Ms. Cook makes a significant logical error. She takes Mr. Dellapiana's comment that "more than one" prosecutor has acted in a less than ethical manner, and then unjustifiably asserts that Mr. Dellapiana "chose to impugn an entire group" and "maligned" them all, including herself, and that they "did not deserve the treatment they received" in the book review. Ms. Cook's glittering overgeneralization constitutes an unfair attack on a man who is as dedicated and professional as any attorney I know, and seems itself to violate the rules of civility. And, Ms. Cook's suggestion that Mr. Dellapiana report those unnamed individuals to the bar for discipline will fall on deaf ears. Defense attorneys aren't inclined to snitch, not even on prosecutors.

Finally, those who read Mr. Dellapiana's book review will understand that his introductory commentary actually related to the content of the book. The book's author is a former federal prosecutor, who admitted that he used threats and tricks to get convictions, but eventually grew disgusted about what he saw, and what he did, and so became a law professor who teaches his students about the importance of ethics and justice.

David Mack
Trial Attorney, Salt Lake Legal Defender Association

Engage in Mentoring

by Nathan D. Alder

I recently attended a Litigation Section CLE luncheon where moderator Jon Hafen asked veteran members of the Bench and Bar to describe the influence of mentors on their early careers. It was a very nice discussion. Then he asked panelists to consider how their legal careers would have turned out had they not had mentors available to them. It was a hypothetical, of course. Given how panelists responded to the first question, the answers to the second question became readily apparent – mentors are invaluable.

To establish a successful career in the law, one should seek, find, and engage mentors who can help you as a new, younger, or maturing lawyer to set the right course, avoid pitfalls, and develop an excellent reputation. If you are new, younger, or learning, please find mentors. Regardless of your practice area, and notwithstanding your work setting (e.g., solo, small firm, larger firm, government, corporate, institutional, etc.), you would be wise to access the wisdom that is available from veteran members of our Bar. I encourage you to find mentors both at your place of employment as well as outside of it.

This premise assumes that those willing to mentor will make themselves available to those who seek their mentoring. Fortunately, Utah is an environment where veteran members of our Bar believe in mentoring, have benefited from such relationships, and are willing to engage as mentors themselves. For those of us who feel we have something to share, whether because we directly benefited from mentor relationships or we are in a position to now help teach the pillars of the profession to a new lawyer, it is time to give back and help someone who is just starting out. You will be appreciated for this, I promise. I encourage you to engage in these relationships. Be a mentor.

In December, the Utah Supreme Court approved the New Lawyer Training Program (NLTP) that is now being implemented for new 2009 admitees. The program is mandatory for new lawyers. It replaces classroom CLE for the first year with a more effective one-on-one format. The NLTP is court-led and bar-administered. The Bench and Bar now seek mentors who will serve the profession by taking this formal court-approved opportunity to more informally guide a new lawyer through a carefully designed and highly effective first year CLE program. More information about the program is available at www.utahbar.org/nltp. At that page of the Bar's website you will find resources and materials, including a video highlighting members of our Bar, about the program. I encourage you to call me if you have any questions or concerns. You may also contact Matty Branch, Appellate Court Administrator; John Baldwin, Bar Executive Director; any NLTP Committee member, including Co-Chairs Rod Snow and Margaret Plane; any Mentor Training Resource Committee member, including Co-Chairs Annette Jarvis and Jeff Hunt; or any Bar Commissioner, for the same purpose. We are here to assist you as you become a mentor.

Utah's program is modeled after Georgia's highly successful program that was started ten years ago; Georgia's program receives excellent reviews every year from both mentors and new lawyers. I recently spoke with the former president of the Georgia Bar who implemented the program. She is excited for us that we, too, will have this tremendous program to benefit Utah lawyers.

The Utah Supreme Court will appoint those who are qualified and willing to serve as mentors. The program requires over 500 mentors. If you are reading this and saying "I should do that," then do it. Join us. I know you will enjoy it. Judge Tacha of the Tenth Circuit has just trained the first group of court-approved mentors. There will be additional training in the months ahead. Truly, I am honored to be president at this time and to ask you to serve with me and our colleagues in this important endeavor.

And now in my own way, I want to attempt to answer the questions Jon Hafen posed in that luncheon. I will answer without identifying my mentors. I believe they know who they are, and frankly there are too many to properly highlight in the space remaining here. I hope they know how much I truly appreciate them. For those of you who know me, and have heard me speak about mentor relationships in my career, you know how personal my feelings are about these good people. I have collected mentors in a variety of settings – at my firm, outside my firm, from the bench, as well as from opposing counsel in hotly contested cases, and from committees and

boards where we are able to work closely together. In particular, I benefited from mentoring relationships right out of law school when I was most impressionable, scared to death, didn't really know any lawyers in Utah, and had a lot of questions. My very first mentor is one of Utah's greatest advocates for the mentoring concept and has taught mentoring to others and has served as a mentor most of his career. Indeed, he designed much of his career around training new lawyers. Hundreds of lawyers credit him for their success, as I do. How fortunate for me to have found him. I have also chosen to keenly observe many lawyers in action, take note of their skills, talk with them, take them to lunch, and try to emulate their good work while finding my own path. Some of my mentors are quite patient, as they listen to me with some regularity. Others send an email, stop me on the street, call for a moment or two, or offer an encouraging word or a piece of advice. I cannot adequately thank my mentors, nor can I properly highlight here all of their goodness and generosity.

To me, the most important part of these mentoring relationships is the relationship itself. That I have gained insight, practical knowledge and even life-enhancing wisdom from them, as well as enjoyed stories, humor and good times, yes, these are certainly great parts of these wonderful relationships. For me, just knowing that there is a group of individuals who care about me and want me to succeed is a truly empowering feeling. Climbing onto their shoulders, I have gained confidence, captured a vision of my own worth in the profession, and been able to launch. In their honor, I wanted to share some of their imparted wisdom.

- When you first learn of another attorney's involvement in a case, call and say hello, make a personal connection; tell them you look forward to working with them.
- Treat others' staff well; treat your own staff well.
- Show interest in all parties, not just your own client.
- Personal grudge matches are not productive.
- Remember we are all human. Mistakes happen.
- Always consider opposing counsel to be an important asset in the case.
- It is not polite to literally point fingers, particularly in mediation.
- Elitism breeds problems.
- Don't go home and be a lawyer with your family; they want you, not the lawyer.
- Your stress should not automatically be others' stress, too.

- Reduce drama; focus on the cold, hard facts.
- It may be personal for some involved, but it does not have to be personal for you.
- Realize that the worst day you've had as a lawyer is 100% better than what most of the world experiences.
- Be grateful to be engaged in service.
- Find your calling and follow it.
- Avoid embarrassing another lawyer.
- Lawyers lead and maintain order in society.
- Understand what Shakespeare really was trying to say about lawyers.
- Don't embarrass the Bench or Bar by falling below standard.
- Address the judge and seek leave at all times when in his or her courtroom, for, as one judge told me, "I am not a potted plant."
- Along those lines, always provide the judge copies of what you are referencing.
- Offering to mediate is not a sign of weakness.
- Work on issues as a team, despite differences, and find unifying concerns.
- Offer second chances.
- Forgive.
- Be the first to re-establish communications.
- Have fun.
- Don't take yourself too seriously.
- Realize that someone may have a personal crisis; we all will at some point in time.
- Travel together for out of town work; arrange itineraries together.
- Find ways to communicate off the case.
- If you find a good airfare, share it early with others.
- Offer to buy lunch; opposing counsel will reciprocate down the road.
- Your career experiences in the law are more of a fellowship than a fight.
- What goes around comes around.
- Courtesy and civility are far superior to the alternatives.
- Lawyers may think they know it all, but they don't.
- Serve in the Bar.
- There is no substitute for hard work and preparation.
- Non-lawyers want and need to know that lawyers are real people, too. Don't be condescending; be real.
- Lawyers need to earn trust just like any other person on the street.
- Intimidation is not appreciated nor is it likely to be productive.
- In trial, never pass up an opportunity to visit the restroom.
- Eat a small, manageable lunch during trial.
- If you think you've got a final version of a brief or memorandum, try to take out another 10%.
- Seek out others to read your final version before submitting it.
- Find a way to improve an aspect of our profession; volunteers are needed.
- Avoid criticizing one who volunteers to help.
- Concede your weakest argument; focus on your best.
- Start negotiating early, whether your opponent knows it or not. Don't close off negotiations.
- Abraham Lincoln was right about who the true winners are in litigation.
- If you mediate, put the case in the mediator's hands.
- Avoid the nasty-gram.
- Re-read your email before you push send.
- Get with the times, buy a Blackberry (told to me by a 60-year-old mentor).
- You actually can control your Blackberry; it does not control you. Blackberries can and should be turned off from time to time.
- Don't be afraid to tell someone you'll get back to them after you've thought it over.
- Apologize if you've made a mistake.
- Don't just blame your secretary if something goes wrong.
- Your personal life is the most important part of your life.
- Stress can and should be managed.

I'm still taking the advice of those closest to me. I'm still learning. Yes, I'm still making mistakes, too. But know that I have truly benefited from wonderful mentor relationships. I very much look forward to serving the Bench and Bar by becoming a court-appointed mentor to a new lawyer in the NLTP. I encourage you to join me in this great endeavor.

Confessions of a Litigator: The Surprising Benefits of Mediation

by Michael Goldsmith

In 2004, the Boston Globe ran a story suggesting that lawyers nationwide, increasingly frustrated and depressed by "win-at-any-cost legal work," yearned for less confrontational ways to resolve disputes. The article extolled the virtues of adopting a more "holistic" approach to law practice instead of the usual "slash and burn" litigation model. However, despite widespread job dissatisfaction within our profession, this call for more enlightened conflict resolution largely went unheeded. Today slash and burn litigation remains the norm.

As a law professor, I recognized the benefits of giving more emphasis to human values and collaborative methods for solving disputes in legal education. But as a trial lawyer, I viewed skeptically any approach to litigation that suggested weakness in my client's position. I struggled with this inner conflict until my work on a hotly contested civil rights action produced a litigation epiphany: **Mediation does not necessarily signal weakness; to the contrary, it may allow results that victory at trial could not have produced.**

Like most epiphanies, this one did not come easily. I represented a family whose elderly father had been wrongfully prosecuted for murdering his wife. Despite acquittal at trial in 1996, the ordeal exhausted his savings, wreaked havoc on his family, and probably hastened his death. When he and his family learned that a highly questionable autopsy report and false statements had led to the charges against him, they filed a civil rights action. After the family retained me in 2000, we became consumed in expensive discovery and extended motion practice. Eight years later – after two successful appeals to the Ninth Circuit – we still had not gone to trial when opposing counsel asked me to advance by six months the previously scheduled court-ordered mediation session.

Despite their expenses, my clients by now had begun to enjoy the prospect of prevailing through a scorched-earth trial strategy that would have revealed that the defendants had engaged in a pattern of civil rights violations. Of course, I was acutely aware that our case also had weaknesses; surviving summary judgment, I explained, did not guarantee success at trial – far from it. Moreover, given the parties' adversarial postures, the case would likely consume many years of appeals regardless of who won at trial.

My clients agreed to mediate after we conducted a mock trial in which the jury awarded them far less than the seven figure sum our complaint requested. Surprisingly, the mediation succeeded beyond our expectations. In part, this occurred because the mediation process defused tensions between parties who had been demonizing each other for more than a decade. But it also occurred because our experienced mediator gave both sides a serious reality check. In meticulous fashion, he identified evidentiary and other obstacles we would have to overcome at trial. He never pushed, preferring instead to highlight objective factors that realistically could not be ignored. And he was politely persistent, following up regularly (at the parties' request) after the initial mediation session produced a stalemate.

Ultimately, however, this supposedly holistic process produced ballistic results. My clients certainly compromised, but we obtained more compensation than our mock jury awarded and received non-monetary relief no court would have imposed. For example, the county defendant issued a formal apology, committed to establishing training programs to reduce the risk of future violations, and formally changed the public record to delete homicide as the cause of death. This actually was my clients' single most important concern: to vindicate their dad by removing all doubt about his innocence.

Of course, not all mediations will produce such outcomes. Indeed, this case was unique among the mediations in which I have participated as counsel. But all of those in which I participated produced results the parties could live with, saved years of expensive litigation, and allowed the parties to achieve closure.

MICHAEL GOLDSMITH holds the J. Woodruff Deem professorship at J. Reuben Clark Law School. He consults nationwide in a variety of criminal defense and civil litigation matters. He now serves as a Special Master for district of Utah federal court, and has recently started a mediation practice.

Judging the Judges

by Joanne C. Slotnik

In 2008, the Utah Legislature changed the way Utah's judges are to be judged. The judiciary's evaluative process, established for almost two decades and implemented by the Administrative Office of the Courts, had included a broad survey of attorneys and jurors, supplemented by an assessment of judge's compliance with education, judicial conduct, and case management standards. Beginning with judges standing for retention election in 2012, however, the evaluative process will become far more comprehensive and will be under the aegis of a newly-created and independent Judicial Performance Evaluation Commission (the Commission).

The new system of performance evaluation is governed by the Judicial Performance Evaluation Commission Act, *see* Utah Code Ann. §§ 78A-12-101, -206 (2008), which establishes a 13-member commission of lawyers and citizens, Republicans and Democrats, to oversee the process. The three governmental branches have each appointed four members, and the Director of the Commission on Criminal and Juvenile Justice completes the roster. The group meets at least monthly, with more subcommittee meetings than any of the members ever suspected when they agreed to serve.

Under the new system, the survey groups will be expanded to include litigants, witnesses, and court staff, and a courtroom observation program will be created. The Commission will prepare a written report on each judge from the data it gathers and will vote on whether to recommend each judge for retention. Public comment will be encouraged, and a website will provide easy access for members of the public to discover how each judge fared in the evaluation process.

Fortunately, the Commission is not starting from scratch. In addition to continuing a survey of attorneys and jurors and certain other objective measures of performance, the judiciary's system of dividing a judge's term into two evaluation cycles (or three cycles for supreme court justices) will be retained. Data gleaned from the first cycle will be available both to the judge for performance improvement purposes and to the Administrative Office of the Courts for judicial education purposes. Data from the second evaluation (or third for supreme court justices) will provide the primary basis for the Commission's retention election report and recommendation.

The Commission is now well into the rulemaking process and is simultaneously working to finalize questionnaires for all categories of survey respondents. The creation of a court observation program will follow. Here's where the Bar can help. If you know of questions on the current survey that do not get to the heart of the matters that concern you, or if you have questions that you think should be included or excluded, please contact the Commission's executive director. Constructive feedback and input – the more specific, the better – is most welcome.

The Commission is clearly a work in progress. It is moving ahead, feeling its way, and trying its hardest to create both a process and a product that will reflect the integrity that the Bar has come to expect in the judiciary at its finest. The Commission is committed to a fair process, one that will ensure judicial independence and at the same time provide the public with reliable information upon which to make informed voting decisions. The Commission will keep you posted as its work progresses.

Currently serving on the Commission are: John Ashton, William Bohling, Robert Fotheringham, Maria Garciaz, Thomas Hatch, Dave Lambert, Anthony Schofield, Douglas Short, Lowry Snow, David Turner, Russell Van Vleet, Jennifer Yim, and Ron Gordon.

JOANNE C. SLOTNIK serves as the Executive Director of the Judicial Performance Evaluation Commission.

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Looking at the Stars: Why Being a Lawyer Matters

by Gary L. Johnson

"We are all in the gutter, but some of us are looking at the stars."

Oscar Wilde, *Lady Wyndermere's Fan,* Act III (1891).

He was accused of being a criminal and a terrorist. His earlier writings had been ignored by the government, but his latest works were perceived as maliciously and wickedly intended to incite violence toward the government. Charges were brought and a criminal action was instituted.

It was not easy to find a lawyer for the defendant. Finally, one attorney stepped forward and was promptly told by his largest and most important client that he would lose that business if he continued the representation. The lawyer indicated his intent to proceed and was promptly fired by the client.

The terrorist was Thomas Paine. His offense was the publication of volume two of the *Rights of Man.* The lawyer who stepped forward to defend Paine was Thomas Erskine, eventual Lord Chancellor of Great Britain.

Erskine came from a family of limited means, and after finishing his preliminary education, spent time in the military. While on leave in England, Erskine attended the Assizes Court being held in a country town. The judge was none other than Lord Mansfield. The two ended up having dinner together that evening and, as a result, Erskine, at the age of 25, was entered as a student of Lincoln's Inn.

Erskine's abilities as a trial lawyer soon attracted many clients, one of which was the Prince of Wales, for whom Erskine was named attorney general. He had reached a level of success many of us strive for, but most fail to obtain.

When the prosecution of Paine began, a retainer for Paine was sent to Erskine, but he was urged by his friends and his biggest client, the Prince of Wales, to decline the engagement. When Erskine indicated he would continue the defense of Paine, numerous attacks were made upon him in various newspapers and the Prince of Wales removed him from his position.

In his closing arguments in defense of Paine (reprinted in Volume One of the *Speeches of Lord Erskine*), Erskine acknowledges to the jury the contempt in which he was held by many for accepting the case. In a few short words (which, if I had my way, I would make every newly admitted lawyer commit to memory), Erskine sets forth the fundamental principles which guided his action:

> I will forever, at all hazards, assert the dignity, independence, and integrity of the English bar, without which, impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend, what he may think of the charge or of the defense, he assumes the character of the judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel.

Erskine goes on to passionately defend Paine and set forth a principled basis for the liberty of the press and, indeed, for the liberty of an individual to seek "to change the public mind by the conviction which flows from reasonings dictated by conscience." At the end of Erskine's closing, however, the jury foreman indicated to the prosecuting attorney general that a reply was not necessary for them, the attorney general sat down, and the jury gave their verdict on the spot: guilty.

Erskine's explanations to the jury for why he felt compelled to defend Paine are as important today – if not more important – than they were in the time of Erskine. Large corporations and local, state, and federal governments are more powerful now than ever. The independence of the judiciary is under attack from all quarters. The independence and integrity of the bar, and the willingness of lawyers to step forward to provide representation to unpopular

GARY L. JOHNSON is the managing attorney in the Salt Lake City, Utah law firm, Richards Brandt Miller Nelson. The views expressed in this article are solely those of the author.

defendants, and for unpopular causes, still serves as one of the cornerstones for the maintenance of freedom in this country.

As a group, we lawyers have become conditioned to hear public entertainers – even our own friends and neighbors – vilify us in jokes and anecdotes. Question: "What is a hundred lawyers at the bottom of the ocean?" Answer: "A good start." No one, not the doctors, not the accountants, and not our friends and neighbors, is going to stand up for us. We have to start doing it for ourselves.

This nation was founded upon the principle of the rule of law. My personal statement of the rule of law is that the protections and prohibitions of our judicial system should apply with equal force to all citizens regardless of their economic status, religious beliefs, gender status, gender preference, or racial identity. As our society has grown more complex, so has the plethora of statutes and laws that regulate it. It is lawyers who are the guides for the maze that is the American legal system. For our service as guides, we are well compensated. We have access to the courts, to judges, to politicians, and to business leaders. With this wealth and influence, however, our profession must also recognize that certain responsibilities are imposed upon it. One of those responsibilities is the promotion of the rule of law.

There used to be a variety of different social institutions to which our fellow citizens could turn to help them resolve disputes. There were any number of different ethnic, economic, religious and political institutions within which members could work out solutions to conflicts in their everyday lives. For better or for worse, the evolution of modern commercial society has led us to the 21st Century in which such alternative dispute mechanisms are diminished, even if non-existent. More and more people turn to the civil justice system as the only method by which they decide their differences.

Because of this societal transition, lawyers have played, and will continue to play, a central role in the functioning of modern commercial life. It is the actions of individual lawyers, in drafting equitable contract terms or in bringing lawsuits, that protect our citizens from abusive commercial practices. It is lawyers who stand between the small business owner and the exercise of raw power by the abusive government bureaucrat. It is lawyers, in honoring their oaths and in paying homage to the history of our noble profession, who represent those among us whom the majority disdain and whom we would just as soon have silenced.

I know we hear more and more that the practice of law is a business. I know we hear that, because I have been among those in my own firm who have preached the liturgy of profitability and productivity.

But we must not confuse the means of a successful practice with the ends of our professional goals and aspirations. We must remember that as lawyers, our activities are circumscribed by an ethical code of conduct not imposed on the ordinary business person. When each of us made the decision to become a practicing attorney, we expressly embraced the notion that a certain moral framework would both serve as an inspiration for our impulses and constrain our appetites.

We are one of the last of the great professions. We are self-regulating. We are well compensated. This autonomy and wealth comes at the price of some service to the society in which we live. Benjamin Cardozo told us that "[t]he final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence." The Nature of the Judicial Process 66 (1921).

One of the founding members of my law firm, William S. Richards, used to have a business card that had beneath his name the phrase: "Attorney and Counselor at Law." Bill didn't think much of our new business cards, which had dropped from our description the adjective "Counselor." He advised me that it was not simply my job to help my clients accomplish their goals, but – and of equal importance – it was my job to tell my clients when I thought they were making mistakes or were just plain wrong. Lawyers, Bill would tell me, are not just technicians or servants, but are professionals whose job it is to provide an independent evaluation to their clients.

When was the last time you sat around with your partners or other attorney friends and discussed what it means to be a "good lawyer?" I know how to measure dollars-in-the-door. I know how to measure work origination and work distribution. Those factors, however, cannot become the sole criteria for our success, or the legal profession will surrender any claim as a force for good in our society. We must begin, as a profession, an internal dialogue among ourselves about all of the attributes that lawyers should demonstrate in our practice of the law.

I acknowledge that the competitive nature of the present legal marketplace has made it an imperative for all law firms to watch the bottom line. We have to be profitable or risk losing our star performers. Law firms have business plans and lawyers have personal marketing plans. We advertise and participate in beauty contests. None of us is exempt from this; we are all of us in the gutter.

We can all, however, still look to the stars. If, as a profession, we fail to do so, then we will become irrelevant. If we fail to honor the great traditions of our profession, if we forget lawyers like Erskine, then we will continue to suffer disdain and disrespect. If we forget that being a lawyer matters, then we relegate ourselves to an ignominious corner on the back porch of history.

Are Medical Records Now Off Limits? An Examination of Sorensen v. Barbuto

by S. Grace Acosta

If defense attorneys seeking medical records have noticed a dramatic increase in the objections to subpoenas and medical releases, this is likely due to the recent supreme court opinion of *Sorensen v. Barbuto,* 2008 UT 8, 177 P.3d 614. *Barbuto* is a case that has mistakenly been interpreted by some as making medical releases and disclosure of medical records beyond the reach of discovery. *Barbuto* is neither as broad as some claim nor should we want it to be as broad as it has been touted.

A SUMMARY OF *SORENSEN V. BARBUTO*

In July 1999, Sorensen suffered brain and back injuries in a car accident and was treated by Dr. Barbuto for approximately eighteen months afterwards. When Sorensen ultimately filed suit regarding the accident, the insurance defense team contacted Dr. Barbuto and had *ex parte* communications with the doctor. Ultimately, the defense hired Dr. Barbuto to act as its expert. Once Sorensen learned that the defense had made contact with one of his treating physicians, Sorensen successfully moved to exclude Dr. Barbuto's testimony from evidence. After that litigation was completed, Sorensen filed suit against his former doctor alleging that the doctor had breached his duty of confidentiality by discussing the case with the defense attorney.

In defense of his actions, Dr. Barbuto argued that Utah Code section 78-24-8(4) permitted him to "'provide information, interviews, reports, records, statements, memoranda, or other data relating to the patient's medical condition.'" *Id.* ¶ 7 (quoting Utah Code Ann. § 78-24-8(4) (2002)). However, the Utah Supreme Court concluded that Rule 506 of the Utah Rules of Evidence controlled, not section 78-24-8(4). *See id.* ¶ 8.

Rule 506(b) sets forth a general rule of privilege and Rule 506(d) provides exceptions to that privilege for "communication relevant to an issue of physical, mental, or emotional condition," Utah R. Evid. 506(d)(1), that is an "element of any claim or defense," *id.* The court has clearly stated that "[R]ule 506(d)(1) is a limited waiver of privilege, confined to court proceedings, and restricted to the treatment related to the condition at issue." *Barbuto,* 2008 UT 8, ¶ 10 (emphasis omitted).

The court also determined that a physician's duty of confidentiality applies even in circumstances where there has been a waiver of privilege pursuant to Rule 506(d)(1). *See id.* ¶ 17. The court clarified that even if a Rule 506(d)(1) waiver has been given, the physician's duty of confidentiality is still in place and prevents that physician from disclosing information to a patient's friends, family, employers, or any other third party. The waiver only applies to the litigation itself, and there is no universal waiver of confidentiality simply because a patient decided to litigate a dispute. The court clarified that a physician's duty of confidentiality requires that the physician "notify[] the patient prior to disclosure." *Id.* ¶ 16. The court stated, "'[b]efore disclosing confidential records or communication in a subsequent litigation, a physician or therapist should notify the patient. Even if the communications may fall into [Rule 506(d)(1)'s] exception to privilege, the patient has the right to be notified of the potential disclosure of confidential records.'" *Id.* (second alteration in original) (quoting *Debry v. Goates,* 2000 UT App 58, ¶ 28, 999 P.2d 582). Thus, a physician may disclose privileged information to third parties, but may only do so if there has been a waiver of the privilege pursuant to Rule 506(b)(1) and must notify the patient prior to the disclosure. None of these pronouncements were novel or new and were, instead, a reaffirmation of existing Utah law.

However, *Barbuto* did rule for the first time that it violated a physician's duty of confidentiality for a treating physician to have *ex parte* communication with defense counsel during litigation. *Barbuto* was careful to only prohibit *ex parte* communication between the attorney and the physician.[1] The court did, however, direct that lawyers must confine their communication with a physician or therapist who has treated the adverse party to formal discovery methods. *See Sorensen v. Barbuto,* 2008 UT 8, ¶ 27, 177 P.3d 614. Thus, despite claims otherwise, formal discovery methods are still available in cases involving doctor-patient communications.

S. GRACE ACOSTA has been with the law firm of Dunn & Dunn P.C. since 2005. She practices primarily in the area of insurance defense but does some domestic and plaintiff work as well. Ms. Acosta is the Utah Minority Bar Association's president-elect.

The court was careful to point out that the opposing counsel could obtain information from treating doctors via traditional discovery methods, stating as follows:

> Given our analysis and holding above, it is important to emphasize the fact that opposing counsel is not foreclosed from obtaining relevant medical information from a treating physician. Such information may still be obtained through traditional forms of formal discovery. Our holding should not be construed as putting the patient in control of what medical information is made available to opposing counsel and what is kept private. Making this information available through formal methods of discovery strikes a balance between enabling the patient to protect confidential medical information that has no relevance to the civil action and providing the patient's adversary access to information that is relevant to a condition placed at issue in the case.

Id. ¶ 24. Accordingly, the adverse party is allowed to subpoena medical records from treating physicians and is allowed to ask that treating physicians bring copies of their file with them to depositions. If the subpoenaing party complies with Rule 45(b)(3) of the Utah Rules of Civil Procedure and advises opposing counsel of their intent to obtain such records via subpoena, then the patient should have sufficient time and opportunity to voice an objection to the production of medical records. *See* Utah R. Civ. P. 45(b)(3).[2] However, in an abundance of caution, medical providers may also want to notify the patient that medical records have been requested and advise them that such records will be produced.

In reality, *Barbuto* modified Utah law minimally. The only new law is that the court clarified that attorneys are not allowed to communicate directly with an adversary's treating physician without either the court or opposing counsel being present (or with their consent). Despite the limited holding of *Barbuto,* it has been greatly exaggerated and broadened by some members of the bar.

HOW BARBUTO HAS BEEN DISTORTED

Myth #1: Defense Attorneys Are not Entitled to Collect Their Own Medical Records.

Some have argued that defense attorneys are not allowed to collect their own set of plaintiff's medical records and that "defense attorneys are only entitled to examine the medical records provided to them by the plaintiff's attorney." Brent Gordon, *Extending Barbuto: No More Medical Releases or Subpoenas,* Utah Trial Journal (Spring 2008). This is simply not true and is rebutted by the plain language of the *Barbuto* opinion itself, which states that "[o]ur holding should not be construed as putting the patient in control of what medical information is made available to opposing counsel and what is kept private." *Barbuto,* 2008 UT 8, ¶ 24.

Although it is true that irrelevant medical records are protected from disclosure, it is a mistake to claim that the plaintiff gets to determine unilaterally what is relevant and what is not relevant. If a plaintiff objects to medical records being produced, then the plaintiff must rely upon normal discovery procedures to prevent disclosure of such records.

A blanket objection to the defense obtaining its own copy of the patient's medical records will needlessly increase the cost of litigation and make the discovery process more contentious. Also, it should be remembered that there is a distinction between what is discoverable and what is admissible. If inadmissible information is discovered during litigation, a party may simply seek to have the information excluded at trial. This does not, however, entitle the party to prevent discovery of medical records.

Myth #2: A Narrow Medical Release or Medical Subpoena is More Effective.

Plaintiffs' counsel often criticize subpoenas and medical releases proposed by defense attorneys as being too broad. However, it

is naïve to think that the staff at medical facilities will take the time to analyze and evaluate a more specific medical release or subpoenas. Anyone who has subpoenaed medical records has no doubt encountered the problem of having subpoenas honored. A large percent of the time, records that are produced in response to even the broadest subpoena are incomplete.

Limiting the request for medical records to a certain body part or time period creates its own complications. Sending such limited subpoena or medical releases may require repeated telephone calls and disputes with the medical provider's staff who are unwilling to evaluate their own files so as to determine whether they are complying with the subpoena. In some instances, the restriction set forth in the more specific subpoena or medical release is either simply ignored or the medical provider responds that they cannot comply with the request at all. This may force subpoena of the medical provider's custodian of record and a page-by-page analysis of all the medical records before a court reporter at a dramatic increase in cost and time. In short, relying upon the medical provider's staff to accurately interpret and comply with a limited medical release or limited subpoena does not work.[3]

Another problem with requiring specific medical releases or subpoenas is that it is impossible for a defense attorney to know what records to request without first seeing the medical provider's file. Plaintiff's attorneys often demand that defense counsel identify "with specificity" the records sought from a certain medical provider and claim that any other request is little more than a "fishing expedition." This demand is unrealistic and ignores the purpose of discovery. Rule 26 of the Utah Rules of Civil Procedure permits discovery that is relevant and appears reasonably calculated to lead to the discovery of admissible evidence. I would argue that a request to a known medical provider for all medical records from five years prior to the date of an accident is permissible as it may lead to discoverable information.

For example, a patient claims a neck injury in a car accident and, responding to written discovery or at his deposition, discloses he was treated by Dr. Jones at a local clinic for all routine medical matters. Defense counsel should be able to subpoena Dr. Jones's medical records to determine whether the patient has ever complained of similar neck problems prior to the date of the accident. Also relevant is whether the patient advised this doctor of his injury, whether the neck injury interfered with other medical treatment he was receiving and the duration of the patient's complaints.

A plaintiff may also claim that a neck injury prevented him from engaging in certain activities. A review of the plaintiff's medical records may reveal whether another injury to a completely separate

part of his body was the actual cause of his limited activity. Defendant's counsel may not have any evidence regarding this injury unless counsel can review the entire medical record. It has been my experience that plaintiffs are often inaccurate medical historians for a number of reasons. Allowing only a limited medical release makes for an uneven playing field and affords defense counsel no opportunity to assess the veracity of a plaintiff's deposition testimony.

SOLUTIONS TO THE PROBLEM

If *Barbuto* were interpreted as broadly as some believe, the cost of personal injury lawsuits would increase exponentially. In cases where the plaintiff's damages justify a fight at every turn, the tactic of resisting any and all medical releases or medical subpoenas may make sense. However, in the average personal injury case where the stakes are $100,000 or less, the tactics suggested by some may not be cost effective or realistic.

There are several solutions to the "stalemate" that may arise between plaintiff and defense attorneys in regard to the production of medical records. They are as follows:

Produce Everything And Then Seek Motions *In Limine*

Discovery is intentionally broad and is designed to cast a wide net. A party to litigation is not only entitled to discover admissible evidence, but is entitled to discover evidence that is reasonably calculated to lead to the discovery of admissible evidence. It is presumed that much of what is collected during discovery will not be used at trial. If the parties cannot agree regarding a specific piece of information, then the party wishing to exclude the information from trial may file a motion *in limine* to exclude the information. This approach is more cost effective in that the parties can narrowly focus their disputes to specific pieces of information rather than blindly fight about records that one side has never seen.

Have the Parties Stipulate that Certain Topics Will Not Be Used at Trial

If a plaintiff is concerned that a specific aspect of the plaintiff's medical history may become public knowledge, e.g., diagnosis with AIDS, a genetic disease, or sexually transmitted disease, the plaintiff's counsel may simply approach opposing counsel and ask for a stipulation that evidence relating to this specific treatment or illness not be addressed during the case. The stipulation could be as narrow as the matter will not be raised before the jury or as broad as all records relating to the diagnosis will not be discussed during depositions or possibly even at the independent medical examination. If the diagnosis or treatment is truly not relevant to the injuries in dispute, I cannot imagine a defense attorney who would not entertain such a stipulation. Moreover, this is precisely the type of specific, narrow request that a court is equipped to address. This approach would be more cost effective and direct than simply objecting to medical releases or subpoenas from each and every medical provider who might mention this diagnosis or treatment.

Have the Records Produced to the Plaintiff Who Creates a Privilege Log

One resolution of this dispute is to have all subpoenaed documents produced directly to the plaintiff at plaintiff's own expense. Within a reasonable time (usually ten to fourteen days), the plaintiff then produces all the records to the defense (at a reasonable cost to the defendant) and also provides a list of the records that the plaintiff finds objectionable in the form of a privilege log.

The privilege log must provide sufficient specificity to allow the defense to meet and confer about why the document should or should not be produced and to file a motion to compel the document if the defense believes that doing so is worthwhile. This process will no doubt dramatically slow down the process of record collection and the discovery phase of any case will have to be expanded accordingly. The process is also time consuming for plaintiff, since it would require the plaintiff's counsel to evaluate hundreds of medical records that the plaintiff may not have reviewed otherwise. The feasibility of this suggestion rests entirely upon the professionalism of the parties involved, and plaintiff's counsel must take this task seriously and provide a reasonable privilege log.

Have Records Produced to a Third Party Who Creates a Privilege Log

Another possible solution to the problem is to select a neutral third party to review and analyze the medical records. Although this suggestion suffers from the same time delays and costs as the plaintiff reviewing the records it does provide the defense counsel with some sort of protection that the privilege log will be done properly. In smaller personal injury cases, hiring a third party to perform such tasks could be quite costly and may eat away at any recovery the plaintiff hopes to obtain. The parties will have to share the cost of this third party, decide upon the third party, and jointly define "relevance."

The neutral third party can be a mediator, arbitrator, retired judge, or any other person that the parties believe can be fair and impartial.

Have Records Reviewed By the Court

Finally, the parties could have the court review the various medical

records and determine whether the documents should be produced. This is the least workable of the alternatives because the courts are not willing to take on this task in each and every case. It would be permissible for the court to make rulings on specific sets of records in dispute, but it would be unrealistic for the parties to expect the court to resolve all medical record disputes. The parties would have to narrow these requests and would have to file briefs, etc. in support of their respective positions. This too would delay the discovery process and increase litigation costs.

BE CAREFUL WHAT YOU WISH FOR

Oftentimes plaintiffs' attorneys become so overly focused on protecting the rights of their clients and shielding them from perceived overreaching and abusive discovery techniques, that they fail to assess whether any such abuses are actually occurring. Most attorneys are simply trying to do their jobs. The purpose of discovery is not to harass, intimidate, or embarrass plaintiffs. Defense attorneys conduct discovery so that they can properly assess liability and value the damages (if any) that the plaintiff sustained. That is not to say that there are not the occasional "bad actors" who warrant hyper vigilance to keep them from harming your client. I am simply saying that the bad actor is more the exception than the rule.

Another detriment to fighting discovery and the free flow of information is that defense counsel, and perhaps most importantly, the claims adjuster will assume, perhaps incorrectly, that the plaintiff is hiding something. At some point plaintiff's counsel will ask the defense to write a check to compensate the plaintiff. Before an insurance company is willing to compensate a plaintiff for his damages, it will need to be satisfied that it was provided a fair opportunity to conduct necessary discovery. Frustrating discovery efforts by objecting to all medical releases does not further this goal and will delay, if not eliminate, settlement.

Those who believe that *Barbuto* is the end of medical releases and subpoenas should reconsider this position. After all, plaintiffs have the burden to prove their damages. Plaintiffs' attorneys should want opposing counsel to see and understand the injuries that their clients have suffered. Without the open exchange of such information, the adversarial process does not work and litigation will become more costly than it already is.

1. Communication between a lawyer's office staff and a physician's office staff for the purposes of checking on the status of responses to discovery, scheduling depositions, clarifying identification information, and other routine or procedural communication was not directly addressed, and it is the opinion of the author that such is not prohibited by *Barbuto*. Such communication is often necessary in order to effectuate responses to subpoenas or collect medical records with medical releases. In circumstances where an attorney does not have staff, it might be best if the attorney communicated in writing with the physician's staff or included opposing counsel in any discussions with the physician's staff regarding routine matters. Most counsel would understand that some form of communication with a physician's staff may be necessary in order to effectively move discovery along and would not object, but I would have a frank discussion with opposing counsel about this prior to taking any unilateral action.
2. Rule 45(b)(3) of the Utah Rules of Civil Procedure provides that the party who issues a subpoena directing a person to copy and mail or deliver documents or electronically stored information, "shall serve each party with notice of the subpoena by delivery or other method of action notice before serving the subpoena." In other words, prior to sending out any subpoenas, counsel needs to notify his or her adversary of the intent to send out the subpoena.
3. This is especially true in disputes regarding collection of records from a pharmacy. A pharmacy is not equipped to know the reason why a drug was prescribed. Thus, asking the pharmacy to produce only records related to a specific injury, disease, or body part is unworkable. The pharmacy has no way to make this determination.

Do Insurance Companies Buy Insurance?

by Mark Dykes

Yes. "Reinsurance" is "an insurance transaction where an insurer, for consideration, transfers any portion of the risk it has assumed to another insurer." Utah Code Ann. § 31A-1-301(140) (2005).

The Basics: Some Nomenclature

The insurer "transferring the risk" is the "ceding insurer," *id.* § 31A-1-301(140)(a), or more commonly, the "cedent." The "insurer assuming the risk" is the "assuming insurer," *id.* § 31A-1-301(140)(b)(i), or "assuming reinsurer," *id.* § 31A-1-301(104)(b)(ii), more commonly, the "reinsurer." Reinsurers can in turn cede portions of their risks to yet another insurer by "retrocession." The "retrocedent" here cedes business to the "retrocessionaire." *Id.* § 31A-1-301(143). In very complex, large risk situations, this process can continue through multiple levels of reinsurers and retrocessionaires.

The reinsurer and cedent share risks in different ways. In "proportional" or "quota share" arrangements, the cedent obligates itself to cede and the reinsurer obligates itself to receive an agreed portion of the risk; for example, 25% of all losses attributable to the cedent's builder's risk policies. Under a "non-proportional" or "excess-of-loss" treaty, the reinsurer's obligation does not engage until a loss within the covered portfolio exceeds the agreed-upon threshold. For example, the treaty may provide that the reinsurer will share only in losses in excess of $300,000 on any particular builder's risk policy.

In return for its services, the reinsurer receives from the cedent a portion of the premiums obtained by the ceding insurer from the underlying insurance policies less a "ceding commission," which is the reinsurer's allowance for the cedent's marketing and administration costs which the cedent expended on the ceded business. Because "[r]einsurance is feasible only if it costs less than the underlying insurance[,]" *Travelers Indem. Co. v. SCOR Reinsurance Co.,* 62 F.3d 74, 76 (2d Cir. 1995), the premiums received by the reinsurer from the cedent are less than those the cedent charges the policyholder.

Reinsurance permits the cedening insurer to spread its risk, to smooth results, and to assume larger limits or risks without simultaneously increasing its capital base. Reinsurance is used to cushion the blow of catastrophic losses ("cat cover"), or to assist paying claims for multiple insureds arising out of a single occurrence ("clash cover"). The cedent can use reinsurance to free up funds for other investments or to create underwriting capacity for new business.

Insurers licensed in a particular jurisdiction can also use reinsurance to "front" the policies of an unlicensed insurer. Thus, the licensed insurer issues the policy, but contracts with the unlicensed entity via a separate reinsurance agreement to reinsure any and all such policies and claims. Utah requires insurance commissioner approval for reinsurance of "all or substantially all" of the cedent's business. Utah Code Ann. § 31A-22-1204. And as will be discussed shortly, a cedent, if the process is done correctly, is also entitled to account for such transaction as reinsurance in its financials, an important issue in every state, including Utah.

When the insurance at issue is life insurance (where it is absolutely certain, if the policy remains in force, that the insured will die and produce a claim, the only issue being when and where, and policy values often increase over time), the arrangement is called "coinsurance."

Coinsurance presents interesting pricing issues. Unlike liability insurance, life insurance often carries an investment component. To attract new business, the cedent may wish to increase "growth rates" on its policies. Thus, the cedent and reinsurer must agree on pricing that will permit the cedent to do so, because the reinsurer will be responsible for its proportionate share. One solution is to choose a market-based index, and to require the reinsurer to share only in increases that are within upward swings of the index, with the cedent left to bear the cost if it decides to increase returns above market.

Finally, "the relationship created is strictly one of indemnification." *Travelers Indem. Co. v. SCOR Reinsurance Co.,* 62 F.3d 74, 76 (2d Cir. 1995). Thus, no payments are due the cedent until the

MARK DYKES is a shareholder at Parsons, Behle & Latimer, in the firm's litigation and natural resources departments. He has been an adjunct Professor of Law at the University of Utah College of Law, teaching insurance law.

cedent pays the underlying claim.

Types of Reinsurance

The main types of reinsurance are "treaty" and "facultative." In either case, the reinsurance agreement is a contract, to be construed as such. *See Excess Ins. Co. v. Factory Mut. Ins. Co.,* 3 N.Y.3d 577, 582, 822 N.E.2d 768, 789 N.Y.S.2d 461 (2004) ("[I]nterpreting reinsurance agreements, as with all contracts, the intention of the parties should control.").

A. Treaty

A treaty is a detailed, normally long-term reinsurance contract. Under the treaty, the reinsurer agrees to indemnify the ceding insurer on a specified portion of the cedent's business. *See John Hancock Prop. & Cas. Ins. Co. v. Universale Ins. Co., LTD,* 147 F.R.D. 40, 40-42 n.2 (S.D.N.Y. 1993). Thus, the treaty may reinsure all comprehensive general liability policies issued by the ceding insurer to construction companies, or all professional liability insurance issued to physicians. If it falls within the business covered by the treaty, the reinsurer has no discretion to turn the business down. Treaties can be proportional (quota share) treaties or excess-of-loss.

B. Facultative

Unlike treaty reinsurance, which covers a broad swath of the cedent's business, "'[f]acultative' reinsurance involves the reinsurer assuming some or all of the reinsured's risk on a specific underlying insurance policy[,]" *Okla. Ex rel. Holland v. Employers Reinsurance Corp.,* 2007 U.S. Dist. LEXIS 68069, at *2 n.3 (W.D. Okla. Sept. 13, 2007), and is thus limited to policies specifically identified.

Instead of a treaty, facultative reinsurance is governed by a certificate of facultative reinsurance or "fac cert" for short, which is normally a single piece of paper with a declarations page on the front and abbreviated terms and conditions on the back. There are several varieties of facultative insurance.

The Cedent's Duty of Good Faith and Disclosure

Why can reinsurers charge less in premiums?

> Reinsurers…generally do not duplicate the functions of the ceding insurers, such as evaluating risks and processing claims.… Instead, they rely on their common interests with the ceding insurers and on an industry custom of utmost good faith, including the sharing of information. Reinsurers depend on ceding insurers to provide information concerning

potential liability on the underlying policies.

Travelers Indem. Co. v. SCOR Reinsurance Co., 62 F.3d 74, 76 (2d Cir. 1995) (citations omitted). Especially in the case of treaty reinsurance, where the reinsurer is obligated to accept broad risks over time, *see Mich. Nat'l Bank-Oakland v. Am. Centennial Ins Co.,* 89 N.Y.2d 94, 106, 974 N.E.2d 313, 651 N.Y.S.2d 383 (1996) (stating that the duty to disclose is broader for treaty reinsurance because of the nature of the risk involved), the reinsurer must rely heavily on the cedent's disclosures of material facts, that is, those facts that are likely to influence the reinsurer's decision to assume the risk. *See Christiana Gen. Ins. Corp. v. Great Am. Ins. Co.,* 979 F.2d 268, 278 (2d Cir. 1992).

A party who has been materially misled into signing a contract is entitled to rescission. *See Coalville City v. Lundgren,* 930 P.2d 1206, 1210 (Utah Ct. App. 1997) (stating that recission is only allowed for a material breach that defeats the agreement's purpose, or that "[is] of such prime importance that the contract would not have been made if default in that particular had been comtemplated" (alteration in original) (quoting *Polyglycoat Corp. v. Holcomb,* 951 P.2d 449, 451 (Utah 1979)). Reinsurance agreements are no different. *See, e.g., Allendale Mut. Ins. Co. v. Excess Ins. Co.,* 992 F. Supp. 278, 282 (S.D.N.Y. 1998) (discussing duty of good faith wherein ceding insurer failed to inform the reinsurers of recommendations in engineer's survey report for insured warehouse and insured's failure to implement the recommendations), *vacated and remanded on other grounds,* 1999 U.S. App. LEXIS 1735 (2d Cir. Feb. 5, 1999). *Cf. Sumitomo Marine & Fire Ins. Co. v. Cologne Reinsurance Co.,* 75 N.Y.2d 295, 304, 552 N.E.2d 139, 552 N.Y.S.2d 891 (1990) (denying rescission when reinsurer was "fully aware" of the facts before issuing the reinsurance agreements). As is usually the case with rescission, where the party seeking the remedy must return the consideration it received in the transaction, the reinsurer must return any premiums received, less claims paid. If on notice of facts warranting rescission, the reinsurer, like any contracting party, must timely seek relief. *See Coalville City,* 930 P.2d at 1209-11 (affirming trial court's judgment when "defendant was determined not to be entitled to rescission because he failed to give timely notice thereof and tender return of consideration received").

Involvement of the Insured in the Reinsurance Transaction

The reinsurer's obligation to indemnify runs only to the ceding insurer. *See Unigard Sec. Ins. Co. v. N. River Ins. Co.,* 79 N.Y.2d 576, 582, 594 N.E.2d 571, 584 N.Y.S.2d 290 (1992). "The reinsurer has no privity with, and is generally not liable to, the original purchaser of the underlying policy." *Travelers Indem. Co.,* 62 F.3d at 76. Unless the reinsurance agreement has a "cut-through" clause, which permits a policyholder to bring a direct action against the reinsurer, *see* J. Tiller, D. Tiller, *Life Health & Annuity Reinsurance,* ACTEX 215 (2d ed. 2005), the policyholder has no rights against the reinsurer. The cedent, not the reinsurer, is responsible for defending, investigating, and settling the underlying claim. *See Unigard Sec. Ins. Co.,* 79 N.Y.2d at 583. As noted next, the reinsurer is, however, bound by the ceding insurer's good faith handling and payment of the underlying claim.

The "Follow the Fortunes" Doctrine

Reinsurers are obligated to indemnify the cedent for good faith payment of claims, that is, to "follow the fortunes" of the cedent. Where disputes do arise, they are often connected to how the cedent settled a claim, and how, in large coverage blocks with multiple layers of coverage, or both, the cedent allocated liability for the settlement, which in turn can affect whether reinsurance is triggered. *Okla. Ex rel. Holland v. Employers Reinsurance Corp.,* 2007 U.S. Dist. LEXIS 68069 (W.D. Okla. Sept. 13, 2007), provides a summary of the applicable doctrines:

> The "follow the settlements" doctrine is the application, in the settlement context, of the broader concept or doctrine of "follow the fortunes." These doctrines are concepts unique to the reinsurance relationship and are designed to prevent the reinsurer from second-guessing the good faith, reasonable decisions of the reinsured entity. In general, the "follow the fortunes" doctrine binds the reinsurer to accept the cedent's (reinsured's) decisions on all things concerning the underlying insurance terms and on claims against the underlying insured, so long as the decisions are in good faith, reasonable, and within the applicable policies. *North River Ins. Co. v. ACE American Reinsurance Co.,* 361 F.3d 134, 139-140 (2nd Cir. 2004). There is substantial authority for the view that, in applying the doctrine, it applies not only to settlement decisions by the cedent, but also to post-settlement allocation decisions by the cedent. *Id.; Travelers Cas. & Surety Co. v. Gerling Global Reins. Corp. of America,* 419 F.3d 181 (2nd Cir.2005).

Okla. Ex rel. Holland, 2007 U.S. Dist. LEXIS 68069, at *16-17.

Dispute Resolution

For years, cedents and reinsurers have resolved their disputes by arbitration using insurance industry experts. Moreover, a typical arbitration clause will provide that the arbitrators are relieved from following judicial formalities and shall consider customary and standard practices in the reinsurance business and not be bound by the strict rules of law.

This can lead to some odd results, however, because reinsurance contracts (or treaties, anyway) often contain a choice-of-law clause. Substantively, this makes little sense, given that the arbitrators are free to vote their conscience. Procedurally, the clause can cause real trouble, because if broad enough, it may be read to require adherence to the arbitration procedures of the identified state, even if one party anticipated something much simpler. Thus, in *Security Ins. Co. v. TIG Ins. Co.,* 360 F.2d 322 (2d Cir. 2004), the court held that a broad California choice-of-law clause meant that California rules applied, one of which stayed arbitration pending the outcome of any litigation arising out of the same set of facts. *See id.* at 323 ("This case presents a recurring and troubling theme in many commercial contracts: to what extent must a court – confronted with a choice-of-law provision in a a contract – incorporate the designated state's statutory and common law governing arbitrations even when doing so seems contrary to the *Federal Arbitration Act*… ?").

The ability, discussed later in this article, to take a credit for reinsurance on its financial statements is often critical to a cedent. If the reinsurer would otherwise be beyond the jurisdiction of a United States court, and the cedent desires, as it surely will, to take the credit, Utah law requires that if "the assuming insurer [fails] to perform its obligations under the terms of the reinsurance agreement, the assuming insurer, at the request of the ceding insurer, shall submit to the jurisdiction of any court of competent jurisdiction in any state of the United States, …." Utah Code Ann. § 31A-17-404(7)(c)(i) (2005). Much ink has been spilled over whether a "submit to suit" clause is inconsistent with the duty to arbitrate. Careful drafting of the reinsurance contract should take care of this. Regardless, "[s]ubmitting to the jurisdiction of Utah courts under Subsection (7) does not override the duties or rights of the parties under a provision in the reinsurance agreement, including any requirement that the parties arbitrate their disputes." *Id.* § 31A-17-404(8).

Utah Law Governing Credits and Reductions in Liabilities for Reinsurance

The title of Utah Code section 31A-17-404, "Credit against reserves for reinsurance ceded," is self-explanatory: If certain requirements are met, Utah insurers may satisfy financial requirements in part through reinsurance.

Utah Administrative Code R590-173 governs this process. Thereunder, credit will be given if the reinsurer is authorized to do business in Utah, *see* Utah Admin. Code R590-173-4, or if the reinsurer has been granted either "accredited status" (not authorized in Utah, but meets certain financial tests and *is*

authorized in at least one other state) or "trusteed status" (neither authorized nor accredited, but sets up a certain type of trust), *see id.* R590-173-5, if the reinsurer is domiciled/licensed in other states, with some financial strictures, *see id.* R590-173-6, or if the reinsurer maintains certain kinds of trust accounts, *see id.* R590-173-7.

Finally, as its title implies, Utah Administrative Code R590-173-8, "Asset or Reduction from Liability for Reinsurance Ceded to an Unauthorized Assuming Insurer not Meeting the Requirements of Sections 4 Through 7," states what happens when the reinsurer does not otherwise qualify under the rule. Many such reinsurers are located offshore, for example, in Bermuda. Here, the cedent is allowed to reduce its liabilities by an "amount of funds held by or on behalf of the ceding insurer, including funds held in trust for the exclusive benefit of the ceding insurer, under a reinsurance contract with such assuming insurer as security for the payment of obligations under the reinsurance contract." *Id.* R590-173-8(A). The security must be held in the United States either under the sole control of the cedent or, as is far more common, in a trust with the cedent as beneficiary, and may be cash, securities approved by the National Association of Insurance Commissioners, or clean, unconditional evergreen letters of credit.

Utah Administrative Code R590-173-9, "Trust Agreements Qualified under Section 8," states the requirements for the trust itself. Often New York financial institutions serve as trustee, and the trust is referred to as a "Reg 144 Trust" after the New York insurance regulation governing such trusts. *See id.* R590-173-9(A)(8) ("The trust agreement shall be made subject to and governed by the laws of the state in which the trust is domiciled.")

The Insolvency Issue

In *Fidelity & Deposit Co. v. Pink,* 302 U.S. 224 (1937), the United States Supreme Court ruled that the reinsurer was not obligated to pay a claim presented to it by the receiver of the insolvent cedent, because the cedent itself, being insolvent, had not actually paid the underlying claim (recall that reinsurance is a contract of indemnity, not liability). The response to *Pink* was now universal legislation, pursuant to which, if the cedent desires credit for reinsurance, the reinsurance agreement must require the reinsurer to pay claims notwithstanding the cedent's (in)solvency. *See* Utah Code Ann. § 31A-22-1201 (2005).

Utah Rules Governing Reinsurance Agreements

In addition to rules governing trusts, in Utah Administrative Code R590-143, "Life And Health Reinsurance Agreements," Utah has established rules governing the reinsurance treaty itself for life and health reinsurance. The gist of this rule is to ensure that the reinsurance is a true, durable, transfer of risk. Thus, credit will not be granted if the treaty requires the cedent automatically to recapture a portion of the reinsurance, *see* Utah Admin. Code R590-143-3(4), (because then the promise of reinsurance is illusory), if "[t]he treaty does not transfer all of the significant risk inherent in the business being reinsured," *id.* R590-143-3(6), (because then the risk really remains on the cedent), if

> [t]he ceding insurer is required to make representations or warranties not reasonably related to the business being reinsured," *id.* R590-143-3(9), or "is required to make representations or warranties about future performance of the business being reinsured," *id.* R590-143-3(10), (the reinsurer cannot escape if the insured violates an unrelated warranty or guesses wrong about the future; again, the transfer of risk must be inviolate), or if "[t]he reinsurance agreement is entered into for the principal purpose of producing significant surplus aid for the ceding insurer, typically on a temporary basis, while not transferring all of the significant risks inherent in the business reinsured and, in substance or effect, the expected potential liability to the ceding insurer remains basically unchanged."

Id. R590-143-3(11).

It is often said that in days gone by, reinsurance agreements were scribbled out on the back of napkins. Although that has changed, it is still the norm for the deal to be agreed upon first, and documented later. Utah has codified this practice, whereby the cocktail napkin has been replaced by a binding letter of intent, which on its own will suffice to permit the cedent to take credit or reduce its liability, *see id.* R590-143-4(A), provided, however, that the actual treaty "must be executed within a reasonable period of time, not exceeding 90 days from the execution date of the letter of intent, in order for credit to be granted for the reinsurance ceded." *Id.* R590-143-4(B). Finally, the treaty must have an integration clause, *see id.* R590-143-4(C)(1), and must require that modifications be in writing signed by both parties, *see id.* R590-143-4(C)(2).

Conclusion

In sum, the law of reinsurance presents the enjoyable coalescence of complicated state regulations, extensive private contracting, and often complex fact patterns concerning the underlying claims.

Serving the Client Who is Deaf

by Dale H Boam

Twenty-four years after my first exposure to the Deaf community I am still deeply involved with Deafness and Deaf Culture as an attorney, certified interpreter, teacher of interpreters, and a friend to the Deaf community.[1] In my practice, I often represent persons who are Deaf and who, by reason of their Deafness, face discrimination at the workplace and barriers when they attempt to access goods and services that the hearing population takes for granted. Sadly, I have seen such barriers in hospitals, doctors' offices, educational institutions, courts, and attorneys' offices. Most of these situations are misunderstandings and easily resolved once people understand their legal obligations and make a slight adjustment in their analysis of the situation. In my practice, I have found that law is a profession inhabited by persons seeking to do right. Doing right is often simply a matter of knowing how to analyze the situational requirements and acting accordingly.

For attorneys, developing a working relationship with a client who is Deaf requires a simple adjustment in perspective: An interpreter is not a luxury. Due to the length and complexity of even the most routine communication between attorney and client, in order to establish effective communication an interpreter is usually a necessity. *See* 28 C.F.R. § 36.303(c). A good rule to follow is to ask yourself if the information you need to present is the kind you would communicate to a hearing client over e-mail, by letter, or in any manner other than face to face; if not, get an interpreter!

This perspective is supported by the text of Title III of the Americans with Disabilities Act (ADA). Title III of the ADA states that, "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. 12182; C.F.R. § 36.201. The term public accommodation includes the offices of attorneys. *See* 28 C.F.R. § 36.104.

Furthermore, Title III of the ADA requires attorneys to make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless they can demonstrate that making the modifications would fundamentally alter the nature of the above as allowed by section 36.302. *See* 28 C.F.R.§ 36.302.

Attorneys must take those steps that are necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently from other individuals because of the absence of auxiliary aids and services. If the attorney can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense, this obligation may be avoided. *See* 42 U.S.C. § 12182(b)(2)(A). Auxiliary aids and services are designed to provide effective communication, which is mandated by the ADA.

Under the ADA, auxiliary aids and services may include qualified interpreters, note-takers, computer aided-transcription services (CART), written materials, telephone handset amplifiers, assistive listening devices and systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for Deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments. *See* 28 C.F.R. § 36.303 (b)(1). Many attorneys with whom I speak make the mistake of reading "written materials" as excusing them from the expense of providing a qualified sign language interpreter, in favor of a pen and paper or a computer. A quick change of perspective is needed here as well. This list is not provided so the attorney can choose the aid or service the attorney *likes*. The list is provided because the type of auxiliary aid or service necessary to ensure effective communication varies according to the method of communication used by the client and the context and content of the communication; the attorney must choose the aid or service that is effective for the immediate situation.

While some persons who are Deaf may prefer to communicate in writing (e-mail tends to be very effective), written communication will not always assure effective communication. Even after communicating in writing for most of the case, a client may request an interpreter in order to clarify or ask questions of a nature too complex or lengthy to be effectively handled in writing. When determining if an interpreter is needed, an attorney should always consider the

DALE H. BOAM divides his time among his positions as an Associate Professor of Deaf Studies Utah Valley University, his small Salt Lake City solo practice – The Law Offices of Dale H Boam P.C., and consulting nationally on the rights of persons who are Deaf.

nature, length, and complexity of the communication involved and the context in which the communication is taking place. In fact, the preamble to the regulation itself lists "communications involving legal matters" as an example of a type of communication that can be sufficiently lengthy or complex to require an interpreter for effective communication. *See* 28 C.F.R. pt. 36, App. B at 703 (2005). Always remember an interpreter is not a luxury – in legal discussions it is usually a necessity.

Many persons who are Deaf are using Video Relay Services (VRS) for telephone conversations. An attorney can call the VRS provider and an interpreter at a call center will call the client who is Deaf and then interpret between the parties. This service is tax supported and provided at no cost to the users. For quick questions or clarifications this is ideal, but do not mistake it as a replacement for an actual interpreter when discussing legal matters. The VRS interpreters may or may not have any experience in interpreting legal matters. Calls are assigned at random to call centers all over the country, and although all interpreters working for VRS providers should have a minimal acceptable skill level, an attorney has no control over the skill or experience of the interpreter assigned to the call; thus, the attorney has no means of assuring the effectiveness of the communication.[2]

FREQUENTLY ASKED QUESTIONS

The following is a list of questions I have received from attorneys since 2004 concerning representation of Deaf clients:

1. As I understand it, the ADA does not apply to my office because I only have 12 employees. Right?

Many attorneys with whom I speak believe that the ADA does not apply to them because their firm or office does not employ 15 persons or more. This is a common error and one born of the way the ADA is written. The law is written in five Titles; the first covering *only* employment of persons with disabilities. Title I waives compliance with the employment portions of the law for any company with 14 or fewer employees. This exception is found only under Title I and has no bearing on access to an attorney's office by clients who are Deaf and who are seeking legal counsel, but not employment, with that office.

2. Who pays for an interpreter?

The short answer is that the entity providing the service pays for the accommodation. The cost of auxiliary aids and services or other ADA mandated measures cannot be charged to the client. *See* 28 C.F.R. §36.301. Attorneys must ensure their services are accessible to the public and that effective communication is provided to clients or potential clients. An attorney may not impose a surcharge on a person or a group of persons with disabilities to cover the costs of measures, such as the provision of auxiliary aids, barrier removal, alternatives to barrier removal, and reasonable modifications in policies, practices, or procedures, that are required to provide that individual or group with the nondiscriminatory treatment required by the ADA. *See* 28 C.F.R. § 36.301(c). This includes potential clients as well as current clients. Think of it this way: You would not require a client in wheelchair to pay for a ramp to enter your office. A ramp is an ADA mandated physical modification; an interpreter is an effective communication requirement mandated by the ADA. The cost of an interpreter is a cost of doing business, like paying for a research service or keeping your lights on. However, the ADA does include tax incentives to encourage compliance.[3]

3. Can't the client who is Deaf just bring his mother (father, brother, wife, girlfriend, etc.) to interpret for him?

Using family members, friends, or other lay persons as interpreters is problematic on many levels. When an interpreter is deemed necessary, the ADA requires that the interpreter is "qualified." The ADA defines a qualified interpreter as "an interpreter who is able to interpret effectively, accurately and impartially both receptively and expressively, using any necessary specialized vocabulary." 28 C.F.R. § 36.104. The ability to sign does not equal the ability to interpret.

Family members and companions may not satisfy the law's requirement that an interpreter is "qualified;" family members and friends may not remain impartial, and may have had no legal training to properly interpret specialized legal vocabulary effectively. Furthermore, the state of Utah requires that persons providing interpreting services hold a state or national certification. *See* Utah Code § 53A-26a-301 (2006). In essence, Utah law interprets the ADA's standard of qualified to mean certified. Persons providing interpreting services without such certification are subject to fines and possible jail time. *See id.* § 53A-26a-501. More important for the attorney, facilitating an uncertified person in the provision of interpreting services can subject the attorney to the same legal sanctions. *See id.*

On an ethical level there is no guarantee that a family member or friend will respect the requirements of privilege, and the use of untrained and possibly interested parties may, in fact, waive the client's right to confidentiality. Certified interpreters are bound by an ethical duty of confidentiality.[4] The Department of Justice warns that family members and friends may not be able to provide impartial or confidential interpreting, even if they are skilled sign users:

> In certain circumstances, notwithstanding that the family member or friend is able to interpret or is a certified interpreter, the family member or friend may not be qualified to render the necessary interpretation because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret "effectively, accurately, and impartially."

56 Fed. Reg. 33553 (July 26, 1991).

By reason of a family member or friend's limited knowledge of legal terminology, dangerous misinterpretations or omissions of advice may occur. The attorney, client, or both could seek redress from the professional, i.e., certified interpreter, but not a lay person should misinterpretations or omissions occur. A quick cost benefit analysis shows that saving a few dollars up front is not worth the potential problems later on.

4. If I have to pay for an interpreter I will lose money on this case, and isn't that an undue burden?
Undue burden is not measured by the amount of income the attorney receives from that one Deaf client, but by the financial impact on the firm as a whole. It is generally accepted that the comparison is cost versus revenues over the course of a year. Undue burden is defined as significant difficulty or expense when considered against the nature and cost of the auxiliary aid or service and the overall financial and other resources of the business.

The undue burden standard is applied on a case-by-case basis. Imagine it this way: The approximate cost of a qualified interpreter for a one-hour attorney-client meeting in Utah ranges from $40 – $50 per hour, at a two hour minimum (plus possible incidental costs). Therefore to successfully establish a defense of undue burden an attorney must demonstrate that spending $80 – $100 is an undue burden relative to the overall operational revenues of the firm or office. I have never seen this argument succeed even with respect to a pro-bono client.

5. Isn't the court responsible to provide an interpreter for my client who is Deaf?
State and local courts are governed by Title II of the ADA and have an obligation to give primary consideration to the aid or service requested by the person who is Deaf when providing effective communication. *See* 28 C.F.R. § 35.160(b)(2). Furthermore, Utah law gives the responsibility for providing an interpreter for any particular judicial or quasi-judicial function to the presiding officer overseeing the specific function. *See* Utah Code Ann. § 78B-1-2002 (2008). Judicial and quasi-judicial functions include, but are not limited to, "civil and criminal court proceedings, grand jury proceedings, proceedings before a magistrate, juvenile proceedings, adoption proceedings, mental health commitment proceedings, and any proceeding in which a hearing-impaired person may be subjected to confinement or criminal sanction." *Id.* §§ 78B-1-202(1), –208. Note that the court's obligation to provide interpreters, under both federal and state law, does not extend to out-of-court meetings between an attorney and a client who is Deaf, or in court "counsel table" communications. However, if

In Memoriam

With deep sadness,
Dart, Adamson & Donovan
announces the passing of
our dear friend & partner,
Helen Christian.

Her loss will be felt
by many for years to come.

Helen E. Christian
November 20, 1948 – February 23, 2009

the court appoints counsel for a defendant who is indigent it is also responsible to appoint and pay for an interpreter for all parts of the proceeding, including preparation. *See id.* 78B-1-202(5). Interpreters must be certified by the State of Utah, and may be subjected to further *voir dire* by the court and the person who is Deaf before being approved to interpret for any specific function. *See id.* § 78-24a-3. As a point of interest, the Utah Administrative Office of the Courts recently added a representative for American Sign Language interpreters to its Court Interpreters Committee. *See* http://www.utcourts.gov/committees/CourtInterpreter.

6. Doesn't the Deaf community understand that by demanding interpreters it will force the firm into a position where it can't (won't?) accept Deaf clients?

As I have stated, it has been my experience that most attorneys are "do right" people. That being said, when I have explained the requirements of the law to some attorneys, I have been accused of trying to extort money, or the attorneys have threatened to withdraw from the case, yelled at the client or referred to them as stubborn and uncooperative. I have been told that clients who are Deaf are too demanding and should be grateful for anything they get, and that it is my obligation to service the legal needs of ALL persons who are Deaf. Retaliation for invoking one's rights under the ADA is in itself a violation of the ADA. Refusing to accept a client because of his or her Deafness or in order to avoid the costs of compliance is per se retaliation. *See* 28 C.F.R. § 36.206.

7. How do I find a qualified (certified) interpreter?

There are several interpreting agencies in Utah. Most can be located on the web at www.uad.org. A list of certified interpreters is also maintained by the State of Utah on the website for Utah Interpreter Programs (the agency responsible for certifying interpreters) at www.aslterpsutah.org. A list of nationally certified interpreters can be found on the website of the National Registry of Interpreters for the Deaf at www.rid.org. As a general rule for legal appointments, the interpreter should hold national certification or at least a Level II certification from the State of Utah in order to satisfy the ADA's standard of "qualified."

CONCLUSION

Attorneys must see things from the client's perspective while understanding the requirements of the law. Deaf clients, like hearing clients, want to understand their legal issues, participate in their cases and develop trust, communication, and an honest dialogue with their attorneys. When clients can't effectively communicate with their attorneys, those goals quickly erode, and such erosion can only lead to deficient representation.

The Department of Justice actively enforces the ADA on behalf of clients who are Deaf and are in need of access to legal counsel. For examples of such enforcement see:

DOJ Settlement with Joseph David Camacho, Esq. http:/www./ada.gov/albuquerue.htm

DOJ Settlement with the Law Office of Cohen and Jaffee LLC http://www.ada.gov/cohenjaffe.htm

DOJ Settlement with Gregg Tirone, Esq http://www.ada.gov/tirone.htm.

DOJ Settlement with Clifford B. Hearn & Clifford B. Hearn, Jr, P.A. http://www.ada.gov/hearn.htm

1. The use of a capital D refers to Deafness as a cultural identity, a small d refers to absence of hearing as a medical condition.
2. Many persons who are Deaf have direct VRS numbers, meaning the call will automatically include the VRS provider with no extra steps. If not VRS services can be reached at:

   Sorenson VRS – 1-866-FAST-VRS;

   HOVRS (Now called PURPLE) – 1- 877-467-4877; or

   Locally at Interwest VRS – 1-866-258-1163
3. Section 44 of the Internal Revenue Code establishes a credit for small businesses, and section 190 establishes tax deduction for businesses generally respecting expenses for such accommodations. The tax credit is for businesses with total revenues of $1,000,000 or less in the previous tax year or 30 or fewer full-time employees. This credit can cover 50% of the eligible access expenditures in a year up to $10,250 (maximum credit of $5000). The tax credit can be used to offset the cost of providing sign language interpreters. The deduction is available to all businesses in an amount not to exceed $15,000 per year.
4. Attorney/client privilege *can* extend to interpreters when the communication being interpreted would be otherwise privileged.

Small Claims Mediation: Thoughts for Practitioners

by Stephen Kelson

Although small claims court may not be a regular part of most attorneys' practices, it is likely that at some point during one's legal career, one will have the opportunity to represent a client with a small claims case. It is even more likely that an attorney will be approached in a limited or informal capacity to explain the small claims process and procedure to someone who has a small claims case. Among the important elements of an answer to this query is a discussion of the availability of mediation in the small claims context. Although several small claims courts in Utah have provided free mediation services for more than ten years, many attorneys are not fully informed about the availability or the benefits of mediation in the small claims process.

Many attorneys misunderstand what mediation is. Some attorneys believe that if they call the opposing counsel or party and make an offer of resolution, they have then "mediated" the case. Such an exchange may be a settlement negotiation, but it is not mediation. Mediation is where a neutral third party (the mediator) assists two or more parties in order to help resolve their dispute.

Mediation is offered in a growing number of small claims court venues in Utah through Utah Dispute Resolution (UDR) and Utah Valley University Mediation Services. For more than ten years, UDR, under the direction of the Administrative Office of the Court, has filled a much needed niche, providing free mediation services for small claims court at the Matheson Courthouse and Third District Court. Since its inception, the small claims mediation program has expanded to include: West Jordan, Third District Court; Bountiful City Justice Court; West Valley City Justice Court; Taylorsville City Justice Court; Logan City Justice Court; Monticello City and San Juan County Justice Courts; and Ogden, Second District Court. In Utah County, Utah Valley University Mediation Services provides small claims mediation services at the Provo, Fourth District Court; Orem, Fourth District Court; American Fork, Fourth District Court; Spanish Fork, Fourth District Court; the Provo City Justice Court; and the Pleasant Grove City Justice Court. These community mediation programs are invaluable to the Utah court system and have resolved thousands of small claims disputes.

It can be easy to overlook the big picture in a small claims case, and see it only as a small monetary circumstance requiring direct trial advocacy and nothing else. Because the small claims court practice generally represents a fraction of an attorney's practice, many attorneys have not taken the time to familiarize themselves with the Rules of Small Claims Procedure or the mediation process in small claims court. However, mediation provides an opportunity for the parties to fully resolve their case and often permits more creative options to do so.

The following are considerations for attorneys representing clients in any small claims case where mediation is made available:

Know your client's options

When parties choose mediation as an option to resolve their small claims dispute, there is a greater likelihood that the dispute will be resolved, because the parties themselves create their own agreement. A client may actually be seeking the resolution to a problem or underlying issue the small claims court cannot resolve through a judgment. Mediated agreements may include provisions a small claims judge does not have jurisdiction to award, such as an exchange of property, services, or a defined payment plan. (A small claims judge may only award a monetary judgment up to $7500.)

Small claims mediation is free of charge, and the parties lose nothing by attempting to resolve their case through mediation. What is discussed in mediation is confidential and private, whereas court proceedings are public for all to hear. If the case is not resolved in mediation, the case can be heard and decided by a judge immediately after mediation. If a mediated agreement is reached, it is written out as a binding agreement reviewed and signed by the small claims judge.

STEPHEN KELSON is an attorney in the office of Kipp and Christian P.C. in Salt Lake City, Utah, where his practice focuses on commercial litigation and insurance defense. Mr. Kelson is also a volunteer mediator and mediation coordinator for Utah Dispute Resolution, which provides alternative dispute resolution services for the community.

Zealous advocacy includes mediation

Zealous advocacy requires exploring all opportunities to resolve a client's dispute. Mediation may provide attorneys an opportunity for their clients to obtain a better outcome than they might otherwise in court.

Mediation is not weakness

Some attorneys cling to the misperception that agreeing to mediate in any case, small claims or otherwise, somehow shows a sign of weakness on their part. To the contrary, agreeing to mediate gives each party the opportunity to explain the strengths of its case and the reasons why it is to the other side's benefit to resolve the matter out of court. All the parties to a given dispute have complete control over the outcome of their mediation. However, in a small claims court trial, the parties lose control of the outcome and are left with the judge's final decision.

Prevailing is not the same as getting paid

Parties often confuse winning at court with collecting a judgment. After obtaining a judgment, the prevailing party may leave the courtroom and suddenly realize that the judgment received didn't put any money in that party's pocket. On numerous occasions, I've been approached after small claims court hearings, where the prevailing party wanted to know when that party will be paid. The small claims court cannot order a party to make payments at a specific time and place; in mediation, the parties can design their own payment plans. When payment plans are made in mediation, there is a much greater likelihood the payments will be made than if a party is awarded a judgment by the small claims court.

There can be substantial economic and other benefits to mediation

Even in the small claims process, a case can involve a substantial amount of time, effort, and expense. Represented parties often fail to consider the cost of paying legal counsel compared with the potential outcomes from the small claims court, as well as what, if any, amount they will eventually be able to collect. Additionally, any party has a right to appeal a small claims court judgment to the district court within thirty days of its entry. If an appeal is taken, the parties will have to return again to court to reargue their case, resulting in more court time, aggravation, and potential attorneys fees. On the other hand, small claims mediation is free of charge.

Discuss authority to mediate before coming to court

Too many attorneys fail to discuss the mediation process with their small claims clients before coming to court. During court proceedings, the judge often explains and offers mediation, but the parties may assume that mediation won't be beneficial to them; if it were, their attorney would have discussed it with them before going to court. In reality, the attorney may have simply been unaware that mediation is available, offered, or just forgot to discuss it.

In cases where counsel is hired by insurance companies to provide representation for an insured, attorneys often go to small claims court without having discussed the option of mediation with the insurance representatives, and thus they have no authority to resolve the case in this way. This often leaves the insured in a dilemma. If the insured chooses to come to a mediated resolution without authority from the insurer, it may be contrary to the terms of the insurance policy, and coverage may be denied. On the other hand, it is generally an insured's understanding that if a judgment is awarded, the insurance company will pay the bill. Attorneys should avoid this predicament by discussing the option of mediation with the insurance representative, and if authority is or is not given to mediate, the client should be made aware of the fact before showing up at trial.

Judgments become public records

All judgments become public records, and available to credit services. Judgments, small and large, whether or not they are paid by insurance coverage, will show up on credit records and can affect credit ratings. Insured defendants represented by counsel may be unaware that judgments will appear on their credit reports, even if they are paid by insurance coverage. However, if a mediated agreement is reached and fulfilled, no judgment is entered, and the defendant's credit rating will not be affected by the case.

The more informed counsel and their clients are about mediation, the more beneficial the opportunity to mediate will be. Make the most of small claims mediation service by actively presenting it as a viable option to your clients. It is a free service. It can resolve cases. It consistently provides a better outcome than may otherwise be achieved through a small claims trial. Use small claims mediation when the opportunity is presented.

Web 2.0 Tools for Utah Attorneys

by Mari Cheney

You've probably heard people talking about blogs, social networking, and Twitter, but may have wondered how these technologies are relevant to you in your professional life. These online technologies are all part of "Web 2.0," a term first coined to describe the transition from web pages only programmers could manipulate to a web that allows anyone to participate online by publishing and sharing content.

Web 2.0 today generally describes online resources that encourage site visitors to add their own content through interactive features like comments and tags. Tags are user-generated and user-assigned identifiers. If you uploaded and tagged a photo with "Bar Retreat" on a photo sharing site like Flickr, other users could upload their photos to the same site and use the same tags. Then, if you searched for Bar Retreat photos, you would find your photos as well as those posted by others. Some of the common websites associated with Web 2.0 and professional awareness/marketing are free blog creation sites like Blogger or WordPress, Twitter, and LinkedIn.

It pays for attorneys to learn about Web 2.0 tools because they can help you market your services, network with others, and keep current on the law and the legal profession. This article will highlight a sampling of both general and Utah-specific Web 2.0 tools for those who are curious about these technologies and want to learn more.

Online Social Networks

You've probably heard of Facebook and MySpace (known generically as social networking sites) and figured they're just for teenagers and college students. Think again! Specialized social networking sites for professionals are now becoming popular. You can use these sites to market your legal services by posting contact information, areas of practice, and links to your website and blog, if you have either.

It's all about networking. Traditional networking meant you went to bar section meetings, joined the local Chamber of Commerce, and became a member of a civic organization like the Lions or Kiwanis. The goal was to get your name out there so that people thought of you when they needed an attorney. Online professional social networks perform a similar function, except you don't have to sit through dry meetings or choke down the rubber chicken meals.

With over 36 million members, one of the most popular social networking sites for professionals is LinkedIn. You can search for colleagues and classmates by name, company, or school, and import contacts from your email address book. You can affiliate yourself with a variety of networks, including your city, the schools you attended, your employer, the Utah State Bar, and some of the Utah State Bar's practice sections. The more networks you are a part of, the broader your potential for making connections.

Plaxo is similar to LinkedIn, and many professionals have profiles on both sites. Update your profile when you move, and your connections on Plaxo are notified that your information has been updated.

Other online networking sites geared toward lawyers and other legal professionals include LawLink, ESQChat, and LegallyMinded, which was created by the American Bar Association. LegalOnRamp is also an online networking source, but the emphasis is on collaboration rather than the social aspect. Share information with other attorneys, particularly in-house counsel, including forms, answers to Frequently Asked Questions, and information on wikis. (A wiki is a collaborative website, where all users can edit and contribute information.)

Setting up your profile on these sites only takes a few minutes. If you continue to make additional connections, update employment information, and interact with your connections online, your status will often be updated and your connections will constantly be reminded of your name and online presence.

Blogs

When you think of a blog (short for weblog), you may think of a personal online diary. However, blogs also refer to websites that are updated frequently, appear in reverse chronological order, and are often topical. Legal blogs, sometimes referred to as "blawgs,"

MARI CHENEY is the reference librarian at the Utah State Law Library. She has a JD from American University, Washington College of Law, and an MLIS from the University of Washington. She welcomes questions and comments about this article at maric@email.utcourts.gov.

range in content from a specialized topic of law, such as employment, health, or bankruptcy, to law and technology, and gossip about firm mergers or layoffs. Some law firms use both internal and external blogs to communicate information, while other attorneys blog anonymously about their daily lives.

Some Utah law firms and solo attorneys are marketing their services through blogs. Other Utah attorneys post about Utah law and appellate cases, providing current awareness services on a variety of topics.

Don't believe everything you read just because it's online! As with any other information you'll find on the Web, be a cautious consumer. Blogs can provide useful information, but they can also be biased or present inaccurate information. Assess the authority of the author and the accuracy and currency of the information.

The following is a selection of Utah-based topical blogs:

Construction & Collection Lawyer, http://utahconstruction.blogspot.com/

Lawyers of St. George (Business Law), www.sglawblog.com/

LexUtah (Utah's Legal Scene), www.lexutah.com/

Utah District Court CMECF Updates, http://utd-cmecf.blogspot.com/

Utah DUI Trial Lawyer, www.utahduilawblog.com/

Utah Family Law Blog, www.longokura.com/blog/

Utah Insurance Law Blog, http://insurance.strongandhanni.com/

Utah Law Talk (Personal Injury), www.utahlawtalk.com/

Utah Personal Injury Law Firm Blog, www.utahpersonalinjurylawfirmblog.com/

Utah State Law Library, www.utcourts.gov/lawlibrary/blog

Many large law firms with offices in Utah also have firm-sponsored blogs, but are not Utah specific.

Other blogs that might interest Utah attorneys are official and unofficial political and government blogs:

The Senate Site, http://senatesite.com/blog

Utah Amicus, http://utahamicus.com/

Utah Attorney General, http://utahag.blogspot.com/

Utah Bloghive, http://utahbloghive.org

Utah Democratic Party, www.utdemocrats.org

Utah House Democrats, http://utahhousedemocrats.org/

Utah Policy Daily, http://utahpolicy.com

Utah Republican Party, http://leadershipthatdelivers.com

Utah Senate Democrats, www.utahsenatedemocrats.org

Finally, a few lawyers throughout the country have started blogs that discuss the law and technology, both from a policy perspective, as well as technologies attorneys can use in their practice.

Technology and Law Blogs:

Dennis Kennedy, www.denniskennedy.com/

Ernie the Attorney, www.ernietheattorney.net/

Future Lawyer, http://futurelawyer.typepad.com/futurelawyer/

The Mac Lawyer, www.themaclawyer.com/

Technola, www.techno.la/

If you're interested in starting your own blog, there are numerous free sites that can help you get started. Check out Blogger, WordPress, or LiveJournal for blog templates and to set up free accounts.

Blog Reader

A blog reader like Google Reader or Bloglines helps you to keep current with blogs without having to visit each blog individually to see if they've posted anything new. A blog reader collects information about each of the blogs you want to monitor and lists the updates in one place. Blog readers do this by using a technology called Really Simple Syndication (RSS). Most blogs offer this option, which is indicated by an orange icon with an image of radio waves in it () or the acronym RSS on the blog page.

To sign up for a blog reader, select the service you want to use. For instance, if you already have a Google account, sign in with your account name and password and then select "Reader" from the list of available services.

Once you've signed up for a blog reader, just click on the RSS icon that appears on the blog you want to follow and then add the blog to your reader. Or, if you know the URL of the blog, you can add a subscription to blog updates directly from the blog reader.

Microblogging

Microblogging is blogging on a miniature scale. A user can create short posts up to 140 characters, including web links. The most common microblogging tool today is Twitter. Posts can range from

a comment about a news item, the best restaurant in town, or an alert about a new supreme court decision. Some journalists have persuaded judges to allow Twittering (or tweeting) from the courtroom so they can report on cases in real time.

Example of a tweet from Utah Government on Twitter (http://twitter.com/UtahGov):

> RT @utahsenate: Utah Public Notice Website: Senator Urquhart's SB 208 passed the second reading on the Senate f.. http://tinyurl.com/9g3m3d

In the above message, UtahGov was retweeting (RT) a message posted by UtahSenate. The "tinyurl" is a shortened version of the URL where you can go to read more information.

Twitter posts are very brief and are immediate. Many people choose to post and receive twitter messages via their cell phone.

You can use Twitter to post links to law firm press releases and news articles, and direct readers to your blog for more information. You can also read what people are saying about your law firm or vet potential clients. Search Twitter posts at http://search.twitter.com/.

A solo attorney can follow other solo practitioners or law firms on Twitter, see what issues they're discussing and ask and answer questions. It's a great feedback tool, especially if you don't have anyone else to brainstorm with at the office.

Even if you aren't convinced that Twitter is the right tool for you, consider signing up for an account to get the user name of your choice. Then, if you feel it's a tool you could use in the future, you'll have your name reserved.

Podcasts

A podcast is an audio and/or video recording you can listen to online or download to an mp3 player. What distinguishes a podcast from a regular download is that your computer notifies you when new content has been added. Also, if you have set up regular downloads, the computer will automatically download the content.

Just as blogs often focus on specific topics, podcasts generally have a theme, such as legal research or intellectual property. Many law schools that host CLE programs upload the audio from these programs to the law school's website and offer syndication so you are automatically notified when new programs are added.

For example, the Intellectual Property Colloquium hosts IP experts to discuss topics every month. The Legal Talk Network specializes in legal podcasts and produces shows including "Lawyer 2 Lawyer" and "Workers Comp Matters."

You can find other law-related podcasts through the iTunes podcast library, as well as through iTunes U, where law schools often upload their podcasts. Also, visit individual law school and law firms' websites to determine if they are podcasting. If they are, you can stream the podcast from those individual websites if you don't want to download them to your computer or mp3 player.

To search for Utah-specific podcasts, just use a search engine to find them.

Specialized Search Engines

If you don't want to search the entire Internet for information about law firms, check out Fee Fie Foe Firm (www.feefiefoefirm.com/), a specialized search engine that returns results from law firm pages only.

Websites to check out:

Blogger (www.blogger.com)

Bloglines (www.bloglines.com)

ESQChat (www.esqchat.com)

Flickr (www.flickr.com)

Google Reader (www.google.com/reader)

Intellectual Property Colloquium (http://www.ipcolloquium.com/current.html)

LawLink (http://www.lawlink.com/)

LegallyMinded (http://legallyminded.com)

LegalOnRamp (www.legalonramp.com)

LegalTalkNetwork (http://www.legaltalknetwork.com/index.php)

LinkedIn (www.linkedin.com)

LiveJournal (www.livejournal.com/)

Plaxo (www.plaxo.com)

Twitter (www.twitter.com)

WordPress (http://wordpress.org/)

Enforcing Civility in an Uncivilized World

by Donald J. Winder and Jerald V. Hale

> *"That man is guilty! That man there is a slime! He is a slime! If he is allowed to go free, then something real wrong is goin' on here!"*
>
> *"Mr. Kirkland, you're out of order."*
>
> *"You're out of order, you're out of order! This whole trial is out of order!"*

Al Pacino as Arthur Kirkland in *And Justice for All*. Valerie Curtain & Barry Levinson, *And Justice for All,* Columbia Pictures, 1979.

We have all seen the entertainment industry's impressions of the legal profession. Fired-up attorneys in court yelling at witnesses, belittling their opponents, and battling the judge hammer and tongs over every perceived slight or unfavorable ruling. Despite the artistic license entertainment writers take in creating these characters for the screen, we know all too well the caricature of the uncivil attorney has a basis in reality and in many cases is not far off the mark. We live in an increasingly disrespectful and competitive world, and our profession is not immune from the general discourtesies that permeate society. The nature of our adversarial system of law can also foster an environment where it is often believed antisocial behavior can get you noticed and get results.

But does the adversarial system necessarily require incivility on the part of the participants? Does the fact that each party enters a matter with the intent to triumph over the other side require disrespect of one's opponent? Winston Churchill did not think so. After the Japanese bombing of Singapore and Hong Kong in 1941, Winston Churchill dispatched a letter to the Japanese Ambassador announcing that a state of war existed between England and Japan. After noting the acts of aggression, Churchill's letter ended with these words: "I have the honour to be, with high consideration, Sir, Your obedient servant, Winston S. Churchill." Churchill commented in his memoirs, "Some people did not like this ceremonial style. But after all when you have to kill a man it costs nothing to be polite." Churchill, Winston S., *Memoirs of the Second World War,* Boston, Houghton Mifflin, 1959. Clearly, the ability to maintain civility can be accomplished, even under the most adversarial situations.

Utah has been at the forefront of promoting civility in the legal profession. As a result of the efforts of the Utah Supreme Court Committee on Professionalism and others in state and local bar associations and courts throughout the country, a revolution has been taking place to put a greater emphasis on civility in the legal profession. Rules of civility have been adopted, at least in part, in numerous jurisdictions.[1]

In the mid 1990s the incivility in the profession that had come to bear from the quest for "zealous" representation began to be called into question. As noted in a law review article in 1994, "[z]ealous advocacy is the buzz word that is squeezing decency and civility out of the law profession.... [It is] the modern day plague which infects and weakens the truth finding process and makes a mockery of the lawyers' claim to officer of the court status." Kathleen P. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away,* 77 Marq. L. Rev. 751, 767 (1994). In response to the quest for more civilized dealings in the practice of law, in 2003 the Arizona Supreme Court eliminated the obligation of attorneys to be "zealous" advocates of their clients in favor of a duty to "act honorably" in furtherance of their client's interests. *See* Ariz. R. S.Ct. 42. Indiana, Louisiana, Montana, Nevada, New Jersey, Oregon, and

DON WINDER is managing partner in the firm Winder & Counsel, PC, Salt Lake City, Utah. Mr. Winder has served on the Utah Supreme Court Committee on Professionalism, tasked with developing Utah Standards of Professionalism and Civility, modifying the Attorney's Oath and recommending the establishment of a program of professionalism counseling for members of the Utah Bar.

JERRY HALE is an associate with Winder & Counsel, PC.

Washington have likewise omitted all references to zealousness in their rules, preambles, and commentaries.[2]

In 2003, the South Carolina Bar amended its Lawyer's Oath to include: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications." In Utah, the Attorney's Oath was recently modified to include a promise to "faithfully observe the Standards of Professionalism and Civility. . . ." Found in the preamble: A Lawyer's Responsibilities, Utah Supreme Court Rules of Professional Conduct, http://www.utcourts.gov/resources/rules/ucja/ch13/intro.htm. It is believed that Utah is only the second state to follow the South Carolina model.

The next inevitable step in the progression toward more civility in our profession – namely, how to enforce the civility provisions that have been enacted and which lawyers are urged to follow. While there have always been professional sanctions available for violating rules of professional conduct, is there more that should or could be done to enforce civility in the profession?

Courts around the country have entered the fray to find a way to enforce what are generally seen as non-binding suggestions on civility. For example, in the Fifth Circuit case, *In re First City Bankcorp. of Texas, Inc.* 282 F.3d 864 (5th Cir. 2002), a "zealous" lawyer referred to opposing counsel as a "stooge," a "puppet," a "deadhead," and an "underling who graduated from a 29th tier law school." The bankruptcy court in which the case was originally heard did not agree with the lawyer's tactics and slapped him with a $25,000 sanction. When the lawyer appealed to the Fifth Circuit, he argued that his behavior was an appropriate trial tactic, allowing him to recover more money for his clients and giving him the upper hand in settlement negotiations. The Fifth Circuit disagreed, and found the lawyer's conduct to be "egregious, obnoxious, and insulting." The $25,000 sanction was deemed appropriate and upheld by the court. A quick search of recent case law will reveal numerous examples where courts around the country have begun to draw lines in the sand regarding incivility in the practice of law. *See, e.g., GMAC Bank v. HTFC Corp,* No. 06-5291 (E.D. Penn. Filed February 29, 2008) (sanctioning attorney $13,026 for actions during deposition described as hostile, uncivil and vulgar); Steven Kreytak, *Lewd Gesture Gets Lawyer 90 Days in Jail,* Austin American Statesman, April 17, 2008; *Hagen v. Faberty,* 66 P.3d 974, 979-80, (NM Ct. App. 2003) (admonishing attorneys for uncivil behavior in briefs, bemoaning "culture of belligerence" that has taken root in legal system).

In the Utah Supreme Court case *Peters v. Pine Meadow Ranch Home Ass'n.,* 2007 UT 2, 151 P.3d 962 (Utah 2007), the petitioner was appealing an appellate court affirmation of a trial court's grant of summary judgment to a homeowners' association regarding the enforceability of its covenants, conditions, and restrictions. Rather than reach the issues raised in the appeal, the Utah Supreme Court focused on the petitioners' briefs and the uncivil language and tone of the briefs to affirm the holding of the lower court. *See id.* ¶1. Specifically, the court noted:

> [P]etitioners' briefs…are replete with unfounded accusations impugning the integrity of the [court] below. These accusations include allegations, both direct and indirect, that the [Court of Appeals] panel intentionally fabricated evidence, intentionally misstated the holding of a case, and acted with improper motives. Further, petitioners' briefs are otherwise disrespectful of the judiciary.

Id. Rather than rule on the merits of the petition, the court dismissed the petition and ordered the offending attorney to pay the other side's attorney fees, which at the time had amounted to approximately $17,000. In sum, the court noted if attorneys continue to adopt the "scorched earth" approach to advocacy, they do so at their own peril. In choosing to disregard the petitioners' briefs, the *Peters* court relied on Rule 24(k) of the Utah Rules of Appellate procedure which provides that "[a]ll briefs under this rule must be…free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken,…and the court may assess attorney fees against the offending lawyer." *Id.* ¶9 (alteration and omissions in original) (quoting Utah R. App. P. 24 (k)). Further, in arriving at its decision the court noted the Utah Standards of Professionalism and Civility,[3] as well as Rule 8.2 of the Utah Rules of Professional Conduct which provides "[a] lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications …of a judge." *Id.* ¶11 (alteration in original) (quoting Utah R. Prof'l Conduct 8.2(a)).

Following up on the issue of enforcement of civility, the Utah Supreme Court has created what is believed to be the first program in the country of professionalism counseling for members of the Utah Bar. *See* Utah Supreme Court Standing Order No. 7, issued January 9, 2008, effective April 1, 2008, http://www.utcourts.gov/resources/rules/urap/Supctso.htm#7. Specifically, the program functions through a board of five counselors, appointed by the Utah Supreme Court, who generally counsel and educate members of the Bar concerning the Standards of Professionalism and Civility (Standards). The court recommended the counselors serve a four-fold purpose: (1) to counsel members of the Bar in response to complaints by other lawyers or referrals from judges; (2) to provide counseling to members of the Bar who request advice on their own obligations under the Standards of Professionalism and Civility; (3) to provide CLE on the Standards; and (4) to publish advice and information relating to the work of the counselors. Of these functions, it is the counseling function which is most critical to the notion of enforcing civility in the profession.

The goal is to provide a method by which incidents of incivility or unprofessional conduct could be reported and addressed. The focus, however, would not be punitive in nature, but rather, educational. In responding to a complaint from a fellow attorney or judge, the counselors may issue a written advisory to the offending lawyer, or may simply counsel with the lawyer in a personal meeting, with the goal of educating the offending lawyer as to alternative modes of practice in harmony with the Standards. In conjunction with this direct contact with the offending attorney, the counselors would publish an annual report concerning the Standards it has interpreted, as well as periodically publishing selected portions of its advisories in the *Utah Bar Journal* for the benefit of practicing lawyers.

As recognized by the Utah Supreme Court, education is the key component to any successful effort to enforce civility. As attorneys learn what is expected in the practice of law, the "culture of belligerence," *see Hagen v. Faherty,* 66 P.3d at 979-80, like the typewriter and carbon paper, will become a relic of a bygone era in our profession.

1. Some, but certainly not all, of these jurisdictions include Arizona, California, Florida, Georgia, Texas, Utah, and even the San Diego County Bar Association. The Utah Standards of Professionalism and Civility may be found at http://www.utcourts.gov/resources/rules/ucja/ch14/03%20Civility/USB14-301.html.
2. *See* Indiana Rules of Professional Conduct, www.in.gov.judiciary/rules/prof_conduct/index.html; Louisiana Rules of Professional Conduct, www.lsba.org/2007/memberservices/codeofprofessionalism.asp; Montana Rules of Professional Conduct, www.montanabar.org/associations/7121/files/ethicsrulecomparison.pdf; Nevada Rules of Professional Conduct, www.leg.stat.nv.us/courtrules/rpc.html; New Jersey Rules of Professional Conduct, www.judiciary.state.nj.us/rpc97.htm; Oregon Rules of Professional Conduct, www.osbar.org/_docs/rulesregs/orpc.pdf; Washington Rules of Professional Conduct, www.courts.wa.gov/rules/?fa=court_rules.list&group=ga&set=rpc.
3. Standard 3 of the Utah Standards of Professionalism and Civility (USPC) provides, "[l]awyers shall not, without an appropriate factual basis, attribute to . . . the court improper motives, purpose or conduct." Standard 1 of the USPC provides, "lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner." www.utcourts.gov/courts/sup/civility.html.

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the March 12, 2009 Commission meeting held at the Dixie Conference Center in St. George, Utah.

1. The Commission approved minutes of the January 30, 2009 Commission meeting without amendment.

2. The Commission selected Lance Dean, Gregory Lamb, Daniel Sam, and Karl Mangum as nominees for the Eighth Judicial District Nominating Commission.

3. The Commission selected Lois Baar, Linda Jones, Laura Rasmussen, Annina Mitchell, Elaina Maragakis, and Mike Larsen as nominees for the Appellate Court Nominating Commission.

4. The Commission approved the filing of a petition for Online Bar Elections and, if approved, will direct staff to mail written notice and paper ballots to those who have not disclosed email addresses. Changing to an online election will effect a savings of approximately $10,000 a year.

5. Fall Forum chairs were announced as Hon. Kate Toomey and Amy Dolce.

6. The Commission approved use of credit cards only for online filing versus a mailed form for annual license renewal. Bar staff estimates that using credit cards for online renewal only will save the Bar a substantial amount annually in credit card fees. The Bar will still accept checks and debit cards for payment with the paper licensing form. If a member would like to pay with a credit card, they will be directed to renew online.

7. The Commission noted that the Bar's service income is down approximately $30,000 and interest income is down about $40,000 due to more conservative investments. The Budget and Finance Committee is currently reviewing a new investment policy. One-time expenses related to newly assessed real property taxes, trademark legal fees and the new mentoring program have all contributed to a budget shortfall.

8. Commission subcommittees reviewing selected Bar programs were directed to complete and finalize their reports for the April 2009 Commission meeting. The programs being reviewed are Continuing Legal Education, Fee Dispute Resolution, Law & Justice Center Operations, and the Office of Professional Conduct.

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

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year, which begins July 1, 2009, and ends June 30, 2010. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its May 29, 2009 meeting.

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

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

Telephone: (801) 531-9077

Email: jbaldwin@utahbar.org

Utah State Bar Ethics Advisory Opinion Committee Opinion No. 08-03

ISSUE: What are the ethical limits for the use of testimonials, dramatizations, or fictionalized representations in lawyers' advertising on television or web sites?

OPINION: Advertising may not be "false or misleading." Testimonials or dramatizations may be false or misleading if there is a substantial likelihood that a reasonable person will reach a conclusion for which there is no factual foundation or will form an unjustified expectation. The inclusion of appropriate disclaimer or qualifying language may prevent testimonials or dramatizations from being false or misleading.

The the full text of this and other Ethics Advisory Opinions are available on the Bar's website: www.utahbar.org.

Survey Results Are In! Women Lawyers of Utah Initiative on the Advancement and Retention of Women Update

Would you have guessed that thirty-four percent of attorneys admit that their spouses do eighty percent of the housework? Two thousand seven hundred and two attorneys admitted to the Utah Bar between 1985 and 2005 took the survey Women Lawyers of Utah (WLU) prepared to assist in addressing the issue of attorney retention and advancement. Of those, fifteen lucky attorneys received Visa Gift Cards to thank them for participating in the survey. Thirty-nine percent of responding attorneys currently work for law firms, twenty-two percent work in government offices, ten percent are solo practitioners, and ten percent are in-house counsel. Thirty percent of attorneys have worked for two different employers since receiving their law degree. WLU plans to use the results of the survey in its two upcoming symposia to improve the practice of law in Utah.

To learn the rest of the results, including overall job satisfaction broken down by type of employer, average hours, perceived discrimination, and much more, please attend our two half-day symposia. The first will take place on May 21, 2009, at the Matheson State Courthouse and the second on June 25, 2009, at the Moss Federal Courthouse. WLU will publicize details regarding the symposia, including how you may register, shortly.

For the May 21, 2009 symposium, Chief Justice Durham will make opening remarks. Cynthia Thomas Calvert, Assistant Director of the Project for Attorney Retention (PAR) and a lawyer herself, will deliver the survey results and discuss how Utah's statistics compare to those from around the country. As the Assistant Director of PAR at the University of California Hastings College of the Law, Ms. Calvert has had the opportunity to work with bar associations, law firms, and corporations around the country to stem unwanted attrition of attorneys from law firms. Professor Vaughn Call, Director of the Department of Sociology at Brigham Young University, who oversaw the survey, will be present to discuss any questions about the survey itself, the survey process, and the survey results.

Those attending will have an opportunity to discuss the results and their reactions to them in small groups with facilitators. In addition, Blane R. Prescott from Hildebrandt International will join with a panel of local lawyers in charge of managing other lawyers to discuss what employers have done in the past to retain attorneys and how those efforts have fared. Mr. Prescott has worked with more than 1000 law firms, helping them with strategy, management issues, compensation and practice management and was Managing Director of Latham & Watkins. Mr. Prescott will address the importance of the retention and advancement of women in law firms from the business perspective.

One month later, on June 25, 2009, WLU will host a second symposium, building on the information learned in the first one. Dean Hiram Chodosh from the University of Utah will synthesize the information from the first symposium and encourage participates to start thinking creatively about best practices based on those results. Mary Crane – lawyer, chef, and now consultant from Mary Crane & Associates – will address the role generational and gender issues play in retention of associates in law firms. Those present will break into focus groups to develop proposals to address the needs raised by the survey.

Many organizations and individuals have contributed time and money to make this Initiative possible. The Initiative's Advisory Board has advised WLU, including assisting with the development of the symposia itineraries. That group includes: Chief Justice Christine M. Durham, Magistrate Judge Paul M. Warner, Nathan Alder, Gary F. Bendinger, Peter W. Billings, Jr., Pat Christensen, Dean Hiram Chodosh, Interim Dean James Gordon, Charlotte L. Miller, Douglas M. Monson, and Alan L. Sullivan.

The Utah State Bar; Holme, Roberts & Owen; and Howrey, LLP have all provided significant financial support for the survey and symposia by contributing $10,000 toward the efforts and becoming Platinum Sponsors. Our Gold Sponsors include: Kirton & McKonkie; Ray Quinney & Nebeker PC; and Stoel Rives LLP. Chapman and Cutler, LLP; Dewsnup, King & Olsen, P.C.; Dorsey & Whitney, LLP; Durham Jones & Pinegar; Parr Brown Gee & Loveless; Parsons Behle & Latimer; Snell & Wilmer LLP; and VanCott Bagley Cornwall & McCarthy all have contributed to become Silver Sponsors. Bronze Sponsors include Clyde Snow Sessions & Swenson; Cohne Rappaport & Segal, P.C.; Fabian & Clendenin; Jones Waldo Holbrook & McDonough; Parsons Kinghorn Harris; Prince, Yeates & Geldzahler; and Richards Brandt Miller Nelson. Other contributors include Jane Resiter Conard LLC; Kruse Landa Maycock & Ricks, LLC; Steve W. Owens; Strindberg & Scholnick; Young, Hoffman, Strassberg & Ensor, LLP; Utah Minority Bar Association; Utah State Bar Litigation Section; and the Utah State Bar Young Lawyers Division. WLU remains extremely grateful to all of the individuals and organizations who have helped to make the Initiative possible.

WLU encourages all attorneys and law practice management professionals to participate in these symposia. The more input the better. For more information on the symposia please visit www.utahwomenlawyers.org.

Looking for a way to make a difference helping less fortunate members of the community and maintain your language skills? Tuesday Night Bar is looking for bilingual attorneys to assist with its new Spanish language clinic. The clinic is held on the first and third Wednesday's of every month at the Sorenson Multi-Cultural Center at 855 West 1300 South in Salt Lake City from 6:00 to 8:00 pm. Participants must be active members of the Utah State Bar in good standing. For more information, or to volunteer, please email Gabriel White at gabriel.white@chrisjen.com.

Pro Bono Honor Roll

A. John Pate – IP Case
Andres Alarcon – Family Law Clinic
April Hollingsworth – Guadalupe Clinic
Bob Brown – Tuesday Night Bar
Brad Christopherson – Tuesday Night Bar
Brody Valerga – Tuesday Night Bar
Bryan Bryner – Guadalupe Clinic
Bryan Johansen – Tuesday Night Bar
Bryan Nalder – Tuesday Night Bar
Carol Castleberry – Tuesday Night Bar
Carolyn Pence – Family Law Clinic
Charles Stewart – Social Security Case
Charles Stormont – Tuesday Night Bar
Chris Martinez – Tuesday Night Bar
Christina Miller – Protective Order Case
Christopher Preston – Guadalupe Clinic
Clark Nielsen – Paternity & PO cases
Clark Snelson – Tuesday Night Bar
Craig McArthur – Protective Order Case
Daniel Morse – Family Law Clinic & Tuesday Night Bar
Darren Reid – Tuesday Night Bar
David H. Day – Wills/Estate Case
David Hall – Tuesday Night Bar
DeRae Preston – Family Law Clinic
Dixie Jackson – Family Law Clinic
Elizabeth Lisonbee – Family Law Clinic
Garth Heiner – Guadalupe Clinic/ Consumer Case
Glen Davies – Tuesday Night Bar
Ian Davis – Guadalupe Clinic
Jake Taylor – Tuesday Night Bar
James Morgan – Guadalupe Clinic
Jared Hales – Family Law Clinic
Jason Grant – Family Law Clinic
Jeffrey D. Gooch – Mediation Tort Case
Jennifer Mastrorocco – Family Law Clinic
Jeremy McCullough – Bankruptcy advice
Joanna Radmall – Tuesday Night Bar
John Zidow – Tuesday Night Bar
Jonathan Jaussi – Bankruptcy advice
Julie Ladle – Tuesday Night Bar
Kathryn Harstad – Guadalupe Clinic
Katie Carreau – Tuesday Night Bar
Keith Eddington – Real Property/ Estate Case
Kelly Latimer – Tuesday Night Bar
Ken Ashton – Tuesday Night Bar
Kristin Jaussi – Guadalupe Clinic
Kyle Hoskins – Farmington Clinic
Lauren Barros – Family Law Clinic
Leslie Orgera – Tuesday Night Bar
Lisa Lokken – Adoption Case
Lois Baar – Tuesday Night Bar
Lou G. Harris – Bankruptcy advice
Louise Knauer – Family Law Clinic
Maria-Nicolle Beringer – Consumer & Adoption Cases
Mark Kittrell – Tuesday Night Bar
Matt Ball – Tuesday Night Bar
Matthew Olsen – Divorce Case
Michael Johnson – Bankruptcy advice
Michael Langford – Guadalupe Clinic
Michael Tita – Tuesday Night Bar
Mike Black – Tuesday Night Bar
Mike Garrett – Tuesday Night Bar
Nicholas Angelides – Senior Cases
Rachel Otto – Guadalupe Clinic
Rachel Terry – Tuesday Night Bar
Rebecca Ryon – Protective Order Case
Rich Mrazik – Tuesday Night Bar
Rita Cornish – Tuesday Night Bar
Rob Crockett – Tuesday Night Bar
Roger Hoole – Adoption
Ryan Bolander – Tuesday Night Bar
Sally McMinimee – Family Law Clinic
Sandra Allen – Tuesday Night Bar
Scott Bell – Tuesday Night Bar
Scott Cheney – Tuesday Night Bar
Shawn Stewart – Tuesday Night Bar
Shellie Flett – Bankruptcy advice
Stacy Ford – Family Law Clinic
Stacy McNeill – Guadalupe Clinic
Steven Kuhnhausen – Paternity Case
Stewart Ralphs – Family Law Clinic
Susan Motschiedler-Tuesday Night Bar
Thomas Barr – Guadalupe Clinic
Tim Dance – Tuesday Night Bar
Timothy Larsen – Bankruptcy Case
Todd Olsen – Family Law Clinic
William Morrison – Bankruptcy rep.

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 84111-3834

Small Firm Section Open To All

The Solo, Small Firm, and Rural Section invites all Utah lawyers and support staff to join this wonderful section. Our section is filled with lawyers dedicated to helping the smaller law practice capture and leverage the vast experience and learning available amongst its members.

Our section offers free CLE courses nearly every month of the year and works very hard to focus on the needs of the small firm lawyer. For example, recent CLE topics have included: (1) how to utilize outsourced legal assistants and paralegals to create profit and efficiency in your law office; (2) using search engine optimization and pay-per-click campaigns to increase your online visibility; (3) how to better handle stress in the legal profession; (4) using social media, or Web 2.0 as a marketing tool; and (5) how to capture referral income for your practice from personal injury cases. Future topics currently scheduled include: (1) counseling bankruptcy clients in the new economic climate; (2) Criminal Law Triage: how to provide emergency counsel to clients and acquaintances; and (3) using virtual office space to cut costs without cutting service. Our CLE events are typically held on the third Friday of every month at the Salt Lake Law and Justice Center. Come and be a part of a great group of like-minded attorneys who love the freedoms that a small law practice can provide.

Mailing of Licensing Forms

The licensing forms for 2009-2010 have been mailed. Fees are due July 1, 2009; however, fees received or postmarked on or before July 31, 2009, will be processed without penalty.

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

If you need to update your address information, you may change it directly online at utahbar.org or you may submit the changes in writing to:

Licensing
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111-3834

You may also submit the information by e-mail to Licensing@utahbar.org or by fax at 801-531-9537.

2009 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2009 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111-3834, no later than Monday, September 14, 2009. The award categories include:

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

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

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 the licensing department at the Utah State Bar.

Utah Bar Foundation

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

The Utah Bar Foundation is a non profit organization that administers the Utah Supreme Court IOLTA (Interest on Lawyers Trust Accounts) Program. Funds from this program are collected and donated to nonprofit organizations in our State that provide law related education and legal services for the poor and disabled.

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

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

Nomination forms must be received in the Foundation office no later than 5pm on Wednesday, May 13, 2009, to be placed on the ballot.

The Utah Bar Foundation will be holding the Annual Meeting of the Foundation on Thursday, July 16, 2009, at 9:00 am in Sun Valley, Idaho. This meeting will be held in conjunction with the Utah State Bar's Annual Meeting.

For additional information on the Utah Bar Foundation, please visit our website at www.utahbarfoundation.org.

Bar Thank You and Welcome to New Admittees

New admittees will be welcomed into the Utah State Bar at the May 15, 2009 admission ceremony to be held at noon in Room 255 of the Salt Palace. Refreshments will be provided after the ceremony.

A sincere thank you goes to all the attorneys who donated their time to assist with the February 2009 Bar exam. Many attorneys volunteered their time to review the Bar exam questions and grade the exams. The Bar greatly appreciates the contribution made by these individuals and gives a big thank you to the following:

BAR EXAM QUESTION REVIEWERS

Craig Adamson	Aric Cramer	Tim Houpt	Langdon Owens, Jr.
John Anderson	Brent Giauque	Elizabeth Hruby Mills	Bruce Reading
Wayne Bennett	Jim Hanks	David Leta	Robert Rees
Branden Burningham	Creighton Horton	Terrie McIntosh	Robert Thorup
David Castleton			

BAR EXAMINERS

Mark Astling	Michael Ford	Michael Lowe	Rocky Rognlie
John Ball, Jr.	Robert Freeman	Nathan Lyon	Maybell Romero
Joseph Barrett	Tammy Georgelas	Gene Miller, Jr.	Ann Rozycki
Brent Bartholomew	Paul Hess	Will Miller	Stephanie Saperstein
Ray Barrios, Jr.	Kelly De Hill	Thomas Mitchell	John Sheaffer, Jr.
Wayne Bennett	Rebecca Hill	Nathan Morris	Michael Sikora
Anneliese Booher	Mickell Jimenez Rowe	Heather Morrison	Leslie Slaugh
Tiffany Brown	Randy Johnson	Julie Morriss	Matthew Steward
Jonathan Cavender	Craig Johnson	Kimberly Neville	Alan Stewart
Gary Chrystler	Lee Killian	Jamie Nopper	W. Kevin Tanner
Marina Condas Gianoulis	Dale Kimsey	Eric Olson	Padma Veeru-Collings
Mark Dean	Karen Kreeck	Jeffrey Owens	Kelly Walker
Sharon Eblen	David Lambert	Jonathan Parry	Elizabeth Whitsett
David Eckersley	Susan Lawrence	Kara Pettit	Jason Wilcox
Lonnie Eliason	Greg Lindley	Stephen Quesenberry	Judy Wolferts
Commissioner Anthony Ferdon	Patrick Lindsay	Kenneth Reich	John Zidow
	Dennis Lloyd	Kyle Roche	

Notice of Ethics & Discipline Committee Vacancies

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

Please send a resume, no later than June 1, 2009, to:

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

Become a Mentor

Show a new lawyer the way to success

Mentor within your office, an individual, or a group

WHAT IS REQUIRED:

1. **Submit** the mentor volunteer form
2. **Appointment** by the Utah Supreme Court
3. **Meet** with your new lawyer a minimum of 2 hours a month

REWARDS – PRICELESS

Receive 12 hours of CLE Credit for your work

MENTOR QUALIFICATIONS

1. Seven years or more in practice
2. No past or pending formal discipline proceeding of any type
3. Malpractice insurance in an amount of at least $100,000/$300,000 if in private practice.

For more information on **BECOMING A MENTOR** go to:

www.utahbar.org/nltp

The Benefits of Effective Mentoring

- Increases productivity for the individual and the organization
- Improves client relations and client attraction
- Reduces the likelihood of new lawyers leaving the organization
- Boosts morale
- Assists in attracting better talent to the organization
- Enhances work and career satisfaction
- Clarifies professional identity
- Increases advancement rates
- Promotes greater recognition and visibility
- Encourages career opportunities within the organization

New Lawyer Training Program

The Utah State Bar Honors Pro Bono

The 2009 Pro Bono Publico Awards were presented at the Law Day Celebration on May 1st at the Little America Hotel. These awards will be presented each year to Utah attorneys, law students, and law firms who make significant contributions in pro bono legal services to Utah's most vulnerable citizens – people living in poverty, individuals with disabilities, veterans, seniors, minorities, and victims of domestic violence.

"I am grateful to fellow bar members who routinely engage in pro bono service. It is rewarding. I encourage you to do more this year than you have done before. Take one additional case. Give one more day. Find one more way to provide institutional pro bono service." – Nate Alder, President of the Utah State Bar

ATTORNEY OF THE YEAR

Scott H. Martin,
Snow, Christensen & Martineau

Honorable Mention: Robert R. Brown, Rhodes International, Inc.

PRO BONO COMMITMENT TO COMMUNITY AWARD

Professor Linda F. Smith,
S.J. Quinney Law School

SENIOR ATTORNEY OF THE YEAR

Nick Angelides, Attorney at Law

YOUNG LAWYER OF THE YEAR

Melissa Fulkerson,
Keith Barton & Associates

Honorable Mention:
Ryan R. Bolander, Attorney at Law

LEGAL AID ATTORNEY OF THE YEAR

Tim Williams, Utah Legal Services

Honorable Mention: Michelle Lesue, Utah Legal Services

LAW STUDENT OF THE YEAR

Tadd Dietz,
S.J. Quinney Law School

Honorable Mention:
Danielle Hawkes,
S. J. Quinney Law School

LAW FIRM OF THE YEAR

FORD & HUFF

Ford & Huff, LLC

Honorable Mention:
Holland & Hart, LLP and Snell & Wilmer, LLP

For more information on the recipients of these awards, please visit www.utahbar.org/probono/

Attorney Discipline

ADMONITION

On February 25, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.9(a) (Conflict of Interest: Former Clients) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was hired to represent a client in a divorce matter. The attorney's office sharing arrangement was the functional equivalent of being in the same firm as a family member. The attorney took a case against a former client of his family member.

RESIGNATION WITH DISCIPLINE PENDING

On February 11, 2009, the Honorable Matthew B. Durrant, Associate Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning David W. Snow for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.15(a) (Safekeeping Property), 1.15(d) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary there are three cases:

Mr. Snow was hired to help his client resolve various debt issues. Mr. Snow was given a large sum of money to resolve the client's outstanding debt. Mr. Snow was to receive 15% of the amount he was able to reduce his client's debt. Mr. Snow failed to pursue the work he was hired for in a timely matter. Mr. Snow failed to communicate with his client and failed to return the unused funds that should have remained in his trust account. Mr. Snow commingled his client's funds with his own funds and used his client's funds to pay his own expenses.

In another matter, Mr. Snow was given a large sum of money to assist a client in resolving various debts. Mr. Snow was to receive 15% of the amount he was able to reduce his client's debt. Mr. Snow negotiated with a creditor and the client approved payment to settle the debt. Mr. Snow did not mail the check to the creditor until after the settlement offer had expired. Mr. Snow's client expressed frustration communicating with Mr.

Snow. Many of the client's creditors had not had contact with Mr. Snow. A new fee arrangement was negotiated with Mr. Snow and his client. After some time had passed, and Mr. Snow had only settled one more account, the client indicated he would handle the remaining accounts himself. Mr. Snow has yet to return the unused portion of his client's money. Mr. Snow failed to keep his client's money in his trust account and used the client's money to pay his own debts.

In the last matter, Mr. Snow was hired to represent a client in a bankruptcy proceeding. Mr. Snow filed the bankruptcy petition and then had no contact with his client for several months. Mr. Snow filed an objection to the trustee's Motion to Dismiss and stated the failure to file the declaration was because of his delay. Mr. Snow failed to timely file notices of two creditors, causing his clients to be unable to include the two creditors in their bankruptcy, and failed to respond to his client's inquiries.

DISBARMENT

On January 14, 2009, the Honorable David N. Mortensen, Fourth Judicial District Court, entered an Order of Disbarment disbarring Paul J. Young from the practice of law for violations of Rules 8.4(b) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

On December 27, 2005, Mr. Young was found guilty of one count of Conspiracy to Defraud the United States in violation of 18 United States Code, section 371. Mr. Young was sentenced to incarceration for a period of 45 months, followed by supervised release for a period of three years.

PUBLIC REPRIMAND

On January 28, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Daniel V. Irvin for violation of Rules 1.3 (Diligence), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Irvin failed to appear at a previously scheduled trial in a client's case. Mr. Irvin failed to appear at a previously scheduled pretrial hearing in another client's case. Mr. Irvin failed to take necessary steps to follow-up on client matters after his computer crashed and he lost computer data regarding upcoming hearing dates.

We are pleased to announce…

New President –

Ronald G. Russell
General Litigation
Title Insurance
Real Estate

J.D., 1983
University of Utah
Order of the Coif

New Shareholders –

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Order of the Coif

Barton L. Gertsch
Business Transactions
J.D., 2004
University of Maryland,
Order of the Coif

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- Labor and employment
- Eminent domain
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- Executive benefits and compensation
- Intellectual property
- Natural resources and environmental law
- Probate and estate administration

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Commercial Litigation
J.D., MBA, 2004
University of Utah,
Magna cum laude
Order of the Coif

Michael J. Schefer
Business Transactions
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University of Florida,
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Pay It Forward: Community Service Opportunities in the Paralegal Division

by Carma Harper

When I was appointed as Chair of the Paralegal Division's Community Service Committee, I thought of it as a great opportunity to find a project where we could make a difference. I soon discovered that there is no shortage of programs and services in need of assistance from the public year round. With so many projects to choose from, allocating our time and resources became a larger challenge.

I am proud to report that in the past year, we have taken part in many very worthwhile activities and causes to benefit our community. Here are some highlights:

- We've had the pleasure of assisting the Young Lawyers Division in the Wills for Heroes Program, in which estate planning documents are prepared free of charge for first responders such as police officers and firefighters. Wills for Heroes events have been and continue to be held all over Utah. I would like to thank the members of our Division's Wills for Heroes Committee, J. Robyn Dotterer, JoAnna Shiflett, and Lindsey Bodily, as well as each volunteer who has donated time to notarize and witness documents.
- Last spring, our committee conducted a Professional Clothing Drive and collected over seven SUVs full of clothing to benefit the Women Helping Women Program. We are very grateful to Henrie's Dry Cleaners for not only donating clothes, but also for cleaning all of the donated items prior to delivery. A special "thank you" to Shawna Powers, Cheryl Jeffs, Mary Stephens, and JoAnna Shiflett for collecting and sorting all of the clothing.
- We joined Mervyn's Department Store and the Davis School District in May 2008 for a project providing clothing and school supplies for underprivileged children. Funds for Mervyn's gift cards were donated by the Davis School District, and each child was paired with an adult volunteer to spend their gift card money on school clothes. Mervyn's also donated a backpack full of additional items, such as books and toiletries, to each child. The program was a huge success, as well as a lot of fun.
- In December 2008, we made over 100 fleece hats and scarves for donation to the Youth Center, as part of a service project being conducted by the Legal Assistants Association of Utah. We appreciate being able to participate in this very worthy effort.

I am humbled by the amount of good work our Community Service Committee has been able to accomplish thus far. I want to take this opportunity to encourage all of us to find ways to "pay it forward" in our communities throughout the year.

We are always looking for new projects and volunteers. Please contact either myself, charper@strongandhanni.com, or J. Robyn Dotterer, rdotterer@strongandhanni.com, with ideas on where we can be of assistance. Thank you for your continued support.

CARMA HARPER is the Region 1 Director for the Paralegal Division, Chair of the Community Service Committee and Liaison to the Young Lawyers Division. She is a paralegal with Strong & Hanni.

UPDATE *Change in Paralegal Division Membership Application & Renewal Policy*

Please be aware that we are changing our policy on membership applications and renewals. Starting with the 2009-2010 membership year, there will be two open application and renewal periods, one from May 1st – 31st and a second from January 1st – 31st. *Membership applications and renewals submitted outside of these dates will be held until the next open application period.* There will be no exceptions and no discounts on membership regardless of when the application or renewal is submitted. Our membership year continues to run from July 1st – June 30th. Thank you for your support.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
05/12/09	**Cell Phones, PDA's, and Netbooks - OH MY!** 11:45 am – 1:30 pm. Smartphone Showdown: Blackberry vs iPhone vs Windows Mobile vs Android. PDA's for the Nostalgic. A Brief Introduction to Netbooks. Portable Security for Legal Pros. $35, lunch included.	1.5
05/21/09	**Annual Real Property.** TBA	TBA
06/02/09	**Short Writing Course for Lawyers, Part II –** with Robert Sykes and John Fay. 4:00 – 7:00 pm. This seminar is a continuation of the popular 2007 Short Writing Course for Lawyers.	3 CLE/NLCLE
06/04/09	**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.	Satisfies New Lawyer Ethics Requirement
06/19/09	**Law Firm Economic Stimulus Package – Surviving Today's Economy.** 9:00 am – 4:00 pm. Special Guest: Jim Calloway, Director of the Oklahoma Bar Association's Management Assistance Program, Past-Chair ABA Tech Show. Lincoln Mead gives him a thumbs up.) Session 1: The Changing Landscape of Law Practice: Don't just Survive – Thrive! Session 2: Improving Profitability – Fees and Billing in the 21st Century. Session 3: The Digital Law Office: Re-engineer Your Workflow. Session 4: (after lunch) 50 Hot tips You Can Put to Use Next Week (or 60 if you are a 60 minute state). Session 5: Marketing in a Down Economy. Session 6: Developing your Action Plan for Success. $80 Solo, Small Firm & Rural Practice Section members, – $185 others.	6
06/17/09	**Annual Paralegal Division Seminar**	TBA
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. Co-sponsored by UAJ.	3 CLE/NLCLE
07/15–18	**2009 Summer Convention in Sun Valley, Idaho** **Enjoy plenty of family fun and CLE in beautiful Sun Valley, Idaho. Practical and informative courses with a variety of subjects to choose from. Keynote speakers: Sandra Day O'Connor, retired Associate Justice, U.S. Supreme Court; Kevin T. McCauley, Institute for Addiction Study; and Michael John Perry, Professor, Emory University School of Law. Look for the convention brochure and registration form in the center of this *Bar Journal*.**	**Up to 15**
07/22/09	**Ethics School.** 9:00 am – 3:45 pm. $175 early registration; $200 after 07/10/09. Required for attorneys admitted reciprocally.	6 Ethics includes 1 hr Professionalism
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
11/12&13/09	**FALL FORUM** Downtown Marriott	9*
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

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