Utah Bar™ JOURNAL

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Cover Art

Ice and Leaves, Federal Building, Salt Lake City, Utah, by six-time contributor, Craig McAllister, Orem.

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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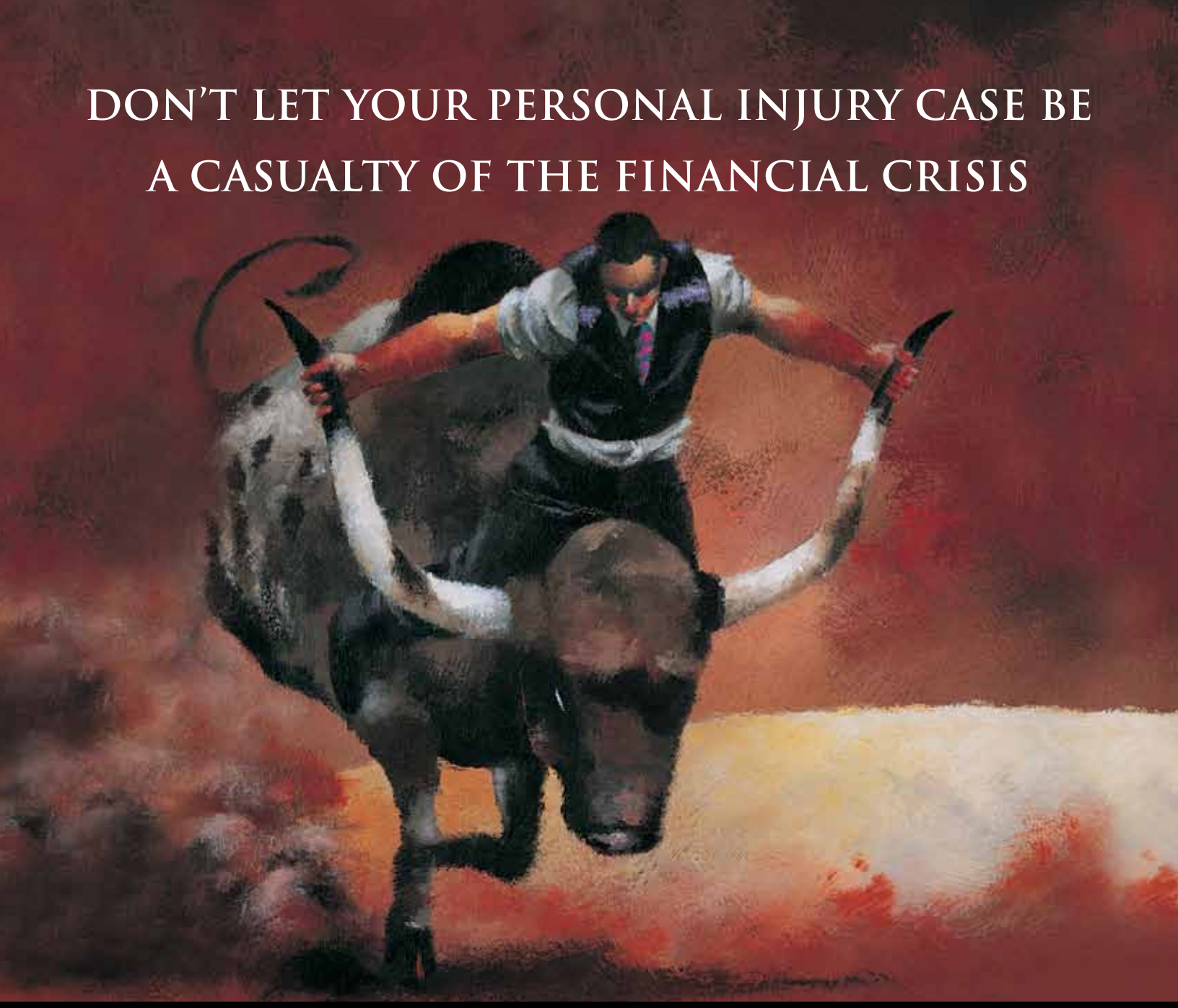

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Letters Submission Guidelines:

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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The Utah Bar Journal

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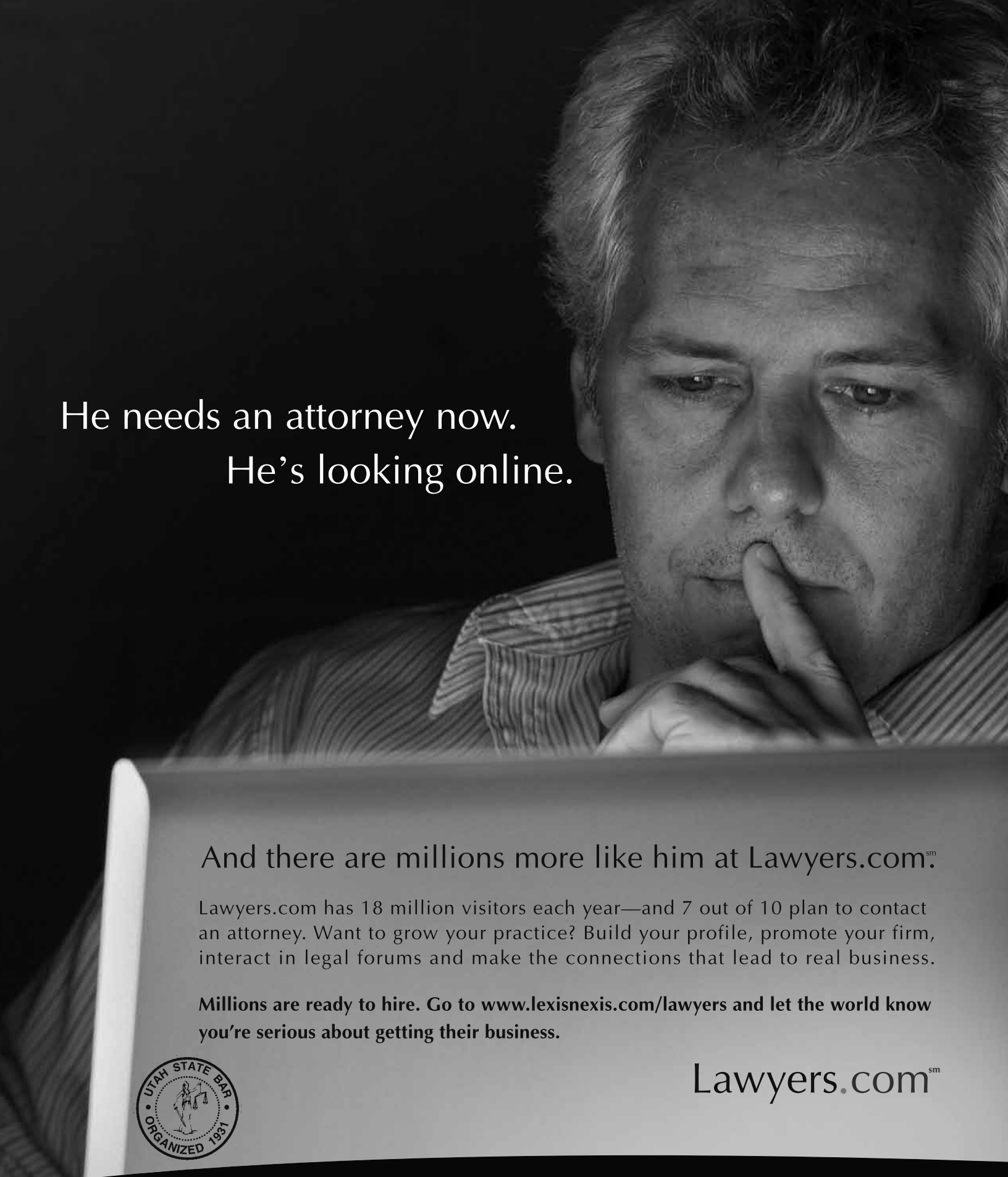

Welcoming 320 New Lawyers Into Our Fold: A Force of 10,000 Problem Preventers and Solvers

by Stephen W. Owens

On October 20, we swore in 320 new lawyers in a crowded ceremony at the Salt Palace. With this addition, we hit the significant milestone of 10,000 problem preventers and solvers. About a quarter of these are on inactive status. We are a force for good, helping maintain a peaceful and fair society.

My wife tells me that people do not like unsolicited advice, and I am trying to get better at keeping my mouth shut unless asked. Nevertheless, I cannot resist this opportunity to give a little counsel to our new colleagues:

Be Prepared
The Scout Motto applies to you. You may be up against some old fart who has warts older than you, but you may find out that the veteran lawyer also has not consulted the Court Rules since then either. Preparation will pay off and may win the day.

Do Not be a Jerk (Unpleasant)
Being an unreasonable jerk will not better serve your client, will alienate your judge, and will eventually come back to bite you. Check your ego at the door and be nice.

Keep Your Client's Expectations Reasonable
Only a fool promises the moon and the stars to a client. Matters sometimes go south, and you will be in an uncomfortable spot if you have led your client to believe otherwise.

Do Not Personally Attack Opposing Counsel
This will never serve your purposes and it invites mud-slinging back your way.

Do Not Interrupt a Judge
It is shocking how many times I have seen this simple rule violated. If the judge wants to point out a concern, shut up and listen.

Realize That You Do Not Create the Facts
This concept will take a lot of stress out of your practice. Live with your facts and be as persuasive as you can with them. Hiding or twisting facts will hurt your cause and credibility.

Treat Your Client's Money as Sacred
It is sacred. Even if a stocky loan shark from Vegas is on your tail, do not touch your client's money. Otherwise, you will go to jail and be disbarred. Don't worry, your knee caps will heal.

Live Within Your Means
Do this and you will not have to worry about the situation described above. My wife and I shared a dumpy Honda Civic with no air conditioning for more years than I care to admit. The fact is, impressing shallow people is over-rated.

Find A Law Niche That You Enjoy
You will like your work more and be able to command greater demand for your services, not to mention a higher fee. You will work more efficiently and obtain better results.

Do Not Neglect Your Personal Health and Relationships
Be careful not to neglect yourself and loved ones. Get enough sleep. Eat right. Exercise. Develop your friendships. Protect your mental health. Avoid addiction.

Always Have a Pro Bono Case
You will be a hero to someone who is in over his or her head and needs a hero. You will always remember these cases.

Consider "Unbundling" Your Services
Many people with legal needs cannot afford full representation for their problems from A to Z. However, these people would benefit from and can afford limited representation to help them reach their goals.

Welcome to our new colleagues! The New Lawyer Training (Mentoring) Program will help in the transition. Thanks for allowing me to serve as your president.

Thank You!

Our deepest thanks to all of the Utah State Bar Sections and Commitees for their invaluable service and commitment to the Bar, the legal community, and the citizens of our state. We appreciate your contributions.

Sincerely,
The Utah Bar Commission & Bar President Stephen W. Owens

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Maintaining Good Client Communication: An Ethical Responsibility and Practical Imperative

by Aaron Bartholomew and Carolyn E. Howard

Lawyers in a general practice setting regularly deal with clients who are experiencing some of the most challenging times in their lives. Clients in these circumstances not only demand competent legal practice from their lawyers, but also effective and regular communication. From a client's point of view, no amount of expertise and legal acumen trumps the client's need to be "kept in the loop." Effective communication with clients may be the most important factor in promoting the stability and success of a law practice.

It is no secret that allegations of inadequate communication are among the most common complaints made against lawyers. Inadequate communication is a problem so pervasive and so easily preventable that we all need to take it more seriously. At a recent conference, Sharadee Fleming, Assistant Counsel for the Utah State Bar Office of Professional Conduct (OPC), shared various statistics regarding the number of bar complaints each year and the reasons for those complaints. From 2005 to 2006, over 72% of complaints to the Utah Bar were related to client communication. Subsequent years have seen improvement in that percentage, but inadequate communication still ranks as the most common complaint made to the OPC.

Practicing attorneys learn very quickly that although we make our living building cases for our clients, we must simultaneously take steps to protect ourselves from potential complaints. Many of us treat the possibility of a bar complaint as a matter of inevitability, and rightfully so. There is a reasonable chance that we will all face one or more bar complaints during our careers, and odds are that it will be related to insufficient communication with a client. If for no other reason than pure self-interest – in order to spend more time in pursuit of billable hours and less in dealing with complaints – as a profession we need to do better in order to create a communication-conducive environment with our clients. Good communication is good business and is bound to bring dividends in the form of returning clients and new referrals.

COMMUNICATION AND THE RULES OF PROFESSIONAL CONDUCT

The Utah Rules of Professional Conduct set forth the general requirements regarding client communication, two of which in our experience are most commonly the concern of clients: "A lawyer shall…keep the client reasonably informed about the status of the matter [and]… promptly comply with reasonable requests for information." Utah Rules of Prof'l Conduct R. 1.4(a)(3) and (4).

In our firm, we have instituted a series of simple, systematized procedures to facilitate time-effective avenues for attorneys to keep clients updated and informed. While we are not experts in communication skills, we have found the following procedures to be effective in maintaining good client communications and preventing client complaints related to inadequate communications:

Telephone Communications

Telephone Logs: Incoming and outgoing telephone calls can be documented in a central repository and in the client's file.

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CAROLYN E. HOWARD is an attorney with Bartholomew, Silva & Associates Law Firm practicing in criminal law, family law, and appeals. She is an Assistant Professor at Utah Valley University and the former Paralegal Director. She is currently on the ABA Advisory Panel.

Even a brief outgoing call may be documented with the operative detail such as, "Called John on April 29, 2009 at 8:25 a.m.; No answer; Left a message re status of case." This technique can become very important when John receives his billing statement and thinks to himself, "But I have not talked to my lawyer in weeks, and my lawyer is ignoring me." But when John comes to our office for his next appointment, we have ready and available documentation indicating every call coming from John and every call made to him. This documentation serves as proof of consistent, maintained communications with the client.

Maintaining a regular telephone log also guards against potential complaints from a difficult client who may simply be dissatisfied with the outcome of the case. For example, recently our staff took a call from an indignant client who accused one of our attorneys of never returning the client's dozen or so calls within the previous month. Because we have the practice of faithfully maintaining a phone log, a quick review of our records showed that the client had not called a dozen times, but three times, two of which were after hours. Moreover, the log showed that all calls had been returned and messages left. We had recorded the dates and times for every call to and from the client. Once a diplomatic staff member reviewed this information with the client, the client felt very satisfied that it was a simple matter of missed connections. What could have been a brewing complaint was quelled with a simple and systematic office procedure.

It is the practice of one attorney in our firm to give her mobile phone number to her clients. Often clients who have concerns want to talk to their attorney *right away.* Having the attorney's mobile phone number often soothes frazzled nerves, even if the client can only leave a voicemail. A voicemail greeting may be recorded indicating that the lawyer is in court or in an appointment, but that if the client leaves a message with any important information the client wants the lawyer to know, the client's phone call will be returned as soon as possible. Of course the lawyer has no obligation to immediately respond to a message received at midnight, but clients are generally reassured when they know their lawyer is aware of the immediate concern. Giving out a mobile phone number is not for every lawyer, but every lawyer should have a telephone number available for the client where the client can leave a message with any immediate concerns and questions.

Written Communications

With readily available technologies like e-mail, instant messaging, texting and "twittering," there is really no reason not to regularly and frequently communicate with clients in writing. The obvious advantages of written communications over oral communications are that they can be easily accessed and referred to without any questions of credibility regarding the substance and timing of communications.

E-mail and Other Electronic Messaging: Increasingly, it seems that e-mail is the most time-effective way to correspond with clients, answer questions, and otherwise keep them informed. However, the privacy concerns surrounding e-mail use by law offices have caused several jurisdictions to adopt special rules regarding the use of e-mail. The American Bar Association has weighed in on the matter and approved e-mail as a medium for conveying confidential and privileged information. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999).

While e-mail is generally a very useful and effective electronic communication tool, time and experience have led us to conclude that some of the other forms of electronic written communication, such as instant messaging, texting, and other more cursory communication methods are too informal to effectively meet the needs of our clients.

Letters: While letters may be considered by some to be "old-fashioned" in comparison to e-mail, for a client, there is still nothing that compares to a periodic update in a written letter. Our firm reviews each client file at regular intervals to ensure that letters are sent to each client informing them of the status of their case, even if we are simply "waiting" for an opposing party to respond to discovery requests or the court to rule on a motion, etc. These status letters often reflect our prior communications with the client such as, "as we talked on the phone about," or "as you said in our office appointment last week," etc.

Status letters also document the decisions clients make regarding their cases. If the road a client has chosen ultimately proves unsuccessful, we have written documentation showing when the client made an informed decision to take that path. For example, in criminal cases where clients are facing potential incarceration, we will always send out a letter before trial confirming with the clients that they are aware of the consequences of taking the matter to trial and the risks trial will entail, especially when a client has refused a plea deal. If the trial results in a conviction, the last thought we want our clients to have is that their lawyer did not disclose that incarceration was possible or even likely. The thought may still cross the clients' mind, but a letter from the office beforehand can help to avert a complaint based on a failure to communicate or disclose relevant considerations.

CLIENT DISCIPLINE

Most attorneys have had to confront the issue of a client acting or "communicating" inappropriately. As attorneys, our view of what constitutes regular and reasonable communications sometimes differs from that of our clients, and a client may expect to be treated as the attorney's "only client."

Some years ago, our firm had a client who had the tendency to come to our offices unannounced and without an appointment, bypass our front-office staff, and either barge into the attorney's office, or peer through the window asking the attorney to come out and meet while the attorney was in an appointment with another client. After this happened a few times, we felt compelled to confront the client and explain that such behavior was inappropriate, disrespectful, and could result in the termination of our representation if the behavior continued. We outlined a plan with the client of when we would be communicating with the client outside of exceptional or emergency circumstances or a scheduled appointment. While not the most pleasant conversation, that discussion had the effect of creating more reasonable expectations for the client, and provided a framework for both the attorney and the client to achieve effective, organized communication.

Since that experience, we have been more vigilant in addressing client communication issues early in the attorney-client relationship. Clients need to be informed before a problem arises of the demands of an active law practice, and the fact that attorneys may not be immediately available when a client calls or makes an unannounced

office visit. Communication expectations and provisions need to be openly discussed, and preferably memorialized in writing, such as in the initial engagement letter.

Fee Disputes

Other than a general lack of communication, failure to communicate regarding financial matters is the most common client complaint. Frequent and detailed communication regarding client bills is extremely important to client satisfaction.

While the subject of good billing practices is worthy of an article in and of itself, the communications aspect of billing is worth addressing here. In our office, we have found the following practices extremely helpful when communicating with clients about billing:

- The frequency of billing may depend, in part, on how much time the attorney is spending on the particular case. In times of very time-consuming work, billing at least weekly lessens the "sticker shock" when the client receives the attorney invoice. Bill at least monthly if not more frequently.
- Provide detailed, plain-English explanations of what the client is being billed for. The more detail the attorney provides, the more the client is going to appreciate the work performed and understand what the attorney is charging the client for. If the attorney has not already done so, sending along copies of court filings or other work product with the invoice demonstrates the work performed often better than the bill can by itself.
- Provide updates of the client's trust account balance, if applicable, as well as what the client should expect in the coming weeks and months in terms of fees expected to be incurred.

As attorneys, we know the craft of lawyering, but that does not always translate into being effective communicators with our clients. We sometimes lose sight of the reality that, while practicing law may be a job for us, we deal with matters that are extremely worrisome and stressful to our clients, and they expect – and need – regular communication with their lawyers to see them through those difficulties. Creating and fostering a culture of disciplined communication with our clients is an ethical mandate and an excellent business practice.

Metadata Minefield, Utah Rules

by Steven L. Nichols

In December 2005, the Florida Bar's Board of Governors (Board) considered the issue of lawyers who look for metadata in electronic documents they have received, for example, from opposing counsel. The Board voted unanimously for a motion condemning the practice and referred two specific questions related to the practice of mining metadata to the Professional Ethics Committee of the Florida Bar. This moment in legal ethics history was made most notable, however, because several Board members stated publically that, prior to having this issue raised, they had never heard of metadata.

Consequently, for the sake of clarity, we will note that "metadata" is defined as data about data. The metadata with an electronic document might, for example, specify who wrote the document, indicate how long it took to edit the document, include comments made about the text of the document not retained in the text itself, and show wording in the document that was changed or deleted. While such metadata does not appear in the text of the finished document, it may be lurking in the electronic file of the document and may be transmitted along with an electronic version of the document that is sent, for example, by e-mail.

For someone who knows how to look for it, metadata can potentially provide a tremendous amount of insight and information into the thought processes that went into drafting a document. In some cases, the metadata may even expose explicitly the confidential position of an opposing party. When this information is found only in the document's metadata, it is almost certainly information that the opposing party had no intention of communicating.

For instance, an attorney drafts a letter on behalf of a client offering to settle a lawsuit. The original settlement offer is $100,000. The attorney e-mails the letter to the client for review, and the client decreases the offered amount to $50,000. If the letter is transmitted electronically to opposing counsel, opposing counsel may find metadata that records this exchange. As a result, opposing counsel may surmise that $50,000 is a low offer and that the attorney sending the letter thought that the settlement offer should have been twice as high. The original figure of $100,000 may reflect either the drafting attorney's opinion of the settlement or may reflect what that attorney was originally told by the client before the client adopted a much lower negotiating position. In either case, this information clearly gives opposing counsel an important insight and makes it extremely unlikely that the client's $50,000 settlement offer will be accepted. An astute opposing counsel with this information may counteroffer settlement at something like $97,000.

In a similar, more explicit scenario, imagine that the client inserts a comment in the draft settlement letter regarding the offered amount. This comment may indicate that the client would be willing to settle by paying as much as $250,000, but wants to start with an initial offer of $100,000. The comment may be deleted before the settlement letter is sent to opposing counsel, but that does not mean that it is actually gone. This deleted comment may remain within the metadata of the document and, if discovered by opposing counsel, will clearly impact the settlement negotiations to the detriment of the client.

In a real world example, former California Attorney General, Bill Lockyer, issued a letter denouncing peer-to-peer file sharing software as "a dangerous product." *See Tom Zeller Jr., Beware Your Trail of Digital Fingerprints,* N.Y. Times, November 7, 2005. Metadata in the electronic version of the letter showed that a senior executive with the Motion Picture Association of America (MPAA) had been involved in drafting the letter. This clearly biased input into the letter, which was issued officially by the state's Attorney General, led at least one critic to the conclusion that the "California AG Plays Sock Puppet to the MPAA." *Id.*

However, in the scenarios posed above, the attorney drafting the settlement letter may never know that the client's confidential position has been communicated to opposing counsel. Rather, the hapless attorney may simply be amazed at how insightfully opposing counsel has moved to a very advantageous position within the realm of what the attorney's own client might be willing to accept.

Having established a working definition and the potential significance of metadata in legal documents, we come to the ethical questions of whether an attorney may, without breaching rules of professional conduct, look for and use any metadata found in an electronic

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document. These questions have received fairly extensive review by various ethics authorities, but with clearly mixed results.

The most general pronouncement on these questions comes from the American Bar Association (ABA). According to the ABA's Standing Committee on Ethics and Professional Responsibility

> [t]he Model Rules of Professional Conduct do not contain any specific prohibition against a lawyer's reviewing and using embedded information in electronic documents, whether received from opposing counsel, an adverse party, or an agent of an adverse party. A lawyer who is concerned about the possibility of sending, producing, or providing to opposing counsel a document that contains or might contain metadata, or who wishes to take some action to reduce or remove the potentially harmful consequences of its dissemination, may be able to limit the likelihood of its transmission by "scrubbing" metadata from documents or by sending a different version of the document without the embedded information.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-442 (2006) (emphases omitted). Various state ethics authorities have before and since addressed this issue. Some have agreed with the ABA's position. Others have not.

The Maryland State Bar Association's Committee on Ethics issued an opinion concluding, like the ABA opinion, that it is not an ethics violation to look at metadata received from opposing counsel. That opinion stated:

> [s]ubject to any legal standards or requirements (case law, statutes, rules of procedure, administrative rules, etc.), this Committee believes that there is no ethical violation if the recipient attorney (or those working under the attorney's direction) reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata.

Maryland State Bar Assoc., Inc. Comm. on Ethics, Opinion 2007-09 (2006).

The District of Columbia Bar similarly follows the ABA position, except where an attorney has "actual knowledge" that the metadata was inadvertently sent. According to the District of Columbia Bar,

> A receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent. In such instances, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work product of the sending lawyer or confidences or secrets of the sending lawyer's client.

D.C. Ethics Opinion 341 (2007).

Five years before the ABA issued its opinion on the subject of metadata, the New York State Bar Committee on Professional Ethics had looked at the issue and reached a contrary conclusion. In 2001, the New York State Bar prohibited attorneys from using computer technology to "surreptitiously obtain privileged or otherwise confidential information" of an opposing party. NY State Bar Assoc. Comm. on Prof'l Ethics, Opinion 749 (2003). The opinion relies on New York's equivalent to ABA Model Rule 8.4, which prohibits a lawyer from engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation" or that is "prejudicial to the administration of justice." Model Rules of Prof'l Conduct R. 8.4 (c), (d).

Three years later, and still before the ABA issued its opinion, the New York Bar reaffirmed its position in opinion 782. This new opinion characterized the result of earlier opinion 749 as "an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets." NY State Bar Assoc. Comm. on Prof'l Ethics, Opinion 782 (2004). This remains the position of the New York Bar, despite the contrary position taken by the ABA.

The Alabama Bar issued an opinion in 2007, also adopting the New York position.

> [T]he Commission believes that an attorney has an ethical duty to exercise reasonable care when transmitting electronic documents to ensure that he or she does not disclose his or her client's secrets and confidences…. Just as a sending lawyer has an ethical obligation to reasonably protect the confidences of a client, the receiving lawyer also has an ethical obligation to refrain from mining an electronic document….The unauthorized mining of metadata by an attorney to uncover confidential information would be a violation of the Alabama Rules of Professional Conduct.

Alabama State Bar Assoc., Opinion 2007-02 (2007).

Most recently, the Colorado Bar has weighed in with opinion 119: Disclosure, Review and Use of Metadata. *See* Colorado State Bar Assoc. Ethics Comm., Opinion 119 (2008). The Colorado Bar opinion seems to capture eloquently the current trend in this area with a balancing of the various previous positions that ethics authorities have taken. According to that opinion,

> A Sending Lawyer who transmits electronic documents or files has a duty to use reasonable care to guard against the disclosure of metadata containing Confidential Information. What constitutes reasonable care will depend on the facts and circumstances. The duty to provide competent representation requires a Sending Lawyer to ensure that he or she is reasonably informed about the types of metadata that may be included in an electronic document or file and the steps that can be taken to remove metadata if necessary. Within a law firm, a supervising lawyer has a duty to ensure that appropriate systems are in place so that the supervising lawyer, any subordinate lawyers, and any nonlawyer assistants are able to control the transmission of metadata.
>
> A Receiving Lawyer who receives electronic documents or files generally may search for and review metadata. If a Receiving Lawyer knows or reasonably should know that the metadata contain or constitute Confidential Information, the Receiving Lawyer should assume that the Confidential Information was transmitted inadvertently, unless the Receiving Lawyer knows that confidentiality has been waived. The Receiving Lawyer must promptly notify the Sending Lawyer. Once the Receiving Lawyer has notified the Sending Lawyer, the lawyers may, as a matter of professionalism, discuss whether a waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the Sending Lawyer or the Receiving Lawyer may seek a determination from a court or other tribunal as to the proper disposition of the electronic documents or files, based on the substantive law of waiver.
>
> If, before examining metadata in an electronic document or file, the Receiving Lawyer receives notice from the sender that Confidential Information was inadvertently included in metadata in that electronic document or file, the Receiving Lawyer must not examine the metadata and must abide by the sender's instructions regarding the disposition of the metadata.

Id.

The Utah Bar has not yet issued a similar opinion on the particular issue of metadata. As a result, some have mistakenly assumed that Utah lawyers are without specific guidance in the ethical dilemmas of this area. However, the Utah State Bar Ethics Committee has issued an advisory opinion that addresses the broader questions: "What are an attorney's ethical obligations when the attorney or his client has lawfully obtained an attorney-client communication between an opposing party and opposing counsel under conditions where the opposing party may not have intended to waive the attorney-client privilege?" Utah State Bar, Opinion 99-01 (1999). Rather remarkably, given its age, this opinion comports nicely with the position taken by the Colorado Bar on metadata as cited above.

According to the Utah opinion, if a lawyer lawfully obtains a confidential communication, for example, an attorney-client communication, "[that] lawyer is required to bring to the attention of opposing counsel the receipt of any such communication unless it is clear from the circumstances that the attorney-client privilege has been *intentionally* waived." *Id.* (emphasis added). Thus, a lawyer who obtains metadata from an electronic document that reveals confidential information for which the attorney-client privilege has not clearly been intentionally waived must notify opposing counsel of receipt of that metadata.

This leaves open the questions of whether a recipient attorney may look for metadata and use it if found. As noted above, the ABA position allows both a search for metadata and its use if found. New York, to the contrary, does not allow an attorney to either seek to obtain or exploit an inadvertent transmission of confidential information.

According to the Utah opinion, Utah Rules of Professional Conduct 8.4(d) places "an obligation upon every lawyer to take steps to preserve the attorney-client privilege [including between other lawyers and their clients] in order to effect the orderly administration of justice." *Id.* Consequently, the opinion seems to indicate that only if the privilege has been waived can the recipient lawyer make use of confidential information that may have been inadvertently disclosed.

> Having so considered this issue, the Committee's view is that an attorney in possession of an opposing party's attorney-client communications for which the attorney-client privilege has not been intentionally waived should advise opposing counsel of the fact of its disclosure, regardless of the specific facts surrounding disclosure. We draw this conclusion primarily because to do otherwise would be inconsistent with the standards of Rule 8.4(d). This approach has the virtue of separating the factual determination regarding the legal merits regarding waiver from the ethical determination of what an attorney ought to do. It also recognizes that the receiving attorney may not have all of the facts relevant to a legal determination, and it guards against subconscious bias in the receiving attorney's consideration of the facts. Finally, it avoids the appearance of impropriety inherent in allowing a receiving attorney to make the determination under what circumstances to advise opposing counsel.
>
> Once the fact of disclosure is before both parties, they can then turn to the legal implications of the disclosure and a legal assessment of whether waiver has occurred. In some instances the parties may be able to agree regarding how to handle the disclosure. In other instances, it may be necessary to seek judicial resolution of the legal issues.

Id.

Thus, in Utah, there does not appear to be any proscription against checking a document for metadata. However, any information obtained which appears to be subject to attorney-client privilege seems to trigger an obligation to notify opposing counsel and refrain from using such information unless the case can be made that the attorney-client privilege has been intentionally waived as to that information. As noted above, this is essentially the same position taken by the Colorado Bar.

In this regard, it is interesting to note that some courts have held that failure to take reasonable precautions to maintain the confidentiality of information will be equated with consent to its disclosure and, consequently, waiver of privilege. *See People v. Gomez,* 134 Cal. App. 3d 874, 879 (1982). We might therefore ask how long will it be before the metadata issue has been so thoroughly publicized and debated that attorneys will be universally expected to remove metadata from any electronic document being transmitted outside one's firm and whether any failure to do so will be considered a failure to take reasonable precautions to protect client confidentiality and thus a waiver of privilege? *See* Model Rules of Prof'l Conduct R. 1.6.

In summary, if you are the sending attorney,

1. Remove metadata from electronic documents leaving your system. This can be done relatively automatically by employing scrubber technology that works with one's e-mail system. Alternatively, documents being transmitted outside the attorney's office can be converted to a Portable Documents Format (PDF), which generally removes metadata that might be available to a recipient.
2. If you discover that metadata has been inadvertently transmitted, you may consider notifying the recipient with instructions to avoid accessing the metadata and asserting attorney-client privilege over the metadata.

If you are the recipient attorney,

1. Determine whether your jurisdiction permits you to review and use metadata gleaned from an electronic document.
2. When you find metadata, consider notifying the sender to satisfy local guidelines or, at least, to preserve an entirely ethical appearance, regardless of whether you are subsequently allowed to make use of the metadata in your jurisdiction. Model Rule 4.4(b), which was added in 2002, states that a lawyer who receives information that he or she knows or should know was sent inadvertently "shall promptly notify the sender." *See Rico v. Mitsubishi Motors Corp.,* 171 P.3d 1092 (Cal. 2007).

The preceding discussion deals generally with metadata in electronic documents that are transmitted for purposes such as settlement or general communication, outside of the contexts of discovery or compliance with a subpoena. With respect to discovery and subpoena compliance, the issues involved may be different. For example, specific rules relating to electronic discovery, apart from the ethics rules discussed here, may apply to metadata that is provided in discovery or compliance with a subpoena.

In such cases, a conference establishing a schedule and parameters for discovery generally allows parties to consult about the nature of pertinent electronic documents they maintain, including specific discussions concerning the production of documents containing metadata and whether the sending party wishes to assert a claim of privilege as to some or all of the metadata. Astute counsel will understand that metadata must be addressed in such a proceeding and will thus have at least the assertion of privilege to protect such metadata.

In this context, scrubbing technology that removes all metadata from electronic documents may violate discovery rules or a subpoena by altering the document a party is required to produce. Consequently, an attorney should be very careful before employing metadata-scrubbing technology in a discovery context.

Father of the Bride

by Rev. Learned Ham

It's funny how life-changing events can start out so innocently. A blind date. Taking the LSAT on a dare. Ordering chicken sushi because you're bored with the same old squishy tuna. My daughter called and we were talking about her upcoming wedding.

Me: Who's going to perform the marriage?

Daughter: Well, we don't really know anybody and we were kind of hoping you would do it.

[All quiet on my end of the line]

Daughter: Dad?

Me: I can't do that. I'm not a minister and so far the Governor hasn't gotten drunk enough to ask me to be a judge. And speaking of the Governor, I'm not one of those, either. Not that I wouldn't be a good one.

Daughter: You can do it on the Internet.

Me: Become the Governor?

Daughter: Become a minister.

Me: Really? I'd rather be Governor; it pays better and I'd get to have my picture taken with Arnold Schwarzenegger. And if things got tough I could just ask Greg Bell what to do. Plus I'd like to be ambassador to Bermuda someday and the Governor's mansion is a nice stepping stone.

Daughter: Dad.

Me: Yeah?

Daughter: You can sign up to be a minister on the Internet and then you can marry people.

Me: Like you and Don?

Daughter: It's Ron.

Me: So it is.

Daughter: Dad, I'm serious. We'll write our own vows, and we'd like you to do the ceremony.

Me: Let me look into it and see if it works.

It works. I think. At least as well as those divinely inspired, tax free, BLM exempt, second amendment, money laundering business trusts that used to form the core of my practice. I really miss those, too. For some reason they were mostly popular with people trying to get dentists to invest in something – I guess the dentists caught on to the usual limited partnership ruse.

Anyway, Utah Code section 30-1-6(1) provides in relevant part as follows:

> Marriages may be solemnized by the following persons only: (a) ministers, rabbis, or priests of any religious denomination who are: (i) in regular communion with any religious society; and (ii) 18 years of age or older; (b) Native American spiritual advisors; (c) [Gary Herbert]; (d) [Greg Bell]; (e) mayors of municipalities or county executives; (f) a justice, judge, or commissioner of a court of record… And it goes on from there but you get the drift of it.

Utah Code Ann. § 30-1-6(1) (2007).

To address the obvious threat to Western Civilization, the legislature decided we needed a law making it clear that ministers ordained over the Internet or by mail aren't really ministers. So in 2001, they chiseled Utah Code section 30-1-6.1 into the tablets: "Certification, licensure, ordination, or any other endorsement received by a person through application over the Internet or by mail that purports to give that person religious authority is not valid for the purposes of Subsection 30-1-6(1)(a)." Utah Code Ann. §30-1-6.1 (2001) (repealed 2006).

Section 30-1-6.1 isn't there anymore, thanks to *Universal Life Church v. Utah,* 189 F. Supp. 2d 1302 (D.Utah 2002). Judge Dale Kimball found that section 30-1-6.1 was unconstitutional in that it violated the equal protection rights guaranteed by the U.S. and Utah constitutions. The court ruled that "there is no rational basis for the differential treatment between (1) ministers who applied via the Internet and mail, and (2) those who applied via fax, telephone, or in person." *Id.* at 1317.

A nice case, but it doesn't really get you all the way around the bases, does it? All we know for sure is that if you're ordained

over the Internet, you might be a minister – provided that you're in "regular communion" with a "religious society."

Those are not defined terms, and we know what that means: a lawyer's playground. What's a religious society? Davis County? An organization founded on spiritual beliefs? A set of ethical principles? Shared ethereal values? (What could be more ethereal than a website?) Does it have to have a building? Probably not, but query whether you can in good faith have a religious society without basketball hoops?

What's "communion?" Meetings? A meeting of the minds? A burning in the bosom? (I doubt it – that's probably just reflux.) Something shared by communists?

And what are we to make of "regular?" This one seems the easiest of the three, or maybe the toughest. Anyone over 50 knows exactly what it means, and fervently aspires to it.

Judge Kimball alluded to the issue presented by the "regular communion" requirement, but concluded that "the court's decision in this matter expresses no opinion on whether [Universal Life Church (ULC)] ministers have authority under [Utah Code section 30-1-6(1)(a)] to perform marriages in Utah, as that thorny issue is not before the court." And further:

> the fact that the Defendants themselves have highlighted that no [ULC] minister has ever been prosecuted – or even threatened with prosecution – for lacking the authority to perform a marriage under [Utah Code section 30-1-6(1)(a)] creates a presumption that, without being covered by the [c]hallenged [s]tatute, ULC ministers could continue, as they have been, to solemnize marriages without fear of prosecution.

Id.

Judge Kimball has always had a gift for making complex legal concepts clear as a saint's conscience. Years ago, when he was a practicing lawyer and I was a summer clerk, I was struggling with the definition of negligence. He explained it to me as "that of which the hiring committee was guilty when it mailed your offer letter," or words to that effect.

I am now a minister, with a certificate, a wallet card, and a parking pass to prove it. I'm especially pleased with the parking pass. It has a bar code.

I called my daughter.

Me: I can do it. [I didn't take her on the long detour through the "regular communion" swamp because

I want her and Lon to be able to go into this in good faith. Plausible deniability – always thinking. And besides, I *am* in regular communion. After 25+ law-loving years of stretching undefined terms like they were salt water taffy,[1] I could make that argument with my tongue tied behind my back.]

Daughter: That's great! Ron will be so excited.

Me: I'd like to have a look at the vows when you've got them ready. Maybe we should get together and go over them.

Daughter: Yeah, the vows. They're not really coming so well. We were hoping maybe you could write them for us.

Three weeks later.

Me: Hey Angel! Hi Von! Great to see you two! I've got some draft vows for you to look over.

Daughter: Thanks, Dad!

Ron: That's great.

Daughter: Daddy?

Me: Yes?

Daughter: This looks like a pre-nup.

Me: Yeah, it is – the vows are in the recitals. Two birds with one stone, you know?

Ron: So, after we say "I do," what's this "notwithstanding any of the foregoing to the contrary" part mean?

Me: Oh that. That's just a standard reservation of rights. Most ministers probably don't do it, but I think it's a good idea. The gift of prophecy notwithstanding, you can't always anticipate everything that might go wrong, and that clause can be a real life saver.

Daughter: "I now pronounce you husband and wife. Let's fund!" What's that mean?

Me: You said you wanted a traditional ceremony. I've done lots of closings and that's how they all end. Well, except for the ones that end with lots of cursing and staplers flying around the room….

Ron: What are "closing deliveries?"

Me: More standard stuff – rings, signatures on the license, cake on the face – nothing off-market.

Daughter: What does "due diligence" mean?

Me: I left that intentionally vague. Ask your mother.

Daughter: What's all this stuff in the bold print about?

Me: Oh, glad you noticed that. I almost forgot. You need to initial that. That's the disclaimer of warranties of marriageability and fitness for a particular purpose.

Ron: Have you ever done this before?

Me: Twice actually. But never on this side of the altar. And believe me, I wish I'd had somebody like me looking out for me….Oh, remember to slip this waiver into the back of the guest register.

Daughter: What's a "waiver and release?"

Me: That's so the guests can't come back at you if they get hurt dancing, or the potato salad sits in the sun too long, or you get a quick divorce and they want their gifts back.

Daughter: Thanks, Dad. That's really thoughtful.

Me: Least I could do. Can I help you find a conference room for the reception?

Daughter: Thanks, we got it covered.

The wedding went off without a hitch, or with a hitch, or whatever. The guests mistook the parts where I forgot my lines for dramatic pauses, my parking pass got me a spot right by the exit, and my daughter thinks I'm a hero. Jon's family thinks I'm a cross between a mortician and a rodeo clown – they've probably never heard the wedding march played on the accordion by a man in black pinstripes before. I think they just don't get out enough.

And by the way, my ministerial powers are not limited to performing marriages. I also have the power to grant absolution, which I suspect some of you need.

1. Remember the taffy puller in the window of the old shop that used to be on South Temple across from Temple Square? If you do, you probably still have a closet full of suits you bought at ZCMI before it became first a mall and finally a hole in the ground. If you don't, you're too young to be trusted. I'm sure Downtown Rising will be stupendous, but unless they bring back the taffy puller it'll be just another parking lot with a food court. Do you think they really made that stuff with salt water? And do you think the salt water really came from the lake? That always struck me as kind of a weak selling point actually, but what do I know? I mean, if you ask me, I'd rather experience the "lake effect" as a meteorological phenomenon than a gastroenterological one.

Possible Refunds Owed on Medicaid Lien Repayments

If You Repaid a Medicaid Lien on a Personal Injury Settlement after November 1, 1994, You May Be Owed a Refund from the State of Utah Due to a Class Action Decision by the Utah Supreme Court.

WHAT IS THIS LAWSUIT ABOUT?

A decision was recently entered by the Utah Supreme Court in a class action against the State of Utah for failing to pay the State's "fair share" of a Medicaid recipient's attorney fees on personal injury settlements. *Houghton v. Office of Recovery Services*, 206 P.3d 287 ¶ 28 (2008). "Fair share" means that the State must reduce its liens for repayment by the same % as the injured recipient's contingent fee agreement with his/her attorney. Since the State often paid less than it owed, many Medicaid recipients are owed a refund, with interest.

HOW DO YOU ASK FOR A REFUND?

If you are included in the Class, you may send in a Claim Form to request a refund, or you may exclude yourself from the class ("opt out"), or object to the proposed settlement. The Third District Court of Salt Lake County authorized this Notice, and will have a hearing to decide whether to approve the settlement, so that refunds can be issued. Get a detailed Notice and a Claim Form at www.MedicaidClass.com.

WHO QUALIFIES AS A CLASS MEMBER?

You must meet ***all four*** of the following requirements:

1. **Attorney.** A lawyer helped you obtain money as a result of your injuries;
2. **Consent**. Your lawyer requested consent from the ORS to represent Medicaid's claim for lien repayment;
3. **Lien Repayment.** The State received lien repayment through the efforts of your lawyer, ***after November 1, 1994***; **and**
4. **Less Than State's Proportionate Share.** The State failed to reduce its lien on your settlement by the same % as the contingent fee you paid your own lawyer, subject to a 33% limit. If the reduction was less than that, you are owed the difference, plus interest.

GETTING MORE INFORMATION?

Class Counsel
ROBERT B. SYKES & ASSOCIATES, P.C.
311 South State Street, #240
Salt Lake City, UT 84111-2320
Special Class Phone Number: (801) 533-0230 ✔
Telephone No. (801) 533-0222
Facsimile No. (801) 533-8081
email: medicaid@sykesinjurylaw.com
website: www.MedicaidClass.com

WHAT YOU GET

If you meet the requirements *and* submit a timely Claim Form, you are owed the difference between the % in your fee agreement with your lawyer, and the % lien reduction granted by the State, subject to a 33% maximum. This difference accrues 10% per year simple interest.

EXAMPLE

$40,000	=	1995 Settlement, obtained by your lawyer, who had a ⅓ contingent fee & requested State consent to represent its lien interest
$10,000	=	Medicaid lien
.....		
$3300	=	lien reduction owed by the State (33% max.)
-$2000	=	lien reduction of 20%, paid by the State [ORS]
$1300	=	refund owed by the State in 1995
+$1820	=	interest at 10% ($130 per year for 14 years)
✔ $3120	**=**	**owed by the State in 2009**

YOUR RIGHTS, DEADLINES & HOW AND WHEN YOU GET A PAYMENT

1. **File Claim.** You must complete and return a Claim Form to the address for Class Counsel listed below.
2. **Deadline.** Your Claim Form must be mailed [post-marked] or faxed to Class Counsel not later than **Monday, February 1, 2010.**
3. **Getting a Claim Form.** You may get a Claim Form by calling Class Counsel or going online to the Class Website, www.MedicaidClass.com.
4. **Detailed Notice.** The Court has approved an official notice, which is available from Class Counsel or online.
5. **Opt Out.** You have the right to exclude yourself from the Class. You must do so by notifying Class Counsel by **February 1, 2010.**
6. **Class Counsel's Fees.** Class Counsel is requesting a 40% fee on each claim. If you wish to object to Class Counsel's attorney fees, you must mail or fax a written objection to Class Counsel at the address set forth herein no later than **Monday, February 1, 2010,** and contemporaneously file the objection with the Clerk's Office, Third District Court, 450 South State Street, P.O. Box 1860, Salt Lake City, UT 84114-1860.
7. **Fairness and Final Hearing.** A Hearing on any objections filed will be held on **Monday, April 19, 2010 at 2:00 p.m.**
8. **Payment.** Payments will be mailed to Class Members after the Court grants final approval to the attorney fees and costs, and Claim Forms are processed.

www.MedicaidClass.com Medicaid@sykesinjurylaw.com
801-533-0230

Indigent Defense in Utah: Constitutionally Adequate?

by Marina Lowe

The Sixth Amendment to the United States Constitution, as interpreted by the Supreme Court, promises the right of defense counsel to all defendants in criminal cases that might result in a sentence of incarceration. In so interpreting, the Supreme Court recognized that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963). As Americans, we recognize that providing criminal defendants with competent counsel is essential to ensure that criminal proceedings are fair and constitutional, and to protect the innocent, particularly when navigating through our complicated system of criminal justice.

Though this right exists, many low-income people are unable to invoke this promise and exercise their right to a meaningful day in court. According to the National Center for State Courts, between 80 and 90 percent of all people charged with criminal offenses in America qualify for indigent defense. *See* National Center for State Courts, Access and Fairness: Indigent Defense FAQs (2009), *available at* http://www.ncsconline.org/WC/CourTopics/FAQs.asp?topic=IndDef (last visited Oct. 1, 2009). However, inadequate funding, lack of training and oversight of defense counsel, and insufficient resources all contribute to a national patchwork of indigent defense that falls short of what is constitutionally mandated. In Utah, our system of providing for indigent defense is ranked **last** by national organizations; substantial examination and reworking of this system must occur in order to meet even the most basic obligations prescribed under both the Utah and federal constitutions.

This article will first examine the legal sources from which the right to counsel flows. Second, it will set forth the factors that constitute sufficient counsel. Third, this article will demonstrate how the state of Utah compares to others in terms of adequately providing counsel to the indigent. Finally, it will discuss the various ways in which indigent defense reform can and should be accomplished.

The Right to Counsel: Legal Standards

The Sixth Amendment to the U.S. Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of counsel for his defence." U.S. Const., amend. VI. However, it was not until the Supreme Court decided the case of *Powell v. Alabama,* 287 U.S. 45, (1932), that this right was given its true meaning. In *Powell*, nine African-Americans, known as the Scottsboro Boys, were charged with raping two white women. *See id* at 49. The defendants were sentenced to death after one-day trials. *See id.* at 50. The defendants were only given access to attorneys immediately prior to trial, thus precluding the ability of their attorneys to construct an adequate defense. *See id.* at 54-55. The Supreme Court reversed the death sentences, finding that the Due Process Clause of the Fourteenth Amendment requires that a right to counsel exists "in capital cases, where the defendant is unable to employ counsel and is incapable of adequately making his own defense." *Id.* at 71.

This ruling was expanded in 1938 when the Court decided *Johnson v. Zerbst,* 304 U.S. 458 (1938), and held that the Sixth Amendment to the U.S. Constitution includes the right to court-appointed counsel in federal court for defendants charged with a felony. *See id*. Thirty years later, in the landmark case of *Gideon v. Wainwright,* 372 U.S. 335, (1963), the Court finally extended the right to counsel to all state court felony prosecutions. *See id.* at 344. Two additional cases heard by the Supreme Court, *Argersinger v. Hamlin,* 407 U.S. 25 (1972), and *Alabama v. Shelton,* 535 U.S. 654 (2002), established that the Sixth Amendment guarantee of a right to counsel means that court-appointed counsel must be made available to indigents charged with misdemeanors in state court, even if the sentence imposed is suspended. Finally, in *Strickland v. Washington,* 466 U.S. 668 (1984), the Court made clear that the Sixth Amendment right to counsel means

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the right to have access to "effective assistance of counsel." *Id.* at 686-87.

The right to have access to effective counsel is also guaranteed under Utah law. Indeed, the Utah Constitution states that "[i]n criminal prosecutions the accused shall have the right to… **defend in person and by counsel.**" Utah Const. art. I, § 12 (emphasis added). The Utah state legislature also recognized the importance of guaranteeing rights to indigent defendants when it enacted minimum standards for the defense of an indigent, in the Utah Code of Criminal Procedure, including the obligation to "afford **timely representation to indigents by competent legal counsel.**" *See* Utah Code Ann. § 77-32-301(2) (2008) (emphasis added). While the right to have effective counsel in a criminal proceeding exists under the law, in practice the defense provided, both in Utah and across the United States, falls short of what is mandated under the law.

ABA's Ten Principles of a Public Defense Delivery System

The foregoing seminal cases established a right to counsel for indigent defendants in state court, and in turn, states were charged with meeting that obligation, through whatever means they saw fit. As a result, a patchwork of practices emerged and with it, substantial problems, including lack of funding, oversight, and accountability. Accordingly, the American Bar Association ("ABA") developed its Ten Principles of a Public Defense System ("Ten Principles"), as a set of national guidelines to aid state and local policymakers in the administration and assessment of indigent defense representation in their state. *See* ABA Comm. on Legal Aid and Indigent Defendants, Ten Principles of a Public Defense System (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf (last visited Oct. 1, 2009). Drawing from Supreme Court case law, these principles are widely recognized as representing the minimum standards by which a state should provide for indigent defense and apply equally to all types of indigent defense models, including state-run public defender offices and contract counsel systems. According to the ABA, these principles establish the "fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney." *Id.*

The principles include the following: independence, statewide funding and structure, prompt appointment of counsel, confidential meeting space, reasonable workload, minimum qualifications, continuous representation of clients by the same attorney throughout the life of the case, resource parity, training, and accountability. *See id.*

In 2000, the Department of Justice issued a report focused on contract systems of public defense, and outlined factors that contribute to ineffective models, including the following: (1) choosing cost of providing for defense over quality, (2) creating incentives for attorneys to plead cases early instead of going to trial, (3) contracting with lawyers with fewer qualifications and giving them higher caseloads, (4) providing limited training and supervision, (5) not providing caps or limitations on caseloads, and (6) not providing support staff or investigative or expert services. *See* U.S. Dep't of

Justice, Office of Justice Programs, Bureau of Justice Assistance, Contracting for Indigent Defense Services, A Special Report 3 (2000), *available at* http://www.ncjrs.gov/pdffiles1/bja/181160.pdf (last visited Oct. 1, 2009).

What emerges from these two reports is that certain factors, namely adequate funding, supervision and training, as well as caseload limits, contribute to a healthy and robust system of indigent defense. In the absence of these characteristics, a model staffed with even the best, most capable attorneys cannot result in constitutionally adequate defense.

Utah: Facts and Issues

Utah ranks behind almost all other states in its provision of indigent defense. *See* National Legal Aid & Defender Association, *Gideon's* Unfulfilled Promise: The Right to Counsel in America (January 31, 2008) (draft report, on file with author). The state provides no funding for indigent defense; instead, Utah shifts the burden of complying with the constitutional mandates of *Gideon* and *Argersinger* to the counties. Each county in Utah is charged by statute to provide indigent defense as it sees fit. Accordingly, a patchwork of models exists across the state. The majority of counties rely on contracts with private attorneys to represent indigent defendants; not all of these private attorneys are able to devote all of their time to contracted indigent clients as assigned. A few counties, Utah and Salt Lake, have formal public defender offices. Finally, some counties have no contract in place but instead rely on private attorneys who bill the county by the hour.

According to the National Legal Aid and Defender Association ("NLADA") draft report cited above, Utah ranks **last** in the organization's assessment of state compliance with the constitutional

obligations enunciated in *Gideon*. To reach this conclusion, NLADA examined the degree to which states' systems of indigent defense comport with the ABA's Ten Principles, and whether the state provides any funding for the provision of indigent defense. State funding is significant because it is generally more stable than county funding. Counties derive their funding for indigent defense from property taxes; thus those counties with depressed property values and higher crime rates have greater need for indigent defense but less ability to fund it.

Utah, as measured on a statewide basis, does not comply with the Ten Principles and is one of only two states (Pennsylvania is the other) that receive no state funding, placing it in last position among the fifty states and earning it a place in NLADA's category, "*Gideon* Ignored." Additionally, Utah ranks third to last of the fifty states in per capita spending for indigent defendants, spending just $5.22 per Utahn. The national average is $11.86. *See* National Legal Aid & Defender Association, A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis (June 2008), *available at* http://www.mynlada.org/michigan/michigan_report.pdf (last visited October 1, 2009).

Indigent Defense: A Nationwide Problem With Various Strategies for Change

Utah, while currently in last place, is well-positioned for improvement. Across the nation, states are grappling with how best to achieve indigent defense reform in order to come into compliance with *Gideon*. Litigation has proved successful in several states. As an example, in 2002, the ACLU of Montana, acting on behalf of indigent criminal defendants from seven counties throughout Montana, brought suit alleging widespread deficiencies in the public defender system. A settlement was reached in which the Montana Attorney General agreed to work with the ACLU to create a statewide indigent defense system. Legislation enacting a statewide system was passed in 2005, and among other things, allowed for the funding of over 100 additional public defenders across the state. On July 1, 2006, the new public defender system began, under the oversight of the newly-established Public Defender Commission.

Likewise, in 2007, the ACLU of Michigan, along with coalition partners, brought suit to challenge the broken system of indigent defense in that state. While that litigation is ongoing, importantly the court refused to dismiss the suit in response to the state's motion contending that the counties and not the state were responsible for any deficiencies in the system. The court held that the state is responsible for providing constitutionally adequate criminal defense; simply delegating responsibility to the counties does not relieve the state of responsibility when the system fails.

Other techniques have proven successful in other states. For example, in 2007, a news story broke detailing the extent to which the Nevada system of public defense was deficient. In response, the Nevada Supreme Court formed the Indigent Defense Task Force, and charged it with investigating three particular areas: independence of indigent defense counsel, case loads of public defenders, and rural issues. In 2008, the Nevada Supreme Court, based on the findings of the Indigent Defense Task Force, issued an order mandating sweeping changes and reform in indigent defense within state.

The time is ripe for Utah to overhaul its current system, whether through the courts, the legislature, or a combination of both. Utah is already making some progress toward the goal of reforming indigent defense through the Judicial Council's creation of an Indigent Defense Appeals Task Force, which is charged with examining the state of appellate indigent defense in the state. Trial-level reform must also be addressed, however, to ensure that the promise of *Gideon* is afforded to all Utahns.

Warning: Your Name Might Be Listed Here

by Joanne C. Slotnik

In response to my whining about how few people read my article "Judging the Judges" published in the spring *Bar Journal,* a colleague recently suggested that if I really wanted attorneys to learn about the work of the Judicial Performance Evaluation Commission (JPEC as the commission is known by those closest to it), I should embed the article in the attorney discipline section. In lieu of that, I hope the misleading title of this article has garnered enough of your attention to keep you reading.

Did you know that, very shortly, the Judicial Council will no longer be overseeing the process of evaluating state court judges? Pursuant to a statute passed by the legislature in 2008, that responsibility is now in the hands of an independent commission composed of four appointees each by the legislative, executive, and judicial branches, plus the director of the Commission on Criminal and Juvenile Justice.

What does this mean for you? Well, the surveys you receive will no longer come by mail from the judiciary or be accompanied by a letter from the Chief Justice. Now the surveys will originate with the JPEC, they will be online, and they will be under the signature of V. Lowry Snow, former Bar president and current chair of the JPEC.

The content of the surveys will also be different. In addition to the typical survey questions, all attorneys will be strongly encouraged to comment in narrative form about various aspects of judicial performance. In recently held focus groups, both judges and attorneys suggested that specific comments are the most effective way to provide useful feedback and encourage improved performance. The anonymity of comments will, of course, be strictly protected. There will be more information about that in the next issue of the *Bar Journal.*

So, what else is new? Beginning with the 2012 retention election, the survey process will include not only attorneys and jurors, as in the past, but also litigants, witnesses, and court staff. Those of you who spend time in district, juvenile, or justice court courtrooms around the state may notice some new survey-related activity afoot.

For both litigants and witnesses, protocols for getting contact information or physically distributing surveys for either group are still being developed at the time this article was authored. The commission sought protocols that would have the least impact on current courtroom operations and would not in any way negatively implicate the independence of the judiciary. By the time you read this, the commission will have settled on the best protocols and instituted them statewide in the courtrooms of the twenty-nine judges standing for retention election in 2012.

The new statutory scheme of judicial evaluation will also include a courtroom observation component. The commission will be training a cadre of observers who will participate in a pilot program this fall to assess the effectiveness of this additional evaluative tool.

If you are still reading, you probably have many questions about this new program. The statutory requirements are numerous and complex, and the time line for implementation is extremely tight. Indeed, in order to meet the time line for the 2012 election, data collection had to start early this fall. This was quite an achievement for a newly-formed commission that had to hire staff and then oversee the professional development of five different surveys, several of which had to be tailored to fit three different court settings, as well as develop an entirely new program of courtroom observation. So, while the commission may not have all the answers to your questions at this early date, you can be sure it is working on them.

One final word: The commission is trying mightily to develop both the substance and procedure for the new judicial performance evaluation program carefully, transparently, and with as much input from interested parties as possible. To that end, I encourage your comments, questions, and suggestions by contacting me either at 801-538-1652 or at jslotnik@utah.gov.

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

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New Lawyer Training Program

Researching the Servicemembers Civil Relief Act

by Mari Cheney

If you are a civil attorney in Utah, you may have already encountered the Servicemembers Civil Relief Act (SCRA), *see* 50 U.S.C. app. §§ 501-96, if your client, opposing party, or a third party to your case is on active duty in the military or is otherwise affected by the SRCA. If you are new to the SCRA, this article will provide information about the basic provisions of the SRCA and secondary sources that provide detailed analysis and sample forms.

In 1941, a Salt Lake attorney outlined the important aspect of the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA) (the predecessor of the SCRA) in two *Utah Bar Bulletin* articles. *See* D. Ray Owen, Jr., *The Soldiers' and Sailors' Civil Relief Act of 1940, 11* Utah B. Bull 1 (Jan.-Feb. 1941) and The Soldiers' and Sailors' Civil Relief Act of 1940 Part II, 11 Utah B. Bull 35 (Mar.-Apr., 1941). Owen detailed case law that attempted to resolve problems within the SSCRA, as well as application and scope.

Additionally, another article examining the SSCRA was published after Operation Desert Storm began in 1991. *See* Kevin R. Anderson & David K. Armstrong, *Soldiers' and Sailors' Civil Relief Act: A Legal Shield for Military Personnel,* Utah B.J., (Apr. 1991), at 8. The authors highlighted important provisions in the SSCRA and recent amendments.

Below is a list of those important provisions as updated by the SCRA as well as citations to pertinent U.S. Supreme Court, Tenth Circuit Appellate, and Utah cases decided since 1991. *See* Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501-96 *et seq.* (updating and renaming the Soldiers' and Sailors' Civil Relief Act).

Section 502: Purpose – Temporary Stay
Provides for a temporary stay in both judicial and administrative proceedings where servicemembers' civil rights may be adversely affected. *See id.* § 502.

Section 511: Persons Benefited or Protected
Defines protections and benefits for men and women in "uniformed services," which include the armed forces and the commissioned corps of both the National Oceanic and Atmospheric Administration and the Public Health Service. *See* 10 U.S.C. §101. Besides active duty servicemembers, in some instances the SCRA also protects members of the National Guard called to active service and reserve members of a uniformed service. *See also* 50 U.S.C. App. § 516. Dependents – including spouses and children – also benefit in some cases. *See United States v. Hampshire,* 95 F.3d 999 (10th Cir. 1996) (holding that defendant was not entitled to protections of the SSCRA when he went AWOL from the military because he was not longer on active duty as defined by this section).

Section 517: Waiver of Rights
Describes how and when a servicemember may waive the SCRA's protections, including what waivers must be in writing. *See* 50 U.S.C. app. § 517.

Section 518: Future Financial Transactions
Discusses when a stay cannot be the sole basis for creditors to deny or revoke credit or change the terms in a credit agreement. *See id.* § 518.

Section 519: Legal Representatives
Defines the legal representative of the servicemember as either the member's attorney or a person with power of attorney. *See id.* § 519.

Section 521: Default Judgments (Includes Child Custody Proceedings)
Requires the plaintiff to file a military service affidavit stating whether plaintiff has determined if a defendant is in military service. *See id.* § 521 (b)(1)(A). If the defendant is in military service, the court cannot enter judgment until the court appoints legal representation. *See id.* § 521 (b)(2). Additionally, the court shall grant a minimum 90-day stay if the court finds that there is a defense and the defendant needs to be present, or counsel cannot locate the servicemember or determine if there is a meritorious defense in the case. *See id.* § 521 (4)(d).

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

Also provides that the servicemember may ask the court to reopen a case where default judgment was entered during military service or within 60 days after termination of military service where (a) the military service materially affected the servicemember's ability to defend herself, and (b) that a meritorious or legal defense exists. *See id.* § 521 (4)(g)(1). This application to reopen a case must be made within 90 days after termination of military service. *See id.* § 521 (4)(g)(2).

Section 522: Stay of Proceedings (Includes Child Custody Proceedings)

Applies to servicemembers during military service or within 90 days after termination of military service where the servicemember has received notice of proceeding. *See id.* § 522 (a). Prior to a final judgment, the court shall stay the proceedings upon application by the servicemember where the servicemember provides (1) communication that details how current military status materially affects his or her ability to appear in court and the date he or she will be available to appear and (2) communication from the servicemember's commanding officer verifying current military status and that the servicemember is not authorized for leave. *See id. § 522 (b); see also Turner v. A. Passmore & Sons, Turner v. A. Passmore & Sons, Inc.,* 2009 U.S. App. LEXIS 17876 (10th Cir. Okla. Aug 4, 2009), (noting that a when a stay is granted under this section, "justice is best serviced by construing this court's stay order as having suspended all deadlines applicable to the appeal, including the cross-appeal deadline").

Also provides for application of additional stay and appointment of counsel if the court refuses to grant additional stay. *See Garramone v. Romo,* 94 F.3d 1446 (10th Cir. 1996) (declining to extend protections of this section where petitioner failed to request a stay); *Davis v. Davis,* 2001 UT App 225, 29 P.3d 676 (noting that final adjudication of child custody was stayed pursuant to the SSCRA).

Section 526: Tolling of Statutes of Limitations

Dictates that military service may not be used in computing time for statutes of limitations including redemption of real property. *See* 50 U.S.C. app. § 526 (a); *see also Conroy v. Aniskoff,* 507 U.S. 511 (1993) (detailing the legislative history of the SSCRA and holding that the plain language of this section makes it clear that a servicemember's military service should not be included in calculating time as it relates to the redemption of real property); *Hamner v. BMY Combat Sys.,* 79 F.3d 1156, (10th Cir. 1996) (agreeing with prior decision that states "the [SSCRA] bars any period of military service from being included

in computing a statute of limitations for or against a person in the military service.")

Section 527: Maximum Rate of Interest on Debts
Pertains to debt incurred prior to military service: that no debt should incur more than 6% interest during military service and one year after for mortgages and trust deeds. *See* 50 U.S.C. app. § 527 (a)(1).

Section 531: Eviction and Distress
Protects servicemembers from eviction during military service if the premises were intended to be occupied primarily as a residence and monthly rent does not exceed $2,932.31. *See* 74 Fed. Reg. 8068 (Feb. 23, 2009), *available at* http://www.gpo.gov/fdsys/pkg/FR-2009-02-23/pdf/E9-3703.pdf.

Section 533: Mortgages and Trust Deeds
Prohibits the sale, foreclosure, or seizure of property owned prior to military service where the sale, foreclosure, or seizure occurs during military service or within nine months after unless approved by court order or the servicemember has waived rights under section 517. *See* 50 U.S.C. app. § 533 (c).

Section 535: Termination of Leases
Covers both residential and motor vehicle leases, *see id.* § 535 (b), and allows the lessee to terminate a lease after the beginning of military service or the date of military orders, *see id.* § 535 (a)(1).

Section 593: Professional Liability Protection
Applies to servicemembers who were health care, legal, or other professionals prior to being ordered to active duty. *See id.* § 593 (a). The servicemember may apply for a suspension of coverage and insurance providers cannot require premium payments during that time. *See id.* § 593(b).

Section 595: Residency
Guarantees residence or domicile for voting purposes. *See id.* § 595; *Fox v. Mandelbaum,* 16 F.3d 416, (10th Cir. 1994) (remanding to lower court to make a determination about diversity jurisdiction based on plaintiff's statement about his domicile and residence during military service); 50 U.S.C. app. § 571, Residence for Tax Purposes; *Fatt v. Utah State Tax Commission,* 884 P.2d 1233 (holding that "persons entering the service carry with them the same tax immunity which they previously enjoyed in their home state").

Utah Law
It is also important to note that in Utah, the legislature during the 2009 legislative session enacted Utah Code section 30-3-40, *Custody and parent-time when one parent is a service member,* during the 2009 legislative session. The new law provides guidelines for both custodial and noncustodial parents who are servicemembers where no parenting plan or other agreement is in place to provide for the care of children in the servicemember's absence.

For example, if the noncustodial parent is deployed, the servicemember's parent time may still be exercised through a family member "with a close and substantial relationship" with the child. *See* Utah Code Ann. § 30-3-40(2)(b). If the custodial parent is deployed and the noncustodial parent will not make arrangements for care, the custodial parent can make arrangements for childcare while deployed but the care must not interfere with the noncustodial parent's parent time. *See id.* § 30-3-40(2)(a)(ii).

Secondary Sources
There are a variety of general and subject-specific secondary sources related to the SCRA that provide more information about the SCRA as well as sample language to include in forms. Some of this information can be found online.

American Bar Association, *The Judge Advocate General's School Guide to the Servicemembers Civil Relief Act* (2007).

Excellent and brief guide to the SCRA that includes analysis of general provisions, procedural protections, and specific explanations of taxation and voting rights and financial protections. Also includes analysis of SCRA's specific provisions on evictions, leases, installment contracts, and mortgages. Each section provides citations to pertinent case law. The authors also highlight terms that may be ambiguous, as the terms have been interpreted in various ways in different jurisdictions.

Contains a sample letter to a creditor asking for a reduction in interest to 6% (Appendix B).

A similar guide – dated one year earlier – is available online at http://www.servicemembers.gov/documents/jag_article.pdf.

R. Chuck Mason, *The Servicemembers Civil Relief Act (SCRA): Does It Provide for a Private Cause of Action?,* Congressional Research Service Report for Congress, March 23, 2009, *available at* http://assets.opencrs.com/rpts/R40456_20090323.pdf.

Examines the U.S. District Court split in whether there is a private cause of action under the SCRA.

Judge Advocate General's Corps, U.S. Army, Legal Services, *available at* https://www.jagcnet.army.mil/legal.

Provides general information about the SCRA and guidance on a variety of issues the servicemember will face, including family law issues, landlord and tenant disputes, and contract issues.

Judge Advocate General's Legal Center and School, *available at* https://www.jagcnet.army.mil/8525736A005BC8F9.

Provides links to publications that include *Army Lawyer* and *Military Law Review.* Also links to the Legal Center and School's publication database, which has a number of SCRA-related guides.

Mark E. Sullivan, *The Military Divorce Handbook: A Practical Guide to Representing Military Personnel & Their Families* (2006).

Practical manual for attorneys who represent servicemembers or spouses going through a divorce. Includes tips on locating and serving servicemembers, including members located overseas. Also includes a sample motion for stay under SCRA and a domicile checklist for servicemembers and spouses. Provides information on parent time, custody, and alimony issues that may arise during a military divorce.

Besides a wealth of information in the appendices, includes a CD-ROM with sample language and forms.

U.S. Department of Justice, Safeguarding the Rights of Servicemembers and Veterans, *available at* http://www.servicemembers.gov.

DOJ-specific information about cases the department has filed on behalf of servicemembers to enforce civil rights under various Acts, including the SCRA. Includes links to SCRA guides and complaints filed by the DOJ.

Notice from the Chief Justice

More than five years ago, the Supreme Court formed the Advisory Committee on Criminal Jury Instructions and the Advisory Committee on Civil Jury Instructions to draft new and amended instructions to conform to Utah law. The Court urged the committees to use plain language drafting principles so that statements of the law would be clear to non-lawyers.

The committees have worked long and hard and, to date, each have produced an impressive body of instructions. These instructions have been approved as the Second Edition of the Model Utah Jury Instructions (MUJI 2d) for use in jury trials. The official depository for these instructions is the state court web site at www.utcourts.gov/resources/muji.

MUJI 2d is a summary statement of Utah law but is not, of course, the final expression of the law. In the context of any particular case, this Court or the Court of Appeals may review a model instruction. Nevertheless, the Supreme Court urges trial judges to use the MUJI 2d instructions to the exclusion of other instructions, if MUJI 2d contains an instruction applicable to the subject, the MUJI 2d instruction accurately states the law on that subject, and a party requests the MUJI 2d instruction. Obviously, the trial court may edit the MUJI 2d instructions to fit the circumstances of the trial.

MUJI 2d is a continual work in progress, with new and amended instructions being published periodically on the web site. We urge trial judges to share their experiences with these model instructions as well as their suggestions for improvements with the advisory committees. John Young chairs the Advisory Committee on Civil Jury Instructions, with Tim Shea providing staff support, and Judge Denise Lindberg chairs the Advisory Committee on Criminal Instructions, with Brent Johnson providing staff support.

We appreciate the responsiveness and care with which the trial courts have addressed the MUJI 2d project so far and look forward to its continued success.

Sincerely,
Christine M. Durham
Chief Justice

Senior Citizen Legal Clinics – a Pro Bono Legal Program

Now in its eighth year, the Senior Citizen Legal Clinics is a volunteer lawyer program sponsored by the Utah State Bar and its Committee on Law and Aging. The program provides volunteer lawyers to help seniors evaluate their needs for legal assistance, help seniors resolve matters during the clinic consultation if possible, and provide seniors with information regarding legal service providers and other appropriate resources to resolve their legal problems. Consultations are for twenty minutes per senior citizen, for a 2-hour time slot, and take place at Salt Lake County Senior Citizen Centers. The volunteer lawyer provides legal advice free of charge. Volunteers may not solicit business or refer the senior citizen to themselves or to their own law firm. If the senior citizen needs further legal assistance, the volunteer lawyer provides referrals to appropriate providers and resources.

Volunteer lawyers use the hours to complete their pro bono requirements, and are published on the pro bono honor roll in the *Utah Bar Journal.* If you have questions or would like to volunteer for this program, please contact the Chair of the Committee on Law and Aging of the Utah State Bar, J. RobRoy Platt robroy@plattlawpc.com 801-769-1313, or Joyce Maughan maughanlaw@xmission.com 801-359-5900.

Twentieth Annual

Lawyers & Court Personnel Food & Winter Clothing Drive

for the Less Fortunate

Look for an e-mail from us regarding our joint effort with the Utah Food Bank where you can purchase one or more meals for families in need this holiday season.

Selected Shelters

The Rescue Mission

Women & Children in Jeopardy Program

Jennie Dudley's Eagle Ranch Ministry
(She serves the homeless under the freeway on Sundays and Holidays and has for many years)

Drop Date

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Volunteers will meet you as you drive up.
If you are unable to drop your donations prior to 6:00 p.m., please leave them on the dock, near the building, as we will be checking again later in the evening and early Saturday morning.

Volunteers Needed

Volunteers are needed at each firm to coordinate the distribution of e-mails and flyers to the firm members as a reminder of the drop date and to coordinate the collection for the drop; names and telephone numbers of persons you may call if you are interested in helping are as follows:

Leonard W. Burningham, Branden T. Burningham,
Bradley C. Burningham, Sheryl Taylor,
April Burningham or Jamie Norris. . . . . (801) 363-7411
Lincoln Mead . . . . . (801) 297-7050

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What is Needed?

All Types of Food

- oranges, apples & grapefruit
- baby food & formula
- canned juices, meats & vegetables
- crackers
- dry rice, beans & pasta
- peanut butter
- powdered milk
- tuna

Please note that all donated food must be commercially packaged and should be non-perishable.

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- boots
- gloves
- coats
- sweaters
- trousers
- hats
- scarves
- suits
- shirts

New or Used Misc. for Children

- bunkbeds & mattresses
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- books
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Personal Care Kits

- toothpaste
- toothbrush
- combs
- soap
- shampoo
- conditioner
- lotion
- tissue
- barrettes
- ponytail holders
- towels
- washcloths

Notice of Election of Bar President-Elect

Any active member of the Bar in good standing is eligible to submit his or her name to the Bar Commission to be nominated to run for the office of president-elect in a popular election and to succeed to the office of president. Indications of an interest to be nominated are due at the Bar offices, c/o Executive Director John Baldwin, 645 South 200 East, Salt Lake City, Utah, 84111 or via e-mail at director@utahbar.org by 5:00 p.m. on January 4, 2010.

The Bar Commission will interview all potential candidates at its meeting in Salt Lake City on January 22, 2010, and will then select two finalists to run for President-elect. Final candidates may also include sitting Bar Commissioners who have indicated an interest in running for the office.

Online balloting will begin on April 1st and will end April 15th at 11:59 p.m. at www.utahbar.org. The President-elect will be seated at the Bar's Annual Convention and will serve one year as President-elect prior to succeeding to the office of president.

In order to reduce campaign costs, the Bar will print a 200-word campaign statement from the final President-elect candidates in the *Utah Bar Journal,* a 500-word campaign statement on the Bar's website, and will provide a set of mailing labels for candidates who wish to send voting lawyers a personalized letter. For further information, please contact John Baldwin at (801) 531-9077, or at director@utahbar.org.

Notice of Election of Bar Commissioners

Second and Third Divisions

Pursuant to the Rules for Integration and Management of the Utah State Bar, nominations to the office of Bar Commission are hereby solicited for two members from the Third Division and one member from the Second Division, each to serve a three-year term. To be eligible for the office of Commissioner from a division, the nominee's residential mailing address must be in that division as shown by the records of the Bar.

Applicants must be nominated by a written petition of ten or more members of the Bar in good standing and residing in their respective division. Nominating petitions may be obtained from the Bar's website at www.utahbar.org/elections/commission_elections.html or call Christy Abad at (801) 297-7031. **Completed petitions must be received no later than February 1, 2010** by 5:00 p.m. Online balloting will begin on April 1st and will end April 15th at 11:59 p.m. at www.utahbar.org.

In order to reduce out-of-pocket costs and encourage candidates, the Bar will provide the following services at no cost:

1. space for up to a 200-word campaign message plus a photograph for the E-bulletin and in the March/April issue of the *Utah Bar Journal.* The space may be used for biographical information, platform or other election promotion. Campaign messages for the E-bulletin and ***Bar Journal*** are due along with completed petitions, two photographs, and a short biographical sketch **no later than February 1st**;
2. space for up to a 500-word campaign message plus a photograph on the Utah Bar Website **due February 1st**; and
3. a set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division who are eligible to vote.

If you have any questions concerning this procedure, please contact John C. Baldwin at (801) 531-9077 or at director@utahbar.org.

Notice of Electronic Balloting

Utah State Bar elections are moving from the traditional paper ballots to electronic balloting beginning this April with the 2010 – 2011 elections. Online voting helps the Bar reduce the time and expenses associated with printing, mailing, and tallying paper ballots and provides a simplified and secure election process. A link to the online election will be supplied in an e-mail sent to your e-mail address of record. Please check the Bar's website to see what e-mail information you have on file. If you need to update your e-mail address information, please use your Utah State Bar login at http://www.myutahbar.org. (If you do not have your login information please contact onlineservices@utahbar.org and your information will be sent to your e-mail address of record.)

Online balloting will begin April 1 and conclude April 15, 2010. Upon request, the Bar will provide a traditional paper ballot. Please contact Christy Abad at adminasst@utahbar.org.

November 12 & 13

Utah State Bar™

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2 hrs. CLE Credit for the Thursday Night Event
7.5 hrs. CLE Credit for Friday

The Utah State Board of Bar Commissioners is pleased to announce the names of those individuals who are eligible for admission to the Utah State Bar. A combined Admissions Ceremony with the Utah Supreme Court and the United States District Court was held on October 20th at the Salt Palace.

Kathleen J. Abke
Alison A. Adams
Matthew M. Adams
Melissa Ann Aland
Clay A. Alger
Stacey N. Allen
Landon A. Allred
Nicholas Wayne Anderson
Rachel S. Anderson
Todd F. Anderson
Jessica A. Andrew
Cortland P. Andrews
Jared M. Asbury
Jonathan S. Bachison
Jeffery A. Balls
John Christian Barlow
Michael C. Barnhill
Abraham C. Bates
Pamela E. Beatse
Matthew J. Black
Jeremy G Blain
Jennifer E. Bogart
Patrick Scot Boice
Daniel E. Bokovoy
David P. Bolda
David N. Booth
Laura K. Boswell
David J. Bowen
Kurt D. Bradburn
Todd Aaron Bradford
Matthew K. Brady
Thomas A. Brady
Jared J. Braithwaite
David G. Bridges
John C. Brown
Michael S. Brown
Deborah B. Buckner
Daniel H. Burton
Bryan R. Bush
Spencer P. Call
Jefferson S. Cannon
Kris Tina Carlston
Jeffrey S. Cartwright
Craig N. Chambers
Joshua D. Chandler
Colin R. Chipman
J. Spencer Clark
Jonathan R. Clark
Merrilee H. Clark
Richard K. Clark
Brent J. Clayton
Jonathan S. Clyde
Scott W. Cockerham
Russell D. Collings
Charles T. Conrad, Jr.
Jerry M. Copatch
Kelly Cope
Spencer M. Couch
Matthew R. Crane
Stonewall J. Crawford
Jacob P. Crockett
Morgan L. Cummings
Suzanne H. Curley
Daniel S. Daines
Micah Lawton Daines
Ruth M. Davidson
Ian J.J. Davis
Nicole M. Davis
Tess A. Davis
Andrew K. Deesing
Kevin Deiber
Margaret Depaulis
Zachary W. Derr
Kelly Dewsnup
Karianne N. Dickinson
Sara D. Dienemann
Tadd C. Dietz
Shelley M. Doi
Andrew M. Dressel
Regan R. Duckworth
Ezekiel R. Dumke
T.J. England
Michael K. Erickson
Tyna-Minet Ernst
Yvette R. Evans
Deborah S. Feder
Elizabeth W. Ferrin
Taylor S. Fielding
Allison S. Fletcher
Craig D. Flinders
Kimball A. Forbes
Nicholas Ushio Frandsen
Robert F. Fratto, Jr.
Jesse Allen Frederick, II
Joshua D. Freeman
Patricia M. French
Alexander F. Fuentes
Tami Lynn Gadd-Willardson
Casey R. Garner
Aaron C. Garrett
Jill C. Garrett
Michael B. Giles
Sidney A. Glick
Richard H. Goates
Alex J. Goble
Stewart W. Gollan
Jacob C. Gordon
Matthew S. Gordon
Trevor E. Gordon
Ryan C. Gregerson
Liana E. Gregory
Robert R. Groesbeck
Jacob Spencer Gunter
Monica H. Gustafson
Steven W. Gutke
Jennifer C. Ha
Matthew Frei Hafen
Michael D. Haney
Scott L. Hansen
Ethan R. Hanson
Brigman L. Harman
Benjamin P. Harmon
Michael D. Harrington
Robert P. Harrington
Sandra M. Hartman
Ronald C. Haslam
Justin D. Hatch
E. Rich Hawkes, II
Clint Heiner
Craig P. Helgesen
David S. Hendrickson
Marshall Hendrickson
Jarred A. Henline
Talar M. Herculian
Jonathan D. Hibshman
Jared K. Hill
Scott C. Hilton
Derek E. Hinds
Kevin L. Hoffman
Tyson C. Horrocks
Megan J. Houdeshel
Derrick C. Hughes
Taylor A. Hughes
Benjamin C. Hymas
Christopher Rex Infanger
Resh T. Jefferies
Kevin D. Jeffs
J. Aaron Jensen
Nathan J. Jensen
Craig T. Jenson
Ryan R. Jibson
Keith L. Johnson
Steven J. Johnson
Craig Jorgensen
Joseph E. Jorgensen
Michael P. Kent
Kristen C. Kiburtz
Brandon L. Kidman
Amy M. Kimble
C. Todd Kinard
Amy J. Kingston
Matthew G. Koyle
James A. Larson
Alex B. Leeman
Scott H. Linton
Kiersty B. Loughmiller
Jeffrey T Lowe
Matthew T. Lund
Brigham J. Lundberg
Paul Lydolph, III
Kenneth E. Lyon, Jr.
Mark Benjamin Machlis
Daniel V. Major
Cynthia M. Malca
Benjamin J. Mann
Jeffrey E. Matson
Joshua L. Mauss
Jason B. McCammon
Daryl J. McCarty
Michael C. McGinnis
Adam J. McKenzie
Jennifer S. Merchant
Peter R. Mifflin
Miles W. Millard
Bentley J. Mitchell
Harold W. Mitts
Malone H. Molgard
Richard S. Montierth
Thomas J. Moore
Tyler K. Moore
Raychelle Morrill
Marcus R. Mumford

Matt A. Munson
Mark Athens Naugle
Burke B. Nazer
Russell John Nelsen
Anna Nelson
Holly J. Nelson
Natalie A. Nelson
Todd J. Newman
Timothy D. Nichols
Bradley A. Nokes
Jesse M. Oakeson
Daniel R.S. O'bannon
Maggie Olson
Kristina B. Otterstrom
Brandon H. Pace
David J. Pacheco
Anjali J. Patel
Richard J. Patterson
S. Joseph Paul
Jessame Jae Petersen
Jalyn Peterson
Jeffrey D. Peterson
Diane Pitcher
Cheryl A. Poole
Landon B. Potter
Bud I. Powell
Michael R. Power
Catherine A. Pray
Arati Raghavan
Jared W. Rasband
Kasey W. Rasmussen
Jeremy S. Raymond
Brittany N. Richards
Brian J. Riddle
Jeffrey K. Riddle
Jennifer Ries-Buntain
Jeff D. Rifleman
H. Stuart Ripplinger
Hillary A. Robertson
Mark A. Robertson
Francisco J. Roman
Chalyse Roothoff
Jessica L. Rose
Benjamin S. Ruesch
Joshua S. Rupp
Parker J. Russell
Yasser F. Sanchez
Jacob A. Santini
Benjamin Schramm
Jeremy Carl Schwendiman
Jared Sechrist
Jeremy M. Seeley
Nathan S. Seim
Matthew P. Sellers
Kirsten Shakespear
Jeremy N. Shimada
William A. Shinen
Mary Z. Silverzweig
Antonio C. Simonelli
Collin R. Simonsen
Nathan R. Skeen
Brandon John Smith
Eric S. Smith
Wesley J. Smith
Abraham O. Smoot
Deborah A. Snow
Tyler V. Snow
Randall G. Sparks
Saul A. Speirs
Rex D. Spencer
Cobie Spevak
Robert A. Stark
Alexander T. Stein, Ph.D.
Quinton J. Stephens
Andrew Alan Stewart
Brian C. Stewart
Ryan D. Stones
Christopher L. Stout
Jacob J. Strain
T. Aaron Stringer
Noella A. Sudbury
Swen R. Swenson
Michael L. Tate
Jessica T. Taylor
Jonathan Lee Taylor
Sanna-Rae Taylor
Michael J. Thomas
C. Christian Thompson
Douglas J. Thompson
Elizabeth Elon Thompson
Kara K. Thompson
Raleigh C. Thompson
Jonathan K. Thorne
Daniel J. Tobler
Letitia J. Toombs
Elizabeth Ann Toscano
Linh N. Tran-Layton
Mark S. Tschaggeny
Mary Jo F. Tuinei
Nicolas David Turner
Robert E. Tyrrell
Artemis D. Vamianakis
Robert C. Van Dyke
Eliza R. Van Orman
Daniel B. Vause
Eric Boyd Vogeler
Garrett A. Walker
Thomas D. Weber
James B. Webster, Jr.
Adam D. Wentz
Eric E. Westerberg
John David Westwood
Eric B. Whiting
Christin B. Williams
John Anthony Williams
Stephanie L. Wilson
Colleen K. Witt
Eric Taylor Woodbury
Mckenna Woodger-Pyper
Daniel M. Woods
Michael A. Worel
Philip Laurence Wormdahl
Brock N. Worthen
Angilee Kym Wright
Daniel E. Young
Shannon Kate Zollinger

House Counsel
Michael James Radford

Foreign Legal Consultant
Alexey Kotov

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.

Notice of Petition for Reinstatement to the Utah State Bar by Steven Crawley

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement ("Petition") filed by Mr. Crawley in *In the Matter of the Discipline of Steven Crawley,* Third Judicial District Court, Civil No. 040905620. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Utah State Bar

Spring Convention in St. George

March 18–20

DIXIE CENTER at St. George

Full online Brochure/Registration will be available January 11, 2010.

ACCOMMODATIONS:
www.utahbar.org

Brochure/Registration materials available in the January/February 2010 edition of the *Utah Bar Journal*

2010 "Spring Convention in St. George" Accommodations

Room blocks at the following hotels have been reserved.
You must indicate you are with the Utah State Bar to receive the Bar rate.
After "release date" room blocks will revert back to the hotel general inventory.

Hotel	Rate (Does not include 11.45% tax)	Block Size	Release Date	Miles from Dixie Center to Hotel
Ambassador Inn (435) 673-7900 / ambassadorinn.net	$65–$75	10–DQ	2/18/10	0.4
Best Western Abbey Inn (435) 652-1234 / bwabbeyinn.com	$109	25	2/18/10	1
Budget Inn & Suites (435) 673-6661 / budgetinnstgeorge.com	$81–$102	20–DQ/Suites	2/18/10	1
Comfort Inn (435) 628-8544 / comfortinn.com/	$126	25	2/18/10	0.4
Comfort Suites (435) 673-7000 / comfortsuites.net	$85	30	2/18/10	1
Courtyard by Marriott (435) 986-0555 / marriott.com/courtyard/travel.mi	$149	5–Q 5–K	2/03/10	4
Crystal Inn St. George (fka Hilton) (435) 688-7477 / crystalinns.com	$99	20–Q 10–K	2/20/10	1
Fairfield Inn (435) 673-6066 / marriott.com	$90	10–DBL 10–K	2/18/10	0.2
Green Valley Spa & Resort (435) 628-8060 / greenvalleyspa.com	$102–$221	13 1–3 bdrm condos	2/ /10	5
Hampton Inn (435) 652-1200 / hamptoninn.net	$105	25–DQ	3/04/10	3
Holiday Inn (435) 628-4235 / holidayinnstgeorge.com	$85	25	2/23/10	3
LaQuinta Inns & Suites (435) 674-2664 / lq.com	$99	10–K	2/01/10	3
Ramada Inn (800) 713-9435 / ramadainn.net	$89	20	2/18/10	3
TownePlace Suites by Marriott (435) 986-9955 / marriott.com/townplace-suites/travel.mi	$149	10–Studio Kings	2/03/10	4
Wingate by Wyndham (435) 986-9955 / wingatehotels.com/Wingate/control/home	$92			3

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.

Pro Bono Honor Roll

Kenneth Allsop – Divorce Case
Robert M. Anderson – Foreclosure Scam Case
Nicholas Angelides – Senior Cases
Joshua Baron – Guadalupe Clinic
Thomas Barr – Guadalupe Clinic
Lauren Barros – Family Law Clinic
John Benson – Immigration Clinic
James Bergstedt – Guadalupe Clinic
Carrie Boren – Family Law Clinic
Victor Copeland – Family Law Clinic
Mark Coppin – Immigration Clinic
Maria-Nicolle Beringer – Consumer & Domestic Cases
Bryan Bryner – Guadalupe Clinic
William Carlson – Family Law Clinic
Ian Davis – Guadalupe Clinic
Jennifer Falk – Divorce Case
Shawn Foster – Immigration Clinic
Richard Fox – Adult Guardianship Case
Keri Gardner – Family Law Clinic
Jeffry Gittins – Guadalupe Clinic
Marlene Gonzalez – Immigration Clinic
Esperanza Granados – Immigration Clinic
Jason Grant – Family Law Clinic
Matthew Hafen – Consumer Auto Case
Sarah Hardy – Divorce Case
Kathryn Harstad – Guadalupe Clinic
Garth Heiner – Guadalupe Clinic
April Hollingsworth – Guadalupe Clinic
Kyle Hoskins – Farmington Clinic
Louise Knauer – Family Law Clinic
Jennifer Korb – Guadalupe Clinic
Dixie Jackson – Family Law Clinic
Kristin Jaussi – Guadalupe Clinic
Jeremy Johnson – Guadalupe Clinic
Darren Levitt – Family Law Clinic
Michael Langford – Guadalupe Clinic
Suzanne Marelius – Family Law Clinic
Jennifer Mastrorocco – Family Law Clinic
Sally McMinimee – Family Law Clinic
Adam Miller – Consumer Case
James Morgan – Guadalupe Clinic
Grant Morrison – Divorce Case
Bao Nguyen – Immigration Clinic
Kate Noel – Guadalupe Clinic
Todd Olsen – Family Law Clinic
Rachel Otto – Guadalupe Clinic
Brad Patterson – Holocaust Reparations Case
Al Pranno – Family Law Clinic
Christopher Preston – Guadalupe Clinic
Stewart Ralphs – Family Law Clinic
Jerry D. Reynolds – Divorce Case
Jon Rogers – Consumer Auto Case
Matthew Romney – Housing Case
Tiana Russell – Housing Case/ Guadalupe Clinic
Brent Salazar-Hall – Family Law Clinic
Lauren Scholnick – Guadalupe Clinic
Allen Sims – Guadalupe Clinic
James Spendlove – Housing/Real Property Case
Kathryn Steffey – Guadalupe Clinic
Steven Stewart – Guadalupe Clinic
Erin Stone – Guadalupe Clinic
Virginia Sudbury – Divorce Case/Family Law Clinic
Barbara Szweda – Immigration Clinic
Aaron Tarin – Immigration Clinic
Roger Tsai – Immigration Clinic
Aaron Waite – Indian Walk In Center
Tyler Waltman – Guadalupe Clinic
Tracey Watson – Family Law Clinic
Alyssa Williams – Immigration Clinic
Murry Warhank – Guadalupe Clinic
Steven Waterman – Housing Case
Donald Winters – Custody Case

Utah Legal Services and the Utah State Bar wish to thank these volunteers for accepting a pro bono case or helping at a clinic in the last two months. Call Brenda Teig at (801) 924-3376 to volunteer.

Attorney Discipline

ADMONITION

On August 10, 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 1.1 (Competence), 1.6(a) (Confidentiality of Information), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was hired to represent a client in a domestic matter even though the attorney had not practiced in that area for over two decades. The attorney did not have sufficient skills to provide the representation necessary in the domestic case. When the attorney filed a Motion to Withdraw, the attorney attached a letter in which confidential and possibly prejudicial information was disclosed.

ADMONITION

On August 1, 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 1.8(a) (Conflict of Interest: Prohibited Transactions) and 1.8(b) (Conflict of Interest: Prohibited Transactions) of the Rules of Professional Conduct.

In summary:

An attorney had a tax and estate-planning practice, and upon learning that several of the clients were seeking investments, the attorney referred those clients to an investment fund as a viable investment opportunity. As fund manager, the attorney had a business or financial interest in the fund, since the fund manager's proposed compensation was based on the value of fund assets, or investments. Every investor, including the client-investors, was required to execute standard investment agreements prior to investing in the fund. The attorney failed to advise client-investors, in a separate writing, of the desirability of seeking advice from independent counsel and failed to allow them a reasonable opportunity seek such independent advice. The attorney failed to obtain client-investor's informed consent to essential terms of the transaction, in a separate writing.

ADMONITION

On August 1, 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(a) (Safekeeping Property), 1.15(b) (Safekeeping Property), 1.15(c) (Safekeeping Property), 1.15(d) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The Office of Professional Conduct received notice from a financial institution that a check written against an attorney's client trust account created an overdraft against the trust account. The check was not written on behalf of a client, but was instead written against either fees earned or expenses incurred, and was used by the attorney to purchase personal or business items. A review of the attorney's trust account records indicates that there have been occasions in the past, when there existed significant discrepancies between the expected balance and actual balance of funds held in the client trust account. The attorney failed to hold the clients' advanced payments of fees separate from the attorney's property. The attorney failed to maintain complete and accurate records of funds held in the client trust account. The attorney failed to clearly identify the funds held in the trust account as funds belonging to, and being held on behalf of, each of the clients. The attorney failed to properly manage the trust account. The attorney kept personal funds in the client trust account in an amount exceeding that necessary to pay regular bank service charges on the account. The attorney failed to hold advance fees in the trust account, and to withdraw funds only as fees were earned, or as expenses were incurred.

ADMONITION

On August 1, 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) (Communication with Persons Represented by Counsel) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney represented a client in a divorce proceeding. The attorney was aware that the opposing party was represented

by counsel. The attorney contacted the opposing party on two occasions without consent from that party's attorney.

RECIPROCAL DISCIPLINE

On August 14, 2009, the Honorable Bruce Lubeck, Third District Court entered an Order of Discipline: Suspension for two years against Brian R. Rayve for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 8.4(b) (Misconduct), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

On October 8, 2008, the United States Patent and Trademark Office ("USPTO") through its disciplinary process entered an Order suspending Mr. Rayve from practicing law for two years. On February 17, 2009, the Supreme Court of Ohio through its disciplinary process issued an Order of reciprocal discipline against Mr. Rayve suspending him from the practice of law for two years. Mr. Rayve was the attorney of record for numerous U.S. Patent applications, which he filed with the USPTO on behalf of a client. Along with the petitions and other filings, Mr. Rayve mailed checks made payable to the order of "Commissioner for Patents." Fifteen checks that Mr. Rayve sent to the USPTO were returned unpaid due to insufficient funds. On numerous occasions the USPTO mailed Mr. Rayve notices of abandonment of the applications for having failed to file a timely response to notices of abandonment, Mr. Rayve failed to respond timely and pay the application fees. In one case, Mr. Rayve filed a notice of appeal and a "Petition for Revival of Unintentionally Abandoned Patent Application." According to the petition, Mr. Rayve contacted the USPTO and learned that the application had become abandoned based on his failure to include the proper fee in his petition. Upon information and belief, the client did not consent to the abandonment of the application or other filings. In one case, the USPTO granted the petition and informed Mr. Ryave of the two-month period for filing an appeal brief. The USPTO later informed Mr. Rayve that the appeal had been dismissed because he did not timely file the appeal brief, and, consequently, (the application had become abandoned because there were no allowable claims). Upon information and belief, the client did not consent to the abandonment of the application or other filings.

PUBLIC REPRIMAND

On August 1, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against David G. Turcotte for violation of Rules 1.15(b) (Safekeeping Property), 1.15(c) (Safekeeping Property) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

A company represented by Mr. Turcotte, entered into a third party security agreement ("the Agreement") with a bank. The Agreement assigned a security interest to the bank and rights to proceeds received by the company in a lawsuit wherein the company was a plaintiff. Mr. Turcotte represented the company throughout the lawsuit. Mr. Turcotte was aware of the existence, terms and conditions of the Agreement. Even so, Mr. Turcotte obtained a judgment in the lawsuit in favor of the company and received funds on behalf of the company. Mr. Turcotte determined that the bank was not owed any monies from the settlement proceeds and disbursed the remainder of the settlement proceeds to third parties other than the bank. In one case, he disbursed funds that directly benefited entities owned or in the control of Mr. Turcotte. Mr. Turcotte disbursed the money without notifying the bank of receipt of the settlement funds.

DISBARMENT

On July 2, 2009, the Honorable James R. Taylor, Fourth District Court entered an Order of Discipline: Disbarment against Richard J. Culbertson for violations of Rules 8.4(b) (Misconduct), 8.4(c) (Misconduct) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

On June 19, 2008, Mr. Culbertson pled guilty to three counts of Communications Fraud, in violation of Utah Code section 76-10-1801, second-degree felonies, and one count of Pattern of Unlawful Activity, Utah Code section 76-10-1601, a second-degree felony. Mr. Culbertson was sentenced to incarceration for a period of not less than one year nor more than fifteen years in the Utah State Prison. Mr. Culberston was ordered to pay restitution in the amount of $1,149,544.89 plus interest.

2009–2010 Paralegal Division Board of Directors

by Aaron L. Thompson

As the new Chair of the Paralegal Division, I am pleased to introduce to you the new officers and directors of the Paralegal Division for 2009-2010. These professionals will continue the tradition of excellent leadership and service to our Division members, to the Bar, and to the community. I look forward to working with many members of the Paralegal Division and its board of directors. I appreciate the support of Steve Owens, the Utah State Bar President, Rob Jeffs, the President-Elect, and the Bar Commissioners. I look forward to making our Division even more beneficial to its members and continuing its outreach to and support of the legal community. I believe that together we can make a difference in the quality and efficiency of the delivery of legal services. If you would like more information about the Paralegal Division, please visit our website at utahbar.org/sections/paralegals.

Top Row: *Jessica Christensen, Aaron Thompson, Steven Morley, Heather Nielson.*
Middle Row: *Carma Harper, Robyn Dotterer, JoAnna Shiflett, Sanda Flint.*
Bottom Row: *Kimberly Cassett, Sharon Andersen, Heather Finch, Julie Eriksson.*
Members not pictured: *Colleen Wrigley, Karen McCall, Lorraine Wardle, Thora Searle.*

Our officers and board of directors for the New Year are:

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

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

Region III Director, Chair-Elect, Heather Finch – Heather is the Director for Region III which covers Juab, Millard, Utah, Wasatch, Duchesne, Uintah, and Daggett Counties. Heather is the head litigation paralegal with the firm of Howard, Lewis & Petersen, P.C., where she works in the areas of civil litigation, plaintiffs' medical malpractice, plaintiffs' personal injury, and plaintiffs' product liability. She has worked with Howard, Lewis & Petersen since 1995, and she has worked as a paralegal since 1989.

Region IV Director, Colleen Wrigley – Colleen is the Director for Region IV which covers Carbon, Sanpete, Sevier, Emery, Grand, Beaver, Wayne, Piute, San Juan, Garfield, Kane, Iron, and Washington Counties. Colleen is a paralegal at the law firm of Clarkson Draper & Beckstrom in St. George, Utah, working primarily in the areas of estate planning and business entity creation and planning. She earned her B.S. at Brigham Young University.

Director-at-Large, Finance Chair, Karen McCall – Karen works at Richards Brandt Miller Nelson in asbestos litigation defense and insurance defense, and she has been a paralegal

for over nine years. In addition to her duties as the Paralegal Division's Finance Officer, she also served as the Division's representative to the Utah Bar Journal, for which she has written and edited several articles. She has a B.A. in Communications from California State University, Fullerton and a Paralegal Certificate from Fullerton College. Karen has been married for 17 years and has a daughter and a son.

Director-at-Large, Secretary, JoAnna Shiflett, CP – JoAnna is a paralegal at Strong & Hanni specializing in litigation and insurance defense with over 22 years in the legal profession. She holds a B.A. in Political Science (University of Utah, 2000) and achieved her CP from the National Association of Legal Assistants (NALA) in February 2008. JoAnna begins her second year on the Division board. She also serves on the Community Service Committee, is involved with the Wills for Heroes program sponsored by the Young Lawyers Division (YLD), and was responsible for the recent redesign of the Division's website.

Director-at-Large, Kimberly Cassett – Kim is a paralegal at Ray Quinney & Nebeker with nearly 12 years of experience, working primarily in the areas of tort litigation, including personal injury, product liability, and medical malpractice. She has a BS degree in Business Management and an Associates degree in Paralegal Studies. She is beginning her second year on the board and has served on several paralegal committees

Director-at-Large, Jessica Christensen – Jessica has worked as a Paralegal in the Asset Forfeiture Unit at the United States Attorney's Office for one year. Asset Forfeiture law consist of both criminal and civil law. Prior to working at the United States Attorney's Office, Jessica worked in the area of family law. Jessica serves the Division as the Governmental Relations Liaison. Jessica has an Associate's Degree in Paralegal Studies from Salt Lake Community College and is currently working on her Bachelor's Degree at Utah Valley University.

Director-at-Large, Robyn Dotterer, CP – Robyn has worked as a paralegal for over 20 years. Robyn has been with Strong & Hanni for nine years. She works with Stuart Schultz and Andrew Wright in the areas of insurance defense in personal injury, bad faith, and legal malpractice litigation. Robyn achieved her CP in 1994 and is a Past President of the Legal Assistants Association of Utah (LAAU). She has served on the Paralegal Division Board in several different capacities and is currently a Director-at-Large and is co-chair of the Community Service Committee and YLD Liaison. Robyn has been married to Duane Dotterer for 35 years and lives in Sandy, Utah.

Director-at-Large, Sanda Flint, CP – Sanda is a paralegal with the law firm of Strong & Hanni working primarily in the area of civil litigation and insurance defense. She received her paralegal certification from the School of Paralegal Studies, Professional Career Development Institute with a specialty in litigation. She achieved her CP designation in 1998, from NALA. She is the past Chair of the Paralegal Division of the Utah State Bar 2003-2004. She served as the Division's first Bar Liaison from 1996 to 2000, as well as the Bar Liaison for the LAAU from 1995 to 2000.

Director-at-Large, Steven A. Morley – Steven is a paralegal in the Asset Forfeiture Unit at the United States Attorney's Office and has been working there for over three years. Federal asset forfeiture law encompasses many aspects of federal criminal law, civil litigation, and trial experience. Steve serves the Division as the Marketing & Publications Committee Chair and Bar Journal Liaison. Steve graduated with a B.S. degree in Paralegal Studies from Utah Valley University. He also worked as a military paralegal in the United States Air Force Reserve for nearly three years specializing in military justice.

Director-at-Large, Heather Nielson – Heather has been a paralegal for over twelve years. She is currently employed by the United States Attorney's Office as a paralegal specialist, primarily in the area of asset forfeiture. Heather serves the Division as the LAAU Liaison. She earned her Bachelor's Degree in Paralegal Studies and Criminal Justice at Utah Valley University.

Director-at-Large, Lorraine Wardle – Lorraine Wardle is the Senior Paralegal at the firm of Victoria Kidman & Associates, working with claims litigation counsel for State Farm Insurance. Prior to joining Kidman & Associates Lorraine worked at several highly esteemed insurance defense firms such as Richards Brandt Miller & Nelson, Dunn & Dunn, Hanson Epperson & Wallace, and Epperson & Rencher. Lorraine lives in West Jordan with her husband and two golden retrievers, and she has one married daughter.

Chair, Aaron Thompson – Aaron is a paralegal employed by the legal department of Headwaters Incorporated, with an extensive expertise in various facets of the law, and a diverse specialty in commercial insurance. He earned his B.A. and Paralegal Studies degree from Westminster College. Aaron has coordinated local and national campaigns for several years. Aaron recently directed Governor Bill Richardson's 2008 Presidential

race in Utah. Equally, Aaron's paralegal career has provided varying experiences from working with the Utah Attorney General's office in the Commercial Enforcement and Consumer Protection divisions to working with local and national organizations, gubernatorial, Senate, Congressional, and Presidential campaigns around the United States.

Ex-Officio Director (Immediate Past Chair), Julie Eriksson – Julie has been a paralegal for 17 years and has been an active participant in the Paralegal Division since its inception. Julie served as CLE Chair of the Paralegal Division from 2007-2008. In 2007, she became Chair-Elect of the Paralegal Division and served as the Division's Governmental Relations Liaison to the Utah State Bar's Governmental Relations Committee. As Chair, she represented the Paralegal Division as an Ex-Officio member of the Bar Commission. Julie is also a member of LAAU and served that association in many capacities including several years as President.

Parliamentarian, Sharon M. Andersen – Sharon has been a paralegal for 19 years and currently works with Pete Barlow at Strong & Hanni. She graduated from the Westminster College Legal Assistant Program in 1990, and over the years has worked for several law firms and corporations in various areas of law. During 2007/ 2008, Sharon served as the chair of the Paralegal Division, and as an ex officio bar commissioner for the Utah State Bar. Prior to that, she served for two years as co-chair of the Paralegal Division's Continuing Legal Education Committee.

Membership Benefits

Members of the Paralegal Division are afforded the benefits that are available to the Bar membership through the efforts of the Bar's Member Benefits Committee. Refer to http://www.utahbar.org/members/member_benefits.html for further information.

- Membership includes the *Bar Journal* which is published 6 times per year.
- Paralegal Division members are welcome to join various sections of the Bar.
- Counseling services for no additional charge through Blomquist Hale.
- CLE: Free CLE Brownbag Luncheons

Get Connected by Joining Today!

Voluntary membership in the Division will help sustain a high level of leadership and professionalism in the legal community. Get involved.

- Membership Cost – $75.00/year
- Membership forms are available on our website http://utahparalegals.org or http://www.utahbar.org/sections/

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
11/11/09	**Probate Essentials Nuts and Bolts CLE.** Presented by Troy Wilson, Wilson Law Offices, P.C. Learn what to submit to the court when you open formally and informally. Explanation of the different types of openings and closings available for probate in Utah. Common pit falls when probating an estate. Representation/fee agreements. Fee Structure, billing issues: what tasks should an attorney perform exclusively vs. what tasks are better suited to an assistant/paralegal. 1:00 – 3:00 pm. $50.	2 CLE/NLCLE
11/12 & 13	 **FALL FORUM – Downtown Marriott, Salt Lake City** **Register and view materials online at www.utahbar.org/cle/fallforum**	**up to 9.5* including Ethics**
11/16/09	**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
11/17/09	**EDiscovery Part 2.** 9:00 am – 12:00 pm.	TBA
12/03/09	**Fall Corporate Counsel.** 9:00 am – 1:30 pm.	4 (incl. 1 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
12/15/09	**Best of Series.** 5 sessions offered starting at 9:00 am. **Session 1:** Ethics and Discipline Update – Billy Walker, Senior Counsel of Professional Conduct (1 hr. Ethics). **Session 2:** Mediation Hits the Headlines: What you May Not Know But Should – Christian Clinger, Michele Mattsson, Joshua King, Bryant McConkie, and Karin Hobbs (1 hr. CLE). **Session 3:** Managing Debt – Chris Webb (1 hr. CLE). **Session 4:** 60 Tips in 60 Minutes: Technology Update – What's Up! (iPhone, Blackberries, networks security, efiling, ediscovery) – Lincoln Mead, IT Director of the Utah State Bar (1 hr. CLE). **Session 5:** TBA. $30 per credit hour.	up to 5 including 1 Ethics
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
01/20/10	**OPC Ethics School.**	6 hrs. Ethics

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

*Subject to change.

Benson & Mangrum on Utah Evidence

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(New book required if you have not purchased a book in two years.)

6.5 hrs. CLE Credit – including 1 hr. Professionalism

Register today at: www.utahbar.org/cle

Classified Ads

RATES & DEADLINES

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

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

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

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

OFFICE SPACE/SHARING

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.

Prime Office Space Available – Class A office space overlooking golf course and Wellsville Mountains in South Logan. Great location with Highway 89-91 exposure. Executive Suite, including phone lines, utilities, and availability of receptionist help for additional fee. Spacious window office with 192 square feet of space. Receptionist/secretarial area including 189 square feet available as option. Computer server available that allows offsite access also an additional option. Another 985 square feet of common area including private bathroom, break room, children's room and conference room. Starting at $1500 a month. Please call (435) 713-0660.

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POSITIONS AVAILABLE

Legal Director: The American Civil Liberties Union of Utah invites applications for the position of Legal Director to coordinate and manage all aspects of its litigation program from our office in Salt Lake City. The Legal Director will enhance the ability of the ACLU of Utah to bring about systemic change through impact-driven litigation that builds upon a network of highly qualified volunteer attorneys. Job duties will also include non-litigation advocacy of community outreach, coalition building, writing and publishing reports, planning and participating in public meetings, and media interviews. For more information please visit www.acluutah.org

Logan, Utah firm seeks a patent attorney with 2 to 5 years experience. Salary is negotiable depending on experience. Excellent benefits are available. Must be a member of the Utah State Bar or be willing to become a member. Please send resume to: Bearnson & Peck, L.C., P.O. Box 675, Logan, Utah 84323-0675 or respond via e-mail to: speck@bplaw.biz

Downtown mid-size law firm seeks to diversify its business practice group. This firm will consider individual/group of lawyer(s) with a portable book of business or possible merger with small firm. Outstanding facilities and benefits. Send replies to: Confidential Box #9, Attention: Christine Critchley, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111-3834 or by email to ccritchley@utahbar.org.

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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.

CALIFORNIA PROBATE? Has someone asked you to do a probate in California? Keep your case and let me help you. Walter C. Bornemeier, North Salt Lake. (801) 292-6400 or (888) 348-3232. Licensed in Utah and California – over 35 years experience.

Language – CTC Chinese Translations & Consulting Mandarin and Cantonese and other Asian languages. We have on staff highly qualified interpreters and translators in all civil and legal work. We interpret and/or translate all documents including: depositions, consultations, conferences, hearings, insurance documents, medical records, patent records, etc. with traditional and simplified Chinese. Tel: (801) 573-3317, Fax: (801) 942-1810, e-mail: eyctrans@hotmail.com.

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Date of Activity	Program Sponsor	Program Title	Activity Type	Regular Hours	Ethics Hours	Professionalism & Civility	NLCLE Hours	Total Hours
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I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Rule 14-414.

A copy of the Supreme Court Board of Continuing Education Rules and Regulations may be viewed at www.utahbar.org/mcle.

Date: _____ Signature: _____

EXPLANATION OF TYPE OF ACTIVITY

A. Audio/Video, Interactive Telephonic and On-Line CLE Programs, Self-Study
No more than twelve hours of credit may be obtained through study with audio/video, interactive telephonic and on-line CLE programs. Rule 14-409 (c)

B. Writing and Publishing an Article, Self-Study
Three credit hours are allowed for each 3,000 words in a Board-approved article published in a legal periodical. No more than twelve hours of credit may be obtained through writing and publishing an article or articles. Rule 14-409 (c)

C. Lecturing, Self-Study
Lecturers in an accredited continuing legal education program and part-time teaching by a practitioner in an ABA approved law school may receive three hours of credit for each hour spent lecturing or teaching. No more than twelve hours of credit may be obtained through lecturing or part time teaching. **No lecturing or teaching credit is available for participation in a panel discussion.** Rule 14-409 (a) (c)

D. Live CLE Program
There is no restriction on the percentage of the credit hour requirement, which may be obtained through attendance at an accredited legal education program. **However, a minimum of Twelve (12) hours must be obtained through attendance at live continuing legal education programs.** Regulation 4(d)-101(e)

The total of all hours allowable under sub-sections (a), (b), and (c) of this Rule 14-409 may not exceed twelve (12) hours during a reporting period

THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION, SEE RULE 14-409 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Rule 14-414 (a) – Each lawyer subject to MCLE requirements shall file with the Board, by January 31 following the year for which the report is due, a certificate of compliance evidencing the lawyer's completion of accredited CLE courses or activities which the lawyer has completed during the applicable reporting period.

Rule 14-414 (b) – Each lawyer shall pay a filing fee in the amount of $15.00 at the time of filing the certificate of compliance. Any lawyer who fails to complete the MCLE requirement by the December 31 deadline shall be assessed a $100.00 late fee. Lawyers who fail to comply with the MCLE requirements and file within a reasonable time, as determined by the Board in its discretion, and who are subject to an administrative suspension pursuant to Rule 14-415, after the late fee has been assessed shall be assessed a $200.00 reinstatement fee, plus an additional $500.00 fee if the failure to comply is a repeat violation within the pasty 5 years.

Rule 14-414 (c) – Each lawyer shall maintain proof to substantiate the information provided on the certificate of compliance filed with the Board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders, or materials related to credit. The lawyer shall retain this proof for a period of four years from the end of the period for which the Certificate of Compliance is filed. Proof shall be submitted to the Board upon written request.

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