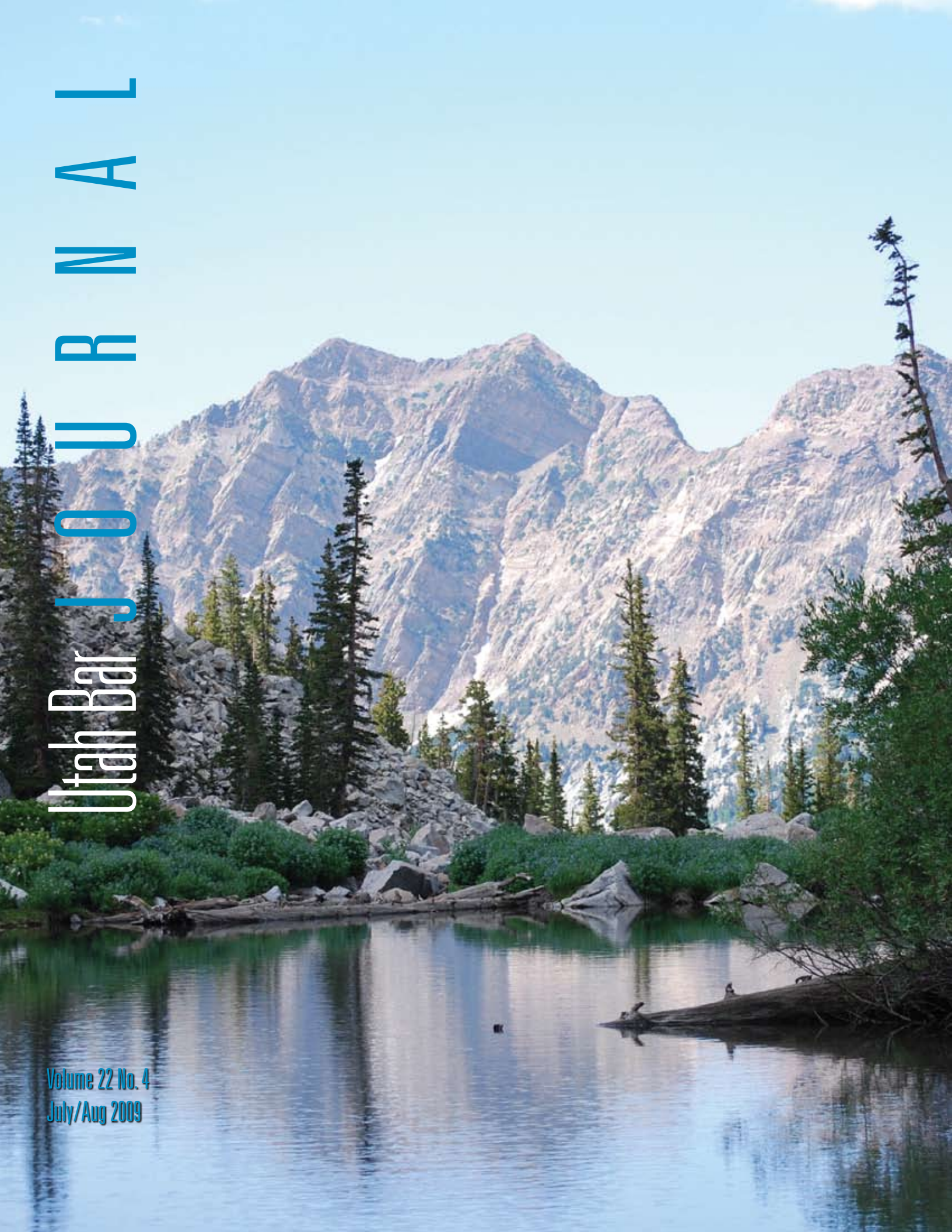
Utah Bar JOURNAL



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Maybird Gulch, Little Cottonwood Canyon, by first-time contributor, Wally Lloyd, Salt Lake City.

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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Looking Back, Looking Forward

by Nathan D. Alder

No leader knows exactly what he or she will face when taking over the reins of an organization. We anticipate, and hope, that things will turn out in our favor, and that we can positively influence the issues. Sometimes it may turn out easier to serve than one might originally expect; other times it may be exactly as envisioned. But sometimes the service required of a leader is heightened and intensified by dramatically changing conditions. Leaders must rise to the occasion and shepherd their cause to safety when storms suddenly appear.

When I took the oath of office a year ago, the issues facing me as a new president seemed manageable and in many ways just what I was used to dealing with as a five-year member of the Bar Commission. However, within two months, the landscape changed dramatically. The mortgage meltdown and lending crisis showed its true identity in the form of collapsed financial institutions, including the bankruptcy of Lehman Brothers (at $640 billion, the largest in history at the time), massive foreclosures, world stock market devaluation, lost retirements, ruined 401(k)s, rising unemployment, and general crises in the business, governmental, and institutional environments. We all watched this develop day by day. The economic collapse in the fall of 2008 set the nation on a course that directly affected all of us. At first, I heard jokes about how lawyers were recession proof. By the end of October, however, those comments were no more; instead I listened to Bar members describe how they were being affected by the economy. I had these conversations with many of you throughout this year. I appreciate that you confided in me, and looked to me as a friend, leader, and resource in a troubled time. Many of our new lawyers were the hardest hit. Some of our senior lawyers cannot retire just yet. My heart goes out to you, and I encourage you to take the long view and to believe in the future.

The challenges and issues presented to me, and all leaders of our profession, have been serious, consistent, and profound. There are no quick fixes. Although I have done my level best to address each challenge and issue as it arose, I am writing to you, as my colleagues, to ask you once again to join in our greater cause and to help our community address the many issues we now face. This is a time for many leaders and many volunteers. All of us need to roll up our sleeves. This is a time when you as members of the Utah State Bar need to become engaged. A lawyer who is defined only by his or her billable hour is missing the point of our current time. We must certainly work to support ourselves, our families and to help our clients, but I also encourage you to get out of your offices and find causes that will lead to solutions for society's greater problems. This is also a time to read and reflect, listen and observe, learn and understand so we can help now and in the future. Do not think in solitary terms; the profession is a fellowship. We must unite and work together. We will succeed if we all choose to contribute. Lawyers have always stepped forward when society needed leaders. Lawyers are privileged by education, training, and experience. Society needs us now. I am grateful I am surrounded by lawyers who are leaders in our society.

As I have done throughout this year, let me address a number of issues of great concern, and by doing so impart a word of farewell, and offer my best wishes to those who will take up the issues that remain.

Bar Finances

The Bar has had to tighten its belt. And we have held back on expenditures for many years now. To hold the line this year we had to make some even tougher cuts. We would like to fund some of our more critical programs at their full levels, but we have not been able to. Unfortunately, our situation will not correct itself when the economy turns around and interest income comes back up to historical levels. The Bar has been on course for a licensing fee increase for many years now, particularly because the number of lawyers has doubled since the last increase twenty years ago. You probably read the e-bulletin announcement about the petition the Commission is working on and will present to the Supreme Court by year end. I encourage you to study the financial documents and understand that the Bar cannot hold off any longer. As fiduciaries, the Commission must protect the future of the Bar; we must do so now.

More information will come to you following the Commission's upcoming meetings. I anticipate that the next *Bar Journal* will have a detailed explanation of the petition we will submit to the Court. In the meantime, we have created a page on our website, at www.utahbar.org/documents, where you can learn more about the Commission's ongoing work in this area.

The Functioning and Funding of our State Court System

I have spent much of my year focused on this issue. I did not necessarily choose this as a focus going in, but it became an issue by virtue of the events from this year. It was my privilege to take up the Bar's seat at this table. It was a tough fiscal year at the Legislature, and I appreciate the dedication and sacrifice of those who worked so hard on behalf of the courts to bring about favorable results. Although the Legislature, with input from Judicial Council representatives, found a way to provide a measure of adequate funding for the court system this year, I know that Utah's economy has not yet turned the corner, and we must diligently watch state revenue levels for next year to see how the court system and all other functions of government will fare. I have addressed this numerous times this year. I am anxious for what has been lost to be restored. Long term, the court system should be funded at prior levels and beyond or otherwise face systemic problems. The down economy has flooded the courts with cases. Yet the court system is smaller by proportion. I believe strongly that properly funding the court system is, and should always be, a priority for our elected leaders.

I have truly appreciated my experience this year working with elected leaders. I am grateful for their service and their understanding of the critical issues we face as lawyers. At the heart of our interests as lawyers is a fair and impartial judiciary. Citizens expect nothing less. The Constitution requires it. We should never tire of advocating for this noble goal. It unifies us. I recently attended an amazing national conference on this topic. I learned a lot during those two days in Charlotte, as I am sure others did. I hope to share more thoughts on this later when things settle down and I can focus on fewer than twelve things at one time. I anticipate Justice Sandra Day O'Connor will address this issue when she speaks on July 18th at our annual convention. Her speech in Charlotte inspired me. I am so grateful she accepted our invitation to speak to Utah lawyers. We have experienced a lot of activity in this regard the last few years, including the creation of the Judicial Performance Evaluation Commission, which will independently survey and evaluate our judges. I am confident in their work and grateful for their dedication. I believe that "justice is the business of government," and that our elected leaders and judicial leaders

should always make it a priority to assess whether we are on the road to a superior justice system which is fair, impartial and appreciated, or something less. I applaud our elected leaders and court leaders who found ways to have dialogue on these topics, and I encourage all lawyers and their clients to help in this important cause.

Public Service

I encourage you to consider public service. This is the time for involvement in public life. At our Fall Forum, Governor Huntsman challenged all of us to consider public service. I reiterated his call numerous times throughout the year. I applaud those of you who have chosen to serve. The profession needs lawyers to engage in public service. It is our calling, particularly as we are officers of the court. There are many ways to serve, from Bar committees, to Court committees, to judicial nominating committees, to community boards, to state boards and commissions, to becoming a legislator or other elected official, to serving on the bench. Eight judicial openings will be filled over the course of the coming year. Three are on the Court of Appeals. This is an important time.

Mentoring aka the "New Lawyer Training Program":

Being involved in this program will be one of the best things you will do as a lawyer. I say that without hesitation. We know the value of mentors. We would not be here without them. I am asking you to mentor a new lawyer. The Bar's website has all that you need to learn more and join this effort; I hope you will also take the time to watch the inspirational video we created about mentoring in Utah. Go to www.utahbar.org/nltp. To launch mentoring and help recruit mentors, I have been surrounded by incredibly capable committee co-chairs Rod Snow and Margaret Plane, and Utah's mentoring mentor, Jim Bachman, as well as a host of leaders devoted to the cause, including Chief Justice Christine Durham, Associate Chief Justice Matthew Durrant, Justice Jill Parrish, Matty Branch, John Baldwin, Jeff Hunt, Annette Jarvis, our Bar Commissioners and Bar staff, and all members of the larger mentoring committee and its sub-committees. This has been a labor of love. It is where my heart is. I am honored to have been at the helm for the start of this transforming program. It will change our profession and ensure the future. Helping new lawyers find sure footing benefits everyone.

Professionalism

If you had not noticed already, this has been the decade of professionalism in Utah. I have been privileged with a front row seat to these transpiring events, going back to 2001. I could not have envisioned in 2001 what 2009 would look like, in part because cynicism and skepticism ruled the day back then. But the Supreme Court and leaders of our profession felt differently, and thus an Advisory Committee on Professionalism was created, and the rest, as they say, is history. The changes in this area of our professional experience have been institutional, personal, purposeful, and profound. It has been an honor to participate in recent admissions ceremonies and hear our new lawyers pledge to uphold the highest standards of the profession, including dedication to the Standards of Professionalism and Civility. It is also an honor to sign my licensing renewal now and make the same pledge. Mostly, it is rewarding to litigate with other lawyers who I know value honor and integrity and who uphold the highest standards of our profession. It is a privilege, not a right, to practice law. We must care for that privilege and honor it deeply. I encourage you to read Jeff Hunt's tribute to Judge Winder. We are fortunate to have examples like Judge Winder after whom we can pattern a higher path. For new lawyers now being admitted, you can thank those who have gone before you for the professional environment you inherit. You can thank Court and Bar leaders who have toiled to bring about a mentoring program designed to inspire and empower you; it is a priceless gift. You can thank colleagues who are dedicated to practicing at the highest levels of the profession. You can commit to starting your own career with dedication to these standards and principles. And you can promise to help others who will follow you. I am grateful to have had the experience of serving on the Supreme Court's Advisory Committee on Professionalism and to see through to the end the amazing developments that were only ideas years ago. To all colleagues who have labored with me in this arena, I thank you. You honor us with your dedication and service.

Lawyer Assistance

I encourage you to seek help if you need it. We all want you to come through your challenges, whatever they may be. We want you to succeed and overcome what holds you back. The Bar funds two outside programs to help you. Several of you called me or stopped me on the street to identify problems in your life or in your career. I am glad you reached out. I encouraged some of you to call either Lawyers Helping Lawyers, 800-530-3743, or Blomquist Hale Professional Counseling Services, 800-926-9619. We used Bar funds to pay for the services that these entities provide. The services are confidential. The Bar does not know who calls or what transpires in your call. We want all lawyers to be productive, healthy, and well so that we may achieve our mutual goals together.

Pro Bono Service

In October we will join with all other lawyers in the United States to celebrate pro bono service as a hallmark of our profession. I encourage you to prepare for October by clearing some time

to engage in your own pro bono work. I am sure you are getting more requests now, in a down economy, than before. For those of you who are diligently engaging in pro bono outreach, thank you. I am pleased that the Bar has made great strides this year, particularly under the direction of our pro bono coordinator, Anna Jespersen, hired this year. Unfortunately for us, she recently decided to move to Houston for school. Due to budget cuts, we are not immediately able to fill her position. We are hopeful, however, that you will find ways to step in and provide meaningful service with existing agencies and other avenues for pro bono work. As a Bar, we will find ways to communicate and coordinate in Anna's absence. And we will celebrate the good that comes from pro bono service in October.

General Services Tax

I spent considerable time this year preparing for what we had been told would be a 2009 bill to broaden the sales tax liability to all services, including legal services. Despite the dramatic impact this would have on our community, I thoroughly enjoyed my work in this area. This is a unifying issue for all lawyers. And I must say that the Bar was the first to respond. We had important discussions with decision makers. We offered assistance, perspective, and resources to leaders who were considering this sweeping change. My work with legislators, the governor, and members of the Tax Review Commission (TRC) has been positive, civil, and professional. I have been treated well, and in turn, I greatly respect the work of these leaders in trying to find solutions to our state's ever growing list of problems. I am grateful to our public servants. In my discussions with leaders, I encouraged them to consider alternatives, namely increasing the cigarette tax and restoring the sales tax on food while exempting the lowest income individuals on whom the food tax would be a hardship. Implementing the proposed sales tax on all services will present political pitfalls for years to come. It is a complicated tax, and not just for us, but for hundreds of thousands of professionals. If the tax excludes business inputs, it will be borne on the backs of households. For lawyers, the tax is problematic for a host of reasons that I previously addressed. We have a page on the Bar's website devoted to this issue, www.utahbar.org/prof_services_tax/. For now, I do not have much more to report, other than to say we are diligently monitoring this issue. The TRC is doing its work and is studying the issue. Public comment hearings scheduled for June were postponed, but we anticipate the TRC will hold hearings on this issue in the near future. If this tax issue gains momentum or if there is some related development, we will update you immediately. I encourage you to stay in contact with John Baldwin and Richard Dibblee at the Bar regarding this issue.

Look to the future

There is so much I could say in this regard, but let me specifically address one issue. In 2010, your voice needs to be heard at the Legislature. But know that being heard and being effective are two different things. Lawyers need to effectively engage now in order to be heard later on. You cannot wait until then and expect that an email will carry the day. Relationships, at the Legislature and elsewhere, are as important now as ever before. If you are not developing relationships with people who can influence issues, then you are not as effective as you could be. Lawyers are academically trained and tend to rely on argument and factual information; that is the business of courts. Outside of court, however, relationships gain importance, particularly in government and business. I encourage you to develop relationships across the board so that when critical issues arise the Bar can count on you to help and be effective. I encourage you also to become acquainted with Bar leaders in order to offer your services and connections to them so we may work together toward mutually beneficial goals.

Frankly, it is hard for me to consider my future beyond July 17th when I am no longer your president. I thoroughly enjoyed every aspect of this service. I was challenged more than I ever thought I would be. Honestly, I am grateful to be standing at the end of the day; at times I wondered if I could. Maintaining a demanding practice, caring for a young family, and meeting the demands of this year's events as president has been heavy. I feel like I have been in trial for ten months straight. I am grateful to my closest friends, family members, colleagues, bar junkies, mentors, law partners, associates, and staff for supporting me in this incredible endeavor. My wife, Laurel, and children sacrificed the most. I can not nominate Laurel as the Bar's volunteer of the year, but you should thank her when you see her. She gave more than I ever imagined she would have to give. It is now my turn to support her in whatever she chooses to do. I am certainly in her debt, as is the Bar. As president, I had the privilege of working with and being supported by the finest people you could ever hope to meet. John Baldwin and Richard Dibblee and their staff are a tremendous credit to our profession. I am grateful I received their full support. The Bar Commission has worked very hard these last two years. The issues drove us to do more and achieve more. To each of our Commissioners, thank you. And to each of you who volunteers and who is dedicated to our legal system, and to the hallmarks of our profession, your service is an honor to the profession and to society. It makes a huge difference. Honorable lawyers lift up society. Thank you. And thank you for the privilege of being your president. I wish you all the best.

Family v. Institution

Advising Clients on the Selection of a Successor Trustee

by Scott M. McCullough and David W. Macbeth

A trustee is a trusted fiduciary who holds the utmost responsibility and duty in caring for another's assets. This is not just a duty of care and loyalty, not just the morals of the marketplace and not just honesty alone, but the "punctilio of an honor the most sensitive." *Meinhard v. Salmon,* 249 N.Y. 458, 164 N.E. 545, 546 (N.Y. 1928). This statement from Judge Cardozo has long been recognized and repeated as the classic statement for describing fiduciary duties, duties held by every trustee.

Advising clients on the selection of this trusted fiduciary can be a twisty road, full of dangerous pot-holes, a road that clients expect their attorney to guide them through. As their trusted advisor, the advice we give clients on this decision can have very long-lasting effects on the clients' fortune and their family.

After dad's death a shelter or bypass trust was left for mother and the children, along with a QTIP trust for mother. Both mother and an institutional trustee were named as successor co-trustees of both trusts. Mother continued to use the trust assets for her benefit and for the benefit of their descendants (specifically providing for the higher education of her grandchildren). After a series of unfortunate events mother was unable to handle her own affairs. The family desired to continue using the trust assets for the benefit of the family in the same manner mother had used them. However, the institutional trustee was unwilling to act without safety nets, such as court approval, for every decision (presumably for fear of being sued) and roadblocked all of the distribution decisions the family made. Even in the face of a unanimously signed consent by the family authorizing the institutional trustee to act, the institutional trustee refused. After months and months of red tape and hassle, not to mention the mounting legal and trustee fees, the family fired the institution and replaced that trustee with another (as allowed by the trust) in the hope that the new institution would work with them and not against them.

Individual trustees also malfunction. In one example, the parents died leaving a son as the individual trustee. He gave a copy of the trust to his sister, a beneficiary, and explained his investment strategy as trustee. That communication constituted his sole report about the trust or trust assets. Over time, sister lost her copy of the agreement and did not remember any basic elements of his investment strategy. Brother refused to give her another copy of the trust agreement. He derided sister for not keeping investment strategies in mind. Brother refused to give her any accounting whatsoever of the trust assets or of trust transactions over the years. When informed of her rights, sister refused to consult an attorney or do anything else, because that "would cause trouble in the family." As time passed, suspicion grew, distrust mounted and conflict within the family was the inevitable result.

Examples of challenges abound regardless of the trustee chosen. The question for us as estate planners is who should we advise our clients select as successor trustees and why? Typically when a revocable trust is set up the grantor or settlor is the trustee, serving with their spouse, if married, and then alone for the rest of the survivor's life. This arrangement generally works very well. Problems typically arise after death (especially in a second marriage situation), during which time administration of the trust really begins, such as when property is no longer used

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DAVID MACBETH is a Trust Officer with Bank of Utah.

for the benefit of the settlor but is to be distributed to or held for the benefit of the surviving spouse, the children, or other selected beneficiaries, and when tax returns are to be filed.

Role of Trustee

We begin by looking at the role of a trustee. A trustee is the legal owner of the assets transferred to a trust, charged with managing those assets in the best interest of the beneficial owner (the beneficiaries), which might include investing trust assets, management of real estate, management of a business controlled by the trust, paying trust expenses, and distributing trust assets. Such management is generally governed by the trust document and is not governed by what the beneficiaries want (regardless of the pressure the beneficiaries apply on the trustee).

Trust documents may leave great discretion to the trustee to manage and distribute the trust assets as they see best or may have strict guidelines the trustee must follow, but managing assets and making distributions are only the beginning of the job. The trustee must also do the following:

i. Collect and inventory trust assets;

ii. Obtain fair market values;

iii. Prepare and have ready accountings of trust assets (renewed annually);

iv. Identify and locate trust beneficiaries;

v. Manage, protect, and invest trust assets;

vi. Open trust accounts;

vii. Open trust safe-deposit box;

viii. Pay debts and expenses;

ix. Insure the filing of tax returns and payment of taxes (IRS form 1041 and Utah State form TC-41);

x. Meticulously record all payments of compensation to the trustee;

xi. Distribute remaining assets to the proper beneficiaries; and

xii. Communicate frequently with trust beneficiaries.

In addition to the responsibilities a trustee must undertake, a successor trustee should also be careful never to do the following:

i. Co-mingle trust funds with personal funds;

ii. Act without the consent of a co-trustee (unless certain actions are specifically delegated to one trustee, such as

delegating all investment strategy to an institutional trustee);

iii. Loan trust assets without proper documentation and security;

iv. Receive assets in their own name;

v. Make final distribution of trust assets before obtaining waivers, receipt, and releases from the beneficiaries; or

vi. Invest trust funds outside of a reasonable return and risk strategy.

Under Utah Law, all but the duties to provide information and the fundamental obligation to act in good faith may be altered by the terms of a trust document. The basic duties and obligations of a trustee are outlined in Utah Code sections 75-7-813 and 75-7-814.

Selecting a Successor Trustee

The choice of a successor trustee usually comes down to an individual (related or unrelated), a corporate or institutional trustee (sometimes called a professional trustee), or some combination of the two. Institutional trustees may come in many variations such as, lawyers, accountants, or professional trustees working within a bank's trust department or a trust company. Clients must consider many factors in the selection of a successor trustee, which include the size of the estate, the complexity of the required administration and distribution of trust assets, expertise or experience in financial matters, projected length of the corpus of the trust, and many more issues. The proper selection of a successor trustee can make the administration of the trust quite easy, but if the wrong selection is made the end result can be a reduction in trust assets, the trustees personal liability for breach of fiduciary duties, and years of expensive litigation.

Legally there are only a few requirements. A trustee cannot be a minor, a convicted felon, or a non-U.S. Citizen, but in today's electronic world a trustee can serve very well even if they reside outside of the state where the trust is being administered. Unfortunately, the selection of a qualified successor trustee goes well beyond the basic legal requirements.

The Case for a Family Trustee

A family or individual trustee generally serves without compensation or is willing to serve for very nominal compensation (income from their duties as trustee is taxable income, where inheritance is generally income tax free). An individual trustee is motivated to get the job done quickly (no "red-tape") and have everything go as smoothly as possible to avoid family conflicts and get their share of the inheritance as fast as possible. For many estates with relatively straightforward assets, such as a home, brokerage account and life insurance, and standard easy to follow distribution patterns, such as distributing equally to the children, an individual trustee can usually handle the job. Of course, the family dynamics and personality of the beneficiaries will better determine if a family trustee is capable of handing the trust. Advisors should be careful in suggesting a successor trustee based just on the monetary value of the trust.

Many settlors select the same person to serve as trustee as they selected to serve as personal representative of their estate. While certainly not a requirement, it can lead to a simple and more consolidated administration, but also removes the second pair of eyes reviewing the administration that may help all the beneficiaries feel more comfortable.

The Case Against a Family Trustee

The difficulties seen when an individual family member is selected as a trustee may include: (1) Lack of training, education, expertise, and experience in financial matters. Another common challenge for a family trustee is knowing how to act when the trust holds a controlling interest in the family business. (Does the trustee know how to run the business and make the decisions necessary to keep the business profitable?); (2) Lack of availability (serving as a trustee requires a great time commitment and most family members already have a full time job); (3) Lack of supervision and independent audits. Many embezzlements start with trusted people borrowing temporarily, with good intentions that mushroom out of control. Placing a family member or friend in such a position can be dangerous. A prospective trustee who is undergoing financial stress should receive extra scrutiny, just as a bank checks the credit history before hiring a teller; (4) Inherent conflicts of interest exist when a family member is the trustee and a beneficiary. Many times disgruntled relatives accuse a family trustee of stealing, cheating, or being unwilling to disclose financial information. The family member being accused spends countless hours working for the benefit of the family and may feel they are doing all the work for nothing while the other children are enjoying a free ride – which they are. Such conflict never ends well. Accusations are made, feelings are hurt, and relationships harmed. Blended families may end up with a step-mom or dad serving as trustee over the deceased parent's children's inheritance. Overbearing children may overwhelm a surviving spouse. Beneficiaries may need protection from themselves. These and other such issues of conflict can destroy family relationships and frequently do; (5) Individual trustees die (with their knowledge of how the trust has been administered) and need to be replaced; (6) Personal liability. Most trust documents have an exculpation of trustee clause which is enforceable under Utah Code section 75-7-1008, unless the breach of trust is committed in bad faith or with reckless indifference to the trust purposes, or the interests of the beneficiaries, or the trustee is personally

at fault. *See* Utah Code Ann. § 75-7-1010 (Supp. 2008). That being said, the personal trustee must still defend themself against any actions brought into question by the beneficiaries and must deal with the emotional, financial, and mental stress caused by such claims.

Sometimes individual trustees believe the trust says what they want it to say. Recently a father died leaving mother as trustee of the marital and family trusts. Their children had stronger than usual claims for support from the family trust. However, mother used both trusts as her own personal funds, indiscriminately, as though the trusts did not exist. She denied assistance to a married son who needed re-training during an economic slump. The son could not bring himself to implement remedies he would have used against a corporate trustee. Blatant disregard for dispositive provisions gives reason to question whether other carefully crafted provisions will be re-read, understood, or implemented.

Most settlors believe their family will make the transition well enough. Experience instructs us that family dissonance can overwhelm and overreach the expected levels of grieving and transition and intra-familial hurts. A psychologist specializing in family transitions and their estates explains that extra intensity. He finds that children often keep their divisive animus capped during the lives of the older generation. Then, not dissipated, the tensions erupt after those lives, with bottled-up intensity.

The Case for an Institutional Trustee

Research indicates that an institutional trustee is generally the preferred choice. A professional has the expertise to put meaning into the words of the trust agreement; understand their responsibilities, and has a system and resources to fulfill the proper execution of the trustee's duties. A good trustee can successfully handle a poorly drafted agreement, while a poor trustee can stumble with the most artfully conceived and well-drafted trust. A professional can handle complex assets and issues (typically involved with higher valued estates where much more sophisticated management is necessary). Other reasons an institutional trustee has great value include: (1) Objectivity: because there is not the inherent conflict of interest, institutional trustees are neutral to family problems and unwavering to family pressures. Frequently a settlor will choose a professional trustee specifically to repel the pressure family requests can put on a family trustee; (2) Time: professional trustees do not have another full-time job so they can devote all the energy to administration of the trust; (3) Institutions do not die (for the most part); (4) Professional trustees often have independent auditors and review committees to insure proper administration and accounting of trust assets. They also have access to experienced attorneys and advisors who can lend

needed support; (5) Liability: using a professional trustee removes any potential personal liability from family members and puts that liability on the institution. Longer-term and difficult family situations argue for an institutional trustee.

The Case Against an Institutional Trustee

Cost is the biggest hindrance clients see in hiring an institutional trustee, but the old adage remains true – "you get what you pay for." Other reasons clients may not like an institution are: (1) Red-Tape: institutional trustees have policies and procedures that must be followed before decisions can be made and action taken. These processes impact timeliness. Often, the institution's legal team located in New York or Washington D.C. calls the shots and therefore removes the ability of the local trust officer, with whom the family has created a good relationship, to get the work done; (2) Complexity: an institution may create complexity in rather simple issues in an effort to make sure they are protected from any liability; (3) Conservatism, an institution can be extremely conservative in the actions they are willing to take. This can be a positive or a negative, depending on what the beneficiaries want to accomplish and what results occur; (4) Impersonality: many beneficiaries like dealing with a non family member because they are impersonal and "all business." Nonetheless, corporate trustee/beneficiary relationships can evolve into cherished friendships. Corporations function through people and those people can care for people they serve. Beneficiaries can also come to care for the people who listen to them and help them. The company can change an assigned trust administrator if that relationship does not work well. Corporate trustees want satisfied, ongoing client relationships, for the relative ease of conducting business and to create financial relationships with remaindermen.

The Case for Co-Trustees

Another option is to use a combination of a family trustee and an institutional trustee. The institutional trustee carries the workload that the individual trustee is not trained to do such as tax returns, financial management, and to be the unbiased, non-emotional "bad cop" when family disputes arise, as they usually do. The family member can handle the interpersonal issues that are ever present in every family trying to divide up inheritance. Many times the family trustee can be granted the power to switch responsibilities between the family trustee and the professional trustee or delegate certain responsibilities to a professional. The family trustee with such ability is, as a result, better able to manage the control and accountability the trustee has to the beneficiaries, which may ease the worries the beneficiaries may have that the trustee has too much power and not enough accountability.

The Case for a Trust Protector or Special Trustee

Another very good option is to select a trust protector or special trustee, who acts as an unrelated, unbiased third party that does not have a conflict of interest and can oversee the trust as well as the trustees. This special trustee could determine fees, competency, and the emotional involvement of the individual trustee, while keeping red tape and bureaucracy of an institutional trustee at a minimum by retaining the power to remove and replace the trustees, terminate the trust, amend the trust for specific tax purposes (such as continued lifetime gifting after the settlor becomes incompetent to reduce the potential estate tax), or to protect a beneficiary (if the trust says make a distribution at age twenty, but the child at twenty is a drug addict, the trust protector, without a court order, could change that distribution requirement to age thirty, or whenever the child is free from drugs, while still allowing the trust to pay for the child's treatment). Even more important the special trustee or trust protector could stand on the sidelines with the ever present threat to make a change if the trustees are unwilling to play fair.

Advising clients on the selection of a successor trustee is critical to the operation and success of the trust and may be the most important advice we can give clients in their planning. The best trustee must (1) have good common sense, (2) have impeccable integrity, (3) be fit in age and capacity to accomplish the purposes of the trust, (4) have or make the time, and (5) know or become acquainted with the beneficiaries.

We carry the burden of educating our clients about the relative merits and weaknesses of all types of trustees. We should focus a wary eye on existing and latent family dissonance as such discord generally is the biggest hurdle a successor trustee faces.

Generally, the worst-case scenario with a corporate trustee involves convenience, time, and fees, which may be resolved by legal representation or appointing a new fiduciary. Individual trustees, in the worst-case scenario, may jeopardize the entire purpose and corpus of the trust.

The role of a successor trustee is a job, and many times a hard one with large consequences on family assets and more importantly, on family relationships. Few friends or family members will consider trusteeship a reward when faced with the actual work itself, wondering whether work is done correctly, grappling with divisive issues and people, and carrying the weight of personal liability. The attached chart may assist clients in the selection of a successor trustee as it allows them to evaluate candidates and address the need for additional help in the areas where the desired trustee is weak.

Selecting the Trustee – The Right Hiring Decision

"The selection of a poor trustee can cause even the most artfully-drafted trust to fail."

Looking for the right mix of ability, experience, temperament, and interest in doing the job well.

	Candidate A	Candidate B	Candidate C
BASIC CRITERIA – *must pass each criteria to serve unassisted*			
Scrupulously honest			
Good common sense			
Time to work for the trust			
Other:			
RECORDKEEPING AND REPORTING – *give enough facts that beneficiaries can protect their interests*			
Record the receipts and disbursements			
Record the trust assets and their value			
Record trustee fees and how the trustee is paid			
Report the transactions, assets, values, and fees			
Report to the appropriate beneficiaries regularly			
Other:			
CONTROL AND PROTECT – *basic financial controls*			
Keep the trust assets separate from personal assets			
Take control of the trust assets			
Take the actions needed to protect the trust's interests			
Other:			
DETERMINE APPROPRIATE PAYMENTS TO BENEFICIARIES – *treat beneficiaries properly, as you decreed*			
Understand the primary purposes of the trust			
Determine beneficiary needs and non-trust resources			
Balance beneficiary status with trust's funds and purposes			
Not use the trust to "fix" old problems or non-trust issues			
Not favor one beneficiary over another			
Manage incentives or tailored concepts			
Has a sense of what is reasonable in different situations			
Understands where trusts and laws allow flexibility or not			
Other:			
INVESTMENT PLAN – *keep the trust financially viable*			
Evaluate returns needed to fulfill the trust's purposes			
Determine the investment strategy			
Determine appropriate investments			
Re-evaluate the trust and beneficiary situations regularly			
Keep up on the economy and the markets			
Other:			

	Candidate A	Candidate B	Candidate C
FAMILY BUSINESS AND SPECIAL ASSETS – *unique assets needing special attention*			
Ability to manage the business			
Training program, if needed, for family members to grow into it			
Corporate oversight is in place and working well			
If there is a plan, can carry it out			
Insure property			
Maintain real estate reasonably			
Select tenants			
Review and approve lease terms			
Other:			
Other:			
MANAGE THE TRUST – *the everyday details*			
Have and use an appropriate bookkeeping system			
Keep the bills paid			
Systematic approach for collecting rents, interest, etc.			
Other:			
TAXES – *good reporting and strategy*			
Compile income tax information			
Have tax returns prepared			
Send K-1s, report beneficiary tax data resulting from the trust			
Pay income and property taxes			
Follow through on tax strategies			
Review tax issues with appropriate professionals			
Aware of and manage tax implications of the investments			
Other:			
DISAGREEMENTS – *what your trust says to do might not be popular*			
Able to say "no," and for the right reasons			
Explain decisions and why they are made			
Able to say "yes," and for the right reasons			
Treat beneficiaries with respect			
Take disagreement personally, react badly or let it fester			
Will disagreement fray family relationships?			
Study the trust and inquire about your intentions			
Other:			
CONFLICT OF INTEREST – *first loyalty is to the trust and its beneficiaries*			
Not personally take opportunities that should be the trust's			
Receive no benefit because of the trust, except trustee fees			
Audits and other oversight			
Other:			

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New Lawyer Training Program

Decisions from the Utah Court of Appeals, 2008

by Judge Carolyn B. McHugh[1]

Editor's Note: *Supreme Court Justice Ronald E. Nehring and Court of Appeals Judge Carolyn B. McHugh addressed some of last year's important Utah appellate decisions at an Appellate Practice Section luncheon on April 20, 2009. Although the information will be of more limited utility for those not in attendance, the* Utah Bar Journal *thought its readers might find the case summaries, distributed as handouts during the presentations, to be of interest. Accordingly, Judge McHugh's handout is reprinted here, with her permission. (Justice Nehring's handout will be published in a future issue of the* Bar Journal.) *Especially because readers will not have the benefit of the commentary provided by the speakers, readers are cautioned that the summaries should not be relied on for any purposes other than calling attention to these opinions and explaining what each case generally involves.*

CRIMINAL

State v. McClellan, 2008 UT App 48 (Cert. Granted) (Conflicts of Interest, Ineffective Assistance of Counsel, Admissibility of Evidence)

McClellan was convicted of first-degree rape. Before trial, his attorney terminated his representation of McClellan and took a position with the Utah County Attorney's Office. McClellan's new counsel filed a motion to continue, but that motion was denied because McClellan refused to waive his right to a speedy trial. McClellan appealed, arguing that the trial court committed plain error when it failed to disqualify the entire prosecutor's office after his former attorney joined the office and failed to remove a juror with a conflict of interest. McClellan also argued that he received ineffective assistance of counsel because his counsel neither moved to disqualify the prosecutor's office nor to disqualify a juror. Finally, McClellan appealed from the trial court's decision to admit audiotape containing his confession.

The Utah Court of Appeals rejected McClellan's argument that he was entitled to a new trial due to his conflict of interest with the prosecutor's office. Whether employment of a defendant's former attorney should *per se* disqualify an entire prosecutor's office was an issue of first impression, and the court of appeals adopted the rule used by the majority of other jurisdictions. The majority rule presumes that the entire office was privy to confidential information held by McClellan's former attorney, but the presumption can be rebutted if the office shows that the attorney with the conflict was properly screened and did not work on the matter in question. In McClellan's appeal, the record was incomplete. Because the defendant carries the burden of ensuring an adequate record is available for review, the record was construed against him in favor of finding effective assistance of counsel and the regularity of the proceedings in the trial court. Accordingly, McClellan's claims of ineffective assistance and plain error were rejected.

The court of appeals also concluded that the trial court did not commit plain error in refusing to disqualify a juror, who worked for a circuit court and had briefly worked for the prosecutor in the past. The juror informed the trial court that her employment would not affect her ability to be impartial, and McClellan failed to show that the juror had such a bias that the proceedings would be tainted. McClellan's ineffective assistance of counsel claim based on counsel's actions concerning that juror also failed. To make a showing of ineffectiveness, McClellan had to overcome presumptions that counsel's failure to object was deliberate and that the choice was strategic. The court of appeals determined that McClellan could not overcome these presumptions because the juror did not exhibit a strong bias or conflict of interest. The court also addressed an alternative means for McClellan to demonstrate that his attorney was ineffective; McClellan could show that the attorney was inattentive during jury selection. But, the court found that there was no such inattentiveness, because during the *voir dire,* McClellan's attorney tried to disqualify another juror for cause and eventually used a peremptory challenge to do so.

McClellan's final argument regarding the admissibility of the audiotape containing his interrogation was dismissed because

JUDGE CAROLYN B. McHUGH was appointed to the Utah Court of Appeals by Gov. Jon M. Huntsman, Jr., in August 2005.

McClellan failed to preserve the issue for appeal. Trial counsel originally moved to suppress the tape due to surprise and failure to instruct McClellan of his *Miranda* rights. However, once the trial court denied his motion, counsel continued to argue unfair surprise but conceded that he did not object to the tape's admission as a rebuttal tool. Counsel also did not seek a continuance to prepare a response to the new evidence. Failure to seek a continuance constitutes a waiver of a claim of unfair surprise on appeal.

Disposition: Affirmed.

State v. Garner, 2008 UT App 32 (Cert. Denied) (Elevated minimum sentences – Rule 22(e), Utah Rules of Criminal Procedure; Sixth Amendment)

Garner was convicted of three counts of aggravated sexual assault, which were each punishable by a prison term of six, ten, or fifteen years to life. At Garner's sentencing hearing, the trial court considered a variety of mitigating and aggravating factors submitted by the parties to support an upward or downward departure from the statutory default, middle minimum prison term of ten years to life. The trial court sentenced Garner to an indeterminate term of fifteen years to life – the maximum minimum sentence available under the statute – on each count.

Garner's claim that the trial court failed to consider proper factors before imposing an elevated minimum sentence did not qualify for review under rule 22(e) of the Utah Rules of Criminal Procedure because this claim involved ordinary, run-of-the-mill error that does not fit into the narrow category of claims permitted under rule 22(e). However, Garner's claim that his sentence was illegal because it violated his Sixth Amendment right to have a jury, rather than a judge, make certain findings that would elevate his sentence was reviewable under rule 22(e). Nonetheless, Garner's sentence did not violate his Sixth Amendment right to have a jury make factual findings that could expose him to a greater sentence. Under Utah's statutory scheme, judicial fact-finding at sentencing cannot expose a defendant to a greater sentence because the judge's fact-finding can alter only the minimum term of an indeterminate sentence.

Disposition: Affirmed.

State v. Yount, 2008 UT App 102 (Suppression of Evidence)

After being involved in a car accident, Yount was charged with several offenses, including driving under the influence. The prosecutor subpoenaed medical records from the hospital that treated Yount immediately after the accident, but Yount did not receive notice of the subpoenas until after the hospital produced

the records. Yount's motion to suppress evidence obtained through the subpoenas was denied.

Yount had the right to notice of subpoenas sent to third parties even where the requested records allegedly contained communications that would be admissible, such as communications that qualify as an exception to the physician-patient privilege. Where a search and seizure of records violates a defendant's rights under article I, section 14 of the Utah Constitution and no exception to the exclusionary rule applies, the evidence must be suppressed.

Disposition: Reversed.

State v. Baker, 2008 UT App 115 (Cert. Granted) (Search and Seizure)

Because of an unilluminated license plate, police pulled over a car, in which Baker was a passenger. During the check of the driver's license, the officer realized that the driver had her license suspended for drugs. The officer requested a canine unit to check the car for drugs, and he returned to the car and arrested the driver. Other officers arrived and began to deal with the several passengers. The first officer had initially seen a knife sitting on the thigh of one of the back-seat passengers. Thus, one of the newly arrived officers confiscated the knife and asked the passengers if they had any other knives. Approximately twelve other knives were produced. The officers testified that after they had the knives there was nothing any of the passengers said or did to make them fear for their safety, yet the passengers were not free to leave until the canine unit arrived. The unit arrived and a dog indicated that it smelled drugs. The officers then frisked the passengers, finding drug paraphernalia on Baker. Baker moved to suppress the evidence of the paraphernalia (plus drugs found on him upon arrival at the jail), and the district court denied the motion, determining that Baker was not "detained" and that the officers reasonably believed that the passengers were armed and dangerous. Baker moved for suppression of the evidence, but the trial court denied that motion.

The court of appeals held that because the driver was arrested long before the canine unit arrived (notwithstanding that she was not actually put in the patrol car until right before the unit's arrival), there was no legal reason to detain the passengers while awaiting the canine unit's search for drugs. Requiring the passengers to remain required some reasonable articulable suspicion. Yet nothing in the officers' testimony indicated any particularized suspicion of criminal activity on the part of the passengers. Thus, this detention while awaiting the canine search was a violation of Baker's Fourth Amendment rights and the resulting evidence must be excluded.

Additionally, the frisk was not warranted as a *Terry* frisk, i.e., for the purpose of protecting the officers. When looking at the totality of the circumstances, the court of appeals determined that there was no reason for the frisk. (Although the stop occurred late at night and there were four passengers that possessed about thirteen knives, there was other evidence that the knives were voluntarily produced and surrendered well before the canine unit arrived, that the officers had no fear for their safety, that one of the officers admitted they frisked to search for contraband, and that the frisk was not done until after the canine unit arrived and signaled the presence of drugs, which was long after the encounter began.)

Disposition: Reversed and remanded.

State v. Clopten, 2008 UT App 205 (Cert. Granted) (Eyewitness Identification, Ineffective Assistance of Counsel)

Clopten was convicted of murder, failure to respond to a police command, and possession of a dangerous weapon by a restricted person, after three eyewitnesses and a former cellmate testified against him. Clopten's defense was based on the theory of misidentification or mistaken identity. The trial court excluded the defense's expert testimony on the fallibility of eyewitness identification but did instruct the jury about the issue. Clopten appealed, arguing that the trial court erred when it excluded the expert's testimony and that he received ineffective assistance of counsel.

With respect to the exclusion of the expert's testimony, the court of appeals followed precedent from the Utah Supreme Court to hold that significant deference should be afforded to the trial court in its decision to exclude an expert's testimony. The supreme court has held that a jury instruction on the fallibility of eyewitness identification adequately conveys to the jury the weaknesses of such identification. Although the court of appeals noted the ongoing concern among courts and legal commentators about substituting jury instructions for expert testimony, it distinguished the current case from the cases that have fostered such concern. Here, Clopten was dressed completely in red, was known, in some capacity, by the three eyewitnesses, and was identified in several different settings and at various time periods after the shooting. The trial court also carefully considered the testimony, the instruction, and the facts before determining that the instructions were adequate and that expert testimony would confuse the jury.

The court of appeals also held that defense counsel's performance was not ineffective. Defense counsel questioned the cellmate witness, who received a reduced sentence in exchange for his testimony against Clopten, at length about the circumstances leading to his testimony. Defense counsel's failure to request a jury instruction on manslaughter was also not deficient or prejudicial. The evidence at trial indicated that the shooter, whether it was Clopten or another, had intentionally murdered the victim, and an instruction on manslaughter, which requires

recklessness, would be futile.

Disposition: Affirmed. Judge Thorne concurred separately, urging the Utah Supreme Court to consider mandating the admission of expert testimony on the issue of eyewitness identification.

State v. Palmer, 2008 UT App 206 (Cert. Granted) (Utah Code section 41-6-44(6)(a))

Palmer was convicted in absentia of DUI after he failed to appear at trial. Upon stipulation by the parties, the jury was removed before the prosecution presented evidence of Palmer's prior DUI convictions to the trial judge. After hearing prior conviction evidence, the court enhanced Palmer's sentence pursuant to Utah Code section 41-6-44(6)(a), which declared DUI a third degree felony when the defendant had two or more convictions within the past ten years. *See* Utah Code Ann. § 41-6-44(6)(a) (Supp. 2004).

On appeal, Palmer argued he was denied his constitutional right to have a jury consider his prior DUI convictions because subsection (6)(a) defined a separate element of the crime of DUI, not a sentence enhancement. *See id.* The Utah Court of Appeals determined that subsection (6)(a) was a sentence enhancement to be applied after a conviction under Utah Code section 41-6-44(2) had been obtained. Therefore, Palmer had no constitutional right to submit evidence of prior DUI convictions to a jury. *See Apprendi v. New Jersey,* 530 U.S. 466, 476 (2000).

Disposition: Affirmed.

State v. Harry, 2008 UT App 224 (Allen Instruction)

The Utah Court of Appeals found that the modified Allen instruction used by the trial court was not coercive *per se* because it did not demand that jurors reach a verdict or encourage them to abandon their conscious convictions, reminded jurors that the State held the burden of proof, and directed jurors to consider all of the court's instructions – not just the modified *Allen* charge. Furthermore, on its face, the modified *Allen* instruction did not place any undue pressure on the minority. Additionally, references by the trial court to the time and expense associated with trying the case did not render the instruction coercive *per se,* nor did the trial court improperly comment on the evidence. However, the court determined that the modified *Allen* instruction was coercive under the specific circumstances of the case because the jury foreperson indicted that the jurors were deadlocked seven to one and the charge was directed to the lone holdout juror. Moreover, the fact that the jury deliberated for only twenty-six minutes after receiving supplemental instruction implied that the minority juror was actually coerced.

The court of appeals also declined to reject all *Allen* and modified *Allen* instructions and expressly adopt the ABA model as the exclusive choice for trial courts in Utah. However, the court did express a preference for the ABA model and urged trial courts to use it as a "safe harbor" in the event of appellate review.

Disposition: Reversed and remanded for a new trial.

Salt Lake City v. George, 2008 UT App 257 (Cert. Denied) (Documents in Lieu of Testimony & Sixth Amendment Right to Confrontation)

Officers observed Frederick George in the driver's seat of a car parked in the lot of a neighborhood park. The officers noticed bottles of alcohol in the car, conducted field sobriety tests on George, and subsequently arrested him and took him to the police station where he submitted to a breath test. Salt Lake City charged George with driving under the influence of alcohol. A jury trial was held wherein the City attempted to admit two calibration certificates in lieu of testimony from the calibration technician, who was unavailable to testify. The City argued that the certificates were self-authenticating documents under rule 902 of the Utah Rules of Evidence. The trial court ruled that the certificates were not testimonial and that the documents were admissible under Utah Code section 41-6a-515.

George appealed, arguing that admission of the certificates violated his Sixth Amendment right to confrontation. The court of appeals determined that the certificates were prepared in the course of carrying out routine calibration testing as required by rule 714-500-4 of the Utah Administrative Code and were not testimonial in nature. The court of appeals also determined that the certificates admitted pursuant to section 41-6a-515 invoked a rebuttable presumption and as a result are not self-authenticating documents. Thus, they were not admissible without the testimony of the technician.

Disposition: Affirmed.

State v. Wilkinson, 2008 UT App 395 (Search and Seizure)

Wilkinson was a passenger in a vehicle that was stopped for speeding. The driver was also operating the vehicle on a suspended driver license. As the officer was processing these violations, he called for a canine unit. The canine unit arrived, the officers briefly conferred, and a dog sniff indicated that there were drugs in the vehicle. Wilkinson was removed from the vehicle, at which point it was determined that there was a warrant for his arrest. The officers arrested Wilkinson, and a search incident to that arrest revealed drugs on his person.

Wilkinson moved to suppress this evidence on the grounds that the initial officer's request for a canine unit, without reasonable suspicion of drug activity, was an impermissible expansion of the scope and duration of the traffic stop. The district court denied Wilkinson's motion.

On appeal, the court of appeals also rejected Wilkinson's scope and duration arguments. As to scope, the court relied on *Illinois v. Caballes,* 543 U.S. 405 (2005), for the proposition that a dog sniff reveals only contraband in which there is no reasonable expectation of privacy and therefore does not expand the scope of a traffic stop. As to duration, the court held that, so long as the overall duration of a traffic stop is not unreasonable, particular actions by police that are unsupported by reasonable suspicion do not render the stop unreasonable merely because they incrementally increase its duration. Accordingly, the court of appeals affirmed the denial of Wilkinson's motion to suppress.

Disposition: Affirmed.

In re M.B., 2008 UT App 433 (Accomplice Liability to Vehicular Burglary/Theft and Possession of Burglary Tools)

M.B., a minor, sat in the passenger seat of a vehicle while two older male passengers, including a relative, burglarized a truck and camper. There was no affirmative evidence he acted as a lookout, was the getaway driver, or otherwise assisted in the crime. The juvenile court convicted M.B. of accomplice liability and possession of burglary tools.

The Utah Court of Appeals held that M.B.'s mere presence, even though he was in dark clothes, was not enough to establish accomplice liability when there was no evidence of active involvement. Further, M.B.'s presence in the vehicle, where there were gloves in the console and a screwdriver lodged between the console and the passenger seat, was insufficient to establish possession of burglary tools. There was no evidence of actual possession, and constructive possession could occur only when there was a "sufficient nexus" between the defendant and the tools to infer intent plus ability to control those tools. The State failed to show that M.B. handled or intended to control the screwdriver or the gloves. Accordingly, the convictions were reversed.

Disposition: Reversed

CIVIL

Uhrhahn Constr. & Design, Inc. v. Hopkins, 2008 UT App 41 (Implied-in-fact Contracts and Mechanics' Liens)

The Hopkins hired Uhrhahn Construction (Uhrhahn) to partially construct their home. The Hopkins received several proposals from Uhrhahn estimating the costs and specifications for the projects. Each proposal stated that alterations that involved an increase in costs must be made in writing. The Hopkins signed the proposals. The Hopkins subsequently made an oral request for additional work, to which request Uhrhahn complied. The Hopkins then refused to pay. Uhrhahn sued, seeking damages and to foreclose on a mechanics' lien. The trial court ruled in favor of Uhrhahn, holding that the Hopkins had waived the provision requiring changes in writing. Accordingly, it allowed Uhrhahn to recover under both its mechanics' lien and implied contract claims. The trial court failed, however, to address whether the mechanics' lien was timely filed.

The court of appeals affirmed the trial court's finding of an implied-in-fact contract, which made the Hopkins liable for the cost of the extra work. Regarding the mechanics' lien, however, it held that because the mechanics' lien action was not timely filed, it was not enforceable. The reversal of the mechanics' lien determination also required reversal of the trial court's award of attorney fees to Uhrhahn. The Hopkins, then, would be entitled to their attorney fees in resisting the mechanics' lien claim "even though the homeowners' success…was a result of the errors or inaction of others." 2008 UT App 41, ¶ 35. The appellate court noted, however, that such fees would be "comparatively minimal," given that homeowners did not prevail on ancillary contract claims.

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

Arnold v. Grigsby, 2008 UT App 58 (Cert. Granted) (Statue of Limitations – Utah Health Care Malpractice Act)

The Arnolds filed a complaint against Dr. Grigsby, among others, for his participation in surgeries to repair Mrs. Arnold's colon, which was perforated during a colonoscopy performed by another doctor. The Arnolds failed to serve Dr. Grigsby with a summons and complaint. Dr. Grigsby was deposed, and then the Arnolds moved for dismissal without prejudice. Five years later, the Arnolds filed an amended complaint and served Dr. Grigsby in Tennessee, where he then resided. Dr. Grigsby moved for summary judgment, arguing that the action was barred by the Utah Health Care Malpractice Act's two-year statute of limitations. *See* Utah Code Ann. § 78-14-4(1) (2002). The trial court agreed and granted summary judgment in favor of Dr. Grigsby.

On appeal, the court of appeals held that the Utah Health Care Malpractice Act's two-year statute of limitations, *see id.,* is not exempt from the tolling statute, *see id.* § 78-12-35, which suspends the running of a statute of limitations when a defendant departs from Utah after a cause of action has accrued against him or her. And this is true even though Dr. Grigsby would be amenable to service of process under Utah's long-arm statute.

Disposition: Reversed.

Foothill Park, LC v. Judston, Inc., 2008 UT App 113 (Mechanics' Lien and Wrongful Lien Statute)

Judston contracted with Foothill to perform land development services on Foothill's property. Judston stopped work on the

property and filed notice to hold and claim a lien in August 2004. Although Judston filed an amended notice in January 2005, he did not initiate a lien foreclosure action within the time provided by statute. Subsequently, in July 2006, Judston filed a third notice of lien, seeking the amounts due for the work performed prior to August 2004. The trial court found Judston's third lien was wrongful and granted Foothill statutory damages and attorney fees. Judston appealed, claiming the trial court erred in ruling that by failing to enforce its lien within 180 days of the first notice, the third notice was rendered invalid. Judston further argued that the provisions of the wrongful lien statute were inapplicable to mechanics' liens.

The Utah Court of Appeals held that the language of Utah Code section 38-1-11(4)(a) served to void the underlying lien, not simply the notice of claim. *See* Utah Code Ann. § 38-1-11(4)(a) (Supp. (2007) (voiding a "filed" lien if no action is taken to enforce the lien within the statutory time frame). Thus, upon expiration of 180 days after the first notice of lien was filed without initiation of a foreclosure action, the right to lien Foothill's property for that same work expired. Because Judston's lien was void, the court lacked jurisdiction to adjudicate claims under the lien statute. The question of whether Judston was entitled to a lien under section 38-1-3 at the time it filed its third notice of claim was one of first impression. Since Judston's entitlement at the time of filing was unresolved, the court determined that the wrongful lien statute was inapplicable in this case.

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

Young v. Fire Ins. Exch., 2008 UT App 114 (Breach of Contract/Bad Faith)

Fire Insurance Exchange (FIE) stopped paying Leigh Young's living expenses and denied her claim for damages under her insurance policy when it concluded that the fire, which damaged Young's home, was the result of arson. Young sued, alleging breach of contract and bad faith. The trial court granted FIE's motion for a directed verdict after Young's expert witness was unavailable to testify. The trial court also granted summary judgment in favor of FIE on Young's bad faith claim.

The court of appeals upheld the trial court's grant of summary judgment on the bad faith issue. The court determined that when an insurer receives a claim from an insured for benefits, the insurer must respond reasonably and objectively, diligently investigate the facts, fairly evaluate the claim, and promptly settle or reject that claim. However, where an investigation creates a factual issue about the claim's validity, there is a debatable reason for denial. Debatable reasons for denial eliminate bad faith claims. The trial court did not exceed its discretion in finding that FIE had a debatable defense.

With respect to the motion for directed verdict, the court of appeals reversed and remanded because Young had established a prima facie case of liability. Once a prima facie case is established, the burden shifts to FIE to prove arson. Although Young had not presented expert testimony, the court held that she had presented enough of an issue of material fact for the jury. Accordingly, directed verdict was improper.

The court also agreed with Young that the trial court exceeded its discretion by refusing to allow Young's expert to testify. Although

FIE argued that the expert was merely a rebuttal witness and that there was no evidence for him to rebut, the court noted that FIE referred to the witness as a rebuttal witness for the first time at trial. The court also rejected FIE's argument that it would be prejudiced by the expert's testimony because FIE had access to the expert's report for over a year before the trial began and the report was prepared in response to several of FIE's fact witnesses' reports.

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

Forsberg v. Bovis Lend Lease, Inc., 2008 UT App 146 (Cert. Denied) (ERISA)

The Hospital contracted with Bovis, a general contractor, to complete a Hospital expansion project. Bovis subcontracted with Western States Electric (WSE). According to its collective bargaining agreement, WSE was required to make trust fund contributions and pay wage assessments (fringe benefits) on behalf of its employees. WSE was perpetually late on those payments, and in June 2002, most of the Appellants, which included the ERISA trust fund, union employees, and the Administration Fee Fund, filed suit in federal court. They were successful in obtaining a judgment against WSE and a Garnishee Order, which required Bovis to credit over $49,000 from WSE's earnings to the funds. Despite WSE's history, the Union continued to allow its employees to work for WSE. The Union also failed to obtain a surety bond from WSE, as required by the collective bargaining agreement. WSE paid the employees their wages but neglected to pay the fringe benefits.

WSE subsequently filed for bankruptcy, and Appellants filed a mechanics' lien against the Hospital's property. Bovis and Travelers Casualty & Surety Company of America executed a bond to release the lien. Appellants then filed a lawsuit to recover the delinquent fringe benefits through foreclosure of the mechanics' lien and collection under the contractors' private payment bond (private bond) statute. The parties filed cross-motions for summary judgment. The trial court granted partial summary judgment in favor of Appellees – Bovis, Travelers, and the Hospital – and denied Appellant's motion for summary judgment.

Appellants brought an interlocutory appeal, claiming (1) the trial court erred when it granted Appellees' partial motion for summary judgment and denied Appellants' on the grounds that Appellants did not have standing; (2) the trial court erred in concluding that the claims were preempted by ERISA; and (3) the fringe benefits could be recovered under both the mechanics' lien and the private bond statutes.

The question regarding Appellants' standing was one of first impression in Utah. Appellants clearly had an interest in the recovery of the fringe benefits. Notwithstanding, Appellees argued that the mechanics' lien and private bond statutes only protected persons who performed services or provided materials to the construction project. Although the court of appeals recognized that Appellants did not personally provide labor or materials to WSE or the project, it concluded that the Appellants were standing in the shoes of the employees and were entitled to enforce their rights. The standing decision was guided by the United States Supreme Court decision of *United States v. Carter,* 353 U.S. 210 (1957), in which a trustee of an employee benefits trust fund brought suit against the surety of a contractor's payment bond. There, the Supreme Court held that the trustee's relationship to the employee was analogous to an assignor-assignee relationship; like an assignee, the trustee has standing. Actual assignment, however, is not required and accordingly, the participation of individual plaintiffs, in addition to the funds and the union, in the trial court suit did not defeat the entities' standing. The court of appeals also joined a number of other jurisdictions in rejecting Appellees' argument that the owner or the general contractor to the project must be a party to the collective bargaining agreement. In Utah, neither the mechanics' lien nor the private bond statutes require such action by the owner.

With respect to the preemption question, the court of appeals relied upon *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.,* 514 U.S. 645 (1995), where the United States Supreme Court announced a strong presumption that ERISA is not intended to preempt laws of general application affecting areas traditionally within state control and concern. *See also Harmon City, Inc. v. Nielsen & Senior,* 907 P.2d 1162 (Utah 1995) (limiting scope of ERISA's preemption). Appellees could not overcome that presumption here. Both the mechanics' lien and private bond statutes are statutes of general application that operate irrespective of ERISA. Neither mentions ERISA or any employee benefit plans or trust funds, and both regulate areas that are traditionally of state concern. Further, Appellants' claims under either statute do not affect the relationship between ERISA entities but instead involve outside parties. Enforcement of these statutes does not create alternative remedies to those provided under ERISA. Accordingly, the mechanics' lien and private bond statutes are not preempted by ERISA.

The court of appeals also determined that fringe benefits were recoverable under both the mechanics' lien statute and the private bond statute. This issue also presented a question of first impression. The court concluded that the use of the phrase "value of service rendered" in the mechanics' lien statute, *see* Utah Code Ann. § 38-1-3 (2005), included the benefit package, not just wages. Such an interpretation was consistent with the purpose of the statute: to protect persons who provide labor or materials. Similarly, the Utah private bond statute uses the phrase "reasonable value of the labor…performed" to describe what an owner is liable for when he fails to purchase a payment bond. *See* Utah Code Ann.

§ 14-2-1. The court of appeals concluded that this phrase also included fringe benefits because the purpose of this statute was also to protect the employees.

Disposition: Reversed.

Bangerter v. Petty, 2008 UT App 153 (Cert. Granted) (Statute of Limitations; Sheriff's Sale)

Bangerter had an outstanding bill to her dentist, which was turned over to a collection agency. A judgment was entered against her for $307.46. The trial judge signed a writ of execution commanding the sheriff to collect the judgment and to sell enough of Bangerter's real property to satisfy the judgment. Accordingly, Bangerter's house was sold to Petty et. al. (the Buyers) at a sheriff's auction in 1998. In 2004, Bangerter sued the Buyers to quiet title in the house. The trial court granted summary judgment in favor of Bangerter because the sheriff's sale was void.

The case was before the court of appeals on a question of the statute of limitations. First, the court of appeals determined that the Buyers had properly pleaded the statutes of limitations even though they were not specifically cited in the original answer. The Buyers fully cited and explained the statutes of limitations on which they were relying in subsequent motions, and the trial court relied on these arguments.

Second, there is no statute of limitations for a quiet title claim. *See In Re Hoopiiaina Trust,* 2006 UT 53, ¶ 26, 144 P.3d 1129. However, here, the claim was not a "true" quiet title claim, but a claim to invalidate the sheriff's sale. Accordingly, some statute of limitations applied. The parties argued several possibly relevant statutes of limitations, but all had passed. Thus, the court of appeals directed the trial court to enter summary judgment in favor of the Buyers

Disposition: Reversed.

Ashton v. Learnframe, 2008 UT App 172 (Cert. Denied) (Jurisdiction)

Learnframe borrowed $1.5 million from American Pension Services (APS). Later, to satisfy its debt, Learnframe transferred ownership of all of its assets to APS. Kirt Ashton, et al., who were employees of Learnframe, filed for a writ of execution against all personal property in the employer's possession, arguing that the transfer was fraudulent and seeking payment for unpaid wages and benefits via an execution sale of all the property in Learnframe's possession. APS was not a party to the employees' action.

Following a hearing at which APS and Learnframe both objected to the sale, the district court concluded that the transfer from Learnframe to APS was fraudulent and that the employees were entitled to proceed with the sale. APS appealed, challenging the propriety of the writ. The employees, however, argued that the court of appeals had no jurisdiction and therefore that the case should be dismissed.

The court of appeals held that because APS was not a named party in the trial court proceedings, APS could not appeal that decision. The court of appeals also commented that APS could have remedied the jurisdiction problem by filing a motion to intervene in the trial court proceedings or a petition for an extraordinary writ.

Disposition: Dismissed for lack of jurisdiction.

Soriano v. Graul, 2008 UT App 188 (Medical Arbitration Agreements)

Gloria Soriano sued Dr. Graul for medical malpractice. Dr. Graul filed a motion to stay the litigation and compel arbitration pursuant to a binding arbitration agreement signed by the parties. The trial court denied Dr. Graul's motion.

Soriano sought medical attention from Dr. Graul on April 28, 2004. That same day, the parties executed the arbitration agreement, which was governed by statute. *See* Utah Code Ann. § 78-14-17 (Supp. 2003). Shortly thereafter, the medical malpractice arbitration statute was amended to include requirements for valid execution of a binding arbitration agreement. *See id.* (Supp. 2007). At trial, Soriano asserted, that the amendments were retroactive and therefore applied to her arbitration agreement even though it was signed prior to the statute's amendment. The trial court agreed. On appeal, Dr. Graul argued that the trial court incorrectly determined that the amendments to the statute were retroactive.

The court of appeals recognized the general rule that a statute does not have retroactive application unless the statute clearly expresses such an intent. However, the court held that the plain language of the statute clearly showed that it was intended to apply retroactively to all medical arbitration agreements entered into after May 2, 1999. Such an intent was also corroborated by the legislative history. The court held that this language was enough to expressly declare that the statute's requirements were to be applied retroactively. Because the agreement did not comply with the requirements of the arbitration statute, it was not enforceable. Dr. Graul's constitutional contract claim was not adequately preserved for review.

Disposition: Affirmed.

Kenny v. Rich, 2008 UT App 209 (Cert. Denied) (Contractual Agreements to Arbitrate)

Rich attempted to build an addition to his home that would violate the setback provisions of his subdivision's Declaration of Protective Covenants (the Declaration). The Homeowners Association (the

HOA) refused to grant Rich a waiver or variance. The Declaration gave Rich the right to arbitrate the HOA's decision, but Rich did not invoke this right within the time frame specified by the Declaration. The court nonetheless ordered the parties to arbitrate the dispute, but it subsequently canceled the arbitration when Rich placed conditions on his participation in the arbitration. Rich and the arbitration panel went ahead with the arbitration despite the cancellation and the HOA's absence, and an arbitration award was produced in Rich's favor. The trial court vacated the arbitration award, conducted a bench trial, and ruled against Rich.

Where a party is contractually bound to follow certain procedures and timelines to invoke specified contractual rights – such as the right to arbitrate a dispute – and the party fails to do so, the party has waived those rights. A trial court, not the arbitration panel, is to decide whether an agreement to arbitrate exists or whether a controversy is subject to an agreement to arbitrate. The presumption in favor of arbitration does not create a presumption in favor of finding that an agreement to arbitrate actually exists. An engagement letter signed after a trial court orders the parties to submit to arbitration is not the equivalent of an independent agreement to arbitrate. In such circumstances, a party does not waive its right to challenge the arbitration award on the basis that no agreement to arbitrate exists.

Disposition: Affirmed.

Puttuck v. Gendron, 2008 UT App 362 (Wrongful Use of Civil Proceedings, Abuse of Process)

Plaintiffs sued Defendants for, among other things, wrongful use of civil proceedings and abuse of process. Plaintiffs' complaint alleged that Defendants had asserted a counterclaim against Plaintiffs in previous litigation between the parties, that Defendants knew that this counterclaim was false, and that the previous litigation had settled in favor of Plaintiffs. The trial court dismissed Plaintiffs' complaint on the ground that the complaint failed to state a claim for which relief could be granted.

Plaintiffs failed to state a claim for wrongful use of civil proceedings because the settlement of the parties' prior litigation did not qualify as a "proceeding terminated on the merits" as required for that claim. Plaintiffs failed to state a claim for abuse of process because they made no allegations regarding an ulterior purpose, or in other words, a collateral advantage that Defendants hoped to gain through the use of process. Plaintiffs' allegations of Defendants' intent to intimidate Plaintiffs and their desire to do harm to Plaintiffs' business reputation alone do not suggest an advantage or gain to Defendants collateral to the proceedings. Additionally, complicating the course of litigation and increasing the costs of defense is not a collateral advantage or ulterior purpose relevant to an abuse of process claim.

Disposition: Affirmed.

Rhodes v. Deptartment of Transp., 2008 UT App 374 (Statute of Frauds)

Rhodes sued the Utah Department of Transportation (UDOT) for breach of contract and other relief, alleging that UDOT had contracted to sell Rhodes a portion of a 6.7-acre parcel of real property. Rhodes asserted that UDOT had agreed to sell him whatever remained of the parcel after UDOT conducted two land trades with third parties. The district court entered summary judgment in favor of UDOT, ruling that the alleged contract's description of the property to be sold was inadequately specific to satisfy the statute of frauds.

The court of appeals reversed, holding that because a specified parcel was to be reduced by land trades to be conducted by the seller without the buyer's participation or approval, determination of the land to be sold to Rhodes rested entirely within UDOT's control and did not require any further negotiation or agreement between the parties. Accordingly, the court of appeals deemed the land description adequate to satisfy the statue of frauds.

Disposition: Reversed and remanded.

Miller Family Real Estate, LLC, v. Hajizadeh, 2008 UT App 475 (Contractual Arbitration Provisions and Substantive Claims)

Miller Family Real Estate, LLC (Miller Family) and Saied Hajizadeh entered into a Real Estate Purchase Contract (REPC) for Miller Family to purchase land owned by Hajizadeh. On the day of closing, Hajizadeh refused to sell the property. Approximately one week later, Miller Family filed a complaint, alleging breach of contract and seeking specific performance, and recorded a lis pendens against the property. Forty-two days after he refused to sell the property, Hajizadeh moved to dismiss Miller Family's complaint because Miller Family failed to comply with the alternative dispute resolution provision in the REPC.

The alternative dispute resolution provision stated that any disputes be submitted to mediation and that mediation occur within thirty days of notice of a dispute. It did not, however, prohibit Miller Family from seeking specific performance from Hajizadeh through the judicial process, provided that Miller Family allowed Hajizadeh to file an answer pending mediation. Miller Family made an offer of mediation upon receiving notice of Hajizadeh's motion to dismiss, but Hajizadeh refused to mediate.

The trial court found that the parties had agreed to mediation and ordered dismissal of Miller Family's complaint without prejudice. Hajizadeh appealed, arguing that dismissal should have been with prejudice because Miller Family's substantive claims were barred due to its failure to comply with the condition precedent of mediation.

The court of appeals refused to conclude that Miller Family's substantive claims were barred by the failure to comply with the alternative dispute resolution provision because that provision was promissory rather than conditional. The preferred rule of contract construction interprets contracts to avoid forfeiture unless the parties expressly articulate or clearly implicate such an intent. Absent a clear intent to forfeit substantive rights if mediation did not occur within thirty days, the appeals court declined to interpret the alternative dispute resolution provision as anything other than a deadline by which mediation must be conducted.

The court of appeals then concluded that even if the alternative dispute resolution provision were a condition precedent, dismissal with prejudice was not warranted. The court of appeals relied upon the Utah Supreme Court decisions in *State v. Ison,* 2006 UT 26, 135 P.3d 864, and *Foil v. Ballinger,* 601 P.2d 144 (Utah 1979). In *Ison,* the supreme court refused to interpret the failure to use an agreed-upon alternative dispute resolution method as a forfeiture of substantive rights. The supreme court also held in *Foil* that "[t]here are numerous instances in which the law requires fulfillment of a condition precedent before the filing of a complaint, and failure to comply with the condition may result in a dismissal, but not on the merits." 601 P.2d at 150. Instead, the parties must express their intent to forfeit substantive claims for failure to comply with the agreed-upon alternative dispute resolution method. Utah's adoption of *Costello v. United States,* 365 U.S. 265 (1961), which held that dismissals where the merits were not considered because the parties failed to satisfy a precondition generally do not prohibit subsequent suits, and the Utah Supreme Court's general aversion to dismissal with prejudice without consideration of the merits further supported the decision to affirm the dismissal without prejudice.

Disposition: Affirmed.

Rawlings v. Rawlings, 2008 UT App 478 (Cert. Granted)
(Requirements for Constructive Trust)

A group of siblings (the Siblings) sued their brother Donald Rawlings, alleging that their father's 1967 transfer of the family farm into Donald's name created a constructive trust for the benefit of the entire family. At trial, the Siblings argued that the district court could create a constructive trust under purely equitable principles to avoid unjust enrichment to Donald. Donald argued that a constructive trust could be imposed, if at all, only if the legal requirements for the enforcement of a failed express trust were met. The district court agreed with the Siblings and imposed an equitable constructive trust. The court of appeals reversed, holding that the circumstances of the case supported only a finding of a failed express trust and that equity cannot rescue a failed express trust if established legal requirements are not met. The court further held that a district court finding of fact that the parties' father did not intend his 1967 deed to transfer ownership of the farm to Donald was incompatible with the creation of an express trust. Accordingly, the matter was remanded to the district court with instructions to enter judgment in favor of Donald.

In a separate issue, the court of appeals reversed a district court contempt ruling against Donald. The district court held Donald in contempt due to his failure to participate in court-ordered mediation in good faith, and awarded costs related to the failed mediation to the Siblings. Donald had attended the mediation session, but had refused to compromise his legal position that he owned the farm in fee simple. The court of appeals held that, by rule, contempt sanctions are available only as to parties who fail to attend a scheduled court-ordered mediation session and not merely because a parties' actions at mediation result in the failure of the mediation.

Disposition: Reversed and remanded.

ADMINISTRATIVE

Frito-Lay v. Labor Comm'n, 2008 UT App 314 (Cert. Granted).
(URCP 60 and UAPA)

Respondent Clausing had suffered a job-related injury and filed for workers' compensation benefits. In relation to one set of claims, the parties had stipulated to Clausing's work history (she was able to work during some periods). The Administrative Law Judge (ALJ) then issued an order awarding benefits but did not specifically exclude from the award the weeks that the parties had stipulated that Clausing had worked (and was thus not eligible for benefits). Clausing later made demand for a full amount of payments, including the weeks she had worked. Frito-Lay refused to pay and sought relief pursuant to rule 60(b) of the Utah Rules of Civil Procedure. Although Clausing recognized that her interpretation of the award was inconsistent with the stipulation, the ALJ denied the motion, not finding "mistake, surprise, or excusable neglect" sufficient for relief under rule 60. Upon review by the Labor Commission Review Board, the Board dismissed the motion, determining simply that rule 60(b) is not cognizable in Labor Commission Proceedings. The Board stated that, instead, the Utah Administrative Procedures Act (UAPA), which does not expressly incorporate rule 60(b) but provides other methods for agency review of ALJ decisions if a request is filed within thirty days, governs.

The Utah Court of Appeals held that UAPA does not preclude the application of rule 60. The error could have been corrected with rule 60(a) because it was a clerical error resulting in the miscalculation of the total award. And the purpose of rule 60(b) is to avoid unnecessary appeals when errors can be easily corrected by the

fact finder. Further, Frito-Lay's motion could have been characterized as a timely motion for agency review since the discovery rule would be applicable here, where until Clausing made her request, Frito-Lay was not aware the order would be construed to include the days that were stipulated that she had worked.

Disposition: Reversed and remanded.

Kramer v. State Ret. Bd., 2008 UT App 351 (Standing and Contract Interpretation)

Mr. Kramer signed an enrollment form for insurance through PEHP for his wife and himself, in which he agreed to the terms of the Master Policy, which included a subrogation clause. Mrs. Kramer was in an automobile accident. PEHP paid over $30,000 of Mrs. Kramer's medical expenses resulting from the accident. The Kramers sued the tortfeasor. PEHP notified the Kramers' counsel of their subrogation rights. The Kramers settled their claim for $100,000 without notifying PEHP or allowing it to be involved in the process. PEHP tried to collect the $30,000 it had paid from the Kramers, but they refused to pay. The Utah Retirement Board (the Board) eventually granted summary judgment in favor of PEHP.

The court of appeals concluded that PEHP had standing to prosecute this case before the Board because PEHP comes within the broad definition of the statutory term "person" and PEHP has suffered a distinct and palpable injury. Summary judgment was appropriate because there are no disputed facts here, and the court of appeals can easily see how the hearing officer reached the conclusions he did based on the undisputed facts. The Master Policy was also a valid and binding contract for the following reasons: there is no ambiguity shown because the Kramers did not argue any alternate interpretations for terms they claim are ambiguous; there was no improper incorporation by reference; the reasonable expectations doctrine is not law in Utah; the Kramers were responsible for reviewing the policy prior to enrollment; and the common law doctrine that the tort victim must be made whole before subrogration rights are triggered can be modified by contract, which it was here.

Disposition: Affirmed.

FAMILY

Corwell v. Corwell, 2008 UT App 49 (Cohabitant Abuse Act)

Stacey Hall, formerly Stacey Corwell, filed a verified petition for protective order against Rocky Corwell, which the district court granted. Corwell objected arguing that he and Hall were not cohabitants as defined in the Cohabitant Abuse Act since they never lived together and their marriage had been annulled. The district court overruled Corwell's objection and determined that the parties previous marital status was sufficient to confer jurisdiction under the Act.

Corwell appealed. The court of appeals reversed the district court and determined that a marriage annulled prior to the events giving rise to the protective order petition would not support cohabitant status.

Disposition: Reversed.

A.B. v. State (In re V.L. and P.L.), 2008 UT App 88 (Termination of Parental Rights)

Mother was the biological parent of four children. Husband was the biological father of two of those children, and A.B. was the biological father of the other two children (the Children), both of whom were born while Mother was married to Husband. Mother's, Husband's, and A.B.'s parental rights were all terminated. This appeal concerned the termination of A.B.'s parental rights in the Children.

The court of appeals affirmed the juvenile court's decision terminating A.B.'s parental rights on the basis of the Utah Supreme Court's recent decision *In re B.R.,* 2007 UT 82, 171 P.3d 435, in which the supreme court emphasized "the juvenile court's broad discretion to evaluate the totality of the evidence regarding both the parent's past behavior and present circumstances." 2008 UT App 88, ¶ 21. We concluded that the juvenile court's decision was sufficiently supported by the evidence and that it did not exceed its discretion in discrediting the testimony of Mother and A.B. to find that A.B. had abandoned the Children and was an unfit parent.

The court of appeals also concluded that the juvenile court's denial of A.B.'s motion for a continuance, which was filed when A.B. was appointed new counsel two weeks before the termination proceedings, was not an abuse of discretion. The Utah Supreme Court has granted trial courts substantial discretion in determining whether to grant a continuance. Here, A.B. did not show that the failure to provide a continuance was prejudicial to his case. Rather, he merely made vague allegations that he was attempting to obtain new evidence and the short time frame would not allow his counsel to make timely objections. Granting the continuance, on the other hand, would inconvenience the other parties.

With respect to A.B.'s ineffective assistance of counsel claim, the court of appeals concluded that counsel's performance was not deficient where he failed to seek custody of the Children because the juvenile court had previously denied A.B.'s petition for visitation. Accordingly, a request for custody of the Children would likely have been denied.

Disposition: Affirmed.

In re C.D., 2008 UT App 477 (Cert. Filed) (Indian Child Welfare Act)

The Division of Child and Family Services (DCFS) originally obtained custody of C.D. and three of her siblings (the Children)

due to Mother's mental health issues. Mother agreed to transfer guardianship and custody of the Children to Grandfather, but Mother's parental rights were not terminated. Mother, Grandfather, and the Children are members of the Navajo Nation and therefore any child custody proceedings involving the Children are governed by the Indian Child Welfare Act (ICWA). *See* 25 U.S.C. §§ 1901-63 (2000) (the ICWA). After Mother, Grandfather, and the Children had been living together for approximately four years, the State removed the Children and again initiated child custody proceedings due to allegations that Grandfather was mentally and physically abusing the Children.

After a combined adjudication and dispositional hearing, the juvenile court found that DCFS had made active efforts to prevent the breakup of the Indian family as required by the ICWA, *see* 25 U.S.C. § 1912, but that those efforts were unsuccessful and further efforts would be futile. The juvenile court granted custody and guardianship of the Children to DCFS and changed the goal for the Children to permanent custody and guardianship. DCFS separated the Children, placing them with two non-Indian foster families. The juvenile court entered its written Findings of Fact, Conclusions of Law, and Adjudication Order on December 5, 2007, and Mother and Grandfather appealed.

Mother and Grandfather presented two issues for decision on appeal: (1) whether the juvenile court properly determined that DCFS made active efforts to prevent the breakup of the Indian family as required by the ICWA, *see* 25 U.S.C. § 1912; and (2) whether the juvenile court complied with the ICWA provisions requiring that Indian children be placed according to certain placement preferences or that good cause be shown for deviation from those preferences, *see* 25 U.S.C. § 1915(b). In addition, the State and the Guardian Ad Litem (GAL) for the Children both challenged the court of appeals' jurisdiction to consider the placement preference issue and the GAL also challenged the court's jurisdiction to consider whether DCFS had satisfied the active efforts requirement.

Active Efforts: The court of appeals held that it had jurisdiction to consider whether the juvenile court's determination that the active efforts requirement of the ICWA had been satisfied and was correct, rejecting the GAL's argument that such a determination could not be appealed until after the final permanency hearing. The appellate court then held that "the State must demonstrate that active efforts have been made with respect to the specific parent or Indian custodian from whom the Indian children are being removed or provide evidence that such efforts would be futile." 2008 UT App 477, ¶ 30. The court then held that "the phrase active efforts [as used in the ICWA, *see* 25 U.S.C. § 1912(d),] connotes a more involved and less passive standard than that of reasonable efforts [as used in Utah's child welfare statutes, *see* Utah Code Ann. § 78A-6-306(10)]." 2008 UT App, 477, ¶ 34. Applying that more demanding standard, the court of appeals affirmed the juvenile court's conclusion that further efforts with Grandfather would be futile.

Placement Preferences: Although the threshold question of jurisdiction was more difficult in the context of enforcement of the ICWA placement preferences, the court of appeals concluded that under the facts of this case, a final, appealable determination of that issue should have been reached by the juvenile court. The appellate court noted that Congress and the United States Supreme Court have stated that the placement preferences were intended as a protection of both the Indian children and of the tribe, and that those preferences form the most important substantive requirement of the ICWA, *see id.* ¶ 40. The court of appeals then held that

> the State must begin its attempts to comply with the ICWA's placement preferences immediately after the shelter hearing and that, by the dispositional hearing, it must demonstrate compliance with those preferences, good cause for deviating from them, or evidence of its prior attempts and a plan for compliance within a specified, reasonable time.

Id. ¶ 50.

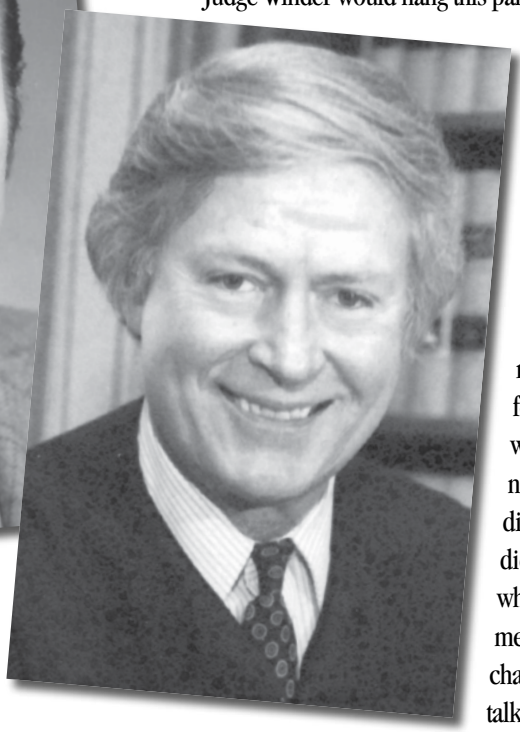
Disposition: Affirmed in part, reversed in part, and remanded for further proceedings.

1. For many of these cases, Judge McHugh was not the author or even a member of the panel that issued the opinion. The actual decisions are the best statement of their facts and holdings. Judge McHugh acknowledges the invaluable assistance of her law clerks, Andrea Valenti Arthur and Leslie Barron, and her intern from the University of Utah College of Law, Brian Nicholls, in preparing these summaries.

Judge David K. Winder: A Model Mentor and Judge

by Jeffrey J. Hunt

With the recent passing of United States District Judge David K. Winder, members of the bar have been celebrating his life and legacy with countless courtroom stories, memories, and reflections of our interactions with this extraordinary judge and man.



As his friend and former law clerk, I mourn the loss of this humble, decent man while cherishing my memories of him and the valuable lessons he taught me and so many others about life and the law. As the Utah bar moves this year to mentor-based training for new lawyers, I can think of few better examples of a model mentor than Judge Winder.

Judge Winder was a mentor and role model to many, not only to his extended family of law clerks but to other lawyers, judges, and persons wholly unconnected to the legal field. Following are some reflections on my experience, which I know was shared by many others who had the good fortune to know Judge Winder.

When I first met him in 1986, Judge Winder had already secured his reputation as an accomplished trial lawyer, revered judge, and wonderful human being. I was a new reporter covering the federal court beat for one of the Salt Lake daily newspapers. I was told by my predecessor on the beat that Judge Winder was approachable, personable, and knowledgeable – all the qualities you looked for in a good source. So, I walked into his chambers – this was before the days of metal detectors and security doors – and introduced myself.

Of course, the first thing I noticed was the Norman Rockwell painting hanging directly behind his desk. It depicts a brave African-American girl being escorted to school by a phalanx of United States Marshalls in front of a wall scrawled with a racial epithet. Entitled "The Problem We All Live With," the painting was inspired by a series of photographs of a young girl named Ruby Bridges integrating an elementary school in New Orleans in the 1960s.

The Rockwell painting makes a powerful statement about racial injustice and the redemptive power of the law. The fact that Judge Winder would hang this painting directly behind his desk made a powerful statement about him as well. This was someone I wanted to get to know.

So we started talking – this cub reporter and this federal judge – and we did not stop for nearly an hour. He didn't know me. He did not know yet whether he could trust me. But, he took a chance on me. We talked about the federal court, the newspaper, any interesting cases he had, local politics. He also listened, which was unusual in my experience as a reporter. Typically, the important people I encountered on the job liked to hear themselves talk. Judge Winder was different. He was asking questions about me and what I thought.

It was Judge Winder who first kindled my interest in becoming

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a lawyer. He encouraged me to apply to law school and got me thinking of combining my experience as a journalist with a career in the law. Upon graduation, he offered me a clerkship in his chambers, which I gladly accepted.

As was the case with nearly all his law clerks, the year I spent clerking for Judge Winder had a profound effect on my legal career and my conception of what a lawyer could and should be.

I was awed by his legendary work ethic, which made me and my fellow clerk look like rank slackers. Because he typically started hearings at 8:00 a.m. each day, and sometimes earlier, I tried to arrive at the office at 7:30 a.m., which was difficult, as my wife and I were still adjusting to life (and no sleep) with our newborn baby. Judge Winder was always at the office when I arrived, so I started coming in at 7:00 a.m. He was already there. I arrived at 6:30 a.m. Already there. 6:00 a.m. There. As a matter of principle, I was not going to start my workday at 5:00 a.m., so I gave up.

The only time I did beat Judge Winder to chambers was when I pulled an all-nighter and scared the daylights out of him as he entered the office at some God-forsaken pre-dawn hour and found me sacked out on the chambers couch.

Over the course of that wonderful year, Judge Winder taught me the value of meticulous preparation in every case. He, of course, was a self-described "fanatic" about preparation, reading and rereading the briefs to simplify the issues and get to the heart of the matter. And while I do not start my workday at 6:00 a.m., the example that Judge Winder set is a constant reminder to me that the work we do deserves to be done well, and doing it well requires discipline and preparation.

Judge Winder also taught me about listening, civility, compassion, fair play, and genuine respect for all people who come in contact with the court, from clerks, bailiffs, court reporters, and security personnel to lawyers, clients, jurors, criminal defendants, victims, news reporters, and members of the public. He treated all with whom he came in contact with uncommon courtesy and respect.

Judge Winder recognized that as lawyers and judges, we hold positions of power and influence that can do harm as well as good. Always mindful of this power, he exercised it carefully and with genuine modesty and humility. He viewed the office of judge as a public trust, not a personal prerogative.

Finally, as any of his former law clerks will tell you, Judge Winder's deep loyalty and attachment to courtroom staff has always extended to his law clerks, whom he treated like family. Clerking for Judge Winder was like a year-long college bull session with your favorite college roommate (co-clerk) and your favorite professor (Judge Winder). Law, politics, history, journalism, sports – no subject was off limits – and Judge Winder enjoyed kibitzing about all of them.

It has been said about great mentors that you learn more from watching them in action than from what they tell you. I learned a lot watching Judge Winder interact with lawyers, parties, jurors, court personnel, and members of the public. I carried those lessons with me when I left Judge Winder and joined the law firm where I still practice, and where I was fortunate to find excellent new mentors, such as Bruce Maak, to guide my development as a young lawyer. I continue to learn from them today. And while my faults as a lawyer and human being are many, I am certain that whatever potential I have realized so far is due largely to the influence of my mentors.

Judge Winder's legacy will live on through the many lives of those he mentored, befriended, and touched, no matter how briefly. It is a legacy of judicial excellence, of personal integrity and compassion, and of uncommon courtesy and decency.

It is now our turn to pass along those values that Judge Winder exemplified so well as a lawyer, as a judge, and as a human being.

Twenty Years of Bar Operations

by Nathan D. Alder, President, Utah State Bar

Over the past three years, the Supreme Court, Bar Commission, Bar staff, and certain Bar committees have engaged in extensive reviews of Bar governance, operations, regulatory obligations, financial status and investments, member services, and public programs. At the direction of the Court, the Commission retained the services of Grant Thornton to conduct a non-financial audit of Bar governance and management. That report included several recommendations, one of which was an extensive review of the Bar's operations. Through Court direction, the Bar then conducted five extensive year-long reviews (management and technology, communications, admissions, access to justice, and member benefits) by July 2008, and will finish five more reviews (professional conduct, continuing legal education, building and property, fee dispute resolution, and client security fund) by this July. As an outside provider, the Grant Thornton review came at a significant financial cost. The remaining two years of operational reviews have been conducted by volunteers, namely Bar Commissioners, key bar leaders and members, in order to ensure that no additional cost would be incurred by the Bar for such reviews. I would like to thank those volunteers for the many thousands of dollars in time donated to this intensive review of the Bar's finances, assets, operations, and programs.

The goal of this three-year review process was for the Court, Bar leaders, staff, and all Utah lawyers to have a better understanding of future Bar needs, challenges, operations, and obligations. The reviews also provided essential information to Bar leaders, lawyers, and the Court to make critical decisions in order to protect the Bar's ongoing interests, so that it can fulfill its mission and meet the on-going needs of the membership and the public we all serve. The first two years of review materials are available online at the Bar's website; the final year's review will be online in the coming weeks and months. Many of our Utah lawyers have participated in online surveys, interviews, committee work, and in writing and reading these reviews. Bar Commissioners have reviewed all of this very carefully; we have engaged in a significant amount of work these past three years. The information and reviews thus far highlight several areas where the Bar needs more resources, where the Bar needs to invest in anticipation of future issues and concerns, and where additional revenue is essential to the Bar's ability to achieve its interests and mission.

In addition to the reviewers of the past three years, the Bar Commission has long been advised by an independent Budget and Finance Committee consisting of dedicated financial professionals, including CPAs, and lawyers with financial expertise. This work is in addition to our annual outside audit by Deloitte & Touche. For each of the last several years, the Budget and Finance Committee has made strong recommendations regarding the need for the Bar to operate with a solid reserve reflecting four months of operations. As the Bar has grown in number and as services and operations have increased, the reserve has not grown in proportion to the budget. Where a $1 million dollar reserve may be appropriate for a $3 million budget, that same reserve would not be appropriate as the necessary costs of Bar operations reach $4.5 million annually. According to the Budget and Finance Committee, the shortfall in reserves needs to be remedied as soon as possible. Bar Commissioners agree. Operating with a reasonable and prudent reserve in place is sound fiscal policy. In an economically challenging year like this year, the reserve is even more important. And with future economic challenges ahead of us, the Commission desires to heed the Committee's recommendations for a solid four-month reserve. Thus, it is time to invest in the future.

In addition to the Budget and Finance Committee (which further recommends that prudent fiscal management includes a sinking fund for building repairs, refurbishment, and replacement), the Bar Commission's sub-committee analyzing building and property is finalizing its year-long review of the issues affecting our building and surrounding property. That special review committee indicates that the 22 year-old building is facing significant improvements, repairs, and refurbishment in the near future. As the building continues to age, the cost of repair and maintenance will increase accordingly. Both committees recommend preparing now for future years.

The Bar building has served us well, housing thousands of meetings and CLE sessions. However, over the last several years and during extensive use, the building's limitations on the membership's ability to use the building have become readily apparent. The Bar Exam is now administered off-site and at a significant cost. Many sections are unable to hold meetings at the building because of constraints on available meeting space. Saving for major remodeling or replacement is something that should begin sooner rather than later. Even if larger meetings and events cannot be accommodated at the current building, the building requires enhanced maintenance and upkeep as it grows older. Saving into a building fund will allow for future maintenance and adaptation.

The Bar also requires several technology improvements. Investing

in technology will further enhance the Bar's ability to deliver services to Utah lawyers. Other review committees, e.g., admissions, communications, member services, etc., indicate needs for various modernizations and other improvements, and for developing more sophisticated operational methods and enhancing our offerings. With increasing demands on the Bar's technology, its web-based services, and web-based portals for member services and benefits, the Bar will necessarily need to add professional staff to deliver those technology services.

Bar management and staff diligently attempt to continue to deliver services and programs to the expanding membership as directed by the Bar and the Bar Commission. Because of budget constraints placed on them, Bar staff are stretched to the limits of their capacity in many areas. As the size of the Bar continues to grow, new staff members will necessarily need to be added to be able to provide essential services.

In response to the information being delivered to the Bar Commission over the past three years, the Commission has decided that prudent fiscal management demands that we petition the Utah Supreme Court for an increase in licensing and admission fees, thus enhancing the Bar's ability to generate revenue and meet operational demands as well as prepare for the future. Even before the reviews began three years ago, Bar Commissioners and staff knew that it was not a matter of "if" but "when" the Bar would need additional revenue. I have been attending Bar Commission meetings since 2001 when I was president of the Young Lawyers Division and I have seen Bar Presidents, Commissioners, and staff undertake tremendous efforts to manage programs and services in order to hold off the eventuality of a licensing fee increase request. Every Bar President I know was grateful they were fortunate enough not to have to implement a licensing fee increase during their tenure, although each recognized a licensing fee increase was inevitable. Over the years, we have taken advantage of certain economies of scale, an influx of thousands of new lawyers who pay fees, the benefits of technology in place of additional professional staff, interest income from generous market economies, and reduced levels of services, in order to maintain fiscal stability year after year. Where other bars have undertaken new programs and offerings, or offered more services, we were more conservative and provided less. For every Utah lawyer who wants the Bar to essentially leave them alone and thereby offer less and therefore require less by way of licensing fees, there are other Utah lawyers, particularly new and younger lawyers, who want more services, more assistance, more offerings and who expect benefits from being admitted to the Bar. Striking a balance is the work of the elected Commission. However, everyone at this leadership level has acknowledged that one day we would no longer be able to provide traditional services and still meet Court-mandated obligations at the current level of licensing fees. That day has come. Bar leaders are prepared to meet that obligation and present a request for increased licensing fees.

It will have been since licensing fees were last increased. I have practiced 14 years now and have never seen an increase. Half of our Bar is my vintage or younger; I represent the median age and practice years of our Bar. During the last twenty years, the number of Utah lawyers has doubled, from 5,103, to over 10,350. Demands for services provided by the Bar have grown, and the Bar has worked with precision and creativity during these demanding times to make its budget each year. These demands, however, have occasionally required the Bar to spend unreserved surplus instead of putting that surplus into reserve for future years. We need a growing building fund to handle significant expenditures that will arise in the not too distant future. The Bar has had sufficient funds to deal with some necessary updates and repairs to the building by using unreserved surplus, but that is no longer the case. Furthermore, the Bar's operational expenditures now outpace revenue as the number of Utah lawyers has grown and services have kept pace.

Of the 17 state bars in the western United States, with which Utah regularly communicates and coordinates programs, services, and leadership discussions, Utah has the longest-running organization

without a licensing fee increase. The next longest is at 12 years, and those leaders are in the same position as we are now, contemplating an increase. Some have recently sought and obtained increases. Licensing fees in Utah are among the lowest in the western states. Other bar organizations marvel at our ability to hold off on an eventual licensing fee increase. Utah is no longer a small bar, however. It is a now a larger state bar with a sophisticated and demanding professional community much like other large bars throughout the United States. The Utah State Bar is proactively addressing the future needs of the profession as well as the current demands upon it from both the Court and thousands of Utah lawyers. Simply put, the Utah State Bar is no longer able to operate on the licensing fees established twenty years ago.

While we have some limited financial cushion for ongoing operations, our reserve is now beginning to diminish and our annual income will soon not be enough for us to keep doing what we feel is necessary to adequately administer our regulatory function (delegated to us by the Supreme Court), while also serving the profession and the public. Our financial staff has charted the lines of revenues to expenses over the last ten years and also projected those lines out to the next ten. Expenses over the last ten years have grown at a rate of just 5% per year as a result of the conservative and efficient management of the Bar. Unfortunately, because of the lack of any licensing fee increase over that same period of time, revenue has been dependant on the addition of new Bar members. As a result, Bar revenue has only grown at a rate of 3% per year. Last year the lines of revenue and expenses nearly crossed at fiscal year-end with no contribution to either the reserve or building fund. By the fall of 2008, however, just as the financial markets were collapsing, those two lines crossed. Our interest income has declined dramatically over the last fiscal year, and combined with several other factors at play, we are now on a course that creates a significant gap between revenue and expenses if not rectified soon. As a result, the Bar is now budgeted to operate in the red for the first time in a long time, despite significant cost cutting, and will continue to operate in the red, dipping into our reserves through the immediate future until corrected.

Twenty years is a long time to slowly grow operations through care, technology, and economies of scale. Because the Bar operates under authority delegated to it by the Supreme Court, any increase in licensing fees would only result through a petition request to the Court and by Court order. I recognize the argument that some may think the Bar should do less and live within its means instead of increasing licensing fees and trying to do more. The Commission has discussed this for years now and has done its best to cut where it can and decrease where it felt it was appropriate. We do, however, feel strongly that the Bar has an obligation to perform not only basic regulatory functions that have been delegated to us by the Court, but also should provide important services to lawyers and to the public. We also believe that our financial reserves need to be increased to better protect on-going operations against unexpected fluctuations in revenue or losses in the market. To do otherwise is fiscally unsound and puts the Bar in a precarious financial position.

I realize that a few lawyers may not fully understand that the Bar is required to perform regulatory functions and may not be aware of the varied and extensive work done by the Commission, volunteers, and staff on numerous fronts and issues of concern. Several areas of desired improvement are communications, governmental affairs, and community involvement. To the extent that more of you will volunteer and serve, we can save some costs that would otherwise be required. As you become more involved, the value of your benefits from the Bar increases. As Commissioners, we realize that we are fiduciaries over licensing fees and have tried to keep costs down while providing value and accountability. We will also look to other sources of appropriate revenue where possible.

As mentioned, copies of the reviews; the 2008-2009 audit, and the budget for the next fiscal year are available at www.utahbar.org/documents. You will also find the Utah Supreme Court's Rules for Integration and Management of the Bar and the Bar's By-Laws through the same link.

The Bar Commission will be continuing discussions and deliberations as it refines its petition to the Court for an increase in licensing fees. Minutes of our last several meetings, wherein we addressed fiscal decisions, are available online. We will prepare additional and detailed information and make it available to you in future communications. We are currently awaiting information from the Admissions Committee regarding the various fees that may be increased in that regard.

A petition to the Court will most likely be submitted before the end of December 2009. If the Court approves all or part of the requested action, we would anticipate that the licensing fees for 2010-2011 would include the increase. This will not affect 2009-2010 licensing that is now being processed. We recognize that the difficult economy has affected lawyers, and we have put off requesting an increase until next year in recognition of that reality. We are also hopeful that by July 2010, the nation's economic troubles will have corrected somewhat and a more optimistic future for all is around the corner.

Never Litigate as a Matter of Principle – Unless, of Course, You're Being Accused of Speeding on a Bicycle

by Jon Schofield

Last summer, I got a speeding ticket for going 37 mph in a 25-mph zone. So what? Speeding tickets are given out all the time. Right? But I was on my bike. I mean, who gets a speeding ticket on a bicycle? After thinking about it, I began to question whether I was really going that fast, and even if I was, I had a legal argument that the speed limit should not apply to a cyclist. So, I decided to fight my ticket, and, after some time, my case finally went to trial (yes, the wheels of justice seem to turn about as fast as my cadence pedaling up Little Cottonwood Canyon). Here is how it all went down.

My wife and I had just finished an enjoyable early-morning ride in Emigration Canyon. We were on our way home, riding down Wasatch Drive behind the Zoo, when I noticed a motorcycle police officer parked on Michigan Avenue just before Wasatch splits Bonneville Golf Course. Seeing the officer and remembering that a sheriff had recently given some of my friends grief for riding side-by-side (which, by the way, I have learned is not against the law),[1] I slowly accelerated in front of my wife and assumed a single-file position. Within moments after passing the officer, I heard the sound of a revving engine and blaring siren. I was being pulled over. The conversation went something like this:

> Motocop: You know the same laws apply to bicycles as automobiles?
>
> Me: Yes, in fact, I try to be very aware of the traffic laws; I obey traffic signals; I ride on the right side of the road; I yield to traffic,. . . .
>
> Motocop (who proceeded to pull out his ticket pad and pen): Well, you were going 37 in a 25. What is your name?
>
> Me: You know, it never occurred to me that speeding was an issue; I mean it's not like a bike can really go that fast.
>
> Motocop: Well, you were.
>
> Me: Now that I am aware that this is an issue, I'll be sure to watch the speed limit and be sure I'm in compliance. How about a friendly warning?
>
> Motocop: Sorry, I guess you will be more careful next time. What is your name and address?
>
> Me (in my mind): This is ridiculous; this guy is just jealous that he has to have a 1690cc motor to go that fast.
>
> Motocop (in his mind): I'll teach this spandex-clad-shaved-legged sissy what it means to be a real biker.

I left with a citation. A few days later, I received a letter from Salt Lake City, notifying me that I would need to pay a $70 fine or appear in court regarding my "Bicycle Violation." At the time I was given my ticket, I was so shocked that I didn't really question whether I was really going that fast (besides arguing with Motocop was going nowhere). But, after pondering the alleged speeding incident, I began to question the whole thing. After all, I was on a leisurely ride with my wife (who, to her credit, is pretty fast, but not that fast), and we were carrying on a conversation at what seemed to be a leisurely pace when I was allegedly clocked. And why did I get a ticket and my wife didn't (OK, I know she is much better looking than me, but isn't the law supposed to be blind). So, in an effort to save myself $70, I went to the court to plead my cause. Surely, they would not really make a cyclist, who was doing his part to conserve fuel and save the environment, pay a fine for speeding. Well, the clerk didn't really care, or at least didn't have any authority to care, so I left the courthouse with an appointment for a pre-trial conference at which time I could plead my case to the prosecutor, who would actually have the discretion to recognize that this was a meritless ticket. Or, so I thought.

A few months later, I went to my pretrial hearing and met with the prosecutor. The conversation went something like this:

> Prosecutor: Why are you here?
>
> Me: Well I got a ticket on my bike for going 37 in a 25 and. . .

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Prosecutor: Wait, your pedal bike?

Me: Yes, crazy huh?

Prosecutor: I've never heard of that before.

Me (in my mind): Sweet, I'm getting off.

Prosecutor: Well, I can cut your fine in half and put you on six months probation.

Me: Laughter (out loud).

Prosecutor: OK, how about no probation and $35.

Me: This has nothing to do with the money; it's all about the principle. I was on a bike for Pete's sake.

Prosecutor: Well, that's the best I can do. Take it or leave it.

So, in the interest of justice, ego, preserving the unalienable natural rights of all cyclists, and having a really good story to tell, I violated the very advice I so often give clients – never litigate as a matter of principle – and told the prosecutor that I'd see them in court.

One thing you have to understand is that not only am I a lawyer, but also I'm a litigator. Because I am a litigator, I actually like going to court. Another thing you should understand is that birds of a feather flock together, and I have lots of lawyer friends who were willing to assist (as you know, no one likes to stoop to befriend or help lawyers, so we're forced to mingle with and assist each other). So, with the encouragement of several of my lawyer friends, I began to prepare for trial.

As with any case, I began assembling my defense team in preparation for the big day. Any lawyer knows that you should never represent yourself, so a long-time friend, former federal prosecutor, and now in-house corporate attorney volunteered to be my defense counsel. I would take the stand and tell my story. My wife would be my corroborating fact witness. Yet, in order to put on a convincing case, we would need more than just a sympathetic story. We would need an expert witness. So, another good friend and cycling partner, who is also a lawyer and a Cat 2 road racer who spends more time on his bike than billing hours, was selected to fill the role of the hired gun.

After my trial date was postponed once on account of Motocop not being able to attend, the big day finally came (remember how slow those pedals turn up Little Cottonwood). When my case was called, I had that feeling of excitement that bike racers get when they line up at the start of the race. I sat at the defense table next to my sharply-dressed counsel, with my lean-and-mean expert witness and my beautiful wife/fact witness seated behind us. I sized up the competition. Across the aisle at the government's table, sat a young prosecutor maybe a couple years out of law school (who to her credit was also sharply dressed) with Motocop who was wearing his uniform complete with black, shiny knee-high boots. He seemed cocky, but wouldn't be for long. It was as if the other team had lined up with the wrong category. In bike racing standards, they were Cat 5s (not that there's anything wrong with that) who had mistakenly registered in the Pro/1/2 field, and they didn't even know it. I almost felt sorry for them, but not quite.

After brief opening statements, Motocop was called to the stand. He sauntered up, swore to tell the truth, and then proceeded to give his testimony, which included a nicely-drawn diagram and the following facts: (1) he was a cop; (2) he was a traffic cop; (3) he rode a motorcycle; (4) while being a cop on his motorcycle, and while he was purportedly enforcing traffic laws, he radar gunned me riding down Wasatch Drive; and (5) he "clocked" me at 37 mph.

On cross examination, my defense counsel elicited the following facts: (1) Motocop liked his job because he got to wear knee-high leather boots; (2) he liked the show "CHiPs" growing up; (3) he could ride his moto and eat a doughnut simultaneously; and (4) he felt that cyclists riding at 7:00 a.m. on a residential street posed a serious threat to the safety of sleeping citizens and therefore needed some law enforcement. Kidding. If I were defense counsel, these facts would have been on the top of my list. I guess that's why a lawyer should not represent himself. Really, the following key facts came out: (1) in over ten years of handing out tickets, he had given six speeding tickets to bicyclists; (2) he never received any specific training on how to use a radar gun to clock a bicycle; (3) he was taught to shoot his radar gun at large non-moving reflective surfaces, like a car grill or windshield; (4) he believed he locked the radar on my bike as I was approaching (perhaps he was referring to the profile of my 23 mm tires or 1.5-inch head tube); (5) he did not believe the radar gun clocked the spinning wheels, the spinning cranks, or my moving legs and feet; and (6) he did not recall how fast I was pedaling or whether I was in an aerodynamic position, holding onto the drops of my handlebars.

Next, I was called to the witness stand. My testimony was basically, I'm an innocent man, I do not believe that I was going 37 mph, and similar iterations thereof. Clearly, the glove did not fit.

Our star fact witness was called to the stand. My wife, like me, testified that she didn't believe we were speeding and that we were on a leisurely ride carrying on a conversation while gently pedaling and sitting upright on our hoods in a non-aerodynamic position. When asked how she rated herself as a cyclist, she

flipped her hair back and said, "pretty good for a girl" (note from proud husband: not only is she "pretty good for a girl," but she can take it to most guys on the bike). After the trial, the Judge, apparently impressed with my wife, commented that she could most likely drop him. We were not sure if he meant that she could drop him on a bike or just drop him…hmmm. I'll not comment on whether that was an appropriate comment. The fact that it was irrelevant was irrelevant since most of the testimony was bordering on irrelevant.

As our final witness, we called our expert to the stand. Expert on what you ask? Expert on arguably nothing. You see, we opted to employ an oft-used litigation tactic: if you can't beat them on the facts, then confuse and obfuscate. With the confidence of a true hired gun, my expert testified all about gear ratios, aerodynamics, and bicycle speeds, noting that it is generally very hard for a cyclist to go 37 mph. Indeed, he testitied that the fastest time-trialists in the world, who ride time-trial aero bikes, who wear aero helmets and skinsuits, and who generate a lot more watts than me don't sustain speeds in excess of 37 mph. Moreover, even at the Tuesday-night criterium races, where many of the fastest racers in Utah gather at the Rocky Mountain Raceway and sprint all-out in a 53x11 gear cross the finish line at speeds only in the 35-40 mph range. Thus, the "expert" opined that to be going 37 mph at the point in question, a cyclist would likely have to be in the drops and spinning a mean gear at a high cadence.

To the prosecutor's credit, she also made a few good points cross examining my expert. First, when she asked how he knew me (in attempt to show bias), he admitted that we were training partners and use to race together. Then utilizing the opportunity to take a jab at my wife, my expert said "but that was before Jon's wife made him quit racing his bike" (which isn't really true, but is illustrative of the tension that can exist between a man's wife and his riding buddies). Second, the prosecutor asked how fast my expert had traveled on his bicycle. Hearing no objection from defense counsel, my expert simply smiled and said with a bit of the same swagger exhibited by Motocop: "over 55 mph." I'm not sure, but I think Motocop started drooling on the table when he heard that testimony. Good thing my expert wasn't on trial, and, good thing the prosecutor didn't think to ask me that question when I was on the stand.

The evidence was in, but before a ruling was made, the Judge listened to closing arguments. Our argument was this: Utah law simply provides that bicycles may not operate at speeds greater than reasonable and prudent. *See* Utah Code Ann. § 41-69-1106(4) (2005). The bike statute contains no specific prohibition that bicycles have to keep the speed limit. The law does state, however, that automobile laws apply to bicycles where "applicable."[2] The law states that an automobile may not be operated at a speed greater than is reasonable and prudent, and then states that the speed limit is prima facia evidence of what is reasonable and prudent. *See id.* § 41-69-601(1)-(3). Yes, bicycle riders have to stop at stop lights, etc., but obviously don't have to wear a seatbelt, because the seatbelt laws would not be "applicable" to a cyclist. So, we argued that the posted speed limits, just like the seat-belt laws, are not applicable to bicycles, because unlike an automobile (which must have a working speedometer, annual safety inspections, etc.), there is no requirement that a bicycle have a functioning speedometer. Bicycles are only required by law to have working brakes and reflective devices if ridden at night. *See* Utah Code Ann. § 41-61-1113-1114 (requiring working brakes, lights, and reflectors if used at night). Thus, we argued the speed limit should not be evidence as to what is a reasonable and prudent speed for a bicyclist; rather the cyclist simply should be left to his or her own judgment as to what is a reasonable and prudent speed. Indeed, why would a cyclist exceed what is a reasonable and prudent speed when he or she is essentially wearing nothing but his underwear? Additionally, as an alternative to our policy argument, we argued that based on the trial testimony, there was sufficient reasonable doubt as to whether I was actually going 37 mph.

In the end, the Judge ruled in my favor, determining that we had established reasonable doubt. The Judge said the prosecution had failed to prove its case and that there was some question as to whether I was actually going 37 mph. The Judge made darn sure, however, that we understood he was not ruling that it's okay for cyclists to speed. It's hard to know what Motocop took away from the trial since he disappeared as soon as the Court said "case dismissed." Either he realized that he never should have given a ticket to a guy on a bike (especially a lawyer on a bike), or he is out for vengeance. So, here is some free legal advice for those of you who like to ride a bike: keep your eyes open and keep your speeds reasonable and prudent (whatever that means). And, if you do ever get a ticket, you'll probably save some time and money by simply paying the citation (but how fun would that be?).

1. Utah Code Section 41-6a-1105(3)(a)-(b) states that "[a] person riding a bicycle…may not ride more than two abreast with another person except on paths or parts of roadways set aside for the exclusive use of bicycles [and]…a person riding two abreast with another person may not impede the normal and reasonable movement of traffic and shall ride within a single lane." Utah Code Ann. § 41-69-1105(3)(a)(b) (2005).

2. Utah Code Section 41-6a-1102(1) states that "a person operating a bicycle…has all the rights and is subject to the provisions of [the Motor Vehicle Act] applicable to the operator of any other vehicle." *Id.* § 41-60-1102(1).

In Defense of the Collection Lawyer

by Lawrence R. Peterson

I was recently in a meeting of collection lawyers who were telling stories about their recent experiences with bar commissioners, court administrators, judges, and other attorneys where collection lawyers as a class were referred to with ridicule or contempt. I guess it is not surprising that these supposedly knowledgeable officers of the court should be prejudiced, since they are people first and professionals only second. Times are hard. But legal professionals should know better than the average Joe that the villain is not the lawyer. Properly viewed, the collection lawyer is an important force for creating that prosperity and commerce that everyone now longs for – not to mention being an agent for fairness and justice.

Listening in on the conversation of my colleagues, I began to sympathize with other classes of people who are the victims of discrimination. Prejudice is prejudice because it deals in untrue generalizations. There undoubtedly are aggressive, greedy collection lawyers, but most attorneys who do collections work are both decent and professional. During my career, I have had the opportunity to practice in several different areas of law, including but not limited to, complex contract litigation, securities, personal injury, divorce, and, finally, collections. In each of these areas of practice, I met and had the pleasure of working with highly competent and professional attorneys. No area of practice has a corner on good or bad lawyers. I have also discovered that success in the collections arena can require just as much judgment and skill as in any other area of practice. In order to succeed as a collection lawyer one has to master a different set of problems than does the lawyer who spends his whole career on one case, but that is not to say that those problems are less challenging. Quantity has a quality all its own.

By definition, collection lawyers deal with parties who can not or will not pay their debts. Here again one must be careful to distinguish between prejudice and fact. If the old saying that "you can't squeeze blood out of a turnip" were true of all delinquent debtors, the collection attorney would soon starve. The success of collection actions demonstrates that, given sufficient motivation, many delinquent debtors can find the resources to meet their obligations. And the successful collection professional soon learns that there is nothing to gain from pursuing the party who truly has nothing. Accurately and efficiently determining which of these two categories applies to the case at hand is a skill of no small moment.

Over my career, I have had clients who could easily pass higher costs along to their remaining customers. Some of those clients are tempted to categorize all their delinquent accounts as "turnips." As Kramer pointed out in an episode of *Seinfeld*, "Big companies write off this stuff all the time." To which Seinfeld replied something like, "I don't even know what it means to 'write it off.'" What it means is this: the paying customers of businesses that fail to distinguish between debtors who will not pay and debtors who can not pay are going to pay more. As a collection lawyer, I see this group of paying customers as my real constituency. Yes, I represent my client, but if I am successful, the real beneficiaries are my client's future customers who will pay less for the client's goods and services – at least those future customers who actually pay for the goods or services they receive.

The American economy runs on contracts. If contracts become unenforceable, businesses will refuse to accept contracts in exchange for their goods and services. "I will be glad to help you. Bring cash." This trend is already underway. If we think the economy is contracting now, wait until cash-only becomes the rule. Collection lawyers tend to favor the efficient enforcement of contractual obligations. However, the area of practice that deals in delaying the enforcement of clear and applicable contract terms continues to flourish, in spite of Rule 11 of the Utah Rules of Civil Procedure and Rules 3.1 and 3.2 of the Rules of Professional Conduct. I do not suppose this is the area of practice court and bar officials should prefer over collection attorneys.

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Of course, the history of collections contains stories of abuses. Sometimes these abuses arise from the mistaken impression among collectors that the delinquent debtor is somehow wicked and needs to be punished. Collection lawyers are not in the business of educating jerks. The average debtor is much like the average person of any other class – usually good, but with notable exceptions. My success and the interests of the debtor are both served by keeping the focus on how to get the bill paid. Having access to the judicial process, if promises are not kept, I can take concrete action. I am not limited to writing another demand letter. I never make idle threats. If no productive options are available, it is time to close the case. Nothing is gained by punishing people who cannot pay. It's the money, stupid! In this context, most collection lawyers I know are in favor of the strict, consistent enforcement of the provisions of the Federal Fair Debt Collections Practices Act. Lax enforcement invites bad actors. Collection lawyers, bound by ethics rules and subject to judicial supervision, do not benefit from unfair or abusive practice even if non-judicial collectors seem to. Nor should those who make their living through the powers granted by the law seek to be excused from applying it as it is written. All should be required to play by the same rules.

I am happy to be known as a collection lawyer. I provide a service to my client: my client sends me paper and I send my client money. Most attorneys cost the client money and send the client paper. I provide a service to the debtor: in my practice I am called on to deal with many unrepresented persons. I try to treat them with respect and fairness. It is almost always in my client's interest to strike a deal that enables the debtor to cooperate in the payment of the debt, and I have met many genuinely decent people who happen to be delinquent debtors. I provide a service to society: parties and persons, both great and small, benefit from knowing that contracts are enforced in our society. I provide a service to persons who actually pay their debts: I am trying to keep them from paying the freight for the people who can pay but do not want to. I do not intend to hang my head in any meeting of the bar, including those filled with consumer advocates. I feel right at home.

Preparing for Future Development:

Government Entities and Developers Should Take Time to Solve Problems that Arose During the Recent Market Boom

by Brent N. Bateman

The bottom fell out of the real estate market in 2007. By all accounts, Utah land development was a conflagration for several years. Steady, almost exponential growth of home sales, home building, and real property values led to a tremendously opportune atmosphere for real property development. *See, e.g.,* Diane S. Gillam & Francis X. Lilly, *Construction in Utah Shatters Records in 2005,* Utah Construction Report, University of Utah Bureau of Economic and Business Research, Vol. 48, No.4 (October, November, December 2005). Landowners and developers benefited by generously feeding the nearly insatiable market demand. Builders benefited by plentiful work and hardy sales. Communities benefited by a steady and healthy inflow of population, infrastructure, and development application fees.

The development community and local governments are paying the price now. The bubble has burst. *See generally,* Actual And Estimated Economic Indicators Utah And The U.S.: February 2009, Utah Governors Office of Planning and Budget, February 11, 2009, available at http://www.governor.utah.gov/dea/forecasts/econind.pdf (tracking economic indicators in Utah from 2006 through 2010 projections. The report indicates, for example, that 26,300 Utah Dwelling Unit Permits were issued in Utah during 2006. During 2007, 20,500 permits were issued. During 2008, only 10,600 permits were issued, with only 9000 permits projected to be issued during 2009). The collapse of the credit market has left development crawling. *See, e.g.,* James A. Wood, *Single-Family Homebuilding Dives to Record Lows,* Utah Construction Report, University of Utah Bureau of Economic and Business Research, Vol. 51, No.1 (January, February, March 2008). Overextended builders, hobbyist developers, and even some municipalities are in dire financial straits. Some developments remain incomplete. *See* Rebecca Palmer, *Credit Crunch Leaves Trendy Mixed-Use Developments on Shaky Ground,* Deseret News, April 11, 2009. Some are smarting from the gaps in the development process that have been exposed.

Stop. Take a breath. The good news about the bad economy is that it is providing an opportunity to pause and self assess. The advantage is time. The problems that were exposed when the bubble burst can now be addressed and solved.

The Office of the Property Rights Ombudsman ("OPRO") benefits from the proverbial 30,000-foot view. Many government entities and developers consult with the OPRO about problems with real estate development. The OPRO sees land use problems both one at a time and cumulatively. In assisting with these problems, the OPRO noted some patterns and is focusing on ongoing problems that can be solved. The purpose of this article is to begin a dialogue about some positive actions that attorneys representing property owners, developers, and government entities may take during this slow down, so that the development process in the future may avoid some of the problems of the past.

Review and Revise Outdated General Plans and Ordinances

Recently the OPRO received a call from the planning staff in a small Utah community. A citizen had applied for a "special exception." The city staff, however, was completely unprepared to handle a special exception hearing. Few knew what a special exception was.

The extensive 2005 revisions to the Land Use, Development, and Management Act ("LUDMA"), removed from Utah statutory law the special exception doctrine. The special exception previously provided a municipality with the opportunity to approve an exception to a zoning ordinance.

The city had never amended its ordinances to bring them into harmony with LUDMA, and the special exception remained a part of the local ordinance. The property owner expected, quite justifiably, to take advantage of the special exception to serve his purposes. Although this was not an unmanageable situation, the city found itself in an awkward position.

The OPRO finds with surprising frequency that cities and counties throughout Utah have not revised their land use ordinances for some time. Since the revisions to LUDMA, the need to update local ordinances is especially acute. Consistency with the provisions of state law will reduce disputes with property owners, and assist staff in processing applications. Additionally, impact and

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development application fees should be examined and revised every few years in order to keep current with changing expenses and market conditions.

Right now is the time for local government attorneys to review those ordinances, and bring them into harmony with the revised state law and the local area's needs. This is best done without rushing or undue pressure, taking the time to consult with those who can provide assistance. The Utah Governor's Office of Planning and Budget maintains many excellent resources to assist local governments in planning and preparing ordinances, such as the Land Use Ordinance Library – a searchable collection of sample land use ordinances from local governments throughout Utah – found at http://www.planning.utah.gov/library.htm. In addition, local governments would be well served to invite developers and members of the real property bar into those discussions. They can provide insights into the weaknesses and strengths of the local development process based on their experience.

Many general land use plans could also benefit from some tinkering. A good general plan encompasses a variety of land uses. During the recent boom many land use plans focused on accommodating large homes. In some areas, commercial development has been neglected and higher density uses have been suppressed. The time to review the general plan includes the time to understand what should be included, but has not been. Good planning is an ongoing process, not a one time shot. *See The Planning Process And The General Plan,* Governors Office of Planning and Budget, p.1-2, located on the internet at http://planning.utah.gov/super/Training/Citizen_Planner/General%20Plan.pdf. It is best to address this problem when time permits.

Obtain Training In Land Use Law, Development Rules, And Property Rights

Property owners and municipalities regularly call the OPRO to ask about impact fees. Although the statutory law on impact fees is carefully crafted, it is often misunderstood. Municipalities ask the OPRO how to calculate impact fees, how to amend them, how to impose them, and how to collect them. Developers and property owners ask how to avoid paying them. More often, developers feel that the impact fees are simply too high, and ask the OPRO to crunch the numbers to determine whether they have been overcharged.

Several aspects of land use law generate repeated questions. The OPRO is eager to assist local government and land owners in finding answers to these questions. Nevertheless it helps to note that numerous resources exist for both government and private citizens to learn about impact fees, exactions, and nearly any other aspect of land use law. While development is slow, attorneys, developers, and government entities should take the time to obtain training in land use law, development

rules, and property rights.

This type of training is readily available. The Utah League of Cities and Towns (the League) has published numerous materials explaining land use laws, and provides on its website (http://www.ulct.org/ulct/land/) several resources for training governments in many aspects of development. As of this writing, these materials include several pamphlets, presentations, and podcasts, including an excellent audio discussion regarding impact fees. The League also provides on-site training to local municipal officials throughout the state.

Other affordable training resources abound. The Utah Land Use Institute (ULUI), www.utahlanduse.org, whose executive director is Craig Call, prepares and conducts several excellent training events throughout the year. Recently the ULUI and the Utah State Bar provided excellent one-day CLE seminars on impact fees. Another series of ULUI seminars will be launched this July at the Law & Justice Center featuring a six-hour comprehensive review of land use regulation and a handbook on Utah land use law. The Governors' Office of Planning and Budget also has many excellent training resources at http://www.planning.utah.gov/. Finally, the OPRO frequently provides training in many aspects of land use law to government entities, developers, attorneys, and other groups. The OPRO can visit nearly any location throughout the state and provides these services for no charge. The need exists. The time is right. The cost is right. Training is vital to an understanding of land use law.

Build Relationships

Recently, the Mayor of a smaller Utah city called the OPRO to complain about the antics of a "greedy developer." This developer was seeking approval of an unpopular project. The Mayor decried the developer's unwillingness to consider more community friendly uses for the land.

Naturally, within a few days, the OPRO received a call from a developer who decried a city's unwillingness to approve his project. The developer stated that he had gone to great effort and expense to ensure that his project complied with all of the applicable local ordinances and regulations. The developer further indicated a desire to include in his project elements that would contribute much to the beauty and value of the community. Nevertheless, the "draconian government" would not listen.

Of course, both of these callers were speaking about the same project. The stereotypes of the greedy developer and the draconian government had dominated their interaction and prevented healthy communication. In working to resolve this matter, the OPRO again noted, as it often has, that the developer and the City wanted exactly the same thing in almost every respect. Both parties wanted a beautiful project that contributed to the value of the community.

Attorneys could be the catalyst to help developers and local governments build a collaborative relationship. Both need the other, and are vital to community progress. Responsible developers and responsible governments both want healthy growth. If the parties involved in the development process could keep their common goals in mind, and work toward workable and profitable development, there would be little remaining to fight about. Certainly, disagreement cannot be avoided, but where a collaborative relationship exists, disagreement can be part of a healthy dialogue rather than waste of resources. Effort should be made to break down stereotypes and strengthen those relationships now.

The ULUI recently brought a program to Utah that has proven very successful in building these relationships in other areas of the country. Developed at Pace University in New York, The Land Use Leadership Alliance provides local leaders and developers with the tools to effectuate a positive and collaborative land use process. The Utah Land Use Institute website (http://www.utahlanduse.org/pages/LULA.html) can provide more information. Short of this, expressing a willingness to simply communicate frequently works wonders.

Learn and Use the Resources Available For Resolving Land Use Disputes

Real estate development in the state of Utah has slowed but not stopped. It cannot stop, because Utah's population continues to grow, and people need places to live, work, and shop. Despite the slow down in the development market, the OPRO has seen a steady inflow of business from government entities and developers who desire assistance with land use disputes. Where development happens, disputes arise. The OPRO provides some special resources for resolving land use disputes before litigation becomes necessary.

Despite the fact that the OPRO has been operating since 1997, many attorneys are unaware of the Office's role. The OPRO is charged with helping citizens and government understand the law. The OPRO assists parties with negotiation, mediation and arbitration. The OPRO provides Advisory Opinions in land use disputes. All of these tools are employed in the cause of dispute resolution. The attorneys at the OPRO are committed to help. The economic slow-down presents a good opportunity to become familiar with the resolution services available, in advance of the actual dispute.

Until recently, the rush to file and process land use permits left little time for either developers or government to "sharpen the saw." One major benefit of the slow-down in real property development is time. Developers, government, and their attorneys can use this time to consider and prepare for future development. Putting forth a little effort, now that the bubble has burst and the rate of development slowed, can result in better communities, a better development process, and better relationships tomorrow. If nothing is done, then when development again knocks on our door, nothing will improve, and we will find ourselves among the unfortunate who refuse to learn from the past.

Noteworthy Laws Passed During the 2009 Legislative Session

by Jeffry R. Gittins

During the 2009 General Legislative Session, almost 400 bills were passed. This article presents a brief summary of a few bills enacted during the session that may be of interest to members of the Utah Bar.

Private Attorney General Doctrine
Senate Bill 53, Awarding of Attorney Fees, abolished the private attorney general doctrine, a common law doctrine under which a court could award attorney fees to a plaintiff who vindicated a strong or societally important public policy. S.B. 53 is in direct response to the recent cases of *Utahns For Better Dental Health-Davis, Inc. v. Davis County Clerk,* 2007 UT 97, 175 P. 3d 1036, and *Culbertson v. Board of County Commissioners,* 2008 UT App 22, 177 P. 3d 621. In both of these cases, the district court had denied the plaintiffs' request for attorney fees under the private attorney general doctrine, but the appellate court reversed the district court and held that the plaintiffs were entitled to attorney fees under the doctrine. Under S.B. 53, courts cannot award attorney fees under the private attorney general doctrine in any action filed after May 12, 2009.

Eminent Domain
Senate Bill 83, Condemnation Amendments, adds a new section to the eminent domain statutes. S.B. 83 addresses the situation in which a condemnor purchases property from a condemnee under the threat of condemnation. In such a circumstance, the condemnor must provide the condemnee with a written statement identifying the public use for which the property is being acquired. If the condemnor puts the property to the public use identified in the statement, the condemnor has no further obligations to the condemnee. However, if, after the condemnor has acquired the property, the condemnor intends to use the property for any purpose other than the public use identified in the statement, the condemnor must offer to sell the property back to the condemnee for the original acquisition price. The condemnor must also offer to sell the property back to the condemnee if the property has not been put to public use and the condemnor intends to sell or transfer the property. S.B. 83 also provides that a condemnee can waive his or her right to repurchase the property by executing a written waiver.

Publication of Legal Notices
Senate Bill 208, Utah Public Notice Website Amendments, modifies the requirements for publication of legal notices. Under S.B. 208, any person required to publish a legal notice in a newspaper must also publish the legal notice on a website established by the collective effort of all of Utah's newspapers. The new requirement applies to all legal notices required by a state statute, by a state agency rule, for judicial proceedings, or by a judicial decision. The new publication requirements do not take effect until January 1, 2010. Until then, legal notices will continue to be published as required by the applicable statute, rule, or judicial decision.

Open and Public Meetings
Senate Bill 26, Open and Public Meetings Act – Meeting Record, modified the Open and Public Meetings Act. Under S.B. 26, written minutes of an open meeting must be made available to the public within a reasonable time after the end of the meeting. Written minutes of an open meeting are a public record even if they are awaiting formal approval by the public body, and such minutes should be clearly identified with a notice that the minutes are unapproved and subject to change until formally approved. Additionally, a recording of an open meeting must be made available to the public for listening within three business days after the end of the meeting.

Court Filing Fees
As most attorneys have probably already discovered, court filing fees have increased dramatically. Senate Bill 184, Civil Filing Fees, increased most civil fees in courts of record. For example, the filing fee for a civil complaint increased from $50 to $75 for claims of $2000 or less, from $95 to $185 for claims between

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$2000 and $10,000, and from $155 to $360 for claims of more than $10,000 and for unspecified claims. The fee increases took effect on May 12, 2009. For a full list of the new filing fees, you may refer to the new Cover Sheet for Civil Filing Actions, available on the Utah Courts website at www.utcourts.gov.

Small Claims Courts

Senate Bill 176, Civil Fees in Small Claims Courts Amendments, increased the jurisdictional amounts for small claims courts. Previously, a small claims court had jurisdiction if the amount claimed did not exceed $7500, including attorney fees but exclusive of court costs and interest. S.B. 176 increased the jurisdictional amount to $10,000. S.B. 176 also increased the filing fees for small claims affidavits. The new filing fee is $60 if the claim for damages (exclusive of court costs, interest, and attorney fees) is $2000 or less, $100 if the claim for damages is greater than $2000 but less than $7500, and $185 if the claim for damages is $7500 or more. The fee for filing counter affidavits also increased. The new filing fee is $50 if the claim for damages is $2000 or less, $70 if the claim for damages is greater than $2000 but less than $7500, and $120 if the claim for damages is $7500 or more.

Firearms

Two important laws were passed relating to firearms. House Bill 357, Firearms Amendments, permits a person to carry a concealed firearm in his or her vehicle. Additionally, a person may carry a concealed firearm in another person's vehicle with the other person's permission. Under Senate Bill 78, Protection of Constitutionally Guaranteed Activities in Certain Private Venues, a business may not prohibit individuals from storing a firearm in a vehicle in the business's parking lot if the firearm is locked in the vehicle or in a locked container attached to the vehicle and the firearm is not in plain view. S.B. 78 also permits the Attorney General to bring an action to enforce the law.

Employment Law

House Bill 206 enacted the Employment Selection Procedures Act, which applies to all employers who have more than fifteen employees. Under H.B. 206, employers are required to develop and maintain a specific policy regarding the retention, disposition, access, and confidentiality of information obtained through a job application process. If an applicant requests to review the policy before applying for a job, the employer must provide the applicant the opportunity to do so. Employers are prohibited from asking for an applicant's Social Security number, date of birth, or driver license number before the applicant is offered a job, except under limited circumstances. Additionally, employers are prohibited from retaining selection process information, such as resumes and applications, for more than two years after the applicant submitted the information. Finally, H.B. 206 limits how employers can use information obtained through the selection process. Employers cannot sell the information and are prohibited from using the information for marketing, profiling, or other similar purposes.

Land Use

Senate Bill 153, County and Municipal Land Use Amendment, prohibits municipalities and counties from requiring a person filing a land use application to obtain documentation regarding a school district's willingness, capacity, or ability to serve the proposed development. Municipalities and counties cannot impose a land use application fee that exceeds the cost of processing the application, nor can municipalities and counties impose an inspection or review fee that exceeds the cost of performing the inspection or review. Additionally, upon the request of a land use applicant, municipalities and counties are required to provide the applicant with an itemization of each fee imposed, showing the basis of the calculation for each fee.

Water Law

As a lawyer who practices primarily in the area of water law, I would be remiss if I did not include something related to this area of law. House Bill 18, Water Rights Applications and Records, provides that if a public water supplier is holding an approved application to meet the reasonable future water requirements of the public, it is deemed to be reasonable and due diligence in completing the appropriation or change. This essentially entitles the public water supplier to an extension of time to complete the appropriation or change. H.B. 18 also amends the law on requests for segregation. Previously, the State Engineer had discretion to approve or deny a request to segregate a water right. Under H.B. 18, if a water rights owner requests that a water right be segregated into two or more parts, the State Engineer is required to segregate the water right. H.B. 18 also permits a water right owner to consolidate water rights. Previously, the law allowed water rights to be segregated, but there was nothing in the law that allowed the water rights to be rejoined into a single water right. H.B. 18 permits the State Engineer to consolidate two or more water rights if the water rights are from the same source, have the same priority, and are sufficiently similar in definition.

Conclusion

This article is intended to provide a short summary of only a handful of the laws passed by the Utah Legislature in 2009. You can access the full text of the bills discussed in this article, along with the full text of all other bills, on the Utah Legislature's website at www.le.utah.gov. Additionally, you can access bill status and voting information, floor debate audio files, committee reports and minutes, and lots of other valuable information relating to the legislative process. The legislature's website is a valuable resource that should be "bookmarked" on your computer for future reference.

President-Elect and Bar Commission Election Results

Robert L. Jeffs was elected as President-elect of the Utah State Bar. Elected in the Third Division are Christian W. Clinger and James D. Gilson. Thomas W. Seiler and Curtis Jensen ran unopposed in their districts and will, therefore, serve as the commissioners representing the Fourth and Fifth Divisions respectively. The Bar thanks the fine lawyers who were willing to campaign and serve. The Bar also thanks all who voted and participated in the process.

Robert L. Jeffs
President-Elect

Christian W. Clinger
Third Division

James D. Gilson
Third Division

Thomas W. Seiler
Fourth Division

Curtis Jensen
Fifth Division

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. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, September 21, 2009. The award categories include:

1. Distinguished Community Member Award
2. Professionalism Award

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

Mail List Notification

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

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.

Please note that credit cards will only be accepted for licensing payments on-line. When remitting with paper forms, by mail or in person, you must pay by check.

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

Notice from Utah State Courts
Changes in Record of Court Proceedings and Transcripts

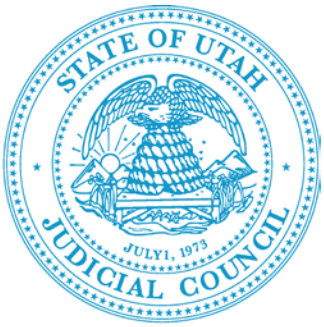
Effective July 1, 2009, court reporters will no longer be employed with the Utah State Courts to make verbatim records of court proceedings. Instead, all court proceedings will be recorded electronically. In capital cases, in addition to the digital recording, the court is permitted to contract with a licensed certified court reporter to report the proceedings. If a party in any other case wants to hire a licensed certified court reporter to report a court proceeding, the party may do so provided the court gives its approval. If an attorney anticipates needing overnight or expedited transcript production, the attorney should request the court's approval to hire a court reporter to report the proceedings and to provide whatever transcripts are needed. Forms for parties to request a court reporter in capital or non-capital cases will be available on the court's web page or in the offices of the clerk of court statewide.

Beginning July 1, 2009, all transcripts for official purposes must be requested through a transcript coordinator located in the appellate clerks' office. As of July 1, transcripts may be ordered and processed on-line by going to the court's web site www.utcourts.gov and clicking on the link for transcripts. When your order is placed, you will receive an email notifying you of the transcriber assigned and how to contact that person. You will need to make adequate payment arrangements with the transcriber within five business days after receiving confirmation of the transcript order. The transcriber will not begin work on the transcript until satisfactory payment arrangements are made.

Once the transcript is prepared and paid for, the transcriber will file the printed, certified transcript and the digital text file with the trial court and send you a copy of the transcript. Transcripts that are prepared outside of the above-described process will not be considered official and may not be used for court purposes. Requests for digital records for purposes other than preparing an official transcript should be made to the court in which the proceeding was held. If you have questions about the new procedures, please contact Nicole Gray at 801-238-7975.

To insure that digital recordings of court proceedings are as clear and distinct as possible, please adhere to the following "best practices" when speaking in the courtroom:

- Do not move microphones.
- Do not block microphones.
- Do not shuffle papers near a microphone.
- Do not speak simultaneously with witnesses, counsel, or the judge.
- Speak within arm's reach of a microphone.
- Use a lapel microphone if one is available. If you approach the bench without a lapel microphone, wait until you are within an arm's reach of a microphone before speaking.
- Use mute button (if available) while consulting with your client; be sure the microphone is on before proceeding.
- Move away from the microphone before coughing or sneezing.
- Hold discussions outside the courtroom or at least away from microphones.



Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the April 24, 2009, Commission meeting held in Ogden, Utah.

1. President Nathan Alder reported on the Western States Bar Conference which he attended with the Bar's Associate Director, Richard Dibblee; President-elect Stephen Owens; and, Fourth Division Commissioner, Robert Jeffs. President Alder stated that other Bars are interested in our new mentoring program. Stephen Owens added that the presentation on independence of the courts stressed the importance of building a network that includes non-lawyers like the League of Women Voters and bankers to assist with this and other difficult legislative issues when the need arises. Bar dues was also a topic of discussion, and Utah is near the bottom end of the spectrum. Many bars appear to be on a regular five or seven year cycle for increases.

2. President Nathan Alder reported on his recent attendance at ABA Day in Washington and observed that this event is now in its 14th year. This year he met with Senators Orrin Hatch and Bob Bennett and Representative Jim Matheson. He was unable to meet with either Representatives Jason Chaffetz or Rob Bishop. He lobbied among other things for an increase in the National Legal Aid budget, a portion of which will go to Utah.

3. Attorney General Mark Shurtleff joined the Commission meeting. Mr. Shurtleff said that when he first came on board at the A.G.'s Office, he wanted to do more training, including supervisory, leadership, management, and mentoring and has been engaged in these efforts for the past seven years. He is currently trying to mesh the A.G.'s mentoring program with the Bar's mentoring program. The A.G.'s office has approximately 500 employees with 200-220 attorneys. The A.G.'s office has had significant budget cuts, which they are trying to address by instituting a hiring freeze and offering early retirement, among other cost saving measures. In light of current economic times, the A.G.'s work load has increased. He understands that Rule 14-107 of the rules governing the Utah State Bar sets Bar fees and he is requesting a one or two year temporary reduction in Bar dues, which now cost the A.G. approximately $84,700 annually. He said if the Bar allowed a 25% cut, it would reduce their fees by $21,000. He would also like to eliminate the Client Security Fund assessment, because the attorneys who are employed by the A.G. do not have trust accounts or private clients.

4. John Baldwin discussed the Bar's financial statements. He explained that CLE income and revenue are up about $30,800 and Admissions income is down for the year. He continued by saying that our investments are down $50,000 in interest, management service income is down $26,000, and BarAlliance net is $80,510. John Baldwin further reported that we received some limited revenue from mentoring fees. Ultimately, we will lose income from "property management," which includes tenant rent and room rental. We made approximately $18-19,000 on the Spring Convention and the 2008 Summer Convention was up a bit. The mentoring program will lose about $50,000 this year, but hopefully, will start catching up in the future. There is, however, lost CLE revenue due to this program, and we will continue to lose in that area. Eventually, it will nearly pay for itself, but there are more start-up costs at the beginning. The General Counsel budget reflects costs related to property tax payments, and legal fees to appeal the issue, and legal fees for the trademark work. Overall, we are down about $94,000 and the forecasted loss on interest will be a big hit. He said we definitely need to make some decisions regarding increasing revenue and decreasing expenditures, but that we are not in a "panic state" just yet; we are running at a $10,000 per month deficit. The Commission voted to implement a $75 license fee increase beginning a year from now for the 2010-2011 fiscal year and have a portion allocated to a building sinking fund with a Commission five-year review program.

5. The Commission asked General Counsel to prepare a petition for a rule to clarify conflicts and confidentiality issues in the New Lawyer Training Program.

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

Pro Bono Honor Roll

Andres Alarcon – Family Law Clinic

Nicholas Angelides – Senior Cases

Deb Badger – Guardianship Case

Philip Ballif – Divorce Case

Julia Babilis – Farmington Clinic

Thomas Barr – Guadalupe Clinic

Lauren Barros – Family Law Clinic

Stephen Beem – Protective Order Cases

Tiana Berkenbile – Guadalupe & Family Clinics

Maria-Nicolle Beringer – Consumer & Domestic Cases

Adam Craig Brown – Bankruptcy Case

Bryan Bryner – Guadalupe Clinic

Sheri Coursey – Family Law Clinic

Christopher Daines – QDRO Case

Ian Davis – Guadalupe Clinic

Ashley Dalton – Family Law Clinic

Joseph Dunbeck – Custody Case

Theresa Foxley – Holocaust Reparations Case

Keri Gardner – Family Law Clinic

Jason Grant – Family Law Clinic

Jared Hales – Family Law Clinic

Kathryn Harstad – Guadalupe Clinic

Garth Heiner – Guadalupe Clinic

April Hollingsworth – Guadalupe Clinic

Kyle Hoskins – Farmington Clinic

Elizabeth Hruby-Mills – QDRO Case

Anthony Kaye – Holocaust Reparations Case

Linda King – Family Law Clinic

Louise Knauer – Family Law Clinic

Kristin Jaussi – Guadalupe Clinic

Dixie Jackson – Family Law Clinic

Jennifer Mastrorocco – Family Law Clinic

Stacy McNeill – Guadalupe Clinic

James Morgan – Guadalupe Clinic

William Morrison – Bankruptcy Cases

Jennifer Neeley – Divorce Case

Todd Olsen – Family Law Clinic

Rachel Otto – Guadalupe Clinic

Christopher Preston – Guadalupe Clinic

DeRae Preston – Family Law Clinic

Stewart Ralphs – Family Law Clinic

Brent Salazar-Hall – Family Law Clinic

Bruce Savage – Protective Order / Divorce Cases

Lauren Scholnick – Guadalupe Clinic

Kathryn Steffey – Guadalupe Clinic

Steve Stewart – Guadalupe Clinic

Don Stirling – Family Law Clinic

Linda F. Smith – Family Law Clinic

Virginia Sudbury – Family Law Clinic

Tracy Watson – Family Law Clinic

Nick Villa – Real Property Case

Shawn Stewart – Senior Legal Clinics

Holland & Hart – Senior Legal Clinics

Ross Nokashimi – Senior Legal Clinics

Elizabeth Conley – Senior Legal Clinics

Lois Baar – Senior Legal Clinics

Jim Baker – Senior Legal Clinics

Nicole Evans – Senior Legal Clinics

Jay Kessler – Senior Legal Clinics & St. Vincent DePaul

Jeannine Timothy – Senior Legal Clinics

Mike Jensen – Senior Legal Clinics

Richard Bojanowski – Senior Legal Clinics

Sharon Bertelsen – Senior Legal Clinics

Phillip S. Ferguson – Senior Legal Clinics

Kathie Brown Roberts – Senior Legal Clinics

Harry McCoy II – Senior Legal Clinics

Jane Semmel – Senior Legal Clinics

Professor Richard Aaron – Senior Legal Clinics

Laurie Hart – Senior Legal Clinics

UPL Committee Needs Lawyers

The Unauthorized Practice of Law Committee meets once a month for approximately an hour. It receives, reviews, and investigates UPL complaints against non-lawyers who engage in the practice of law. We are in much needed assistance from a few good lawyers who can devote a few hours a month towards this end. Please contact Dan Larsen (dlarsen@swlaw.com or 801-257-1900) or Katherine Fox (kfox@utahbar.org or 801-297-7047) if you want to know more – or even better, volunteer!!!

Congratulations!

Congratulations to the new lawyers sworn in at the joint admissions ceremony to the Utah Supreme Court and the U.S. District Court of Utah held on May 15, 2009

Neil Anthon
Che Arguello
Gregory C. Baker
Ronald Ball, Jr.
Cameron M. Banko
Ryan D. Baxter
Brenton S. Bean
Jarom J. Bergeson
Sibyl C. Bogardus
Nathanael C. Bryson
Robin E. Bucaria
Justin Ross Call
Diane V. Canate
Stephanie A. Charter
Benjamin P. Cloward
Joanna G. Cloward
F. Chad Copier
Jeffrey T. Cragun
Thomas Michael Crofts
Janna B. Custer
David S. DeGraffenried
Suzanne M. Disparte
Steven M. DuBreuil
Matthew David Ekins
Rex M. Feller
Jason C. Foulger
Ronald Fuller
Paul H. Gosnell
Matthew Griffiths
Jonathan Kirk Hansen
Kevin V. Harker
Matthew M. Holmes
Richard H. Honaker
Fong Hsu
James E. Ji
Jeremy B. Johnson
Whitney A. Kania
Chad A. Keetch
Nancy P. Kennedy
Brett M. Kraus
Derrick K. Larson
Mark A. Larson
Thomas R. Leavens
Christine A. Leavitt
Loretta G. Lebar
Alan M. Lemon
Darren M. Levitt
Tanya Noreen Lewis
Derek T. Marshall
Michael C. Mathie
Alan McBeth
Michael S. Melzer
Ronald B. Merrill
Haylee P. Mills
Gary Millward
William W. Morgan
Megan B. Moriarty
Carol Mortensen
Kate M. Noel
Stephanie Lynn O'Brien
Tracy Lynn Olson
Matthew Donald Ormsby
Gregg A. Page
Mary Leed Piciocchi
George C.M. Poulton
James P. Price
Jared W. Rigby
Rachael S. Rose
Steven M. Sandberg
Kelly N. Schaeffer-Bullock
Phillip R. Shaw
Rachel M. Slade
Martin R. Slater
Kallie Ann Smith
Jennifer B. Smock
Matthew W. Starley
Belinda A. Suwe
Bryan L. Swenson
Amy M. Taniguchi
Jeffrey Dean Teichert
Clint Thompson
John S. Viernes
Joy Lynn Walters
Benjamin B. Whisenant
D Russell Wight
Scott G. Wilding
Tasha M. Williams
Heather J. Wood
Stephen Q. Wood
Morgan J. Wyenn
Dallas Brent Young

House Counsel
George B. Brunt

2009 ABA Enterprise Fund Emeritus Attorney Pro Bono Indigent Guardianship Project

This Project is sponsored by the American Bar Association Enterprise Fund, the American Bar Association Commission on Law and Aging, and the Section of Real Property, Trust and Estate Law.

This is a pilot program with the goal of establishing or expanding Pro Bono programs using volunteer attorneys qualified for practice under state Emeritus rules, to assist low-income families and other low-income petitioners in establishing an adult guardianship in uncontested cases. Utah Legal Services has been awarded this grant in Utah.

The goal is to leverage the tremendous talent and experience of retired and inactive attorneys to meet the special needs of this underserved population.

PRO BONO OPPORTUNITIES
Utah Legal Services is looking for both active and inactive emeritus attorneys as well as qualified inactive attorneys under Rule 14-110 and Rule 14-803 (inactive lawyers providing legal services for legal services organizations) to volunteer for this Project.

If you are interested in volunteering as an attorney for this Project and representing low-income petitioners in establishing a guardianship in uncontested cases, please contact either of the following individuals at Utah Legal Services:

TantaLisa Clayton: Phone: 801-924-3390; email: tclayton@utahlegalservices.org

Brenda Teig: Phone: 801-924-3376; email: brendat@utahlegalservices.org

** If sending an e-mail, please have reference line read: ABA Emeritus Grant, so e-mail is not deleted.

Thank you to all the sponsors of the
2009 "AND JUSTICE FOR ALL" Law Day 5K Run & Walk

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Repertory Dance Theatre
Rodizio Grill
Salt Lake Bees
Salt Lake Film Society
Salt Lake Running Company
Starbucks
Target
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The Spa Club
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Attorney Discipline

ADMONITION

On April 17, 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 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In Summary:

An attorney was hired to represent a client in a Social Security Administration matter. After the briefing schedule was set, the attorney missed the first deadline to file the brief on behalf of the client. The attorney asked for an extension and was given one. The attorney missed the deadline and asked for extensions six additional times. Ultimately, when the brief was not filed after the seventh extension of time, the Commissioner filed a Motion to Dismiss for failure to prosecute the claim. The attorney did not respond to the Motion to Dismiss on behalf of the client. The attorney failed to notify his client of the Motion to Dismiss. The case was dismissed. Although the attorney filed an appeal of the dismissal, the U.S. District Court upheld the dismissal. The attorney's explanation for not filing the pleadings was that he had delegated preparation of the documents to his paralegal.

ADMONITION

On April 10, 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 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), Rule 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In Summary:

An attorney assisted a nonlawyer in the unauthorized practice of law. The attorney acknowledged that the nonlawyer had been in trouble in the past for the unauthorized practice of law. The attorney was aware that the nonlawyer was using business cards with the words "Legal Representative" on them. In spite of this, the attorney agreed to meet with the "clients" of the nonlawyer. The attorney was aware of at least one letter sent to a client which by the letterhead implied that the nonlawyer was a lawyer and wherein the nonlawyer purports to provide legal advice to a client. The nonlawyer was clearly associated with the attorney. The attorney failed to supervise the nonlawyer's activities.

INTERIM SUSPENSION

On March 30, 2009, the Honorable James R. Taylor, Fourth Judicial District Court, entered an Order of Interim Suspension Pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability, suspending Richard J. Culbertson from the practice of law pending final disposition of the Complaint filed against him.

In Summary:

On June 19, 2008, Mr. Culbertson pleaded guilty to and was convicted of three counts of Communications Fraud – 2nd Degree Felony, Utah Code Annotated § 76-10-1801, and one count of Pattern of Unlawful Activity – 2nd Degree Felony, Utah Code Annotated § 76-10-1601. The interim suspension is based upon the felony convictions.

PUBLIC REPRIMAND

On March 16, 2009, the Honorable Kevin K. Allen, First District Court, entered an Order of Public Reprimand against Raymond

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.

N. Malouf for violation of Rules 1.2(a) (Scope of Representation and Allocation of Authority between Client and Lawyer) and 8.4(a) (Misconduct) of the Rules of Professional Conduct. Mr. Malouf was further ordered to attend Ethics School, pay attorneys fees and costs to the OPC, and turn over disputed funds held in his trust account to a bankruptcy trustee for resolution of ownership of the funds.

In Summary:
After a car accident, Mr. Malouf was hired to pursue a personal injury action on his client's behalf. Mr. Malouf received an offer from the attorney for the opposing party's insurance company to settle the matter for the policy limits. Mr. Malouf advised his client to accept the settlement offer but his client rejected the offer. In a later meeting, the client informed Mr. Malouf that he would get back to Mr. Malouf on whether to or not to settle the matter. Before the client responded back to Mr. Malouf, Mr. Malouf accepted the settlement and deposited the settlement funds into his trust account. Mr. Malouf believed that a better resolution was not possible. Mitigating factor: Absence of a dishonest or selfish motive. The Court found that Mr. Malouf acted in what he thought was in the best interest of his client.

PUBLIC REPRIMAND
On April 10, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against R. Bradley Neff for violation of Rules 1.15(a) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In Summary:
Mr. Neff's attorney trust account was deficient when a check was presented for payment. The account was deficient again one week later. Mr. Neff and his employee each wrote checks from the account for the same amount. Only one check should have been written. Mr. Neff determined he was entitled to the excess money as earned fees. Mr. Neff made this determination without verifying the account balance or the amount owed to him. Therefore, Mr. Neff failed to keep his funds separate from those of his client. Mr. Neff failed to maintain accounting records for the account. Mr. Neff failed to respond to the OPC's lawful request for information.

Thank You to the 2008-2009 Young Lawyer Division Executive Council

by M. Michelle Allred

The Utah State Bar Young Lawyers Division ("YLD") would like to thank the following attorneys and paralegal liaisons for their tremendous service as volunteer leaders on the YLD Executive Council during the 2008-2009 bar year. Because of their willingness to devote their time and energy, the YLD offered significant contributions to the Bar and to members of the public through a variety of programs, services, and events.

If you are interested in volunteering with the YLD in the future, please contact Michelle Allred, 2009-2010 YLD President, at allredm@ballardspahr.com. For more information about the YLD, please visit www.utahyounglawyers.org.

2008-2009 Officers

President: Karthik Nadesan (Nadesan Beck PC)

President-Elect: M. Michelle Allred (Ballard Spahr Andrews & Ingersoll, LLP)

Treasurer: Jason Yancey (Rooker Rawlins, LLP)

Secretary: Sara N. Becker (Kirton & McConkie)

Immediate Past President: Stephanie Wilkins Pugsley

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And Justice For All Committee: Candice Pitcher (Jones Waldo Holbrook & McDonough), Jordan Kendall (Brayton Purcell, LLP), and C. Ryan Christensen (Parsons Kinghorn Harris)

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Wills for Heroes Committee: Tiffany Brown (Dart Adamson & Donovan) and Sarah Spencer (Christensen & Jensen)

Liaisons

Governmental Relations Committee: Christopher Von Maack (Magleby & Greenwood)

Utah Minority Bar Association: Simón Cantarero (Holland & Hart)

Paralegal Division: Carma Harper (Strong & Hanni) and J. Robyn Dotterer (Strong & Hanni)

20th Anniversary of Paralegals' Day

Recipient of Utah's 2009 Distinguished Paralegal of the Year Award

by Julie L. Eriksson and Sharon M. Andersen

On May 21, 2009, the Paralegal Division and the Legal Assistants Association of Utah (LAAU) came together to celebrate the 20th anniversary of Paralegals' Day, originally designated as Legal Assistants' Day on June 15, 1989, by Governor Norman Bangerter. Subsequent declarations, signed by Govs. Michael Leavitt and Olene Walker in 1994 and 2004, respectively, have set aside the third Thursday of each May to honor all Utah paralegals and their contributions to the legal profession.

This year's event, held at the Grand America, featured an address on "Civility in the Legal Profession and Civility in Everyday Life," presented by Associate Justice Matthew M. Durrant of the Utah Supreme Court. The 4th Annual Distinguished Paralegal of the Year Award, co-sponsored by the Paralegal Division and LAAU, was also given out. This award is presented to the Utah paralegal who, over a long and distinguished career, has, by his/her ethical and personal conduct, commitment and activities, exemplified the epitome of professionalism, as well as rendering extraordinary contributions coinciding with the purposes of the Paralegal Division and LAAU as set forth in their bylaws.

Heather Finch
2009 Distinguished Paralegal of the Year

The recipient of this year's award was Heather Finch. Heather was born in 1970 and grew up in Oklahoma and Texas, then moved to Utah with her family when her father was transferred to Hill Air Force Base. She graduated from the Paralegal Studies program at Wasatch Career Institute in 1990 and worked at several law firms before settling in at Howard, Lewis & Petersen in 1995, where she is now head litigation paralegal. Her practice areas include medical malpractice, personal injury, product liability, and civil litigation.

Heather is Region 3 Director of the Paralegal Division and will take over as Chair in July 2010. She has worked tirelessly to expand CLE opportunities for Utah County paralegals and is currently working on a paralegal utilization product which, when completed, will provide extensive guidelines on the various roles and tasks Utah paralegals can perform in multiple practice areas.

She married attorney Doug Finch in 1993 and had an instant family of five children to balance with her career. In her spare time, she enjoys outdoor activities such as traveling, camping, hiking, and snowshoeing.

Heather was nominated for Paralegal of the Year in an overwhelming fashion, by six attorneys and fellow paralegals. The following are a few comments from the nomination forms:

- Is effective at evaluating each case and knows what needs to be done to move cases forward to good outcomes;
- Is held in great esteem by the clients with whom she works… she is on their side and cares what happens to them;
- Trains and mentors paralegals with the same attention to ethical and competent client service; and
- Has done a great deal to promote feelings of goodwill among the general public.

The members of the Paralegal Division and LAAU wish to congratulate Heather Finch on all of her accomplishments, and on being named Utah's 2009 Distinguished Paralegal of the Year.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
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
08/14 & 15	**Annual Securities Law Section Workshop.** Full day seminar at the historic Wort Hotel in Jackson Hole, Wyoming. (http://www.worthotel.com) Agenda pending.	TBA
09/24/09	**NLCLE: Family Law.** 4:30 – 7:45 pm. Pre-registration: $75 YLD members, $90 others. Door registration: $80 YLD members, $100 others.	3 CLE/NLCLE
Early Oct.	**NLCLE: Personal Injury.** 9:00 am – All day seminar. Co-sponsored by Utah Association for Justice.	TBA
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	**FALL FORUM** Downtown Marriott	9*

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

*Subject to change.

Classified Ads

RATES & DEADLINES

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

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

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

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

FOR SALE

Park City general civil litigation law practice for sale. Please send inquiries to P.O. Box 681598, Park City, UT 84068.

50% interest in well-equipped, 3690-hour Cessna Turbo-210. Based at Salt Lake International. Glass panel (Aspen EFD 1000); Garmin 430 & 530 WAAS-certified GPS; GDL-69 data link and NEXRAD weather display; STec 60-2 autopilot; GAMI injectors; Knisley exhaust; PI 1700 engine analyzer; Shadin fuel-flow gauge; O2-equipped; Robertson STOL modification; Reiff engine heater; Rosen visors; May 2009 annual; 162-180 kt cruise; 23,000-foot service ceiling. Contact Gary Sackett, who is looking for a 500-hour-plus, IFR-rated pilot as a partner. 801-534-7336 or 801-278-3028.

OFFICE SPACE/SHARING

Beautiful Holladay Historic Building Executive Office Space. Large office $450.00/month. Small office $350.00/month. 4 offices available. Can also rent all 4 offices as a suite with private entry. Included: phone, voicemail, phone reception, wireless internet, use of high capacity copier, use of 2 conference rooms, janitor, utilities, landscaping, snow removal, and large free parking lot. Everything you need to be up and running on the very first day of occupancy! Available immediately. Minimum 1 year lease. Contact Kristal at 801-746-6000.

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Large Salt Lake City law firm seeks litigation associate with 3 to 5 years experience. Strong academic credentials and writing skills are required. Salary commensurate with experience, excellent benefits. Must be a member of the Utah State Bar. Please send resume to Christine Critchley, Confidential Box #1, Utah State Bar, 645 S 200 E, Salt Lake City, Utah 84111 or respond via email to ccritchley@utahbar.org.

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