Utah Bar JOURNAL

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Cover Art

Milk Weed at Flaming Gorge, by three-time contributor, Paul Amann, 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 3000 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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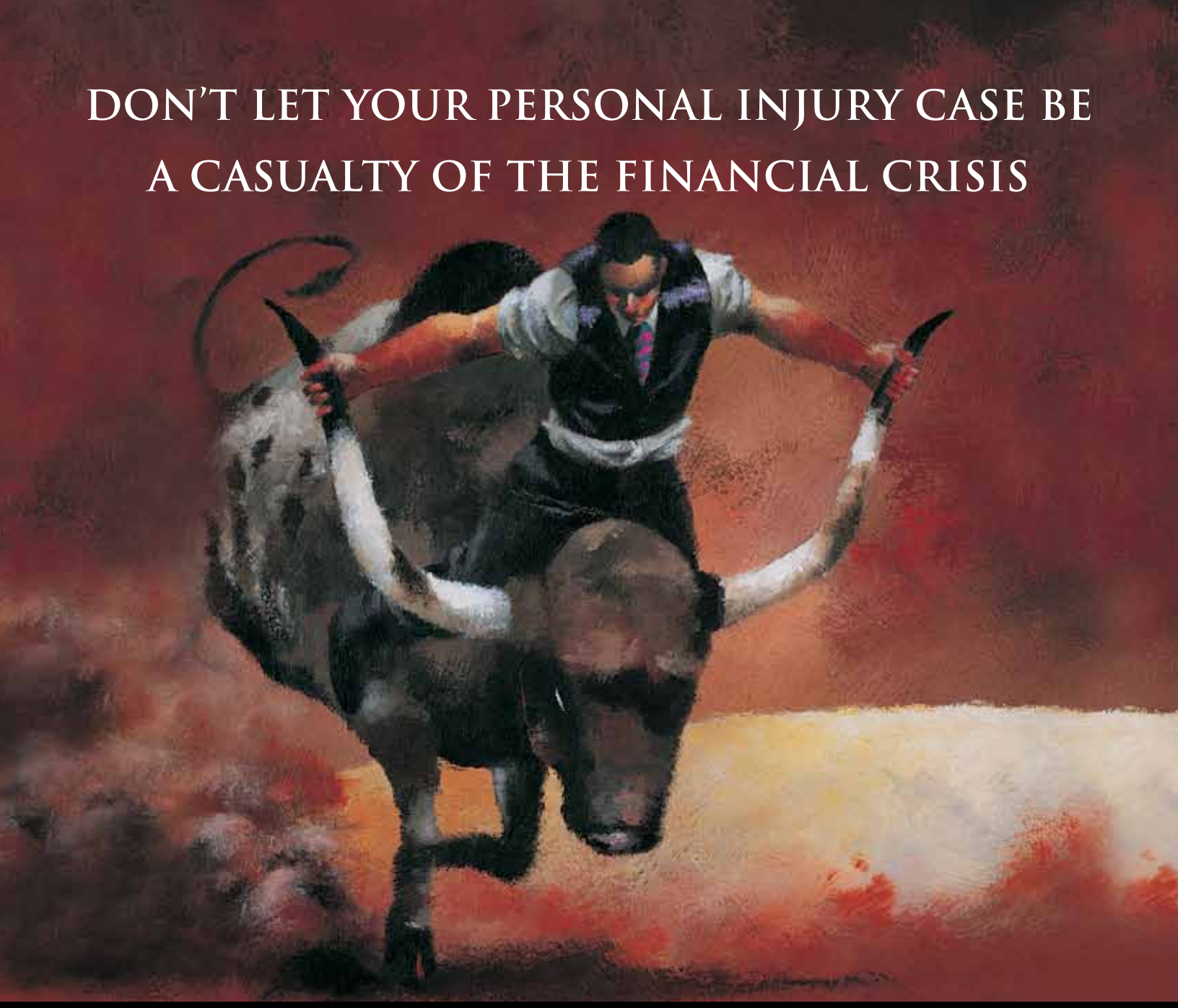

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Letters Submission Guidelines:

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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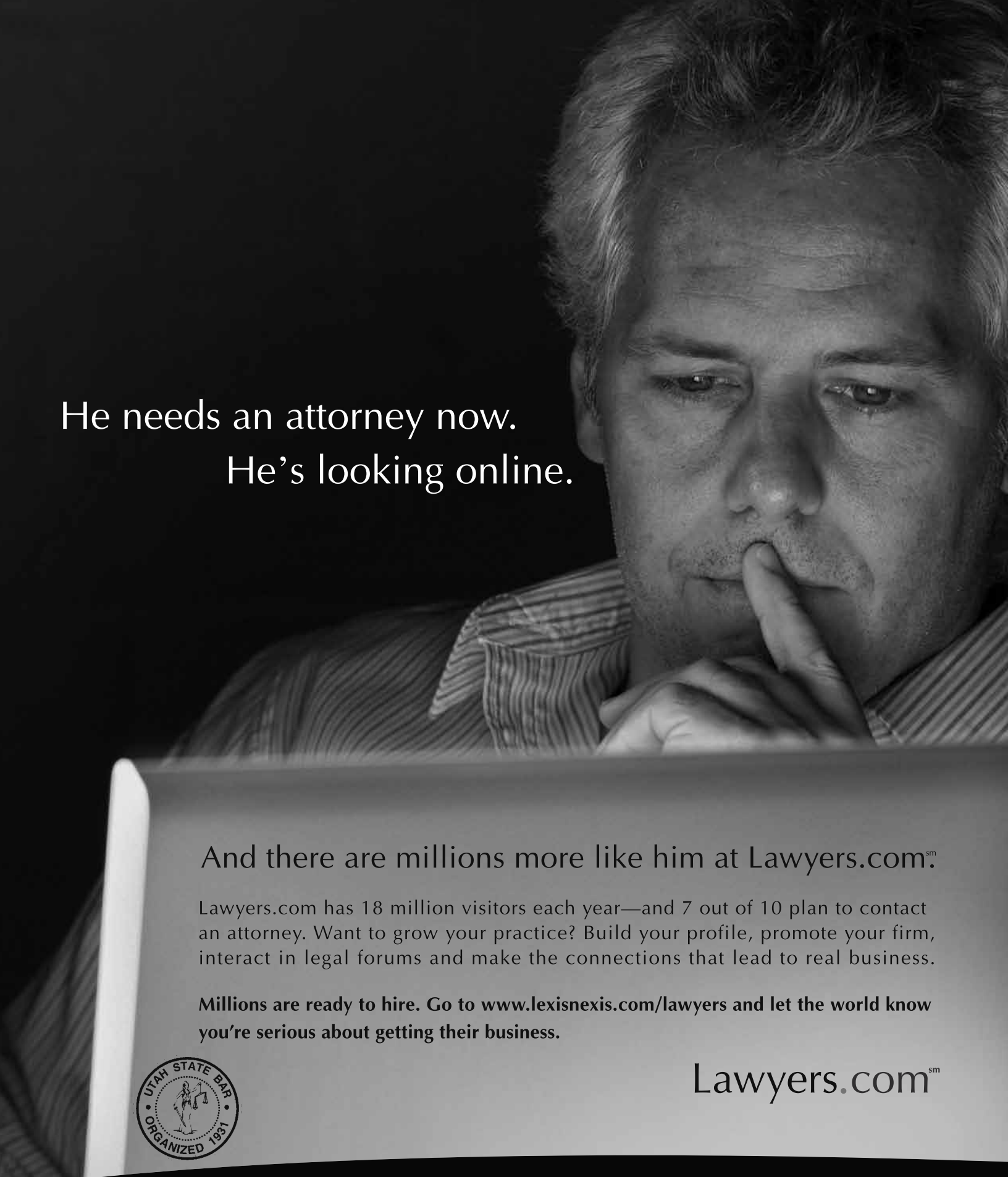

Protecting the Critical Role of our Fair and Impartial Courts

by Stephen W. Owens

It is a pleasure to take over the reins of the Utah State Bar from Nate Alder, our outgoing President, who has done an extraordinary job. It is also delightful to associate with our very competent, hard-working, and experienced Bar Commission and Bar Staff (including John Baldwin, Richard Dibblee, and Connie Howard).

I love lawyers and the law. My dad was a lawyer. My brother is a lawyer. I also have plenty of relatives who have found themselves on the other (criminal) side of the law! I will always speak up to defend the value of lawyers to society and their important role in preventing and peacefully solving problems.

At our recent Summer Bar Convention in Sun Valley, we were honored to have former United States Supreme Court Justice Sandra Day O'Connor speak to about 600 Utah lawyers and their family members. She declared that "judges are not politicians in robes" and "for judges, it is more important to be right rather than popular."

Justice O'Connor paid tribute to Utah's merit-selection system for choosing judges, whereby we avoid the significant conflicts of interests inherent in raising money and campaigning for judicial elections. However, she warned of a blurring of the separation of powers between the three co-equal branches of government and asked us to stand up for and educate the public about the importance of protecting our fair and impartial state courts.

When I stand before a judge to obtain a significant ruling, I do not want that judge thinking to him or herself, "If I rule in favor of Mr. Owens's client, I may face retaliation, upset the governor, a legislator, or the press, or jeopardize the funding of our Courts." Instead, I want the judge thinking to him or herself, "On the facts before me, what do the law and justice require?"

Judges need not be immune from criticism, but they absolutely must not be ideologically intimidated. Their decisional independence cannot be compromised.

Recently the ABA conducted a summit and completed a report on protecting our fair and impartial courts. The report and other resources are available online at www.abanet.org/op/fisc. I encourage you to review this information and to preach its message to others, including school children, community groups, and your elected officials.

Other ways to protect our courts include making sure that:

- Our courts are adequately funded, including reasonable judicial salaries and sufficient, competent staff for our judges.
- The judicial selection process is respectful and fair to applicants, and not so narrow as to prevent non-traditional applicants from being appointed.
- Judicial retention reviews are entirely apolitical and fair.
- Our clients understand the judicial process so hopefully they can feel that the process was fair, regardless of the final outcome.

Thank you for the opportunity to serve. Thank you for the key role that you play in our peaceful society. Feel free to contact me at any time at sowens@eolawoffice.com or 801-983-9800.

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SOUND ATTORNEYS

Prince, Yeates & Geldzahler is pleased to announce the election of Sally B. McMinimee as President of the firm, and the hiring of four new associates.

Sally B. McMinimee

Sally served on the firm's Board of Directors for the last five years. Her practice focuses on commercial law, family law, and she serves as counsel to the receiver in a large federal receivership matter. Sally is active in many legal and community organizations. She is licensed to practice in Utah and Idaho.

Jennifer R. Korb

Jen joins the firm with five years of experience with the Utah Division of Securities. Her practice includes securities litigation and general civil litigation with an emphasis in federal equity receiverships.

Aaron B. Millar

Aaron's practice focuses in the areas of bankruptcy and commercial litigation. He joins the firm from the Los Angeles office of Heller Ehrman and is licensed to practice in Utah and California.

Kate M. Noel

Kate's practice focuses on real estate, commercial lending, and business law. She is a 2008 graduate of the University of Utah, S.J. Quinney College of Law.

Tyler O. Waltman

Tyler practices in the areas of general litigation, bankruptcy-related litigation and general corporate law. He joins the firm from the London office of Latham & Watkins.

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Judicial Independence and Civics Education

by Sandra Day O'Connor

EDITOR'S NOTE: *Justice Sandra Day O'Connor addressed the Utah State Bar on July 18, 2009 at the Bar's Summer Convention in Sun Valley, Idaho. Her speech was met with great enthusiasm and we are grateful that she has given her permission to have her remarks published here.*

It's too early to stand up. And I like those introductions from your chairman's two daughters, whom I've met, they're great. What he could have told you is much shorter, he could have told you I'm just an unemployed cowgirl now.

It's early in the day. I'm very impressed to see so many of you out at this early hour, very impressive indeed. I'm so glad to be invited to come to Sun Valley. Through the years my family and I have visited Sun Valley a number of times, most often in winter to have a little skiing, but other times too. And it's just a great spot for any gathering.

When I retired from the Supreme Court I thought, well maybe for a couple of years anyway, there were a couple of goals that I could try to achieve during my retirement. The first goal was to try to redirect our national discussion about judges and courts into something a little more constructive than just hurling labels such as "activist" or "elitist" at those judges who have handed down some decision you might not agree with. I thought that was a fairly reasonable goal because we didn't have any place to go but up on that discussion.

But what became clear early on to me, was that the only way to achieve any progress on the first goal was through a second one and that is to restore civics education in our nation's schools. With nothing but these two modest goals in mind, I have to admit I thought retirement might give me a little break from work. Well that was naive. A few years in, I can tell you that I am now kind of exploring ways to retire from retirement. But I've also learned that there is a lot of work to be done, and I want to enlist everybody's help, including yours. I'm going to focus on those two topics of mine this morning: judicial independence and civics education, which is necessary to protect the first.

The independence of our judiciary was absolutely critical to the framers of our constitution. Two of the primary grievances that the colonists listed against King George in the Declaration of Independence involved the *absence* of judicial independence in colonial America. The Declaration of Independence charged that the King had "obstructed the Administration of Justice, by refusing his Assent to Laws establishing Judiciary Powers" and he had "made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries," said the Declaration.

Now, as a safeguard against those abuses, our Constitution was written to insulate the federal judiciary from political influences so that judges could apply the law fairly and without prejudice. It did this by providing federal judges with lifetime tenure – well actually it says for good behavior – and a salary which can not be diminished during that term of office. Of course it hasn't been increased either. That wasn't a guarantee. At the Constitutional Convention, when a delegate there proposed that federal judges should be removed whenever the President and Congress saw fit, that proposal was shouted down by the other delegates. One delegate described that proposal as "weakening too much the independence of the Judges." Another one said it was "fundamentally wrong to subject judges to so arbitrary an authority." So we ended up with the provisions we have in our national constitution that do protect federal judges.

Now the 50 states have followed different paths. They started, of course, like the federal government, with appointment by governors of states and a confirmation process of some kind, often by the legislative branch. That's how they started, but then along came President Andrew Jackson. There's a new book out about him. I've refrained from reading it yet because he made me pretty mad with what I'm about to tell you. He's the one who

SANDRA DAY O'CONNOR was nominated as an Associate Justice of the Supreme Court by President Reagan and took her seat September 25, 1981. Justice O'Connor retired from the Supreme Court on January 31, 2006.

went around telling states that they ought to elect their state judges, that we shouldn't follow the federal model. The first state he persuaded to do that was Georgia and a whole bunch of others followed suit. Today thirty-some states still have some form of election of state judges. Now that's amazing when you consider we didn't start out that way.

Arizona, I'm pleased to say, and Utah, I'm pleased to say, have adopted a so-called merit system for selection of most of their judges. Those systems have served our two states very well.

I'm talking today to a group of people, an audience, that already knows this history and you already know how critical it is to have an independent judiciary in the concept of the framework of our constitution. That notion has been one of our country's greatest contributions to governance around the world. With the breakup of the Soviet Union and the establishment of 26 new nation states, we have the opportunity to help those new countries develop their own forms of government. And in each instance we stress the importance of a fair and independent judicial branch. Not one of those countries has opted for the election of judges, I'm happy to say. In fact, we're the only country in the world, as far as I know, that still elects so many of our judges.

But judicial independence is not immunity from criticism. Criticism of what judges are and what they do is perfectly fair. But there is a difference between criticism and ideological intimidation, and some of what we hear in the discussion really can be put in the latter category more often. The phrase "judicial independence" is tough to define, so it helps to have some examples. There's no figure in Utah's history that has tested the limits of judicial independence quite like the Federal District of Utah's very first Chief Judge, Willis W. Ritter.

Now some of you may even have known Judge Ritter or practiced in court before him, and if you did then you probably have a strong opinion about him. So let me start by saying that I did not know Judge Ritter, he passed away just as I was beginning my judicial career as a trial court judge in Arizona, so I do not mean to either praise or criticize him. I bring him up only as an example of somebody who tested our commitment to judicial independence, and he certainly did that.

In his third year on the bench in 1952, Judge Ritter's courtroom did not resemble the beautiful facilities that you now have in Salt Lake City. He was on the second floor of an out-of-date building that had no air conditioning, and there were some ventilators directly behind the bench that ran down to a massive mail room on the ground floor, which had a loud and clunky freight elevator. Well one day when the mail room was particularly noisy, a testifying

witness in Judge Ritter's courtroom said he couldn't hear anything because the courtroom, with all the mail room noise piping in, sounded like a bowling alley. Well, Judge Ritter ordered the Marshall of the court to arrest the offenders, and the Marshall returned with a postman who had two packages handcuffed to him, because he didn't want to leave the packages unattended. Well the noise in the courtroom continued, and Judge Ritter continued sending the Marshall to arrest any mail carrier making noise or using the freight elevator. Within two hours Judge Ritter had 26 postal clerks, foremen, and supervisors arrested and sitting in the courtroom. Neither rain nor sleet nor snow can stop the mail, but on that fateful day a disgruntled federal judge did just that.

This is just one of various stories where it may be fair to conclude that Judge Ritter may have abused his authority as a judge, but did not commit a high crime or misdemeanor warranting impeachment. After giving a lecture to the people sitting in the courtroom who had been arrested, he released all of the postal workers. But the judge went on in this same way, stepping on toes for the better part of three decades on the bench. Now I should mention that his somewhat defiant spirit may have helped him make some truly prophetic rulings, such as the case of *Ex Parte Sullivan,* in which he upheld a criminal suspect's right to consult his attorney during interrogation, and that ruling was more than a decade before the U.S. Supreme Court ruled in *Gideon, Escobedo,* or *Miranda.* As was often the case in his courtroom, his ruling was overturned by the Tenth Circuit – twice – but only because it was ahead of its time. Because in time his ruling in that case proved to be prophetic. But just as sure as Judge Ritter was extremely intelligent, he was abrasive, and the longer he sat on the bench the stronger was the opposition to him.

As that opposition reached its apex, more than two decades after the mail room incident, the Utah Bar Association was presented with six resolutions in support of removing Judge Ritter from office. Now it was January, 1976, a few months away from our nation's bicentennial celebration, and this Bar Association appealed to the same sentiment that had swayed our Founders 200 years earlier. While segments of the Bar were not especially fond of Judge Ritter, with good reason, the resolutions calling for his removal were overwhelmingly rejected by the state bar of Utah because of the importance of judicial independence.

Now Harold G. Christensen – who was the Utah Bar President at the time and not a political ally of Judge Ritter by any means – said with respect to those resolutions: "The issue before the Bar is not whether Ritter is a good judge. The issue is the independence of the judiciary. The resolutions are an unwarranted interference with the independence of the judiciary and probably unconstitutional." Bar commissioner James B. Lee added, more poignantly, "Let's not make fools of ourselves." Both Mr. Christensen and Mr. Lee were presented with lifetime achievement awards two years ago when this State Bar Association celebrated its 75th anniversary, and based on that small historical excerpt, they would have had my vote as well.

Now this Bar Association understood then, as I know it does now, that while Judge Ritter's behavior may have been obnoxious, capricious, or even tyrannical at times, it does not compare to the oppression that could befall our citizens should we ever lose the check of an independent judiciary. It was the Founding Fathers' judgment that the rogue judge poses far less risk to our system of government than any instrument we might otherwise wield to expeditiously remove him.

The reason why judicial independence is so important is because there has to be a place where being right is more important than being popular; where fairness triumphs over strength. That place, in our country, is in the courtroom. It can only survive so long as we keep out political influences. In order to dispense the law without prejudice, judges have to be assured they're not going to be subject to retaliation by the other two branches of government for their judicial acts. In 1968, the year after the U.S. Supreme Court struck down the anti-miscegenation laws in the case of *Loving v. Virginia,* there was a Gallup poll that showed that only 17% of white people responding in the region approved of interracial marriage. That's a very small number, and it's tough to imagine that judges, if they could be easily removed through political devices, would have issued that opinion striking down those statutes. I'm not sure what the Gallup polls in the South said about racial integration of the schools before the Supreme Court's opinion in *Brown v. Board of Education,* but I suspect they were equally hostile to that idea as well.

Yet, our nation's commitment to judicial independence is waning these days because we're not educating our children about the role of our courts. According to the Annenberg Public Policy Institute, two-thirds of Americans can name at least one, if not three, of the judges on the Fox TV show "American Idol," but only one-in-eight Americans can identify our Chief Justice of the United States. The worst statistic of all is that barely *one-third* of Americans can even name the three branches of government, much less say what they do. That's really scary.

Now think for a moment about the implications of that kind of ignorance for the continuing validity of our nation. Two of the branches of government are democratically elected. In many states, as I've already said, the third branch, the judiciary, is elected as well. I'm happy to count Utah, along with my home state of Arizona, among those that rely primarily on merit-selection for choosing our judges. I believe that the merit selection system is the best method for choosing qualified state judges and allowing

them to apply the law evenhandedly.

But the reason we have so many states electing judges is that we are not teaching generations of young people what role the judiciary is supposed to play. They grow up viewing judges as nothing more than politicians in robes, and I think that typically turns out to be a self-fulfilling prophecy. Judicial campaigns typically do little more than breed distrust of judges. Money is funneled into so-called "information" for the voters about judicial candidates, often in the form of television advertisements. As one recent law review article explained,

> Fewer than one in three TV ads in the 2004 State Supreme Court [election] races [in various states] focused on the traditional themes of qualifications, experience, and integrity. Far more often, those judicial TV campaign ads misrepresented the facts and tried to scare the voters. Complicated decisions were reduced to slogans and fealty to the law was subordinated to sound bites.

Worse yet, the most prominent donors of money to those judicial campaigns are the litigants and the lawyers who appear before the judges. Now you don't have to be a constitutional law scholar to figure out there is something wrong with that. Just last month, the U.S. Supreme Court issued its opinion in a case called *Caperton v. Massey Coal Company,* that was a case in which a single campaign donor contributed more than $3 million to a state judicial campaign in order to try to oust a sitting West Virginia Supreme Court Justice and elect a challenger. The donor in that case of the sum $3 million was the CEO of a company that was appealing a $50 million verdict against it in the state supreme court. It appeared that the campaign donation was a pretty good investment because the incumbent lost the election and the successful challenger in that race ultimately cast the deciding vote in favor of overturning the $50 million verdict against the donor company and its CEO.

Now the legal issue for the Supreme Court was tough, and the Supreme Court ruled five to four that under those circumstances the Fourteenth Amendment's Due Process Clause required that judge to recuse himself from the case, in as much as it involved such a substantial donor to his campaign. But the bigger issue is the distrust that judicial campaigns and cases like *Caperton* breed in the minds of the citizens across the country.

All those advertising dollars are taking a toll in our country. Voters in states that elect judges are more cynical about the courts, they are more likely to believe that judges legislate from the bench, and they are less likely to believe that judges are fair and impartial. That kind of distrust has the perverse effect of making voters *more* inclined to elect their judges rather than go to an appointment process. If you don't believe that judges

can be fair and impartial, you might want to select judges by a process that you think will be most likely to result in a judge who is partial to *you* and be unfair in *your favor.* I guess that's the thinking, I don't know. But people have to understand the role of an independent judiciary so they can properly uphold judicial independence and ensure its accountability to the law of the land.

So what can be done about this growing distrust? You in this audience are among the people who can best combat misinformation. It's true that many Americans do not understand our system of governance, or the importance of an independent, impartial judiciary. The solution is simple: We have to tell them. What I mean by "we" is all of us; everyone in this audience, including me. Many of you are lawyers, and as lawyers, you are leaders in your communities. You're articulate, people will listen to you if you tell them what role judges should play, as long as you speak out clearly, loudly, and through the channels that your audience uses. I hope you will speak out: in private and in public, locally, and statewide. In schools, be part of that education process. Find ways to get groups of students together and put on programs that are going to help them understand. Your voices need to be heard.

For my part, I'm working to address civics education through the internet. Let me just say first of all, that about one-half of the states in this country have stopped making civics, government, and American history requirements for high school. Think of it – half! We just can't tolerate that. We have to return. The No Child Left Behind law has an unintended consequence in this regard. What we learned by testing our high school graduates against those of about 20 other Western nations, is that our high school grads score very low in math and science compared to those of other nations – very low. The President and Congress thought we ought to do something about it and what you do at the federal level is shovel out money, right? I mean, that's the remedy for most everything. Money is going to schools for math and science education based on test scores. But the perverse effect that that's had in many schools is that because the schools are not eligible for any federal money for other subjects like civics and history – or even music or things like that – they stop teaching them and stop making them a requirement. So that's what's going on and we have to stop it. For the most part in this country our schools are still governed by local school boards so it is possible to continue to have an influence and to make sure that your schools do not neglect those subjects.

I've used some people we've assembled at Georgetown University Law School and at Arizona State University in Arizona to develop a free, interactive, online civics curriculum called Our Courts.[1] You heard about it in my introduction. And that website is up and running. It's addressed to middle school students. Why? That was my choice because I think the middle school students have reached an age where the light bulb up here turns on. They start being interested in the world around them and wanting to learn things. They're receptive and I think it's the perfect time to get into this subject. So that's what we're trying to do. By the end of August we hope to have the two very interesting interactive games on the website. They will be used both in classrooms or at home. The website is very teacher friendly. The teacher doesn't have to worry about a thing, just turn on the computer and follow the directions. It's going to be good. It can stand alone or be used to supplement an existing curriculum. The interactive games that we're putting on, we hope can be used by young people in their free time. We know that children tend to spend 40 hours a week using media of some kind; whether it's computers, TV, video games, or music. That's more time than they spend in school. That's more time than they spend with their parents. If we can capture a little of that 40 hour time span to get them thinking and learning about government and civic engagement, I think it's a big step in the right direction. So we're trying to use the media that young people themselves opt to use by putting games on this program. I think it's going to allow the student to do some interesting things. In the games the rule of law, in one of them, is just being developed, so with the outcome of each case, the world around them is going to change in some way, sometimes dramatically. That feature allows the student to see how the law, and their choices of how to use it, can have big impacts on the world around them.

Through games, online discussion, and social networking, the Our Courts website allows students to express themselves about relevant issues and to share ideas about worthwhile civics projects that can make a difference, and to tackle problems from the perspectives of different players in our government. I think this is a good tool to leverage the way things are done. And the new experts, who hold the key to this potential, are our youth, the youth of our nation. With this method the young people learn to be teachers themselves, and their parents – or grandparents in my case – turn out to be the students.

We have a big job to do to ensure that our children and grandchildren have the information and skills they need to use the tools of their generation wisely. We're fortunate in the United States to have a stable and durable democratic government, but it shouldn't be taken for granted. Because it is the citizens of this nation who have to preserve our system of government, and in order to do that they have to understand what it's all about. I hope that each one of you will help make sure that the citizens of Utah have that understanding.

1. www.ourcourts.org

Following Justice O'Connor's remarks, she participated in a question/answer session with Frank Pignanelli. The following is a transcript of their chat.

Frank Pignanelli (FP): Well, Justice, thank you so much for coming. We're honored to have you and you are to be congratulated. For the first time in the 60-odd years that the Utah State Bar has held a convention, this is the first time we've had anyone show up for a Saturday morning.

Justice O'Connor (JO): I was awfully impressed. Don't tell me that.

FP: It won't be like this next year, so thank you. As I expressed to you earlier, we sent out a broad range of questionnaires asking people about what they would like to ask of you. One of the most important, insightful questions, delving into the heart and soul of you and the court was this: Justice, do you Twitter?

JO: The short answer is no. See, I have a lot to learn too.

FP: Do you have an iPod?

JO: No.

FP: That answers that.

JO: Okay.

FP: We had a great deal of questions about what's happening in the United States Senate right now with Judge Sotomayor, about the role of gender in everything and her experience. In your book you went to great lengths, really describing what Justice Thurgood Marshall brought to the court and his experiences about the impact of gender. How did gender impact your deliberations and your decision making process?

JO: I can't even answer that, I don't know. But I think the main thing is that at least half of our citizens have two X chromosomes – they're female. And I think it's great for our citizens to be able to look at the important organizations of our government and see that women, as well as men, are part of it and making it work. We saw, where's Christine Durham? Right over there. She's Utah's Chief Justice and she has done a fabulous job. She has earned a fabulous reputation across this country and I'm sure that her presence on your Supreme Court has been important to all of you. To know that a woman, namely Chief Justice Christine Durham, is on that court. And it matters from the perspective of the citizens.

I don't think she probably decides cases any differently because she's a woman than she would if she weren't. I don't think I did. But it matters to our citizens to see them there.

FP: Well, along that theme, my mother's an Irish Catholic, and being an Irish Catholic, when I told her that I was going to have this big honor she cried. Then she said after 12 hours of labor and decades of disappointment, you've finally done something worthwhile.

JO: I don't believe that statement at all. If I know your mom, she's very proud of you.

FP: She's a wonderful person.

JO: Yeah, okay.

FP: But this typifies a lot of questions and comments. One of the great questions we've had in this was how did you blend being a mother and having a legal profession? Who were your heroes and heroines that you looked up to to guide you?

JO: Well I didn't have a lot when I grew up, I have to tell you. I grew up on a very remote cattle ranch down on the New Mexico/Arizona border, south of the Gila River and my companions as a youngster, until I was 10 years old, were my parents and the cowboys who lived on the ranch. And that was pretty much it. My mother never worked outside the home, and that was fine. There wasn't any way to get any place to go to work. We all worked on the ranch, everybody did. My mother and I did along with everybody else and so I didn't have role models. It was very funny, when it came time for me to finally go to school, my mother taught me to read early because she was a teacher by training. But they decided since I didn't have any young people to play with or to be around that I should go away to school. I had grandparents living in El Paso Texas, so my grandmother said, fine, I'll take care of her. So they packed me off to El Paso. I went to a little school called Miss Radford's School for Girls and it was a funny little school. The headmistress was fearsome. She wore her hair pulled back in a bun. She wore pince-nez glasses, no makeup. She only wore shirtwaist dresses made out of men's shirts-striped material, long sleeves, down to her ankles and she was just the scariest person you ever saw in your life. She had me terrified.

Those were the years when we were in a big recession or depression. Remember the 30's? Pretty bad. And we had a President named Franklin Delano Roosevelt. I don't know about your experiences from those years but my father was not an admirer of Franklin Roosevelt, to put it mildly. And he didn't believe in all of that government help. He thought we should take care of ourselves and the only person that he thought was worse than Franklin Roosevelt was his wife Eleanor. Well, anyway, Dr. Lucinda de Leftwich Templin, my principal at Radford decided to invite Eleanor Roosevelt to come to Radford to speak to us. And Eleanor Roosevelt came. I did not dare tell my parents. Oh my gosh! I didn't know what to expect and I remember all of the little girls – we had one little boy at Radford School for Girls – his name was Sam Donaldson. Do you know Sam Donaldson? His mother sent him to Radford School for Girls.

FP: Explains a lot.

JO: Yeah, doesn't it.

So we were all lined up out by the flagpole when Eleanor Roosevelt arrived. She was driven up in one of those kind of long black cars and she got out of the car and she was homely, I will say that. But, I'd been prepared for the worst. And she had this shirtwaist dress, not unlike those that Dr. Lucinda Templin wore. It came down to her ankles and kind of high top black shoes and she had a slouch hat that covered half the head, you know, came down like that. And around her neck she wore the same thing that my grandmother had. You remember those fox furs where the actual fox bit the tail of the fox and it was around your neck with the feet hanging? Oh! So there she was and she got out of the car and we were all around the flagpole. She walked up and among us and she had charisma. Now how many people can you look back on that you've met that had real charisma. I'll tell you a few that I've met in my life who did. One was Nelson Mandella, and he had charisma. I'll tell you, I've met him a couple of times and it was incredible. He walked among you and you knew there was someone special. Another was the Dalai Lama. He's an amazing person. And Eleanor Roosevelt had charisma, she really did. She walked among us and talked and I was very, very impressed. Now I didn't dare tell my parents. I think it was some years before they knew that Eleanor had visited. But anyway, I didn't have a lot of mentors, but I was impressed with Eleanor Roosevelt, among others.

FP: Thank you, that was great. As I mentioned to you earlier I had the opportunity to take a tour of the Supreme Court years ago and I was impressed by the basketball court which…

JO: The highest court in the land. It's right over the courtroom.

FP: I was walking out and there was a sign that said the court is reserved every morning for Justice O'Connor's aerobic class. Tell us a little bit about that.

JO: Oh well, I am a believer in getting a little exercise. You wouldn't know it today, I'm old and creaky. But I really think that's important to have a little exercise every day and so when I went to Washington

the first thing I did when I got there – that was 1981 – was call the YWCA. I said do you have anybody you could send over to teach an exercise class at the U.S. Supreme Court, early every morning during the week. And they found a young woman who came and – she actually came three days a week not five, but I worked something else out on the other days and she stayed at the court 17 years teaching that class. I invited all the young women, law clerks, and employees at the court who wanted to join to come. I then included some of the women on capitol hill that included wives of a few of the congressmen. Then I thought uh-uh, that won't work. So that class is still going on, believe it or not. Whenever I'm in Washington I'm up in that class. It was a good thing.

FP: I believe you're the last Justice to have served in an elected position in a state legislature. In fact, you are a hero for many legislators and former legislators – there is life and respectability after serving in the state legislature.

JO: That's right. You're an example, aren't you?

FP: Not of respectability, but a former legislator, yes. You may be the last one the way things are going. How did that work?

JO: Now, with our new nominee – it looks like she'll be confirmed – her experience is impressive, both educationally and on the bench. But it means all nine justices will have been pulled off the U.S. Court of Appeals – all nine. When I went on the Court in 1981 Justice Rehnquist had been in my class in law school of all things, and he never served a day as a judge before going on the Supreme Court. But he was a fabulous justice and later chief justice. Lewis Powell from Virginia had never served a day as a judge and he also was just wonderful. And if you go back through history of justices on the court, a majority never were judges first. So I think it's probably good to have a little diversity on the court in terms, not only of gender, but also in terms of background. It was very funny because I think Bill Rehnquist always felt a little bad that he had never had any experience at all sitting on the bench and so he decided, while he was a justice, that he would take a case in a federal district court, a criminal case, and preside over it. And so he went down to Virginia and he sat as the trial judge in a case. And I don't remember what the charge was against the defendant, but the case went to trial and it was resolved and later there was an appeal. Wouldn't you know, he was reversed on appeal and he never asked to go sit as a judge again.

FP: One of your causes has been the state courts and also state's rights. You raise a good question about the impact of 21st century economics and dynamics and this push to nationalize everything and the concerns you have with that.

JO: Well, I do and I continue to have them but I'm not in a position to do anything about it now. But the framers of our national constitution, they thought what they had created was a national, a federal government of limited powers. That was the idea, right? And it took a long time for cases to come through the Supreme Court and it took a few wars and Congress started enacting legislation, not unlike legislation you'd expect from a state legislature. And as these issues came to the courts, the courts sustained, as within the powers of Congress, just about anything they wanted to enact under a liberal interpretation of the Commerce Clause powers. I certainly think the original notion of a federal government of limited powers has been severely challenged through the years and perhaps it's a dead issue but we had a few cases while I was still on the court where we debated some of these issues and made a tiny bit of headway, but that may not be long lasting.

FP: This is our attempt maybe to hit the home run – any insights, anything you can tell us about *Gore v. Bush*?

JO: Oh dear! Don't make that the last question, I don't want to end on a sour note.

FP: We've got a bunch of those.

JO: That was a difficult time for the Supreme Court. The election, the national election for President, had been very close. What many of our citizens fail to remember when we have a presidential election, is that we're not having a direct election of the voters – we're not. When the constitution was written we had a nation that was comprised of 13 colonies and they were kind of spread out. We didn't have any telephones, telegraph, computers. We didn't have any means of instant communication at all. And the framers realized that in holding an election for President and Vice President, that it was going to be hard to get the information from one state to the others so that we'd know how each state voted. They decided it would be better to put up a system of each state electing electors and the electors could then assemble in one central place and the electors would be instructed by their states how to vote in the presidential election and would cast their votes. The states can say it's an all-or-nothing deal – we have 13 electors and all 13 are going to have to vote the same way – I mean whoever carries the majority gets all 13. Or the states can say no, we'll divide it just as they are, in fact, divided. Well, that is still our system today and people forget that. And we came down to the election in the Bush/Gore election and in the state of Florida, we know that the popular vote was really, really close. Ultimately that translated itself into how the electoral college votes would come out for Florida and there

were claims by some that Florida had violated federal law in how they were handling the counting of ballots in Florida. Florida, in some of the counties, had put in some kind of voting machines where you punch and it, if you vote properly, it punches a hole in the ballot, through the ballot, to cast your vote. And if you don't punch it as you should, then it results in a hanging chad. Remember that? Well anyway, they didn't have uniform rules in Florida about how to count these and to tell the volunteers who were working at the polls how they should operate so they could apply similar standards in all the polling places. So the Supreme Court took one of the cases, the petitions, from Florida and the whole court was unanimous in saying no, Florida hadn't been following the rules and they sent it back to the Supreme Court of the state and we didn't hear anything further from Florida. But things continued and there continued to be disputes and a second petition was filed, which the court accepted by a divided vote this time, then decided it and the result was divided. But again, it concluded at the end of the day that Florida hadn't been following the federal rules. The point of argument there was that it was then very close to the date when the new president was supposed to be sworn in and we still didn't know. And so the Supreme Court said no, we don't think they've been doing it right and we're not sending it back to Florida. This is the deal – as far as we can see, this was the result and that's the end of the line. Well, that produced a great furor as you might imagine, and we're still hearing it. You probably are here too. I mean it goes on and on. People thought that the Supreme Court chose the President. That's what I hear when I go around. And I just don't think that's right. The Supreme Court decided Florida wasn't following the federal law in the presidential election and the result was that President Bush was declared elected President.

Now there were three separate recounts of the four critical counties in Florida, the votes, after that – three – conducted by different groups of the press, because the ballots were all saved, so they could go through and count them. And in none of the recounts would the result have changed, so you know, I don't worry about it anymore. I think, okay, if there were something wrong we would have heard about it. The press would have told us, right? So I'm going to let sleeping dogs lie.

FP: That's good advice.

The questions that we've received the most, more than anything else, are about the children's books.

JO: Oh, okay.

FP: Could you talk about the children's books that you've written and you're writing?

JO: Well, I have two children's books that I've written. One is about my favorite little horse, we named him Chico. He was found in a wild horse herd and he was trained for riding and he was small, so we used the word Chico, which is small in Spanish. And he was a great little horse. He had what we call cow sense. He knew what to do. If you were on Chico in a roundup and you were trying to head some calf or cow off, that horse knew and he'd help you do it. I mean, you'd be trying to guide, but he knew already what he was supposed to do and he would do it. He was a great little horse and the best thing about him was that if I ever fell off he'd stop and wait for me to get back on. Now none of the other horses would do that so he was a real winner in my book and I wrote a little book about Chico.

Recently I have a second children's book out about the wild animal pets that I had at the Lazy B. When my mother married my father and moved out to the Lazy B ranch we had no indoor plumbing, no running water, no electricity, no nothing. The cowboys slept on the spring porch around the four room adobe house and that was it. And how she managed to handle diapers and all that stuff when I arrived, I can't imagine. Boy, I would have hated that. But they got along somehow.

She didn't want any animals in the house. She thought she had enough problems as it was and she didn't need any pets in the house. So I wanted… horses are great but they're not cuddly and so I thought, you know, it would be nice to have a cuddly little pet. We had to try various little things that I caught. We had a lot of wild animals around and I caught a little cottontail rabbit and they are so cute. You've seen those. The jackrabbits are ugly but the cottontails are adorable. And I tried making a pet out of the cottontail but he wasn't interested. I mean he would eat the lettuce and the carrots, but it didn't have much interest in paying attention to a caregiver. So I eventually put him back where I found him.

I found a desert tortoise. They are incredible animals. They live to be over 100 years old. If you touch them they pull their legs and head in so you just have a big, hard shell. So that's not too cuddly either. We had a walled in front yard that actually had some green grass in it and the tortoise liked that. We put the tortoise out in the yard and when my mother wasn't paying any attention I'd bring it in the house. It was smart, it learned where the icebox was. We didn't have a refrigerator because we didn't have electricity, but you'd buy a big chunk of ice to put in the icebox and keep things cold until you went back to town. So he learned where the icebox was and he'd clatter over and wait there for you to get something out for him to eat. This was a

very smart animal. Unfortunately, they hibernate for a couple of months in the winter. Did you know that? They go underground and we were getting close to winter and so I decided we'd better put the tortoise back. So that was the end of tortoise.

Then there was a little, young coyote that was caught in a trap. We didn't know who set the trap, but we released it and I took that thing home and we tried to treat its leg and make a pet out of the coyote. The cowboys said uh-uh, you can't do that. Bad idea, you can't. That's what my parents said too. But you know, well we're going to try, so we tried. You can't make a pet out of a coyote.

Then my father found on the roundup a little baby bobcat and he couldn't see any evidence of a parent and the cat was crying and looked like it needed help. He put the thing in his jacket pocket and brought it home and that night, pulled it out and we fed it milk with an eyedropper and it got to be huge. That was a pretty good pet, it was all right. It was a lot like a big cat.

FP: You raised a bobcat?

JO: Yeah! It was a pretty good pet. So that's part of the story but then after three or four years the bobcat disappeared and my father said, well he's found another bobcat. We called him Bob, it was very imaginative. So Bob disappeared and we had to go to town one day. We went once a week for groceries. The grocer said, Sandra come out back, I want to show you something. He took me out back and showed me this little white mutt dog with a long curly tail and it smiled. How many of you have seen dogs that smile? Some of them do, honestly! Some do. And they know when it's appropriate to smile and they show their teeth, you know, the real thing. And this was a cute little dog and he said if your parents will agree you can take the dog. So I had to persuade my mother, who didn't want pets in the house, and she said, well, if it doesn't come in the house, I guess you can. So we took the dog home and her name was Susie. So the little book is called *Finding Susie,* and Susie turned out to be the perfect pet at the end of the day. So that's the book. Now I'm not doing any more children's books. I am working on one though for adults, young in spirit people. We're working on that and that's kind of the end.

FP: Well, we look forward to that. Justice O'Connor, on behalf of the Utah State Bar and millions of Americans, thank you so much for your service and for coming today.

Summary of Significant Utah Supreme Court Cases 2008-2009

by Justice Ronald E. Nehring

Editor's Note: *Supreme Court Justice Ronald E. Nehring and Court of Appeals Judge Carolyn B. McHugh addressed some of the 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, Justice Nehring's handout is reprinted here. (Judge McHugh's handout was reprinted in the July/August 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.*

State v. Moreno, 2009 UT 15, 203 P.3d 1000

Area of law: Juvenile, Fourth Amendment

Mr. Moreno's minor daughter was adjudicated delinquent for drug-related offenses. As part of her adjudication, the juvenile court ordered Mr. Moreno to submit to drug testing based on various findings and an allegation that Mr. Moreno and his girlfriend were "cooking meth in the hills." Mr. Moreno appealed the juvenile court's contempt charge against him for failure to submit to the court-ordered drug testing.

The court held that although juvenile courts are granted broad authority to impose orders on parents and hold them in contempt for failure to comply, this broad authority is limited to mandates that are reasonable. The court held that a reasonable condition must further the goals of the Act in that the sole motivation must be reforming the minor's behavior and there must be a logical connection between the alleged actions of the parent, the delinquent behavior of the minor, and the court-ordered condition. In addition, a condition cannot be reasonable if it violates constitutional rights. The court held that the standard for determining whether an administrative search is reasonable requires a balancing of the government's interest in operating its institutions and the individual's privacy interest. Key to this inquiry is an examination of whether the parent has a reduced expectation of privacy when their child is adjudicated delinquent. The court held that because a parent of a delinquent child did not have a reduced expectation of privacy, the government interest did not outweigh the privacy interest and probable cause was required for the search of Mr. Moreno. Because there was no probable cause for the search, the juvenile court's decision was reversed. Justices Durrant and Wilkins dissented. They would have held that whether Mr. Moreno's expectation of privacy was reduced was irrelevant to the assessment of reasonableness.

Helf v. Chevron, 2009 UT 11, 203 P.3d 962

Area of law: Personal Injury, Workers' Compensation

Jenna Helf sued Chevron U.S.A., Inc., for injuries she sustained while working at the Salt Lake City Refinery. On the day Ms. Helf was injured, Chevron initiated a chemical reaction in an open-air pit that created a toxic cloud and set off chemical alarms at the Refinery. Several workers were sent home due to illness. When Ms. Helf arrived for her shift, her supervisor had her initiate the same reaction without informing her of the earlier result and without informing her that she needed special respiratory equipment. When Ms. Helf initiated the reaction, toxic gasses were again released, which caused Ms. Helf to vomit and lose consciousness. As a result of her exposure to the toxic gases, Ms. Helf now suffers from a permanent seizure disorder. Ms. Helf was awarded compensation under the Workers' Compensation Act. She also brought suit against Chevron, alleging willful misconduct, intentional nonfeasance, negligent infliction of

JUSTICE RONALD E. NEHRING was appointed to the Utah Supreme Court by Gov. Michael O. Leavitt in May 2003 after eight years of service on the Third District Court bench.

emotional distress, and intentional infliction of emotional distress. Chevron filed a 12(b)(6) motion, arguing that the exclusive remedy provision of the Workers' Compensation Act barred Ms. Helf's claim. The district court granted Chevron's motion and Ms. Helf appealed.

Although compensation under the Workers' Compensation Act is normally the exclusive remedy for a worker injured on the job, if the injury is intentional, the worker may bring a tort action against the employer. The level of intent necessary to trigger the intentional injury exception was the focus of this case. The court affirmed the intent to injure standard articulated in *Lantz v. National Semiconductor Corp.,* 775 P.2d 937 (Utah Ct. App. 1989), but clarified how it is to be used to distinguish between intentional and accidental injuries. The court held that the purpose of the "intent to injure" standard was to distinguish between intentional and accidental or unexpected injures. Ultimately, intent to injure

> requires a specific mental state in which the actor knew or expected that injury would be the consequence of his action. To demonstrate intent, a plaintiff may show that the actor desired the consequences of his action, or that the actor believed the consequences were virtually certain to result. But a plaintiff may not demonstrate intent by showing merely that some injury was substantially certain to occur at some time. For a workplace injury to qualify as an intentional injury under the Act, the employer or supervisor must know or expect that the assigned task will injure the particular employee that undertakes it.

Applying this test to the facts of the case, the court held that there were facts to support an allegation that Chevron intentionally injured Ms. Helf when it sent her to initiate the chemical reaction. Justice Wilkins dissented in part. He reasoned that Ms. Helf had elected her sole remedy when she sought workers' compensation and was foreclosed from seeking civil damages.

Smith v. Mosier, 2009 UT 3, 201 P.3d 1001

Area of law: Bankruptcy

Ms. Smith filed for Chapter 7 Bankruptcy in December 2006. After Ms. Smith filed her taxes for 2006, she discovered that she had overpaid and was entitled to a refund. She then filed an Amended Schedule B in her bankruptcy, claiming that the refund was exempt since all of her taxable income came from social security and retirement payments, which are exempt. The bankruptcy court disallowed her claim, and Ms. Smith appealed. The United States Bankruptcy Appellate Panel of the Tenth Circuit certified the case to the supreme court for a determination of whether, under Utah law, an overpayment of taxes is exempt when the monies with which the tax deposit was made were exempt.

Because Utah Code section 78B-5-507 recognizes that exempt property may remain exempt if the debtor utilizes reasonable methods of tracing, the court held that monies refunded to a taxpayer as an overpayment of taxes are exempt if the monies were withheld from exempt income and there is a reasonable method of tracing. Therefore, in Ms. Smith's case, the court held that the recordation of taxes and refunds is a reasonable method of tracing.

Southern Utah Wilderness Alliance v. Automated Geographic Reference Center, 2008 UT 88, 200 P.3d 643

Area of law: Government Records Access and Management Act

The Automated Geographic Reference Center is statutorily obligated to provide geographic information services to state agencies, the federal government, and private persons. The main service provided by the Reference Center is the maintenance of the State Geographic Database. Included in this database are records of R.S. 2477 rights-of-way, which the Reference Center is statutorily required to compile. *See* Utah Code section 72-5-304(3)(a).

Currently, the state of Utah and Garfield County are litigating the existence of numerous R.S. 2477 rights-of-way. SUWA submitted a GRAMA request to the governor's and attorney general's offices seeking all records relating to routes the state and county were claiming as R.S. 2477 rights-of-way. The attorney general released some files but otherwise denied the request, asserting that GRAMA did not require the documents to be disclosed. SUWA then sent a more specific GRAMA request to the Automated Geographic Reference Center, largely seeking geographic information service data, which would include photographs. The Reference Center denied the request claiming that the records were not public, but even if they were, they were protected under GRAMA's exceptions for work-product, attorney-client privilege, and draft documents. The Reference Center also claimed that SUWA's request to the Reference Center was duplicative of its request to the governor's and attorney general's offices. On appeal from administrative proceedings, the district court determined that the requested information was protected as attorney-client and work-product documentation. We reversed.

First, addressing the Reference Center's argument that the records were not public, the court reemphasized that documents are presumptively public, and a statute must explicitly define records as nonpublic or create a conflict with GRAMA in order for records to be nonpublic. Reviewing the statutory origins for the R.S. 2477 documents, the court held that the statute did not

explicitly deem the R.S. 2477 records private, nor did it create a conflict with GRAMA; therefore, the documents were public. Second, addressing the GRAMA exceptions, the court held that the documents were not work product because they were not prepared in anticipation of litigation nor did they contain legal theories; instead they were prepared by the Reference Center under a statutory mandate and in the ordinary course of business. The court also held that R.S. 2477 records were not attorney-client communications because the Reference Center had no attorney-client relationship with the municipal bodies that supplied the records, and the various entities supplying the records did not do so in an effort to seek legal advice. Again we noted that the records were created and incorporated into the state database as required by statute. Next, the court held that the R.S. 2477 records were not drafts because the database and its contents were created for various public entities and not just the originator of each record. Finally, the court held that SUWA's records request to the Reference Center was not duplicative of its request to the governor's and attorney general's offices. We explained that to be duplicative, a request must be made to the same entity, and because the Reference Center and governor's office and attorney general's office are all different agencies, they are different entities; therefore, the court held that SUWA's requests were not duplicative.

During the 2009 general legislative session, the Utah Legislature amended GRAMA with House Bill 122, which expanded protection to documents prepared in *anticipation* of litigation under the work-product and attorney-client communication exceptions.

Fox v. Park City, 2008 UT 85, 200 P.3d 182

Area of law: Property, Local Land Use Authority

Eight months after the city issued a building permit, Mr. and Ms. Fox noticed that the building being constructed seemed to exceed Park City's height restriction. The Planning Commission rejected the Foxes appeal of the building permit on the grounds that the appeal was filed after the 10-day limitation set by the Land Management Code. The Planning Commission designated the issuance of the building permit as the triggering event for the running of the appeal period. The district court upheld the Planning Commission's determination, and the Foxes appealed.

The court first found that the 10-day appeal period of Utah Code section 10-9a-704 rather than the 10-day appeal period in the Land Management Code was the appropriate statute of limitations. Next, the court held that the appeal period under section 10-9a-704 begins to run when the affected party has actual or constructive notice of the issuance of a permit. The mere issuance of a building permit is not constructive notice because Utah law does not require that notice of a building permit be given to neighboring landowners. The commencement of construction, however, is constructive notice that a building permit has been issued. In this case, the district court's dismissal was upheld, even though the court found that the district court's test was in error, because the Foxes did not appeal until they noticed the possible violation, several months after construction had commenced.

Sevier Power v. Hansen, 2008 UT 72, 196 P.3d 583

Areas of law: Constitutional, Power of Initiative

The Board of County Commissioners approved an initiative to be placed on the general election ballot that would require coal-fired power generating facilities to get voter permission before building. Sevier Power sued the Board to remove the initiative, relying on Utah Code section 20A-7-401, which forbade initiative and referenda on land use matters.

The court found that the Utah Constitution vests legislative power in the people as well as the legislature. The court recognized that the legislature had power to establish procedures and conditions for initiatives and that administrative actions were not subject to initiative. However, the court found that this initiative was legislative in nature because it changed the overall framework of issuing conditional use permits. As such, the legislature could not limit its scope and Utah Code section 20A-7-401 was an unconstitutional infringement on the people's right to initiative.

Downing v. Hyland Pharmacy, 2008 UT 65, 194 P.3d 944

Area of Law: Torts, Negligence

From 1996 to 2000, Hyland Pharmacy filled Mr. Downing's prescription of fen-phen. Mr. Downing sued the pharmacy for negligence, alleging that it had continued to fill his prescription of fen-phen after the FDA and the manufacturer had withdrawn it from the market. The district court granted summary judgment for the defendant, holding that under no circumstances could a pharmacy be liable for filling a prescription issued by a physician under *Schaerrer v. Stewart's Plaza Pharmacy, Inc.,* 2003 UT 43, 79 P.3d 922.

The court reversed summary judgment and distinguished *Schaerrer* on the grounds that in that case, the court refused to find the pharmacist had a duty to warn of a medication's general side effects when the pharmacist filled a physician-ordered prescription that had been approved by the FDA. The court held that the facts alleged by Mr. Downing state a cause of action for negligence as a matter of law because a pharmacist has a duty of reasonable care when issuing prescriptions not approved by the FDA. The court remanded the case to the district court to determine the appropriate standard of care.

State v. Rosa-Re, 2008 UT 53, 190 P.3d 1259

Area of Law: Criminal, Jury Selection

Mr. Rosa-Re was tried and convicted of forcible sexual abuse. Just prior to the names of the jury being announced, defense counsel requested a sidebar conference and said, "I think given the seriousness of the charges we're probably going to need the record to make a *Batson* challenge. Just wanted to make everybody aware because of the sixteen perspective jurors that we had left after the for-causes, four were men, three were stricken by the state." Defense counsel did not mention the *Batson* challenge again until after the jury found Rosa-Re guilty. Mr. Rosa-Re appealed and the court of appeals held that his *Batson* challenge was untimely. The supreme court granted certiorari on the issue of whether Mr. Rosa-Re's *Batson* challenge was timely.

The court held that the objection, raised prior to the jury being sworn in and venire being dismissed, raised *Batson* in context of jury selection and noted that the state had stricken three men. The court held that the objection was timely, but it noted that counsel in the future would be wise to clearly state that they are making a *Batson* challenge and state the basis for the objection.

Conatser v. Johnson, 2008 UT 48, 194 P.3d 897

Areas of law: Property, Public Easement

In June 2000, the Conatsers floated in their raft down the Weber River. While doing so, they crossed land belonging to the Johnsons and touched the river bed in four ways: the boat occasionally scraped against the bottom, the oars occasionally touched the bottom, the fishing tackle touched the bottom, and Mr. Conatser walked along the river bottom to fish and move fencing. The Conatsers were cited with criminal trespass.

The court found that the public's easement in state waters includes the right to engage in all recreational activities that utilize the water and does not limit the public to activities performed upon the waters. The public has the right to touch privately owned beds of state waters in ways incidental to all recreational rights because this right is reasonably necessary and convenient for the effective enjoyment of the easement. In so holding, the court stated that this public right was not an additional burden on landowners but merely an existing burden arising from the public easement.

Bybee v. Abdulla, 2008 UT 35, 189 P.3d 40

Areas of law: Wrongful Death, Arbitration Agreements

Mrs. Bybee's husband committed suicide. Mrs. Bybee brought a wrongful death action against Dr. Abdulla, who had been treating Mr. Bybee for allergies and who had given him a prescription for anti-depressants and subsequently increased the dosage. Dr. Abdulla moved to stay the district court action and compel arbitration pursuant to an agreement that Mr. Bybee had signed. Dr. Abdulla appealed.

The court held that the arbitration agreement was unenforceable against Mr. Bybee's heirs. It rejected Dr. Abdulla's assertion that Mr. Bybee was the "master of his claim" and thus could bind his heirs to arbitration for two reasons: (1) the phrase "master of his claim" used in *Jenson* only stood for the proposition that a wrongful death action cannot be brought if the decedent settled, won, or lost prior to his death; and (2) the Utah Constitution affords special protection to wrongful death actions. In Utah, a wrongful death cause of action, while derivative of the underlying personal injury claim, is a separate claim that comes into existence at the death of the injured person, and this independent nature means that heirs are not subject to the decedent's agreement to arbitrate. The court then found that nothing in the Arbitration Act can be understood to bind strangers to the agreement in future controversies. The 2004 amendment to the Act, stating that non-signatories are bound by arbitration agreements if their claim stems solely from the injury of a signatory, does not encompass a wrongful death claim. A wrongful death claim has an independent basis from injury to the signatory of the arbitration agreement. The court also found that Mrs. Bybee was not bound to arbitrate as an intended beneficiary to the agreement.

Should We Put the Death Penalty on the Chopping Block?

by Ralph Dellapiana

Deaths due to violence are always tragic. Most especially affected are the victims' families. And, in a broader sense, all of us are diminished.

Some homicides have aggravating factors that allow them to be charged under Utah's aggravated murder statute. *See* Utah Code Ann. § 76-5-202 (2009). Inherent in every aggravated murder case is the critical moral question of whether or not to seek the death penalty. New Jersey repealed its death penalty in 2007 and replaced it with a maximum sentence of life in prison without possibility of parole, as did New Mexico in 2009. Bills to abolish the death penalty are also pending in a few other states.

Is it time for Utah to reconsider its death penalty? This article does not purport to be an exhaustive scholarly analysis, but is meant to provoke discussion. The article discusses seven questions that we in Utah's bar, state policy makers, and citizens should consider in addressing the issue of the death penalty, including: (1) Is the high cost of seeking the death penalty justified given its infrequent use?; (2) What are the moral implications of intentional killing by the state?; (3) How does religious doctrine affect the decision to kill?; (4) Is there a danger of executing innocent defendants?; (5) Is the death penalty imposed in an arbitrary or discriminatory manner?; (6) How are victims' rights impacted by the lengthy death penalty process?; and (7) Is life without parole a viable alternative to the death penalty?

Question No. 1: Is the high cost of seeking the death penalty justified given its infrequent use?

The current economic crisis has resulted in massive governmental budget shortfalls. Governor Jon Huntsman's recommendations for the 2010 budget constitute a 36.9% reduction from the Authorized Fiscal Year 2009 budget, a reduction of almost $467 million. *See* Office of the Governor, State of Utah, Budget Recommendations, Fiscal Year 2010, at 162 (Dec. 4, 2008), *available at* http://governor.utah.gov/budget (follow "2010 Budget Recommendation Book" hyperlink) (last visited June 1, 2009).

The costs of successfully executing a criminal defendant are staggering. Data compiled for more than 25 years in virtually all of the states studied consistently show that the death penalty costs millions more than keeping someone in prison for life. *See* Jonathan E. Gradess, Andrew L. B. Davies, *The Cost of the Death Penalty in America: Directions for Future Research,* The Future Of America's Death Penalty: An Agenda For The Next Generation Of Capital Punishment Research 411 (Carolina Academic Press, Eds. Charles S. Lanier, William J. Bowers, James R. Acker, 2009) (hereinafter "America's Death Penalty"). For example, a 2005 study by New Jersey concluded that the death penalty had additional costs amounting to $4.2 million per death sentence, or $28 million per death sentence after reversals. *See id.* at 404. Kansas found that the additional costs to seeking a death penalty were over $4.26 million per execution. *See id.* In Maryland, the Urban Institute reported that a case resulting in a death sentence cost $3 million, almost $2 million more per case than when the death penalty was not sought, and $37.2 million for each execution. *See* Death Penalty Information Center, http://www.deathpenaltyinfo.org/costs-death-penalty (last visited June 1, 2009). Why is the death penalty so much more expensive than life in prison? Death penalty prosecutions cost more because the consequences of error and procedural unfairness are magnified when life is in the balance; thus, courts have imposed stringent due process protections. *See Woodson v. N. Carolina,* 428 U.S. 280, 305 (1976). The American Bar Association has promulgated the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Revised Edition (February 2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf (last visited June 1, 2009) (hereinafter "ABA Guidelines"). And appellate courts often reverse convictions or remand cases for re-sentencing where the guidelines are not followed. *See e.g., Rompilla v. Beard,* 545 U.S. 374, 387 (2005).

The trials and appeals required in capital cases can take over a decade. The costs of each of these proceedings are broken

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down in more detail below.

Trial Level Costs

Death penalty cases typically involve additional investigative costs, more numerous pretrial motions, and a far lengthier jury selection process and trial than non-death penalty cases. Recent studies indicate that several thousand hours are typically required to provide appropriate representation in death penalty cases. *See* ABA Guidelines, at 40.

Moreover, death penalty cases require a mitigation investigation, including the collection of all medical, educational, and employment records of the defendant. Records relating to members of the defendant's extended family may also be important. Multiple interviews of the defendant's family, friends, employers, school teachers, and others are standard, and require travel to wherever they live. The chairman of the Utah Association of Criminal Defense Lawyers' Capital Case Committee estimated that an adequate mitigation investigation requires 800-1000 hours.

Appellate Costs

The appeal process for capital cases is far more extensive and costly than for a non-death penalty case. In the vast majority of non-capital cases, this direct appeal is the end of the appellate process. However, in capital cases, there are post-conviction or habeas appeals. Studies cited in the ABA Guidelines indicated that such appeals can take up to 3300 lawyer hours. *See id.* at 41.

In addition to two lawyers, the habeas appellate team should also have a qualified mitigation specialist, investigators and experts. Consistent with ABA Guidelines, both trial and mitigation phase investigations must be redone from the beginning. The mitigation specialist must reinvestigate and assemble "a more-thorough biography of the client than was known at the time of trial…to discover mitigation that was not presented previously." *Id.* at 128.

Once the post-conviction investigation is complete, a petition is filed in the state trial court. If relief is denied, an appeal is taken to the Utah Supreme Court, and then to the United States Supreme Court. If relief is denied in state court, a similar series of appeals may be brought in federal court.

Corrections Costs

It is more expensive to house inmates on death row because of enhanced security measures. Expensive appeals by death row inmates continue, in some cases, for two decades. According to a report obtained from the Department of Corrections and cited in a recent *Deseret News* article, "it is common knowledge that to try, house and execute an offender costs as much as three times what it costs to house an offender for an average life term." Jacob Hancock, *Utah bucking U.S. death penalty trend,* Deseret News, May 3, 2009, at A1.

Cost-Benefit Analysis and Opportunity Costs

Attempting to kill people is a bad investment. Despite the tremendous additional resources spent prosecuting and defending capital cases, Utah rarely executes anyone. Only six, including five volunteers, have been executed since the death penalty was reinstated in 1976.

If the death penalty is repealed, the savings could be used for more beneficial and cost effective programs such as increased

law enforcement, resulting in reduced crime rates.

For example, a state official in New Jersey said that the $11 million spent on the death penalty in 2005, with no executions, could have paid for 160 new police officers to be deployed. *See* America's Death Penalty at 412. Such an investment would surely help reduce crime across the board. Additionally, victim advocates supported legislation in Colorado proposing that money used in capital cases would be better spent investigating 1400 cold case murders. *See* Erica Grossman, *Crime and Punishment: Can killing Colorado's death penalty help the state catch murderers?*, Boulder Weekly, March 19-25, 2009, at 10, *also available at* http://www.boulderweekly.com/20090319/coverstory.html (last visited June 1, 2009).

In sum, given the expensiveness and ineffectiveness of the death penalty system, is it worth the cost?

Question No. 2: What are the moral implications of intentional killing by the State?

Presently, Utah is aligned politically on the death penalty issue with such "axis of evil" countries as Iran, Iraq, and North Korea. The top five countries in executions in 2008 were China, Iran, Saudi Arabia, Pakistan, and the United States. On the other hand, 135 civilized countries in the world have abolished the death penalty. *See* Death Penalty Information Center, http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries (last visited June 1, 2009).

In the United States, 15 states do not have the death penalty. New Mexico's repeal of its death penalty statute has helped to partially restore our nation's standing in the world as a human rights leader. On April 15, 2009, Pope Benedict XVII honored Governor Bill Richardson in an audience in Rome. The Roman Coliseum, once the arena for gladiator combat and executions, was specially illuminated to celebrate the repeal. Governor Richardson said, "I didn't want America to continue being isolated with this position, because the world was moving in another direction. It's about time that America starts following along with the rest of the world in abolishing the death penalty." The Associated Press, *New Mexico's Gov to Be Honored at Colosseum,* April 15, 2009, *available at* http://abcnews.go.com/International/wireStory?id=7342094 (last visited June 1, 2009).

This year, Maryland's governor Martin O'Malley promoted a bill to repeal his state's death penalty, saying, "The death penalty is fundamentally and irredeemably incompatible with the most important foundational truths of our republic [and] the fundamental civil and human rights bestowed on humankind by God." Governor Martin O'Malley, *On the Repeal of Capital Punishment in Maryland,* Testimony Before the Senate Judicial Proceedings Committee (Feb. 18, 2009), *available at* http://www.governor.maryland.gov/speeches/090218c.asp (last visited June 1, 2009).

Most people probably agree that killing people is wrong. But what about the "worst of the worst," shouldn't we kill them? After all, what they did was abhorrent. In fact, most of them *intentionally* killed other people.

Here's the crux of this moral issue: *It's not about them, it's about us!* That is, should *we* do that which we abhor? Should *we* intentionally kill?

In sum, should we be killing people who kill people to show that killing people is wrong? It's cruel and barbaric, not worthy of us. The vast majority of civilized countries in the world have abolished the death penalty. As a state that asserts a duty to demonstrate moral leadership in the world, perhaps we should too.

Question No. 3: How does religious doctrine affect the decision to kill?

Doesn't "Thou Shalt Not Kill" say it all? After all, whom would Jesus kill? In Utah, the vast majority of those who ascribe to a religion are Christian. Almost all major Christian religions in the United States that have taken a position are opposed to the death penalty.

Some people believe that the largest church in Utah, The Church of Jesus Christ of Latter-day Saints, supports the death penalty. It does not. The Church regards the question of whether, and in what circumstances, the state should impose capital punishment, "as a matter to be decided solely by the prescribed processes of civil law." The Church of Jesus Christ of Latter-day Saints, http://www.newsroom.lds.org/ldsnewsroom/eng/public-issues/capital-punishment (last visited June 1, 2009). So, the LDS among us can decide for themselves what is morally right.

What does the Bible teach about capital punishment? Death penalty supporters cite such Old Testament language as in *Exodus* 21:12: "He that smiteth a man, so that he die, shall surely be put to death."

In Old Testament times, retribution was the rule. But Dale Recinella analyzed the Bible and Talmudic commentary to identify substantive and procedural laws concerning how and when the death penalty was applied in the Old Testament. *See* Dale Recinella, The Biblical Truth About America's Death Penalty 329 (Northeastern University Press 2004). Then he compared and contrasted those findings with how and when the death penalty is applied in American today. After an exhaustive analysis, Recinella stated: "Our conclusions are not ambiguous. The American death penalty fails miserably under the revelations of biblical truth. It cannot be conducted under biblical authority." *Id.*

Moreover, whatever one's feelings about the modern day applicability of Old Testament teachings, for Christians, Jesus completes the perfection of God's revelation of his will. Jesus said, "Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth. But I say unto you, That ye resist not evil: but whosever shall smite thee on thy right cheek, turn to him the other also." *Matthew* 5:38-39. And,

> Ye have heard that it hath been said, Thou shalt love thy neighbour, and hate thine enemy. But I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you; That ye may be the children of your Father which is in Heaven; for he maketh his sun to rise on the evil and on the good, and sendeth rain on the just and on the unjust.

Id. at 5:43-35.

In the New Testament, love and mercy replace retribution. As the Apostle Paul taught, "Recompense to no man evil for evil." *Romans* 12:17. Similarly, "Dearly beloved, avenge not yourselves, but *rather* give place unto wrath; for it is written, Vengeance is mine; I will repay, saith the Lord." *Id.* at 12:19. So God has said he will handle the vengeance. "Thou shalt not kill" appears to remain his will for us.

Question No. 4: Is there a danger of executing innocent defendants?

There is indisputable evidence that despite the extra procedural safeguards provided in death-eligible cases, the death penalty process is fraught with error. Innocent people have been convicted and sentenced to death. Since 1973, a total of 135 people in 26 states have been released from death row with evidence of their innocence. *See* Death Penalty Information Center, http://www.deathpenaltyinfo.org/innocence-and-death-penalty (last visited June 1, 2009).

New Mexico Governor Bill Richardson cited death row exonerees in support of his decision to sign the bill repealing New Mexico's death penalty this year. He said,

> In a society which values individual life and liberty above all else, where justice and not vengeance is the singular guiding principle of our system of criminal law, the potential for wrongful convictions and, God forbid, execution of an innocent person stands as anathema to our very sensibilities as human beings.

Editorial, *Governor Bill Richardson Signs House Bill 285: New Mexico Death Penalty Repealed,* SantaFe.com, March 19, 2009, *available at* http://santafe.com/articles/governor-bill-richardson-signs-house-bill-285 (last visited June 1, 2009).

Evidence of wrongful death sentences was also the reason given by Illinois Governor George Ryan in 2003 when he commuted the death sentences of 167 Illinois death row inmates. *See* Canadian Coalition Against the Death Penalty, News – Illinois Governor Ryan Commutes ALL Death Sentences (2003), http://www.ccadp.org/news-ryan2003.htm (last visited June 1, 2009).

Just this year, Maryland addressed the wrongful-conviction problem by significantly limiting the types of cases that will be death-eligible. The death penalty can only be imposed if there is either DNA or other biological evidence connecting the defendant to the crime, a videotape of the crime, or a video-recorded confession by the accused. *See* Julie Bykowicz, *Md. House OKs death penalty reform,* The Baltimore Sun, March 27, 2009, at A3, *also available at* http://www.baltimoresun.com/news/local/politics/bal-md.penalty27mar27,0,1903193.story (last visited June 1, 2009).

Should we consider putting such limitations on death penalty prosecutions in Utah? We in the criminal bar like to the think we are infallible, but why take the chance on the unforgivable?

Question No. 5: Is the death penalty imposed in an arbitrary or discriminatory manner?

In *Furman v. Georgia,* 408 U.S. 238 (1972), the United States Supreme Court declared the death penalty unconstitutional as being cruel and unusual under the Eighth Amendment based on its arbitrary and discriminatory application. Justice Potter Stewart, in a concurring opinion, observed, "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed," and concluded that the Eighth and Fourteenth Amendments cannot tolerate sentencing procedures that allow the penalty to be "so wantonly and so freakishly" inflicted. *Id.* at 309-10.

New capital punishment laws, presumably designed to limit the application of the death penalty to only the worst cases and to provide for its consistent application, were upheld in *Gregg v. Georgia,* 428 U.S. 153 (1976). Nevertheless, there is evidence that the death penalty is still far from being consistently applied.

Many factors other than the gravity of the crime or the culpability of the offender appear to affect death sentences, including and especially geography, and race.

In 2008, 95% of all executions occurred in the South, with 62% in Texas alone. *See* Death Penalty Information Center, http://www.deathpenaltyinfo.org/arbitrariness (last visited June 1, 2009). Is there any more arbitrary death selection process than mere geography?

Racial discrimination has been found in 96% of the states where there have been reviews of race and the death penalty. There was a pattern of either race-of-victim or race-of-defendant discrimination, or both. *See* David C. Baldu et al., *In the Post-Furman Era: An Empirical and Legal Overview, With Recent Findings from Philadelphia,* 83 Cornell L. Rev. 1638 (1998). Similarly, an analysis of twenty-eight studies by the U.S. General Accounting Office found a "remarkably consistent" pattern of racial disparities in capital sentencing throughout the county. *See* Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty,* 35 Santa Clara L. Rev. 433, 434 (1995). In Utah, for example, Mark Hoffman, a white male Mormon, committed two murders via premeditated bombings, and was offered a lesser plea, whereas William Andrews, a black man, who did not kill anyone, was executed.

But, can't all these problems be remedied? In *Callins v. Collins,* 510 U.S. 1141 (1994) (denying a death row inmate's petition for certiorari), a dissenting Justice Blackmun wrote:

> For more than 20 years I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor.... I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.... [N]o combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question – does the system accurately and consistently determine which defendants *deserve* to die? – cannot be answered in the affirmative....The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.

Id. at 1145 (J. Blackmun, dissenting).

Given the apparently intractable problems in attempting to achieve any significant consistency and fairness in the application of the death penalty, should we consider limiting the maximum punishment for any crime to life without possibility of parole?

Question No. 6: How are victims' rights impacted by the lengthy death penalty process?

Victims' families undoubtedly experience a high level of frustration with the criminal justice system. Because of the extensive constitutional due process requirements in death penalty litigation, trials are lengthy, and appeals can go on for decades. For families of victims, there is no closure.

Instead of repealing the death penalty, would a limitation on habeas appeals help victims? During Utah's 2009 Legislative session, Utah Attorney General Mark Shurtleff offered a plan to limit the appeal process by amending the state Constitution. Senate Joint Resolution 14 provided that, following a direct appeal, "a person may challenge the legality of the conviction or sentence only in the manner and to the extent provided by statute." S.J. Res. 14, 58th Leg., Gen. Sess. (Utah 2009), *available at* http://le.utah.gov/~2009/htmdoc/sbillhtm/SJR014.htm (last visited June 1, 2009). In other words, the amendment would give the state legislature the sole authority to decide which cases could be appealed.

While the idea of reducing appellate time may have superficial political appeal, Shurtleff's proposal is unlikely to withstand a constitutional challenge. The proposal has been criticized as violating the bedrock principle of the separation of powers among the three branches of government, and making it likely that federal courts will become much more active in state court affairs. *See* Linda Thomson, *Shurtleff's plan to cut appeals draws judicial criticism,* Deseret News, Jan. 27, 2008, at B1; *see also* Editorial, *Shurtleff offers travesty of justice,* Salt Lake Tribune, Feb. 15, 2009, at A12.

Another problem with limiting habeas appeals is that, if the defendant did not have competent counsel for defendant's trial and direct appeal, the habeas review may be defendant's first opportunity to be represented by competent counsel. Thus, restricting habeas appeals would be problematic, especially in death penalty cases. As the Utah Supreme Court has explained:

> We cannot allow a defendant's life to be taken by the government without an adequate review of the conviction.... [I]t falls to us, as the court of last resort in this state, to assure that no person is deprived of life...without the due-and competent-process of law. Without a sufficient defense, a sentence of death cannot be constitutionally imposed. This basic concept is bedrock upon which our constitutional government stands.

Archuleta v. Galetka, 2008 UT 76, ¶¶ 18-19, 197 P.3d 650.

Question No. 7: Is life without parole a viable alternative to the death penalty?

Two alternatives to the lengthy death penalty process come to mind. First, the district attorneys in the state could end the lengthy process in some aggravated murder cases simply by no longer seeking the death penalty. For example, once our previous district attorney took death off the table in the Destiny Norton case, the case was over in an hour. The defendant pled guilty and was sentenced to life without possibility of parole.

With no trial, and no appeals, the victim's family had immediate and satisfactory closure.

Or, what would be the effect on victims' families if the death penalty were repealed altogether, as in New Jersey? Richard Pompelio, Executive Director of the New Jersey Crime Victims Law Center, said,

> I don't think it's made much of a difference at all other than that some of the cases that were languishing out there are now getting tried. The important thing for crime victims is that the process have an end, and with the death penalty there never was an end.

Rudy Larini, *A year later, state assesses justice without death penalty,* New Jersey Star-Ledger, Dec. 15, 2008, at 1.

Prosecutors in New Jersey agree that eliminating the death penalty has not hindered them in obtaining tough sentences for the most violent offenders. Essex County Prosecutor Paula Dow, head of the state association of county prosecutors, said,

> Under the old system some prosecutors felt pressured to seek the death penalty, despite the lengthy, expensive trials and prolonged appeals. It was a very big drain on the limited resources of law enforcement. There were long delays in the resolution of the cases, multiple appeals and very high costs associated with the handling of the litigation.

Id.

Finally, to quote one of our state supreme court justices on the viability and propriety of a maximum sentence of life without parole: "Based on our experience, a sentence of life without parole may be less expensive to the state, more miserable for the guilty and more certain for the victims and society." *Menzies v. Galetka,* 2006 UT 81, ¶ 123, 150 P.3d 480 (J. Wilkins, concurring).

Conclusion

The death penalty system is costly and ineffective, fundamentally immoral, violative of Christian principles, allows for the possibility of executing innocent people, is imposed in an arbitrary and discriminatory manner, and lacks closure for the families of victims.

Repeal of the death penalty may be appropriate but it is not necessary today. An immediate moratorium on death-penalty prosecutions is appropriate however in order for a blue-ribbon commission to study the costs and options in more detail.

Analyzing Mechanics' Lien Claims: A Few Suggestions

by Spencer Macdonald

A few years ago I inherited a case in which I was defending my client against a mechanics' lien. Shortly into the case I realized that the plaintiff had filed the lawsuit thirteen months after recording the lien, far outside the statutory requirement of 180 days. I called opposing counsel and explained that the untimely filing of the suit was fatal to his client's lien claim. Plaintiff's counsel (who, by this point, had run up tens of thousands of dollars in fees) reluctantly conceded the point and agreed to dismiss the lien claim. And because the lien statute was the sole basis for the plaintiff's right to recoup its fees, the plaintiff decided to cut its losses and settle the case for pennies on the dollar.

A year or so later, I took on a case in which the lien claimant had failed to file a "Preliminary Notice" with the State Construction Registry, thus depriving him of his lien rights. If I had overlooked this error, my client could have ended up paying thousands in legal fees defending against the lien. As it was, I simply wrote a letter, the claimant released the lien, and my client came away from the experience thrilled at having avoided a lawsuit and its attendant expenses.

In Utah, laws pertaining to mechanics' liens have become increasingly difficult to navigate. The experiences described above prompted me to develop a fairly systematic approach to lien claims, some of the highlights of which are set forth below. While no article can address all possible permutations of Utah's lien laws, this note includes some basic issues that practitioners might otherwise overlook when evaluating lien claims.

Is the Lien Claimant Entitled to File a Lien?
Utah Code section 38-1-3 identifies those parties entitled to file a lien (in essence, anyone who provides labor, materials, or services to improve real property). *See* Utah Code Ann. § 38-1-3 (2005). In *Packer v. Cline,* 2004 UT App 311 (mem.), the Utah Court of Appeals affirmed the trial court's invalidation of a mechanics' lien filed by an individual who did not meet these requirements. *See id.* In *Packer*, the defendant recorded a purported mechanics' lien for $70,000 against the plaintiffs' (his former in-laws) residence for the value of a mural painted in the residence by defendant's former spouse. *See id.* para. 2. Because defendant had not provided labor, materials, or services to improve real property, he was not entitled to file a lien. *See id.* para. 4. Further, defendant was found liable for statutory damages and fees under section 38-9-4(3) of the Wrongful Lien Statute. *See id.* para. 6.

Was the Lien Timely Recorded?
In order for a lien claimant to preserve lien rights against a residential property, the claimant must record the lien against the property no later than ninety days after the filing of a Notice of Completion or, where no Notice of Completion is filed, 180 days after final completion of the original contract. *See* Utah Code Ann. § 38-1-7(1)(a)(i)(A)-(B) (Supp. 2008). A lien that is not timely recorded is invalid and unenforceable. *See In re Williamson,* 43 Bankr. 813, 825 (Bankr. D. Utah 1984).

Was a Suit to Foreclose on the Lien Timely Filed?
A mechanics' lien becomes void, and the district court loses jurisdiction if the lien claimant fails to file an action to enforce the lien within 180 days from the day on which the claimant recorded the lien. *See* Utah Code Ann. § 38-1-11(2)-(4).

Did the Lien Claimant Contract with the Property Owner or with a General Contractor?
In 2005, the Utah Legislature amended Title 38 of the Utah Code to include provisions pertaining to the "State Construction Registry" (the SCR). The SCR is designed to "provide a central repository for notices of commencement, preliminary notices, and notices of completion filed in connection with all privately owned construction projects as well as all state and local government owned construction projects throughout Utah." *Id.* § 38-1-27(2)(c). Primary filing and access to the SCR, as well as notification to interested persons, are all done electronically.

The SCR's filing requirements can have a significant impact on lien claims. When the property owner has properly filed a Notice of Commencement in the SCR, all subcontractors must thereafter timely file a Preliminary Notice (often referred to as a pre-lien) with the SCR. *See id.* § 38-1-32(1)(a)(i).

This pre-lien requirement only applies to "subcontractors" as defined by statute (in contrast to a "general" or "original" contractor).

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Essentially, anyone who contracts directly with the property owner is deemed a "contractor," while anyone who does not contract directly with the owner is deemed a "subcontractor." *See id.* § 38-1-2(1); *For-Shor Co. v. Early,* 828 P.2d 1080, 1082 (Utah Ct. App. 1992) ("[A] lien claimant will be characterized an 'original contractor,' regardless of the function he performed in the particular construction project, so long as his contract was with the property owner.").

This is important because a subcontractor risks losing its lien rights if the subcontractor does not comply with the SCR, whereas general or original contractors can disregard the SCR filing requirements altogether. *See id.* 38-1-32(1)(a)(i). Consequently, property owners can minimize their exposure to lien claims by having subcontractors contract with the general contractor (rather than with the property owner). Conversely, lien claimants can avoid the added hassle of complying with the SCR, as well as the risk of losing lien rights through noncompliance with the SCR by contracting directly with the property owner.

Did the Property Owner Timely File a Notice of Commencement on the State Construction Registry?

The SCR potentially benefits property owners by reducing the number of potential lien claimants to only those who comply with the SCR. Property owners who wish to avail themselves of the SCR should therefore file a Notice of Commencement either no later than fifteen days after the issuance of the building permit, *see* Utah Code Ann. § 38-1-31(1)(a)(i) (Supp. 2008), or no later than fifteen days after commencement of physical construction work at the project site, *see id.* § 38-1-31(1)(b). Importantly, an untimely notice (or failure to file a notice) relieves subcontractors from complying with the SCR requirements altogether. *See id.* § 38-1-31(3)(a).

The SCR requires the local government entity issuing the building permit to transmit the building permit information to the SCR. *See id.* § 38-1-31(1)(a)(i)(A)(I). This usually results in a Notice of Commencement being generated and recorded on the SCR without any effort by the property owner or general contractor. However, I have observed several instances where the local government entity did not timely file a Notice of Commencement, thus allowing subcontractors to disregard the SCR filing requirements. Property owners or general contractors are therefore well advised to take steps to ensure that the Notice of Commencement is timely filed. Conversely, potential lien claimants (particularly subcontractors who have failed to timely file a Preliminary Notice) should also investigate the timeliness of the Notice of Commencement, as an untimely notice relieves them of their obligation to comply with the SCR.

If the Lien Claimant is Required to File a "Preliminary Notice" on the State Construction Registry, Did He Timely File the Notice?

When the SCR filing requirements are in play, a subcontractor must "pre-lien" the project by filing a Preliminary Notice on the SCR by the later of (A) 20 days after commencement of work or of furnishing labor, services, material, etc., or (B) 20 days after the filing of a notice of commencement if the subcontractor's work commences before the filing of the first notice of commencement. *See id.* § 38-1-32(1)(a)(i)(A)-(B).[1]

A lien claimant (that is, a subcontractor) who is obligated to file a Preliminary Notice but fails to do so "may not hold a valid lien under" the lien statute. *Id.*§ 38-1-32(1)(d)(i)(A). Lien claimants should therefore either contract directly with the owner (thus obviating the SCR filing requirements) or implement procedures to regularly pre-lien projects by timely filing Preliminary Notices. Conversely, property owners should always evaluate a lien claimant's compliance with the SCR before expending effort in disputing the lien.

Was the Lien Claimant Properly Licensed?

Utah Code section 58-55-604 states that a contractor may not commence or maintain any type of lawsuit (including a suit to foreclose a mechanics' lien) if the suit is filed to collect compensation "for performing any act for which a license is required ...without alleging and proving that the licensed contractor was appropriately licensed when the contract sued upon was entered into, and when the alleged cause of action arose." Utah Code Ann. § 58-55-604 (Supp. 2008). Consequently, a contractor's failure to comply with the licensing requirements of this statute precludes it from maintaining a lien. *See A.K. & R. Whipple Plumbing & Heating v. Aspen Const.,* 977 P.2d 518, 522 (Utah Ct. App. 1999).

However, the licensure statute includes several statutory exceptions. *See* Utah Code Ann. § 58-55-305. Several common law exceptions to this statute have also softened its potential impact. *See A.K. & R. Whipple Plumbing & Heating v. Aspen,* 1999 UT App 87, ¶ 14 (internal quotation marks omitted) (noting that the statutory bar "does not preclude the application of the previous common law exceptions to the general rule of non-recovery").

For example, in *Fillmore Products, Inc. v. Western States Paving, Inc.,* 561 P.2d 687 (Utah 1977), the Utah Supreme Court held that the general rule of denying relief to unlicensed persons should not be applied "inflexibly or too broadly" because the statute "might become 'an unwarranted shield for the avoidance of a just obligation.'" *Id.* at 689-90 (citation omitted). Thus,

> a court addressing the issue of whether an unlicensed contractor may maintain an action for quantum meruit must: (1) determine whether the contractor is properly licensed or whether its status as an unlicensed contractor places it within the purview of section 58-55-604; and (2) determine whether the contractor is entitled to relief under common law principles despite its non-licensure and support that conclusion with appropriate findings of fact. In other words, if the court concludes the claim falls within the purview of section 58-55-604, but the common

law exceptions apply, then the statutory bar will not preclude suit. However, if the court determines section 58-55-604 applies but the common law exceptions are inapplicable, then section 58-55-604 absolutely bars the action.

A.K.&R. Whipple Plumbing & Heating, 1999 UT App 87, ¶ 14.

Yet another common law exception arises out of *Lignell v. Berg,* 593 P.2d 800 (Utah 1979), which states that "the party from whom the contractor seeks to recover is…not a member of [the class the licensure statute is intended to protect] if the required protection (i.e., against inept and financially irresponsible builders) is in fact afforded by another means." *Id.* at 805. Utah's licensure statute is intended to protect the public from incompetent contractors. *See A.K. & R. Whipple Plumbing & Heating,* 1999 UT App 87, ¶ 13. However, "'the general rule' (of nonenforceability) is not to be applied mechanically but in a manner 'permitting the court to consider the merits of the particular case and to avoid unreasonable penalties and forfeitures.'" *Lignell*, 593 P.2d at 805 (citation omitted).

In other words, "the party from whom the contractor seeks to recover is…not a member of [the class the licensure statute is intended to protect] if the required protection (i.e., against inept and financially irresponsible builders) is in fact afforded by another means." *Id.* And if a litigant is not within this class, "the [licensure] rule will not be applied," so "the pivotal issue …is whether defendant occupied a protected status." *George v. Oren, Ltd.,* 672 P.2d 732, 735 (Utah 1983) (citations omitted); *see also Am. Rural Cellular, Inc. v. Sys. Commc'n Corp.,* 890 P.2d 1035, 1040 (Utah Ct. App. 1995) ("[W]hen the contracting party possesses knowledge and expertise in the field, it is not within the class of persons in need of the protection that the licensing statute was intended to provide").

Is the Lien Barred by the Residence Lien Recovery Fund?

The Utah Residence Lien Recovery Fund "is an alternate payment source for contractors, laborers or suppliers whose liens are voided because a homeowner qualifies for protection under the Residence Lien Restriction and Lien Recovery Fund Act." Utah Department of Occupational and Professional Licensing, http://www.dopl.utah.gov/programs/rlrf/ (last visited Aug. 2, 2009). These protections are available to property owners who (A) have a written contract, (B) with a properly licensed contractor, and (C) have paid the contractor in full pursuant to the terms and conditions of the contract. *See* Utah Code Ann. § 38-11-107(1)(a) (Supp. 2008); *id.* § 38-11-204(4)(a)-(b).

"[P]ayment disputes are very common on construction projects such that compliance with the third requirement is sometimes virtually impossible until the end of litigation. Thus, it is often unclear whether an owner is entitled to the protection afforded by the Act." Randy B. Birch, Residence Lien Recovery Fund – The Homeowner's Responsibilities, http://www.northeasternutahlitigationattorney.com/2009/02/residence-lien-recovery-fund-homeowners.html (last visited Aug. 2, 2009). However, a property owner who has paid a general contractor in full but still ends up facing liens from unpaid subcontractors may be able to avoid such liens by applying for protection under the Act.

Do Any of the Provisions of the Wrongful Lien Statute or Abuse of Lien Statute Apply?

The Wrongful Lien Statute provides penalties for liens that are "wrongful," which are defined as "a lien, notice of interest, or encumbrance" that is not "expressly authorized by this chapter or another state or federal statute;…authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or…signed by or authorized pursuant to a document signed by the owner of the real property." Utah Code Ann. § 38-9-1(6). A lien claimant who fails to release such a lien within ten days from the date of the owner's written request is liable for "$3,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs." *Id.* § 38-9-4(2). This statute provides even harsher penalties against lien claimants who record a lien while knowing or having reason to know that the lien is "a wrongful lien," is "groundless," or "contains a material misstatement or false claim." *Id.* § 38-9-4(3). The penalty is "$10,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs." *Id.*

The more narrowly tailored Abuse of Lien Statute penalizes lien claimants who record a lien "containing a greater demand than the sum due" and does so "with the intent to cloud the title;…to exact from the owner or person liable by means of the excessive claim of lien more than is due; or…to procure any unjustified advantage or benefit." *Id.* § 38-1-25(1). The penalty is "twice the amount by which the abusive lien exceeds the amount actually due; or . . . the actual damages incurred by the owner of the property." *Id.* § 38-1-25(2).

A property owner who disputes the propriety of a lien or the lien amount should ask their attorney to evaluate these statutes. Conversely, a lien claimant should take precautions to ensure that the claimant does not run afoul of these statutes.

Conclusion

These suggestions are by no means exhaustive, nor are they applicable to every lien claim. But systematic analysis of lien claims has the potential to save all involved parties a lot of time and effort by weeding out flawed claims early on in the litigation process.

1. A subcontractor who fails to file a Preliminary Notice prior to commencing work on a project may be able to resurrect at least a portion of his lien rights. "If a person files a preliminary notice after the period prescribed by Subsection (1)(a), the preliminary notice becomes effective five days after the day on which the preliminary notice is filed." Utah Code Ann. § 38-1-32(1)(b). Consequently, a subcontractor can file a belated Preliminary Notice, then reduce or eliminate his work on the project for the next five days. The subcontractor has then preserved his lien rights as to the remaining work completed after those five days. *See id.*

Utah LLCs vs. Other State LLCs: When Should Attorneys Consider Forming LLCs Outside Utah?

by Justin J. Atwater and Russell K. Smith

Since Wyoming's passage of the first limited liability company ("LLC") statute in 1977, the LLC has grown to be a favored form of business entity, not only in Utah, but throughout the nation. This is largely because of the flexibility of an LLC and its hybrid feature of corporate protection coupled with partnership taxation.

All states and the District of Columbia have adopted LLC statutes, and many of these statutes have been substantially amended several times. These statutes vary considerably in both form and substance. Many of the early statutes were based on the first version of the ABA Model Prototype Limited Liability Company Act (the "Prototype Act") while a few of the later statutes were based on the Uniform Limited Liability Company Act ("ULLCA"). Because of important differences between the various statutes, attorneys have the opportunity to forum shop and choose the LLC statute which best fits a particular client's needs.

Utah enacted its first LLC statute in 1991, and after several revisions, the entire statute was replaced, in 2001, with the Utah Revised Limited Liability Company Act (the "Utah LLC Act"). The Utah LLC Act consists of provisions taken from a variety of sources including the Utah Revised Business Corporation Act, the Utah Revised Uniform Limited Partnership Act (the "Utah LP Act"), the Utah Professional Corporation Act, the Utah Revised Nonprofit Corporation Act, the Prototype Act, the ULLCA, and the LLC statutes of California, Colorado, Connecticut, Delaware, Mississippi, North Carolina, New York, Virginia, and Washington.

While the intent of the drafters of the Utah LLC Act was to create a useful, flexible, and comprehensive LLC statute, the Utah LLC Act has several characteristics that are less business-friendly than other LLC statues. This article explores three such areas where a client's interests might be better served by forming a non-Utah LLC: (1) inadequate asset protection; (2) subordination of creditor-members; and (3) undue extension of statutory apparent authority. Other less business-friendly aspects not discussed in this article include: the prohibition of oral operating agreements; limitations on modifying fiduciary duties; limitations on delegation of authority; and confusion of the tax term-of-art "capital account."

Inadequate Asset Protection

An important aspect of the law of unincorporated business organizations (*i.e.,* partnerships and LLCs) is the "pick-your-partner" principle. Most, if not all, LLC statutes provide that, subject to certain limited exceptions, a transferee of an LLC interest is not automatically admitted as a member of the LLC. Express consent of the existing members is often required for admission of a new member.

An extension of the "pick-your-partner" principle is the use of charging orders in lieu of foreclosure and liquidation as a creditor remedy to satisfy personal debts of a member. Charging orders operate much like garnishments and require an LLC to pay over to a debtor-member's creditor amounts that otherwise would be distributed to the debtor-member until the debt is satisfied. A charging order constitutes a lien on a debtor-member's LLC interest. Once the liability has been satisfied either with distributions from the LLC or otherwise, the charging order terminates and the rights to receive distributions with respect to the LLC interest are fully restored to the debtor-member. Importantly, a creditor with a charging order does not become a member of the LLC, and, accordingly, has no voting or management rights in the LLC.

Many LLC statutes limit a creditor's right against a debtor-member's LLC interest to a charging order. Such statutes are viewed as friendly toward LLC members because they severely restrict a creditor's collection rights against a debtor-member. For example, the Delaware Limited Liability Company Act (the "Delaware Act")

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provides that "[t]he entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of a member's assignee may satisfy a judgment out of the judgment debtor's limited liability company interest." Del. Code Ann. tit. 6, § 18-703(c) (2009).

In contrast, some statutes, including the Utah LLC Act, take a "liquidation approach," under which a creditor can foreclose on the debtor-member's LLC interest and receive permanent economic rights in the LLC interest, including rights to distributions from the LLC after the member's debt has been satisfied. *See* Utah Code Ann. § 48-2c-1103(2)(b) (2007). In addition, when a creditor forecloses on a single-member Utah LLC interest, the creditor becomes the sole member of the LLC without the consent of the member and the creditor remains as the sole member of the LLC even after the debt is satisfied. This liquidation approach deprives members of a potentially valuable asset protection tool and is often cited as a factor for clients in choosing non-Utah LLCs. Clients interested in asset protection should consider forming LLCs outside Utah in states with LLC statutes that provide charging orders as the exclusive remedy by which a creditor may satisfy a debtor-member's liability out of the member's LLC interest.

Subordination of Creditor-Members

The Utah LLC Act, like other LLC statutes, provides that a member of an LLC may transact business with the LLC and, subject to applicable law, shall have the rights and obligations with respect to any such matter as a person who is not a member. *See* Utah Code Ann. § 48-2c-119 (2009). These provisions recognize not only that members of LLCs often wear many different hats (e.g., creditor, lessor, guarantor, employee, etc.), but also that members of an LLC frequently transact business with the LLC, and should not be penalized for such transactions.

A member may become a creditor of an LLC in a variety of ways. In practice, members often: (i) lend money (either secured or unsecured) to the LLC; (ii) provide services to the LLC for which the member is to receive remuneration; (iii) sell goods to the LLC on credit; (iv) are entitled to receive indemnification payments from the LLC; (v) are entitled to reimbursement for LLC expenses paid by the member on behalf of the LLC; and (vi) lease real or personal property to the LLC.

Each LLC statute establishes a priority of asset distribution in connection with the winding up of an LLC's business. Typically, assets are first applied or set aside to satisfy an LLC's obligations to creditors, in the order of priority, as provided by law (i.e., secured creditors first based on the priority, and then to the unsecured creditors based on priority). It is only after the creditors have been paid or otherwise provided for that any remaining assets are distributed to the members in respect of the LLC interests.

Member-friendly LLC statutes do not distinguish between non-member-creditors and member-creditors with respect to priority of liquidating distributions, and the fact that a person is a member does not alter any rights that such person may have as a creditor. For example, the Delaware Act provides that upon the winding up of a Delaware LLC, the LLC's assets are to be distributed as follows: (1) first, to creditors, *including members and managers who are creditors,* to the extent otherwise permitted by law, in satisfaction of liabilities of the LLC other than liabilities for which reasonable provision for payment has been made, and liabilities for interim and resignation distributions to members and former members; (2) second, to members and former members in satisfaction of liabilities for interim and resignation distributions, unless otherwise provided in the LLC agreement; and (3) thereafter, to the members. *See* Del. Code Ann. tit. 6, § 18-804(a) (2009). In contrast, the Utah LLC Act penalizes member-creditors by subordinating their creditor interests behind non-member-creditors in liquidation. Under the Utah LLC Act, the assets of an LLC are to be applied or distributed as follows: (1) first, to pay or satisfy the liabilities of creditors *other than members,* in the order of priority, as provided by law; (2) second, to pay or satisfy the liabilities to members in their capacity as creditors, in the order of priority, as provided by law; (3) third, to pay or satisfy the expenses and costs of winding up the LLC; and (4) thereafter, to the members. *See* Utah Code Ann. § 48-2c-1308. This member-creditor subordination penalty is neither warranted nor justified solely on the grounds that the creditor is a member. In fact, this provision is inconsistent with other Utah creditor rights statutes including the Utah Uniform Commercial Code and the Utah Real Estate Act, both of which provide for different payment priorities.

The Utah LLC Act further confuses creditor rights with respect to expenses and costs incurred as part of winding up an LLC. The Utah LLC Act subordinates creditors of costs and expenses of winding up behind all other creditors, regardless of whether or not the creditor of such expense is a member or non-member. *See id.* § 48-2c-1308(1)(c). Accordingly, non-member-creditors such as attorneys, accountants, and employees who assist in the winding up of the LLC and suppliers and other consultants who provide goods and services during the winding up period of an LLC may be subordinated to all other creditors. This provision of the Utah LLC Act is a disincentive to persons who might otherwise provide goods and services to an LLC that is, or might be, winding up its business, especially in circumstances where the LLC may have insufficient assets to pay all of its creditors.

The Utah LLC Act has the dubious distinction of being the only LLC statute that creates such an inequitable asset priority distribution.

In fact, not even the Utah LP Act uses such a liquidating distribution provision. Instead, the Utah LP Act uses the same basic liquidating distribution provision as the Delaware Act (i.e., first to creditors, including partner creditors). *See* Utah Code Ann. § 48-2a-804 (2009).

Some practitioners have argued that the members of a Utah LLC may contract or opt out of the statutory distribution provisions of the Utah LLC Act in a written operating agreement. In fact, it is the authors' experience that many Utah LLC operating agreements, either intentionally or inadvertently, contain asset liquidation distribution provisions that conflict with the distribution ordering provisions of the Utah LLC Act by including provisions similar to the liquidation distribution provisions provided under the Delaware Act and the Utah LP Act. In spite of this proactive drafting, these statutory distribution provisions may not be modified with respect to non-member-creditors without their consent. The Utah LLC Act specifically provides that a Utah LLC's articles of organization or operating agreement may not restrict rights of persons other than the members, their assignees and transferees, the managers and the LLC, without the consent of those persons. *See id.* § 48-2c-120(h). Accordingly, the superior priority rights granted to non-member-creditors under the Utah LLC Act may not be restricted without such non-member-creditors' consent and, therefore, an operating agreement with an alternative liquidating distribution scheme would not be operative or enforceable vis-à-vis non-consenting, non-member-creditors.

Given that the Utah LLC Act unduly penalizes member-creditors and creditors of wind-up expenses by subordinating their creditor interests, clients and attorneys should consider alternate jurisdictions with LLC statutes that do not contain similar subordination provisions.

Undue Extension of Statutory Apparent Authority

The Uniform Partnership Act of 1914 first codified a particular type of apparent authority based on position, providing that "[t]he act of every partner…for apparently carrying on in the usual way the business of the partnership binds the partnership." The position concept of statutory apparent authority has found its way into the various uniform partnership and limited liability company acts, as well as almost every LLC statute including the Utah LLC Act. Although the position concept of statutory apparent authority makes sense for general and limited partnerships, its application to LLCs is questionable.

Third parties dealing with general or limited partnerships know by the entity's legal name and by a person's status as a general or limited partner whether the person has the power to bind

the entity. However, as noted in the prefatory note to the Revised Uniform Limited Liability Company Act (the "RULLCA"), the position concept of apparent authority "does not make sense for modern LLC law, because: (i) an LLCs status as member-managed or manager-managed is not apparent from the LLC's name…; and (ii) although most LLC statutes provide templates for member-management and manager-management, variability of management structure is a key strength of the LLC form of business organization."

One hallmark of the LLC is its flexible management structure. However, most state LLC statutes (including the Utah LLC Act) require that the LLC specify upon formation whether it is managed by "managers" (i.e., a "manager-managed" LLC) or managed by "members" (i.e., a "member-managed" LLC). These same statutes vest in a person or persons apparent authority to act on behalf of the LLC based on the management structure selected. In a member-managed LLC, each member, as a member, has apparent authority to act on behalf and bind the LLC in the ordinary course of business of the LLC. In contrast, in the manager-managed LLC only those persons named as managers have statutory apparent authority, and the members, as members, have no statutory agency authority. In each case, the statutory agency authority is linked exclusively to the internal governance structure, and is not readily apparent to outsiders.

Problems often arise with statutory agency authority when the members of an LLC do not intend that *every* manager in a manager-managed LLC or every member in a member-managed LLC have such broad agency authority. For example, the members may want a corporate- or board-style management structure. In such a management structure, the board of managers is intended to operate as a group with no single manager, acting alone, having actual agency authority to act on behalf of the LLC. However, if under the applicable state LLC statute, each manager has statutory apparent authority to act on behalf of and bind the LLC in the ordinary course of business of the LLC (as is the case in Utah, *see* Utah Code Ann. § 48-2c-802(2) (2007)), then, notwithstanding a written operating agreement and intentions of the members, a manager may, without actual authority, bind the LLC in the ordinary course of business if the third party did not know or did not otherwise have notice that the manager lacked authority.

The Utah LLC Act provides as follows:

> an act of a manager, including the signing of a document in the company name, for the apparent carrying on in the ordinary course of the company business, or business of the kind carried on by the company, binds the company unless the manager had no authority to act for the company in the particular matter and the lack of authority was *expressly* described in the articles or organization or the person with whom the manager was dealing knew or otherwise had notice that the manager lacked authority.

Id. § 48-2c-802(2)(c) (emphasis added).

In addition, in connection with transferring or affecting a Utah LLC's interest in real or personal property, the Utah LLC Act provides that

> unless the LLC's articles of organization expressly limit a manager's authority, a manager signing, acknowledging and delivering a document purporting to transfer or affect the LLC's interest in real or personal property, the document so delivered shall be conclusive in favor of the person who gives value without knowledge of the lack of authority of the manager.

Id. § 48-2c-802(3). Accordingly, under the Utah LLC Act, any limitation on a manager's (or member's) authority must be *expressly* set forth in the articles of organization to be effective against third parties, and limitations set forth only in the operating agreement will only be effective against third parties with knowledge of such lack of authority.

In contrast, the Delaware Act (Section 18-402), the RULLCA (Section 301(a)), and the Revised Prototype Act (Section 301) each departs from the statutory apparent authority model found under the legacy LLC statutes, including the Utah LLC Act.

The Delaware Act provides in part: "Unless otherwise provided in a[n] [operating] agreement, each member and manager has the authority to bind the [LLC]." Del Code Ann. tit. 6, § 18-402. (2009). As such, the Delaware Act does not vest statutory apparent authority in a person or persons based of the type of management structure adopted by the LLC (i.e., "member-managed" or "manager-managed"). While perhaps not apparent upon first review, the Delaware Act puts *all* third parties on notice that no member or manager has apparent agency authority to bind the LLC. In commenting on this section of the Delaware Act, one commentator relayed the following anecdote: "When a man says, 'I can do anything unless my wife says I may not,' I question anyone's ability to rely upon him without her there to confirm he may act." Thomas E. Rutledge & Steven G. Frost, *RULLCA Section 31 – The Fortunate Consequences (And Continuing Questions) Of Distinguishing Apparent Agency And Decisional Authority,* 64 The Business Lawyer 37 (Nov. 2008). The Delaware Act operates in the same fashion and third parties may not rely on the statute for authority of a member or manager, they must look to the operating agreement of the LLC because it may grant agency authority or limit such authority in ways that are different than would exist in the absence of such provisions in the operating agreement.

RULLCA Section 301(a) expressly provides that members have no statutory apparent authority. Furthermore, by its silence (i.e., no specific statutory authority granted), managers of a manager-managed LLC also do not have statutory apparent authority. The Revised Prototype Act goes even further and provides that no person shall have power to bind the LLC except to the extent such person is authorized in the LLC operating agreement, by the members, in a duly-filed statement of authority, or as provided by law.

Each of the Delaware Act, the RULLCA and the Revised Prototype Act provide greater management flexibility than the Utah LLC Act by allowing members of an LLC, formed pursuant to these statutes, to adopt a management structure, authorize person(s) with authority to bind the entity, and have greater comfort that persons lacking actual authority will not have the power to bind the LLCs as to third parties. While this may impose a greater burden on the third parties to make sure that the person with whom they are dealing has actual authority, such due diligence is no different than what third parties must do when conducting business with a corporate agent.

Therefore, to the extent a client desires to change, limit, or eliminate the statutory apparent authority that would otherwise be granted under the Utah LLC Act, attorneys should consider forming the LLC in Delaware or in a state that has adopted either the RULLCA or the Revised Prototype Act.

CONCLUSION

Forum selection is often overlooked during the LLC formation process. Due to perceived ease and convenience, many clients and practitioners elect to form their LLCs in the state in which the company will operate. Failure to carefully consider the forum for LLC formation can result in unwanted consequences. In particular, and as explored in this article, the Utah LLC Act has hidden traps that can produce undesired business results. Clients and practitioners wanting to avoid these traps should consider forming their LLCs under more business friendly statutes such as the Delaware Act.

Before the Utah Bar Journal

by Mari Cheney

The *Utah Bar Journal* has existed in its present form since 1988. Before that, a variety of publications acted as a state bar journal to provide information to members. Because there have been so many incarnations of publications acting as the official journal of the state bar, it is sometimes difficult to locate specific articles because many of these publications are often casually referred to as the bar journal. To make things even more confusing, during the 1970s and 1980s, multiple bar publications overlapped to provide information to attorneys.

Valuable information can be found in these publications, including old court rules and commentary on newly enacted laws.

The *Utah Bar Bulletin*, 1931-1960, 1963

The *Utah Bar Bulletin* began in 1931 and discontinued publication in 1960, with the exception of a special issue in 1963. It was much smaller than the current *Utah Bar Journal*: 8-1/2 by 5-1/2 inches.

The introduction to the first volume states: "With the advent of the 'Utah Bar Bulletin', [sic] the Utah State Bar takes a further step in its aim to establish a unified organization of the legal profession, working for the best interests of that profession and of the public which it serves." *An Introduction,* Utah Bar Bull., Oct. 1931, at 1.

In 1973, in the first issue of the newly created *Utah Bar Journal,* the editor described the end of the *Bulletin's* publication.

> [The Bulletin] was laid to rest with the special issue… becoming a victim of the financial pinch which found rising costs of publication and a low fixed budget combining to bring about its demise. At that time, a special committee of the Bar recommended its discontinuance and the recommendation was accepted and adopted by the Bar Commission.

J. Robert Bullock, *Greetings to The Utah Bar Journal,* Utah B.J. May-June 1973, at 5, 6.

The Summation, 1958-1973

The Summation, started by the University of Utah College of Law, began as a publication dedicated to events primarily of interest to students, faculty, and alumni of that school, but eventually became a predecessor to the *Bar Journal,* with articles written for practicing attorneys. In 1973, *The Summation* ceased publication and the staff worked with the bar to create the first issue of the *Utah Bar Journal.*

Utah Bar Letter and *Utah State Bar Members Newsletter,* approximately 1961-1988

There is some confusion about the initial publication date of the *Utah Bar Letter.* However, at least one issue exists from 1961, and by 1968 the *Utah Bar Letter* was regularly published. It ceased publication in 1988. For a brief period in 1985 – during the months of April, May, and August, the publication was called the *Utah State Bar Members Newsletter,* but reverted back to the *Utah Bar Letter* for the October 1985 issue until the final issue in January 1988.

The *Utah Barrister* and *The Barrister,* 1977-1988

The *Utah Barrister* was published in 1977 and 1978, and then published as *The Barrister* from 1980 to 1988. However, after the May 1980 issue, it is unclear whether any issues were published until mid-1986.

The Utah Barrister was created by the Young Lawyers' Section to replace a publication called the *Centerfold* (not kidding). The mission was similar to other bar publications in existence at that same time: to keep members informed through articles and editorials, as well as to announce activities and programs.

The Utah Bar Journal, 1973-1986, 1988-present

As stated earlier, *The Summation* ceased publication when the first issue of the *Utah Bar Journal* was published, with the idea that the *Bar Journal* would become a way for the bar to regularly communicate with its members and provide articles of interest.

From 1973 to the single volume published in 1986, the *Bar Journal* was printed in a much smaller format than today's version, similar to the *Utah Bar Bulletin*. It ceased publication for over

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a year, until the "new" *Utah Bar Journal* was published in August/September of 1988. This issue began a new numbering scheme with Volume 1, Number 1, so if you are looking for a *Bar Journal* article with just the volume and issue number as your citation, remember that the volume numbers overlap. The "old" *Bar Journal* contains volumes 1 through 14 (spanning the years 1973 to 1986). The "new" *Bar Journal* also contains volumes 1 through 14 (spanning the years 1988 to 2001). Make sure you have a date of publication or article title when looking for articles during these time periods, or you may not turn up anything in your result.

For the first issue of the "new" *Bar Journal,* the bar changed the format by adding color on the cover and enlarging the publication to an 8-1/2 by 11 inch format. It consolidated "in one publication the *Utah Bar Letter, Utah Bar CLE,* the old *Utah Bar Journal* and the Young Lawyers Section's *Barrister.*" Calvin E. Thorpe, *Editor's Note,* Utah B.J. Aug.-Sept. 1988, at 4.

This "new" *Bar Journal* was published monthly, except for July and August, until 2000. From 2001-2004, nine issues were published yearly. In 2005, the bar adopted the current practice of publishing bi-monthly issues. While most "old" *Bar Journals* had 12 issues, many were combined into a single volume but not on a predictable basis. Some years the issues were identified by seasons (summer, winter, fall, or spring) or by the month or months those issues covered.

Randall L. Romrell, member of the *Bar Journal's* Editorial Board, published a narrative Q & A in a 2007 issue of the *Journal*, providing information about editors of the *Bar Journal,* and described two publications that came before it. *See* Randall L. Romrell, *Questions You Might Ask About the History of the Utah Bar Journal,* Utah B.J. 75th Anniversary Special Issue 2007, at 36. Between his article and this one, hopefully the history of the Bar Journal is now more complete.

How You Can Help the Utah State Law Library

If you have information about the following titles, or have copies that you would like to donate, please let me know.

- *The Summation*
- *The Utah Bar Letter* (including the *Utah State Bar Members Newsletter*), or
- The *Utah Barrister* (a.k.a. *The Barrister* and before that, *Centerfold*)

Our goal is to fill gaps in our collection so that researchers can locate both the current *Utah Bar Journal* as well as all older versions at the law library. This information will be shared with the other law libraries in Utah.

Contact information:
Mari Cheney
Utah State Law Library
450 South State Street, W-13
Salt Lake City, Utah 84114
801-238-7979
maric@email.utcourts.gov

AUTHOR'S NOTE: *Thanks to Shawn Nevers, Ron Fuller, and John Bevan for their help with this article.*

Looking for a new and interesting way to rack up continuing legal education credit? Consider authoring an article for the *Utah Bar Journal*. If your article is published in the *Journal* you could earn up to 3 hours of CLE credit for 3,000 words.*

The *Bar Journal* editors are always interested in hearing 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, call (801) 297-7022, email barjournal@utahbar.org or write:

Utah Bar Journal
645 South 200 East
Salt Lake City, Utah 84111

*Contact the MCLE office for CLE eligibility requirements.

2009 Summer Convention Awards Presented

Judge Judith S. H. Atherton
JUDGE OF THE YEAR

Paul T. Moxley
LAWYER OF THE YEAR

New Lawyer Training Program Committee (NLTP)
COMMITTEE OF THE YEAR

Appellate Practice Section
SECTION OF THE YEAR

American Bar Association Representative

The Board of Bar Commissioners is seeking applicants to serve a two-year term as the Bar's representative to the American Bar Association's House of Delegates. The term would run through the August 2011 ABA Annual Meeting.

Please send your letter of application and resume no later than Monday, October 5, 2009 to John C. Baldwin, Executive Director, Utah State Bar, at jbaldwin@utahbar.org or 645 South 200 East, Salt Lake City, Utah 84111.

The ABA House of Delegates meets two times a year during the ABA conventions. There will be some preparation work to review issues and communicate with the Bar Commission. The Bar's delegate to the ABA is also an Ex-officio Member of the Utah State Bar Commission.

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:

Distinguished Community Member Award

Professionalism Award

***Pro Bono* Lawyer of the Year**

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.

Become a Mentor

Show a new lawyer the way to success

Mentor within your office, an individual, or a group

WHAT IS REQUIRED:

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

REWARDS – PRICELESS

Receive 12 hours of CLE Credit for your work

MENTOR QUALIFICATIONS

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

For more information on
BECOMING A MENTOR go to:

www.utahbar.org/nltp

The Benefits of Effective Mentoring

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

New Lawyer Training Program

Pro Bono Honor Roll

Andres Alarcon – Family Law Clinic

Nicholas Angelides – Senior Cases

Justin Ashworth – Family Law Clinic

Joshua Baron – Guadalupe Clinic

Thomas Barr – Guadalupe Clinic

Lauren Barros – Family Law Clinic

Tiana Berkenbile – Guadalupe & Contract Case

Callie Buys – Guadalupe Clinic

Maria-Nicolle Beringer – Consumer & Domestic Cases

Bryan Bryner – Guadalupe Clinic

William Carlson – Family Law Clinic

Heather Carter-Jenkins – Protective Order Hearings

David Castleberry – Landlord/Tenant Case

Roberto G Culas – Pro Bono LAMP Case

T. Edward Cundick – Bankruptcy Hotline

Ian Davis – Guadalupe Clinic

Keri Gardner – Family Law Clinic

Jeff Gittins – Guadalupe Clinic

Chad Gladstone – Family Law Clinic

Jason Grant – Family Law Clinic

Steven Gunn – Divorce Case

Kristy Hanson – Adoption Case

Kathryn Harstad – Guadalupe Clinic

Garth Heiner – Guadalupe Clinic

Shane Hillman – Landlord/Tenant Case

April Hollingsworth – Guadalupe Clinic

Kyle Hoskins – Farmington Clinic

Elizabeth Hruby-Mills – QDRO Case

Rex Huang – Pro Bono Contract Case

Linda King – Family Law Clinic

Louise Knauer – Family Law Clinic

Jennifer Korb – Guadalupe Clinic

Isaac James – Family Law Clinic

Kristin Jaussi – Guadalupe Clinic

Dixie Jackson – Family Law Clinic

Larry Jenkins – Adoption Case

Julian Jensen – Adoption case

Philip Jones – Bankruptcy

Tim Larsen – Bankruptcy

Darren Levitt – Family Law Clinic

Scott Windsor Lee – Indigent Guardianship Case

Elizabeth Lisonbee – Family Law Clinic

Randy McClure – Guardianship Case

Jeremy McCullough – Bankruptcy

Christina Micken – Adoption Case

Daniel Morse – Family Law Clinic

Jennifer Mastrorocco – Family Law Clinic

Sally McMinimee – Family Law Clinic

Adam Miller – Consumer Case

James Morgan – Guadalupe Clinic

Kate Noel – Guadalupe Clinic

Todd Olsen – Family Law Clinic

Rachel Otto – Guadalupe Clinic

Christopher Peterson – Foreclosure Scam Case

Craig T. Peterson – QDRO Case

Christopher Preston – Guadalupe Clinic

DeRae Preston – Family Law Clinic

Stewart Ralphs – Family Law Clinic

Brent Salazar-Hall – Family Law Clinic

Bruce Savage – Divorce Case

Lauren Scholnick – Guadalupe Clinic

Linda F. Smith – Family Law Clinic

Kathryn Steffey – Guadalupe Clinic

Steve Stewart – Guadalupe Clinic

Erin Stone – Guadalupe Clinic

Virginia Sudbury – Family Law Clinic

Earl D. Tanner Jr. – Estate Planning case

Richard Tanner – Protective Order Hearings

Tracy Watson – Family Law Clinic

Theodore Welkel – Family Law Clinic

Matthew Tyler Williams – Family Law Clinic

Robert Wing – Guadalupe Clinic

"BAR SHARKS FOR JUSTICE"

UTAH STATE BAR YOUNG LAWYERS DIVISION

Eighth Annual Pool Tournament & Social

October 8th & October 15th, 2009

Thursday Evenings Starting at 6:00
Match Times To Be Announced

Lumpy's Downtown - *A Private Club For Members*
145 W. Pierpont Ave, Salt Lake City

To register a team
Go to www.andjusticeforall.org to download a registration form or call 801-924-3182.
Registration deadline is October 1, 2009.

To join in the social festivities
Simply come to Lumpy's on any or all of the nights of play. You can socialize with old friends, meet new colleagues and cheer on your favorite team.

Proceeds benefit "and Justice for all"
a non-profit organization providing free civil legal aid to the disadvantaged in Utah

Printing Sponsor, Orange Legal Technologies

ORANGE LEGAL TECHNOLOGIES

Presenting Sponsor
CIT Bank

CIT

Venue Sponsor, Lumpy's Downtown

LUMPY'S DOWNTOWN

Lumpy's will also donate 10% of food sales

"Bar Sharks for Justice" Team Registration Form

Team Contact _____

Sponsoring Organization _____

Phone ( ) _____ Email _____

☐ **$250 Team Sponsor ($100 for Government & Non-Profit Organizations)**

Each team consists of a two-player team. However, teams have the option to switch either or both of the two players between matches (you may add/change alternate names at any time). Benefits include:

- Registration for 1 two-person team
- Two t-shirts
- Name listed on event web page & t-shirt
- Recognition in Utah Bar Journal ad following the event
- Included in "And Justice for All" newsletter

Player 1 _____
Circle T-Shirt S M L XL XXL 3XL

Alternate 1_____

Alternate 2_____

Player 2 _____
Circle T-Shirt S M L XL XXL 3XL

Alternate 1_____

Alternate 2_____

☐ **$500 Team Sponsor**

Each team consists of a two-player team. However, teams have the option to switch either or both of the two players between matches (you may add/change alternate names at any time). Benefits include:

- Registration for up to 2 two-person teams
- Four t-shirts
- Business name, logo, and link on event web page
- Logo on t-shirt
- Recognition in Utah Bar Journal ad following the event
- Included in signs at the event
- Included in "And Justice for All" newsletter

Player 1 _____
Circle T-Shirt S M L XL XXL 3XL

Alternate 1_____

Alternate 2_____

Player 2 _____
Circle T-Shirt S M L XL XXL 3XL

Alternate 1_____

Alternate 2_____

Player 3 _____
Circle T-Shirt S M L XL XXL 3XL

Alternate 1_____

Alternate 2_____

Player 4 _____
Circle T-Shirt S M L XL XXL 3XL

Alternate 1_____

Alternate 2_____

Payment

☐ Check payable to "Utah State Bar"

Send to Utah State Bar
645 S. 200 E.
Salt Lake City, UT 84111

☐ Visa ☐ Mastercard

Name on Card_____
Address_____
No. _____ exp. _____
Signature_____

Registration and fee must be received by October 1, 2009.
If you would like to order additional shirts or have questions, please call (801) 924-3182

Thank You and Welcome to New Admittees

New admittees will be welcomed into the Utah State Bar at the October 20, 2009 admission ceremony to be held at noon in Room 255 of the Salt Palace. Refreshments will be provided after the ceremony.

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

BAR EXAM QUESTION REVIEWERS

Craig Adamson	Aric Cramer	Gary Johnson	Robert Rees
Michael Allen	Lynn Davies	David Leta	Stephen Schwendiman
John Anderson	Brent Giauque	Abby Magrane	Mark Sumsion
Susan Black Dunn	Jim Hanks	Terrie McIntosh	Bob Thompson
Branden Burningham	Hon. Thomas Higbee	Langdon Owens, Jr.	Robert Thorup
David Castleton	Elizabeth Hruby Mills	Bruce Reading	Steven Tyler
	Jeff Hunt	Scott Reed	

BAR EXAMINERS

Jared Andersen	Drew Clawson	Derek Langton	Jonathan Parry
Mark H. Anderson	Stephen Edwards	Catherine Larson	Rachel Peirce
Mark R. Anderson	Trevor Eldredge	Loretta LeBar	Charles Perschon
Ken Ashton	Wade Farraway	Greg Lindley	Chad Platt
P. Bruce Badger	Russ Fericks	Patrick Lindsay	Stephen Quesenberry
Bart J. Bailey	Shannon Freedman	Amy Livingston	Peter (Rocky) Rognlie
J. Ray Barrios	Andrea Garland	Michael Lowe	Maybell Romero
Brent Bartholomew	Mike Garrett	Ben Lusty	Ann Rozycki
Carl Barton	Tammy Georgelas	Todd Mecham	Elizabeth Schulte
Jim Bergstedt	Robert Harrison	Vince Meister	John Sheaffer, Jr.
Karla Block	Kelly Hill	Tony Mejia	Mike Sikora
Anneliese Booher	Bill Jennings	Angela Micklos	Alan Stewart
Sara Bouley	Casey Jewkes	Branden Miles	Kevin Sundwall
Brad Bowen	Craig Johnson	Joanna Miller	W. Kevin Tanner
John Bowen	Michael Johnson	Elijah Milne	Stephen O. Taylor
David Broadbent	Randy K. Johnson	Doug Monson	Heather Thuet
Tiffany Brown	M. Kevin Jones	Elliot Morris	Steve Tingey
Heidi Buchi	Matthew Jube	Heather Morrison	Ann Tolley
Craig Carlile	Ben Kotter	Kim Neville	Elizabeth Whitsett
Jonathan Cavender	Hon. Mark Kouris	Jamie Nopper	Brent Wride
Gary Chrystler	Karen Kreeck	Michael Olmstead	John Zidow

Ethics Advisory Opinion Committee Seeks Applicants

The Utah State Bar is currently accepting applications to fill vacancies on the 14-member Ethics Advisory Opinion Committee. Lawyers who have an interest in the Bar's ongoing efforts to resolve ethical issues are encouraged to apply.

The charge of the Committee is to prepare and issue formal written opinions concerning the ethical issues that face Utah lawyers. Because the written opinions of the Committee have major and enduring significance to members of the Bar and the general public, the Bar solicits the participation of lawyers who can make a significant commitment to the goals of the Committee and the Bar.

If you are interested in serving on the Ethics Advisory Opinion Committee, please submit an application with the following information, either in résumé or narrative form:

- Basic information, such as years and location of practice, type of practice (large firm, solo, corporate, government, etc.) and substantive areas of practice, and
- a brief description of your interest in the Committee, including relevant experience, ability and commitment to contribute to well-written, well-researched opinions.

Appointments will be made to maintain a Committee that:

- Is dedicated to carrying out its responsibility to consider ethical questions in a timely manner and issue well-reasoned and articulate opinions, and
- includes lawyers with diverse views, experience and background.

If you want to contribute to this important function of the Bar, please submit a letter and résumé indicating your interest by September 25, 2009 to:

Ethics Advisory Opinion Committee
C/O Christy J. Abad, Executive Secretary
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111

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. Should you have questions regarding your CLE compliance, please contact Sydnie Kuhre, MCLE Board Director at skuhre@utahbar.org or (801) 297-7035.

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.

Attorney Discipline

ADMONITION
On June 15, 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 1.4(a) (Communication) and 8.4(a) (Misconduct).

In summary:
An attorney was hired to represent a client in a personal injury case. For approximately eight months the attorney rarely communicated with the client. The client contacted the attorney's office and spoke with a staff member on numerous occasions attempting to find out about the case. When the client asked for status updates, the attorney failed to comply.

ADMONITION
On June 15, 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 8.4(d) (Misconduct) and 8.4(a) (Misconduct).

In summary:
An attorney represented a client in a paternity action. The attorney, on behalf of the client, filed a petition for common law marriage. The attorney failed to notify the court in the common law marriage action of the pendency of the paternity action. Additionally, the attorney failed to notify the petitioner in the paternity action of the common law marriage action.

ADMONITION
On May 25, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.15(d) (Safekeeping Property), 1.15(e) (Safekeeping Property), 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct).

In summary:
The attorney and partners in the firm acknowledged that Workers Compensation Fund had a lien on settlement proceeds in regards to a case the firm was handling. The case settled and the funds were distributed to the client without paying the Workers Compensation Fund lien. The attorney delegated to a subordinate the assignment of carrying out some of the firm's responsibilities regarding the Workers Compensation Fund claim. No prior notification of settlement was made to the Workers Compensation Fund prior to disbursement. There was a potential dispute regarding the Workers Compensation Fund Claim that the attorney had researched and consulted on with the senior partner. The attorney did not place the settlement funds in safe-keeping until the Workers Compensation Fund claim dispute was resolved.

ADMONITION
On May 25, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.4(a) (Communication), 1.4(b) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct).

In summary:
The attorney accepted representation of a client and entered an appearance on the client's behalf, creating an attorney-client relationship. At the time the attorney entered an appearance, the

attorney knew that the matter could not be completed if a previously scheduled hearing was not continued. When the attorney's motion for a continuance was not granted, the attorney did not find another attorney to attend the hearing on behalf of the client and the attorney failed to prepare the client to appear pro se at the hearing. Furthermore, the attorney did not keep the client reasonably informed about the status of the case before and after the hearing; failed to attend a second hearing on behalf of the client or withdraw from representation of the client prior to the hearing.

ADMONITION

On June 8, 2009, the Vice Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 5.1(a) (Responsibilities of Partners, Managers, and Supervisory Lawyers), 5.1(c) (Responsibilities of Partners, Managers, and Supervisory Lawyers), and 8.4(a) (Misconduct).

In summary:

An attorney practiced in a law firm with a partner. The attorney did not exercise sufficient oversight of the partner's use of the firm's trust account. The attorney did not question the amount of the fee the firm received in comparison to the cash payment received by the client. Furthermore, the attorney did not investigate the matter further when he received a letter from counsel for the client disputing the amount of the fee. Instead, the attorney simply relied on the representation of events from the partner.

ADMONITION

On June 15, 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 8.1(b) (Bar Admissions and Disciplinary Matters) and 8.4(a) (Misconduct).

In summary:

An attorney knowingly failed to respond to the OPC's first request for information after the OPC received a notice of insufficient funds on the attorney's trust account. The attorney's various responses and submissions to the OPC, both written and in testimony, contained several inconsistencies.

ADMONITION

On June 15, 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 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.15(a) (Safekeeping Property), 1.15(c) (Safekeeping Property), 3.2 (Expediting Litigation), and 8.4(a) (Misconduct).

In summary:

An attorney was hired to file a Bankruptcy Petition. The attorney was paid advance money to file the Bankruptcy papers. Of the advanced money, part was designated for attorney fees and part was designated to pay the filing fee, according to the attorney's fee agreement. The attorney deposited all the money into the operating account. After receiving payment from the clients, the attorney failed to return calls from the clients and failed to keep them updated regarding their case. The attorney failed to file the Petition for Bankruptcy or any other papers on behalf of the clients. The attorney failed to refund the unearned fees; and the attorney failed to refund the payment for the filing fee that was not incurred; and the attorney failed to turn the file over to the clients or their new attorney.

ADMONITION

On June 15, 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 4.2(a) (Communications with Persons Represented by Counsel) and 8.4(a) (Misconduct).

In summary:

An attorney was notified that an individual was represented by counsel. The attorney wrote directly to the individual after receiving the notice from the individual's attorney.

INTERIM SUSPENSION

On June 8, 2009, the Honorable Joseph C. Fratto, Third Judicial District Court, entered an Order of Interim Suspension Pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability, suspending Donald J. Purser from the practice of law pending final disposition of the Complaint filed against him.

In summary:

On May 15, 2008, Mr. Purser was found guilty of one count of Sale of Unregistered Security – 3rd Degree Felony, *see* Utah Code Ann. §61-1-7 (2006); *id.* §61-1-21. On October 15, 2008, Mr. Purser was found guilty of one count of Securities Fraud – 2nd Degree Felony, *see id.* §61-1-1; *id.* §61-1-21. The interim suspension is based upon the felony convictions.

INTERIM SUSPENSION

On June 8, 2009, the Honorable Robert Faust, Third Judicial District Court, entered an Order of Interim Suspension Pursuant to Rule 14-518 of the Rules of Lawyer Discipline and Disability, suspending Matthew T. Graff from the practice of law pending final disposition of the Complaint filed against him.

In summary:

An attorney discipline complaint was filed against Mr. Graff. Subsequent to the filing of the discipline complaint felony criminal charges were filed against Mr. Graff. The attorney discipline complaint allegations are independent of the criminal charges. However, Mr.

Graff's acknowledged that his practice of law pending resolution of the attorney discipline action and the pending criminal charges poses a substantial threat of irreparable harm to the public.

SUSPENSION

On July 2, 2009, the Honorable Sandra N. Pueler, Third District Court entered an Order of Discipline: Suspension for six months all but 30 days stayed with probation imposed against Richard Nemelka for violation of Rules 1.7 (Conflict of Interest: Current Clients), 3.3 (Candor Toward the Tribunal), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Nemelka signed his clients' names, notarized the signatures, and filed the documents with the court allowing the court to believe that his clients had actually signed the papers.

Mr. Nemelka filed motions to intervene in two of the underlying cases so that he could pursue collection of his fees while still representing the clients.

The following were aggravating factors: prior record of discipline; pattern of misconduct; multiple offenses; and substantial experience in the practice of law. The following mitigating factors: remorse; absence of a dishonest and selfish motive; good character and reputation.

PUBLIC REPRIMAND

On June 15, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Roy D. Cole for violation of Rules 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Cole worked with a nonlawyer assisting clients with immigration cases. Mr. Cole clearly knew that the nonlawyer was not a licensed Utah attorney. Mr. Cole knew he would be supervising the nonlawyer, but failed to adequately explain and communicate that to his clients. Mr. Cole failed to keep his clients adequately informed of what was going on with the case. Mr. Cole failed to provide copies of any documentation to the clients. Mr. Cole failed to explain the scope of the representation to the clients and, based on the various accounts given to the disciplinary authority, the disciplinary authority could not discern what was the actual scope of representation. Mr. Cole failed to provide legal services for the fee he charged his clients. Mr. Cole failed to present any evidence to show that the fee collected was reasonable given the work performed.

Young Lawyer Division Celebrates Pro Bono Opportunities

As the Utah State Bar prepares for the upcoming American Bar Association's ("ABA") National Pro Bono Celebration October 25-31, 2009,[1] I would like to highlight a few of the pro bono and service opportunities offered by the Young Lawyers Division ("YLD"). If you would like to get involved in these or other YLD activities, please visit www.utahyounglawyers.org or contact Michelle Allred at allredm@ballardspahr.com.

Tuesday Night Bar

Since October of 1988, the YLD has coupled with the Utah State Bar to provide a free legal advice program to help members of the community to determine their legal rights on a variety of issues. Each year, approximately 1100 individuals meet with a volunteer attorney for a brief one-on-one consultation at no cost. Tuesday Night Bar is held the first four Tuesdays of each month between 5:00 p.m. and 7:00 p.m. at the Utah Law & Justice Center, 645 South 200 East, Salt Lake. Volunteers are also needed for a Spanish-language clinic held on the first and third Wednesday of each month at the Sorenson Multicultural Center, 855 West 1300 South, Salt Lake, from 6:00 p.m. to 8:00 p.m.

Wills for Heroes

The Wills for Heroes program was predicated upon the alarming fact that an overwhelmingly large number of first responders – 80 to 90 percent – do not have simple wills or any type of estate planning documentation, although they regularly risk their lives in the line of duty. The objective of the Wills for Heroes program is to provide free estate planning documents to firefighters, police officers, paramedics, corrections and probation officers, and other first responders and their spouses or domestic partners. The Wills for Heroes program involves attorneys and first responder organizations in both metropolitan and rural communities throughout the state. Visit www.utahyounglawyers.org to see the calendar and locations of upcoming volunteer opportunities.

Choose Law

The Choose Law Program is focused on educating students from at-risk backgrounds about the legal profession. Through partnerships with several local high schools, YLD attorneys have an opportunity to meet with students and highlight the importance of law in society and the diverse careers that a law degree can provide. The most important part of the program is the emphasis on the importance of education and the instruction and mentoring that the students receive from the volunteer attorneys.

Fight Against Domestic Violence

The YLD is teaming up with the ABA in the fight against domestic violence. The YLD has held a toy drive for children in domestic violence shelters, a professional clothing drive for victims of domestic violence, and is in the process of planning "A Mile In Her Shoes: A Walk Against Domestic Violence," a community-wide walk to raise awareness of domestic violence issues. All proceeds raised will be donated to domestic violence shelters in the Salt Lake area. Visit www.utahyounglawyers.org for additional details. Opportunities are also available to represent domestic violence victims in hearings under the Utah Cohabitant Abuse Act.

Mentoring Opportunities

The YLD provides several mentoring opportunities, including programs to provide mentoring to new lawyers entering the legal profession, law students, and high school students. Visit www.utahyounglawyers.org for additional details.

Needs of Children

The YLD will continue to hold toy drives and clothing drives for children in state custody or otherwise in need. In addition, the YLD will, once again, sponsor Private Attorney Guardian

ad Litem Training for attorneys who want to become eligible to work as a private Guardian Ad Litem ("GAL"). A private GAL is a court-appointed attorney who represents the best interests of children in proceedings involving custody and parent time disputes. Visit www.utahyounglawyers.org for additional details.

Cinderella Project

The Cinderella Project is a relatively new project aimed at providing low-income and disadvantaged high school aged young women with new or gently worn formal dresses and accessories to allow them to participate in school activities that they would otherwise be unable to attend, specifically the high school prom and other formal activities. The YLD volunteers work with the community to receive donations of special occasion attire, and then work with the individual students to provide assistance and mentoring to the young girls. Ultimately, the program seeks not only to boost self-esteem and provide positive role models for young women who have succeeded in the face of overwhelming adversity, but also works to remove social barriers and promote inclusiveness and diversity in the community.

Citizenship Initiative

The YLD is beginning a new program this year aimed at assisting individuals who are preparing to take the Naturalization Test and become U.S. citizens. Volunteer YLD attorneys will assist in tutoring individuals on the fundamental concepts of American democracy and the rights and responsibilities of citizenship, including topics such as basic U.S. history and civics.

1. The annual National Pro Bono Celebration is scheduled for October 25 through 31, 2009. Sponsored by the ABA, the celebration is a coordinated national effort to showcase the great difference that pro bono lawyers make to the nation, its system of justice, its communities, and most of all, to the clients they serve. The week is also dedicated to the quest for more pro bono volunteers to meet the ever-growing legal needs of this country's most vulnerable citizens.

National Pro Bono Celebration
October 25-31, 2009

CELEBRATE PRO BONO

The American Bar Association Standing Committee on Pro Bono and Public Service is sponsoring the first National Pro Bono Week Celebration. As part of the weeklong National Pro Bono Celebration, bars and legal organizations across the country have planned more than 180 commemorative educational events in 39 states.

As one of many events in Utah celebrating National Pro Bono Week, members of the Utah State Bar will serve lunch at the St. Vincent's dePaul Resource Center in Salt Lake City on Tuesday, October 27, 2009. Following the meal, lawyers will offer a free legal clinic, answering questions regarding a variety of legal topics.

If you are interested in participating in the event at St. Vincent dePaul Resource Center, please contact Christy Abad at 801-297-7031 or christy.abad@utahbar.org.

You can find more information about National Pro Bono Week at www.celebrateprobono.net. Information about other events taking place in Utah during National Pro Bono Week will be made available on the bar's website: www.utahbar.org.

Propagating Paralegal Punditry

by Aaron L. Thompson

In all my years working in the paralegal profession one alliteration has forever influenced my daily decisions; "Prior Preparation Prevents Pretty Poor Performance."

I recently became the newest Chair of the Utah State Bar Paralegal Division. With the welfare of our division weighing heavily on my mind I can not help but naturally assume the role as its Chief Cheerleader, incessantly proclaiming the diverse benefits that paralegals provide to the legal profession. And yet this single resounding alliteration continues to reverberate the inherent significance of our state's paralegals ever so naturally.

As a paralegal I haven't taken the normal career route. The State of Utah has a large portion of paralegals that work for law firms. However, this is metaphorically where the two roads diverge and having taken a different route has provided me a greater understanding of how valuable our paralegals are to the State of Utah, our legal profession, and our local and national communities.

Having felt the paralegal call to service through civic duty to continually strive to fight for justice and the betterment of my local and national communities, I equally divided my time working between the legal profession as well as political causes. In so doing I have seen the many ways that paralegals are being utilized in other states that have yet to occur in our great state of Utah.

I have thoroughly enjoyed the many years working as a paralegal in the political environment with local and national elections. I have learned that paralegals can be found in so many industries assisting the efforts for something as simple as college and university legal departments all the way up through the inner workings of the recent Presidential elections. As we lived our lives leading up to the 2008 November General Election, paralegals were being sent to various states to perform Advance Staff logistics working with local contractors to ensure the various events would run smoothly. Paralegals were being employed in opposition research, rapid media response, F.E.C. and campaign expenditure filings, as well as working with local attorneys in various states to protect against voter intimidation and voter fraud. Paralegals have also been found conducting multifaceted domestic and international event scheduling for the State Department, writing speeches, talking points, press releases, conducting surveys, as well as implementing logistical plans for the past Presidential inauguration. Paralegals inherently multi-task and carry a diverse set of tools in their holsters somewhat like a Swiss Army knife.

We all are experiencing the financial market crises now being scrutinized by our legislators and senatorial committees. All these matters and more are predominantly on the minds of the Utah State Bar Paralegal Division Board of Directors. Accordingly, we are working hard to bring a comparative economic value to the work we perform.

We have already begun a new plan to communicate our efforts more efficiently through the recent development of a new user-friendly web site. As a Board we are additionally proud of the design of a new Division logo recently completed and originally drafted by a local Utah graphics art talent, Jonathan Turner from Logan, Utah. As with any logo, a lot of planning, research, and discussion went into drafting this logo to find a symbol that conveys the significance of our role as directors, paralegals, and members of the legal community. Contained within this logo you will find the year our Division was established, the scales of justice, the gavel, the state flower, and the state symbol of the beehive. As paralegals we are industrious by nature with a

AARON THOMPSON is a paralegal specializing in risk management and diverse commercial insurance exposures with Headwaters Incorporated and the current Chair of the Utah State Bar Paralegal Division.

glowing sense of pride in the progress of our local and national community. We love to help bring down the costs of hiring legal professionals and making legal services more affordable. We thoroughly enjoy the many opportunities we have to continually support attorneys. Like the symbolic nature of the colors laden in the artwork of our Division's logo, we are driven by our idealism and bound by our judicial loyalty to those we work for in our individual paralegal expertise, albeit corporate law, medical malpractice, or criminal law among various other specialties. Our Division members are utilized in a wide-range of legal and non-legal professions in this country and within our state. Our members work as paralegals for a variety of public, private, and governmental institutions in Utah.

As we round out the final months of this year, I hope you will take my advice to heart and examine those paralegals who work around you and value them for their tireless problem-solving efforts. Paralegals naturally execute the optimal work product understanding the spirit of this little statement that "prior preparation (always) prevents pretty poor performance." I hope you will continually lean on the diverse skill set of paralegals, realizing their extensive economic value. Additionally, in the next year as a Division we hope to hone our skills while becoming more integrated in various aspects of the Utah Bar's work to ensure a fair and impartial judiciary. We also hope that you will follow our initiatives to better the paralegal profession through unfettered professional dedication, civility, and contributions to improve our legal and local community.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
09/24/09	**NLCLE: Family Law.** 4:30 – 7:45 pm. Member in practice less than three years: $75 pre-registration/$80 at the door, all others: $90 pre-registration/$100 at the door.	3 CLE/NLCLE
09/25/09	**Utah Cyber Symposium 2009.** All day seminar beginning at 8:00 am at Thanksgiving Point, Lehi, UT. Featured speakers: David Bradford, CEO of Fusio-io – former General Counsel of Novell and Paul Levy, Public Citizen. Early registration: (before August 31, 2009): $120 Cyberlaw Section members or non-lawyers, $140 to join Cyberlaw Section and register for the even, $180 for non-members. Breakfast and lunch are included.	6 including 1 hr professionalism & civility
10/02/09	**Annual Construction Law Seminar.** 9:00 am – 4:30 pm. Downtown Marriott, 75 South West Temple, Salt Lake City. $85 section members, $210 others.	7 incl. 1 hr professionlism
10/02/09	**Limited Representation.** 8:30 am – 12:00 pm. How to effectively use limited representation. Including: Ethical considerations, court's reactions, profitability and forms, forms you need to get it right, bumps in the road. Practitioners Virginia Sudbury, Rebecca Long, and Adam Ford. Judges Hon. Rodney S. Page, Hon. John L. Baxter, and Hon. Lames L Shumate. $90	3
10/13/09	**What Can I Expect for My Upcoming Trial?** 8:30 am – 5:00 pm. Co-sponsored by Utah Association for Justice. $125 for new lawyers (in practice three years or less), $75 Paralegals, $200 others.	7 NLCLE
10/15/09	**Judicial Ideas on Written Persuasion.** 4:00 – 7:00 pm. Second District Court Hon. Michael D. Lyons; Third District Court Hon. Anthony Quinn, Hon. Kate A. Toomey, Hon. Lee A. Dever; Fourth District Court Hon. Claudia Laycock; U.S. District Court Hon. Dee V. Benson; Utah Court of Appeals Hon. Gregory K. Orme, Hon. Pamela T. Greenwood; Utah Supreme Court Justice Jill N. Parish. $80 Active under three, $90 early registration, $110 door.	3
10/23/09	**CLE & Golf, St. George, Sand Hollow.** Agenda pending. SUBA and Litigation Secion members: $65 for CLE & golf, $40 CLE only; all others: $150 CLE & Golf, $90 CLE only.	3
10/29/09	**New Lawyer Ethics Program.** 8:30 am – 12:30 pm. $75.	fulfills new lawyer ethics requirement.
10/29/09	**NLCLE: Business Law.** 4:30 – 7:45 pm. Member in practice less than three years: $75 pre-registration/$80 at the door, all others: $90 pre-registration/$100 at the door.	3 CLE/NLCLE
11/12 & 13	**FALL FORUM – Downtown Marriott, Salt Lake City** **See insert in the center of this Bar Journal for details.**	**9* including ethics**
12/10/09	**7th Annual Utah Elder Law, Estate Planning, & Medicaid Planning 2009.** All day. Speakers will include Robert Fleming, Brad Frigon and Calvin Curtis. Topics will include "Medicaid and Estate Planning Update," "What You Must Know About Asset Protection," and "Effective Retirement Plan and IRA Beneficiary Designations." $249 before December 8, 2009, $269 at the door.	TBA
12/11/09	**Annual Lawyers Helping Lawyers Ethics Seminar.** 8:30 am – noon. $90 if registered and paid before December 9, $120 after.	3 Ethics incl. 1 professionalism
12/15/09	**Best of Series.** $30 per credit hour, 5 sessions offered starting at 9:00 am.	TBA
12/16/09	**NLCLE: Litigation.** (Subject to Change) 9:00 am – 12:00 pm. Member in practice less than three years: $75 pre-registration/$80 at the door, all others: $90 pre-registration/$100 at the door.	3 CLE/NLCLE
12/18/09	**6th Annual Annual Benson & Mangrum on Utah Evidence Seminar.** All day. $140 without book and $240 with book. (New book required if you have not purchased a book in two years.)	6.5 incl. 1 hr. professionalism

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.

OFFICE SPACE/SHARING

Office space located at 837 South 500 West, Bountiful. Private suites located inside existing law firm start at $175 per month. Independent suites up to 2,000sf also available. Contact Heidi smaproperty@gmail.com or 801-815-9095.

Office Space in Ogden. $200/month for first 6 months then $300/month. Walking distance to courts. Receptionist, copier, fax, internet, voicemail, phone, large conference room, 2 bathrooms, kitchenette, janitorial, utilities, alarm system, landscaping, snow removal and ample parking available. 2 offices left. Contact Laura Thompson at (801) 560-7778.

Prime Downtown & Holladay full service office space available: 275 S Temple 1,100 sq ft at $13.50 sq ft, 4190 Highland Dr 7,650 sq ft at $13.00 sq ft, 2225 Murray-Holladay Rd 5,300 sq ft at $12.00 sq ft. We'll size & build to suit. Contact Barbara at 801-450-3135.

The Prime, second story office suite of the Salt Lake Stock and Mining Exchange Building overlooking historic Exchange Place through floor to ceiling windows, is now available for lease. This includes seven separate office spaces, with reception/secretarial area and individual restrooms - $5000 per month. Also available, one large, main floor office 16'x28' – $800 per month. Unsurpassed tenant parking with free client parking next to the building. Contact Richard or Michele at 801-534-0909.

POSITIONS AVAILABLE

APPLICANT FOR CRIMINAL CONFLICT OF INTEREST CONTRACT – The Salt Lake Legal Defender Association is currently accepting applications for several trial and appellate conflict of interest contracts to be awarded for the fiscal year 2010. To qualify for the trial conflict of interest contract, each application must consist of two or more attorneys. Significant experience in criminal law is required. Application due on or before November 25, 2009. Please contact Lisa, 801-933-8703.

Mid-sized Salt Lake City law firm seeks attorney or group of attorneys with portable book of business. This is an opportunity to join an experienced, established firm. Excellent work environment and benefits package. Send inquiries to Confidential Box #20, Attn: Christine Critchley, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834 or by email ccritchley@utahbar.org.

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

Legal Secretary with 3 to 5 years of experience sought for general practice firm. Salaried position with full benefits after 90 days. Salary commensurate with experience. To apply, please submit your resume along with your requirements to: litigationstaffsearch@gmail.com.

Smith Knowles, Mid-Size AV-Rated firm located in Weber County is accepting applications for Associate Attorney with 5 to 10 years experience in Business Entity and Transaction practice. Qualified candidates must be highly motivated with excellent research/writing skills. Existing cliental a plus. Send resume to mmoyes@smithknowles.com or fax 801-781-2152.

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CHILD SEXUAL ABUSE – SPECIALIZED SERVICES. Court Testimony: interviewer bias, ineffective questioning procedures, leading or missing statement evidence, effects of poor standards. Consulting: assess for false, fabricated, misleading information/ allegations; assist in relevant motions; determine reliability/validity, relevance of charges; evaluate state's expert for admissibility. Meets all Rimmasch/Daubert standards. B.M. Giffen, Psy.D. Evidence Specialist (801) 485-4011.

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

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