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Jan/Feb 2010

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Winter in Bryce Canyon, by first-time contributor, Leslie Orgera, Salt Lake City.

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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.

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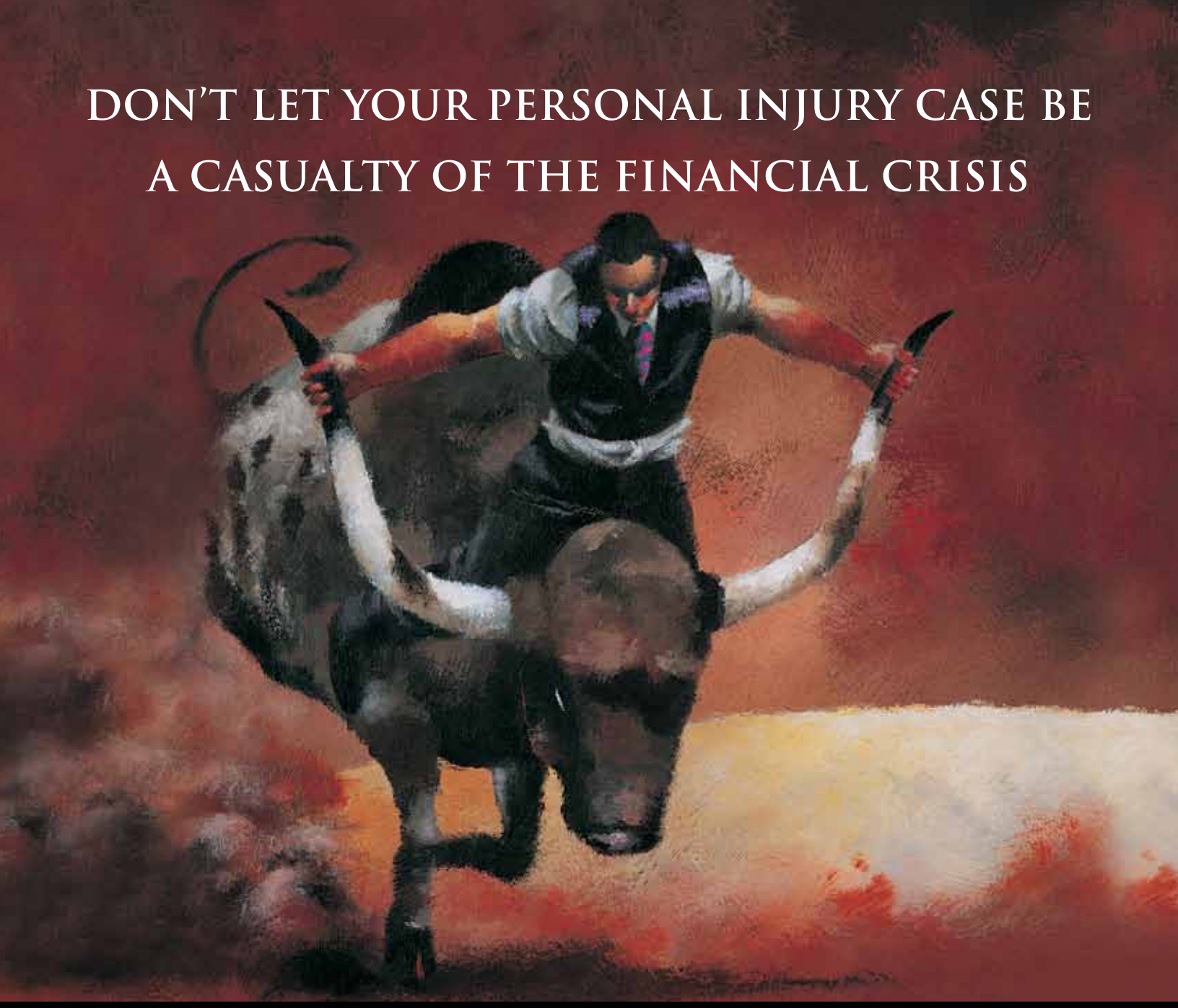

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2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal,* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.
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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.
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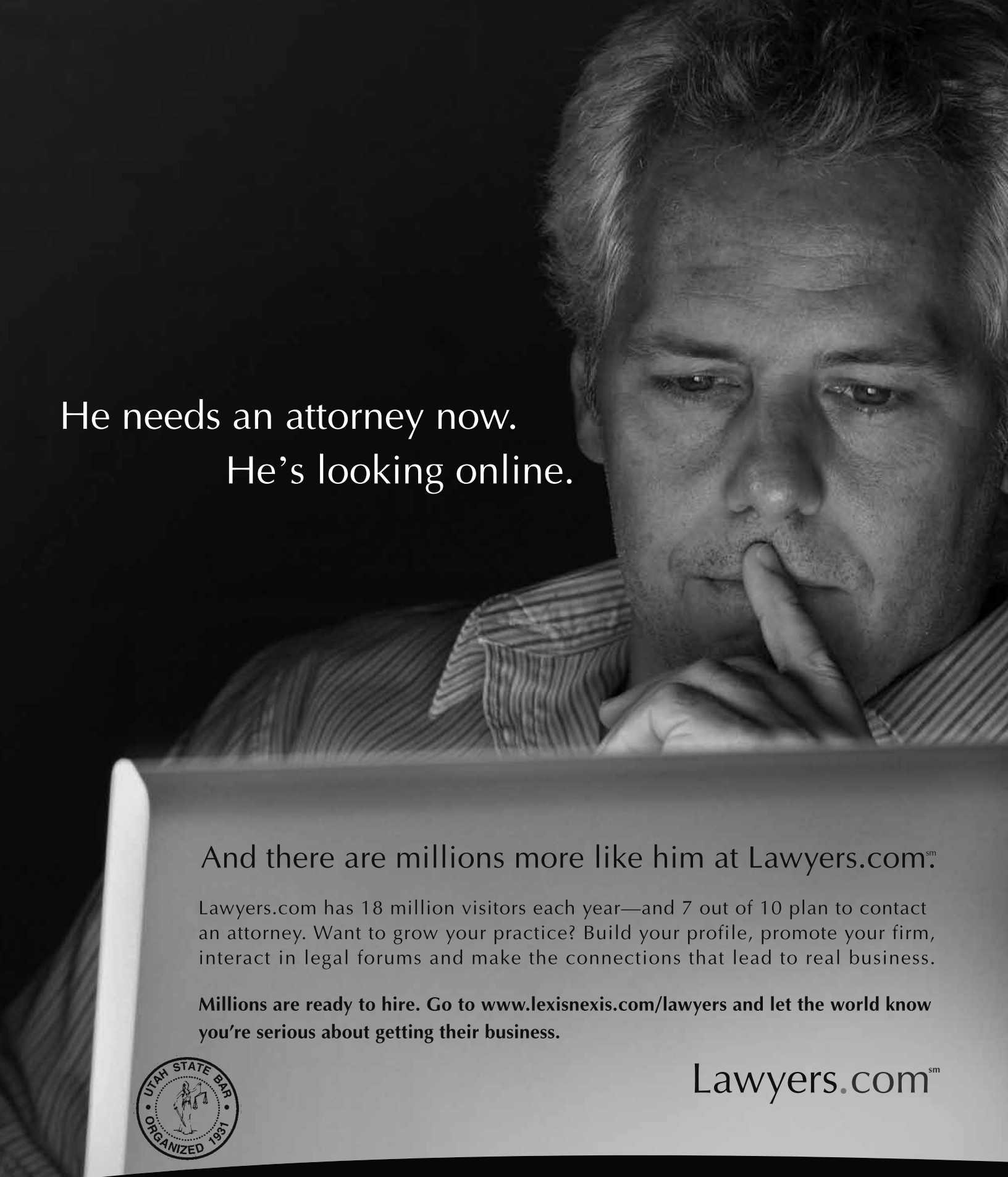

Don't Tax Justice

by Stephen W. Owens

Our legislature goes back to work shortly, facing another tremendous budget shortfall. Certain policy groups and politicians are considering trying to expand the state's tax base to include a tax on professional services, which obviously would include lawyers. This consideration is due to the downward shift in Utah's economy and the belief that Utah's sales tax structure is still based on archaic manufacturing models rather than services-based realities.

Taxing Hardship & Basic Rights

Adding a tax on the many important services individuals and businesses need is unwise, because it would place yet another burden on those already suffering misfortune and vulnerability in their time of immediate need and personal crisis.

Lawyers, in particular, perform critical functions in transacting family, business, and financial matters, as well as enforcing and defending people's basic rights. Lawyers also provide expertise to Utah businesses to help them conduct and protect their business matters. A tax on the sale of legal services would impose a serious detrimental impact on the ability of Utah's people and businesses to retain help in carrying out basic commerce.

We all face inconvenience and hardships in the natural course of our daily lives. Our ability to deal with unavoidable events in our family, business, and financial matters would become more burdensome if our efforts to combat our misfortune became even more "taxing." These are times when we need help and understanding, not hindrance and compounded hardship.

Tenants dealing with unreasonable landlords and landlords dealing with unreasonable tenants would be impacted. Anyone facing a criminal charge or harm from personal injury would be taxed. So would those having to deal with issues surrounding the death of a loved one, the trauma of divorce or child custody, the tragedy of domestic abuse, unfair housing restrictions, estate administration, real estate transfers, and credit/bankruptcy.

A sales tax on legal services would tax people for taking responsible steps to manage their affairs. Examples include persons who wish to protect their families by preparing a will and appointing guardians, individuals buying and selling their homes or businesses, and those who are incorporating a new business. Increasing the cost of legal services would deter individuals and small businesses from retaining lawyers at the outset, resulting in more costly legal problems and greater burdens on our state's judicial system down the road.

Other Professional Services Impacted

Other professional services, including medical care, accounting, engineering, architecture, and real estate services, would also be affected. A sad consequence of this tax would then be that consumers will forgo needed services like preventative medical care because the prices will be higher. Even the less critical (but no less necessary) life needs like lawn care, physical therapy, clogged pipes, or home remodeling may be put off or ignored if they become more expensive.

It will be the consumers who pay the tax, not the plumber, lawn mower, physical therapist, hair dresser, barber, engineer, contractor, or architect. Everyday problems will cost more – from filing your tax return to a midnight run to the emergency room. Fighting cancer and chronic illnesses will cost more.

The small business that might be struggling to remain solvent will find its costs increased significantly when it must pay a tax on the professional services it receives. These include not only legal and accounting services, but computer, custodial, and security services. For most small businesses, a sales tax on professional services will increase the cost of doing business without corresponding, offsetting benefits.

Taxing professional services provided to businesses requires businesses to build the tax into the price of the goods or services sold, which will again be taxed upon final sale. Imposing a sales tax on the services used in the distribution chain results in pyramiding and in a substantially increased sales tax burden.

Utah Would be at a Disadvantage Nationally

This tax would place Utah's businesses at a competitive disadvantage to states that do not tax professional services. This tax would discourage businesses and professionals from locating in Utah, resulting in lost job,

wage, and tax opportunities. The tax would encourage Utah citizens to seek professional services from out-of-state providers. This is especially true of border communities and sophisticated clients, or clients of law firms that have out-of-state affiliates.

Only three states – South Dakota, New Mexico, and Hawaii – currently tax legal services. Florida and Massachusetts enacted sales tax on services, but promptly repealed the measures when they proved to be unpopular and difficult to administer. National advertising agencies refused to advertise in Florida. Several other states, including Maine, Maryland, Ohio, and Vermont, as well as the District of Columbia, rejected similar proposals. There is almost universal recognition that this tax is based upon unsound public policy.

Other Pitfalls With Taxing Legal Services

This tax would create a tremendous financial impact on practicing attorneys – especially if the tax is due when the client is billed, not when (and if) the bill is paid. The tax would require all lawyers to apply, account for, collect, and pay the tax, increasing overhead.

All communications between a client and his or her lawyer are confidential to protect the client. A tax audit on a lawyer's alleged failure to properly administer the tax could violate the client's attorney/client privilege, and create a greater burden on lawyers to continue to protect those communications.

There are also numerous unresolved questions as to the constitutionality of the proposed tax on legal services which the State might have to litigate over several years. These include taxing a person's ability to defend him or herself in a criminal case, adding an impermissible burden to accessing the courts or exercising one's rights, or violating equal protection, due process, separation of powers, and the Supremacy Clause rights. Taxing some professions while exempting others may violate equal protection laws.

Conclusion

Government officials are appropriately thinking outside the box on how to fund needed programs. However, adding a tax to professional services, and especially to legal services, would force people to forgo needed help at a time that they need it most. Please contact your legislators and make sure they understand that adding this tax is a bad idea.

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The Slope of Utah Ski Law

by David S. Kottler

This article marks the thirtieth anniversary of the Utah Legislature's 1979 enactment of Utah's Inherent Risks of Skiing Act. *See* Utah Code Ann. §§ 78B-4-401 to -404 (2009). Since then, national statistical studies tell us that there have been approximately 900 ski/snowboard related fatalities and over five million ski/snowboard related injuries. Each year, Utah's slopes can expect to see about three fatalities and over 10,000 injuries. While the vast majority of these accidents are not actionable, it is nonetheless surprising that the entire body of Utah ski law consists of only a handful of reported cases – in a state which boasts "The Greatest Snow on Earth" and around four million skier visits annually. Despite the scant volume of ski-injury litigation in Utah, the statistics above suggest that many Utah attorneys will confront the issue at some time in their career. This article attempts to provide a general framework in which to understand, evaluate, and advise clients about the slope of Utah ski law.

Downhill ski/snowboard accidents typically fall into one or more of the following five categories:

- Collisions with other skiers/snowboarders, with immovable objects (*e.g.,* trees), or with movable objects (*e.g.,* runaway skis or snowboards);
- Ski lift accidents due to negligent design, maintenance, or operation of the lift, or due to the negligence of other skiers or passengers on the lift;
- Accidents caused by ski area negligence such as failure to mark a known hazard, improper slope maintenance and/or grooming, or inadequate avalanche control;
- Accidents caused by ski instructor negligence, such as leading ski school students into overly challenging terrain or failing to provide safety instructions; and
- Accidents or injuries resulting from faulty equipment, most commonly alpine bindings that fail to release properly.

These categories frequently overlap, providing plaintiffs' attorneys with multiple possible defendants and theories of recovery for any individual accident.

The Utah Inherent Risks of Skiing Act

In most ski-injury cases, the first question to be asked (usually in the defendant's motion for summary judgment) is whether the ski area operator enjoys immunity under the Utah Inherent Risks of Skiing Act (the "Skiing Act"). The Skiing Act was passed in 1979 at the behest of ski-industry lobbyists, who feared a wave of litigation against ski area operators following the seminal case of *Sunday v. Stratton Corp.,* 390 A.2d 398, 403 (Vt. 1978) (holding ski area operator liable for injuries sustained by a novice skier who tripped on an obscured piece of undergrowth: "What [the plaintiff] 'assumes' is not the risk of injury, but the use of reasonable care on the part of the [ski area operator].").

The stated purpose of the Skiing Act is

> to clarify the law in relation to skiing injuries and the risks inherent in that sport, to establish as a matter of law that certain risks are inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those inherent risks.

Utah Code Ann. § 78B-4-401. The Skiing Act broadly defines "inherent risks of skiing" as "those dangers or conditions which are an integral part of the sport," and provides a non-exclusive list of such dangers and conditions (*e.g.,* "variations or steepness in terrain" and "collisions with other skiers"). *Id.* § 78B-4-402.

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Despite what some argue is the "plain language" of the Skiing Act, the Utah Supreme Court held, in *Clover v. Snowbird Ski Resort,* 808 P.2d 1037 (Utah 1991), that the Skiing Act "does not purport to grant ski area operators complete immunity from all negligence claims initiated by skiers." *Id.* at 1044. Rather, the Skiing Act only protects ski area operators from liability in cases where one or more of the enumerated dangers that caused the injury is an "integral aspect[] of the sport of skiing." *Id.* In other words, ski area operators owe the skiing public a duty to exercise ordinary care to mitigate or eliminate the hazards of skiing. However, ski area operators are shielded from liability for injuries resulting from "dangers that skiers wish to confront as essential characteristics of the sport of skiing or hazards that cannot be eliminated by the exercise of ordinary care on the part of the ski area operator." *Id.* at 1046-47.

In *Clover,* the plaintiff was injured at Snowbird Ski Resort when another skier collided with her after jumping over a crest with a steep drop off on the downhill side of the crest. *See id.* at 1039. Due to the drop off, skiers above the crest could not see skiers below the crest (a condition known as a "blind jump"). *See id.* The plaintiff sued Snowbird alleging, among other things, that Snowbird was negligent in its design and maintenance of the ski run and in its failure to take reasonable measures to eliminate the hazardous blind jump. *See id.* The trial court granted Snowbird's motion for summary judgment, ruling that the plaintiff's claim was barred by the Skiing Act. *See id.* at 1043. In reversing that decision, the Utah Supreme Court held that the existence of a blind jump is not an essential characteristic of a ski run, and that the plaintiff could, therefore, recover against Snowbird if she could prove that Snowbird could have prevented the accident through the use of ordinary care. *See id.* at 1048; *see also White v. Deseelhorst,* 879 P.2d 1371, 1375 (Utah 1994) (precluding summary judgment in favor of ski area operator where genuine issue of fact existed concerning necessity of signs warning of cat track traversing expert run).

Preinjury Releases

Although the Skiing Act remains a viable defense to ski area liability in many cases, the existence of a pre-injury release does not (at least in recreational skiing accident cases, as opposed to ski racing cases). In *Rothstein v. Snowbird Corp.,* 2007 UT 96, 175 P.3d 560, the plaintiff, a season pass holder at Snowbird, had signed two separate release and indemnity agreements prior

to suffering severe injuries after colliding with a retaining wall camouflaged by a light layer of snow. *See id.* ¶¶ 3-4. The district court cited these pre-injury releases in granting Snowbird's motion for summary judgment on the plaintiff's ordinary negligence claim. *See id.* ¶ 5. The supreme court reversed, invalidating the pre-injury releases as contrary to the public policy of the state of Utah as expressed in the Skiing Act. *See id.* ¶ 20. The court stated, "The bargain struck by the [Skiing] Act is both simple and obvious from its public policy provision: ski area operators would be freed from liability for inherent risks of skiing so that they could continue to shoulder responsibility for noninherent risks by purchasing insurance." *Id.* ¶ 16; *see also Hawkins v. Peart,* 2001 UT 94, ¶ 16, 37 P.3d 1062 (invalidating pre-injury release signed by parent on behalf of minor child).

Interestingly, just two months before deciding *Rothstein,* the Utah Supreme Court reached the opposite conclusion in upholding a release signed by a plaintiff before he was injured during a skiercross race hosted by Park City Mountain Resort. *See Berry v. Greater Park City Co.,* 2007 UT 87, ¶ 1, 171 P.3d 442. Although Justice Ronald Nehring authored both opinions, his analysis in *Berry* only tangentially references the public policy rationale of *Rothstein,* suggesting that rationale does not apply to some ski-related activities, even if the inherent risks of the activity would be covered by the Skiing Act. Justice Nehring stated: "[W]hile the reach of the Act may extend to ski-related activities that fall outside the public policy considerations underlying the adoption of the Act, those activities, like skiercross racing, are nevertheless subject to a separate analysis for the purpose of evaluating the enforceability of pre-injury releases." *Id.* ¶ 18. Justice Nehring does not specifically distinguish the facts in *Rothstein* from the facts in *Berry*. Thus, while preinjury releases are clearly invalid in simple recreational skiing accident cases, prudent defense practitioners will try to align their facts with *Berry* in other cases. *See also Pearce v. Utah Athletic Foundation,* 2008 UT 13, ¶ 21, 179 P.3d 760 (holding that pre-injury release signed by adult bobsled rider is valid and protects operator of public bobsled ride from liability for ordinary negligence); *but see Ghionis v. Deer Valley Resort Co., Ltd.,* 839 F. Supp. 789, 797 (D. Utah 1993) (invalidating pre-injury release of ski area operator for negligence in renting skis with bindings incompatible with plaintiff's ski boots).

Collisions

Collisions, both with other skiers/snowboarders and with moveable and immoveable objects, are a common cause of actionable ski/snowboard injuries. Liability for collisions may be imposed upon anyone whose negligence contributed to the collisions, subject to the limitations of the Skiing Act.

In *Ricci v. Schoultz,* 963 P.2d 784 (Utah Ct. App. 1998), the court addressed the standard of care to be applied in skier vs. skier collision cases. *See id.* at 786-87. On a picture-perfect ski day on an easy run at Snowbird, Ricci was skiing behind and to the left of Schoultz. *See id.* at 785. As Ricci approached to within a few feet behind Schoultz, Schoultz unexpectedly lost control, and veered left into Ricci who was unable to avoid the collision. *See id.* Ricci sustained severe injuries. *See id.* Although the jury found that Schoultz was negligent, the trial judge granted Schoultz's motion for j.n.o.v. and dismissed the case. *See id.* The court of appeals affirmed, offering this cursory explanation: "A skier does have a duty to other skiers to ski reasonably and within control. However, an inadvertent fall on a ski slope, alone, does not constitute a breach of this duty.… Schoultz's loss of control and fall, by itself, does not establish his negligence." *Id.* at 786-87.

Although the *Ricci* court tells us that an inadvertent fall does not breach a skier's duty "to ski reasonably and within control," *id.,* it unfortunately provides little guidance as to what conduct would breach that duty or what evidence would support a jury's finding of negligence. However, some language in Ricci suggests that a plaintiff must present evidence that the defendant's conduct increased the risks of skiing beyond those inherent in the sport. *See id.* at 786 (quoting *Freeman v. Hale,* 36 Cal.Rptr.2d 418, 423-24 (Cal. Ct. App. 1994) (noting that defendant had consumed a large quantity of alcohol before colliding with the plaintiff: "'[W]hile [defendant] did not have a duty to avoid an inadvertent collision… he did have a duty to avoid increasing the risk of such a collision.'")).

Several types of evidence are frequently available to support a plaintiff's claim that the defendant's conduct increased the risks of skiing, including: eyewitness testimony, violation of national and international standards for safe skiing, violation of a safety law, and the testimony of experts in ski safety and/or engineering/accident reconstruction.

Eyewitnesses may be identified and their written statements contained in Ski Patrol collision reports. Additional eyewitnesses may sometimes be found among ski area employees (*e.g.,* lift operators, ski instructors, or volunteer mountain hosts who saw the accident) or among other skiers. Ski area records often contain detailed logs possibly revealing the names of potential witnesses who might have seen the accident while riding up a nearby lift or while participating in a ski school class.

Evidence that the defendant violated safe skiing standards and/

or a ski safety law also lends support to the plaintiff's claim of negligence. The Skiers Responsibility Code (the "Code") sets forth the rules of the road which all skiers should obey:

- Always stay in control and be able to stop or avoid other people or objects.
- People ahead of you have the right of way. It is your responsibility to avoid them.
- You must not stop where you obstruct a trail or are not visible from above.
- Whenever starting downhill or merging into a trail, look uphill and yield to others.
- Always use devices to help prevent runaway equipment.
- Observe all posted signs and warnings.
- Keep off closed trails and out of closed areas.
- Prior to using any lift, you must have the knowledge and ability to load, ride, and unload safely.

Other safe-skiing standards can be found in written material published by the National Ski Patrol, the National Ski Areas Association, Professional Ski Instructors of America, and the International Federation of Skiing.

Additionally, many municipalities have recently passed ski-safety laws, such as the following Wasatch County ordinance:

> No person shall ski or snowboard in a reckless or negligent manner so as to endanger the life, limb, or property of any person, or so as to display a willful or wanton disregard for other persons or property. The primary duty shall be on the Skier or Snowboarder to avoid collision with any person or object below him.

Wasatch County Ordinance No. 08-03(II)(2) (2008). Although a violation of a safety law does not constitute negligence per se, it will certainly support a claim of negligence under most circumstances. *See Hansen v. Eyre,* 2005 UT 29, ¶ 12 n.4, 116 P.3d 290 (statutory violation may be considered as evidence of negligence); *see also* MUJI CV212 Violation of a safety law. "Violation of a safety law is evidence of negligence unless the violation is excused." MUJI CV212 However, *Ricci* cautions that the occurrence of a collision, without more, is insufficient to establish a defendant's negligence simply for failing to avoid the collision. *See id.* at 786-87.

Ski Lift Accidents

The Utah Passenger Ropeway Systems Act, *see* Utah Code Ann. § 72-11-101 to -216 (2009) ("Ropeway Act"), declares that

> It is the policy of the state to:
>
> (a) protect citizens and visitors from unnecessary mechanical hazards in the design, construction, and operation of passenger ropeways, but not from the hazards inherent in the sports of mountaineering, skiing, snowboarding, mountain biking, and hiking, or from the hazards of the area served by passenger ropeways, all of which hazards are assumed by the sportsman.

Id. § 72-11-201.

"Passenger ropeways" include, among other things, aerial tramways, chair lifts, and rope tows, *see id.* § 72-11-102(10), and are not treated as common carriers or public utilities, *see id.* § 72-11-214(1). Although the stated policy of the Ropeway Act may limit potential liability in ski lift accidents cases, Utah courts have not addressed the issue. Nonetheless, the Ropeway Act does not purport to limit liability for "unnecessary mechanical hazards in the design, construction, and operation of passenger ropeways." *Id.* § 72-11-201.

Illustrative of facts that might give rise to liability in Utah are those from the Colorado case of *Trigg v. City & County of Denver,* 784 F.2d 1058 (10th Cir. 1986). The plaintiff, a beginner skier, was not firmly seated on the chair lift after loading, having partially slipped out of the chair. *See id.* at 1059. In violation of a state regulation requiring the ski-lift operator to immediately stop a lift in the event of danger, the operator failed to stop the lift until the plaintiff had traveled almost 200 feet from the loading ramp and was dangling 25 feet above the ground. *See id.* A ski patroller instructed the plaintiff to "point her skis downhill and drop." *See id.* The plaintiff suffered serious injuries to both knees when she landed. *See id.* The Tenth Circuit Court of Appeals held that the jury should have received a negligence-per-se instruction based on the ski lift operator's alleged regulatory violation. *See id*. at 1061.

Similarly, Utah's administrative rules implemented pursuant to the Ropeway Act adopt the standards of the American National Standard Institute as the governing standards for the operation and maintenance of passenger ropeways. *See* Utah Admin. Code R920-50-1(B) (2009). ANSI B77.1-1999 American National Standard for Passenger Ropeways § 4.3.2.3.3 states: "Should a condition develop in which continued operation might endanger a passenger, the attendant shall stop the aerial lift immediately and advise the operator." Thus, facts similar to those in *Trigg* may lead to liability in Utah.

Equipment Failure

In *Meese v. Brigham Young University,* 639 P.2d 720 (Utah 1981), the Utah Supreme Court addressed the standard of care to be applied in the context of ski equipment rental. *See id.* at 724-26. In that case, the plaintiff, a student at BYU, was injured when the bindings on skis she rented from the BYU bookstore failed to properly release. *See id.* at 721. The court held that the BYU bookstore employee, acting as a ski equipment rental agency, had a duty to exercise ordinary care commensurate with industry standards to correctly adjust the bindings and that the employee should have "do[ne] more than to merely fix the tension on the bindings from a chart and that he should have directed plaintiff to at least go through the necessary motions to test the release mechanism of the bindings." *Id.* at 723. The court suggests that the same standard of care applies to ski equipment sales. *See id.* at 722-23 ("Adjustment of the binding to a skier's need and boots is the responsibility of the agency from which the boots and skis are acquired, whether it be by rental or purchase.").

Conclusion

With the number of annual skier visits to Utah slopes increasing at an accelerating pace since the 2002 Olympics (approximately 33% more skier visits last year than in the 2001-02 ski season), it is safe to assume that Utah's courts will confront many more issues relating to the law of skiing in the years ahead. For example:

- Can a ski instructor be held liable for negligent supervision of a child ski student who falls off a chair after loading the lift without any adult supervision?
- What standard of care are ski patrollers and ski-area operators bound to follow in marking and eliminating the risks of an in-bounds avalanche?
- Will a ski patroller be held liable for negligently allowing a reckless skier to continue skiing when the reckless skier subsequently collides with another skier?

These and other questions are likely to arise as Utah ski law continues to evolve.

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The Utah Minority Bar Association and Ripples of Hope

by Scott M. Matheson, Jr.

EDITOR'S NOTE: *Scott M. Matheson, Jr. addressed the attendees of the Utah Minority Bar Association's annual scholarship banquet on October 23, 2009. We are pleased that he has given his permission to have his remarks published in the* Bar Journal.

I first want to thank Chrystal Mancuso-Smith and the officers of the Utah Minority Bar Association for inviting me to speak tonight. I consider it a great honor to do so.

I see so many wonderful friends as I look around the room. The friend I've known the longest is Judge Valdez, who has been my tennis partner starting about 45 years ago, and who still shows me no mercy on the tennis court, but was most generous with his introduction.

Judge Valdez's introduction reminds me of one of the Utah Minority Bar Association dinners (in 1994) that I'll never forget. The keynote speaker was a famous criminal defense lawyer from San Francisco. Before our out-of-town guest was introduced to speak, Judge Valdez was asked to say a few words as one of the evening's honorees.

I remember how he was entertaining, inspirational, and charismatic; how he so completely mesmerized the audience and stole the show that there was no need for a keynote speaker, and we were all ready to go home.

And so, I hope you understand that although I am very thankful to Judge Valdez for introducing me tonight, I was a bit worried when I learned that I would follow him and might have the same experience as our keynote speaker did that night many years ago!

I've been coming to this dinner since it started. I have an almost perfect attendance record, but there have been some close calls. One year I was looking at my calendar, and suddenly I had this sinking feeling that I had missed the dinner. I was relieved to learn a few days later that it had been postponed for several months into early the following year.

Then there was the time during the 2004 election campaign when I was scheduled to debate Jon Huntsman, Jr., at KUED right when the dinner started. When the debate was over, Robyn and I rushed to the Law & Justice Center and made it in time for dessert. The UMBA officers assured me that the perfect attendance record was still intact.

Three years ago, though, when I was based in Washington, D.C. for the year, I was tempted to fly out for the dinner, but it didn't happen, and for that I apologize and ask your forgiveness.

So why do I think this event is so important? Well, it's not just because the food has been so great over the years, and the food has been great. Remember the potluck years when everyone was invited to bring a favorite dish? We all enjoyed an ethnic food smorgasbord topped off with the annual tradition of Phil Uipi's roasted pig.

But as good as that was, it's not about the food. It's about the minority community and all parts of the legal community coming together to celebrate diversity, to recognize accomplishments, and to address challenges. For a long time I have thought, and I continue to think, that no other event for the legal community is more important and more significant than this one. And I would like to use my time to explain why.

While these remarks are for all of you, they are especially for the students with us tonight. The theme of this year's banquet is "Diversity as a Foundation for Excellence." In keeping with this theme, I have decided to entitle my remarks, "The Utah Minority Bar Association and Ripples of Hope." I take this title from a phrase in Robert Kennedy's famous Day of Affirmation Speech that he delivered in Capetown, South Africa in 1966. On that day he issued the following call to action:

> Few will have the greatness to bend history itself, but each of us can work to change a small portion of events, and in the total of all those acts will be written the history of this generation. It is from numberless diverse acts of courage and belief that human history is shaped. Each time [someone] stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, [this] sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current that can sweep down the mightiest walls of oppression and resistance.

When I think of the Utah Minority Bar Association and what its members have done over the years, I think of ripples of hope, ripples that have

SCOTT M. MATHESON, JR. is a law professor at the University of Utah.

formed a current of opportunity and a river of accomplishment. Because when we look back together, we can see where this organization started, where it has come, what it has accomplished, and the reservoir of continuing and unfinished business that lies ahead.

Each student scholarship, each successful mentorship, each breakthrough career opportunity, each act of pro bono service, and each accomplishment have sent out ripples of hope. I believe this event, the Utah Minority Bar Association Banquet, which has brought us together year after year, has been a key tributary.

I want to acknowledge how much UMBA works throughout the year on many important projects. I believe this dinner is a key organizing force, where important issues of our time are discussed. That's what I wish to talk about tonight.

Some of you have been coming to the annual banquet for a long time, and you probably have memories of significant things that have happened here over the years. Let me mention a few that stick out in my mind.

I don't think anyone who was there that night in 1993 will forget when Fred Korematsu was the keynote speaker. We spent the evening with an extraordinary historical figure who stood up to the massive deprivation of civil liberties imposed by the United States government on over 100,000 individuals of Japanese descent, including Judge Uno, who were evacuated and interned during World War II (and my wife's grandmother was detained). That night of this banquet, Fred Korematsu represented the victims of pervasive government infringement based on racial discrimination and a misplaced assessment of national security risk.

Another banquet that stands out for me was when Chief Justice Robert Yazzie of the Navajo Supreme Court was the speaker in 1996. Thanks to Judge Thorne and Mary Ellen Sloan and others for making that happen. Chief Justice Yazzie provided us a perspective on the connection of Navajo courts with longstanding cultural understandings and traditions. He explained the Peacekeeping System, a contemporary version of traditional Navajo justice that has been successful in dealing with social problems in the Navajo nation and has contributed to our understanding of restorative justice.

I recall the dinner on September 14, 2001. Why? Because three days before, terrorists flew two planes into the World Trade Center buildings, one into the Pentagon, and another crashed in Pennsylvania, altogether killing over 3,000 people, an attack and a tragedy of unthinkable and horrific proportions. My brother was supposed to speak but had to send a video and stay in Washington to vote on emergency legislation.

I recall that dinner as an appropriately somber evening, but also as an importantly successful event because all of us were deeply

shocked and saddened. The dinner brought us together to recognize the importance of respect, of mutual support, and of commitment to ideals of equality, freedom, and nonviolence.

A milestone for UMBA was the conception and implementation of the Diversity Law Pledge – the Utah Pledge to Racial and Ethnic Diversity for Utah's Legal Employers. UMBA presidents Clayton Simms and Trystan Smith and others took the lead, and the diversity pledge was unveiled at the annual banquet. The Diversity Pledge launched a dialogue on diversity and its benefits for the legal profession, and it continues to serve an important role in the Utah legal profession.

Those attending in 2003 will recall an interesting speaker with an interesting message. Then UMBA President Ross Romero brought in Chris Johnson as the keynoter. He was the Vice President and General Counsel for General Motors North America. He talked about the growing recognition in major corporate circles that a diverse workplace is important for businesses, including law firms, to function successfully in a diverse society and a global economy.

Thanks to UMBA Presidents Sean Reyes and Cheryl Mori, along with Yvonne Hogle, Kristen Vasquez and many others, this event reached new heights in 2005 with the recognition of the first 50 minority lawyers in the State of Utah – one of the best legal events in our state's history.

What an inspirational evening! What a hall of fame of pioneering lawyers who faced obstacles and challenges that they should never have had to face and overcome, but face and overcome them they did. Their hard work and sacrifice helped make it possible for following generations of minority lawyers to pursue opportunities and fulfill their dreams.

And then, two years ago, Judge Valdez, as the keynote speaker, having just published his outstanding book entitled *No One Makes It Alone,* told his inspirational story of having literally been rescued from the streets of Salt Lake City, introduced to a sport he came to love, and mentored in lessons of life that have enabled him to make an important difference for young people and our community every single day.

I can remember other banquet nights when important and inspiring things happened as well:

- The well-deserved recognitions of both minority and non-minority attorneys and also of non-attorneys for their accomplishments and contributions to advancing opportunity and diversity – what a great honor for anyone to be recognized by UMBA.
- The growth of UMBA membership and participation and the partnerships that have been forged with many individuals and groups in the legal community – just look at the range and depth of sponsorship support for this event and other UMBA activities.
- The scholarships for law students – I can't begin to tell you, as a law professor and a dean, how appreciative and proud I am of this organization for supporting students.

Not only have the scholarships helped make it possible for the recipients to fulfill their dreams of a legal education, the recognition of a scholarship also builds confidence and commitment. Every time you bestow a scholarship on a student, you are saying, "We know you can do it, and we want to help."

Beyond that, we want our students to feel welcome in the Utah legal community and to know they can have a very satisfying and successful career in Utah while serving the profession and the community.

Over the years, UMBA and the growing number of scholarship sponsors have invested tens of thousands of dollars in a large number of students, an investment that is paying off in producing new leaders for UMBA and some of the most accomplished members of the Bar.

We have seen a pattern over the years. UMBA scholarship recipients have become law school graduates, who in turn have become new members of UMBA, who then have become officers in UMBA, and who have become leading members of the Utah Bar. They have done much on their own, but, as Judge Valdez has taught us, no one makes it alone, and it is UMBA that has helped make so much of this happen.

Just look around the room and see UMBA leaders like Narda Beas Nordell, Yvette Donosso, Marlene Gonzalez, and Karthik Nadesan. They and many other UMBA leaders have worked tirelessly for this organization and for the community.

Let me say a few words about the founders of the UMBA. It was back in the late 1980s and early 1990s that Raymond Uno, Robert Archuleta, Robert Flores, Glenn Iwasaki, John Martinez, Tyrone Medley, Bill Thorne, Dane Nolan, Jimi Mitsunaga, Ken Hisatake, James Esparza, Solomon Chacon, and a number of others had the vision and commitment to bring all minority attorneys together.

They joined together for the common purpose of seeking equal justice and equal opportunity – opportunity to attend law school, opportunity to practice in law firms and government offices, opportunity to serve as judges and legislators, and opportunity to be leaders in all of these areas.

They and many others dedicated themselves to achieving these goals. And they did this by encouraging and mentoring minority students and attorneys, by advocating for minority hiring and appointments, and by making the case for the critical role that diversity plays in our society. Judge Uno was the first president, followed by Robert Archuleta, and the list of UMBA officers through the years reads like an honor roll of service.

At the very beginning, the annual banquet was conceived and organized.

It was seen as a way to recognize minority lawyers' accomplishments, to award scholarships to students, and to raise funds to support UMBA's goals. But just as important was the opportunity this event has provided every year for us to come together, to affirm old friendships and make new ones, to reaffirm the value of diversity, and to rededicate ourselves to the principles and goals of UMBA.

For the founders like Ray Uno, they can look around this room and see the UMBA members who are partners in leading law firms, top attorneys in government offices, members of the legislature, judges on various courts, law professors, leaders of the Utah Bar, including, in recent years, the first minority President of the Utah State Bar, Gus Chin, and the ABA's first Outstanding Young Lawyer Award winner, Sean Reyes. UMBA has been an active and effective agent of change in helping to make these things possible.

As a Utah lawyer and a citizen of this state, I salute all of you for these accomplishments. From the classroom to the courtroom, from the law firm to the legislature, from ripples of hope to realization of dreams, the Utah Minority Bar Association has enhanced our profession and our community, and for that we should be deeply proud, and deeply grateful.

I know the path has not been easy, that not every effort has succeeded, that in a diverse group dedicated to diversity there will be debate and different opinions, and that there is much work to be done. But after less than twenty years, the founders of UMBA can be proud of what they started and know that their vision was clear, their voice was heard, and their cause was just.

I said at the beginning that I took my title for these remarks from Robert Kennedy's Day of Affirmation speech. I take my inspiration from the following statement by Martin Luther King, Jr.: "We must accept finite disappointment, but we must never lose infinite hope."

Infinite hope – that's what the founders and their successors brought to the Utah Minority Bar Association, that's what this organization is all about. Infinite hope – hope for equal opportunity, hope for equal justice, hope for a better future founded on diversity and mutual respect.

As each of you works toward those goals, you send out ripples of hope, ripples that converge into a current of opportunities and a river of accomplishment. And when we meet again each year at this great banquet, we celebrate diversity as a foundation for excellence, and we leave with a sense of infinite hope.

It has been my great honor to share these thoughts with you tonight, and I look forward to seeing all of you again next year, and the year after that, and the year after that, and the years after that! Thank you very much.

In Memoriam

HOWARD LEWIS & PETERSEN PC

It is with great sorrow that we announce the passing of our good friend and partner Craig M. Snyder, who passed away October 26, 2009 from pancreatic cancer. He was a long-time partner in our firm, having worked with us since 1973. In 1987 he was voted Domestic Relations Lawyer of the Year by the Utah Bar Association. Craig served as president of the Central Utah Bar Association in 1978, and as a Utah State Bar Commissioner from 1991 to 1997. Craig conducted his practice with integrity, and has left a legacy and example for upcoming lawyers. Our Christmas parties and March Madness festivities will never be the same as Craig masterfully emcee'd these events with great wit, charm and laugh-till-you-cry humor. He has left a void in our hearts and in our firm. We will greatly miss him.

Craig M. Snyder
July 19, 1947 - October 26, 2009

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- John A. Adams, RQ&N Managing Director

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To reach Brett Tolman:

btolman@rqn.com

Going to the Bar

by Roger A. Kraft

In early July 2008, the family of David James Bell (D.J.) walked into my office and hired me to represent D.J. on two counts of first degree felony child kidnapping and one count of second degree felony burglary. The family informed me that two neighbor children ended up in D.J.'s house, which resulted in the brutal beating of D.J. and his partner, Dan Fair, by the family of the two children. D.J.'s family paid a fairly handsome retainer expecting the best defense possible, and I promised them everything short of guaranteeing them an acquittal. I wanted this case and I was ready to do whatever was necessary to get a positive result. However, there was a problem. I had a guy who had just been arrested for kidnapping two children and, in a recorded police interview, said, "I took the children, I know I shouldn't have." Additionally, D.J. was gay, and I was going to have to deal with the social and political issues that went along with this case. The media latched onto the case immediately, adding another element to deal with.

As I delved into the case, visiting the bloody scene, interviewing witnesses, making initial observations, and studying out the facts, I realized this case was bigger than I had imagined and would require more than one solo practitioner to handle effectively. It would include the potential cross examination of child witnesses and require the hiring of several specialists, such as an expert witness to prepare for the impeachment of the children's testimony, a head trauma expert to counter D.J.'s confession, a private investigator, and a former detective to testify as to the investigation. The case would require that I interview and prepare for direct or cross examination of at least thirty individuals, all while trying to maintain my regular practice. In short, I needed more than just my office, which consisted of one assistant and myself.

Because D.J.'s family mortgaged their house to pay my retainer, exhausting their resources, I needed help, and I needed it to come cheap. As I pondered on whether I knew anyone qualified and willing to help, I remembered my friend, attorney Susanne Gustin. Susanne had been one of the few attorneys to actually introduce herself to me and ask my name when I started practicing in Utah. Prior to that introduction I had felt what I describe as the cold shoulder of the Defense Bar, not having graduated from the University of Utah or Brigham Young University and never having worked for the Legal Defender's Office or the District Attorney's office.

I met Susanne for lunch, and I asked her to assist me just with the childrens' testimony. She agreed, and after another half hour she was "all in" and had agreed to help with the entire case. She agreed to help with the understanding that there probably wouldn't be any money in it for her. Before long, Susanne had two private investigators, Todd Gabler and Shane Johnson, two doctors, and a former police detective now living in California, all willing to help at reduced rates or no fees at all.

The help did not stop there. Two other attorneys, Andy Deiss and Billie Siddoway, of Jones Waldo Holbrook & McDonough, jumped in head first, volunteering their after hours time to provide research and other invaluable resources. When the State filed a motion just days before trial to allow hearsay statements as evidence, attorney Kelly Ann Booth immediately volunteered to stay up that night and etch out a brief on the subject. We won that argument.

I have received many kudos since the not-guilty verdict came down in this case, but with each compliment comes a certain amount of guilt. While this was my case originally, the rest of the team, especially Susanne, proved to be invaluable, and I could not have defended this innocent man without each of them. I continue to ask myself why Susanne agreed to help me and why the others were so willing to help uncompensated. The answer I keep coming back to is this: because it was the right thing to do. Because once in a while, even attorneys understand the need to put themselves second.

I take away two valuable lessons from this experience. First, as

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members of the bar we need to be prepared to step up and lift one another's burdens once in a while. Second, we need to be willing to have our pride take a back seat and ask for help when help is needed. That is what the Bar is supposed to be about. That is what we, as members of the Bar, should be working toward each day.

Maybe that "cold shoulder" of the defense bar isn't so cold after all. Other attorneys who assisted us directly or indirectly included:

Darren Levitt
Cara Tangaro
Steven Shapiro
Liz Hunt
Lisa Remal
Rich Mauro
Lynn Dolandson
Bob Steele
Rebecca Hyde Skordas
Mike Peterson
Maren Larson
Kent Hart
Patrick Corum
Daniel Torrence
Richard Gale
Kim Trupiano
Rob Latham
Margaret Olsen
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Mike Sikora
Jennifer Gowans
Linda Jones
Karen Stam
Tawni Hansen
Sheldon Carter
Ben Hamilton

Ethical Conundrum? Try Asking the Ethics Advisory Opinion Committee

by Meb W. Anderson

It is five minutes to five and you are sitting in your office just about to leave for the weekend, when of course the phone rings. It is a former client calling from the county jail. He asks you to mail him his entire client file. You say, "OK, I'll locate it and send it to you," and you hang up. On the drive home, you recall that this particular client file contains explicit crime scene photos, third-party medical reports, victim identification information, psychological and psychosexual evaluations, and so on, and you also recollect that a number of these documents are subject to court-ordered restrictions. You also recall, albeit faintly, that at some point in your career someone told you that when a former client requests the file, the Utah Rules of Professional Conduct define what constitutes the file, and require that most, if not all, of it should be turned over to the client.

On Monday morning you ask around the office, but nobody gives you the certainty you desire in addressing this issue. You do some legal research, but continue to feel uncertain. Do you send the former client the entire file, as required by Utah Rule of Professional Conduct 1.16(d)? Do you commit an ethical violation – or worse – if you send the former client the restricted documents? Certainly someone somewhere must have faced a similar ethical dilemma.

A Utah lawyer once confronted this exact scenario. Luckily, this lawyer knew where to turn, and his dilemma became the subject of an ethics opinion. On December 8, 2006, the Utah State Bar Ethics Advisory Opinion Committee issued Opinion 06-04, which advises that: "Absent prosecutorial or court-ordered restrictions, a former client's access to his client file may not be restricted. In limited circumstances, a lawyer may delay transmission of certain information in a current client's file." Utah State Bar Ethics Advisory Opinion Committee, Op. 06-04 (2006).

What is the Ethics Advisory Opinion Committee?

The Ethics Advisory Opinion Committee ("the Committee") is authorized to issue letter responses and to issue and publish formal written opinions responding to requests from members of the Bar for advisory opinions regarding the ethical propriety of anticipated professional or personal conduct. The Committee consists of fourteen voting members, each of whom is an active member of the Utah State Bar in good standing, and at least one of whom is a sitting or former judge. An attorney from the Office of Professional Conduct serves as a non-voting consultant to the Committee.

The current Committee members are: Maxwell A. Miller, Chair; Judge Kate Toomey, Vice-Chair; Linda F. Smith, Secretary; Nelson T. Abbott; Meb W. Anderson; Alain C. Balmanno; Herschell Bullen; Paul C. Farr; John Morris; Karra J. Porter; John D. Ray; John A. Snow; Ryan Tenney; Shelley Wismer; and Judith D. Wolferts. These individuals represent a broad range of practice areas, and include attorneys in private practice affiliated with firms of all sizes, government employment, and academia.

Each year the Committee receives a variety of requests for ethics advisory opinions concerning Utah lawyers' ethical behavior under the Utah Rules of Professional Conduct. The Committee responds to all such requests either by issuing a formal ethics opinion to be published and thereby available to Utah lawyers and the public at large, or by issuing a letter response to the requesting party.

Ethics opinions focus on "the ethical propriety of anticipated professional or personal conduct of Bar members." Ethics Advisory Opinion Committee Rules of Procedure I(a)(1). Accordingly, the Committee does not entertain requests for legal opinions or opinions on any other subject outside the scope of its authority. Moreover, the Committee may exercise its discretion to decline a request if it "does not involve a significant subject or involves isolated conduct," *id.* R. I(b)(3)(i), or if the request "is clearly resolved by applicable Committee opinions, the Rules of Professional Conduct, statutes or case law," *id.* R. I(b)(3)(ii). The Committee also may, in its discretion, decline an otherwise appropriate request if it involves a matter that is already the subject of review by a court or by the Office of Professional Conduct, and may decline a request to opine upon the propriety of the conduct of an attorney who is not the author of the request.

MEB W. ANDERSON is an Associate with the law firm Stirba & Associates.

The Committee is not the Office of Professional Conduct. Nevertheless, because an attorney from the Office of Professional Conduct serves as a consultant to the Committee, its views and perspectives are available to the Committee.

How Do I Request an Ethics Advisory Opinion?

The Board of Bar Commissioners, any member of the Bar in good standing, or any "person with a significant interest in obtaining an advisory opinion on legal ethics may request an opinion." *Id.* R. III(a)(1). Requests must be in writing, and include a brief description of the facts; a concise statement of the issue presented; and relevant citations to rules and ethics opinions, judicial decisions, and statutes. *See id.* R. III(a)(2), (3). The requests may be submitted directly to the Committee, or filed with the Board of Bar Commissioners or the Office of Professional Conduct, in which case those entities must forward the request to the Committee. *See id.* R. III(a)(2).

Once received, the Committee reviews each request, making a preliminary determination as to whether it is within the Committee's authority, should be declined, or should be the subject of an opinion. The Chair or the Chair's designee conducts a preliminary determination, which is followed by the full Committee's review. Regardless of the Committee's ultimate disposition of the requests, each receives considerable effort and discussion. In appropriate circumstances, the Committee may seek the views of appropriate Bar sections or committees, request public comment, invite the requestor to make additional oral or written presentations, or consult with the Office of Professional Conduct. *See id.* R. III(c).

The identities of persons or entities involved in making a request for an ethics opinion are confidential and shall not be disclosed in a published opinion without their consent. *See id.* R. VI. All voting and non-voting members of the committee and their staff are bound to maintain the confidentiality of the requesting persons or entities, and further, may not disclose the particulars of pending requests or circulate draft opinions. *See id.* (noting some limited exceptions for circulating drafts among colleagues and consulting non-Committee members concerning general issues).

In the event you disagree with an ethics opinion, recourse is available. *See id.* R. III(e). Generally, ethics opinions and letter responses are subject to review by the Board of Bar Commissioners within thirty days of their issuance. Also, a request for reconsideration of an ethics opinion may be filed with the Committee at the requesting party's option. The ethics opinion under review "shall remain in full force and effect for the period during which the review is pending, unless the Board, in its discretion, issues a stay pending the outcome." *Id.* R. III(e)(1)(iii). Appeal procedures for letter responses are handled a bit differently, with a mandatory request for reconsideration to the Committee. *See id.* R. III(e)(2).

What Does an Ethics Opinion Do For Me?

The ethics opinions are advisory in nature, and assist attorneys in avoiding unethical conduct. Assuming a factual context similar to what was posed by the request, a Utah lawyer who acts in a manner that is consistent with what was prescribed in an ethics opinion enjoys a "rebuttable presumption" of having conformed his or her conduct to the Utah Rules of Professional Conduct.

Where Can I Find Ethics Opinions?

An index of the Committee's opinions can be found at: http://www.utahbar.org/rules_ops_pols/index_of_opinions.html

Recent ethics opinions of interest include:

Opinion No. 09-01

Issue: What are the ethical limits for the use of testimonials, dramatizations or fictionalized representations in lawyers' advertising on television or web sites? See Utah State Bar Ethics Advisory Opinion Committee, Op. 09-01 (2009).

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

Opinion No. 08-01

Issue: May an attorney provide legal assistance to litigants appearing before a tribunal *pro se* and prepare written submissions for them without disclosing the nature or extent of such assistance? If so, what are the attorney's obligations when full representation is not undertaken? *See id.* Op. 08-01 (2008).

Opinion: Under the Utah Rules of Professional Conduct, and in the absence of an express court rule to the contrary, a lawyer may provide legal assistance to litigants appearing before tribunals *pro se* and help them prepare written submissions without disclosing or ensuring the disclosure to others of the nature or extent of such assistance. Although providing limited legal help does not alter the attorney's professional responsibilities, some aspects of the representation require special attention. *See id.*

Opinion No. 07-01

Issue: May a lawyer purchase the exclusive right to referrals generated from the membership base of an organization whose members from time to time may have need of the legal services offered by that lawyer? *See id.* Op. 07-01 (2007).

Opinion: The proposed arrangement, which contemplates the

exclusive funneling of referrals to one lawyer or firm, is not permitted, as it violates Utah Rule of Professional Conduct 7.2(b), which prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services. The fact that the recommendation is made by an organization does not change the outcome here. *See id.*

Opinion No. 06-05

Issue: Do the Utah Rules of Professional Conduct preclude a lawyer from participating in an ad hoc legal advisory group to a private, nonprofit, public interest legal organization, if the persons served by the legal services organization have interests adverse to the interests of a client of the lawyer or the lawyer's law firm? *See id.* Op. 06-05 (2006).

Opinion: Generally, no. Rule 6.3 of the Utah Rules of Professional Conduct, with respect to legal services organizations, and Rule 6.4, with respect to organizations involved in the reform of law or its administration, provide that service as an officer or director of such organizations or membership in such organizations does not by itself create an attorney-client relationship with the organization or the organization's clients. These rules do require that a lawyer be observant of the lawyer's duties under Rule 1.7 to the lawyer's clients and to the clients of the lawyer's firm. Rule 6.3 requires that the lawyer not knowingly participate in a decision of the organization that is incompatible with the lawyer's obligations under Rule 1.7, or that could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer, or on the representation of a client of the lawyer or the lawyer's firm. Rule 6.4 requires that when the lawyer knows a client of the lawyer may be materially benefited by a decision of the law reform organization, that the lawyer-member disclose this fact to the organization. Under some circumstances, a lawyer's participation on an ad hoc litigation advisory group may create an attorney-client relationship with the organization or the organization's clients requiring the lawyer to comply with Rules 1.6, 1.7, and 1.9 before representing or continuing to represent clients adverse to the interests of the organization or the organization's clients in such matters. *See id.*

A Plaintiff Attorney's View of Sorenson v. Barbuto

by Brent Gordon

In *Sorenson v. Barbuto,* 2008 UT 8, 177 P.3d 614, the Utah Supreme Court prohibited informal *ex parte* contacts between insurance defense attorneys and plaintiffs' treating physicians. The supreme court directed insurance defense attorneys to "confine their contact and communications with a physician who treated their adversary to formal discovery methods." *Id.* ¶ 27. The court explained that formal discovery is necessary, because physicians and insurance attorneys are not reliable sources to ensure that privileged medical communications are not disclosed during ex parte conversations. *See id.* ¶ 23.

Barbuto simply reiterated existing law governing the disclosure of medical information in personal injury cases: the patient-physician privilege protects from disclosure medical communications that are unrelated to the injuries at issue in a case. But what *Barbuto* did, was embolden plaintiff attorneys to protect privileged medical information in their clients' medical files. Thus, S. Grace Acosta, an insurance defense attorney, recently noted a "dramatic increase in objections to subpoenas and medical releases" following the *Barbuto* decision. S. Grace Acosta, *Are Medical Records Now Off Limits? An Examination of* Sorenson v. Barbuto, 22 Utah Bar J. 3 (May/June 2009).

Plaintiffs are justified in objecting to subpoenas and medical releases that seek the disclosure of all of their medical records, because some of the records may be protected by the patient-physician privilege. Allowing insurance defense attorneys to obtain records directly from the provider "would make it impossible for a patient or a court to appropriately monitor the scope of the physician's disclosures." *Barbuto*, 2008 UT 8, ¶ 23. Discovery rules prohibit discovery of privileged matters. *See* Utah R. Civ. P. 26(b)(1). And a court must quash a subpoena that seeks privileged information. *See id.* 45(e)(3)(E).

Insurance defense attorneys do not believe it is fair to limit their examination of privileged documents, because plaintiffs and their attorneys may claim that certain records are unrelated and privileged when they are not. While this concern is legitimate, the public policy reasons supporting the patient-physician privilege outweigh the defense bar's discovery concerns. The supreme court has previously observed, "The very nature of all privileges means that they will sometimes interfere with establishment of the whole truth." *State v. Blake,* 2002 UT 113, ¶18, 63 P.3d 56.

The Acosta article proposed several procedures to alleviate the insurance defense bar's discovery concerns. However, many of its proposals require the disclosure of privileged information. Further, the Acosta article ignored a body of well-developed Utah case law addressing the issue.

There is no need to reinvent the wheel

The Acosta article's attempt to formulate a procedure to determine when medical records are privileged is completely unnecessary, as the Utah Supreme Court has already done so. The supreme court described its process as the most effective and sensitive balance between the interests of defendants and citizens who expect and rely on confidentiality of medical records and communications. *See State v. Cramer,* 2002 UT 9, ¶ 22, 44 P.3d 690. The court of appeals noted that this procedure "strik[es] a balance between the important interests of physician-patient confidentiality and the pursuit of a claim or defense." *Debry v. Goates,* 2000 UT App 58, ¶ 27 n.4, 999 P.2d 582.

In *State v. Cardall,* 1999 UT 51, 982 P.2d 79, the supreme court held that where a defendant makes only a general request for information from otherwise privileged records, it is the plaintiff who decides what information must be disclosed. And the plaintiff's "decision on disclosure is final. A defendant has no constitutional right to conduct his own search of the [plaintiff's] files." *Id.* ¶ 32.

When specific information is sought by a defendant (as opposed to a general request for information), a defendant must show with reasonable certainty that the plaintiff held back medical

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information that is not only relevant, but material to the case. If defense counsel makes such a showing, then the trial court, not defense counsel, will conduct an *in camera* review of those medical records. If the trial court finds that some of the records are material, then it may expose the records "only to the extent necessary to present the evidence." *See Debry,* 2000 UT App 58, ¶ 26.

These Utah opinions follow the decision of the United States Supreme Court in *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987). In *Ritchie,* the United States Supreme Court rejected the argument that defense counsel should be given an opportunity to search through confidential files. The Supreme Court explained, "A defendant's right to discover…evidence does not include the unsupervised authority to search through [confidential] files." *Id.*

In *State v. Blake,* 2002 UT 113, 63 P.3d 56, the supreme court revisited its holding in *Cardall* and expounded on the procedure for determining whether records are privileged. The supreme court noted that the disclosure of privileged medical information "was limited and require[s] a showing with reasonable certainty that evidence exists which would be favorable to the defense." *Id.* ¶ 19. It also explained that the showing necessarily requires some type of extrinsic evidence. *See id.* And it reminded trial courts that they should not grant an *in camera* review based on general requests for records. *See id.* ¶ 22.

The holdings in *Cardall* and *Blake*, which were criminal cases, are equally applicable to civil cases because the patient-physician privilege "applies to both civil and criminal cases." *Burns v. Boyden,* 2006 UT 14 ¶12 n.2, 133 P.3d 370. In fact, in a civil case in which the court of appeals followed *Cardall,* the court noted that in criminal cases, due process concerns limit the scope of a privilege to ensure that a criminal defendant has a right to a fair trial. *See Debry,* 2000 UT App 58, ¶ 27 n.4. Thus, it observed that in civil cases, the exception to the patient-physician privilege could be more narrowly construed when personal liberty is not at stake.

There is no need to create from scratch a new procedure to determine whether medical records are privileged. That has already been done. Under the current system, the plaintiff is entitled to make the initial determination as to what documents are not privileged, and therefore, discoverable. Defense counsel then has an opportunity to show that the plaintiff did not produce information that was not privileged.

Subpoenas are off limits

The Acosta article's assertion that defense attorneys can use subpoenas to obtain a plaintiff's medical records is dead wrong. Subpoenas and medical authorizations suffer the same defects as *ex parte* communications, in that a plaintiff has no way of determining whether a health care provider will disclose privileged medical records if the records are sent directly to the defense attorney. There is no difference between physicians making an oral disclosure of medical information directly to defense attorneys and physicians making written disclosures directly to defense attorneys. Both forms of direct disclosure are improper.

Instead, the supreme court has held that a defendant must utilize the procedure described above to obtain medical information. In *State v. Gonzales,* 2005 UT 72, 125 P.3d 878, Gonzales was accused of attempted rape. Gonzales defended the action by alleging that his accuser was taking medication for a psychological issue and was "a mentally disturbed teen bent on retaliation." *Id.* ¶ 11. To prove his case, Gonzales' attorney issued a subpoena to obtain his accuser's mental health treatment records and represented that the accuser's psychological health was an element of a defense in a lawsuit. The state subsequently moved the court to quash the subpoena.

The trial court quashed the subpoena because Gonzales' attorney failed to notify the other party of the subpoenas and failed to turn the records over to the court for an *in camera* review of the privileged information before inspecting the contents of the records. *See id.* ¶ 25. The supreme court affirmed the trial court's ruling quashing the subpoena. The supreme court explained that Gonzales may be entitled to review confidential psychological records but he must "obtain them using the proper avenue." *Id.* ¶ 43. The court noted that Gonzales "used a *flawed subpoena process* to obtain privileged records. His authority to examine [medical] records, however obtained, depended on approval of the trial court following an *in camera* review." *Id.* ¶ 44 (emphasis added).

The law in Utah is clear: subpoenas are not allowed to discover medical records. When subpoenas are used, a plaintiff has no ability to monitor the disclosure of medical information to a defense attorney to ensure that no privileged information is improperly disclosed.

In sum, defense attorneys do not have the right to obtain medical records directly from a plaintiff's medical providers because, by doing so, they eliminate a plaintiff's right to monitor and control the scope of the physician's disclosures. The supreme court enunciated a procedure to determine whether medical records are privileged. According to that procedure, the plaintiff determines whether records are privileged when the defense makes a general request for information. That determination is final unless the defense can show, with reasonable certainty, that non-privileged documents were withheld.

Should Utah Lawyers Stop Forming Utah LLCs? A Response to Smith/Atwater

by Brent R. Armstrong

Stop Forming LLCs in Utah – Form them in Delaware! That's the recommendation of two Utah lawyers, Russell K. Smith and Justin J. Atwater, in their article published in the Sep/Oct 2009 issue of the *Utah Bar Journal.*

INTRODUCTION

This article is a partial response to the Smith/Atwater criticisms of the Utah LLC Act. In their article, Smith/Atwater focus on three subject areas ("traps" they say) in the current Utah LLC Act, which justify looking out-of-state for help, primarily to Delaware. In this response, the three main headings from the Smith/Atwater article have been included to make comparison easier. These headings from the Smith/Atwater article are (A) "Inadequate Asset Protection," (B) "Subordination of Creditor-Members," and (C) "Undue Extension of Statutory Apparent Authority." In the end, we agree with Smith/Atwater on one of their three criticisms, but disagree with them on the other two issues.

INADEQUATE ASSET PROTECTION

When Is Foreclosure of a Charging Order Justified?

A charging order is a court-ordered remedy that has been around for decades. So has the concept of foreclosing a charging order. In 1921, when Utah adopted the Uniform Partnership Act ("UPA"), the UPA included the charging order remedy, and allowed for redemption of the interest charged if redemption occurred before foreclosure. Consistent with the UPA, the current Utah LLC Act allows a court-ordered foreclosure sale of the LLC interest.

Foreclosure of liens requires a sale of the charged asset (in this case an LLC interest), somewhat similar to foreclosure under any trust deed or mortgage (or stock pledge under the UCC). At a foreclosure sale, the debtor-member, other LLC members, and the LLC itself, are free to bid, and the high bidder wins. If the judgment creditor is the high bidder, it wins. If someone else is the high bidder, the creditor gets paid and the debtor receives the rest of the sales proceeds.

In general, a judgment creditor can attach any asset of a debtor to satisfy the judgment. Utah LLC law specifies a charging order as the exclusive remedy for satisfying the judgment out of the judgment debtor's LLC interest. Smith/Atwater seem to imply that the creditor should hold the charging order until the judgment is paid in full from LLC distributions and then release the LLC interest back to the debtor-member free of the lien.

Should the judgment creditor be limited only to distributions from the LLC as the sole source for payment of the judgment? If distributions were plentiful and regular, there would be little incentive for the judgment creditor to foreclose on the LLC interest.

But what if no distributions are made or what if distributions are meager? Does that mean the debt should never be paid and the judgment creditor should be permanently deprived of payment?

The alternative policy questions seem to be: (1) Should a judgment creditor of an LLC member be allowed to obtain a lien on a member's LLC interest and, if distributions on such interest are insufficient, cause such interest to be sold at foreclosure sale? If "yes," then the Utah LLC Act should not be changed on this point; (2) Should a judgment creditor of an LLC member, once the charging order is entered, be entitled to payment on the judgment only if, and to the extent that, distributions are made from the LLC on such interest? If "yes," then the Utah LLC Act should be amended to adopt that rule.

Perhaps a compromise could help. On this point, a provision from the Revised Uniform Limited Liability Company Act ("RULLCA") may provide a solution: "Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest." Revised Uniform Limited Liability Company Act § 503(c) (2006). To become effective in Utah, that compromise would need to be embodied in an amendment to the Utah LLC Act.

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Judgment Creditors and One-Member LLCs

As to one-member LLCs, the Utah charging order rule is pro-creditor. Why is that so? A contra example may suffice: Suppose you formed a one-member LLC and transferred some valuable assets to the LLC. Then, you personally borrowed money, or otherwise incurred unsecured debt, but you failed to repay the debt. The creditor sues you, obtains a judgment, and then obtains a charging order against your LLC interest. But the creditor is prevented by law from pursuing foreclosure sale against your LLC interest. As the sole member, you (or someone you alone elect) could stop all future distributions (if there were any) and the creditor would never get paid – at least that situation seems possible under the approach Smith/Atwater are suggesting.

Here, the alternative policy questions seem to be: (1) Should "asset protection" be extended to an LLC member to the point where an attaching creditor could be paid only out of distributions where the debtormember has power to stop all LLC distributions? If the answer is "no," then the Utah LLC Act should not be revised on this point; (2) Should the right of a creditor to be paid on a just debt be subordinated (a Smith/Atwater term) to the right of the debtor to engage in "asset protection" planning maneuvers? If the answer is "no," then the Utah LLC Act should not be revised on this point.

SUBORDINATION OF CREDITOR-MEMBERS

On this subject, Smith/Atwater's criticism is well-taken. Perhaps the Utah LLC Act should be amended to put all LLC creditors on equal footing on LLC liquidation and winding up, irrespective of whether the creditors are LLC members or third parties.

UNDUE EXTENSION OF STATUTORY APPARENT AUTHORITY

This is a big issue. We disagree with the Smith/Atwater conclusions on this issue. The issue of statutory apparent authority is tied to many other issues besides those mentioned in the Smith/Atwater article – issues such as how to disclose limits on manager authority, transparency, certainty, and how best to keep down the cost of doing business.

Where to Disclose Limits on Manager Authority?

Current Utah LLC law requires that the identity of the person(s) holding management authority over an LLC, and any limits on that authority, be disclosed in the LLC's Articles of Organization. In contrast, Smith/Atwater assert that such disclosures should only be in the LLC's operating agreement, and not in the Articles of Organization. To say it another way, Smith/Atwater want to take Utah LLC law back to pre-2001 when the law was as they now propose.

Under pre-2001 LLC law in Utah, such disclosures were not required in the Articles of Organization. But that situation gave rise to the Utah Supreme Court case of *Taghipour v. Jerez,* 2002 UT 74, 52 P.3d 1252. In 1994, three individuals formed a manager-managed LLC under Utah law to purchase and develop a parcel of real estate. *See id.* ¶ 2. One of the members – Jerez – was designated in the Articles of Organization as the sole manager. *See id.* In 1997, unbeknownst to the other two members, Jerez caused the LLC to borrow $25,000 from Mt. Olympus Financial, L.C. by giving a trust deed on the real estate, and then caused loan proceeds of $20,000 to be disbursed to him. *See id.* ¶ 3. Jerez apparently misappropriated the $20,000 he received. *See id.* ¶ 4. The LLC ultimately defaulted on the loan, and Mt. Olympus foreclosed on the property. *See id.*

In 1997, the Utah LLC Act in effect did not require limits on manager authority to be expressly stated in the Articles of Organization, but allowed such limits in the operating agreement. *See id.* ¶¶ 5-6. The LLC's operating agreement provided: "No loans may be contracted on behalf of the [LLC]…unless authorized by a resolution of the [m]embers." *Id.* ¶ 9. Apparently, Mt. Olympus never received or examined the operating agreement, or conducted any significant due diligence.

Later, the LLC and the other two members sued Jerez and Mt. Olympus seeking declaratory judgment that the loan agreement and foreclosure were invalid because Jerez lacked authority to bind the LLC, per the operating agreement. *See id.* ¶ 5. Plaintiffs argued that Mt. Olympus, as lender, was bound by the provisions of the operating agreement. *See id.*

The Utah Supreme Court, affirming the Utah Court of Appeals, held: (1) Utah's LLC statute in effect in 1997 [section 48-2b-127(2) of pre-2001 Act], which made certain kinds of real estate documents binding on an LLC when signed by a manager applied; and (2) the LLC was bound by the loan agreement. *See id.* ¶¶ 14-15, 18.

Smith/Atwater espouse disclosure of those who hold LLC management authority, and any limits thereon, only in a private document (the operating agreement) and eschew disclosures in the Articles of Organization – a public document. Although they seem to acknowledge that limits on manager authority should be written down somewhere, they want such limits only expressed in a non-public document. Is it easier to verify identity of the manager and limits on manager authority in the Articles of Organization – a public document – or in the Operating Agreement – a private document?

Authority Disclosures Under Utah LLC Law

Under the current Utah LLC Act, the person(s) holding management authority over an LLC must be identified in the Articles of Organization. When the holder of that authority changes, the Articles must be amended to reflect that change.

More critically, the Utah public file – including full PDF images of the Articles of Organization, amendments thereto, and annual reports – can be accessed over the Internet by any connected device (computer, smart phone, etc.). Thus, from anywhere in the world, anyone using a device connected to the Internet can verify, 24/7, who holds management authority for a specific Utah LLC, and what limits exist on that authority.

Further, per Utah Code section 48-2c-121, such disclosure in the filed Articles constitutes constructive notice to third parties of that information. Thus, the verifier need check no further than the filed documents in most cases.

It takes less than one minute to access, via the Internet, the database at the Utah Division of Corporations and Commercial Code and view the data on any Utah LLC that has filed Articles of Organization. It takes only about three additional minutes (and $2.00) to enter credit card data and download a full PDF image of those Articles, amendments thereto, and annual reports. How much easier could it be? In other words, in Utah it is apparent, and transparent, who holds authority to bind an LLC.

Authority Disclosures Under Delaware LLC Law

How does a similar inquiry work in Delaware? Some information (but not documents) at the Delaware Secretary of State's Office are accessible via the Internet. But what information? The name or other identity of the LLC's manager or members? No. Limits on the manager's authority? No. So where must the verifier go to identify the manager or members and any limits on their authority? Answer: the LLC's operating agreement.

Where does one find the operating agreement for a Delaware LLC? It is not on public file anywhere. Does one ask the registered agent of that LLC? Good luck! Since the operating agreement is a private document, it is doubtful that agent would release a copy to a stranger! This gets worse.

Delaware allows LLC operating agreements to be oral. How does someone in Utah access or examine an oral operating agreement for a Delaware LLC? Whom do you ask? Someone in Delaware? Someone in Utah? The LLC's manager or members? But how do you find out who is the manager and who are the members?

Even if you contact someone knowledgeable about a particular Delaware LLC, must they disclose anything to you? Will they be willing and able to describe clearly and reliably all limits on authority of the LLC's manager? How could you know those limits for sure?

There is more. Not only may a Delaware LLC have an oral operating agreement, that agreement could be part written, part oral, could be in multiple documents, bits of paper, records, emails and text messages – all private – and that oral agreement could be implied from the actions or inactions of the LLC's members. With that breadth, how could such an operating agreement be subject to any examination and how could the examiner ever attain confidence in what constitutes the operating agreement? Although the statute of frauds should be discussed at this point, we defer that to another day.

And, under Delaware law there could be multiple layers of secrecy: First, one needs to identify the manager or the members, but their identity lies only in private documents (or an oral agreement), and one can never be sure if all relevant documents and oral statements have been identified. Second, once the manager's identity is established to some level of assurance, one then needs to identify the limits on the manager's authority. A similar quest for documents and oral statements must be pursued.

Was this situation intentionally created by Delaware – to keep all of this information secret and unavailable? If not, why would its LLC law be structured this way?

Disclosure of Authority Limits Desirable

In a multi-member LLC that is manager-managed, the members may want limits on manager authority to be on public file, in the hope that such disclosure will keep the manager from exceeding his authority and, possibly, jeopardizing the members' investment in their LLC interests. In this way, results similar to the *Taghipour* case might be avoided.

Transparency vs. Secrecy

Transparency is now an 'in' word. Politicians, including President Barack Obama, have preached the virtues of "open government" and "complete transparency" for all transactions with government.

Speaking of transparency, disclosure of names and addresses of LLC managers and members may soon be required by federal law. In March, 2009, U. S. Senator Carl Levin introduced Senate Bill 569 which requires the name and address of each beneficial owner of a U.S. corporation or LLC to be identified in writing when forming such entities and requires such information to be updated as it changes. In part, that bill is in response to a report by the Financial Action Task Force on Money Laundering that criticized the United States for failing to collect such beneficial ownership information for use by law enforcement agencies. Senator Levin stated: "It doesn't make sense that less information is required to form a U.S. corporation than to obtain a drivers license. The United States needs to meets its international anti-money laundering commitments, and that means getting beneficial ownership information [on] U.S. corporations."

Senator Charles Grassley, a co-sponsor of S.B. 569, added: "The more transparency, the better for keeping business above board and accountable and for building public confidence in the marketplace. This legislation makes registration of a corporation [or LLC] meaningful in that the public can know who is running the corporation. Right now, that's not the case."

In apparent response to the threat of the new federal law (S.B. 569), Nevada changed its law, effective October 1, 2009, to require a written list of the names and addresses of all shareholders of Nevada corporations and all members of Nevada LLCs to be held by the registered agent for those entities, or by a records custodian whose identity and address are known to the registered agent.

Certainty

Under the Utah LLC Act, LLC documents in public files at the Utah Division of Corporations mean something. They are not just filed to be stored, but to be accessed, retrieved, examined and used with confidence by the public. For example, Utah Code section 48-2c-121(1) states:

> Articles of organization…filed with the division constitute notice to third persons, and to members and managers… of all statements set forth in the articles.. [that are required to be set forth in the Articles by Subsection 48-2c-403(1) or that are permitted to be set forth in the Articles by Subsection 48-2c-403(4)].

Utah Code Ann. §48-2c-121(1)(2007).

The main requirements under Subsection 48-2c-403(1) include a statement that the LLC is either manager-managed or member-managed and the name and address of each manager or each member, as applicable. In addition, any restrictions on authority of those who manage must be expressly set forth in the filed Articles.

Lower Cost of Doing Business

In Utah, the cost to determine who holds authority to manage an LLC is minimal since anyone with an Internet connection can verify that authority almost instantly. However, in states where there is no reliable public record, significant effort and cost must be expended to determine who holds management authority.

In addition, where oral operating agreements are recognized by law, legal counsel might need to interview (and take statements from) all potential members and managers, former members and managers, LLC employees and agents, bankers and, perhaps, relatives of each of the foregoing to reach a relatively reliable conclusion as to who holds such authority and what limits exist on that authority. Even then one cannot be 100% certain. Counsel for the LLC may be required to render a legal opinion to the requesting party on the subject. That whole exercise can be costly and can delay business transactions.

Modern LLC Law

In their article, Smith/Atwater quote the prefatory note to the RULLCA which states that the **position concept** of apparent authority **"does not make sense for modern LLC law,"** (emphasis added), purportedly because of the difficulty in Delaware and some other states in identifying who holds authority to manage an LLC and what limits exist on that authority.

But which approach constitutes "modern" LLC law – Delaware's, which could require many hours making inquiries and finding and examining private documents and oral agreements (with lingering uncertainty over the result), or Utah's, which utilizes electronic commerce, takes only minutes to verify and gives certainty?

CONCLUSION

Before forming Delaware LLCs, Utah lawyers should carefully consider the benefits Utah LLCs could provide.

Online Judicial Performance Evaluation Survey: Why You Shouldn't be Afraid

by Karen Wikstrom

Introduction – Survey is going online

In 2008, the legislature changed the way Utah judges are evaluated as part of the judicial retention process. In the past, the Administrative Office of the Courts, through an independent contractor, administered a survey to attorneys and jurors that requested information about the judge's performance, demeanor, legal knowledge, and temperament. This information was then reported to voters as part of the official voter information packet prepared by the Lieutenant Governor to help inform the public about the judges standing for a retention vote.

The legislature has now created a new 13-member commission – the Judicial Performance Evaluation Commission ("JPEC") – to oversee the evaluation and retention process. Four commissioners are appointed by the legislature, four by the Governor, and four by the judiciary. The thirteenth member is the executive director of the Commission on Criminal and Juvenile Justice. Information about JPEC is available online at www.judges.utah.gov.

Beginning with judges standing for retention election in 2012, the manner in which attorneys will be surveyed regarding judicial performance will also change; JPEC will be surveying attorneys using an online survey.

After conducting a national competitive bidding process, JPEC contracted with my firm, Wikstrom Economic & Planning Consultants, Inc., to conduct the surveys. Working closely with JPEC, my firm is developing the survey questions and establishing the survey protocols. We are also administering the survey, analyzing the survey responses, and reporting the findings to JPEC. As part of this process, we have conducted focus groups with judges, attorneys, and court staff. When we asked attorneys about concerns with an online survey, some expressed reservations about the preservation of confidentiality and anonymity. This article discusses the reasons for the change and how these concerns will be addressed.

The Evaluation Process

Judges are evaluated twice during each of their terms; the first (the "midterm evaluation") is designed to provide information to the judge to help him or her improve and is not made available to the public. The second (the "retention evaluation") will be made public and will include a recommendation by JPEC regarding the retention of the judge that will be part of the voter information packet.

WHY CHANGE?

Cost Effective

Paper surveys are fast being relegated to the history books – and for many good reasons. The amount of paper used in preparing the forms, envelopes, etc.; postage to disseminate the survey and for completed forms to be returned; data entry/scanning; and the potential for human error that is magnified every time a human has to intervene in the process all contribute to a much more costly survey.

Easier to Complete Survey

According to the Alaska Judicial Council, "Attorneys who use our electronic surveys report that they are much easier and considerably less time-consuming to use." An online survey can direct the respondent to the next appropriate question, a process far more cumbersome with a paper survey. An online survey can also be more easily tailored to the specific respondent.

Faster Turnaround of Results

With the online survey, the time to publish results is dramatically reduced.

Just as Confidential as Paper Surveys

Measures are in place to protect the privacy of your survey response. Each participating attorney is given an individualized link to the survey. Survey responses are encrypted for secure transmission to the contractor. When an online response is received by the independent contractor, it is stripped of the e-mail address that might identify the respondent. The response is then identified by a randomly assigned control number. This is essentially the same process that is used with the

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paper survey when the outside return envelope bearing the respondent's name and signature is separated from the survey response.

No "Tell-tale" Handwriting

We have heard stories of right-handed attorneys who have completed the survey using their left hand to disguise their handwriting so that their comments would not reveal their identity. Online surveys eliminate this concern entirely.

Other JPEC Surveys are Online

Court staff, litigants, and courtroom observers will also be primarily using online surveys.

How Will it Work?

We will obtain email addresses from the Utah State Bar. You will receive an email from the JPEC (judicalperformance@utah.gov) that will provide you with a link to the survey. In a separate email, you will receive a password. Using both the link and the password, you will be able to access and complete the survey. Once you submit the survey and your email address has been recorded as having completed the survey, the electronic file will be stripped of any information that would identify your email address. Your response will be assigned a control number. The data will be immediately entered into a database that will be transferred to Wikstrom Economic & Planning Consultants, Inc. Once the survey period is over, the database of email addresses will be deleted from our system.

We track the email addresses for completed surveys so that we are able to send "friendly reminders" to those who have not completed their surveys. Again, once the survey is completed, any link between your email address and the survey will be eliminated. Once the survey process is completed, the file that tracks the number of responses using email addresses will be destroyed.

PROTECTION OF CONFIDENTIALITY

Use of a Secure Server – Just Like Your Bank!

We will be using Questionpro, one of several online survey providers, to provide a secure environment, not unlike online banking, for respondents to take the survey. Using a protocol commonly referred to as Secure Socket Layer (SSL), interaction between the survey-taker and survey is encrypted, ensuring that there can be no eavesdropping or tampering with the communication by an unauthorized third party.

Survey invitations will be sent to respondents using their personal email addresses. The message sent includes a URL (web address) that directs their browser to the secure website and begins the survey. For added security, we will add password protection to the surveys so only respondents who have received the correct password can log in to reply.

Use of Online Surveys in Other States

Alaska began offering an online survey option in 2004. Since then, the use of paper surveys dropped rapidly from about 40% of the returned surveys in 2005 to 16% in 2009. Clearly, the acceptance of electronic surveys has increased significantly. In fact, in 2005, 75% of all members of the Alaska Bar requested a paper survey form, yet only 15% submitted a completed paper survey; substantially more completed the online survey.

Massachusetts started surveying online in 2005. According to Mona Hochberg, Supreme Judicial Court Judicial Performance Evaluation Coordinator, while many attorneys have been concerned about confidentiality, she routinely gets phone calls from attorneys asking that she find their survey forms because they "accidently evaluated the wrong judge." Please be advised that we will not be able to find your survey form for editing once you have submitted it. Massachusetts has found that attorneys completing the online survey provide more comments than those submitting paper surveys.

OTHER REASONS TO FEEL OK ABOUT AN ONLINE SURVEY

Attorney Use of Email Without Encryption

How many of you write to your clients concerning their cases and use email? Do you feel comfortable using the Internet to communicate privileged and confidential information? Many states have issued ethics opinions regarding the use of email by attorneys as it relates to confidentiality. Most have determined that the use of unencrypted emails does not violate confidentiality. Surely the use of a highly secure and encrypted online survey offers less risk than emailing the details of a settlement proposal over an unencrypted network.

Compare Risk with Other Online Transactions

How many purchases have you made over the Internet during the past year? Nearly 75% of all Americans use the Internet and about 80% of those made an online purchase last year. Each time you make an online purchase, you provide credit card and other personal information that could be compromised, and yet you continue to do it. When you order an online credit report, you enter all of the information necessary for someone to access all of your bank accounts, but this does not stop nine million households from ordering the reports annually. The security for the Judicial Performance Evaluation Survey matches that of your bank, favorite online retailer, or credit reporting company.

WHAT TO EXPECT?

Pretest

In January 2010, we will pretest the survey using a smaller sample of attorneys. This will help us determine the best wording for questions and refine the process. If you receive a survey during this time, please complete it as quickly as possible.

Survey for Midterm Evaluation of Judges Standing for Retention in 2012

Beginning in about February 2010, many of you will receive an email inviting you to complete a survey of judges standing for retention in 2012. This will be part of the midterm evaluation. The email will come from judicialperformance@utah.gov. The email will provide a link to the survey for the specific judge you are being asked to evaluate and a password.

If you have any questions concerning the survey or the process, please call me at 801-521-7724.

The Not-So-Secret Crucible of Bankruptcy

by J. Robert Nelson

Judging by the popularity of some recent novels, there seems to be a deep-rooted fascination with the mysterious world of codes, secret symbols, and rituals. For some, my topic is equally arcane – the implications of a bankruptcy filing for the dealings, transfers, and transactions that precede it.

Many years ago, I attended a series of lectures delivered by George Treister, a nationally-recognized authority on bankruptcy law. Treister began the first lecture by noting that bankruptcy was more important than any of us novices realized. He went on to argue that it was a veritable crucible in which the adequacy of pre-bankruptcy transactions received their ultimate testing. At the time, my experience was so limited that I did not fully appreciate his point. Since that lecture, I have had ample opportunity to work with financially distressed businesses and individuals. One of my early involvements was with Global Marine Drilling, a Houston-based company with oil and gas drilling operations in the Gulf of Mexico, the North Sea, and Indonesia. My clients, a syndicate of national banks that had financed acquisition of deep water drilling rigs, found themselves in the proverbial cross hairs as the debtors, other creditors, and creditors committees scrutinized the loan and security documents hoping to expose flaws in the banks' liens on rigs, which constituted the debtor's most valuable assets. The loan had been negotiated and documented by a transactional lawyer at my firm, and she spent sleepless nights worrying that some minor mistake would prove fatal to the banks' position. Ultimately, the liens stood up to examination, and the banks' secured position gave them substantial leverage when the debtor eventually formulated its plan of reorganization.

Global Marine Drilling was an early exposure to the bankruptcy crucible. Since then, I have witnessed many other examples of how bankruptcy opened the door to investigation of pre-filing mistakes, how it permitted changes in operating control of troubled companies, how it could be used to invalidate pre-bankruptcy transfers, terminate pre-bankruptcy contracts and leases, and even modify fundamental terms of loan agreements.

For "outsiders," there is an element of the surreal in the bankruptcy system. Indeed, in a domain governed by its own statutes and rules, its own court system, and an unfamiliar vocabulary, legal experience in other areas, intuition, and common sense are not always reliable guides for the uninitiated. I began to appreciate this the first time I tried to explain to a client why he had to return a pre-bankruptcy debt payment even though he still was owed money, or to another client why, just because a Ponzi scheme was involved, he might have to surrender a payment that was only what he had been promised. Bankruptcy has a number of "unusual" provisions that can have broad ramifications for pre-bankruptcy dealings and transactions. I will touch upon some of the more significant ones and conclude with a few practical implications of the bankruptcy crucible.

The Automatic Stay

Bankruptcy is synonymous with delay. When a case is filed, all of those carefully drafted contractual default and remedy provisions bump up against the Bankruptcy Code (all statutory references are to title 11 U.S.C. known as the Bankruptcy Code). Section 362 automatically stays all actions against or related to property of the bankruptcy estate. Continuation of suits, enforcement of liens, and termination of contracts and leases all come within the ambit of the statutory stay. Generally, the stay continues for the duration of the case. The bankruptcy court can lift the stay if a non-debtor party establishes that relief is justified because (1) a debtor has no equity and does not require an asset to reorganize effectively or (2) for cause, including the debtor's failure to adequately protect the interest of the non-debtor in estate assets.

Avoidance of Transfers

The ongoing saga of Bernie Madoff is a reminder that pre-petition transfers can be targeted using the so-called avoiding powers under the Bankruptcy Code. The bankruptcy system is based on, among other things, the principle of equality of distribution so that creditors of the same class receive generally equivalent treatment. The Bankruptcy Code includes a number of provisions specifically aimed at avoiding and recapturing pre-bankruptcy transfers that in effect favor one creditor over the general creditor body. Section 544, the so-called strong arm section, gives a bankruptcy trustee (or debtor-in-possession) the status of a hypothetical lien creditor.

J. ROBERT NELSON has practiced as an insolvency lawyer for more than 35 years. He recently jointed Durham Jones & Pinegar, P.C. as of counsel to the firm and is a member of the firm's Bankruptcy Section.

This permits a trustee to avoid liens and other interests that have not been properly perfected before a bankruptcy filing. Another provision, section 547, is directed at preferential transfers. That section permits a trustee to recover debt payments made during the ninety days before bankruptcy (one year in the case of transfers to insiders). It applies even if (a) the payments were on valid obligations of the debtor and (b) the creditor receiving the payment continued to have a claim even after the preference. Section 548 permits avoidance of fraudulent transfers. Generally, it mirrors state fraudulent transfer laws that are also applicable in bankruptcy under the "strong arm" section. Under section 548, a trustee may challenge transfers intended to hinder, delay, or defraud creditors. That language has been interpreted to include payments made in connection with Ponzi schemes. The section also covers transfers made by an insolvent debtor for less than reasonably equivalent value. In that regard, section 548 has been used to challenge pre-bankruptcy asset sales deemed to have been for an inadequate price.

Rejection of Contracts and Leases

Bankruptcy contradicts the adage that "a deal is a deal." One of the more important bankruptcy powers is the ability to break contracts. In recent years, numerous well-publicized cases of airlines, large retailers, and even automotive manufacturers, have been filed to deal with "burdensome" real estate and personal property leases, employment agreements, dealership agreements, and benefit packages. In bankruptcy, contract and lease rejection turns on reasonable exercise of business judgment. Courts have shown a definite inclination to sustain a debtor's exercise of judgment when rejection is deemed crucial to the outcome of a reorganization. Although damage claims arise from lease and contract rejection, that is often of hollow comfort to the non-debtor party both because of statutory caps on some claims (one year's rent under real estate leases) and because reorganization plans often pay such claims at substantial discount.

Under section 365, a debtor may also assume a lease or contract if the debtor cures any monetary defaults and agrees to perform according to contractual terms. If there is equity in a lease (a rarity in these difficult times), some debtors will assume a lease and then assign it to a third party.

Modification of Loan Agreements

Most bankruptcies have their roots in a debtor's inability to pay debt, particularly secured debt, according to terms. Bankruptcy not only offers a reprieve from enforcement by imposition of an automatic stay, it also permits modification of fundamental loan terms including the debt amount, interest rate, and repayment term. Many times the changes are a matter of post-filing negotiation and agreement between debtor and lender. In some cases, the changes are imposed by "cramdown" under section 1129(b)(2)(A).

The bankruptcy power to bind dissenters also applies to unsecured debt. Under section 1126(c), if a majority in number and two-thirds in amount of claims of an unsecured creditor class vote to accept a treatment, those in the class who vote against the plan are bound.

Discovery of Pre-Bankruptcy Misconduct

A hallmark of bankruptcy is transparency. A debtor's actions, both before and during a case, are scrutinized by a combination of lenders, bondholders, committees, the United States Trustee, and a cadre of lawyers. In bankruptcy, the free flow of information is assured by the requirement of detailed bankruptcy schedules and statements, detailed operating reports, liberal discovery rules, and court-supervised status conferences. In this environment, any pre-bankruptcy misdeeds, let alone post-filing improprieties, cannot be concealed for long.

Management's Loss of Control

Chapter 11 and other reorganization chapters of the Bankruptcy Code presume management's retention of control of a business as a debtor-in-possession. Nonetheless, debtors can lose control of their reorganizations in a number of ways. Pre-bankruptcy misconduct (such as improper transfers in a Ponzi scheme) can lead either to conversion of a case to a chapter 7 liquidation under section 1112(b) or to appointment of a trustee under section 1104. In addition, timing is crucial in bankruptcy cases. The failure to heed statutory deadlines can result in stay relief under section 362(d), forfeiture of real estate leases under section 365, and even loss of a debtor's exclusive right to propose and confirm a reorganization plan under section 1121(b).

Because bankruptcy can have such significant impact on pre-filing activities, I will conclude with several practical implications. Whatever the transaction, simple prudence dictates that careful attorneys always consider financial circumstances and the potential for bankruptcy. There are times that the financial risk is so pronounced that it alone may be a deterrent to an intended transaction. Even if the risk is considered manageable, a few precautions may still be worthwhile. For example:

- Management, aware of their fiduciary duty to protect assets, may wish to reconsider transfers to insiders or distressed sales of assets at bargain prices;
- Because of the fraudulent transfer risk, prospective purchasers of assets of a distressed business may press for a bankruptcy filing so that a transaction can be pursued under supervision of the bankruptcy court;
- Suppliers, mindful of the preference risk associated with deferred

payments, may condition deliveries upon COD terms or require timely payment for all new product. Then again, the mere risk of a future avoidance action usually would not warrant rejecting a preferential payment. Even if a bankruptcy should follow, statutory and factual defenses leave substantial latitude for a recipient to negotiate a less-than-full return of a pre-bankruptcy transfer;

- With insolvent clients, lawyers and other professionals usually should request and work against retainers to minimize the preference risk; and
- After assessing the risk, lessors and parties to contracts may conclude that they are better off postponing transactions until they can be approved by a bankruptcy court.

The preceding list makes no mention of lenders. As a group, lenders tend to be the most sensitive to the delays, added costs, and other potential downsides of a borrower's bankruptcy. Because of that, even if the possibility of bankruptcy is remote, lenders will include loan provisions geared both to complicate a voluntary bankruptcy filing and to expedite loan enforcement if one does ensue. Of course, contractual proscriptions on the filing of a bankruptcy are contrary to public policy and unenforceable as a matter of law. However, some lenders require their borrowers to include in corporate charters provisions that condition bankruptcy filing on unanimous board approval. In such cases, the lenders require the inclusion of independent board members who may be more favorably disposed to the lender. Because of the duty owed by directors of a distressed company to creditors, however, this device ultimately may not stymie a bankruptcy filing.

Lenders commonly include other loan provisions aimed at "bankruptcy proofing" a transaction. For example, real estate lenders make their loans to entities whose sole function is to hold legal title to the real estate collateral, with all project-related costs born by a separate development entity. That structure is driven by the view that without debt (other than to the lender) an entity should not qualify for bankruptcy relief because of a dearth of debt to reorganize. Other lenders include loan provisions intended to expedite relief from the section 362 stay. Secured lenders, as previously noted, are entitled to adequate protection of their lien interests during a bankruptcy. A debtor's failure to provide adequate protection is a ground for lifting the stay. Recognizing this, some loan documents contractually define the protection to which a lender would be entitled in the event of bankruptcy, and couple this with an agreement that, failing such protection, the court should lift the stay. Provisions of this type may at least be probative in a court's ruling on a stay relief motion. Such provisions may at least be probative in a court's determination of a motion for stay relief under section 362.

Samurai Lawyer

by Harold G. Christensen

Reviewed by Cathy Roberts

In his book *Samurai Lawyer,* Harold G. Christensen describes a colleague who paced the hall of the courthouse, smoking one cigarette after another while the jury deliberated. Every time this attorney walked out of the courtroom after a trial, whether he had won or lost, he said he felt as if he had left a part of himself at the counsel table. "He died at a young age without realizing he was trying to do the work of the jury," Christensen writes.

Christensen, too, felt anxiety every time the judge or jury was handing him a "report card" at the end of a trial. But he believed that if a trial lawyer could put aside his ego and simply do his job without worrying about the judge or the jury, then litigation could be survivable. An interest in Eastern religions led him to discover a useful survival guide for the trial lawyer in the tenets that once guided Samurai warriors. These tenets, also known as Bushido, the "Way of the Warrior," have provided him "direction in [his] practice, restraint in victory, and solace when things didn't go as expected." The book is short, but do not let its brevity fool you. In it, Christensen dissects the practice of trial law with the razor-sharp blade of a medieval Japanese sword.

The skilled, well-armed, well-educated Samurai were members of a warrior class in feudal Japan. Warlords relied upon them when their advisors – poets, priests, tax collectors, and bureaucrats – failed to solve problems. The Samurai's guiding tenets included honesty, courage, respect, compassion, and justice. Christensen asserts that trial lawyers are like Samurai, because when negotiation fails, they must go to battle, acting in harmony with a personal code of conduct.

Six years ago last October, the Utah State Bar established the Utah Standards of Professionalism and Civility. These standards, based on the lawyer's obligation to the administration of justice, provoke the following question for some litigators: aren't we fighters, rather than lovers? My clients, indigent criminal defendants, whose liberty, and sometimes lives, are in jeopardy, ask me, "Are you willing to fight for me?" Whether we litigate felonies, contentious divorces, vindictive contract disputes, or multiparty litigation class action suits, our clients usually prefer the sight of flashing swords and the sound of thundering hooves to the sight and sound of us discussing vacation plans or football scores with "the Enemy."

Christensen, who, in addition to his private practice at Snow Christensen & Martineau, has served as Utah State Bar president, charter president of the first American Inn of Court, Deputy Attorney General of the United States, and law professor, advises trial lawyers to seek actual combat at every opportunity, after providing the client with an honest appraisal of the likelihood of a victory. I asked him what a Samurai warrior would do to his enemy, constrained by standards of professionalism and civility. "He'd lop his head off, but he'd probably apologize first," said Christensen, with a laugh.

The cover picture, of a samurai carrying a sword in one hand, and a briefcase in the other, sets the semi-humorous tone of the book. In his quest to reconcile the competing interests of the fear of combat, and the need for combat, Christensen has gathered advice from a wide variety of sources, including Mark Twain, Lao Tzu, famous football coaches, horse trainers, and other Zen masters. His own guides to trial practice are worth the price of the book. Samurai lawyers, he writes, like Samurai warriors, can learn from the Seven Principles of Bushido:

CATHY ROBERTS is a felony trial attorney with the drug team of the Salt Lake Legal Defenders Association. She is also a Utah Bar Journal *editor.*

Be acutely Honest throughout your dealings with all people. Believe in Justice, not from other people, but from yourself. To the true Samurai, there are no shades of gray in the question of Honesty and Justice. There is only Right and Wrong.

Related to the precepts of Lao Tzu, and Tao Te Ching, litigation tactics seem more inspired, but this is not just common-sense advice clothed in Asian mystique. Samurai warriors' swordsmanship, violent and lethal, was the reason they went to battle. Going to battle with a blunt sword would be unthinkable. Lawyers' words are their swords. Truth-seeking, when confronted by mendacious witnesses and confusing laws, often feels like chopping down the thorns around Sleeping Beauty's castle.

If the rules of civility fail the Samurai lawyer, then what? Should they curb their tongues to avoid being uncivil? Christensen leaves the application of his seven principles to the individual attorney.

A curious omission is any mention of women Samurai, although there was at least one famous female Samurai warrior, Tomoe Gozen, around 1000 AD, who rode into battle and fought as skillfully and valiantly as any male samurai. Women litigators, presumably, may follow the male Samurai lawyer's guidelines, although the author's advice that we should meditate for thirty minutes before getting up in the morning may be challenging for attorneys with young families.

This book is both thought-provoking and timely, as Utah lawyers re-examine their roles under new rules which some members predict will require significant changes in current methods of advocacy.

Samurai Lawyer is available at the King's English Book Store and at Amazon.com.

Notice of Election of Bar Commissioners

Second and Third Divisions

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 http://www.utahbar.org/elections/commission_elections.html. Completed petitions must be received no later than February 1, 2010, by 5:00 p.m.

In order to reduce campaign costs, the Bar will print a 200-word campaign statement and photograph in the March/April issue of the Utah Bar Journal, post a 500-word campaign statement and photograph on the Bar's website, and provide 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. For further information, please contact John Baldwin at (801) 531-9077, or at director@utahbar.org.

2010 Spring Convention Awards

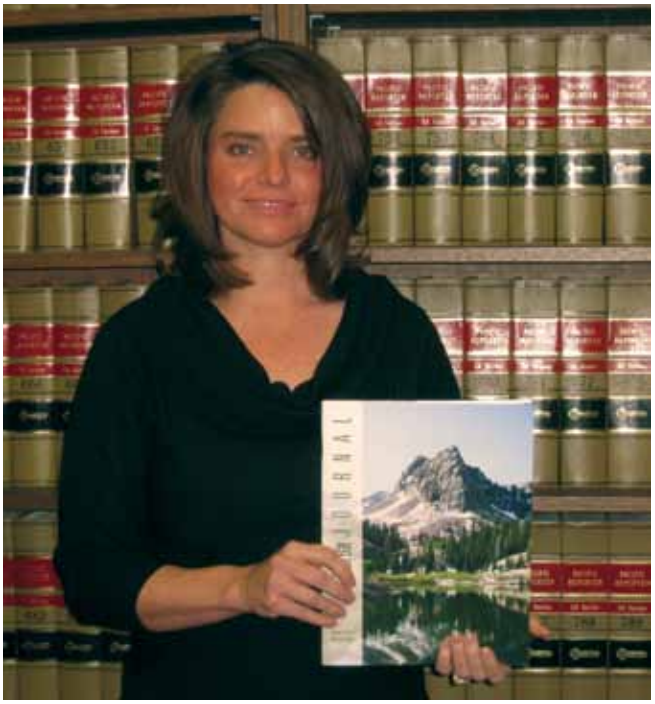
The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2010 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession. Award applications must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, January 11, 2010. You may also fax a nomination to (801) 531-0660 or email to adminasst@utahbar.org.

1. **Dorathy Merrill Brothers Award –** For the Advancement of Women in the Legal Profession.

2. **Raymond S. Uno Award –** For the Advancement of Minorities in the Legal Profession.

2009 Utah Bar Journal *Cover of the Year Announced*

The winner of the *Utah Bar Journal* Cover of the Year award for 2009 is first-time contributor, Heather Finch, Provo, Utah. Her photo of Lake Blanch and Sundial Peak was taken in Big Cottonwood Canyon. It appeared on the cover of the March/April issue.



Heather is one of 77 attorneys, or members of the Paralegal Division of the Utah Bar, whose photographs of Utah scenes have appeared on covers since August, 1988. Fifty percent of the cover photos in 2009 were submitted by first-time contributors.

Congratulations to Heather, and thanks to all who have provided photographs for the covers.

Thank You…

Thank you to all participants and volunteers for their assistance and support in the 20th Annual Lawyers & Court Personnel Food and Winter Clothing Drive. We were able to deliver a large truck load of donated items, along with cash donations to specific shelters. We thank you all for your kindness and generosity.

Pro Bono Honor Roll

Andres Alarcon – Family Law Clinic
Clark Allred – Domestic Case
John Anderson – Family Law Clinic
Nicholas Angelides – Senior Cases
Justin Ashworth – Family Law Clinic
T. Brian Barr – Guadalupe Clinic
Lauren Barros – Family Law Clinic
Abe Bates – Foreclosure Scam Case
M. Paige Benjamin – Collection Case
Maria-Nicolle Beringer – Consumer & Domestic Cases
Wendy Bradford – Family Law Clinic
Bryan Bryner – Guadalupe Clinic
Allison Burger – Family Law Clinic
Brian Cannell – Collection Case
Victor Copeland – Family Law Clinic
Ted Cundick – Guadlupe Clinic
Ian Davis – Guadalupe Clinic
Jana Dickson – Family Law Clinic
Gary Doctorman – Foreclosure Scam Case
Kyle Fielding – Guadalupe Clinic
Randall Gaither – Divorce Case
Keri Gardner – Family Law Clinic
Jeffry Gittins – Guadalupe Clinic
Jason Grant – Family Law Clinic
Kathryn Harstad – Guadalupe Clinic
Garth Heiner – Guadalupe & Family Law Clinics
April Hollingsworth – Guadalupe Clinic
Kyle Hoskins – Farmington Clinic
Louise Knauer – Family Law Clinic
Stephen Knowlton – Family Law Clinic
Dixie Jackson – Family Law Clinic
Isaac James – Family Law Clinic
Darren Levitt – Family Law Clinic
Paul MacArthur – Adoption Case
John Maddox – Adoption Case
Nancy Major – Family Law Clinic
Benjamin Mann – Family Law Clinic
William Marsden – Guadalupe Clinic
Aaron Miller – Guadalupe Clinic
Adam Miller – Divorce Case
Russ Minas – Family Law Clinic
Bruce Nelson – Protective Order hearings
Ellen O'Hara – Family Law Clinic
Todd Olsen – Family Law Clinic
Rachel Otto – Guadalupe Clinic
Langdon Owen – Probate Case
Al Pranno – Family Law Clinic
Christopher Preston – Guadalupe Clinic
DeRae Preston – Family Law Clinic
Stewart Ralphs – Family Law Clinic
Jon Rogers – Consumer Case
David Rosenbloom – Protective Order Case
Brent Salazar-Hall – Family Law Clinic
Lauren Scholnick – Guadalupe Clinic
Kent Scott – Foreclosure Scam Case
Justin Scott – Foreclosure Scam Case
Cobie Spevak – Family Law Clinic
Kathryn Steffey – Guadalupe Clinic
Steven Stewart – Guadalupe Clinic
Erin Stone – Guadalupe Clinic
Virginia Sudbury – Family Law Clinic
Jessica Taylor – Family Law Clinic
Tracey Watson – Family Law Clinic
Matthew Williams – Family Law Clinic
Heather White – Foreclosure Scam 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.

Mail List Notification

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

Utah's Pro Bono Week was a Success!

National Pro Bono week was launched as an American Bar Association initiative at the 2008 ABA Annual Meeting, with plans for the first one to occur in October 2009. This first annual celebration was held October 25 through 31, 2009. Quoting their website: "The Celebration was a coordinated national effort to showcase the great difference that pro bono lawyers make to the nation, its system of justice, its communities and, most of all, to the clients they serve."

Utah State Bar Pro Bono Committee Co-chairs, David Hall and Candace Vogel, coordinated various events around the state to mark the week-long Pro Bono Celebration. What follows is a summary of a few of the events.

Utah State Bar Free Legal Clinic

On Tuesday, October 27th, 25 lawyers volunteered to serve equal parts of lunch and legal advice to people who wouldn't get either without help. The economic downturn has created more people without jobs or homes who need help. At the St. Vincent DePaul Resource Center in Salt Lake City, attorneys provided winter gloves to each client and the telephone number for low-income legal services so that they could gain further assistance with a spectrum of issues, including immigration, family law, housing and employment.

Utah Legal Services Celebration

Utah Legal Services celebrated Pro Bono Week on Thursday, October 29 with a recognition breakfast at the Community Justice Center. Salt Lake City Mayor Ralph Becker joined in thanking volunteer attorneys who have taken a pro bono case or volunteered at a legal clinic this past year.

L–R: Tracey Watson, Brenda Teig, and Mayor Ralph Becker

- Tracey Watson was recognized for her work on a difficult case representing a victim of domestic abuse.
- Tony Kaye and Steven Burt received an award from Ballard Spahr Andrews & Ingersoll, LLP for work they did on a foreclosure scam pro bono case.

L–R: Richard Fox, Steven Burt, and Brenda Teig

- Smith Hartvigsen, PLLC attorneys Steven Stewart, Bryan Bryner, Kyle Fielding, Jeffry Gittins, James Morgan, Christopher Preston, and Kathryn Steffey were recognized for their commitment and hard work at the Guadalupe Clinic every month for the past several years.

L–R: Steve Stewart, Jeff Gittins, Kyle Fielding, and Chris Preston of Smith Hartvigsen, PLLC with Mayor Ralph Becker

- Maria-Nicolle Beringer is a pro bono fellow with the firm Dewey LeBoeuf. She assists individuals on the Bankruptcy Hotline, helps clients in divorce matters, represents individuals at Protective Order hearings, investigates and assists with foreclosure scam cases, and provides valuable research and writing assistance in a number of consumer matters.

- On behalf of the Indian Walk In Center (IWIC), Ella Dayzie, Executive Director, Sharon Austin, Board of Director's Chair, and JoLynn Spruance, Board member were there to thank Aaron M. Waite for assisting the IWIC in acquiring a new health facility.

Following the breakfast, two free CLE events for attorneys interested in volunteering were offered.

Central Utah Bar Free Legal Clinic and Luncheon
Utah Valley University professor and lawyer, Jill Jasperson, and Carissa McNamara, pro bono coordinator for a local law firm, organized a free legal night and a Pro Bono Luncheon. Professor Jasperson divided her UVU Legal Studies students to assist attorneys with event publicity, client intake forms, legal consultation timekeeping, and parking. Refreshments were donated by the Bank of American Fork, and notary services were provided by the Utah Community Credit Union.

Refreshments: Students were in charge of contacting a local bank, Bank of American Fork, which volunteered to sponsor and supply all the refreshments for the event. Students previewed the library, found the best rooms for the food, helped serve the food, dressed professionally, and worked during the whole event, and created name tags for themselves. Students coordinated with the bank to get the refreshments to the right areas, met and greeted attorneys, and helped serve to the attorneys, faculty, staff, students, and clients. Two dozen local attorneys assisted approximately 150 clients. Attorneys clocked in over 100 hours of free legal services with a market value of over $20,000. Students spent well over 200 hours of time preparing, and manning the clinic.

Utah County also celebrated National Pro Bono Week with a CLE luncheon hosted by Utah Valley University with Central Utah Bar Association, UVU Center for the Study of Ethics, Woodbury School of Business, and the Legal Studies Department as sponsors. The topic of the CLE luncheon was "The Civic Duty of Pro Bono Work." Introduction to the luncheon was made by Tom Seiler, 4th District Bar Commissioner. He was instrumental in creating the first Tuesday Night bar in Utah County and spoke of his experiences. Robert L. Jeffs, Utah Bar President-Elect was the moderator for the invited panelists.

Scott H. Martin provided significant pro bono services for SPLORE (Special Populations Learning Outdoor Recreation and Education) and received the 2009 Pro Bono Lawyer of the Year award. He spoke on his experiences with his pro bono project.

Melissa Fulkerson was named 2009 Pro Bono Young Lawyer of the Year. Melissa first became involved with pro-bono work through her participation in the 4th Street Viaduct Project under the instruction of Professor Jensie Anderson. She spoke of her 4th street viaduct project experiences, and the inspiration it has been to continue forward in further pro bono cases.

Prof. Linda F. Smith at the S.J. Quinney College of Law, University of Utah received the 2009 Commitment to Community Pro Bono Award and spoke of the University's Clinical Program work that has directed and developed over the past two decades.

Adam Ford spoke as representative for the 2009 Pro Bono Law Firm awardee, Ford and Huff. He spoke on pro bono as a core value of their law firm, and emphasized pro bono and low bono legal services.

Utah State Lawyer Legislative Directory 61st Legislature 2010

The Utah State House of Representatives

Lorie D. Fowlke (R) – District 59

Education: B.S., Law Enforcement, Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Public Education; Public Utilities & Technology; Chair, Judiciary

Elected to House: 2005

Practice Areas: Domestic Relations, Construction, Small Business, Real Property, Probate, and Contracts

Brian King (D) – District 28

Education: B.S., Economics, University of Utah; J.D., University of Utah College of Law

Committee Assignments: Commerce and Workforce Services; Business and Labor; Judiciary, Ethics

Elected to House: 2008

Practice Areas: Representing claimants with life, health, and disability claims; class actions.

Kay L. McIff (R) – District 70

Education: B.S., Utah State University; J.D., University of Utah College of Law

Committee Assignments: Higher Education; Judiciary; Workforce Services and Community and Economic Development

Elected to House: 2006

Practice Areas: Former presiding judge for the Sixth District Court, 1994–2005. Before his appointment, he had a successful law practice for many years, most recently as a partner in the McIff Firm.

Kraig J. Powell (R) – District 54

Education: B.A., Willamette University; M.A., University of Virginia; J.D., University of Virginia School of Law; Ph.D., University of Virginia Woodrow Wilson School of Government

Committee Assignments: Judiciary; Education; Health and Human Services

Elected to House: 2008

Practice Areas: Tesch Law Offices, P.C.; Municipal and Governmental Entity Representation; Zoning and Land Use

The Utah State Senate

Lyle W. Hillyard (R) – District 25

Education: B.S., Utah State University; J.D., University of Utah College of Law

Committee Assignments: Chair, Executive Appropriations; Public Education; Education; Judiciary, Law Enforcement & Criminal Justice

Elected to House: 1980; Elected to Senate: 1984

Practice Areas: Family Law, Personal Injury, and Criminal Defense

Daniel R. Liljenquist (R) – District 23

Education: B.A., Economics, Brigham Young University; J.D., University of Chicago Law School

Committee Assignments: Commerce & Workforce Services; Health & Human Services, Business and Labor; Government Operations and Political Subdivisions; Co-Chair, Retirement & Independent Entities

Elected to Senate: 2008

Practice Area: Focus Services, LLC

Mark B. Madsen (R) – District 13

Education: B.A., Spanish/American Studies, George Mason University, Fairfax, VA; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Transportation; Environmental Quality; National Guard and Veterans' Affairs; Judiciary; Law Enforcement & Criminal Justice; Chair, Workforce Services & Community and Economic Development; Senate Rules

Elected to Senate: 2004

Practice Area: Eagle Mountain Properties of Utah, LLC

Ross I. Romero (D) – District 7
MINORITY WHIP

Education: B.S., University of Utah; J.D., University of Michigan Law School

Committee Assignments: Executive Appropriations; Higher Education; Judiciary, Law Enforcement & Criminal Justice; Revenue and Taxation

Elected to Senate: 2004

Practice Areas: Civil Litigation, Labor & Employment, Intellectual Property/Information Technology, and Government Relations & Insurance Tort

Stephen H. Urquhart (R) – District 29

Education: Williams College; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Higher Education; Business and Labor; Chair, Transportation & Public Utilities & Technology

Elected to House: 2000; Elected to Senate: 2008

Practice Areas: St. George, Utah

John L. Valentine (R) – District 14

Education: Savanna High School, Anaheim, CA; B.S., J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Chair, Higher Education; Chair, Business and Labor; Revenue and Taxation, Ethics

Elected to House: 1988; Appointed to Senate: 1998; Elected to Senate: 2000

Practice Areas: Corporate, Estate Planning, and Tax

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.

Fall Forum Award Recipients

Congratulations to the following distinguished attorneys who were honored with awards at the 2009 Fall Forum:

Craig R. Mariger
Professionalism Award

Karen Hale
Distinguished Community Member

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 expense 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 email sent to your email address of record. Please check the Bar's website to see what email information you have on file. If you need to update your email 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 our staff will respond to your request.) Online balloting will begin April 1 and conclude April 15, 2010. Upon request, the Bar will provide a traditional paper ballot by contacting Christy Abad at adminasst@utahbar.org.

Attorney Discipline

ADMONITION

On September 17, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 4.2(a) (Communication with Persons Represented by Counsel) and 8.4(a) (Misconduct).

In summary:

An attorney was contacted by a minor whose parents were involved in a divorce proceeding in district court. The minor informed the attorney that the minor had been appointed a Guardian ad Litem (GAL), though the minor had not heard from the GAL in over two years. The minor asked the attorney for representation in the district court proceeding. The attorney researched the possibility of representation, and reviewed Ethics Advisory Opinion 07-02. That opinion addresses the situation that the attorney was presented with, and advises that in the case of a mature minor, an attorney may speak with the minor even without the permission of the GAL and not violate Rule 4.2. The attorney spoke again to the minor after conducting research. The attorney filed a Notice of Appearance in the case. The GAL filed a Motion to Strike Notice of Appearance of Counsel. The attorney conducted further research to determine if the minor was a "mature minor" as described in the ethics opinion. The attorney filed a response to the motion to strike. A pretrial hearing was held where the attorney's representation was discussed. The attorney asked to withdraw from the case after the representation was challenged by the father's counsel and the GAL. The court removed the attorney from the case, struck all of the pleadings that had been filed, and chastised the attorney for what had been done. The court stated that the attorney's actions were "wrong," "out of line," "unethical," and "inappropriate." The attorney followed all orders of the court.

The Rules of Procedure for the Ethics Advisory Opinion Committee ("EAOC") state: "A lawyer who acts in accordance with an ethics advisory opinion enjoys a rebuttable presumption of having abided by the Utah Rules of Professional Conduct." The Utah Supreme Court has advised that it expects the OPC to take action whenever it believes a disciplinary rule has been violated and that the OPC cannot adequately perform that function if it is bound by the opinions issued by the EAOC. As was the case in this matter, the opinions are advisory, and the presumption that an attorney who follows an opinion has not violated a Rule is rebuttable and inconclusive.

PUBLIC REPRIMAND

On November 13, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Larry N. Long for violation of Rules 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), Rule 5.5 (Unauthorized practice of Law; Multijurisdictional Practice of Law), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Long was hired by the complainant to represent a client on

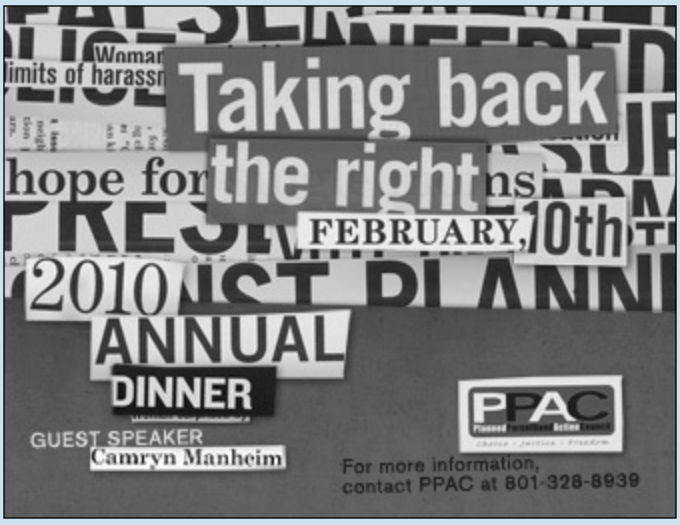
a violation of a Protective Order. The complainant originally met with a non-lawyer working for Mr. Long, on April 18, 2007. The complainant paid a $750 retainer fee to the non-lawyer. After Mr. Long failed to appear at a court hearing the complainant called Mr. Long to inquire about his failure to appear and spoke to the non-lawyer. After Mr. Long failed to appear at the next hearing scheduled, the complainant called to speak with Mr. Long and again only spoke with the non-lawyer. At one point, the non-lawyer planned to serve as a mediator for the parties in this dispute, while Mr. Long represented the client and while the non-lawyer was employed by Mr. Long. The non-lawyer prepared a mediation settlement document and sent it to opposing counsel for signature. The complainant was led to believe that the non-lawyer was an attorney. Mr. Long failed to effect measures to make reasonably certain that the non-lawyer as his employee complied with the Rules of Professional Conduct. Mr. Long failed to adequately supervise the non-lawyer's activities to insure the non-lawyer was not engaging in the Unauthorized Practice of Law. Mr. Long allowed the non-lawyer to appear in court, contact an opposing party and conduct mediation proceedings at Mr. Long's office.

PUBLIC REPRIMAND

On November 10, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against David C. VanCampen for violation of Rules 1.4(b) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. VanCampen represented a client who was charged with three misdemeanors. Mr. VanCampen failed to appear at two bench trials. Mr. VanCampen failed to notify his client that he was leaving the firm where he had been employed and that he was no longer representing the client. Mr. VanCampen failed to withdraw as counsel and failed to make sufficient arrangements to protect his client after terminating the representation. Mitigating factors included: Respondent's stated intent not to resume the practice of law and Respondent's apparent lack of intent to harm his client. Aggravating factors included: Respondent's extensive disciplinary history and pattern of misconduct.



RECIPROCAL DISCIPLINE

On July 23, 2009, the Honorable Kate A. Toomey, Third District Court, entered an Order of Discipline: Public Reprimand against Timothy Barnes for violation of Rules 1.3 (Diligence), 1.4 (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. This was a reciprocal discipline order based upon a Nebraska Supreme Court order of discipline.

In summary:

The Nebraska Supreme Court found that Mr. Barnes accepted a flat-fee of $1500, plus $500 for expenses to obtain tax-exempt status for a non-profit corporation in February 2006. Mr. Barnes never completed the application. After several months had gone by, Mr. Barnes contacted the corporation to request additional information. When the corporation attempted to get clarification, they found that Mr. Barnes had moved to Utah without notifying the corporation. In January 2007, the corporation asked for Mr. Barnes to refund the money.

The Nebraska Counsel for discipline filed formal charges against Mr. Barnes in June 2007. After charges were filed Mr. Barnes refunded $1500 and promised to refund the remainder, however at the time of the hearing he had not refunded the remainder.

The Nebraska Supreme Court found that Mr. Barnes failed to complete the matter and failed to notify the non-profit corporation that he was unable to do so. He failed to return any of the money the corporation paid for his fees and expenses until after the Counsel for Discipline had filed formal charges against him. The Nebraska Supreme Court also found that the evidence did not show that Mr. Barnes repaid the full amount of his unearned fee. In mitigation, the Nebraska Supreme Court found that during some of the time that Mr. Barnes neglected his client's legal matter, he was contending with a series of personal and family health issues and that he cooperated with the Counsel for Discipline, admitted most of the allegations in the formal charges and acknowledged responsibility for his actions. There was no record of other complaints against Mr. Barnes and he was no longer engaged in the private practice of law.

INTERIM SUSPENSION

On October 20, 2009, the Honorable Vernice S. Trease, Third Judicial District Court, entered an Order of Interim Suspension Pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability, suspending Richard D. Wyss II from the practice of law pending final disposition of the Complaint filed against him.

In summary:

On December 1, 2008, Mr. Wyss pleaded guilty to Making a False Statement, a felony, United States Code Annotated § 1001(a)(2). The interim suspension is based upon the felony conviction.

Tuesday Night Bar: A Model Pro Bono Program

by M. Michelle Allred

The Young Lawyers Division ("YLD") is dedicated not only to assisting young lawyers in the practice of law, but also to improving the availability of legal services to the public. Each year, the YLD offers an array of programs and services to the community, providing young lawyers with the opportunity to volunteer for several hours or several days.

One such program, Tuesday Night Bar, was recently recognized by the American Bar Association for the tremendous impact that it has had on both the volunteer lawyers and the service recipients. Since 1988, Tuesday Night Bar has been working in conjunction with the Utah State Bar Association to provide in-person legal consultations to members of the underserved populations in the Salt Lake City area. The premise of the program is simply to provide preliminary counseling and general information to individuals who are otherwise unable to resolve their own legal dilemmas.

The success of the Tuesday Night Bar program is dependent upon the willingness of lawyers, both young and old, to donate their time and legal prowess to those individuals who are unfamiliar with the legal system and basic legal principals. According to Christina Micken, current co-chair of the YLD Tuesday Night Bar Committee,

> Many citizens have legal problems but are simply afraid of the unfamiliar legal system and of lawyers. The Tuesday Night Bar programs puts a face on lawyers and allows a chance for citizens to interact with an attorney for free, in a brief one-on-one consultation. The simple chance to speak with a lawyer in this setting can help alleviate their fears of the legal process.

To participate in Tuesday Night Bar, a community member first calls a toll-free number (staffed by the Utah Bar Center) to schedule an appointment. Each participant completes an intake form, which provides some preliminary information about the participant's background and the nature of the legal problem. Participants are limited to three visits per year, preventing the creation of an ongoing attorney-client relationship between a participant and an attorney and ensuring that all citizens have access to participant in Tuesday Night Bar. Each year, nearly 1200 community members receive assistance from Tuesday Night Bar volunteers.

While the Utah State Bar Association staff handles scheduling the community participants, the YLD Tuesday Night Bar Committee co-chairs, Christina Micken (Bean & Smedley), Kelly Latimer (Department of Hearings and Appeals), and Gabriel White (Christensen & Jensen) work with the volunteer attorneys. As Gabriel White explains,

> [t]he YLD committee coordinates attorneys, encouraging local firms to sponsor a team of attorney volunteers who then agree to attend the program a few times a year. Each firm appoints team captain who is responsible for making sure that the weeks that have been allotted to the firm are filled with at least five to six attorneys.

The Tuesday Night Bar program was designed to be an "attractive" volunteer opportunity for busy attorneys. The program is held year round, allowing attorneys to volunteer at the best time of year for their individual practice. The program is held the first four Tuesday evenings of each month, from 5:30 p.m. to 7:30 p.m. at the Law and Justice Center (645 South 200 East, Salt Lake City). Each participant is allowed 20 minutes to ask the volunteer attorney questions about their particular legal problem. Although volunteer attorneys are invited to attend CLE training session that focus on the areas typically encountered (bankruptcy,

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landlord-tenant, debtor-creditor, and family law), the volunteer attorneys typically act as a referral source, letting the participants know of their legal rights and referring them to private attorneys or legal service agencies.

Not only do volunteer attorneys have the opportunity to give back to the community, but they also have the opportunity to gain experience in dealing with clients on a one-on-one basis, a skill that younger attorneys often lack. In addition, the program helps to improve the public's opinion of the legal community. "Simply seeing a lawyer giving free advice shows the public that lawyers do care about their community. We are not the stereotype often portrayed in popular culture," according to Kelly Latimer.

Over the past two decades, the Tuesday Night Bar program has been such a success that the YLD has a created a similar "Wednesday Night Bar" program to focus on the Spanish-speaking population of our community. As this new program develops, the YLD is in need of additional Spanish-speaking volunteer attorneys. In addition, several local bar associations (including Ogden, Orem, Park City, Provo, St. George and others) have established similar programs outside the Salt Lake City area. If you would like to volunteer with the Tuesday Night Bar program, please contact Christina Micken (mickenc@aol.com), Kelly Latimer (kellylatimer@comcast.net), Gabriel White (gabriel.white@chrisjen.com), or Michelle Allred, the current Young Lawyers Division President (allredm@ballardspahr.com).

To read Phillip Long's article "Utah YLD's Formula for Pro Bono Success" published in the American Bar Association's *The Affiliate,* please visit http://www.abanet.org/yld/publications.

Upcoming YLD dates...

JANUARY

5 Tuesday Night Bar

6 YLD Board Meeting

6 Wednesday Night Bar – Sorenson Community Center (Spanish Language)

12 Tuesday Night Bar

13 Citizenship Initiative – Sorenson Community Center

16 Wills for Heroes – Davis County First Responders (at the Layton Police Department)

19 Tuesday Night Bar

20 Wednesday Night Bar – Sorenson Community Center (Spanish Language)

23 Mentoring Marathon

27 Citizenship Initiative – Sorenson Community Center

29 Tuesday Night Bar

FEBRUARY

2 Tuesday Night Bar

3 YLD Board Meeting

3 Wednesday Night Bar – Sorenson Community Center (Spanish Language)

4-6 ABA YLD Midyear Meeting

9 Tuesday Night Bar

10 Citizenship Initiative – Sorenson Community Center

16 Tuesday Night Bar

17 Wednesday Night Bar – Sorenson Community Center (Spanish Language)

20 Wills for Heroes – Federal Marshals (at the Federal Courthouse)

23 Tuesday Night Bar

24 Citizenship Initiative – Sorenson Community Center

UDVC, Not Just Another Abbreviation

by Heather A. Roberson

Prior to becoming a corporate paralegal, I spent eight years after graduating from college working for both the local domestic violence shelter and the Salt Lake City Police Department Victim Advocates performing on-scene crisis intervention and counseling victims of violent crimes. I worked with victims, survivors and abusers alike. After two homicides which impacted me personally, I decided to take a different career path. However, after an eight year hiatus in the for-profit business world, I decided to serve again and started to volunteer for the Utah LinkLine – a statewide domestic violence resource hot line. I am amazed at the number of people who are not familiar with the issues of domestic violence. This includes attorneys, paralegals, and their clients, all of whom could benefit from this information.

Paralegals, attorneys and others in the legal profession should be aware of an important statewide resource not just for the sake of their clients but for personal safety reasons as well. Many times you may have clients, co-workers, or relatives who are in abusive relationships, and being familiar with a few local resources, as well as knowing what you can do immediately at your office or on the phone to support someone in this situation could help make a difference in their choices, or even save a life.

What is the UDVC?

The Utah Domestic Violence Council (UDVC), formerly the Utah Domestic Violence Advisory Council, was founded in 1978 by the Division of Child and Family Services (DCFS). It was initially formed as a community forum to start a dialogue about domestic violence in Utah and was subsequently incorporated in 1993. In 1994, the UDVC became independent of DCFS. In 1998 the UDVC was designated as a 501(c)(3), not-for-profit organization.

The UDVC is recognized nationally as the state domestic violence coalition in Utah. It receives the majority of its funding from a grant awarded under the federal Family Violence Prevention and Services Act, *see* 42 U.S.C. § 10403. Additional funding comes from a partnership grant with Utah Coalition Against Sexual Assault, some private foundation grants, and limited state funding for the 24-hour Domestic Violence LinkLine. The Domestic Violence LinkLine is committed to linking individuals with domestic violence issues to information and/or resources within their community. The LinkLine operates 24 hours a day, seven days a week. It is their goal to update and track services available to the community on a statewide basis. This LinkLine is a crucial resource needed to link individuals with counseling, shelters, safe houses, support groups, police, mental health services, human service agencies, legal services, victims' assistance groups and more. The LinkLine received 2488 calls in 2008.[1] The grants fund outreach to underserved communities and training activities. The UDVC works closely with and provides funding for Utah's 22 local domestic violence coalitions, as well as collaborating with and providing resources and information to many individuals and agencies. The UDVC's unique status as a grassroots, open community forum and a not-for-profit Council as well as its local and national relationships allow it to function with efficiency and effectiveness.

What is Domestic Violence?

Legally, domestic violence is defined as any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another. *See* Utah

HEATHER A. ROBERSON is a paralegal at SOS Staffing Services, Inc. specializing in corporate and employment law. She remains an active member of the Paralegal Division of the Utah State Bar.

Code Ann. § 77-36-1 (2008).

Domestic violence is also about power, control, domination and fear. When one person exhibits a pattern of attempting to gain power and control over someone with whom they have or have had a relationship, by using physical and sexual violence, threats, emotional abuse, financial control, legal status, harassment, or stalking, that person is committing domestic violence. These control factors are also used to alienate victims from their family, friends, and co-workers leaving the victim with no feasible support system to end the relationship. Domestic violence is also known as partner abuse and spousal abuse.

Who is Affected by Domestic Violence?

Domestic violence used to be thought of as a family problem, a private issue in which outsiders should not get involved. The truth is domestic violence affects everyone! Whether you are a neighbor who is hesitant to call the police or a co-worker who does not want to pry, someone else's family abuse problem is your problem too. Domestic violence occurs among all age groups, genders, races, educational backgrounds, religious denominations, and socioeconomic groups.

The Utah specific *No More Secrets Domestic and Sexual Violence 2009 Report* shows that while some aspects of domestic violence appear to be decreasing, others are holding strong or are on the increase:

- Approximately 32% of all support Child Protective Services investigations include incidents of domestic violence.
- The Third District Court, which includes Salt Lake County, accounts for 40% of the 4919 Civil Cohabitant Abuse filings for 2008.
- 4240 Temporary Protective Orders were issued in 2008, up from 3995 in 2007. However, the number of Protective Orders issued has decreased year over year since 2000, down to 1970 orders granted in 2008.

The national statistics below are from the American Institute on Domestic Violence website:

- The health-related costs of rape, physical assault, stalking, and homicide by intimate partners exceed $5.8 billion each year. Of this total, nearly $4.1 billion is for victims requiring direct medical and mental health care services.
- Lost productivity and earnings due to intimate partner violence accounts for almost $1.8 billion each year.
- Intimate partner violence victims lose nearly 5.6 million days of household productivity and nearly 8.0 million days of paid work each year – the equivalent of more than 32,000 full-time jobs.
- 68% of senior executives surveyed agreed that their company's financial performance would benefit from addressing the issue of domestic violence among its employees.
- 94% of corporate security directors rank domestic violence as a high security risk.
- 78% of Human Resource Directors identify domestic violence as a substantial employee problem.
- 60% of senior executives said that domestic violence has a harmful effect on their company's productivity.

Domestic violence can be an uncomfortable topic of conversation even for the toughest of attorneys or paralegals who have "heard it all…" This issue is difficult for victims because leaving an abusive relationship, which can mean leaving their home, friends, church, personal possessions, and sometimes even children, is mentally and emotionally challenging for victims at best and terrifying at worst. In some cases, it is even deadly. As a paralegal possibly performing intake duties with your clients, you may be in a position to hear about the violence, and being prepared with resources and not being embarrassed or seeming uncomfortable talking about the facts of the situation can help your client get to a safe place.

What Can Paralegals and Attorneys do if They Know or Suspect Someone is Being Abused?

If a client discloses to you they are being abused, this can be an uncomfortable situation if you are unsure how to respond. Below are three ways to take immediate action in your office or on the phone to provide assistance and support for your client.

1. First, address any immediate safety needs. If the victim is currently in danger, ask the victim if he/she wants you to call police or medical assistance.
2. Second, after a victim's immediate safety needs have been met, the most important thing you can do is listen. It is important to relay to the victim that no one deserves to be abused, and that he/she is not alone. Do not tell the victim

what to do or place any blame on his/her actions. The victim is not responsible for the abuse, and only the abuser can stop the abusive behavior.

3. Ask if they have a safety plan. If they do not, you can go to http://www.ccfmtc.org/pdf/Personal_Safety_Plan%20.pdf to print one and help them answer the questions. This is a comprehensive safety plan addressing concerns of leaving the batterer, violence in the workplace, domestic violence shelters, and children's issues.

You can also become familiar with your local coalition and the resources available to them and your clients. There are currently 22 local domestic violence coalitions across the state of Utah comprised of community responders to domestic violence including: domestic violence shelters, victim advocates, Division of Child and Family Services domestic violence coordinators and staff, prosecutors, judges, law enforcement, health care providers, domestic violence treatment providers, educators, faith community leaders, and adult probation and parole officers. Throughout the year, the UDVC collaborates with, supports, and helps coordinate public awareness campaigns with these local domestic violence coalitions. They work on the delivery of vital services and prevention initiatives. They also work to empower their local communities and educate their local leaders so the needs surrounding the elimination of domestic violence are met more effectively.

The UDVC supports Utah's 22 local coalitions in many other ways as well.[2] The UDVC acts as an information liaison between the coalitions and the domestic violence movement statewide by providing a monthly statewide events calendar, informative emails, training events and coordinating contact information about each coalition with the Utah Domestic Violence Coalitions Directory. The UDVC staff and its members also participate directly with the coalitions. Through visiting the local coalitions and providing cultural competency training, the UDVC Diversity Coordinator has established a strong relationship with the local coalitions. This partnership provides services to currently unserved populations, such as Morgan County, and enhances services to many extreme rural and underserved populations in Utah.

The most effective way to reduce domestic violence is through a coordinated community effort – this includes everyone in the legal profession. Domestic Violence has no boundaries; it appears in all socio-economic classes, racial groups, religious persuasions and genders. I have heard that it is almost impossible not to know someone, or know someone who knows someone, who has been a victim of domestic violence. Being able to better understand what domestic violence is and having even a limited awareness of the resources available to victims of domestic violence, as well as those who commit it, can have an impact on stopping this behavior in our communities. As attorneys and paralegals, it is our duty to be aware of the resources and help our clients where we can with this perpetual problem in our society.

Legal Resources:
ABA Commission on DV, "Comprehensive Issue Spotting: A Tool for Civil Attorneys Representing Victims of Domestic and Dating Violence, Sexual Assault and Stalking, avialable at http://www.abanet.org/domviol/pdfs/Issue_Spotting_FINAL.pdf

Links to Utah Domestic Violence Related Laws:
Cohabitant Abuse Act, Utah Code Ann. § 77-36 (2008)

Stalking Definition, Utah Code Ann. § 76-5-106.5 (2008)

Links to Federal Domestic Violence Related Laws:
Enforcement of Protective Orders: http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin4/5.html

How to Find Help
Call the statewide domestic violence LinkLine at: 1-800-897-LINK (5465).

Visit the website: http://www.udvac.org/ or contact the UDVC office at (801) 521-5544.

If you or your client(s) are in danger or have an emergency please call 911.

1. *No More Secrets Domestic and Sexual Violence 2009 Report, available at* www.nomoresecrets.utah.gov.
2. Local coalitions are located in Beaver County, Box Elder County, Carbon County, Cache/Rich Counties, Davis County, Emery County, Garfield County, Grand County, Iron County, Juab County, Kane County, Millard County, Salt Lake County, Sanpete County, Tri-County (Sevier, Piute, and Wayne), Tooele County (including Wendover, NV), Uintah/Duchesne/Daggett Counties, Utah County, Wasatch/Summit Counties, Washington County, Weber County, and San Juan County.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
01/20/10	**OPC Ethics School – What They Didn't Teach You in Law School.** 9:00 am – 3:45 pm. $175 before 01/10/2010, $200 after. Lunch included. This seminar is designed to answer questions and confront issues regarding some of the most common practical problems that the Office of Professional Conduct assists attorneys with on a daily basis. Learn about: • How to avoid complaints; • How to set up a trust account; • Your duty to clients; • Law office management; • Professionalism & Civility; • Avoiding conflicts of interest; • How to effectively respond to complaints.	6 hrs. Ethics incl. 1 Professionalism or 6 hrs. NLCLE
01/21/10	**Utah District Courts E-Filing Overview for January.** 9:00–10:00 am. $25. The Utah Court's IT service is rolling out the electronic filing system. This program is designed to provide information on how efiling is being managed and how it could impact your practice. • Overview of the E-Filing Project • Types of E-filing Opportinities for Firms and Solo Practitioners • Walk through demonstration of the web based efiling program	1
01/27/10	**Making E-Discovery Work for You.** 9:00 – 11:00 am. Presenter: Michael Kemper, founder of Canyon Connections, a company specializing in computer forensics, data recovery and database design, assisting companies throughout the US and Canada with custom software solutions.	2
01/28/10	**The Basics of Real Property Law in Utah.** 4:30 – 7:45 pm. Co-Sponsored with the Real Property Section.	3 CLE/NLCLE
02/05/10	**Litigation Strategy: Early Case Assessment Strategies, Proactive Corporate Data Management, Litigation Hold and Collection in a Economic Downturn.** 9:00 am – noon. $90. Linda Sharp, KrollOnTrack.	3
02/12/10	**Intellectual Property Summit.** 8:00 am – 5:00 pm. Downtown Marriott.	TBA
02/16/10	**Utah District Courts E.Filing Overview.** 9:00–10:00 am. $25.	1
03/11/2010	**Utah Minority Bar Association Annual Immigration Law Seminar.**	TBA
03/18 thru 03/20/10	**2010 Spring Convention in St. George**	9

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

Classified Ads

RATES & DEADLINES

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

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

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

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

NOTICES

Looking for a will or trust drafted by Oscar Walker Royce, DOB: 12-16-23, DOD: 1-10-09. He resided in the St. George/ Washington area. Please call (801) 277-4292, William R. Hadley, Attorney at Law, 2225 E. Murray Holladay Rd #204, Salt Lake City, UT 84117.

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Executive Office Space in South Bountiful. $200/month utilities and internet included, beautifully remodeled and easy on/off access to I-15. Two upper offices with window views and five lower offices. Please visit druproperties.com or call 801-397-2223 for more information.

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SERVICES

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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Certificate of Compliance

UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION

Utah State Bar
645 South 200 East
Salt Lake City, Utah, United States, 84111
Telephone (801) 531-9077 / Fax (801) 531-0660

For Years_____ through _____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

_____

_____

Date of Activity	Program Sponsor	Program Title	Activity Type	Regular Hours	Ethics Hours	Professionalism & Civility	NLCLE Hours	Total Hours
				Total Hours				

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.

Make checks payable to Utah State Board of Continuing Legal Education or complete credit card information below. There will be a $20 charge for returned checks.

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1. Seven years or more in practice
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3. Malpractice insurance in an amount of at least $100,000/$300,000 if in private practice.

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

www.utahbar.org/nltp

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