Utah Bar™ JOURNAL

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March/April 2010

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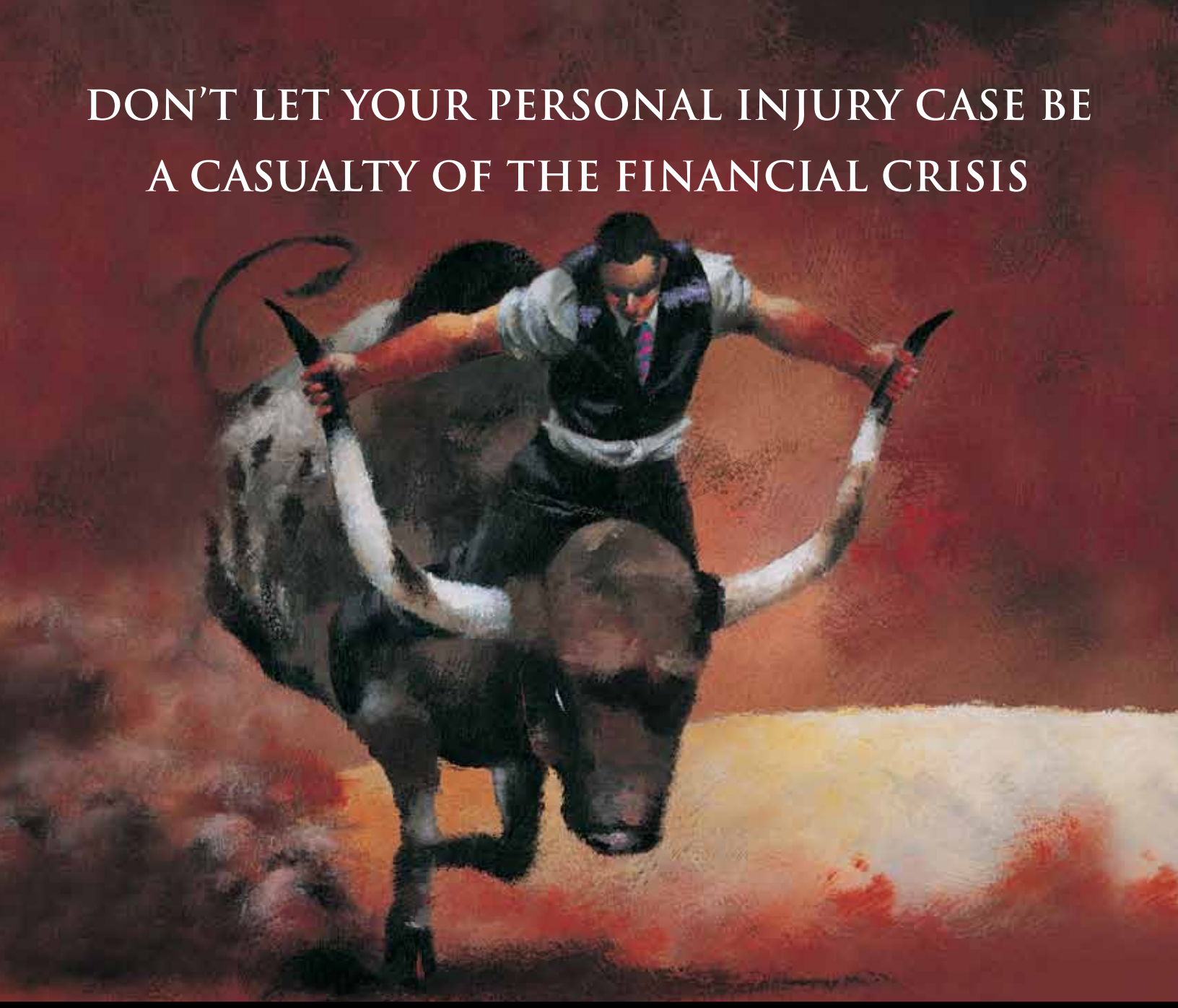

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Cover Art

House Finch, an early sign of spring, taken in Providence, Utah, by first-time contributor, Scott Wyatt, Ephraim.

Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their photographs, along with a description of where the photographs were taken, to Randy Romrell, Regence BlueCross BlueShield of Utah, P.O. Box 30270, Salt Lake City, Utah 84130-0270, or by e-mail .jpg attachment to rromrell@regence.com. If non-digital photographs are sent, please include a pre-addressed, stamped envelope for return of the photo, and write your name and address on the back of the photo.

Interested in writing an article for the Bar Journal?

The Editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine. If you have an article idea or would be interested in writing on a particular topic, please contact us by calling (801) 297-7022 or by e-mail at barjournal@utahbar.org.

Guidelines for Submission of Articles to the Utah Bar Journal

The *Utah Bar Journal* encourages the submission of articles of practical interest to Utah attorneys and members of the bench for potential publication. Preference will be given to submissions by Utah legal professionals. Submissions that have previously been presented or published are disfavored, but will be considered on a case-by-case basis. The following are a few guidelines for preparing submissions.

Length: The editorial staff prefers articles of 3000 words or fewer. If an article cannot be reduced to that length, the author should consider dividing it into parts for potential publication in successive issues.

Submission Format: All articles must be submitted via e-mail to barjournal@utahbar.org, with the article attached in Microsoft Word or WordPerfect. The subject line of the e-mail must include the title of the submission and the author's last name.

Citation Format: All citations must follow *The Bluebook* format, and must be included in the body of the article.

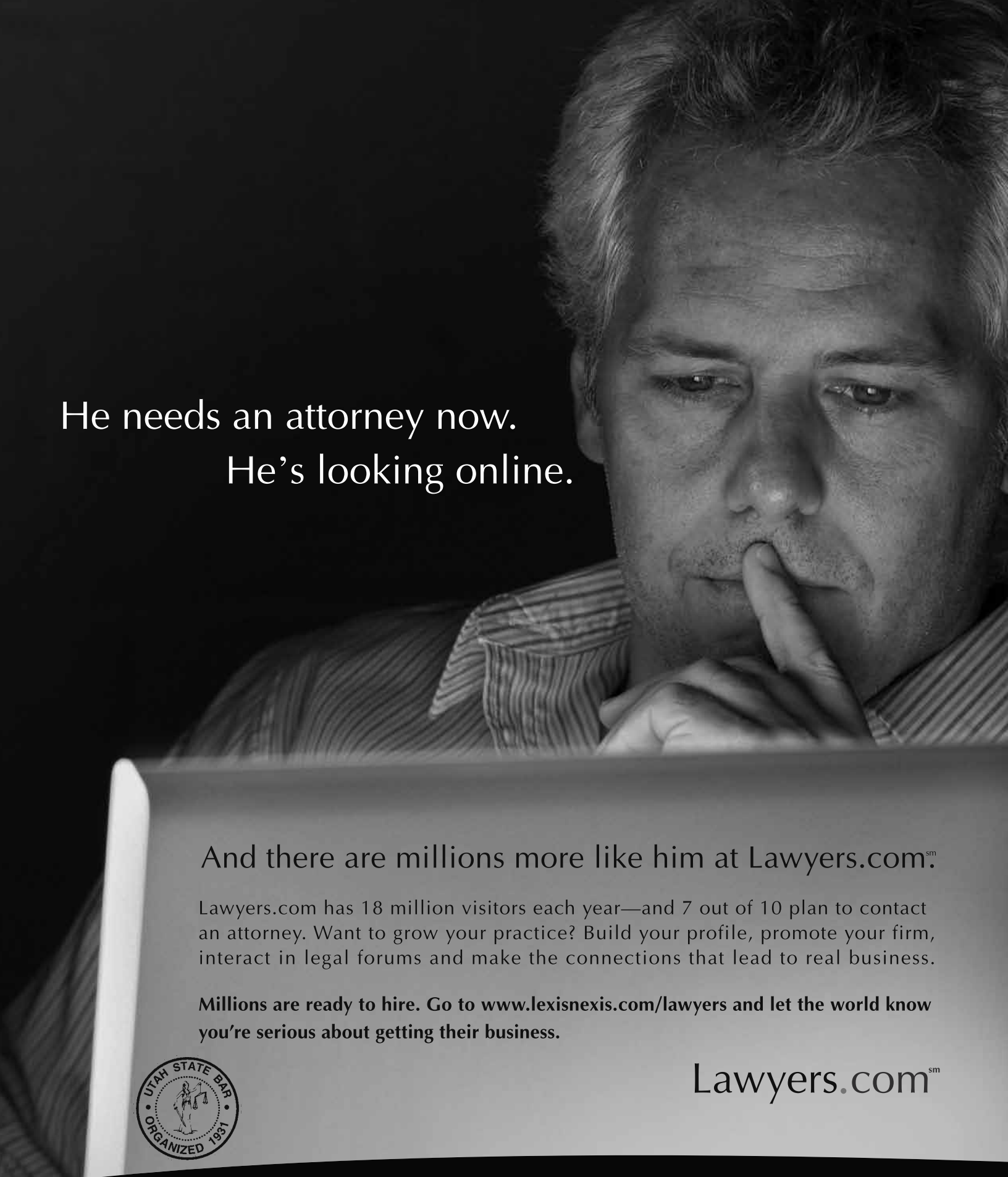
No Footnotes: Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial endnotes to convey the author's intended message may be more suitable for another publication.

Content: Articles should address the *Utah Bar Journal* audience – primarily licensed members of the Utah Bar. Submissions of broad appeal and application are favored. Nevertheless, the editorial board sometimes considers timely articles on narrower topics. If an author is in doubt about the suitability of an article they are invited to submit it for consideration.

Editing: Any article submitted to the *Utah Bar Journal* may be edited for citation style, length, grammar, and punctuation. While content is the author's responsibility, the editorial board reserves the right to make minor substantive edits to promote clarity, conciseness, and readability. If substantive edits are necessary, the editorial board will strive to consult the author to ensure the integrity of the author's message.

Authors: Authors must include with all submissions a sentence identifying their place of employment. Authors are encouraged to submit a head shot to be printed next to their bio. These photographs must be sent via e-mail, must be 300 dpi or greater, and must be submitted in .jpg, .eps, or .tif format.

Publication: Authors will be required to sign a standard publication agreement prior to, and as a condition of, publication of any submission.



Letters Submission Guidelines:

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal,* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

VISION OF THE BAR: *To lead society in the creation of a justice system that is understood, valued, respected, and accessible to all.*

MISSION OF THE BAR: *To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.*

The Utah Bar Journal

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Letters to the Editor

The *Utah Bar Journal* has been receiving and publishing word of lawyers who do pro bono work at various clinics, and that work is commendable indeed. Not published in these lists, however, are the names of those who do their alms in secret. Recently I was blessed by someone from the latter group.

While at an OSC hearing for a Water Quality Act violator I had prosecuted, the defendant had a physical meltdown. Having run out of money and lost his original attorney, he literally collapsed outside the court at the thought of going to the hearing. Luckily, a hero was present.

Local attorney Shelden Carter stepped in and represented the defendant. We quickly worked out a resolution. Little acts like this, routinely done, form thousands of points of light that brighten our profession. Shelden's example for us all shows that he is truly a great American.

Paul Wake

The Bar Commission's recent petition to increase licensing fees deserves scrutiny, particularly in comparison to other Utah licensing fees. Professional licensing fees administered by the Utah Division of Occupational and Professional Licensing (which licenses and regulates over 80 professions, including all the medical professions) range from approximately 25% to 50% of the proposed bar licensing fees. Does it really cost that much more to license and regulate attorneys?

DOPL fees are subject to the Utah Budgetary Procedures Act. Bar fees are not. DOPL fees cover licensing and regulation only. Bar fees include mandatory association membership fees, requiring all Bar licensees to pay for extras including the *Bar Journal* and lobbying efforts. It is time for a fresh evaluation of the core licensing and regulatory functions Bar licensees should be required to pay.

Sincerely,
Thad LeVar

The January-February *Utah Bar Journal* included an article by Meb Anderson, a member of the Ethics Advisory Opinion Committee, urging lawyers to seek ethical guidance from the EAOC when in doubt on an ethical issue. The EAOC Opinion 07-02 had concluded that "If a mature minor independently and voluntarily attempts to obtain a second opinion or independent representation from an uninvolved attorney, that attorney does not violate Rule 4.2 ["a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer."] Yet the same issue of the *Bar Journal* includes notice in the Attorney Discipline section, authored by the Office of Professional Conduct, in a case involving Rule 4.2 and Opinion 07-02 that the EAOC opinions are "advisory, and the presumption that an attorney who follows an opinion has not violated a Rule is rebuttable and inconclusive."

This apparently inconsistent result between the OPC and the EAOC has engendered confusion and no small amount of consternation by many members of the Bar. Why should the Bar even have an EAOC whose opinions cannot be relied upon and are disregarded by the OPC?

Gary Sackett, former Chair of the EAOC has submitted an article for publication in the next issue of the *Utah Bar Journal* discussing and analyzing the disciplinary note that has prompted this difficulty, and explaining why OPC's admonition to Bar members not to rely on EAOC opinions was unnecessary. For the benefit of Bar members, this issue needs to be resolved.

Maxwell A. Miller
Chair EAOC

President-Elect and Bar Commission Candidates

President-Elect Candidate

Retention of President-Elect

Rod Snow has been nominated by the Bar Commission to serve as President-Elect in 2010-2011 and as President in 2011-2012, subject to a retention election submitted to all lawyers on active status. No other candidates petitioned the Commission to run for the office.

ROD SNOW

Rod Snow of Clyde Snow & Sessions brings over five years of experience on the Bar Commission and thirty-five years of state and federal law practice. He is a Fellow in the American College of Trial Lawyers, an ABA Foundation Fellow, the Bar's 2003 distinguished lawyer, and the 2009 recipient of the Federal Bar's Distinguished Service Award.

Mr. Snow respects and admires the Bar leaders who have served in the past and their many accomplishments. He has supported a strong Young Lawyers Division that provides services like Wills for Heroes, legal clinics for the public, and fundraisers for abused women and children. He co-authored the New Lawyer Training Manual (approved by the Utah Supreme Court), making Utah one of the first states to adopt mandatory mentoring.

Mr. Snow is committed to Bar service. His vision, if elected, includes a renewed effort to (1) increase transparency and accountability, (2) support the supreme court's initiative on professionalism and civility, (3) improve new lawyer training and CLE offerings, (4) widen the scope of low and pro bono legal services for the poor and underprivileged, and (5) support dispute resolution education and projects.

Mr. Snow respectfully requests and appreciates your support. Please vote.

Second Division Candidates

FELSHAW KING

During my time as a Commissioner the Bar has adopted many programs to help its members. My role as a Commissioner has been helpful in establishing these programs:

1. Casemaker.
2. A diversion program with the Office of Professional Conduct (OPC).
3. Counseling Program for members and families.
4. New Lawyer mentoring program.
5. New lawyer referral program.

The Commission has helped defeat legislation which could adversely affect the legal profession. A new challenge now on the horizon is sales tax on legal services. As a former legislator I can provide insight into the legislative process and continue to strengthen the Bar's relationship with the Legislature.

As you may know, there is a proposal not to replace a retiring judge in the Second District. We should contact our legislators to oppose this plan and the Bar should support us.

As a Commissioner I have worked to help solo practitioners and small firms. It has been a great experience to serve as a Commissioner. It would be an honor to serve an additional term and I ask for your support and vote.

TRENT D. NELSON

Serving and representing the Second Division would be a great honor. Although the Utah Bar was originally organized to regulate attorneys, the Bar can also be a great source of support to these same attorneys.

I am dedicated to helping attorneys deliver quality legal services, to an ever broadening portion of our community, through (1) nurturing civility and professionalism in the practice of law; (2) continuing quality CLE (focused on practical applications); (3) developing systems and programs that improve the reach and efficiency of legal services; (4) supporting cost and time saving alternatives to litigation (e.g., mediation, arbitration, etc.); (5) enriching our communities through volunteer opportunities; and (6) informing the public of available legal resources.

The practice of law is varied and ever changing. The Bar, and the attorneys it represents, must continue to evolve and improve. I look forward to representing the attorneys of the Second Division, and would greatly appreciate your support.

Mr. Nelson is a solo practitioner in Kaysville, Utah, with a practice focused on juvenile law, family law, and estate and business planning. Mr. Nelson has been practicing for 11 years and has degrees in Economics, the law and an MBA.

Third Division Candidates

H. DICKSON BURTON

Dear Colleagues,

With the encouragement of friends, I am seeking the opportunity to serve as a Bar Commissioner for the Third Division. I believe my service could be meaningful and effective and I ask for your vote.

I have been a member of the Utah Bar for 26 years. During that time, I have had the opportunity to litigate in state and federal courts around the country, as well as in Utah. In doing so, I believe I have gained valuable insights into the issues and challenges faced by Bar members in Utah, especially those created by our uniquely challenging economic times.

It is clear that our profession is changing, and that it will continue to evolve rapidly and dramatically due to external factors and pressures of which we are all well aware. As attorneys and members of the Bar, we need to be smart, proactive and well-prepared as we seek to transform these challenges into opportunities. However, it is equally critical that in the face of change we strive to preserve core principles of professionalism and integrity, and vigorously stand for the rule of law, an independent judiciary, and access to justice for all.

Thank you for your support.

SU CHON

I am excited for this opportunity to serve you by running for Bar Commissioner in the Third Division. I bring a diverse legal experience from working in small firms, large firms, in-house, non-profit, and government and as a result, would be a voice for all groups. In addition to my experience working with past and current Bar leaders, I bring an open mind, fresh ideas, and enthusiasm to this opportunity to serve. Please feel free to contact me at 801-530-6391 or via email at sjchon@gmail.com.

My goals as Bar Commissioner are to (1) promote fiscal responsibility and efficiency of the Bar's services; (2) ensure that the services offered by the Bar are responsive to our members' needs; (3) support programs that encourage mentoring of law students and lawyers; (4) support programs that provide services to all practice groups and sections; and (5) support programs that provide legal services to underserved and under-represented communities. I am grateful to all those who have encouraged me to run for Bar Commission, and I respectfully ask for your vote in this election.

REX HUANG

I doubt any of us can remember a time when so many attorneys are out of work. I hope to help create new opportunities for legal professionals while stemming the abuses occurring in our small claims courts where consumer rights are routinely trampled. I will push for the Bar to propose an administrative fee for large volume small claims litigants to fund educational initiatives where attorneys can counsel small claims defendants about their rights. I would also propose an attorney referral website be provided to small claims litigants where they can retain the services of an affordable attorney in their area. I would also propose that the Bar push for curbing the limits in small claims actions.

Having been in a small firm for nearly 10 years and corporate counsel for the last 5, my experiences in litigation, criminal defense and as in-house counsel represent the majority of practitioners in the Bar.

As corporate counsel, and separately as trustee of a non-profit that serves the needs of children, I am experienced in controlling costs to provide a strong organization.

I have previously served as the UMBA representative on the Commission and I hope to be of service once again.

JOHN LUND

Luckily for me, lawyers are everywhere I go. All day long I interact with co-counsel and judges on cases. Many of my friends are lawyers, including my wife Julie. It has been this way for 25 years. I wouldn't want it any other way. I now seek to serve the legal community which has become so important to me.

Since 1984, I have practiced at Snow, Christensen & Martineau doing civil litigation, serving six years as firm President. I chaired the Courts & Judges Committee for several years. I served on the Executive Committee of the County Bar and was 2002-2003 President. Currently I chair the Supreme Court's Advisory Committee on Evidence and serve on its Advisory Committee on Civil Jury Instructions.

I am proud to be a Utah lawyer. The vast majority of us are true professionals focused on providing clients with the best possible legal services. The Utah State Bar helps to preserve the integrity of our profession and assures that Utah has competent lawyers and independent judges. As bar commissioner for the Third District I will do my best to help provide Utah lawyers with the services they actually want and truly need from their bar organization.

Helping Unemployed/Underemployed Lawyers

by Stephen W. Owens

I have been talking to and meeting with a number of unemployed/underemployed lawyers who are definitely feeling the contracted economy. The sun will come out tomorrow, but until it does, here are some ideas:

Declare yourself an active lawyer in private practice rather than tell people you are unemployed. Do this even if you currently have no paying clients. Get a laptop, a cell phone, and business cards.

Take lawyers you know out to lunch. Brainstorm with them and ask them for overflow work at a contract rate.

Meet potential clients. Figure out two or three areas of the law that interest you and go meet face-to-face with potential clients to ask them for work.

Gather mentors. These are people who will be on the lookout for work for you. Send them weekly e-mails to let them know what you are doing. If you are a new lawyer, talk to your Bar-appointed mentor for ideas.

Meet lawyers who have the jobs you want. Even if you don't know these people, call them and ask to meet them to discuss what they do and how they see the industry developing.

Join and be active in Bar Sections of interest and your local Bar. Call the chair or president (available at utahbar.org) and ask for an assignment. Go to the sponsored events. Network with these individuals.

Seek clients online. Marketing yourself online can be inexpensive or free. Sign up for the Bar's Lawyer Referral Directory for free. I understand some lawyers are obtaining work on Craig's List, Facebook, Linked In, Youtube, Twitter, blogs, social networking sites, and sites such as LawCrossing.com.

Leverage your undergraduate degree. Become a legal expert in your undergraduate field. Track down potential clients who will be interested in a lawyer who shares their interests.

Do pro bono. This will keep you active in the law and "out there" for others to see. You can volunteer through the And Justice for All organizations, the Litigation Section's Attorney Volunteers in Court Program, Wills for Heroes, or Tuesday Night Bar.

Focus on the value you can provide to clients. Rather than trying to get a job for your own purposes, focus on how to become invaluable to your clients in helping them make more money or reducing their headaches.

Use your undergraduate university's and law school's alumni career services.

Participate in the Bar's new series of free CLEs for unemployed or underemployed lawyers, beginning Friday, April 9, 1:00 p.m., at the State Bar offices.

Do excellent work. Whatever you do, do timely and quality work to build your reputation.

Write an article or speak on unique legal topics to lawyers or non-lawyers who can provide you referrals or work. Send copies of your product to those who may be interested in the information.

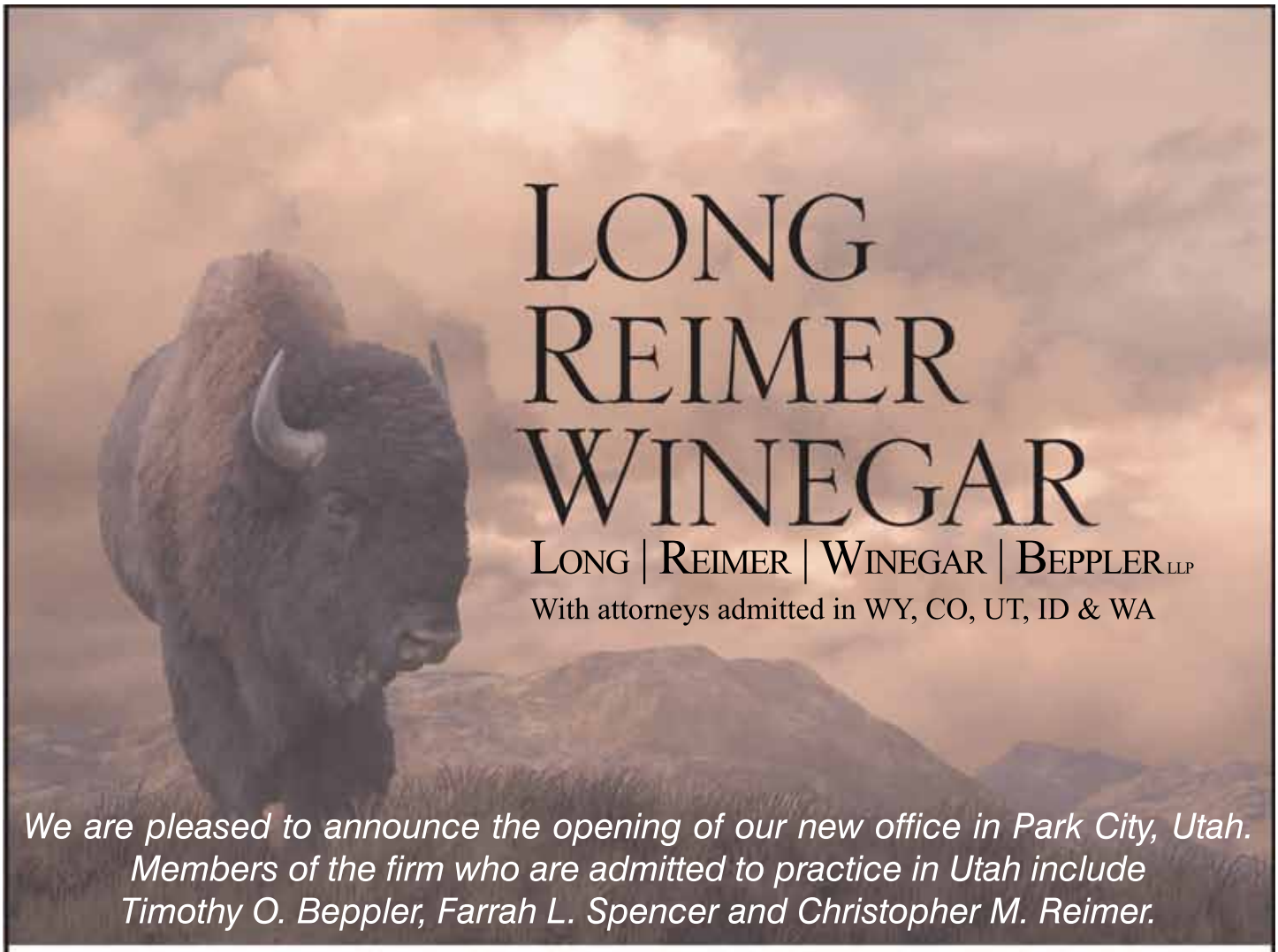
Learn a quick pitch. Be able to concisely sell your abilities and how you can add value to your clients.

Stay in touch with your former classmates from high school to law school. Chances are some of your old friends have extra work.

Get involved in the community. Coach a team, serve on a non-profit board, or run for your community council or PTA.

If you get discouraged, seek free, confidential, statewide help from Lawyers Helping Lawyers (peer) or Blomquist Hale Consulting (professional).

The future is bright. We have all been there. Keep hustling and you will find your career path.



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Domestic Asset Protection Trusts: A Comparison of the Laws of Utah and Wyoming[1]

by Timothy O. Beppler and Christopher M. Reimer

In recent years, asset protection has gone from a niche industry to a mainstream area of estate planning. Whereas estate planning lawyers were once primarily concerned with minimizing taxes, since the 1980s they have focused increasingly on asset protection. The surge of interest in asset protection tools can be attributed to a variety of factors, including bankruptcy reforms and the perception of a growing risk of liability, whether from tort, contract, or professional conduct. One viable option for clients seeking to place assets beyond the reach of future creditors consists of the asset protection trust. A number of states have enacted statutes making self-settled spendthrift provisions enforceable, subject to certain conditions. The Rocky Mountain region has been no stranger to this trend, with the recent enactment of domestic asset protection trust statutes in Utah and Wyoming. This article will examine the requirements and relative benefits of Utah and Wyoming as a situs for an asset protection trust.

THE ROAD TO THE DOMESTIC ASSET PROTECTION TRUST

Courts in the United States have traditionally held that self-settled trusts are not entitled to spendthrift protection. Consequently, creditors have been able to satisfy judgments out of the assets of self-settled trusts, regardless of the inclusion of a spendthrift clause. The traditional refusal of United States jurisdictions to recognize self-settled spendthrift trusts caused settlors to create trusts in foreign jurisdictions that recognized their validity. As American society has grown increasingly litigious and new risks of personal liability have arisen, settlors have looked to foreign jurisdictions to mitigate the growing risk of personal liability, whether by contract, by tort, or by professional conduct. Proponents of offshore asset protection trusts cite a number of beneficial aspects of locating a trust in a foreign jurisdiction, making it more difficult for a creditor to satisfy a judgment from trust assets. Unfortunately, offshore asset protection trusts come with a number of drawbacks. Establishing such trusts can be complicated and expensive. Many individuals may also be hesitant to transfer control over their assets to a foreign trustee or to an unfamiliar jurisdiction that may not possess the economic and political stability that settlors have come to expect from the United States. Finally, United States courts have demonstrated hostility towards offshore trusts and, on occasion, have used various means to diminish such trusts' effectiveness as asset protection tools. As such, clients may prefer to take advantage of some of the more recently-enacted asset protection trust statutes offered in some U.S. states.

Alaska passed the first domestic asset protection statute, providing asset forfeiture protection to irrevocable, self-settled trusts. Delaware followed Alaska's lead, allowing for irrevocable, self-settled spendthrift trusts. Nevada enacted the next such statute allowing domestic asset protection trusts. Currently, domestic asset protection trusts are recognized by statute in at least eleven states. Such trusts have many uses, the most important of which is to protect a settlor's assets from attachment by creditors. While the scholarly literature contains some debate about the effectiveness of such trusts in light of Constitutional and conflict of laws principles, domestic asset protection trusts are still in their infancy, and courts have had few opportunities to address their effectiveness. Such

TIMOTHY O. BEPPLER is a partner in the Park City office of Long Reimer Winegar Beppler, LLP. He is admitted in Utah and Wyoming, and a member of the Salt Lake City Estate Planning Council.

CHRISTOPHER M. REIMER is a partner in the Jackson Hole, Wyoming office of Long Reimer Winegar Beppler, LLP. He is admitted in Utah, Wyoming, Idaho, and Colorado.

trusts have spawned a rich literature regarding the legitimacy and policy-advisability of asset protection trust statutes.

UTAH ASSET PROTECTION TRUSTS

In 2003, the Utah Legislature enacted Utah Code section 25-6-14, which allows settlors to create self-settled spendthrift trusts for their own benefit. *See* Utah Code Ann. § 25-6-14 (2007). While Utah's statute contains many similarities to asset protection trust statutes passed by other state legislatures, it contains a few notable differences. For example, the Utah statute specifies numerous conditions and situations where a transfer to an asset protection trust is not effective. Additionally, the Utah statute is notable for imposing a short statute of limitations on creditors seeking to avoid transfers to an asset protection trust.

Trust Requirements

Utah law provides that a settlor may transfer property to a trust in which the settlor retains a beneficial interest, and that creditors may not satisfy claims out of that interest if certain conditions exist. The chief requirements for such a trust are: (1) that the trust includes an enforceable spendthrift provision; (2) that the trust was created on or after December 31, 2003; and (3) that the trust be irrevocable. The trust must have at least one trustee that is a trust company authorized to engage in trust business in the state of Utah. An individual non-qualified co-trustee may serve alongside the qualified Utah trust company.

Settlor Rights and Powers

Utah's statute allows settlors of spendthrift trusts to retain certain rights and powers. However, settlors should be careful to avoid retaining powers that give them actual control over the trust or trustee, which could render trust assets subject to a judgment. A settlor may retain the right to veto distributions, a testamentary special power of appointment or similar power, or the power to appoint nonsubordinate advisors/protectors without causing the trust to lose its irrevocable status. A settlor may also retain the power to remove and terminate the trust, but only if it is exercisable with the consent of a person with a substantial beneficial interest in the trust, which interest would be adversely affected by exercise of the settlor's power to revoke or terminate all or part of the trust. A settlor may maintain the right to receive distributions of income and/or principle at the discretion of another, including a non-settlor trustee, to receive an interest in charitable remainder unitrust of charitable remainder annuity, and to receive principal subject to an ascertainable standard set forth in the trust. The

settlor may serve as a distribution advisor, investment advisor, or trust protector. The trust may also have nonsubordinate advisors or protectors who can: (1) remove or appoint trustees; (2) direct, consent to, or disapprove of distributions; and (3) serve as investment directors.

Fraudulent Transfers

Understanding a jurisdiction's fraudulent transfer rules is essential to anyone who seeks to engage in asset protection planning. Forty-three states, including Utah, have adopted the Uniform Fraudulent Transfer Act (UFTA). Under UFTA, a transfer of property may be considered void if made with intent to defeat claims by creditors. Consequently, a creditor may satisfy a claim with the transferred asset, circumventing the purpose of an asset protection trust. Utah's version of UFTA applies to transfers of property to asset protection trusts. A court may satisfy a claim or liability out of a settlor's beneficial interest in a trust if the transfer was made with actual intent to hinder, delay, or defraud. The burden of proof imposed on creditors asserting that a transfer is fraudulent is that of clear and convincing evidence. The statute of limitations with respect to a UFTA action in Utah is set forth in Utah Code section 25-6-10, and depending on the circumstances, can be one or four years from the transfer, or if later, within one year after the transfer could reasonably have been discovered by the claimant. *See id.* § 25-6-10. Under Utah Code section 25-6-14(8), if a creditor successfully avoids a transfer to an asset protection trust, the transfer will only be considered void "to the extent necessary to satisfy the settlor's debt to the creditor…and the costs and attorney fees allowed by the court." *Id.* § 25-6-14(8). The risk of fraudulent transfers raises ethical issues for estate planning attorneys, who may face liability or ethical sanctions for assisting clients in engaging in fraudulent conduct. Utah's asset protection statute does not require a solvency affidavit, but provides some protection from liability for assisting in the creation of asset protection trust to attorneys and others who satisfy requirements imposed by the statute. Unlike Wyoming, Utah does not require due diligence or any kind of affidavit before a settlor may create a self-settled spendthrift trust.

Exceptions

Utah's asset protection statute provides a number of situations where spendthrift provisions are not enforceable. Exceptions include the following: child support claims; alimony claims; property division upon divorce; taxes or other money owed to the government; violations of written agreements; public assistance received by the settlor under the Medical Benefits Recovery Act; trusts requiring that all or part of a trust's income and/or principal must be distributed to the settlor as beneficiary; transfers made when the settlor is insolvent or the transfer renders the settlor insolvent; and situations where trust assets are listed in a written representation of the settlor's assets given to a claimant to induce the claimant to enter into a transaction or agreement with the settlor.

Moving Trust Situs

Utah allows a trust located in another jurisdiction to be moved to Utah. To do so, the trust must have a Utah trust company as a trustee and the trust must be administered in Utah.

Exclusive Jurisdiction

A common concern with domestic asset protection trusts is that their spendthrift provisions may not be enforceable against a judgment obtained in a state that does not recognize the validity of such trusts. Utah Code section 25-6-14(7) attempts to ensure that Utah courts will be the sole arbiter of any issues surrounding asset protection trusts by providing that Utah courts "shall have exclusive jurisdiction over any action brought under this section." Utah Code Ann. § 25-6-14(7) (2007). If Utah takes primary supervision over a trust's administration, an argument may be made that Utah courts are not required to recognize another jurisdiction's judgments against the assets of a Utah asset protection trust. Such a statute may be valid, but exceptions to the Full Faith and Credit Clause are narrow. As yet, no court has determined the validity of this statutory protection, so its efficacy remains unknown.

Duration

In 2003, the state legislature extended the rule against perpetuities period to 1000 years with respect to trusts.

State Income Tax Consequences

One aspect of Utah law that may make it unfavorable compared to other domestic asset protection trust jurisdictions is that the state imposes an income tax on Utah source income earned by the trust. Utah Code section 59-10-202(2)(b) provides, however, that non-Utah source income earned by a Utah asset protection trust is not taxed until distributed to a Utah resident. *See* Utah Code Ann. § 59-10-202(2)(b) (2008).

WYOMING ASSET PROTECTION TRUSTS

In 2007, Wyoming adopted asset protection trusts by amending its version of the Uniform Trust Code to add Wyoming Statutes section 4-10-510 through 523, *see* Wyo. Stat. Ann. §§ 4-10-510 to -523 (2009). Wyoming's statute contains provisions similar to

many other states, but lacks some of the restrictions and conditions imposed by Utah law. As with Utah's statute, a creditor can void a transfer by bringing an action under Wyoming's Uniform Fraudulent Transfer Act. Wyoming's statute is somewhat unique in that it requires settlors to engage in some level of due diligence before transferring assets to an asset protection trust, including signing an affidavit stating that the settlor possesses and will maintain personal liability insurance.

Trust Requirements

Wyoming allows a settlor to create a spendthrift trust for his or her own benefit if the trust instrument states that it is a "Qualified Spendthrift Trust." To be effective, such a trust must be: (1) irrevocable; (2) governed by Wyoming law; and (3) subject to a spendthrift provision. A settlor establishing a Wyoming asset protection trust must possess and maintain personal liability insurance equal to the lesser of $1 million or the value of trust assets.

Settlor Rights and Powers

As in Utah, a Wyoming asset protection trust must be irrevocable to be valid. A settlor may maintain certain rights and powers without causing an asset protection trust to lose its irrevocable status. Interests in principal and income that a settlor can maintain without losing a trust's irrevocable status include current income, charitable remainder unitrust, up to a 5% interest in a total return trust, and the use of real property under a Qualified Personal Residence Trust. Settlors may also retain certain powers, which in some instances are broader than those permitted under the Utah statute, including the ability to veto distributions, an inter vivos or testamentary general or limited power of appointment, the power to add or remove a trustee, trust protector, or trust advisor, and the ability to serve as an investment advisor. Wyoming asset protection trusts may have both an investment advisor and trust protector.

Fraudulent Transfers

Like Utah, Wyoming has adopted a version of the UFTA. The UFTA applies and sets aside any transfer to a trust made: (1) with actual intent to hinder, delay or defraud; or (2) without receiving a reasonably equivalent value in exchange where the debtor is about to engage in transactions with unreasonably small assets, or, intended, believed, or reasonably should have believed the debtor would incur debts beyond the debtor's ability to repay. Wyoming is unique among domestic asset protection jurisdictions

in requiring a certain amount of due diligence, including a sworn affidavit. Absent a showing of bad faith, trustees, trust protectors, trust advisors, other trust fiduciaries, and persons counseling, drafting, administering, preparing, executing, or funding a trust are immune from suit by a creditor. Trustees are protected if a court finds that they have not acted in bad faith in accepting or administering the property.

Exceptions

Wyoming asset protection trusts are subject to a number of express exceptions, although the number of such exceptions is smaller than under Utah's statute. Other than a transfer voidable under the UFTA, the only exceptions to spendthrift protection for a Wyoming Qualified Spendthrift Trust is with respect to (1) child support claims and (2) qualified trust property listed upon an application or financial statement used to obtain or maintain credit other than for the benefit of the trust.

Moving Trust Situs

Wyoming's statute allows the property of a trust created outside of Wyoming to be transferred to the trustee of a Wyoming asset protection trust if the transferring jurisdiction, such as Utah, provides similar creditor protection. The transfer relates back to the date of the transfer to the original trust. An irrevocable trust from another state may also elect to become a qualified spendthrift trust under Wyoming law if it incorporates Wyoming law, obtains a qualified trustee, and contains a spendthrift clause. Wyoming's statute provides that, if a court declines to apply Wyoming law to an asset protection trust or its spendthrift provision, the qualified trustee may resign. If the trustee resigns and the trust instrument has no provision providing for the appointment of a successor trustee, the trust's qualified beneficiaries may petition a Wyoming court to appoint a successor trustee consistent with the purposes of the trust and Wyoming's asset protection statute.

Duration

The Wyoming legislature amended its rule against perpetuities in a fashion similar to the Utah statute. While Wyoming retains a twenty-one year rule against perpetuities generally, it does not apply to a trust created after July 1, 2003, if (1) the trust states that it shall terminate within 1000 years; (2) the trust is governed by Wyoming law; and (3) the trustee maintains a place of business in, administers the trust in, or is a resident of the state of Wyoming.

State Income Tax Consequences

Unlike Utah, Wyoming imposes no income tax upon trusts. This provides a significant incentive for clients to create an asset protection trust in Wyoming, or moving the situs of a Utah trust to Wyoming prior to distribution of the trust assets.

Trustees

Wyoming's statute defines a "qualified trustee" as an individual residing in the state, a "person" authorized by Wyoming law to act as a trustee, or a regulated financial institution. Wyoming's Uniform Trust Code defines a person as, inter alia, an individual, corporation, trust, limited liability company, or partnership. This allows for the use of a "private trust company" as trustee so long as it is properly established and operated in a manner so as not to be exempt from regulation by the Wyoming Banking Commissioner.

Like Utah, Wyoming provides some protection from liability to trustees, protectors, advisors, other fiduciaries, and any person involved in counseling, drafting, preparing, administrating, executing, or funding an asset protection trust.

State Income Tax Minimization

The creation of a Wyoming Qualified Spendthrift Trust can be an incomplete gift for federal gift tax purposes, and can also be structured so that it is not a grantor trust within the meaning of Internal Revenue Code sections 671 through 679. The combination of these characteristics makes it possible for a non-Wyoming resident to use a Wyoming Qualified Spendthrift Trust to own assets in a fashion that are not subject to income tax imposed by the "home" state.

CONCLUSION

Clients perceive the threat of personal liability from an increasing number of sources. As such, it makes sense to search for new tools of asset protection. In addition to traditional asset protection techniques, like limited liability companies, family limited partnerships, and offshore asset protection trusts, estate planners may now consider the use of domestic asset protection trusts. Utah and Wyoming offer two possible forums for the establishment of a new asset protection trust, or for moving the situs of a previously existing trust. Both jurisdictions have unique characteristics and offer creditor protection and tax planning opportunities.

1. A more comprehensive version of this article that includes additional footnotes and citations can be viewed at www.lrw-law.com. The authors would like to offer special thanks to Aaron J. Lyttle, a third year law student at the University of Wyoming, College of Law, for his assistance with this article.

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New Lawyer Training Program

Alternative Dispute Resolution Procedures with IRS Appeals

by Peyton H. Robinson

The IRS has a formal, administrative process available to taxpayers for resolving proposed adjustments resulting from audits. In the Appeals Office, taxpayers are able to meet with an officer who is required by his or her position to be independent from any other IRS function, in order to try to resolve a dispute without litigation. *See* 26 C.F.R. § 601.106 (2009). The Appeals program has been moderately successful, but the IRS would like to make it more so by broadening its alternative dispute resolution ("ADR") functions into mediation and arbitration, and allowing these processes for a variety of different types of taxpayers. These efforts have been in conformity with the IRS Restructuring and Reform Act of 1998, P.L. 105-106, *see* 26 U.S.C. § 7123 (2000), which directed the IRS to implement procedures to allow a broader use of early appeals programs and to establish procedures that allow for ADR processes such as mediation and arbitration.

While this article discusses how the IRS is using Appeals to expand its ADR alternatives, it should be noted that there are many other types of ADR processes available for taxpayers, depending on the circumstances. For example, there are Advance Pricing Agreements for transfer pricing matters, Pre-filing Agreements for certain discrete issues (though not transfer pricing), and even a special process for valuing artwork before filing a return. However, since at least 1927, Appeals have been the IRS's main administrative option for resolving tax disputes outside of court, and it has the broadest reach in terms of subject matters that can be addressed as compared to other ADR initiatives. Therefore, under the current IRS organization, it seems logical to use Appeals for other ADR functions such as mediation and arbitration.

Typically, when taxpayers are faced with an audit of a tax return, assuming the audit leads to a proposed adjustment, they will be issued a "30-day letter" by the examiner, which provides the basis for the adjustment, and advises them that they have thirty days within which to file a request for Appeals consideration. If the taxpayers fail to file a request for appeals assistance (commonly referred to as a "protest"), then the IRS will issue a "90-day letter" which advises the taxpayers that they have ninety days within which to file a petition with the U.S. Tax Court, or else face assessment and collection procedures. Generally, the 30-day letter is the taxpayers' ticket to re-consideration of Exam's proposed adjustment by Appeals before proceeding into litigation.

PRE-APPEALS ADR

Alternatively, instead of waiting for the proposed adjustment to go to a 30-day letter, a taxpayer may involve Appeals as a mediator at the end of an IRS examination (after the IRS has fully developed the disputed issue). This is accomplished either through the Fast Track Mediation ("FTM") Procedure, or through the Fast Track Settlement ("FTS") Procedure.

Fast Track Mediation

In July 2000, the IRS implemented a pilot FTM program with the Small Business/Self-Employed ("SB/SE") Division. The program provided that the SB/SE Exam team and the taxpayer could mediate disputed issues with an Appeals Officer acting as a "neutral party." The case remained under the jurisdiction of Exam during the mediation. The pilot program's goal was to promote issue resolution between the Exam team and the taxpayer within thirty to forty days of the initial joint discussion. Due to the success of the pilot program, the IRS issued revenue procedure 2003-41, *see* Rev. Proc. 2003-41; 2003-1 C.B. 1047, to formally establish the FTM Procedure.

FTM is generally available for all SB/SE non-docketed cases and certain collection source work (e.g., offer in compromise and collection due process issues), but it is only initiated after an issue is fully developed by the SB/SE Exam team. FTM is optional, either side may terminate the process, and it does not replace other

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existing dispute resolution processes. For example, if mediation with the Exam team and the Appeals Officer (mediator) is unsuccessful, the taxpayer may still request a meeting with the Exam team manager, or go through the normal Appeals process after the issuance of the 30-day letter. The mediator is generally not able to consider the hazards of litigation in his or her recommendations or to use delegated settlement authority. The purpose of the FTM Procedure is to help the Exam team and taxpayer reach their own agreement. The taxpayer does not have the option of using a non-IRS employee or outside person in order to conduct the mediation.

This latter point can be a problem for many taxpayers, even if only a perceived problem. Under usual Appeals processes, there is a prohibition on ex parte communications between the Appeals Officer and other IRS employees "to the extent that such communications appear[s] to compromise the independence of the appeals officers." *See* Rev. Proc. 2000-43, 2000-2 C.B. 404 (addressing limitations on ex parte communications). That prohibition does not apply to the FTM Procedure because the mediator is not acting in his or her role as an Appeals Officer. Section 8.26.3.5 of the Internal Revenue Manual ("IRM") provides that if a FTM case is unagreed with the SB/SE exam team, it will be assigned to a different Appeals Officer (for normal administrative reconsideration). *See* Internal Revenue Manual 8.26.3.5 (October 24, 2007), available at http://www.irs.gov/irm_08-026-003.html#d0e203. There is, however, no prohibition on communications between the Appeals mediator and the later assigned Appeals Officer. *See id.* 8.26.3.9. Thus, in a 2007 American Bar Association survey, more practitioners said, "Appeals lacked independence in fast track mediation" than had actually tried the program; clearly indicating at least a problem of perception. *See* American Bar Association, Survey Report on Independence of IRS Appeals (August 11, 2007), available at http://www.abanet.org/tax/irs/survey/appealssurvey07.pdf. Nonetheless, for taxpayers with certain types of cases such as where the law is fairly clear, but there is a factual dispute, or a misunderstanding about how the facts should be interpreted, the FTM Procedure may help bring the taxpayer and IRS personnel to a relatively quick settlement.

Fast Track Settlement

In a different tack from FTM, the IRS established the FTS Procedure in revenue procedure 2003-40, *see* Rev. Proc. 2003-40; 2003-1

C.B. 1044, for Large and Mid-size Business ("LMSB") Division taxpayers to have an opportunity to mediate their disputes at the examination level with an Appeals Officer acting as a neutral party. The goal of the FTS Procedure is to resolve the case through a mediated settlement within 120 days, *see* Internal Revenue Manual 8.26.1.4 (October 13, 2008), available at http://www.irs.gov/irm/part8/irm_08-026-001.html#d0e138. During the pilot program phase, by May 31, 2003, the IRS and 104 LMSB taxpayers had successfully settled their disputes through the FTS Procedure in an average time of sixty-nine days.

While the FTS Procedure still involves mediation between the taxpayer and the LMSB Exam team, the process provides that the Appeals mediator has settlement authority under Delegation Order 97 found in section 1.2.47.6 of the IRM, Delegation of Authorities for the Appeals Process, and he or she can consider the hazards of litigation in proposing a settlement. *See id.* 1.2.47.6 (August 18, 1997), available at http://www.irs.gov/irm/part1/irm_01-002-047.html#d0e361. If a FTS case is settled due to consideration of the hazards of litigation, Appeals exercises its delegated authority to enter into a closing agreement with the taxpayer, *see id.* 8.26.1.3.2 (October 23, 2007), available at http://www.irs.gov/irm/part8/irm_08-026-001.html#d0e57. An Appeals closing agreement in such a case is necessary because LMSB does not have authority to enter into a settlement based on the hazards of litigation. Revenue procedure 2003-40 provides that if the taxpayer accepts the Appeals FTS Officers' proposed settlement, but the LMSB team manager rejects it, the issue is elevated within the IRS, and the LMSB Territory Manager must review it. If the Territory Manager does not accept the settlement on behalf of LMSB, the case is closed out of the FTS Procedure as unagreed. Thus, arguably the Appeals mediator will not be able to reach a FTS with a taxpayer without agreement from Exam, either at the audit level or with management.

Similar to the FTM Procedure, the taxpayer does not lose any administrative rights to pursue resolution of the case if the FTS Procedure is unsuccessful, such as continuing in the normal Appeals process. However, like FTM, the rule against *ex parte* communications does not apply, and revenue procedure 2003-40, section 7.02 explicitly states: "With respect to FTS cases that are returned for traditional Appeals consideration, *ex parte* restrictions will not be imposed on intra-Appeals communications." Rev. Proc. 2003-40. Thus the Appeals FTS Officer may presumably discuss the FTS case with any later assigned Appeals Officer, and therefore, if unsuccessful with FTS, a taxpayer may find there is a diminished level of Appeals independence (a concern that Exam would be able to influence indirectly the later assigned Appeals Officer through the FTS Officer).

Procedurally, FTS should be initiated when the issue in dispute has been fully developed, a Notice of Proposed Adjustment (Form 5701) has been issued, and the taxpayer has provided a response. If a 30-day letter has been provided to the taxpayer, the case is then generally ineligible for FTS, *see* Internal Revenue Manual 8.26.1.7 (October 13, 2008), available at http://www.irs.gov/irm/part8/irm_08-026-001.html#d0e400. The expectation is that all relevant issues and claims were raised, all pertinent information was disclosed, and the case is ready for resolution in the process.

The FTS Procedure has seen some success as an ADR process, not as a way for taxpayers to avoid an adjustment, but more to be able to reach an agreement with the Exam team on an expedited basis. For example, for Merck & Co., Inc., it was part of the process used to resolve $2.3 billion in federal tax adjustments and resolve all issues in dispute for years 1993-2001, *see* IRS Info. Rul. 2007-35. Similarly, Marriott issued a press release in June 2007 describing its agreement with the IRS using the FTS

Procedure to resolve proposed adjustments for 2000-2002 for $220 million (Marriott had received a notice of adjustment in March 2007). An IRS Appeals official in June 2007 noted that the FTS cases were concluding in an average of 79 days, while the average complex audit cases were taking 600 days or more to move through the traditional Appeals process.

The LMSB FTS model has proven to be sufficiently effective that the IRS formally broadened the availability of the FTS Procedure to SB/SE taxpayers in Ann. 2006-61, *see* 2006-2 C.B. 390, applicable for a test period of two years, and extended again in Ann. 2008-110, *see* 2008-48 I.R.B. 1224, for another two years (applicable for applications received through November 30, 2010). Not to be left out, the Tax Exempt and Government Entities ("TE/GE") Division was also granted formal access to FTS in Ann. 2008-105, *see* 2008-48 I.R.B. 1219. For both SB/SE and TE/GE, the IRS's goal with FTS is to complete the cases accepted into the procedure within 60 days (or about half of the goal time for LMSB taxpayers).

POST-APPEALS ADR

Despite its effectiveness, some taxpayers do not conclude the Appeals process with an agreed settlement of their tax dispute. Such an occurrence does not necessarily mean that the only option is litigation or an adjustment by Appeals. Taxpayers may still have available post-Appeals mediation or arbitration.

Post-Appeals Mediation

Late this year, the IRS issued revenue procedure 2009-44, *see* 2009-40 I.R.B. 462, which provided an updated post-Appeals mediation program (replacing revenue procedure 2002-44). The general idea is that where a taxpayer cannot reach agreement with the Appeals Officer assigned to the case, but where there are meritorious arguments in the taxpayers' favor that they feel is not being adequately considered, the taxpayer can request another Appeals Officer to come in and mediate a resolution. Not surprisingly, the post-Appeals mediation program is enjoying little success, though not without effort.

Former Tax Court Judge Carolyn Miller Parr wrote in late 2009, *see* Carolyn Miller Parr, *Why Postappeal Mediation Isn't Working and How To Fix It,* Tax Notes Today, Sept. 16, 2009, available at http://www.com/taxcom/features.nsf/Articles/1170408SC68E8F788525763300002C150?Open Document 2009 Tax Notes Today 175-8, Sept. 14, 2009, about her experiences as a mediator in this program, and commented that "[T]he fundamental reason IRS mediation is not working is the deep lack of trust flowing

both ways." This should surprise no one. The participants are the taxpayer and Appeals, with an Appeals mediator, but Appeals is able to bring in virtually any other IRS resources that the officer thinks may be relevant to the proceedings, and to communicate *ex parte* with such other participants as necessary. Since the post-Appeals mediation process provides for an Appeals Officer to do the mediation, even if the taxpayer brings in a co-mediator (at the taxpayer's own cost, but subject to approval by the IRS), there is understandably an apprehension that the taxpayer is not going to receive a fresh look at the facts, and both co-mediators can easily end up being perceived as advocates for their respective employers.

There are also unequal incentives to settle (the desire to settle is typically a key requirement for mediation to work). One of the primary concerns of the taxpayer is of course the cost, not only with the tax adjustment it faces, but also costs related to pursuing litigation. Some tax disputes can lead to bankruptcy. On the IRS side, however, the government employees involved get a paycheck either way, and where they feel they have made their last and best offer, then the hope of reaching a mediated settlement is likely not to be realistic.

Post-Appeals Arbitration

Arbitration of tax disputes can sound inviting where circumstances have dragged on for an extended period of time, and where the taxpayer believes its position has serious merit (and is not simply an attempt to reach a better deal). Revenue procedure 2006-44, formally established the procedure, *see* Rev. Proc. 2006-44 2006-2 C.B. 800, following several years of a pilot program begun in 2000, *see* Announcement 2000-4; 2000-1 C.B. 317. It is specifically designed to resolve only factual issues relevant to the dispute. However, if the parties to post-Appeals mediation described above are unable to reach an agreement, and if the factual issues are the determinant point, then the taxpayer may seek to bring the unsuccessful mediation into arbitration.

The arbitration contemplated by the IRS procedure is significantly different in its process from what is involved in usual commercial arbitration, or for that matter, what is accepted by the IRS in its treaties with Canada, Germany, Belgium, and Switzerland. The latter generally involves a scenario whereby the arbitrator must choose between the best positions offered by each side ("baseball" arbitration). Commercial arbitration tends to be governed by many rules of practice designed to ensure independence, *see generally,* American Arbitration Association, available at http://www.adr.org. Unfortunately for taxpayers, the scenario for IRS post-Appeals arbitration provides a significantly different context.

Under IRS procedures, Appeals does not have to agree to arbitrate. There is no formal method to appeal the denial of a request to arbitrate. An Appeals Officer unrelated to the dispute may be selected, or if the IRS and taxpayer agree, an outside arbitrator may be selected (with a sharing of the costs). Appeals may bring in IRS Chief Counsel attorneys to participate, and there is no taxpayer assurance of independence as there would be in the commercial or treaty context.

Thus, the post-Appeals arbitration procedure has generally been a resounding failure in terms of taxpayer support. For example, the post-Appeals arbitration process was announced in 2000, but through mid-2007, only fourteen taxpayers had requested it, and of those cases, only one had been resolved, *see* Stephen Joyce, *Officials Urge Taxpayers to Use Alternative Dispute Resolution Tools,* 105 Daily Tax Report G-3 (June 1, 2007).

This is not to say that post-Appeals arbitrations or mediations are not useful processes for taxpayers. For example, a factual misunderstanding where the details are objectively favorable to the taxpayer, but misunderstood by the Appeals Officer, could be addressed by post-Appeals arbitration. However, there may be a better way.

An Alternative to IRS ADR

John Klotsche, an attorney in Washington, DC, suggested in a series of three articles this year, published in Tax Notes Today in March, July, and September 2009, that the present IRS ADR processes, such as post-Appeals mediation and arbitration, are antiquated, too confrontational, and do not effectively advance the IRS's goal of promoting a high level of tax compliance. He proposed three changes to the present system: moving forward the timing of the ADR process, requiring mandatory mediation, and assuring the mediator is independent. These are sensible suggestions that would go a long way to improving IRS ADR processes.

Requiring mediation at the end of the audit or the beginning of Appeals would help avoid the entrenched positions that can result after years of negotiating with Exam and then later with Appeals. If both sides knew mediation was required, perhaps they would be more flexible and realistic in evaluating their positions from the outset. In addition, mediation is mandatory in many state and federal courts, *see, e.g.,* Utah's Mandatory Divorce Mediation Program, and could be effective for the IRS and taxpayers as well. Mediation is, by its nature, non-binding

on the parties, but it presents an opportunity to identify and discuss with a trained mediator and the other side the primary issues, the strengths and weaknesses of each side's position, and to seek jointly a settlement.

Finally, to resolve the perceived lack of independence in the current ADR processes, Klotsche proposes the IRS form an "ADR Center," which would be separate from Appeals. The use of Appeals officers for mediation and arbitration, even if well intentioned, cannot ever be entirely independent because the officers are employees of one of the parties to the dispute. "Independence" means a truly neutral third-party mediator or arbitrator with no ties to the IRS or the taxpayer. In the commercial world, ADR is practiced this way.

Klotsche envisions the ADR Center as an independent, mutually exclusive alternative to Appeals, but not an elimination of traditional Appeals. Therefore, a taxpayer could choose one or the other, but would not be allowed "two bites of the apple," by going to Appeals after reaching an impasse at the ADR Center. While the structure, staffing, function, and coordinating rules of such an ADR Center would certainly be subject to public debate and are presently difficult to anticipate, it presents a novel idea for resolving several problematic issues with the present IRS ADR processes.

Still, despite some challenges with the present ADR processes, the commitment of the IRS to making available more alternative venues for resolving tax disputes is promising for those taxpayers who end up with adjustments that are not resolved with Exam. Taxpayers may seek mediation before going through the traditional Appeals processes, or if Appeals cannot reach a settlement with a taxpayer, then it may be possible (under the right set of facts) to go through a post-Appeals ADR process before having to face litigation.

Attorney Volunteers in Court

by Nicole Farrell

The Litigation Section of the Utah State Bar and the Administrative Office of the Courts are launching a new program that they hope will help remedy two problems – underemployed attorneys and a heavily burdened state court system – that have worsened as a result of difficult economic times.

The temporary pilot program, "Attorney Volunteers in Court," recruits underemployed attorneys to volunteer with the state courts. The program is designed to meet two goals. First, it seeks to help lawyers develop new skills and gain legal work experience until they can find permanent employment in the law. Second, the program will provide assistance to the court system, which has experienced reduced funding and an increased caseload in recent years. Attorneys may serve in justice courts, juvenile courts, district courts, and appellate courts. The Utah pilot program is being adapted from a similar program, which has had success in the state of New York.

"Underemployed attorneys – some who have just graduated from law school and others with years of experience – will have opportunities to improve their legal skills and professionalism while searching for work in the legal profession," says Bar President Stephen W. Owens. "At the same time, the courts and the public will get talented legal assistance to help with their heavy workload."

TYPES OF VOLUNTEER OPPORTUNITIES

Attorneys can volunteer to provide one of three types of assistance in the Utah State Court System.

Chambers Volunteers

Attorneys will be assigned to particular judges or to a pool of judges working in a district (at the option of the judges). Volunteers will be supervised by the Trial Court Executive or Court Level Administrator for the judicial district or court level to which they are assigned, and their work product will be reviewed by the law clerk assigned to the same judges as the volunteer.

Public Assistance

Attorneys will be assigned to the Self-Help Center of the Utah State Law Library to serve in courthouses, answering questions and offering assistance in walk-in, clinical settings. Questions are expected to primarily focus on civil matters, including procedural issues, forms, the Online Court Assistance Program, housing, collections, juvenile and domestic issues. This will be similar to public assistance programs such as "Tuesday Night Bar," provided by the Utah State Bar. The Self-Help Center Director will supervise volunteers.

Administrative Offices

Attorneys will be assigned to the Administrative Offices of the Courts to perform legal research. The District or Juvenile Court Administrator will supervise volunteers. The Capital Litigation Staff Attorney or the Juvenile Court Law Clerk will review work product.

Benefits of Volunteering

Volunteering will provide underemployed attorneys with the unique opportunity to gain work experience within the court system. Those who volunteer with the Public Assistance component of the program will also be providing a valuable public service by assisting individuals who cannot afford attorneys.

Through participation in the program, volunteer attorneys will also have the opportunity to cultivate contacts in the legal profession and develop writing, research, interpersonal, professionalism, and administrative skills in the court environment. Importantly, volunteer attorneys will be given the opportunity to gain experience that will assist them in securing employment in the future. This program is a perfect opportunity for talented but underemployed attorneys to sharpen their skills and develop professionally while they search for legal employment. This program is also ideal for those who are pursuing other activities and do not necessarily wish to have legal employment at this time, but who desire to stay connected

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to and maintain contacts within the legal profession. At the same time, the skills possessed by the volunteer attorneys will greatly assist the court system in responding to its increased workload during difficult economic times.

Volunteer Requirements

Volunteers must complete an online application. The application and instructions can be found at www.utahbar.org/courtvolunteers/. Volunteers should indicate on their applications the type of position they are seeking (Chambers, Administrative, or Public Assistance), areas of interest, and the geographical location in which they could provide assistance. Efforts will be made to match appropriate work with the volunteers' interests.

Chambers and Administrative Offices volunteers will be expected to commit to at least twenty hours per week as volunteers. Public Assistance volunteers will be expected to commit to at least eight hours per week as volunteers. In most cases, volunteers can perform work on a schedule that is convenient to them. Volunteers will be expected to serve for at least three months. At the end of the three months, volunteers may ask to renew their term.

Volunteers must be members of the Utah Bar in good standing. This requires graduation from law school and passage of the Utah State Bar. Chambers and Administrative Offices volunteers need not be active members of the Bar, while Public Assistance volunteers do need to be active members. While serving as volunteers, attorneys cannot be engaged in the practice of law, or have any ongoing relationship with any type of legal employer.

Chambers and Administrative Office volunteers will be expected to demonstrate excellent writing skills, while Public Assistance volunteers will be required to have strong interpersonal skills. All volunteers must pass background checks.

In some instances, workspace will be provided. However, in other cases, volunteers will be required to provide their own computers and work from home or from a law library.

Volunteers must comply with special ethics rules applicable to volunteers, see Sup. Ct. R. of Prof'l Practice 6.1 and 6.5; Utah State Bar Ethics Op. 99-04 (June 30, 1999). Volunteers will also be required to comply with the personnel policies of the Utah State Courts. Each court or district may impose its own special conditions governing the work of the volunteers.

The Litigation Section hopes that attorneys will take advantage of this exceptional opportunity. "This pilot project is a mutually beneficial program that provides attorneys with a unique opportunity to assist the courts by lending their time and experience to the courts during very challenging budget times," said Dan Becker, Utah State Court Administrator. "The program is expected to be a win-win scenario for everyone involved."

For more information about the litigation section visit http://litigation.utahbar.org.

Services for Attorneys at the Utah State Law Library

by Mari Cheney

A variety of free and low-cost services are available at the Utah State Law Library. Even though the law library is physically located in Salt Lake City, many of the library's services are available to attorneys throughout Utah via our document delivery service and the Utah State Courts' website.

Databases

The law library's public computers provide free access to HeinOnline, Pioneer, and Westlaw. If you are outside the Salt Lake area and can't make it into the law library, but know the citation you want to access via one of these databases, contact the library for a document delivery.

HeinOnline provides access to over 1300 law review titles, many of which pre-date LexisNexis or Westlaw coverage. HeinOnline also provides access to many federal titles, including the United State Code, United States Statutes at Large, the Federal Register, and the Code of Federal Regulations. Interested in legal history? HeinOnline provides access to a full reprint of English Reports (1220-1867) and through the Legal Classics Library, Blackstone's *Commentaries on the Laws of England.*

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Evaluating Judicial Performance: How Judges Can Earn High Marks Even From Those Who Lose

by Jennifer MJ Yim

Conventional wisdom suggests that 50% of people appearing in court will walk away unhappy with their judge, their attorney, and the legal system in general. How could a criminal defendant sentenced to prison have positive things to say about the judge? When the Judicial Performance Evaluation Commission (JPEC) first discussed the statutory requirement to survey litigants and witnesses about judicial performance, some commissioners questioned how such surveying could result in anything but a 50-50 split, with winners praising the judge and losers voicing dissatisfaction. Many judges believe they are powerless to prevent half the participants leaving their courtrooms unhappy.

And yet, for each of the three years that the Administrative Office of the Courts has surveyed court users statewide, over 70% of respondents rated satisfaction with their court experience as "more than adequate" or "excellent." A 2009 national study sponsored by the National Center for State Courts found that 74% of those with direct court experience expressed confidence in their state courts. If it is not winning and losing that accounts for public satisfaction and confidence in the justice system, then what is it?

Multiple studies show that *procedural justice,* also called fair processes, makes the crucial difference when people evaluate the quality of their experience with a decision-maker. People are more likely to base their judgments about a decision maker's performance on whether they experienced fair processes than on whether they were granted advantageous outcomes or were afforded fair outcomes. Despite the counter-intuitive nature of this conclusion, it may sometimes matter less whether you win or lose than how the game was played!

In the judicial arena, procedural justice usually encompasses four factors: participation, neutrality, trustworthiness, and dignified and respectful treatment.

Participation: Was the party afforded an active voice in the decision-making process, allowing litigants to feel they have "been heard" by the judge?

Neutrality: Did the judge treat all parties in an impartial manner, basing decisions on objective factors?

Trustworthiness: Did the judge demonstrate concern about the situation? Does the judge appear to have proper motives, adequate reputation, and character to serve as a decision-maker in the case? (Litigants may not feel they have the information necessary to judge judicial competence but feel able to weigh a judge's motives.)

Treatment with dignity and respect: Was the party treated courteously and as a valued member of society?

Studies show that judges who successfully afford litigants procedural justice based upon the above factors enjoy at least two benefits. First, such judges are more likely to have litigants who express satisfaction with their judge's performance, regardless of the actual verdict. And second, the litigants are more likely to comply with the judge's orders. In other words, procedural justice pays dividends both in measures of public trust and confidence as well as in higher levels of compliance with court orders.

What makes these findings even stronger is their replication in numerous settings, including personnel management, banking, law enforcement, correctional institutions, federal aid programs, tax collections, courts, and even with military soldiers in Iraq. In all of these settings, what consistently matters most to people on the receiving end of decisions is whether they believed the

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processes used to reach the decision were fair.

Think, for a moment, about how you interact with your clients, employees, or family members. The next time you need to make a decision that significantly affects their lives, consider how a process that affords participation, neutrality, trustworthiness, and treatment with dignity and respect might help your interaction. Research suggests that how you interact can improve the chances that others will leave satisfied with your decision, and be more likely to comply with it.

Of course, nothing about these research findings suggests that winning does not matter. To suggest otherwise would be to push the envelope of counter-intuitiveness too far. Outcomes do matter. Justice depends on judges making good, fair decisions every day. The important procedural justice issue for judges is that outcomes matter less than we sometimes think, particularly in terms of whether people feel satisfied with a judge's performance and confident in the legal system.

Procedural justice provides a useful way to think about JPEC's task of evaluating judges because it considers the criteria citizens actually use to evaluate both decision-makers and their government. JPEC must grapple with issues of procedural justice in order to produce meaningful evaluations of judges for Utah voters. The Commission also considers procedural justice a relevant marker of its own success in terms of how it conducts its business, including treatment of those affected by its decisions. What thoughts do you have about this concept of procedural justice as it affects JPEC? Contact Joanne Slotnik, executive director of the Commission, at 801-538-1652 or email me at jyim@xmission.com.

Better Late than Never – Implied Warranties of Workmanlike Manner and Habitability Now Available in Utah

by Timothy R. Pack

I must make a confession: Sometimes I am dead wrong. I have misstated a rule or legal principle to a client before, insisted to my wife that pizza is best eaten cold, and lectured friends that *this* year was Greg Ostertag's year. And sometimes, just sometimes, after I realize my mistake and the bone-headedness of my statements, I admit that I was wrong and see the good sense and reasonableness in the right answer. Although I have not been practicing law for very long, I have found, surprisingly, that it is hard to get lawyers to admit that they were wrong. So when the Utah Supreme Court admits that it was wrong, and goes so far as to publicly state it, and in writing no less, I take notice and commend the court.

This article discusses the Utah Supreme Court's opinion in *Davencourt v. Davencourt,* 2009 UT 65, 221 P.3d 234 only as it relates to the implied warranties in the sale of new residences. This issue only comprises a small part of the *Davencourt* opinion as it covers many issues with an insightful discussion on the economic loss rule.

It had been well established that Utah Courts do not recognize an implied warranty of habitability nor an implied warranty of workmanlike manner in the context of new residential sales. However, the Utah Supreme Court's recent opinion in *Davencourt* said *sayonara* to the anachronistic doctrine of *caveat emptor.* Historically, the Utah Supreme Court has held tight to the doctrine of *caveat emptor* which was so very chic in the first half of the twentieth century. *See id.* ¶ 51. "'Underlying this almost universal doctrine was the theory of equal bargaining power in contract and the ability and opportunity to inspect.'" *Id.* ¶ 51 (quoting 12 Thompson on Real Property § 99.06(a)(2) (David A. Thomas ed., 2d Thomas ed. 2008)). Even into the 1990s the Utah Supreme Court reiterated this principle for upholding the doctrine of *caveat emptor:*

> The purchaser has the right to inspect the house before the purchase as thoroughly as that individual desires, and to condition purchase of the house upon a satisfactory inspection report. Further, if there are particular concerns about a home, the parties can contract for an express written warranty from the seller. Finally, if there are material latent defects of which the seller was aware, the buyer may have a cause of action in fraud.

Am. Towers Owners Ass'n v. CCI Mechanical, Inc., 930 P.2d 1182, 1193 (Utah 1996) (quoting *Maack v. Res. Design & Constr., Inc.,* 875 P.2d 570, 582-83 (Utah Ct. App. 1994)).

However, every state in the union, except Utah, has established, by common law or statute, the implied warranty of workmanlike manner or the implied warranty of habitability in new residential home sales. *See Davencourt*, 2009 UT 65, ¶ 52.

> Forty-five states have adopted an implied warranty in some form and Hawaii appears to have done so in dicta. Forty-three states provide for an implied warranty of habitability. Besides the four states that do not recognize any implied warranty, only Delaware, Nebraska, and Ohio expressly reject the implied warranty of habitability; yet those three states each provide for an implied warranty of workmanlike manner. Out of the four states that have not adopted any implied warranty, two states, New Mexico and North Dakota, have not directly addressed or answered the issue. The

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> two remaining states, Georgia and Utah, have expressly rejected implied warranties. But Georgia does so because it allows recovery under negligence theory. This leaves Utah in a minority of one.

Id. The court makes a point of illustrating how lagging Utah was on this point. One can almost sense a tinge of embarrassment underlying Chief Justice Durham's opinion.

The primary reason for abandoning the doctrine of *caveat emptor* in this context, according to the *Davencourt* court, is the unequal bargaining power between a new home buyer on the one hand, and the builder-vendor or developer on the other. Before the *Davencourt* decision, the court only recognized an implied warranty of habitability in the residential lease context. *See Wade v. Jobe,* 818 P.2d 1006, 1010 (Utah 1991). The Utah Supreme Court's historical reasoning for not extending the implied warranty of habitability to the sale of new homes is that buyers of homes do not have to the same degree of unequal bargaining power as do lessees. In other words, because lessees are more disadvantaged than new homebuyers, the implied warranty of habitability was simply inapplicable in the context of new home sales. *See Maack,* 875 P.2d at 583. The Utah Supreme Court, in 1994, found that "the circumstances presented to the purchaser of a residence are not closely analogous to those of a relatively powerless lessee." *Id*.

However, the court in *Davencourt* appropriately recognized that the construction of a new home is a complex undertaking which requires the expertise of many different tradespeople as well as knowledge of the applicable building codes and regulations. The builder-vendor/developer is regularly engaged in the sale of new homes, "whereas for a buyer the purchase of a new home is a significant and unique transaction." *Davencourt v. Davencourt,* 2009 UT 65, ¶ 53, 221 P.3d 234. The court noted, as the plaintiff in *Maack* also argued, that "the purchase of a home is not an everyday transaction for the average family, and in many instances is the most important transaction of a lifetime." *Id*.

The builder-vendor/developer is also in a better position to prevent and correct the harm and should therefore bear the risk of loss. *See id.* In addition, an implied warranty would hopefully prevent sloppy and unskilled labor and construction of new homes. *See id.* Furthermore, the imposition of an implied warranty is "'consistent with the expectations of the parties'" 61 ¶ 54 (quoting *Sloat v. Matheny,* 625 P.2d 1031, 1033 (Colo. 1981), because the purchaser always expects to receive "'a house suitable for habitation.'" *Id*. ¶ 54 (quoting *Yepsen v. Burgess,* 525 P.2d 1019, 1022 (Or. 1974)). The court further reasoned that to apply the doctrine of *caveat emptor* on a new homebuyer is "'manifestly a denial of justice.'" *Id.* (quoting *Bethlahmy v. Bechtel,* 415 P.2d 698, 710 (Idaho 1966)).

The court expressly overruled *American Towers* as it applies to the implied warranties, which only allowed an implied warranty of habitability in the context of leases, and held that "[u]nder Utah law, in every contract for the sale of a new residence, a vendor in the business of building or selling such residences makes an implied warranty to the vendee that the residence is constructed in a workmanlike manner and fit for habitation." *Id*. ¶ 55. The court set forth five elements that a plaintiff must show in order to establish breach of the implied warranty of workmanlike manner or habitability: "(1) the purchase of a new residence from a defendant builder-vendor/developer-vendor; (2) the residence contained a latent defect; (3) the defect manifested itself after purchase; (4) the defect was caused by improper design, material, or workmanship; and (5) the defect created a question of safety or made the house unfit for human habitation." *Id*. ¶ 60.

As the title of this article suggests, the *Davencourt* court's holding is long overdue. Moreover, when compared with the implied warranties that have existed in the sale of goods under the Utah

Uniform Commercial Code (UCC), the court's ruling seems especially tardy. To illustrate, suppose I purchase a brand new toaster from my local appliance store. Now after I bring my new toaster home and begin to operate it according to the manufacturer's specifications, the toaster malfunctions in that it barely warms my slices of bread. But as the purchaser of the defective toaster, I can take comfort that I am protected by the implied warranty of merchantability or perhaps the implied warranty of fitness for particular purpose. *See* Utah Code Ann. §§70A-2-314, 315 (2009).

Now suppose I purchase a newly constructed house from Joe the Contractor. After two years of living in the house, I find that the stucco on the outside of the house has not been applied properly and now moisture is seeping into the walls. Unless I bargained for an express warranty for more than two years with Joe the Contractor, I had no recourse against Joe for his poor workmanship. *See* Utah Code Ann. §78B-4-513 (2008) (codifying the economic loss rule). Although this result seems odd and inequitable when compared with the toaster purchase, it was nevertheless true that, prior to *Davencourt*, a purchaser of a toaster in Utah had greater protections, in terms of implied warranties, against latent defects, than a new homebuyer did.

According to the *Davencourt* court, the complexity of the transaction, the sophistication of the purchaser, the expectation of the parties, and the determination of which party is best positioned to prevent the harm dictates whether an implied warranty should exist. Applying these policy considerations to the transaction of buying a toaster, we find that (1) purchasing a toaster is a relatively simple event; (2) toasters are relatively simple machines and do not require an expertise in toasters to make an informed purchase; (3) both parties expect the toaster to effectively toast bread into a delicious golden hue; and (4) the manufacturer or seller of the toaster is in the best position to prevent any defects. Applying these factors, to the much more complicated and important transaction of purchasing a home, it certainly seems that the implied warranties of workmanlike manner and habitability ought to be more deserving of recognition than the warranties provided under the UCC. Although this is not a perfect analogy, it hopefully illustrates the cognitive dissonance that results from not implementing implied warranties in the purchase of new homes.

Other Considerations

Because the implied warranties of workmanlike manner and habitability are two separate warranties, they should carry separate and distinct meanings. The court in *Davencourt* does recognize that there could be a distinction between the two and seems to define the implied warranty of workmanlike manner as "the quality of work that would be done by a worker of average skill and intelligence.'" *Davencourt v. Davencourt* 2009 UT 65, ¶ 56 (quoting *Nastri v. Wood Bros. Homes, Inc.,* 690 P.2d 158, 163 (Ariz. Ct. App. 1984)). As for the warranty of habitability, the court stated that "if a new residence does not keep out the elements because of a defect of construction, such a residence is not habitable or that the new residence must 'provide inhabitants with [a] reasonably safe place to live, without fear of injury to person, health, safety, or property.'" *Id.* (quoting *Nastri,* 690 P.2d at 163).

But a builder-vendor/developer need not construct a perfect home so as to "make [it] an insurer against any and all defects in a home." *Id.* ¶ 59. The court in *Davencourt* understood that "'no house is built without defects'" and held that the implied warranties do not "'protect against mere defects in workmanship, minor or procedural violations of the applicable building codes, or defects that are trivial or aesthetic.'" *Id.* (quoting *Bethlahmy v. Bechtel*, 415 P.2d 698, 711 (Idaho 1966), and *Albrecht v. Clifford,* 767 N.E.2d 42, 47 (Mass. 2002)). Again, as the fifth element in the breach of implied warranty cause of action states, the defect must raise a question of safety or make the house unfit for human habitation.

The court also noted that the protection of the implied warranties are "not intended to alleviate purchasers of their due diligence and opportunity to inspect a residential construction." *Id.* Therefore, an argument could be made that if a new homebuyer fails to reasonably inspect the home, the implied warranties may be unavailable to them in some degree.

Although the *Davencourt* decision abolishes the doctrine of *caveat emptor* in the context of new residential housing, the doctrine is still very much alive in the purchase and sale of a used home. The reasoning for this is, that in the sale of a used home, the buyer is not contracting with the builder-vendor/developer. Therefore, the implied warranties of workmanlike manner and habitability will only exist in a transaction between a builder-vendor/developer and a buyer for new construction or inventory. Utah courts, and particularly the court in *Davencourt*, take great efforts not to blur the lines between contract and tort. *See id,* ¶¶ 20-48. The court stresses that an implied warranty arises under contract, and therefore, "privity of contract is required to bring a claim for breach" of one of the implied warranties. *Id.* ¶ 57.

The court also notes that the implied warranties survive the effect of merger. The merger doctrine "'is applicable when the acts to

be performed by the seller in a contract relate only to the delivery of title to the buyer.'" *Id.* (quoting *Stubbs v. Hemmert,* 567 P.2d 168, 169 (Utah 1977)). Basically, when the parties execute a deed, the terms of the underlying contract are merged into the deed, and the contract is superseded. However, collateral acts to the conveyance of title by the seller "'survive the deed and are not extinguished by it.'" *Id.* (quoting *Stubbs*, 567 P.2d at 169); *see also id.,* ¶¶ 64-74 (discussing the collateral rights exception to the merger doctrine). The Court held that these implied warranties are independent and collateral to the conveyance of title, and therefore survive merger. *See id.* ¶ 58. Furthermore, the implied warranties cannot "be waived or disclaimed, because to permit the disclaimer of a warranty protecting a purchaser from the consequences of latent defects would defeat the very purpose of the warranty." *Id.* (quoting *Albrecht,* 767 NE 2d at 47).

Finally, the court in *Davencourt* held that a claim for breach of the implied warranties "must be brought in accordance with Utah Code Section 78B-2-225." *Davencourt*\, 2009 UT 65 ¶ 61. That section imposes statute of limitation of six years for "all causes of action by or against a provider arising out of or related to the design, construction, or installation of an improvement." Utah Code Ann. § 78B-2-225(2)(e)(2008).

Conclusion

The *Davencourt* decision represents a major shift in the judicial protection of purchasers of new homes. The Utah Supreme Court has recognized that purchasing a home is an incredibly significant and complicated event, an event which homebuyers undertake only a few of times in their lives. Therefore, compared with a builder, vendor, or developer of new housing, the homebuyer stands on very unequal footing, and justice requires judicial protection that is best accomplished through the recognition of the implied warranties of workmanlike manner and habitability.

But what I really admire about the *Davencourt* opinion is the court's readiness to recognize and admit it had been wrong. Most telling of the court's character, if a court can, in fact, have a character, is its willingness to adopt the following maxims:

> The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected ….

Davencourt, 2009 UT 65 ¶ 55 (quoting *Schipper v. Levitt & Sons, Inc.,* 207 A.2d 314, 325 (N.J. 1965)).

Avoiding General Solicitations in a Securities Private Placement

by Jason D. Rogers, Christopher A. Scharman, and Brad R. Jacobsen

Other than the most mature and profitable businesses, all businesses need to raise capital. Due to the broad definition of the term "security," capital investments other than bank loans will generally be deemed a security. All sales of securities generally must either be registered with the Securities & Exchange Commission (the "SEC"), or be exempt from registration. Since few Utah businesses have registered an offering of securities with the SEC, most Utah businesses seeking non-bank funding must find an exemption from registration.

The most commonly used registration exemptions are found in Regulation D promulgated under the Securities Act of 1933, as amended (the "Securities Act"). This article addresses the issue of offering securities in a private placement and outlines the prohibition against using "general solicitation or general advertising" set forth in the Securities Act and Regulation D.

BACKGROUND

All offerings of securities must be either (1) registered with the SEC or (2) exempt from registration, *see* Securities Act § 5; Regulation D. Since the registration process is time-consuming and expensive, most Utah businesses wish to ensure that any securities they offer are exempt from registration. *See* General Accounting Office, Report to the Chairman, Comm. On Small Bus., U.S. Senate, Small Business Efforts to Facilitate Equity Capital Formation at 23 (2000). An exemption from registration does not exempt an offering from the anti-fraud requirements or any other provision of the securities laws. *See* Securities Act Release No. 33-6389 (Mar. 8, 1982).

Regulation D includes three exemptions from Securities Act registration. Under Rule 504, an issuer may sell up to $1 million of securities to an unlimited number of persons. However, Rule 504 offerings are not permitted in Utah. The exemption under Rule 505 allows an issuer to sell up to $5 million of securities to an unlimited number of "accredited investors" (as defined herein) and up to thirty-five nonaccredited investors.

Rule 506 allows an issuer to sell an unlimited amount of securities to an unlimited number of "accredited investors" and up to 35 nonaccredited investors. The issuer must also reasonably believe that each nonaccredited purchaser either alone or with a purchaser representative has sufficient knowledge and experience to be capable of evaluating the merits and risks of the prospective investment in a Rule 506 offering. In addition, a Rule 506 offering allows an issuer to avoid having to comply with state registration and exemption requirements, other than notice filings. *See* Securities Act § 18(a)(1)(A); 18(b)(4)(D); Rule 506(a).

Rule 502 prohibits the use of a "general solicitation or general advertising" in a Rule 505 or Rule 506 offering of securities. *See* Rule 502(c). Neither "general solicitation" nor "general advertising" is defined in Regulation D or in the SEC release adopting Rule 506. This article will address the few interpretations of these terms that have come from the SEC.

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ANALYSIS

The majority of this analysis will be based on SEC no-action letters. A no-action letter is a method of securing informal advice from the SEC on a specific proposed transaction. Generally, an attorney representing a party with a question prepares a letter to the SEC laying out the facts of the transaction. The SEC responds as to whether it is likely to bring legal action against such a transaction or whether it will take no action. No-action letters generally end with a disclaimer stating that the SEC's position in the letter is based on the representations made in the initial letter to the SEC, and any different facts or conditions might require a different conclusion.

Advertisements

Examples in Rule 502(c)

Although the terms "general solicitation" and "general advertising" are not defined in Regulation D, the rules do clarify that at least the following actions qualify as a general solicitation: "any advertisement, article, notice or other communication published in any newspaper, magazine, or similar media or broadcast over television or radio" or "any seminar or meeting whose attendees have been invited" by a general solicitation. *See* Rule 502(c). The SEC believes that whether a particular action is a general solicitation is generally an issue of facts and circumstances, and therefore typically declines to give specific guidance. *See* Interpretive Release on Regulation D, Securities Act Release No. 33-6455, 17 C.F.R. Pt. 231, 1983 SEC LEXIS 2288 (March 3, 1983).

Product Advertisements

The above examples refer to using radio advertisements and seminars in connection with an offering of securities. By the terms of the rule, they do not apply to advertisements for goods and services other than securities. However, the SEC believes that an issuer's product promotion may be deemed a general solicitation or general advertising for the sale of securities, based on (1) the content of the advertisements and (2) the actual use of the advertisement in relation to the offering of securities. When enumerating these criteria, the SEC declined to issue guidance on this particular issue. *See Printing Enters. Mgmt. Sci., Inc.,* 1983 SEC No-Act. LEXIS 2250 (Apr. 25, 1983). In addition, if the primary purpose of an advertisement is to sell securities and to condition the market for future sales, an advertisement may constitute an offer even if an issuer is not offering securities at the time. Again, the SEC declined to give further guidance about the meaning of "conditioning the market." *See* Gerald F. Gerstenfeld, 1985 SEC No-Act. LEXIS 2790 (Dec. 3, 1985).

Generic Advertisements and Informational Seminars

The treatment of general advertisements for seminars giving purely "generic" industry information depends on the purpose for which the seminar is given. In the SEC's review of an NASD disciplinary action, a registered representative of a broker-dealer advertised a seminar he was giving on hedge funds in a newspaper. The advertisement read, in part: "'Today's Hottest Investment'/ Hedge Funds/WHAT THEY ARE/HOW TO INVEST." Although the registered representative gave uncontradicted testimony that the information given in the seminar was "generic" in nature, prior to the seminar he had sent a letter to investors in his current hedge fund stating that the seminar was intended to attract new investors to such fund. The SEC held that the purpose of the advertisement was the relevant factor, not the content and deemed the advertisement and the seminar a general solicitation. *See In the Matter of Brian Prendergast,* 2001 SEC LEXIS 1533.

Offeree/Issuer Relationship

To date, the SEC has focused on the relationship between the issuer and the potential investor in determining whether a general solicitation has occurred. For a communication to a potential investor to not be considered a general solicitation, the SEC requires a pre-existing, substantive business relationship between the issuer and the potential investor. *See, e.g., Woodtrails-Seattle, Ltd.,* 1982 SEC No-Act. LEXIS 2662 (Aug. 9, 1982); *E.F. Hutton & Co.,* 1985 SEC No-Act. LEXIS 2917 (Dec. 3, 1985); and *Bateman Eichler, Hill Richards, Inc.,* 1985 SEC No-Act. LEXIS 2918 (Dec. 3, 1985). If there is a pre-existing, substantive business relationship between the issuer and potential investor, the SEC allows an issuer to target and solicit interest such persons. *See Woodtrails-Seattle, Ltd.*

While the SEC asserts that "prior relationship is [not] the only way to show the absence of general solicitation," the SEC has not issued any guidance on any other way to avoid a general solicitation. *See* Securities Act Release No. 33-6825 (Mar. 15, 1989).

Substantive and Pre-existing Relationship

The substantive aspect of the issuer-investor relationship focuses on the potential investor's financial sophistication and ability to evaluate the risks and merits of the proposed offering. The issuer must be able to demonstrate that the potential investor was sufficiently sophisticated in financial matters to participate in the private offering. Targeting accredited investors exclusively would satisfy this "substantive" requirement because accredited investors, as defined by the Securities Act, are presumed to be sophisticated for Rule 506 purposes. *See* Rule 501(a); *see also H.B. Shaine & Co., Inc.,* 1987 SEC No-Act. LEXIS 2004 (May 1, 1987). A "substantive" relationship may be created by a "satisfactory response by a prospective offeree to a questionnaire that provides…sufficient information to evaluate the respondent's sophistication and financial situation."

Please note that the guidance regarding the establishment of a "substantive" relationship through a questionnaire was specifically applied to a solicitation by a broker-dealer on behalf of an issuer, not to a solicitation by an issuer directly. Another no-action letter states that

> the types of relationships with offerees that *may* be important in establishing that a general solicitation has not taken place are those that would enable the issuer (or a person acting on its behalf) to be aware of the financial circumstances or sophistication of the persons with whom the relationship exists or that are otherwise are of some substance and duration.

Mineral Lands Research & Mktg. Inc., 1985 SEC No-Act. LEXIS 2811 (Dec. 4, 1985) (emphasis added).

The potential investor's sophistication alone, however, is not sufficient to prevent application of the prohibition. *See* Interpretive Release on Regulation D, Securities Act Release No. 33-6455, 17 C.F.R. Pt. 231, 1983 SEC LEXIS 2288 (March 3, 1983), Q. 60, ("The mere fact that a solicitation is directed only to accredited investors will not mean that the solicitation is in compliance with Rule 502(c)."). The relationship between the issuer and the potential investor must also satisfy the requirement that it be "pre-existing." A relationship is pre-existing if it existed for some duration prior to the current private offering. *See E.F. Hutton & Co.,* 1985 SEC No-Act. LEXIS 2917 (Dec. 3, 1985). A pre-existing relationship most likely exists with potential investors with whom the issuer has a business relationship that allows the issuer to reasonably be sure the potential investor is sufficiently sophisticated in financial matters to participate in the offering. Furthermore, a pre-existing relationship clearly exists with investors who have participated in previous offerings made by the issuer. For example, there is no general solicitation where a general partner that has sponsored previous limited partnerships contacts investors in such previous limited partnerships to invest in a new limited partnership, provided the general partner believes that each investor is capable of evaluating the merits and risks of the investment. *See Woodtrails-Seattle, Ltd.* Offering securities to potential investors that do not have a "substantive" and "pre-existing" relationship with the issuer runs the risk of violating the prohibition against general solicitations and advertising.

Creating a Substantive and Pre-Existing Relationship

Official guidance does little to address the manner in which an issuer may create a substantial and pre-existing relationship. However, the guidance applicable to broker-dealers discussed

below may be applicable to issuers as well.

Offeree/Broker-Dealer Relationship

Since many issuers do not have pre-existing relationships with large numbers of investors, they often hire a broker-dealer that has such relationships. *See* Sjostrom, William K., *Relaxing the Ban: It's Time to Allow General Solicitation and Advertising in Exempt Offerings,* 32 Fla. St. U.L. Rev. 1, 14-19 (2004). Certain SEC no-action letters provide guidance as to how a broker-dealer may develop a substantive and pre-existing relationship with potential investors where one does not currently exist, *see e.g., E.F. Hutton & Co.; Bateman Eichler, Hill Richards, Inc.,* 1985 SEC No-Act. LEXIS 2918 (Dec. 3, 1985); *H.B. Shaine & Co., Inc.;* and *IPONET,* 1996 SEC No-Act. LEXIS 642 (July 26, 1996). These no-action letters demonstrate that a substantive and pre-existing relationship may be developed through the use of a suitability questionnaire designed to ascertain the financial sophistication of potential investors as long as there is a "cooling-off" period between the time of the questionnaire and the private offering. In other words, a questionnaire may be used to establish the substantive aspect of the relationship, and a cooling-off period that allows the potential investor to participate only in offerings that are to be in the future establishes the relationship to be pre-existing.

In the 1985 Bateman Eichler no-action letter, the SEC provided guidance on how a broker-dealer can tailor its actions to avoid a general solicitation. Bateman Eichler's proposed program involved various account executives sending a monthly mailing to not more than fifty potential local investors, including a letter and a financial questionnaire. If the potential investor completed the questionnaire, the account executive would follow up to obtain additional information. Those completing the follow-up stage would then be offered securities in the areas in which the potential investor indicated interest. No offering materials would be sent for any offering ongoing at the time of the initial solicitation, and no offering materials would be sent for at least forty-five days after the initial mailing. The broker-dealer's letter to the SEC indicated that this program, "much like seminars, speaking engagements and generic advertising of Bateman Eichler, would serve as the first step in establishing a business relationship with new clients."

The SEC noted the following factors: (1) that the proposed solicitation would be generic in nature and would not make reference to any specific investment and (2) that the broker-dealer would implement procedures designed to insure that persons solicited are not offered any securities that were offered or contemplated for offering at the time of solicitation. *See Bateman Eichler, Hill Richards, Inc.,* 1985 SEC No-Act. LEXIS 2918 (Dec. 3, 1985).

The SEC ruled that the later offers of securities "would not be deemed made by a general solicitation as a result of the initial solicitation" provided that the broker-dealer received "sufficient information to evaluate the prospective offeree's sophistication and financial circumstances." *Id*. The SEC did not believe that Bateman Eichler's questionnaire provided enough information to constitute a substantive relationship. However, in a later no-action letter, the SEC indicated that full responses to a certain questionnaire would establish a pre-existing substantive relationship. *See H.B. Shaine & Co., Inc.,* 1987 SEC No-Act. LEXIS 2004 (May 1, 1987). Once the there is a substantive relationship, offering materials may be placed on a password-protected website. *See IPONET,* 1996 SEC No-Act. LEXIS 642 (July 26, 1996).

There are two key points to ensuring that a questionnaire creates a substantive relationship. First, the questionnaire must be sufficiently detailed to properly determine the potential investor's level of sophistication in financial matters and financial circumstances. In other words, the questionnaire must be sufficient for the broker-dealer to determine the potential investor's ability to evaluate the risks and merits of the private offering and that the potential investor's financial condition is adequate.

Second, the questionnaire process must be timed in a way that allows the relationship to be pre-existing to any offering. In other

words, the questionnaire process must allow, "that sufficient time will have elapsed between a respondent's completion of the questionnaire and the completion or inception of any particular offering." *H.B. Shaine & Co., Inc.* Under this requirement, a broker-dealer cannot establish a quick relationship with a potential investor immediately before commencing a private offering in a specific attempt to circumvent the rule. Such relationships can, however, be developed in anticipation of some future offering so long as such offerings were not initiated or under consideration during this pre-qualification review. The SEC stated

> [I]t is important that there be sufficient time between establishment of the relationship and an offer so that the offer is not considered made by general solicitation or advertising. In the [SEC]'s view, if the relationship was established prior to the time [the broker/dealer or issuer] began participating in the Regulation D offering, an offer could be made to the person with whom the relationship was established without violating Rule 502(c).

E.F. Hutton & Co., 1985 SEC No-Act. LEXIS 2917 (Dec. 3, 1985).

Time Period Elapsing for Pre-existing Relationship

There is little guidance on the time period that must elapse between the first introduction to a prospective investor and the offering of a security. A court has held that a one-week period between an initial "cold call" and following up on the call with a securities offering is not sufficient to establish a relationship. *See S.E.C v. Credit First Fund, LP,* 2006 U.S. Dist LEXIS 96697 (C.D.Cal 2006). In the Bateman Eichler no-action letter, the SEC did not object to a 45-day waiting period between the initial contact with a potential investor and a securities offering, provided the securities offering had not been initiated at the time of the initial contact. In the context of a website listing hedge fund information which only accredited investors could access, the SEC did not object to a 30-day waiting period between the day the potential investor qualified for the website and the day the investor could invest in a fund listed on the site. In addition, since hedge funds raise money on a semi-continuous basis, the SEC allowed the offering to be ongoing at the time of the investor's qualification. *See Lamp Techs., Inc.,* 1997 SEC No-Act. LEXIS 638 (May 29, 1997).

Application of Broker-Dealer Rules to Issuers

The above questionnaire procedures were approved solely for licensed broker-dealers. It is not clear whether an issuer could itself prequalify investors using these procedures. The SEC declined to give no-action relief to an issuer contemplating building a database of accredited investors by sending a generic financial questionnaire to users of its services that the issuer believed were likely accredited investors. *See* Agristar Global Networks, Ltd., 2004 SEC No-Act. LEXIS 203 (February 9, 2004). In a 2000 Release, the SEC opined:

> Generally, staff interpretations of whether a "pre-existing, substantive relationship" exists have been limited to procedures established by broker-dealers in connection with their customers. This is because traditional broker-dealer relationships require that a broker-dealer deal fairly with, and make suitable recommendations to, customers, and thus, implies that a substantive relationship exists between the broker-dealer and its customers. We have long stated, however, that the presence or absence of a general solicitation is always dependent on the facts and circumstances of each particular case. Thus, there may be facts and circumstances in which a third party, other than a registered broker-dealer, could establish a "pre-existing, substantive relationship" sufficient to avoid a "general solicitation."

Securities Act Release No. 33-7856 (April 28, 2000), 2000 SEC LEXIS 847 (footnotes omitted).

Conclusion

The following general principles may be inferred from the analysis above with respect to avoiding a "general solicitation":

- **Advertisements and seminars.** Advertising relating to a securities offering is never allowed. Advertising relating to an issuer's goods or services is permissible as long as the primary purpose of the advertisement is not to condition the market for future sales of securities. Seminars giving general information may not be given if the purpose is to attract investors for an issuer's securities.

- **Substantive and pre-existing relationship.** An issuer may offer securities to those with whom the issuer has a pre-existing and substantial relationship. To be pre-existing, at a minimum the relationship must have been established at least 30 days prior to the offering. To be substantial, an issuer's relationship must be such that the issuer is fully aware of the financial circumstances or sophistication of the potential investor.

- **Facts and circumstances.** The determination of whether or not a general solicitation or general advertisement has been made will always be made on the particular facts and circumstances of an offering. Counsel should be very careful in advising clients as to the types of communications that are permitted in connection with an offering of securities.

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the January 22, 2010 Commission meeting held in Salt Lake City at the Law & Justice Center.

1. The Commission decided to not retain Roger Tew as a lobbyist this year to monitor the professional services tax issue. The state has been revisiting the idea of imposing a tax on professional services, including legal services. The Bar has been in contact with legislative leadership and the governor's office and has expressed the Bar's concerns with the concept generally. Our regular lobbyist, John T. Nielsen will monitor the ongoing debate.
2. The Commission approved the San Diego Marriott Hotel and Marina as 2011 Summer Convention site. The San Diego Marriott offers numerous, and convenient activities for Convention attendees and their families.
3. The Commission agreed to conduct a Summer Convention survey of all lawyers in 2012.
4. The Commission designated August 27th and 28th for the monthly Commission meeting and annual retreat.
5. Commissioners approved filing a petition with the Utah Supreme Court for admission rule changes to modify the requirement that FBI background reports be filed with the Bar Application and permit applicants to submit the FBI reports up to 30 days before the Bar Admissions Ceremony.
6. The Commission selected Evelyn Furse, Melanie Vartabedian, and Lisa Yerkovich as co-recipients of Dorathy Merrill Brothers Award.
7. The Commission selected Trystan Smith as recipient of Raymond S. Uno Award.
8. The Commission agreed to recognize Kathy Dryer for her work with Utah Law Related Education.
9. The Commission nominated Rod Snow as candidate for office of Bar President-elect.
10. Commissioners agreed to continue to work on Operations Sub-committee report recommendations with March 18th as the deadline for motions.

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

The Utah State Bar is calling for nominations for the 2010 Pro Bono Publico Awards

The deadline for nominations is April 1, 2010.
The awards will be presented at the
Law Day Celebration at the Little America Hotel on April 30.

By bestowing these prestigious awards, the pro bono community seeks to recognize outstanding pro bono service and to convey a message to the legal profession and the general public about the importance of such service in helping to provide all of Utah with equal access to the justice system, regardless of income.

To download a nomination form and for additional information, please go to www.utahbar.org.

Pro Bono Honor Roll

Andres Alarcon – Family Law Clinic
Brad L. Anderson – Guardianship Case
Nicholas Angelides – Senior Cases
Judy Barking – Guardianship Case
T. Brian Barr – Guadalupe Clinic
Lauren Barros – Family Law / LGBT Law Clinics
Jonathan Benson – Immigration Clinic
Tyler Berg – Ogden Legal Clinic
Dawn M. Call – Probate Case
Maria-Nicolle Beringer – Consumer / Bankruptcy Cases
Richard Fox – Guardianship Case
Keri Gardner – Family Law Clinic
Jeffry Gittins – Guadalupe Clinic
Chad Gladstone – Family Law Clinic
Marlene Gonzales – Immigration Clinic
Jason Grant – Family Law Clinic
Sheleigh Harding – Family Law Clinic
Garth Heiner – Guadalupe Clinic
April Hollingsworth – Guadalupe Clinic
Randall Holmgren – Probate Case
Melanie Hopkinson – Family Law Clinic
Kyle Hoskins – Farmington Clinic
Louise Knauer – Family Law Clinic
Stephen Knowlton – Family Law Clinic
Dixie Jackson – Family Law Clinic
Cathy Johnstone – Protective Order Hearing
John Larson – Bankruptcy Hotline
Darren Levitt – Family Law Clinic
Nancy Major – Family Law Clinic
Benjamin Mann – Family Law Clinic
Mark Naugle – Custody Case
Ellen O'Hara – Family Law Clinic
Todd Olsen – Family Law Clinic
Rachel Otto – Guadalupe Clinic / Employment Discrimination Case
Kenneth Parkinson – Divorce Case
Mary Kay Patton – LGBT Law Clinic
Candice Pitcher – LGBT Law Clinic
Silvia Pena-Chacon – Domestic Tribal Court Case
Christopher Preston – Guadalupe Clinic
DeRae Preston – Family Law Clinic
Stewart Ralphs – Family Law Clinic
Brent Salazar-Hall – Family Law Clinic
Jeremy Schwendiman – Family Law Clinic
Lauren Scholnick – Guadalupe Clinic
William Shinen – Divorce Case
Eric S. Smith – Domestic Case
Kathryn Steffey – Guadalupe Clinic
Virginia Sudbury – Family Law Clinic
Aaron Tarin – Immigration Clinic
Jessica Taylor – Family Law Clinic
Ita Tonga – Family Law Clinic
Linh N. Tran-Layton – Immigration Clinic
Joy Walters – Bankruptcy Hotline & Family Law Clinic
Murry Warhank – Guadalupe Clinic
Tracey Watson – Family Law Clinic
Angilee Wright – Family Law Clinic

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.

Notice of Petition for Reinstatement to the Utah State Bar by Stanford Nielson

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement of Stanford V. Nielson and Motion to Consolidate Cases ("Petition") filed by Stanford Nielson, in *In the Matter of the Discipline of Stanford Nielson,* Third Judicial District Court, Civil No. 940905588. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

2010 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2010 Summer Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org, no later than Friday, May 21, 2010. The award categories include:

1. Judge of the Year
2. Distinguished Lawyer of the Year
3. Distinguished Section/Committee of the Year

Do You Have a Client Who May Have a Legal Claim Against an Investment Advisor?

We Can Help.

Our legal practice is reserved exclusively to the representation of individuals and small companies in claims to recover investment losses resulting from mismanagement or fraud.

Claims against brokers are filed with FINRA*. Claims against other Investment Advisors are usually filed in arbitration, but the forum varies depending on the customer agreement.

*FINRA is the Financial Industry Regulatory Authority, formerly the National Association of Securities Dealers (NASD). FINRA has regulatory authority over all broker dealers in the United States.

Consultation is Free. Even if we decline the case, we provide the client with an analysis of the cause and amount of loss at no charge.

Attorneys' fees are paid on a contingent fee basis; your client pays no attorneys fees if we do not recover for them. Our clients, by definition, have already lost significant funds. We do not subject them to further loss in the event the claim is not successful.

Please contact us if we can be of service to your client.

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Utah Bar Foundation

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

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

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

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

Nomination forms must be received in the Foundation office no later than 5pm on Wednesday, May 12, 2010 to be placed on the ballot.

The Utah Bar Foundation will be holding the Annual Meeting of the Foundation on Thursday, July 15, 2010 at 9:00am in Sun Valley, Idaho. This meeting will be held in conjunction with the Utah State Bar's Annual Meeting.

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

Utah State Bar Request for 2010–2011 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more of 13 different committees which participate in regulating admissions and discipline and in fostering competency, public service and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name_____ Bar No._____

Office Address_____ Telephone_____

Email Address_____ Fax No._____

Committee Request

1st Choice:_____ 2nd Choice:_____

Committees

1. **Admissions –** Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.
2. **Bar Examiner –** Drafts, reviews and grades questions and model answers for the Bar Examination.
3. **Bar Exam Administration –** Assists in the administration of the Bar Examination. Duties include overseeing computerized exam-taking security issues, and the subcommittee that handles requests from applicants seeking special accommodations on the Bar Examination.
4. **Character & Fitness –** Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.
5. **Courts and Judges –** Coordinates the formal relationship between the judiciary and the Bar including review of the organization of the court system and recent court reorganization developments.
6. **Fee Dispute Resolution –** Holds mediation and arbitration hearings to voluntarily resolve fee disputes between members of the Bar and clients regarding fees.
7. **Fund for Client Protection –** Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.
8. **Ethics Advisory Opinion –** Prepares formal written opinions concerning the ethical issues that face Utah lawyers.
9. **Member Resources –** Reviews requests for sponsorship and involvement in various group benefit programs, including health and malpractice insurance and other group benefits.
10. **Spring Convention –** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
11. **Summer Convention –** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
12. **CLE Advisory Committee –** Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality and conformance.
13. **Unauthorized Practice of Law –** Reviews and investigates complaints made regarding unauthorized practice of law and takes informal actions as well as recommends formal civil actions.

PLEASE COMPLETE FRONT AND BACK OF FORM BEFORE SUBMITTING REQUEST

Please list current or prior service on Utah State Bar committees, boards or panels or other organizations:

_____
_____
_____
_____

Please list any Utah State Bar sections of which you are a member:

_____
_____
_____
_____

Please list *pro bono* activities, including organizations and approximate *pro bono* hours:

_____
_____
_____
_____

Please list the fields in which you practice law:

_____
_____
_____
_____

Please include a brief statement indicating why you wish to serve on this Utah State Bar committee and what you can contribute. You may also attach a resume or biography.

_____
_____
_____
_____
_____
_____
_____

Instructions to Applicants: Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday.

Date_____ **Signature**_____

Detach & Mail by June 30, 2010 to:
Robert L. Jeffs, President-Elect
645 South 200 East • Salt Lake City, UT 84111-3834

"and Justice for all"

28th Annual Law Day 5K Run & Walk

presented by Bank of the West

May 15, 2010 • 8:00 a.m.

S. J. Quinney College of Law at the University of Utah

"Law in the 21st Century - The Race to Justice"

REGISTRATION INFO: Mail or hand deliver completed registration to address listed on form (registration forms are also available online at www.andjusticeforall.org). **Registration Fee:** before April 30 -- $25 ($10 for Baby Stroller Division), after April 30 -- $28 ($12 for the Baby Stroller Division). Day of race registration from 7:00 a.m. to 7:45 a.m. Questions? Call 801-924-3182.

HELP PROVIDE LEGAL AID TO THE DISADVANTAGED: All event proceeds benefit "and Justice for all", a collaboration of Utah's primary providers of free civil legal aid programs for individuals and families struggling with poverty, discrimination, disability and violence in the home.

DATE: Saturday, May 15, 2010 at 8:00 a.m. Check-in and day-of race registration in front of the Law School from 7:00 - 7:45 a.m.

LOCATION: Race begins and ends in front of the S. J. Quinney College of Law at the University of Utah just north of South Campus Drive (400 South) on University Street (about 1350 East).

PARKING: Parking available in the lot next to the Law Library at the University of Utah Law School (about 1400 East), accessible on the north side of South Campus Drive, just east of University Street (a little west of the stadium). Or take TRAX!

USATF CERTIFIED COURSE: The course is a scenic route through the University of Utah campus. A copy of the course map is available on the website at www.andjusticeforall.org.

CHIP TIMING: Timing will be provided by Milliseconds electronic race monitoring. Each runner will be given an electronic chip to measure their exact start and finish time. Results will be posted on www.andjusticeforall.org immediately following race.

RACE AWARDS: Prizes will be awarded to the top male and female winners of the race, the top male and female attorney winners of the race, and the top two winning speed teams. Medals will be awarded to the top three winners in every division, and the runner with the winning time in each division will receive two tickets to the **Utah Arts Festival**.

RECRUITER COMPETITION: It's simple, the organization who recruits the most participants for the Run will be awarded possession of the Recruiter Trophy for one year. However, all participating recruiters are awarded a prize because success of the Law Day Run depends upon our recruiters! To become the 2010 "Team Recruiter Champion," recruit the most registrants under your organization's name. Be sure the Recruiting Organization is filled in on the registration form to get competition credit.

SPEED TEAM COMPETITION: Compete as a **Speed Team** by signing up five runners (with a minimum of two female racers) to compete together. All five finishing times will be totaled and the team with the fastest average time will be awarded possession of the Speed Team Trophy for one year. There is no limit to how many teams an organization can have, but a runner can participate on only one team. To register as a team, have all five runners fill in the same Speed Team name on the registration form.

SPEED INDIVIDUAL ATTORNEY COMPETITION (Sponsored by Workman Nydegger): In addition to the overall top male and female race times recognized, the top male and female attorneys with the fastest race times will be recognized. To enter, an individual must fill in their State Bar number in the space provided on the registration form.

BABY STROLLER DIVISION: To register you and your baby as a team, choose the **Baby Stroller Division**. IMPORTANT: Baby Stroller entrants register **only** in the baby stroller division. Registration for the stroller pusher is the general race registration amount ($25 pre-registration, $28 day of). Simply add on $10 for each baby you want to get a t-shirt for ($12 day of). Don't forget to fill in a t-shirt size for both adult and baby.

WHEELCHAIR DIVISION: Wheelchair participants register and compete in the **Wheel Chair Division**. Registration is the general race registration amount ($25 pre-registration, $28 day of). An award will be given to the top finisher.

"IN ABSENTIA" RUNNER DIVISION: If you can't attend the day of the race, you can still register in the **"In Absentia" Division** and your t-shirt and racer goodie bag will be sent to you after the race.

CHAISE LOUNGE DIVISION: Register in the **Chaise Lounge Division**. Bring your favorite lounge chair, don your t-shirt, and enjoy your racer bag of goodies while cheering on the runners and walkers as they cross the finish line!

REGISTRATION - "and Justice for all" Law Day 5K Run & Walk - presented by Bank of the West
May 15, 2010 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

To register by mail, please send this completed form and registration fee to Law Day Run & Walk, c/o Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111. If you are making a charitable contribution, you will receive a donation receipt directly from **"and Justice for all".**

First Name: _____ Last Name: _____
Address: _____
City, State, Zip: _____
Birth Date: _____ Phone: _____ E-mail Address: _____

OPTIONAL COMPETITIONS (Registrations must be received by April 30, 2010 to be entered in any of these):

Recruiting Organization:	Speed Competition Team:	Speed Individual Attorney:
_____	_____	_____
(must be filled in for recruiters' competition)	(team name)	(Bar number)

Shirt Size (please check one)

❒ Child XS ❒ Child S ❒ Child M ❒ Child L

❒ Adult S ❒ Adult M ❒ Adult L ❒ Adult XL ❒ Adult XXL

❒ Long-sleeved T-Shirt (*add $10*)

Baby Shirt Size (*baby stroller participants only*)

❒ 12m ❒ 18m ❒ 24m ❒ Child XS

DIVISION SELECTION (circle only one division per registrant)

14 & Under - Male	A	25-29 - Female	H	45-49 - Male	O	60-64 - Female	V	Wheelchair - Male	CC
14 & Under - Female	B	30-34 - Male	I	45-49 - Female	P	65-69 - Male	W	Wheelchair - Female	DD
15-17 - Male	C	30-34 - Female	J	50-54 - Male	Q	65-69 - Female	X	Baby Stroller - Male	EE
15-17 - Female	D	35-39 - Male	K	50-54 - Female	R	70-74 - Male	Y	Baby Stroller - Female	FF
18-24 - Male	E	35-39 - Female	L	55-59 - Male	S	70-74 - Female	Z	Chaise Lounge	GG
18-24 - Female	F	40-44 - Male	M	55-59 - Female	T	75 & Over - Male	AA		
25-29 - Male	G	40-44 - Female	N	60-64 - Male	U	75 & Over - Female	BB	**In Absentia**	**HH**

☐ *Please check here if you **do not** wish to be timed during the walk/ run.*

Payment

Pre-Registration *(before 04/30/10)*	$25.00
Baby Stroller *(add $10 per baby)*	$10.00
Long sleeved t-shirt	$10.00
Charitable Donation to "and Justice for all"	$_____
TOTAL PAYMENT	$_____

Payment Method

❒ Check payable to "Law Day Run & Walk"

❒ Visa ❒ Mastercard ❒ American Express

Name on Card _____

Address_____

No._____ exp. _____

RACE WAIVER AND RELEASE: I waive and release from all liability the sponsors and organizers of the Run and all volunteers and support people associated with the Run for any injury, accident, illness, or mishap that may result from participation in the Run. I attest that I am sufficiently trained for my level of participation. I also give my permission for the free use of my name and pictures in broadcasts, video, web, newspapers, and event publications. I consent to the charging of my credit card submitted with this entry for the charges selected. I understand that entry fees are non refundable. **I agree to return the timing transponder and its attachment device to an appropriate race offical after the race. If I fail to do so, I agree to pay $95.00 to replace the timing transponder and attachment device.**

Signature (or Guardian Signature for minor) Date If Guardian Signature, Print Guardian Name

_____ _____

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Notice of Electronic Balloting

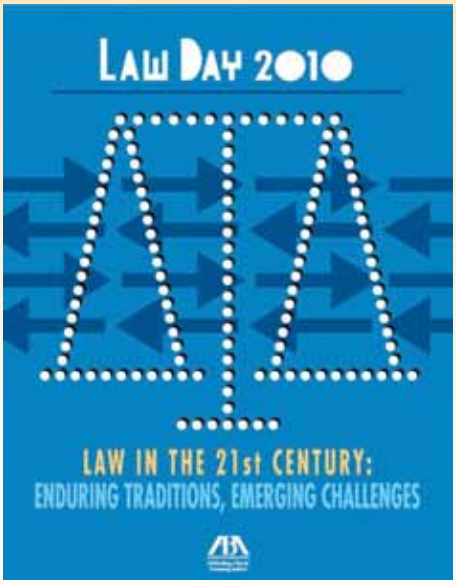
Utah State Bar elections are moving from the traditional paper ballots to electronic balloting beginning this April with the 2010–2011 elections. Online voting reduces the time and expense associated with printing, mailing, and tallying paper ballots and provides a simplified and secure election process. 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 at http://www.utahbar.org/forms/members_directory_search.html to see what email information you have on file. You may update your email address information by using 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.

2010 LAW DAY LUNCHEON

FRIDAY, APRIL 30 • 12:00 NOON

LITTLE AMERICA HOTEL

500 SOUTH MAIN STREET • SALT LAKE CITY



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- Liberty Bell Award (Young Lawyers Division)
- Pro Bono Publico Awards
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FROM LEFT TO RIGHT:

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R. CAMDEN ROBINSON*
BRIAN J. RIDDLE*
JEFFREY K. RIDDLE

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Attorney Discipline

ADMONITION

On November 30, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 8.1(b), (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct).

In summary:
An attorney was hired to assist a client in a property dispute. The attorney failed to send letters within 14 months of being hired. The attorney failed to take any appropriate or effective actions to obtain all necessary information to fully prepare the client's letters. The attorney failed to answer letters, phone calls, and emails from the client. The attorney failed to send written correspondence when phone calls were not answered. The attorney did not finish the legal work. The attorney failed to respond to the OPC's Notice of Informal Complaint.

Mitigating factor: No injury to clients.

ADMONITION

On December 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) (Communications with Persons Represented by Counsel), and 8.4(a) (Misconduct).

In summary:
An attorney represented a client in a domestic dispute. The court appointed a separate attorney to represent a party also involved in the domestic dispute. The attorney knew that the separate party was being represented by an attorney. The attorney communicated in the presence of the separate party regarding the subject of the representation without the knowledge and/or consent of the Court appointed attorney.

ADMONITION

On November 13, 2009, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.5(a) (Fees), 7.1 (Communications Concerning a Lawyer's Services), 7.5(d) (Firm Names and Letterheads), and 8.4(a) (Misconduct).

In summary:
The attorney met with a potential client for a free consultation. The attorney discussed the attorney's fees with the potential client and gave an amount for the fees should the potential client hire the attorney. The attorney appeared at one court hearing on an emergency basis. The attorney met with the potential client afterwards and discussed the fee. The potential client paid the attorney a small fee for the appearance. The potential client signed a retainer agreement but then decided and told the attorney that the representation was no longer wanted. The client then hired another attorney whose fee was less. Even though the attorney had not been retained, the attorney appeared at a driver's license hearing for the client. The attorney left when the client appeared with another attorney. The attorney filed a collection lawsuit against the potential client. The attorney attempted to collect an unreasonable fee for services rendered. The attorney caused a debt collection action to be filed for an amount that was equal to the entire flat fee that would have been charged had the client accepted the representation. The attorney used "and Associates" as firm names on his letterhead when the attorney is the only attorney in the office. The use of "and Associates" represents to the public that there are other attorneys at the office.

PUBLIC REPRIMAND

On November 24, 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 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 7.1 (Communications Concerning a Lawyer's Services), 7.5(d) (Firm Names and Letterheads), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Long charged excessive fees for work he completed in two criminal matters. In one case Mr. Long appeared in court only a few times before his client was accepted into Drug Court. In another case Mr. Long made only a few court appearances before his client entered a plea. In the second case Mr. Long did not appear in court after his client's plea was entered.

At all times relevant to the conduct at issue, Mr. Long was the only lawyer in his office. Mr. Long presented himself to the public using the names L. Long Lawyers and Long & Associates. The use of these firm names misleads the public to conclude that there were other lawyers in Mr. Long's office.

PUBLIC REPRIMAND

On January 6, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Joe Cartwright for violation of Rules 1.2(a) (Scope of representation and Allocation of Authority Between Client and Lawyer), 1.4(a) (Communication), 1.4(b) (Communication), 1.15(c) (Safekeeping Property), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

A client met with Mr. Cartwright's contract paralegal. The paralegal represented to the client and his parents the intent to perform legal work for a substantially discounted fee. Mr. Cartwright was unaware of the communication. Mr. Cartwright instructed the paralegal to collect a retainer fee from the client and instructed the paralegal to inform the client of Mr. Cartwright's hourly rate. The paralegal instructed the client to make a check payable to him and the paralegal proceeded to hold that money for over two weeks without the money being deposited in Mr. Cartwright's trust account. Mr. Cartwright never met with the client. Mr. Cartwright never explained his fee structure or scope of representation to the client. Mr. Cartwright failed to specifically instruct his paralegal to have the retainer check paid to Mr. Cartwright.

RESIGNATION WITH DISCIPLINE PENDING

On January 13, 2010, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Richard Reynolds for violation of Rules 1.2(d) (Scope of Representation), 1.4(b) (Communication), 1.5(b) (Fees), 1.15(d) (Safekeeping Property), 3.3(a)(1) (Candor Toward the Tribunal), 8.1(b) (Bar Admissions and Disciplinary Matters), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary there are two matters:

In the first matter, a client hired Mr. Reynolds to represent her in her divorce. The court entered a restraining order that prevented the sale of personal and marital assets that could be deemed a marital asset by both parties in the divorce case. The client's vehicle was an asset that could have been deemed a marital asset in the divorce proceedings. Mr. Reynolds did not explain how the sale of the vehicle could effect the restraining order and the divorce case. Mr. Reynolds's billing for his client listed an unexplained increase in the balance due. Mr. Reynolds did not provide his client receipts or proof of how the claimed expert/consulting fees were assessed. After Mr. Reynolds withdrew from his client's representation, he filed a Motion to Intervene and Memorandum to Intervene on her case in the divorce matter. Mr. Reynolds obtained an order on his motion. The client filed a Motion for Review of Order Re: Motion to Intervene with the Court. The court granted a review of the issue of attorney fees and costs owed by the client to Mr. Reynolds. At a review hearing, the court directed Mr. Reynolds to produce to his client's new attorney all computer files involving his client in a format to be specified by the client's attorney. Mr. Reynolds did not provide any computer files to the client's attorney. At a review hearing, the court ordered Mr. Reynolds to provide his computer billing files to his former client's attorney. Mr. Reynolds did not comply with the court's order that he provide his former client's attorney his computer billing files.

In the second matter, Mr. Reynolds was hired to represent a client in a criminal matter involving charges of possession of a controlled substance and possession of a dangerous weapon by a restricted person. The client signed an Employment and Fee Agreement with Mr. Reynolds. The client paid Mr. Reynolds a flat-fee of $1500. The client's firearms and ammunition had previously been seized. As part of an agreement, Mr. Reynolds took possession of the client's firearms and ammunition. Mr. Reynolds indicated to his client that he would turn the firearms and ammunition ("property") over to a friend or family member of the client. Mr. Reynolds did not surrender the property to a friend or family member of the client. Mr. Reynolds did not surrender the property to his client upon completion of his client's probation and reduction of conviction to a misdemeanor.

The client made numerous written and telephonic requests for his property to be returned. Mr. Reynolds did not give the client any money in exchange for the property. A judgment was entered against Mr. Reynolds in First District Court, as a result of a suit brought by his client for the return of his property. The OPC served Mr. Reynolds with a Notice of Informal Complaint (NOIC). Mr. Reynolds did not respond to the NOIC.

SUSPENSION

On December 21, 2009, the Honorable Robert K. Hilder, Third District Court entered an Order of Discipline: Suspension for six months and one day against Douglas H. Killpack for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4 (Communication), 3.3(a) (Candor Towards the Tribunal), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary there are two matters:

A client contacted Mr. Killpack to represent her on her divorce matter. Prior to a meeting the client had informed Mr. Killpack by telephone that she did not wish to file bankruptcy at that time due to a pending home loan. At the meeting the client completed bankruptcy paperwork with the understanding that it would be ready should she later decide to file for bankruptcy. Within approximately two days of the client's meeting with Mr. Killpack, Mr. Killpack filed the bankruptcy and the divorce. The client learned the bankruptcy was filed when she was contacted by her loan officer regarding her home loan. The client received a letter informing her of the Bankruptcy Trustee meeting which had been scheduled for her case. Mr. Killpack initially informed the client that the notice was an error and that Mr. Killpack still had the unfiled bankruptcy. Mr. Killpack told his client that the bankruptcy was filed by mistake. Mr. Killpack's solution to correct the problem was for neither she nor Mr. Killpack to attend the Trustee meeting so that the case would be dismissed. The client and her loan officer spoke with Mr. Killpack and Mr. Killpack agreed to write to the loan provider admitting Mr. Killpack's error in filing the bankruptcy with the hope of reviving the home loan.

Mr. Killpack attended the Trustee's meeting. The client's attempts to discuss this matter with Mr. Killpack further resulted in unreturned calls. Mr. Killpack refused to refund the money that his client paid for the bankruptcy paperwork. Subsequent to these events, the client hired another attorney in an effort to resolve these matters. The attorney sent Mr. Killpack a letter stating essentially the same facts described above. In his Fax Transmission to the attorney, Mr. Killpack denied his error. At no time did Mr. Killpack contact the bankruptcy court to correct his error.

A client hired Mr. Killpack to file a bankruptcy. Mr. Killpack filed a chapter 7 bankruptcy on behalf of his client. Prior to the filing of the bankruptcy, his client married and moved to California. The client attempted to contact Mr. Killpack to inform him that she had changed her address. Mr. Killpack did not return his client's telephone calls. The client sent Mr. Killpack a letter informing him of her new contact information and requested that Mr. Killpack contact her to inform her of the court date. The client also called Mr. Killpack and left a message with her contact information. Mr. Killpack did not respond to his client's telephone call. Mr. Killpack attended the meeting of the creditors, during which the trustee completed a detailed report stating there was no new address for the client. Mr. Killpack made no effort to ensure that his client was aware of or would be attending the creditors' meeting. The client received information from the Bankruptcy Court indicating that because she had not attended the meeting of the creditors, her bankruptcy case was dismissed. Mr. Killpack made no effort to object to the dismissal on his client's behalf or inform the court that he erred by not providing his client's new address to the court.

SUSPENSION

On December 14, 2009, the Honorable Kate A. Toomey, Third District Court entered an Order of Discipline: Suspension for a three year suspension against Christopher S. Hall for violation of Rules 5.5(a) and (b) (Unauthorized Practice of Law; Multijurisdictional Practice of Law), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Hall was notified that his license was administratively suspended, but he nevertheless continued to practice law and held himself out to be a lawyer by filing pleadings, appearing in court, and communicating with opposing counsel. Mr. Hall failed to respond in a timely fashion to two lawful demands for information from the Office of Professional Conduct and failed to appear for Screening Panel Hearings in two disciplinary matters.

Aggravating factors included: failure to acknowledge the wrongful nature of the conduct and failure to make a good faith effort to rectify the consequences; substantial experience in the practice of law; prior record of discipline; a pattern of misconduct; multiple offenses; and obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority.

Upcoming Events

New Lawyers Survivor's Guide CLE Seminar

Dates: April 9

Times: TBD

Location: Utah Law & Justice Center
645 South 200 East
Salt Lake City, Utah.

The Utah State Bar and the YLD are teaming up to provide new lawyers with the information that they need to practice law in a changing economy – successfully starting a solo law practice, getting and keeping your first client, interviewing tips and secrets, advice from seasoned lawyers, and other information to help you succeed. Additional information will be announced by email and on the YLD website at www.utahyounglawyers.org.

Wills for Heroes

Date: March 19
(during the Utah Bar's Spring Convention in St. George)

Time: 12:30 p.m. – 5:30 p.m.
Training will take place during the first hour.

Location: St. George Police Department
200 East 265 North
St. George, Utah

Date: April 17

Time: 10:00 a.m. – 5:00 p.m.
Training will take place during the first hour.

Location: Logan City Police Department
290 North 100 West
Logan, Utah

The Wills for Heroes program was predicated upon the alarming fact that an overwhelmingly large number of first responders – 80 to 90% – do not have simple wills or any type of estate planning documentation, although they regularly risk their lives in the line of duty. The objective of the Wills for Heroes program is to provide free estate planning documents to firefighters, police officers, paramedics, corrections and probation officers and other first responders and their spouses or domestic partners. Attorneys of all ages and experiences are encouraged to volunteer. For more information, and to register to volunteer visit the Wills for Heroes tab at www.utahyounglawyers.org.

Tuesday Night Bar

Dates: March 2, 9, 16, 23, and 30
April 6, 13, 20, and 27

Time: 5:00 p.m. – 7:00 p.m.

Location: Utah Law & Justice Center
645 South 200 East
Salt Lake City

Since October of 1988, the YLD has coupled with the Utah State Bar to provide a free legal advice program to help members of the community to determine their legal rights on a variety of issues. Each year, approximately 1100 individuals meet with a volunteer attorney for a brief one-on-one consultation at no cost. Attorneys of all ages and experiences are encouraged to volunteer. To volunteer, please contact Kelly Latimer at kellylatimer@comcast.net.

Wednesday Night Bar (Spanish-language clinic)

Dates: March 3, 17
April 7, 21

Time: 6:00 p.m. – 8:00 p.m.

Location: Sorenson Multicultural Center
855 West 1300 South
Salt Lake City

Spanish-speaking attorney Volunteers are needed for a Spanish-language clinic held on the first and third Wednesday of each month. Attorneys of all ages and experiences are encouraged to volunteer. Contact Gabriel White for additional information at gabriel.white@chrisjen.com.

Citizenship Initiative

Dates: March 10, 24
April 14, 28

Times: 6:00 p.m. to 8:00 p.m

Location: Sorenson Multicultural Center
855 West 1300 South
Salt Lake City

The YLD is beginning a new program this year aimed at assisting individuals who are preparing to take the Naturalization Test and become U.S. citizens. Volunteer attorneys will assist in tutoring individuals on the fundamental concepts of American democracy and the rights and responsibilities of citizenship, including topics such as basic U.S. history and civics. Attorneys of all ages and experiences are encouraged to volunteer for this valuable and fun experience. To volunteer, please contact Nathan Burbidge at NBurbidge@burbidgewhite.com.

Cinderella Project

The Cinderella Project will take place in April. The date is still to be determined. The date, time, and location will be announced by email and on the YLD website at www.utahyounglawyers.org.

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

Young Lawyers Division Executive Board Meeting

Dates: March 3
April 7

Times: 12:00 p.m.

Location: Utah Law & Justice Center
645 South 200 East
Salt Lake City

The YLD Executive Board meets once a month to discuss YLD business, projects, upcoming events, and how the YLD can benefit young lawyers and the community. If you would like to attend, please contact Michelle Allred at allredm@ballardspahr.com or any member of the Executive Board.

What is the Young Lawyers Division (YLD)?

All members of the Utah State Bar in good standing under 36 years of age and members who have been admitted to their first state bar for less than five years, regardless of age, are automatically members of the Young Lawyers Division. For more information on YLD, or the events listed below, visit www.utahyounglawyers.org or contact Michelle Allred, YLD President, at allredm@ballardspahr.com.

The Litigation Paralegal: Tips and Advice for Assisting in all Phases of Ligitation

by Heather Finch

The Role of the Paralegal

While most attorneys are becoming more accustomed to including a paralegal in their litigation teams, they do not always know how to make maximum use of a paralegal's skills and talents. You can increase your involvement and responsibility in a case by developing a strong and open line of communication with the attorneys and then by doing good work.

Ask the attorneys on a regular basis what is going on in the case, the outcome of hearings, the judge's ruling on motions, anticipated scheduling for discovery and what motions have been filed and what will be filed in the future. Read and understand the major pleadings in the case and review major correspondence. Also, read the briefs when compiling their exhibits or attachments. Understanding the legal and factual issues in the case will help you play a more significant role as the case progresses, and will save a lot of time as you begin to prepare for trial. Show a sincere interest in the issues of the case in order to encourage the attorneys to include you as a litigation team member.

It is up to you to offer to undertake specific tasks which the attorneys may not be aware you can take on. Most attorneys have no idea how many things a well-trained, intelligent, and experienced paralegal can accomplish. Don't be afraid to take on new tasks - challenge yourself! Have a goal to increase the role you play on each successive case you work on with a particular attorney.

Start preparing for trial as soon as you become involved in the case.

Keep a chart of when depositions are taken, digested, and signature sheet returned. This will save you from having to reconstruct this before trial and will help you manage your workload throughout the litigation. Compile a "key documents" notebook as soon as you begin indexing documents and include documents attached as exhibits to briefs or key deposition exhibits. Keep a running index of deposition exhibits. This is useful when preparing for subsequent depositions and helps avoid duplication of exhibits. Start a first draft of your trial exhibit list and prepare a running index of exhibits attached to briefs. By adding these exhibits to your key documents notebook, it increases your familiarity with the key documents of the case and makes it easy to find them, since they will undoubtedly be used again and again during litigation. The key documents notebook is a good place to look when preparing your first draft of the trial exhibit list. Update your witness files often as this will make preparing witnesses for their depositions much easier.

Exhibits – Before Trial Begins

When it comes to trial exhibits, work with the attorneys to get decisions from them early enough so that the process is not mayhem. Once identified, order the exhibits in the manner in which they should appear on the list, e.g., chronological or by witness. Explain to the attorneys the process of preparing exhibits so they understand how long it takes to copy, punch, and organize them into binders with tabs. Set up a timetable for the process with drop dead dates. Make sure you are familiar with the schedule of pre-trial events and advise the attorneys as to when things need to be completed in order to meet those deadlines. Prepare a draft exhibit list from the deposition exhibits, exhibits to briefs, and key documents file. Include copies of the documents when you present this to the attorneys to facilitate their review. Gather all documents into a conference room and urge (or really nag) the attorneys to go through them so they can identify potential trial exhibits. You can even offer to make a first cut if they wish.

Determine as early as possible how many copies you will be making, how the attorneys want their exhibits organized, and how the judge prefers them. Pre-order binders, tabs and file

HEATHER FINCH is a paralegal at the firm of Howard, Lewis & Peterson specializing in civil litigation. She is also the Chair Elect of the Paralegal Division of the Utah State Bar.

folders. Alert your copy company about the upcoming job so they can allocate the necessary resources. Talk with the judge's clerk about numbering type and pre-numbering. Whenever possible, pre-number exhibits before making copies. The more unnumbered copies floating around, the more confusing it gets later. Place numbered copies of the trial exhibits into the appropriate witness files. Whenever possible, make a clean set over which you have complete and total control! Lawyers tend to mark up their copies, then you're sunk when you need a clean copy.

As early as possible, work with the attorneys to identify your demonstrative and summary exhibits. Begin drafting them even if you don't yet have all the data. Plan for whatever audio/visual equipment you will need. Make arrangements to rent whatever equipment you will need well in advance. Get spare light bulbs and extension cords. Visit the courtroom to determine where the outlets are located and where you can put your overhead projector or LCD unit. Find out if the court has a white screen and where the best placement of the screen would be for both the judge and jury to view.

Coordinate with your experts to make sure their exhibits are in order, and find out which ones will be used as demonstrative exhibits and prepare them accordingly. Keep trial exhibit lists of all parties organized in several ways – chronologically, by exhibit number, or by witness – for ease of cross reference, particularly as the attorneys cross examine. Communicate with the attorneys how they will want exhibits organized for use at trial. For example, do they want one exhibit per file folder or in binders? Does the attorney want you to hand exhibits to the attorney as the attorney needs them or will the attorney take all of the exhibits to the podium at the beginning of the examination?

Witnesses

Early on, prepare and serve your trial subpoenas. Whenever possible, call witnesses to establish a cordial relationship, to obtain all their phone numbers, and to advise them of the rough plans for the date and time of their testimony. If they have never testified before, explain how it works and what to expect. *Take care to avoid coaching third party witnesses*. When asked, (and they will ask) just say that you don't know what questions they will be asked. If the witness has been deposed, you might suggest that it is possible that they could be asked some of the same questions they were asked in their deposition and make sure they have a copy of their deposition to review. They can discuss their anticipated testimony with the attorney and make arrangements for the attorney to meet with them to answer their questions.

If you will be assisting in court during trial, make arrangements for someone at your office to coordinate calling the witnesses and arranging for them to appear and testify at the appropriate date and time. Designate one person to coordinate this, in order to avoid confusion or duplication of efforts. If possible, have someone there at court to greet them, update them on the schedule and let them know whether they can sit in the courtroom while waiting to testify. This will make the witness more comfortable, and is also a good way to monitor whether your witnesses talk to anyone from opposing counsel's office or to other witnesses. Tell the witnesses to bring a book or something to keep them occupied as more often than not they are kept waiting for their time to testify.

Take good care of your clients. Right before trial, the attorneys are usually too busy to "babysit" so this becomes your job. Be reassuring. Present the trial team as organized and under control (no small feat), and answer whatever questions they might have *that you are qualified and authorized to answer*. When in doubt, defer to the attorneys.

Trial Notebooks

Communicate with the attorneys regarding what they want in their notebooks. In cases where more than one attorney is working on the case, it usually means multiple versions of trial notebooks. Some items to include in your notebook might be: (1) exhibit lists, (2) pre-trial orders, (3) witness outlines, (4) voir dire materials, (5) jury information & chart, (6) motions in limine, and (7) relevant case law.

The Courtroom

Have everything you will need for the courtroom with you, such as: (1) pleading files, (2) original depositions for publishing, if necessary, (3) source documents for summary or demonstrative exhibits, (4) witness files, (5) most recent correspondence file (or all, if you have room), (6) office supplies, (7) designated "go to" person back at the office if anything is needed, and (8) Extra light bulbs, pens, batteries for laptop and cell phone, PowerPoint files, etc.)

Introduce yourself to the judge's bailiff and clerk(s), if you haven't already met them during the course of litigation. Find out from the bailiff how early the courtroom is opened each morning (so you can get set up as early as possible), whether it will be locked at lunch, and whether you can leave things in the courtroom overnight. You will need to check to see if the judge has any hearings the next day before trial begins. Sometimes you can leave everything on the tables and other times you have to set it all aside. Find out if the judge has a preference as to where the audio visual screen is set up.

Make certain that all audio visual equipment is set up ahead of

time each day, that the equipment is working properly, and that you have all supplies you may need. For example, if there was a hearing that morning on another matter, your audiovisual equipment may have been moved or unplugged. These are the types of details the paralegal should handle so that the attorneys don't need to worry about them. They are seemingly minor, but if not taken care of, your team may look sloppy, unorganized or unsure of themselves before the judge or jury. Arrange ahead of time to have videotapes/DVDs and/or audiotapes made of the proceedings that you can get copies of as the trial progresses.

Specific Tasks at Trial

Keep track of what is entered into evidence and update your lists nightly. Establish a procedure with the attorneys where they ask you daily before trial ends whether everything they have used that day has been entered into evidence. Pull and refile exhibits as necessary (always refile exhibits at the end of the day - ask the judge's clerk if the judge's exhibit binders need to be reorganized or repaired).

Take notes when possible, at least of witnesses in order, time on and off the stand, major subjects, etc. This will help when reviewing the dailies, if requested, or when looking for testimony while working on the appellate briefs. Listen closely to testimony for any contradictions with previous deposition testimony. Having a laptop with the file information will help you quickly find that testimony and point it out to the attorneys. Establish a system with the attorneys in which you can let them know of any issues such as the arrival of surprise witnesses or prohibited witnesses in the courtroom. Some attorneys don't mind having notes passed while some do and they will ask for a nod before they release a witness. Work it out beforehand so you don't disrupt the proceedings and the attorneys' examinations.

Get the list of the jury pool from the court as soon as you can. Circulate the list at the firm to determine if anyone knows a potential juror. Take copious notes during Voir Dire, with a particular focus on items that may help you locate each juror after trial. Whenever possible, watch the jurors to gauge their attentiveness, e.g., who is sleeping, responses to particular testimony or witness, exhibits, or what testimony jurors are taking notes.

Check with the judge's clerk to see if the judge will release the telephone numbers of jurors. If not, try to catch jurors as they leave after a verdict has been rendered in order to ask permission to contact them later.

Refine the trial process each day. Ask the attorneys each night (in the unlikely event that they haven't already told you) what could be done to make things run more smoothly the next day. Refine your trial notebooks and exhibit organizations, pursuant to those discussions. Don't be afraid to offer suggestions since it is your job to organize and help make things run smoothly.

Post-Mortem

Draft an interview outline for jurors (be sure to include their view of witnesses, exhibits, experts, attorneys, arguments; i.e., who did you find most believable, least believable, etc.). Finalize the outline after input from the attorneys. Locate and call each juror for an interview and organize the results of your research. Meet with the attorneys to determine improvements for future trials. De-brief the support staff regarding how things went and how things could be improved for future trials. You will get helpful ideas from their perspective, especially if you weren't at the office during the day, and this will also give them the opportunity to gripe. Memorialize this meeting, so you can really use the suggestions next time you go to trial. Organize exhibits and notes while the trial is still fresh in your mind. This will help when you're trying to locate things for any appellate briefs. Don't forget to return original documents to the client, with the attorney's permission, while the trials is still fresh in the client's mind as well. Lastly, go home and reintroduce yourselves to your spouse, children, and significant others and take a few days off to recharge!

Seeking Nominations for the Distinguished Paralegal of the Year

The Paralegal Division of the Utah State Bar and Legal Assistants Association of Utah are seeking nominations for "Distinguished Paralegal of the Year."

For nomination forms and additional information please contact Suzanne Potts at spotts@clarksondraper.com.

The deadline for nominations is April 16, 2010.

The award will be presented at the Paralegal Day luncheon on May 20, 2010.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
03/10/10	**Mastering Complex Mediations.** 12:00–4:45 pm. Sheraton, Salt Lake City. $250. Negotiation for Attorneys: Beyond the Basics – IAM President, Teresa Wakeen; Outstanding Advocacy in Complex Mediations – William B. Bohling and Mark Rudy; Behind the Curtain and Inside the Other Rooms: Deconstructing the Mediator's Actions – Tracy Allen and Eric Galton; Don't Let the Mediator or Advocate Blow Your Session: Resurrecting the Stalled Mediation – Mike Young, Cliff Hendler and Karin Hobbs. Sponsored by the Utah State Bar Alternative Dispute Resolution Section.	4
03/11/10	**Utah Minority Bar Association Annual Immigration Law Seminar.** 1:00 – 5:00 pm. $75 for UMBA members, $100 for others. Immigration and its overlap with Employment Law – Roger Tsai. Immigration and overlap with Family Law – Scot Poston. Co-Sponsored by the Utah Minority Bar Association and the Utah State Bar.	3.5 CLE/NLCLE
03/18 thru 03/20/10	**2010 Spring Convention in St. George**	9
03/19/10	**Overview of Utah Courts EFiling.** (at the Spring Convention in St. George). $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 EFiling Project; Types of Efiling Opportinities for Firms and Solo Practitioners; Walk through demonstration of the web based efiling program.	1
03/24/10	**Thurgood Marshall's Coming!** Webcast featuring T. Mychael Rambo as Justice Thurgood Marshall. Winner of the ABA 2005 Silver Gavel Honorable Mention Award in Theatre! 10:00 am – 1:15 pm. $189.	3 self study
04/09/10	**New Lawyer Survival Guide: Especially designed for the currently unemployed attorney.** 1:00 – 5:00 pm. Free to currently unemployed attorneys of the Utah State Bar. The seminar will focus on the art of networking, including a session planned to interact with volunteer practicing lawyers. Information on Utah job prospects, tips on opening your own practice, building a safety net in legal and practice management, and finding clients. Alternative practice areas such as contract work and limited representation will also be discussed.	Pending
04/15/10	**New Lawyer Ethics Program.** 8:30 am – 12:30 pm. $75. Introduction to the Bar and to the Practice – Michelle Allred, Young Lawyer Division Chair; Introduction to the Bar & Pro Bono Service – Stephen W. Owens, President, Utah State Bar; Professionalism, Civility, and Practicing Law – Justice Jill N. Parrish, Utah Supreme Court; New Lawyer Training Program – Margaret D. Plane, Supreme Court Committee on New Lawyer Training; Who Defends Your Interests? – Michael Skolnick, Kipp & Christian; Consumer Assistance and the Discipline Process – Jeanine Timothy, CAP attorney; The Top Ten Reasons Lawyers Receive a Bar Complaint – Diane Akiyama, Office of Professional Conduct; Judging the Judges: What's Your Role? – Joanne Slotnik, Judicial Performance Evaluation Commission; A Candid Look at the Profession-Stress and Burnout – Utah Lawyers Helping Lawyers.	Fulfills new lawyer ethics requirement.
05/05/10	**Impeach Justice Douglas!** Webcast featuring Graham Thatcher as Justice William O. Douglas. 10:00 am – 1:15 pm. $189.	3 self study
05/11/10	**Gotcha's in Criminal Law.** 4:30 – 7:45 pm. $75 for active under 3, $90 for all others.	3 CLE/NLCLE
05/13/10	**Mentor Training and Orientation.** 9:00 – 11:00 am. Free to Utah Supreme Court Appointed Mentors. Utah Law & Justice Center	2 hrs. incl. 1 Ethics & 1 Prof.
06/09/10	**Clarence Darrow: Crimes, Causes and Courtroom.** Webcast featuring Graham Thatcher as Clarence Darrow. 10:00 am – 1:15 pm.	3 self study

Classified Ads

RATES & DEADLINES

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

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

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

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

OFFICE SPACE/SHARING

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.

Available for Sub-Lease are our beautifully-decorated offices, located in the heart of downtown Salt Lake City. Three fully furnished private offices, one unfurnished office, a four carrel workroom, main receptionist area with waiting room, large conference room, small conference room. Space available February 1st, call James at 801-364-5600 to schedule a time to look at the space.

POSITIONS AVAILABLE

Mid-to-large sized Salt Lake City law firm seeks an attorney with experience in tax law & estate planning to replace a retiring partner. The ideal candidate will have more than six years of experience. Send inquiries to Confidential Box #2, Attn: Christine Critchley, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834 or by email ccritchley@utahbar.org.

Estate and Tax Planning Attorney seeking a partner. Beautiful, furnished downtown offices call James at 801-364-5600.

EXPAND YOUR PRACTICE! VETERANS NEED REPRESENTATION Learn how at the Seattle seminar April 22-24, 2010 from NOVA, www.vetadvocates.com, 877-483-8238

Downtown mid-size law firm seeks to diversify its business practice group. This firm will consider individual/group of lawyer(s) with a portable book of business or possible merger with small firm. Outstanding facilities and benefits. Send replies to: Confidential Box #11, Attention: Christine Critchley, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111-3834 or by email to ccritchley@utahbar.org.

Petersen & Associates, the in house counsel for Farmers Insurance in Utah, is looking for an attorney with: Minimum 10 years experience, multiple first chair jury trial experience, significant exposure cases, complex litigation and tort/contract litigation. EEOC. Spanish speaking a plus. Competitive compensation package includes: Incentive based pay for performance, company car, 401k with generous company match, in addition to defined contribution pension plan, short-term incentive bonus plan and additional benefits. E-mail resume and/or cover letter to: debbie.rasmussen@farmers.com.

Main Street SLC law firm seeks 1-2 attorneys with existing clientele to join an association of 8 lawyers. Established and diverse group of seasoned lawyers focusing on business transactions and litigation. Newly-renovated office space. Please send inquiries to Confidential Box #3, Attn: Christine Critchley, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834 or by email ccritchley@utahbar.org.

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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