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Utah Bar® JOURNAL

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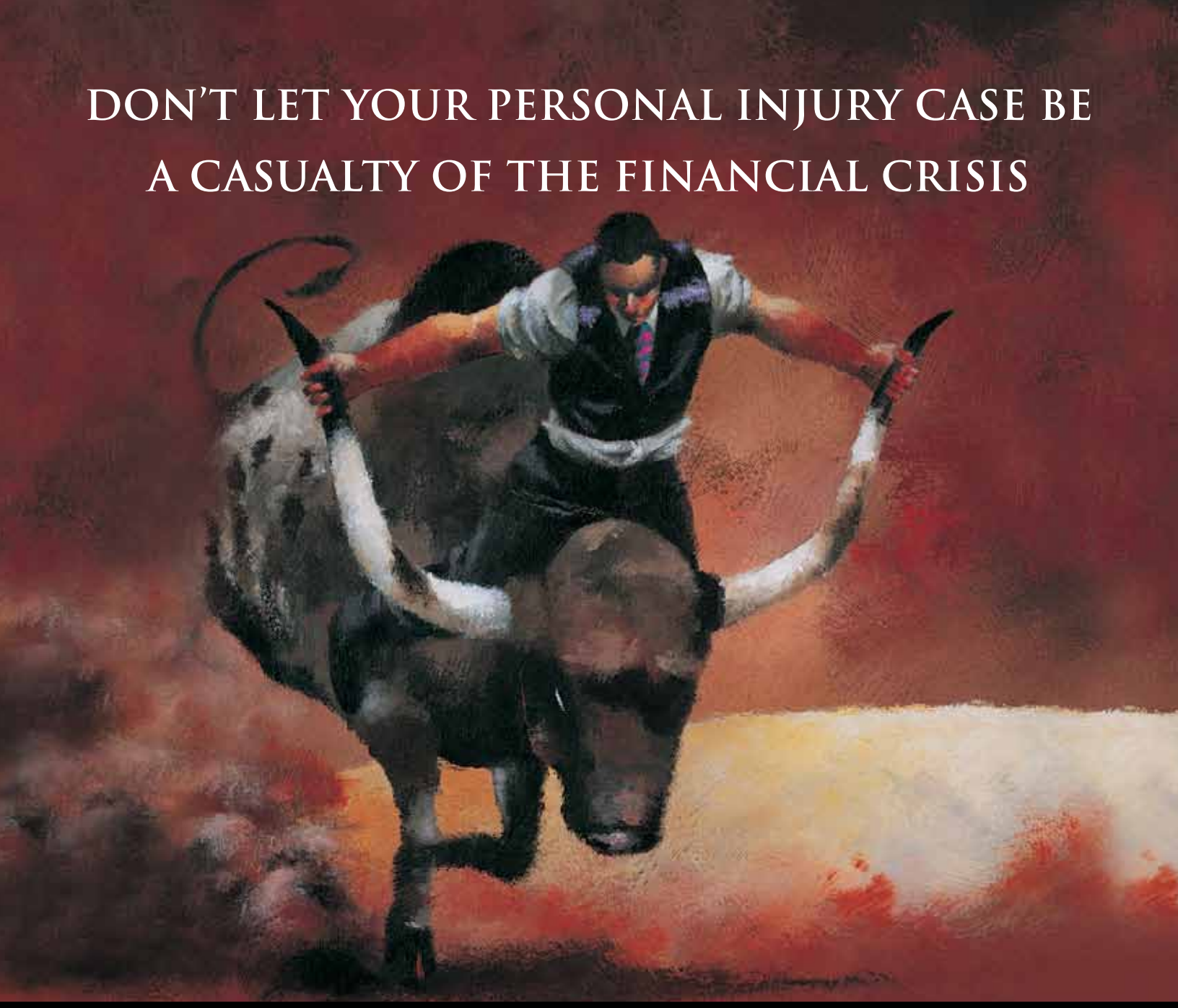

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Cover Art

"House on Fire" near Blanding, Utah, by George Sutton of Salt Lake City.

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

Interested in writing an article for the Bar Journal?

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

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

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

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

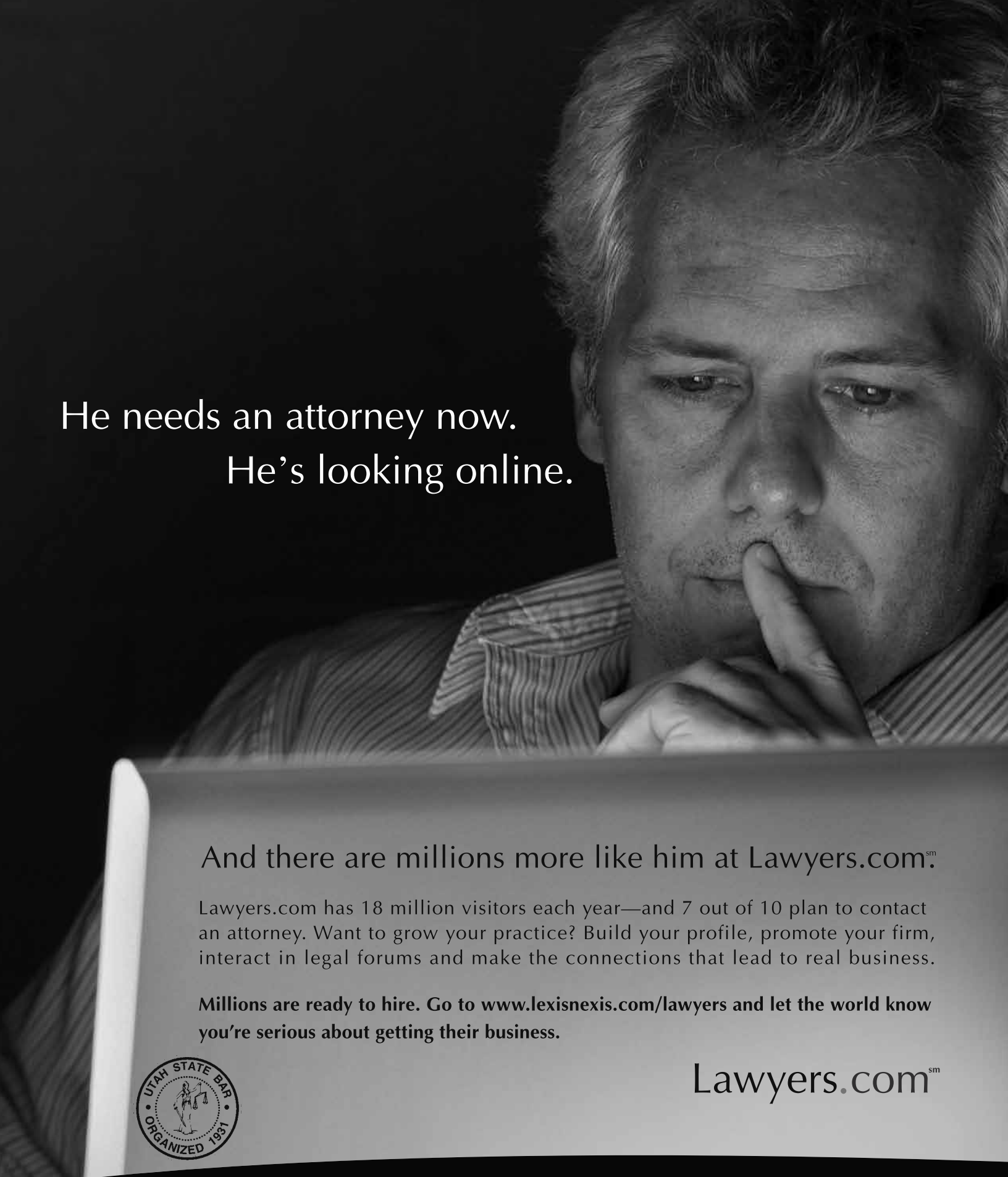
No Footnotes: Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial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

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

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

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

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



Letters Submission Guidelines:

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

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The Dreaded Letter from OPC

by Stephen W. Owens

The Bar's efforts can be broken down into four categories: Admissions, Discipline, Education, and Services. I would like to talk about the unpleasant topic of Discipline. Nothing can ruin a lawyer's day like receiving a letter from the Office of Professional Conduct (OPC) advising the lawyer of a Bar Complaint.

My four attorney firm, Epperson & Owens, focuses primarily on defending healthcare providers in medical malpractice cases. From time to time, I have also handled state licensing problems for my healthcare clients. Many times I have received a call from an irritated and nervous client saying, "An investigator from the State Division of Occupational and Professional Licensing just showed up in my waiting room and wants to interview me about an allegation."

"Is it sex, drugs, or money?" That is what I always think to myself. Those issues can get professionals (like everyone else in the world) in trouble.

Last Year: 1200 Complaints, 38 Lawyers Disciplined

In addition to sex, drugs, and money, lawyers have lots of other things to worry about, including ignoring a client's calls, blowing deadlines, taking a case you should reject (perhaps you do not know what you are doing and do not have the time and energy to find out), disclosing confidential information to others, or treating someone disrespectfully.

Last fiscal year the Bar received about 1200 calls, letters, or formal Complaints from people unhappy with lawyers. We have about 7800 active lawyers, for a complaint-to-lawyer ratio of about 15% (although some lawyers received multiple complaints). Last year 38 lawyers were disciplined, or about five out of every thousand lawyers. These included three disbarments, two suspensions, one resignation, and eleven public reprimands. Some complaints take over a year to process, but for simplicity's sake, I did not include in the above statistics "carry-over" matters from the year before or the year after.

Wading through 1200 unhappy complaints to find the .0048% of lawyers who justify discipline is a big effort. The paid and volunteer lawyers who weed through it all deserve our appreciation. Due process is always a big concern for everyone involved.

A Careful Review

Three years ago, the Bar Commission began a comprehensive review of all of the Bar's programs and operations. This review is now complete. Bar Commissioner Jim Gilson chaired a committee to review OPC and the Bar's Consumer Assistance Program (CAP) to see what might be improved. Jim had previously served as a member of a Supreme Court's Ethics and Discipline Committee, which consists of lawyers and members of the public who screen cases investigated by OPC. Other members of the review committee included Commissioner Lori Nelson, past Bar President Lowry Snow, past Commissioner Laurie Gilliland, and lawyer Kim Wilson. Kim previously chaired the Ethics and Discipline Committee.

The OPC review committee spent months going through all relevant written materials. It conducted many interviews with lawyers, members of the Utah Supreme Court Rules committee, members of the Supreme Court Ethics and Discipline Committee, and OPC staff. The Review Committee surveyed every attorney who had been a respondent in any discipline case that was concluded by OPC during the last two years and/or that had been sent to a screening panel. The Review Committee also sent an e-mail survey to all members of the Bar.

The Review Committee found that OPC and CAP are performing well and are generally positively regarded by Bar members. The Review Committee concluded that the current system of attorney discipline is preferred over alternative government-run systems. The surveys showed that most lawyers, including those who were respondents in matters brought against them by OPC, believed that OPC's lawyers and staff acted professionally and with civility and that OPC's Senior Counsel, Billy Walker, is well respected and has succeeded in his difficult job, which he has done for over 13 years.

The CAP Program, administered by Jeannine Timothy, was also perceived as being highly effective in screening out cases and resolving issues before they become discipline related. This is perceived to be a great service to lawyers and the public in not only helping clients understand issues involving lawyers, but also nipping potential complaints in the bud while they are still at a stage where resolution can be found short of an ethical violation.

Efforts to Improve

The Bar Commission is proud of the work of OPC and CAP and values the efforts of the many public and lay volunteers on the Court's Ethics and Discipline Committee screening panels. Of course, we should always work to improve the process for both the public and the profession.

The Commission recently adopted 10 recommendations of the Review Committee and will begin immediately with OPC and CAP to implement these recommendations:

1. Include a senior volunteer lawyer in OPC's weekly screening meetings to bring in more front-line private practice experience to help with screening and prosecutorial decisions. The severity of an ethics violation should be as much of a factor in the charging decision as whether there is credible evidence that a violation occurred. The senior volunteer lawyer should participate in OPC's meetings as a consultant with non-binding authority to assist OPC in screening cases. Four to six consultants will be selected by the Bar Commission's Executive Committee.

2. Provide mechanisms for greater use of the OPC Diversion Program. The Diversion Committee should determine whether the process could be streamlined. The availability of diversion could be better marketed.

3. Provide better training to screening panel members of the Supreme Court's Ethics and Discipline Committee about their role in the disciplinary process, including clarification of their relationship with OPC, the burden of proof that must be met by OPC, witness cross examination, and no presumption in favor of accepting the recommendations of OPC.

4. Appoint more solo and small firm practice lawyers or lawyers who practice family law or criminal law to serve as screening panel members.

5. Clarify the intake procedure between OPC and CAP to ensure that a non-written complaint about an attorney is ultimately treated the same as if it had been submitted in writing. Not all matters handled by CAP must be in writing.

6. Clarify the rule and provide guidance to the Bar's receptionist about the OPC/CAP intake process.

7. Develop rules or protocols for CAP in order to provide guidance and direction to future CAP Administrator.

8. Initiate investigations if OPC learns of possible violations of the rules via the public domain. These investigations should be expedited.

9. Promote awareness and increased use by Bar members of the Ethics Hotline.

10. Involve OPC and CAP in the full development and execution of these recommendations.

The Bar is fortunate to have six outstanding lawyers and five dedicated staff members in OPC and a helpful and experienced lawyer handling CAP. They provide a great service and will work with the Bar Commission and the Court to improve processes and help assure the public and the profession that complaints will be dealt with appropriately and as expeditiously as possible.

Conundrum Revisited

by David S. Dolowitz

In the 1998 article, *The Conundrum of Gifted, Inherited and Premarital Property in Divorce,* Utah Bar Journal, Volume XI, No. 3, April 1998, the question of how courts treat gifted, inherited, and premarital property was explored. The inconsistency of the decisions of the appellate courts rotating between the fairly definitive language of *Mortensen v. Mortensen,* 760 P.2d 304 (Utah 1988), and the equitable approach actually effected in the *Mortensen* case and utilized in *Burke v. Burke,* 733 P.2d 133 (Utah 1987), was addressed and analyzed. A series of decisions from the Utah Appellate Courts was examined. These decisions traced the evolution of utilization of the *Burke* approach, that is, equitably deciding how to treat this property; sometimes returning it to the person to whom it had been gifted or who owned it before the marriage or by whom it was inherited during the marriage, other times treating it as though it was marital, utilizing equitable division principles.

After publication of the article, Judge Michael D. Lyons also examined the subject in a subsequent article, *Source of Funds Rule – Equitably Classifying Separate and Marital Property,* Utah Bar Journal, Volume XI, No. 6, wherein he suggested a mathematical approach to dealing with the problem.

Examining the cases since these articles appeared, it appears that the rule emerging is that articulated by the concurring justices, Justices Christine Durham and Michael Zimmerman, in *Mortensen*, that is:

> As I read the majority opinion, the rules articulated today require only that in the *usual* case not fitting within one of the exceptions spelled out by Justice Howe, property acquired by one spouse during the marriage through gift or inheritance should be awarded to that spouse upon divorce. I take this to be nothing more than a variation on the analogous rule applicable to property brought into the marriage by one party: in the usual case, that property is returned to that party at divorce, absent exigent circumstances. *Preston v. Preston,* 646 P.2d 705, 706 (Utah 1982).

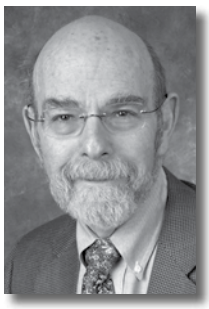
760 P.2d at 310.

The exceptions articulated by Justice Howell, to which Justices Durham and Zimmerman referred, were (1) the other spouse has, by his or her efforts or expense, contributed to the enhancement, maintenance or protection of the property, thereby acquiring an equitable interest in it, or (2) the property has been consumed or its identity lost through commingling or exchanges, or (3) where the acquiring spouse has made a gift of an interest therein to the other spouse. *See id.* at 308-09.

The cases decided since 1998 indicate that the Utah Court of Appeals is continuing to develop the equitable rule, not the hard-and-fast rule stated by *Mortensen,* which, as was pointed out in the original article, is honored more in the breach than by enforcement. For practicing lawyers, this means in any case involving premarital, inherited, or gifted property, there is no hard-and-fast rule that we can articulate for our clients. Rather, we must tell them that it is a question of equity, which is going to have to be resolved by a trial court if the matter cannot be settled in some fashion. Any doubt about this was dispelled by the court of appeals in *Olsen v. Olsen,* 2007 UT App 296, 169 P.3d 765, when the court declared:

> Utah statutory law provides for "equitable orders relating to the…property" of divorcing spouses. Utah Code Ann. § 30-3-5(1) (Supp. 2007); *see also Rosendahl v. Rosendahl,* 876 P.2d 870, 874 (Utah Ct. App. 1994) (stating that the court has the power to distribute marital property "in an equitable manner" and need not "consider property division in isolation"). In Utah, marital property is ordinarily divided equally between the divorcing spouses and separate property, which may include premarital assets, inheritance, or similar assets, will be awarded to the acquiring spouse. *See Bradford v. Bradford,* 1999 UT App 373, ¶ 23, 993 P.2d 887 ("property acquired by one spouse by gift and inheritance during the

DAVID S. DOLOWITZ is a shareholder at Cohne, Rappaport & Segal where he is on the management committee and heads the family law department. Mr. Dolowitz is on the Board of Governers of the American Academy of Matrimonial Lawyers and on the Board of Editors of the Journal of the AAML.



> marriage [should be awarded] to that spouse" (alteration in original) (internal quotations marks omitted)); *Haumont v. Haumont,* 793 P.2d 424 (Utah Ct. App. 1990) (noting premarital property generally retained by acquiring spouse). Nevertheless, a trial court "'may, in the exercise of its broad discretion, divide the property equitably, regardless of its source or time of acquisition.'" *Oliekan v. Oliekan,* 2006 UT App 405, ¶ 28, 147 P.3d 464 (quoting *Haumont,* 793 P.2d at 424 n.1).

Id. ¶ 23.

The court went on to rule on the specific question presented that while social security benefits are separate property, a trial court *could* make appropriate adjustments in the division of marital property considering that right to income because separate property should be awarded to its "owner."

Other cases since 1998, both published and unpublished, demonstrate ways the courts have applied the evolving equitable principles and provided guidance as to how these cases should be processed and decided. While no definite rule is declared, this body of common law provides a framework in which to work.

The Utah Court of Appeals in *Elman v. Elman,* 2002 UT App 83, 45 P.3d 176, articulated the rule frequently restated and applied thereafter: the trial court must define the property as separate or marital. The marital property should generally be divided equally between the parties, and the separate property (gifted, inherited, or premarital) awarded to its owner. However, separate property could be divided if one of the exceptions existed. While the court sought to limit the case to the unusual question of valuing an above-market appreciation in separate property made possible by the other spouse's management of the marital business and property, it did affirm an award of part of the separate property to the spouse. The trial court's approach, referring back to the decision of *Schaumberg v. Schaumberg,* 875 P.2d 598, 602 (Utah Ct. App. 1994), where the court traced and returned a portion of inherited property but found the rest was marital property as a result of ongoing refinancing and value appreciation of a business building during the marriage, was accepted.

The *Elman* court analyzed the issue of appreciation of premarital property during the marriage, noting that the husband challenged the trial court's awarding the wife any portion of appreciation in his separate property. After observing that a trial court is first required to determine whether property is marital or separate and restating the rule: "Generally, trial courts are also required to award premarital property, and appreciation on that property, to the spouse who brought the property into the marriage." *Elman,* 2002 UT App 83, ¶ 18. The court went on to note that separate

property is not beyond a trial court's reach, and rearticulated the rule that a trial court may award separate property of one spouse to the other in those extraordinary situations where equity so demands. *See id.* ¶ 19.

The *Elman* court determined where the wife's active management of the marital property allowed the husband to focus his full-time attention on managing his separate property, which produced a growth in the value of his separate property substantially above the average rate of return for similar property, a division of the excess appreciation was justified. This was upheld by the court of appeals, which noted that the trial court subtracted from the rate of return a reasonable amount (which was "returned" to the husband) and then prorated the remaining (excess) appreciation based on the years of the husband's most active management efforts. *See id.* ¶ 20. The court of appeals cited *Dunn v. Dunn,* 802 P.2d 1314 (Utah Ct. App. 1990) (discussing marriage as an equitable partnership) and *Schaumberg,* as authority to support this approach.

Interestingly, the husband based his position that all of the appreciation of separate assets should have been his alone on the Utah Supreme Court decision of *Burke v. Burke,* 733 P.2d 133 (Utah 1987), which was discussed at great length in the original article. The court of appeals distinguished *Burke* by noting that the appreciation in that case was primarily due to inflation, not whether there had been any effort by the husband toward the appreciation and growth in value. *See id.* ¶ 18. The court of appeals observed that, unlike in *Burke,* the wife in *Elman,* through her distinct efforts, contributed to the appreciation and thus affirmed the award. *See id.* ¶ 29.

The husband's attack on the methodology used by the wife and on the trial court ruling was rejected, because the wife was held to have met the burden of proof of introducing credible evidence as to the appreciation. Once she had done that, the husband had the burden to produce credible evidence contradicting this evidence of extraordinary financial growth. As he failed to do so, the methodology and award were affirmed. *See id.* ¶ 33.

This approach of valuing and dividing an increase in separate property was again confronted by the Utah Court of Appeals in the unreported decision *Hayes v. Hayes,* 2006 UT App 289U (mem.). The wife complained that the trial court abused its discretion in allowing the husband credit for his financial contributions to the marital estate. The court of appeals, citing *Hall v. Hall,* 858 P.2d 1018, 1023 (Utah Ct. App. 1993), related that a trial court may subtract an amount necessary to reimburse the contribution to marital property before dividing the proceeds of sale. *See id.* para. 3. Thus, the return of the value as separate property of the original inheritance, gift, or premarital property was ruled an appropriate approach before effecting an equal division of property when it is the appreciation that is being divided. However, the court of appeals then went on to note that the trial court did not allow the wife to back out the value of her separate property, (her condominium) when dividing the property. The resulting division was found inappropriate, and a remand was ordered for reexamination of that issue, that is, the return to her of her separate property before division of the marital property. The same principles should be applied to both parties.

Finally, the wife objected to the trial court's awarding the appreciation and separate property of the husband solely to him. The court of appeals rejected her challenge, ruling that none of the exceptions applied because the increase in value came solely from the effects of inflation on land values, not from the efforts of either party, citing *Burke,* 733 P.2d at 135, as authority for this.

Also, in 2006, the court of appeals issued its decision in *Riley v. Riley,* 2006 UT App 214, 138 P.3d 84, where the court upheld an unequaled property division – awarding the wife all of her retirement based on the ability of the husband to accumulate a much higher future retirement based on education and skills acquired by him during the marriage while being supported by the wife. This decision should be considered special because of the role of the fault of the husband and his securing substantially increased earning skills during the marriage.

A different approach was taken by the court of appeals in *Bradford v. Bradford,* 1999 UT App 373, 993 P.2d 887, where the trial court returned to the husband the marital home and land on which it was located, which was his separate property prior to marriage. He conveyed the home to himself and his wife as joint tenants during the marriage for the purpose of developing the property. Before the court of appeals, the husband argued that this return to him was proper. He asserted it should have been treated as separate property because he had inherited it, brought it into the marriage, maintained it, and improved it; therefore, the trial court correctly returned it to him. However, the court of appeals held that the transfer of otherwise separate property to joint tenancy by the grantor spouse is presumed to be a gift that transmuted the property to marital property. *See id.* ¶ 22. The court ruled that the conveyance made the separate property into marital property and to return it to husband without explaining why was not appropriate. *See id.* ¶ 24. The court of appeals also ruled that generally in a divorce proceeding each party is entitled to his/her separate property and 50% of the marital property. That presumption, however, does not take away from the trial court the power to make an unequal distribution if equity so requires. *See id.* ¶ 26. The court then observed that an unequal distribution can only be justified when the trial court carefully articulates in detail the findings of why the exceptional circumstances exist. Examining the findings of the trial court in *Bradford,* the court of appeals found the award

not fully explained and remanded the case for either an amended ruling on the division of the property or findings as to why the property that husband transmuted from separate to marital should be returned to him based on exceptional circumstances. *See id.* ¶ 27. These probably existed based on the fraud the trial court found wife and her children had perpetrated on husband, but the trial court was not explicit in explaining that the fraud or some other basis existed for the property award.

In *Morris v. Morris,* 2005 UT App 435U (mem.), the court of appeals affirmed a trial court's division of property after exploring the question of how the trial court treated gifts the parties gave to each other during the course of the marriage. The husband challenged the failure of the trial court to appropriately value and divide items of personal property the parties gave each other during the marriage. He wanted these items individually considered to determine their value and whether they should be considered separate or marital. The court of appeals noted, citing *Bradford,* that usually a gift of an interest in separate property is considered marital when it is given by one to the other; then, examining *Osguthorpe v. Osguthorpe,* 804 P.2d 530, 535 (Utah Ct. App. 1990), observed that gifts to a spouse during the marriage can be considered separate or joint by the trial court if the non-acquiring spouse contributed to the property or the property lost its identity through commingling exchanges or the acquiring spouse gifted the property to the other spouse. The court of appeals noted that the money used for the gifts had been marital funds, and therefore found that the trial court correctly determined these gifts to be marital property through the commingling process. The husband's objection that the trial court did not value each item of personal property on the parties' lists was affirmed on the basis that the trial court was in the best position to make an award of property that would best permit the parties to go on with their separate lives.

In another unreported decision, the court of appeals in *Mackey v. Mackey,* 2002 UT App 349U (mem.), found the trial court's methodology of determining part of the value of the home was marital and part was non-marital appropriate. The equal division of the marital portion was ruled the proper method of proceeding, as was the trial court's ruling to return to the wife the appreciation on the home from the time period that she originally purchased it to the date that the parties moved in, because it was her separate property. The court of appeals noted that the husband had done nothing to increase the value from the time the wife acquired the home until the parties moved into it. The husband's labor, which added to the value, and the marital funds that were invested in the home during the marriage were considered part of the marital estate, citing *Schaumberg v. Schaumberg,* 875 P.2d 598, 603 (Utah Ct. App. 1994).

In another unreported decision, *Larsen v. Larsen,* 2006 UT App

295U (mem.), the court of appeals affirmed the trial court's ruling that the parties commingled their business and personal assets throughout their marriage. The court considered all of the parties' property to be marital, despite the separate contributions each may have made. In carrying out the final decision, the court adjusted its determination when a business asset was sold to balance the disparity in what each received when the proceeds of sale were not what the court previously determined were expected.

In *Lowry v. Lowry,* 2007 UT App 56U (mem.), another unreported decision, the court of appeals confronted an appeal by a husband claiming the trial court erred by awarding the wife a portion of his inheritance. The court of appeals cited *Bradford* and noted that trial courts have considerable discretion when distributing marital property in divorce cases and that distributions will be upheld unless a clear and prejudicial abuse of discretion is demonstrated. The court of appeals then stated that as a general rule each party would be awarded inherited property received during the marriage, but upheld the trial court's decision that found the separate property in that case was held in a joint bank account, and was commingled, so the property division was ruled fair. *See Lowry,* 2007 UT App 56U, para. 6 (citing *Finlayson v. Finlayson,* 874 P.2d 843, 847 (Utah Ct. App. 1994)). The court observed that the husband conceded he kept the inherited funds in a joint banking account where he deposited his income and from which the parties paid for living expenses, vacations, and a pickup truck from the joint account, and deemed those items were indeed appropriately marital because of comingling.

To demonstrate the difficulty of handling this type of case, a result directly opposite to *Lowry* was affirmed in *Kimball v. Kimball,* 2009 UT App 233, 217 P.3d 733. The court of appeals affirmed the ruling of the trial court that inherited funds received from the sale of stock that were placed in a joint account and then moved to a separate account retained their character as separate property and were appropriately awarded to the spouse who inherited the stock in the first instance. *See id.* ¶¶ 4, 25. The deposits were simply considered as transfer points, not an ownership conveyance or comingling.

In *Hodge v. Hodge,* 2007 UT App 394, ¶ 5, 174 P.3d 1137, the court of appeals reversed and remanded the trial court decision where the trial court failed to enter findings carefully delineating what property was marital and what property was separate. It restated the rule that the trial court has the obligation to first determine if property is marital or separate, divide the marital property, and return the separate property, unless there is a reason for division of the separate property.

In 2009, this method was expanded in *Kunzler v. Kunzler,* 2008 UT App 263, 190 P.3d 497. The court of appeals reversed the trial court's award of property that the husband's mother testified was gifted to her son as his separate property, and there was an insufficient evidentiary basis on which to affirm the trial court's ruling, but split two to one on remand directions. Two of the judges felt that there should be a remand to determine if there was a basis for an equitable division of the separate property over the objection of Judge Davis, who opined that this had not been sufficiently preserved by the wife at trial. *See id.* ¶¶ 35, 36. The court unanimously agreed, however, that maintaining the household while the husband worked was not a sufficient basis for an equitable division of the separate property.

The Kunzler rationale, that maintaining a household is not a basis for an award of separate property was thereafter restated as the basis for the reversal of an award to the wife of part of the company's increased value that occurred during the marriage in *Jensen v. Jensen,* 2009 UT App 1, ¶¶ 2, 14 ,16, 203 P.3d 1020.

In this same vein, the Utah Court of Appeals in *Child v. Child,* 2008 UT App 338, ¶¶ 9, 10, 194 P.3d 205, reversed the trial court's finding that the increase in value of the husband's business was marital property. The court of appeals determined that there was no finding of any work or contribution by the wife that enhanced the value of the business, she did nothing to protect it, the property was not consumed, it was not commingled, nor was it exchanged for any other property. Consequently, there was no basis on which to find it was marital. This part of the opinion was appealed to the Utah Supreme Court, which affirmed the court of appeals reversal of the trial court. But as in *Kunzler,* the Supreme Court remanded the case to the court of appeals with instructions to examine the facts to see if any basis existed for an equitable award to the wife of the increased value, and if the court of appeals determined there was not a sufficient basis on which to make such a decision, the matter should then be sent back to the trial court for further examination. *See Child v. Child,* 2009 UT 17, 206 P.3d 633.

On the theme of returning separate property to the owner of gifted, inherited, or premarital property, the Utah Court of Appeals in *Johnson v. Johnson,* 2007 UT App 329U (mem.), affirmed that property purchased with separate premarital funds by the wife, which were never titled in the husband, was appropriately awarded to the wife as non-marital property. She paid all taxes and insurance on the property from her separate funds, and while the husband did some tile work and supervised some landscaping and the installation of a home theater, that was not enough to fall within one of the exceptions. Nor did living on the property qualify it to be transmuted in some form to fall within one of the exceptions to the general rule.

In *Thompson v. Thompson,* 2009 UT App 101, ¶ 12, 208 P.3d 539, the court affirmed that a husband was entitled to the appreciation on the premarital portion of his retirement as separate property.

Two cases that involved extensive amounts of tracing premarital and marital property are instructive. In *Oliekan v. Oliekan,* 2006 UT App 405, 147 P.3d 464, the court of appeals carefully discussed the trial court's tracing of assets and issued an opinion regarding the return of the husband's interests in premarital retirement plans. The court affirmed the ruling of the trial court that such interests did not lose their identity as separate property and become commingled when they were converted, cashed out, and rolled over into IRA's during the marriage. *See id.* ¶¶ 21, 22. The court of appeals also described the tracing of the funds. *See id.* ¶ 23. There was a marital portion determined to exist for a deferred compensation plan that was appropriately ruled marital and divided, *see id.* ¶¶ 34-36, because the accounts were frozen when the parties were married, and everything that occurred with them occurred thereafter, application of the *Woodward* formula was deemed appropriate to the marital portion of the retirement plans and the deferred compensation plans. *See id.* ¶ 28.

In *Richards v. Brown,* 2009 UT App 315, 222 P.3d 69, the parties lived together for 10 years. They never married. The trial court found that the action was filed more than one year after the cohabitation and possible common law marriage ended, which precluded a determination of the relationship as a marriage. The court went on to find that where $71,100.00 was contributed by Mr. Richards to Ms. Brown, and payments were made by Ms. Brown toward the mortgage on her home, there was no property interest created. These payments were reasonably considered to be Mr. Richard's rental payments, there was no unjust enrichment or promissory estoppel. However, the court ordered $10,136.00 be reimbursed to him because those funds had been expended for capital improvements on the home.

In two unreported decisions released late in 2009, the Utah Court of Appeals applied these principles. In *Brough v. Brough,* 2009 UT App 344U (mem.), the court of appeals ruled that where (a) the evidence showed the parties commingled accounts by running income and separate funds through a joint account, (b) the home was held as joint tenants, and (c) a company employed both of them and they jointly assumed liability for assets used in the business, that the property was appropriately ruled to be joint marital property or the wife's efforts had helped enhance the value of the husband's separate property.

Then in *Soderborg v. Soderborg,* 2009 UT App 359U (mem.), the court noted that the wife failed to present any evidence demonstrating how she contributed to the enhancement or maintenance of properties and, therefore, had not contributed to their value and was not entitled to a portion of them. This is in contrast to the evidence in *Brough* where the wife worked in the business, assumed the liability, and was able to show that any increase in value was, in part, due to her efforts.

An analysis of these decisions provides guidance to the extent that if parties comingle assets or legally convey them to one another, all of the property will be considered marital. If they jointly work on the property to enhance its value, it may be considered marital. If one has separate property, whether by premarital ownership, gift, or inheritance during the marriage, and it is kept separate but grows in value through the efforts of one or both of the spouses, the increase may be considered marital and can be divided either by valuing and backing out the original contribution or simply valuing the growth in excess of what might have been otherwise expected. But this occurs only if one of the articulated exceptions has occurred, as in *Elman v. Elman,* 2002 UT App 83, 45 P.3d 176.

In sum, it would appear that the real rule in Utah comes from *Burke*, not *Mortensen,* though the actual holding in *Mortensen* affected the *Burke* rule and that is what the courts continue to do. This approach is the approach already taken by the Utah Court of Appeals in *Schaumberg v. Schaumberg,* 875 P.2d 598 (Utah Ct. App. 1994), and *Elman,* where the court of appeals upheld returning the original inheritance to the husband but ruled the appreciation of a separate asset, which husband refinanced and maintained during the marriage, to be marital property and the equity increase in the building to be marital property that was appropriately divided equally between the parties. The recent *Olsen* decision is another variation of the rule. Separate property is awarded to its owner and marital property awards can be adjusted to effect equity if, but only if, an exception is established.

In sum, there is no clear rule, and each case must be evaluated and presented on its own terms within the guidelines described.

Advising Your Clients (and You!) in the New World of Social Media: What Every Lawyer Should Know About Twitter, Facebook, YouTube, & Wikis

by Randy L. Dryer

By March of 2010, there were 200 million blogs worldwide, 450 million people on Facebook, 27 million tweets every 24 hours, and 1.2 billion YouTube views each day. These staggering statistics reflect the explosive growth social media has experienced over the past three years, which growth is expected to continue unabated in the future.

Social media, i.e., blogs, wikis, social networking sites like Facebook and LinkedIn, multimedia sharing sites like YouTube and Flickr, and social tagging sites like Digg and Yelp, represents a revolutionary shift in the way we communicate. Social media has democratized information and empowered ordinary citizens with the ability to organize, share information, and be heard like never before in our history. Social media is word of mouth on steroids and is beginning to morph from a fun and easy way to stay socially connected with friends into a dynamic and interactive way of doing business and practicing law. Businesses must now interact with their customers and other stakeholders in an entirely different way, and lawyers will have to adjust accordingly in the not too distant future.

As clients begin to adopt these new social media technologies, they will expect the lawyers who advise them to understand how these new communication platforms operate and what new legal risks are created. While space constraints do not allow a detailed discussion of all the legal risks arising from the use of social media, this article will identify the primary legal risks of utilizing social media in two contexts. Part one identifies four primary areas of legal concern when businesses utilize social media. Part two briefly highlights various ethical issues when lawyers use social media.

CORPORATE USE OF SOCIAL MEDIA CREATES A HOST OF UNIQUE LEGAL ISSUES AND RISKS

1. Advertising and Marketing Risks

Advertising dollars spent on social networking and blog sites topped $1.2 billion in 2009 and are expected to grow at an annual rate of 7.5% over the next two years. *See* Erick Sass, *What's Holding Back Social Network Advertising?,* The Social Graf, March 4, 2010, *available at* http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=123714. Legal counsel should be aware of the following when advising clients in the arena of social media advertising:

a. Advertising Laws

Traditional advertising laws, both federal and state, in general apply to online and social media advertising. Depending on the nature of the advertising and on what social media platform it is being placed, various federal and/or state laws may apply, including section 5 of the Federal Trade Commission Act (prohibiting "unfair or deceptive acts or practices," including advertising), section 43(a) of the Lanham Act (prohibiting unfair competition), the Digital Millennium Copyright Act (addressing copyright protections), section 230 of the Communications Decency Act, (protecting social media site providers from liability for user generated content), and the CAN-SPAM Act (governing email practices).

b. New FTC Guidelines Implicate Social Media

The Federal Trade Commission recently issued new endorsement and testimonial guidelines that apply to social media, whether company sponsored or not. *See* 16 C.F.R. Part 255. Inadvertent liability may result absent careful monitoring. In summary, if there is any "material connection" between a company and a blogger or tweeter, it must be disclosed by the blogger or tweeter, and liability for failing to do so, under certain circumstances, can be imposed on the company. Thus, employees who blog and favorably comment on the company or its products or services, may be deemed an "endorser" under the guidelines and subject to the disclosure guidelines.

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c. Company Sponsored Social Media

Company branded pages on Facebook, YouTube, and other social media sites generate a whole host of legal issues relating to the monitoring and removal of content, trademark and copyright infringement, and privacy and publicity rights and require care in drafting appropriate privacy policies and terms of service. Of critical importance is whether the social media site is company operated, *e.g.,* a blog, or operated by a third party, *e.g.,* Facebook. It is much easier to regulate content on the former than the latter. When a company's social media platform is operated by a third-party, the company is dependent on the terms of service of the hosting site insofar as regulating content is concerned. The terms of service provisions vary widely depending on the social media site. *Compare* Facebook Terms of Service Provisions, *available at* http://www.Facebook.com/terms-php, *with* Twitter Terms of Service Provisions, *available at* http://twitter.com/tos. It is easy to start a conversation about the company or its products on social media platforms, but it is very difficult to control that conversation.

2. Employers/Employees Issues

Both employers and employees are using social media with greater frequency for business and non-business related purposes. This is an area fraught with legal pitfalls and requires careful consideration on the part of management and legal counsel. While virtually every business already has a policy regarding use of company equipment for personal emails, the policies may not cover social media. Companies need to be concerned about three areas in particular:

a. Employee Use of Social Media

Employees use social media even if the company does not and often access social media with company owned equipment and on company time. Employees need to fully understand the power and consequences of social media participation and how often people fail to recognize a clear line between private and professional lives. Companies should adopt a social media policy to address employee use and to educate employees about issues of maintaining corporate reputation and good will, preservation of trade secret information, and concerns over harassment, discrimination, and privacy, etc. Examples of employee social media policies can be found at http://www.bulletproofblog.com/2010/02/23/six-great-examples-of-employee-social-media-policies/. A recent survey of U.S. companies showed that 54% of companies completely ban employees from using social networking sites at work, and only 10% allow employees full access to social networks during work hours. Policies banning employee use of social

media, however, may generate employee unhappiness and are difficult to monitor and enforce, and the trend is to allow regulated use. In February 2010, the Department of Defense reversed its three-year-old ban on social media sites from .mil computers. Presently, all users of unclassified computers may now access social networking sites like Facebook, Twitter, Flickr, and YouTube. An excellent practical guide as to what employers should consider in allowing employee use of social media is available online. *See* Gene Connors, *Here are 10 Social Media Commandments for Employers,* Crain's Detroit Business, *available at* http://www.crainsdetroit.com/article/20100308/EMAIL01/100309855#.

b. Employer Use of Social Media

Companies are increasingly using social media to (a) screen potential job applicants, (b) investigate suspected fraudulent claims for workers' compensation or unemployment benefits, and (c) monitor employee conduct, which may reflect poorly on the company. The ability of employers to lawfully use social media for the above purposes is still evolving and strongly militates in favor of having a written policy. Company access to and use of social media information in employment decisions may implicate anti-discrimination laws, National Labor Relations Act issues, the Federal Electronic Communications Privacy Act, and the Fair Credit Reporting Act (the FCRA). Regarding the FCRA, it is important to remember that provisions of the Act do not only apply to credit information as the name of the Act implies. A cautionary article about the legal risks associated with using blogging and social networking sites to gather information about prospective and existing employees is available online. *See* Gregory I. Rasin & Ariane R. Buglione, *Social Networking and Blogging: Managing the Conversation,* New York Law Journal, July 27, 2009, *available at* http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202432487473&hbxlogin=1.

c. Termination

A clear policy on the use of social media is essential if an employer intends to monitor employee use, avoid privacy issues, or wants the ability to discipline or terminate an employee for inappropriate postings. Some states like California, Colorado, Connecticut, New York, and North Dakota have enacted "lifestyle" laws that prohibit an employer from taking adverse employee actions based on lawful, off-work conduct. Although there are countless examples of employees being terminated for posting critical comments about their employer on a social media site, *see* Jan Sjostrom, *Interns' Facebook Postings Spur Norton Museaum to Dismiss Two,* Palm Beach Daily News, Aug. 6, 2009, *available at* http://www.palmbeachdailynews.com/news/content/arts/2009/08/06/internparty0807.html, the safest legal path is to have a policy that clearly sets forth prohibited posts.

3. Intellectual Property Issues

A general discussion of trademark/copyright law or the steps a company should proactively take to protect a company's intellectual property is beyond the scope of this article. However, a lawyer advising a business client on the interplay between social media and intellectual property should be aware of the following:

a. Policing One's Intellectual Property is Essential

It is of paramount importance to regularly review social media sites for unauthorized use of a company's trade name, logo or other intellectual property, since communications through social media are global, ever changing, and essentially everlasting. By diligently policing a company's intellectual property on social media sites, a company can more likely fend off a claim that it has waived its ability to enforce its ownership rights. Although this can be time consuming there are numerous tools a business may use to monitor the web. *See* 26 Free Tools for Monitoring Your Brand's Reputation, http://www.pamorama.net/2009/12/06/26-free-tools-for-monitoring-your -brands-reputation/. There are also a growing number of third-party services to monitor the web. *See* The Search Monitor, http://www.thesearchmonitor.com; Converseon, http://ww.converseon.com.

b. Trademark Protection in Virtual Worlds

The use of trade names and logos in virtual worlds as avatars and virtual world products is an emerging area of concern. The law is less than clear in this area, but trademark laws against infringement in the real world should theoretically apply to infringement in the virtual world. A discussion of the various issues surrounding the protection of brands in virtual worlds can be found online. *See* Emma Barraclough, *Virtual worlds – the new frontier in IP protection, available at* http://www.managingip.com/article/2205066/Virtual-worlds-the-new-frontier-in-IP-protection.html.

c. Misappropriation of Corporate Intellectual Property for Social Media User Names

Most social media sites allow participants to create a user name or personalized URL addresses. The use of a company name or logo by unauthorized users is a growing concern. For example, there are hundreds of unauthorized "I love Starbucks" pages and groups, but also hundreds of "I hate Starbucks" or "Starbucks sucks" pages and groups. How to deal with these uses is legally delicate, and most social media sites have inadequate policies or lax enforcement to prevent such infringement. There is little case law addressing this area of concern.[1] Facebook, with more

than 350 million active users, has adopted a policy to deal with incidents of trademark infringement and name imposters, which provides some clarification on the subject.

d. Copyright Infringement

Since passage of the Digital Millennium Copyright Act, most social media sites have created a specific procedure for addressing copyright disputes. These procedures are found in the sites' Terms of Service and usually offer a quicker and less costly way to enforce copyrights than litigation. The procedures, however, are not self executing, thus requiring diligence on the part of the copyright owner. *See* Kay Lyn Schwartz & Jason R. Fulmer, *You Twit Face! Protecting Your IP in the World of YouTube, Twitter and Facebook: a practical protection guide for the IP owner,* Jan. 22,2010, *available at* http://www.lexology.com/library/detail.aspx?g=118f7e68-8b91-4375-bc14-32041247a1e2 (discussing how YouTube, Twitter, and Facebook address copyright infringement claims).

4. Litigation Issues

While the use of social media is generally thought of as primarily impacting the "court of public opinion," its impact on the litigation process cannot be overlooked. The following areas of concern should always be considered by legal counsel:

a. Expanded Scope of Discoverable Content

Social media clearly expands the universe of potentially discoverable materials and impacts data retention/destruction policies. Just as requests for emails were the discovery rage of the last decade, requests for information on social media platforms will soon become standard. Unlike the early internet days where digital information was primarily emails, information now posted on social media sites includes audio, photographs, and video. Virtually everyone has a cell phone, and virtually every cell phone has both still photograph and video capabilities. And in 2010 we are seeing more and more ways for people to access their social media sites (and upload content) through their mobile phones. These new technologies are dramatically changing the discovery landscape.

b. Litigation Hold Letters

Posts on social media are within the scope of "electronically stored information" as that term is used in Rule 34 of the Federal Rules of Civil Procedure. Litigation hold letters likely trigger an

obligation to preserve such posts if they are reasonably related to the litigation. This means that just like companies had to revise their document retention and destruction policies and their internal protocols for handling litigation hold requests when email became a pervasive way of communicating, so too will these policies require updating to address the nuances of social media.

c. New Sources of Impeachment

Social media has become an evidentiary gold mine for impeaching witnesses and undermining a company's litigation position in the last decade. The proverbial "smoking gun document" of the pre-internet era has given way to the "smoking gun email," which will soon give way to the "smoking gun tweet." Like the early days of email, postings on social media sites tend to be colloquial, casual, and lacking many of the usual constraints found in communications through more formal means. There is also a misperception that information on social media sites are private or limited to "friends" of the poster.

d. Possible Waiver of Privileges

The cavalier use of social media may result in the unintended waiver of the attorney work product privilege or privileged attorney-client communications. Attorneys and clients need to be educated on this risk.

e. Impact on Trials

Social media is impacting the way trials are being conducted and counsel need to be alert to any inappropriate activities of jurors or other participants in the litigation process. Appeals courts in Colorado, Maryland, and New Jersey have recently reversed jury verdicts because of social media use by jurors during trial. *See* Eric P. Robinson, *Trial Judges Impose Penalties for Social Media in the Courtroom,* Citizen Media Law Project, March 3, 2010, *available at* http://www.citmedialaw.org/print/3320?utm-source. The rise of mistrials and post trial challenges to verdicts because of inappropriate juror use of social media is forcing courts to modify their stock jury instructions. The Conference of Court Public Information Officers is currently conducting a study to determine the effects of digital media on the courts.

f. Service of Process

Social media, under certain circumstances, has already become a substitute for traditional service of process in foreign countries and may become the wave of the future in the U.S., as well. *See* Andriana L. Schultz, *Superpoked and Served: Service of Process Via Social Networking Sites,* 43 U. Rich. L. Rev. 1497 (2009) (comment).

ETHICAL ISSUES FOR LEGAL COUNSEL

In late 2009, the ABA created a Commission to study, among other things, whether the ABA Model Rules of Professional Conduct and existing enforcement mechanisms adequately address the use of social networking sites by lawyers and law firms. The Commission, according to its website *located at* http://www.abanet.org/ethics2020/, expects to take three years to complete its work. In the meantime, lawyers should be cognizant of the following ethical rules and issues that may be implicated by social media:

Rule 1.1 (Competence)

Rule 1.1 of the ABA Model Rules of Professional Conduct on Competence necessarily requires counsel to be informed as to legal risks of social media.

Rule 1.6 (Confidentiality of Information)

Rule 1.6 of the ABA Model Rules of Professional Conduct on Confidentiality of Information can be violated through social media postings. *See* Ken Strutin, *Social Networking Pitfalls for Judges, Attorneys,* New York Law Journal, March 17, 2010, *available at* http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202446299127&Social_Networking_Pitfalls_for-Judges_Attorneys (discussing the potential social networking problems for judges and lawyers).

Disclaimers

Disclaimers by lawyers on social media platforms are prudent. This is particularly important on a law firm web site or an attorney blog that addresses legal issues. Disclaimers are likely more important for private attorneys than in-house counsel to avoid potential problems such as unintentionally establishing an attorney-client relationship, a claim of unauthorized practice of law, or running afoul of the rules on solicitation. An illustrative disclaimer for an official law firm blog can be viewed at http://www.intellectualpropertyblog.com. An illustrative disclaimer of an individual attorney blog can be viewed at http://wwww.svmedialaw.com/legal/disclaimer.

Social Media Research

Surreptitious research of social media information is a legal and ethical minefield. In March 2009, the Philadelphia Bar Association Professional Guidance Committee issued an opinion that held it would be unethical for a lawyer to ask a third person to "friend" a witness for the purpose of gaining access to information on the witness's Facebook and MySpace pages for possible use in litigation. Notwithstanding the Philadelphia ethics opinion, which is advisory only, where to draw the line on permissible research and use of information on social media sites is far from resolved and likely

will vary widely from jurisdiction to jurisdiction. Numerous legal commentators have opined on the subject and several states have enacted rules specifically dealing with pretexting. *See* Ken Strutin, *Pretexting, Legal Ethics and Social Networking Sites,* Oct. 5, 2009, *available at* http://www.llrx.com/node/2205/print. The issue implicates Model Rule 4.1. (Truthfulness in Statements to Others) and likely will be addressed by the ABA's Task Force.

Attorney Web Profiles

Attorney web profiles should be regularly monitored for compliance with ethical rules. The South Carolina Bar Ethics Advisory Committee recently issued an ethics advisory opinion holding that any attorney "claiming" or endorsing a web-based profile of the lawyer must ensure that all information on the website complies with the Rules of Professional Conduct. This includes not only information the attorney posts on the site, but also information posted by third-parties such as client ratings, peer endorsements, and company ratings. A lawyer may "claim" a listing by affirmative action such as updating a listing or through inaction after becoming aware of the information on the third-party site. Thus, lawyers, under certain circumstances, may be responsible for the information contained on websites such as Martindale Hubbell, SuperLawyers, LinkedIn, and lawyer locator or rating sites. *See* Stephanie Francis Ward, *Grade Anxiety,* ABA Journal, Feb. 2010 (discussing the ethical issues of attorney web profiles).

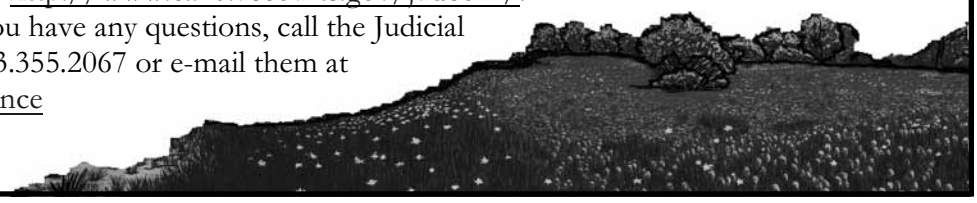
"Friending" is Potentially Problematic

Sending a friend request to a judge may implicate ethical issues for both the attorney and the judge. Several states have already ruled that a judge may not accept or initiate Facebook friend requests to attorneys who appear before the judge. *See e.g.,* Florida Judicial Ethics Advisor Committee, Op. 2009-20, *available at* http://www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/2009/2009-20.html.

CONCLUSION

The emergence of social media in business and the practice of law have opened up amazing new opportunities for marketing and connecting with customers and clients. It is not without legal risk, however, and lawyers need to understand these risks, not only for their clients, but for themselves, as well.

1. In September 2009 ONEOK, a natural gas distributor, sued Twitter for trademark infringement for allowing an imposter to adopt the company's name as the imposter's user name and post what ONEOK alleged were misleading statements. Twitter initially refused to terminate the unauthorized account, but did so after being sued. The case was resolved by settlement, and the account was transferred to ONEOK.



An Overview of Criminal Tax Fraud Cases and Consequences in the State of Utah[1]

by Mark Baer & Alex Goble

Benjamin Franklin, in a letter to Jean-Baptiste Le Roy in 1789, is credited with saying that "in this world nothing can be said to be certain, except death and taxes." For this, Mr. Franklin is well known and credited. But another aphorism accredited to this great man is as follows: "There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government."

Why this is so, is anyone's guess. Theories include the relative anonymity of taxes, the collection, receipt, and accounting thereof, and the actual or perceived complexity of the tax system. As well, there is an undercurrent of disobedience on the part of some individuals, justified by them on one level or another, often on the basis of not liking one or another government policy, program, or process. A more likely explanation, however, is the simple and fundamental truth that some people just do not like to pay actual, real money to anyone when they may get away with not doing it, or when there is not an immediate, observable return on the investment. It seems clear that greed and selfishness play a large, perhaps overwhelming, role in motivating individuals to be non-compliant with their obligations when it comes to taxes.

The federal government is the most widely known entity for the creation and enforcement of tax laws, and for the pursuit of those who choose not to comply with those laws. Most efforts at compelling compliance take the form of audits, or at least the threat of an audit. In more egregious cases, criminal prosecutions are instigated at the federal level. The bases for federal tax-related prosecutions are found in Title 26 of the United States Code and include such offenses as tax evasion, failure to file, the filing of false or fraudulent returns, or aiding or providing assistance relating to the filing of fraudulent returns. Closely related and often-used criminal enforcement tools at the federal level involve charges of money laundering and other currency violations.

State governments likewise pursue and prosecute individuals and, occasionally, businesses for violations of the criminal code as it relates to taxation. Utah's primary tax fraud statute is Utah Code section 76-8-1101, which reads in pertinent part:

> **Criminal offenses and penalties relating to revenue and taxation – Rulemaking authority – Statute of limitations.** (1) (a) As provided in Section **59-1-401,** criminal offenses and penalties are as provided in Subsections (1)(b) through (e).
>
> . . . .
>
> (c) (i) Any person who, with intent to evade any tax, fee, or charge as defined in Section 59-1-401 or requirement of Title 59, Revenue and Taxation, or any lawful requirement of the State Tax Commission, fails to make, render, sign, or verify any return or to supply any information within the time required by law, or who makes, renders, signs, or verifies any false or fraudulent return or statement, or who supplies any false or fraudulent information, is guilty of a third degree felony.
>
> . . . .
>
> (d) (i) Any person who intentionally or willfully attempts to evade or defeat any tax, fee, or charge as defined in Section **59-1-401** or the payment of a tax, fee, or charge as defined in Section **59-1-401** is, in addition to other penalties provided by law, guilty of a second degree felony.
>
> . . . .
>
> (e) (i) A person is guilty of a second degree felony if that person commits an act:
>
> (A) described in Subsection (1)(e)(ii) with respect to one or more of the following documents:
>
> (I) a return;
>
> (II) an affidavit;
>
> (III) a claim; or
>
> (IV) a document similar to Subsections (1)(e)(i)(A)(I) through (III); and

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(B) subject to Subsection (1)(e)(iii), with knowledge that the document described in Subsection (1)(e)(i)(A):

(I) is false or fraudulent as to any material matter; and

(II) could be used in connection with any material matter administered by the State Tax Commission.

Utah Code Ann. § 76-8-1101 (Supp. 2009) (emphasis added).

Related charges can and often include: theft by deception, *see id.* § 76-6-405; fraud by a fiduciary, *see id.* § 76-6-513; communications fraud, *see id.* § 76-10-1801, and a pattern of unlawful activity, *see id.* § 76-10-1603, among other possible criminal charges.

There are, however, important differences between federal and state approaches to tax violations. For example, unlike the federal system, Utah law recognizes that failure to file and tax evasion are two separate offenses so long as the state relies "upon materially different acts to prove [both subsections c and d]" that one is not a lesser included offense of the other. *State v. Smith,* 2003 UT App 179, ¶ 16, 72 P.3d 692. Similarly, failure to file charges do not merge into tax evasion charges under Utah law so long as separate evidence is proven by the state. Further, Utah law also is clear that a federal finding of non-compliance is unnecessary for a state finding of non-compliance. *See Jensen v. State Tax Comm'n,* 835 P.2d 965, 969-70 (Utah 1992). This is based in the concept that although the Utah State Tax Commission ("Tax Commission") relies on many federal standards in computing tax liability, a violation of federal law is not prerequisite for violation of state law. Additionally, given the relative number of returns the federal government must monitor each year versus that of a state, one can logically conclude that a state is far more likely to notice violations and investigate them. Indeed, it is the case in many instances that the federal government does not pursue remedies and/or prosecute federal violations until after a state prosecution has occurred or has at least been investigated.

In Utah, a state tax case generally finds its way to the Tax Commission, and once there, it is assigned to that agency's Criminal Investigation Division. That division reviews the matter, gathers evidence, and drafts a report, all of which are then generally sent to the Utah Attorney General's Office, or occasionally to various county attorneys' offices where they are screened for potential filing in the district courts located around the state.

Cases arise from referrals from a number of sources, including aggrieved private parties, inconsistent financial filings, and protestor activities. Protestor activities can range from simple non-filing to various and sometimes quite widely-made claims

of unconstitutionality. For example, protesting individuals often claim that they are not subject to taxation on the basis of status, nationality, obscurity, Uniform Commercial Code offsets, violations of the Fifth Amendment right against self-incrimination, and many other claims or theories involving oaths, status, or even "natural law." All of these ideas, concepts, theories, and contentions have long been discounted by both state and federal courts at all levels.

For example, in the *Jensen* case discussed above, the Court held that "[t]he information sought on income tax returns does not fall within the Fifth Amendment privilege against self-incrimination." *Jensen,* 83 P.2d at 973. Federally, *U.S. v. Brown,* stands for the position that the Fifth Amendment privilege against self-incrimination is not a defense to a charge of failing to file an income tax return. *See id*.

It is also a fairly common claim by defendants who refuse to supply tax information that the state must find the information entirely without the aid of the defendant. However as a matter of law, pursuant to Utah Code section 59-1-1406, it is the duty of all taxpayers to maintain records and to make them available for review to the Tax Commission. *See* Utah Code Ann. § 59-1-1406 (2007). Many individuals under investigation for tax crimes have no reliable records for the Tax Commission to review, or in the case of those charged with failure to file, they refuse to supply any of the requested information. In such instances, the Tax Commission – to the best of its ability – determines the tax owed by the taxpayer and creates a return for the taxpayer. The Tax Commission is authorized to do this under Utah Code section 59-1-1406, which states as follows: "If a person required to file a return with the commission fails to file the return with the commission, the commission may estimate the tax, fee, or charge due from the best information or knowledge the commission can obtain." *Id*.

Once the Tax Commission has undertaken this endeavor and an amount of taxes, penalties and/or interest owed is determined, the delinquent taxpayer will often contest the amount assessed, claiming it to be incorrect. This occurs despite the fact that the individual did not initially comply, often even after having been offered assistance, in providing information for the Tax Commission to use in creating the assessed tax liability. In the criminal context, much of the time spent prosecuting tax cases revolves very little around the actual elements of the crime itself, but instead focuses on the restitution owed. Indeed, it often appears that it is more important to defendants to retain as much of their unpaid liabilities as possible rather than to work toward a resolution, which in failing to do so puts their lives and even freedom at risk.

One of the most common tactics used to combat the assessment made by the Tax Commission is to claim that the state has failed to adequately give credit for numerous deductions the defendant is owed. In the criminal context there is a common misconception that since the state has the burden to prove the elements of the crime beyond a reasonable doubt, the state must also prove beyond a reasonable doubt any supposed deductions the defendant insists exist. This can be described as the proverbial "disproving the negative." In other words, the state cannot *disprove* the existence of unclaimed deductions. However, the courts have rejected any notion that the state has the burden to disprove unclaimed deductions. *See e.g., Cont'l. Tel. Co. of Utah v. State Tax Comm'n,* 539 P.2d 447, 450 (Utah 1975) ("The taxpayer is required to show that his claim is fairly and clearly allowable under the terms of the statute."). While the state does have the burden of proof on the criminal elements, the burden of production regarding claimed deductions rests on the taxpayer. And in the cases of taxpayers who have failed to file, the unclaimed deductions are completely unavailable to them by statute. Federal statutory authority under Title 26 section 63 of the United States Code states: "Unless an individual makes an election under this subsection for the taxable year, no itemized deduction shall be allowable for the taxable year. For the purposes of this subtitle, the determination of whether a deduction is allowable under this chapter shall be made without regard to the preceding sentence." 26. U.S.C. § 63(e)(1) (2000).

The underlying motivation and purposes for criminal prosecutions vary widely. Ultimately, prosecutions arise from a need for everyone to comply with the tax laws of the federal or state authorities. After all, without being able to source their revenue, governments could not and would not be able to provide any services. And despite a common-man theme that government is either a bad provider of services, or wasteful, or not properly oriented, it is beyond question that society would simply cease to function in a civilized manner absent the funding of government. Think of schools, roads, police, fire service, many utilities, our system of laws, national defense, and so forth, all of which are unable to function without funding.

The legal structure outlined above notwithstanding, it is true that our tax structure is mostly predicated upon the principle of self-directed compliance. This, of course, does not always occur, and thus we come to the flip side of compliance, which is deterrence – some of the legal parameters in the criminal arena have just been outlined above. Overall, general deterrence is mostly effectuated by audits – and the collection of funds in that process – a fairly well-known and documented process.

This brings us to the question of what additional or "spillover" benefits arise from the investigation, filing, prosecution, and resolution of criminal cases and the publicity that often accompanies such matters. It is clear that under any analysis deterence/prosecution serves to increase the amount of revenue brought in to the state when pursuing tax cases. This is based upon the actual amounts collected in criminal cases, which will include penalties and interest.

Penalty statutes are in place for those not in compliance – as a form of deterence – wherein increased amounts are owed in taxes if

delinquent individuals are forced into compliance. *See* Utah Code Ann. § 59-1-401(7)(a)(iii), (iv) (Supp. 2009). These are relevant in both the criminal and civil contexts. Under that authority, the amount of penalty assessed can be either 50% or 100% of the total underpayment, depending on the activity undertaken to avoid taxation. This often has the effect of doubling (the 100% penalty) the original tax assessment.

In addition to the foregoing, there is an additional spillover effect from successful criminal prosecutions. Another way to phrase spillover would be to consider the "multiplier effect" that successful prosecutions of tax fraud engender outside of the immediate results of the case at hand. The quantitative question that arises is how much revenue comes into the coffers of the state from individuals, other than the defendant, who are similarly situated – or at least similarly situated in their own minds – as compared to each dollar collected in criminal matters. The issue then is one of trying to determine how much revenue is garnered by the state from those who voluntarily resolve their outstanding obligations out of fear of successful criminal prosecutions. Of course, when considering this issue, it quickly becomes clear that it is difficult to definitively determine the net benefit of criminal prosecutions in the area of tax fraud. However, a reasonable determination can be made if some quantitative measure can be given to the spillover/multiplier number. Some studies have shown that multiplier to be as high as 66-to-1. *See* Jeffrey A. Dubin, *Criminal Investigation Enforcement Activities and Taxpayer Noncompliance,* California Institute of Technology (2004). Thus, for every thousand dollars in recovered restitution/tax fraud, 66,000 dollars would be the net gain to the taxing entity. Clearly this is a huge amount. In the case of the efforts of the state of Utah to pursue tax fraud in the criminal context, this would mean a net revenue source approaching $100–150 million dollars annually, or perhaps more, while the cost to the state for pursuing these matters is mere thousands of dollars on an annual basis.

In any event, when all is said and done (and whether Ben Franklin was correct or not), paying taxes remains primarily in the realm of self-motivation and self-directed compliance. Most individuals will comply with their obligations, which will ensure the continued provision of essential governmental and societal functions.

To the others who would and do avoid their obligations and fail to comply with the law as it relates to taxation, there is always the possibility of audits or even criminal sanctions being brought by the authorities. Criminal prosecutions have the benefit of not only addressing those individuals who would and do flaunt the law, but effective pursuance also creates a spillover or multiplier effect which gets many other individuals involved, or re-involved, in the process of fulfilling their legal obligations with respect to the tax laws.

And while no one likes taxes and the oversight and obligation that comes with the tax structure, certainly no one who does voluntarily pay his or her fair share and complies with the law in this area likes to be thought of as gullible, naive or as someone who can easily be taken advantage of by those unwilling to financially support the civil society of which we are all a part.

1. This article is an updated and expanded version of a shorter article that first appeared in a recent publication of The Utah Prosecutor.

So Now What is My Deadline? Timing Changes to the Federal Rules

by R. Christopher Preston

On December 1, 2009, major changes took effect in the Federal Rules of Civil Procedure, affecting the time for filing nearly every document or pleading that one files in federal district court. Though at the same time changes were also made to the federal procedural rules governing bankruptcy and criminal cases, this article only addresses the timing changes to the Federal Rules of Civil Procedure ("Federal Rules"). In conjunction with these changes to the Federal Rules, the United States District Court for the District of Utah modified the timing provisions for some of its local rules. For the most part, these changes affect only how one calculates deadlines for filing documents or pleadings pursuant to the Federal Rules. The purpose of this article is to alert and educate readers on these recent changes.

COUNTING DAYS UNDER THE FEDERAL RULES

Central to the changes effected in the Federal Rules is the modification in the method for counting days when calendaring response times. Previously, a party had to be conscious of two separate methods for calculating deadlines, depending on whether the amount of time to act was more or less than 11 days. "When the period of time prescribed or allowed,…is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation." Fed. R. Civ. Pro. 6 (pre-December 2009). However, if the period of time prescribed or allowed was 11 or more days, then intermediate Saturdays, Sundays, and legal holidays were included in the computation. *See id.* While generally not difficult to follow, this bifurcated system often tripped up the unwary and required lawyers to always remain conscious of the number of days required for a particular response.

Indeed, the Utah federal district court website explained that this was one of the reasons why changes were proposed to the timing rules:

> The old system of counting created a series of potential pitfalls for litigants in counting out time periods. For example, 12 days usually last 12 days, 10 days never lasted just 10 days. In fact, 10 days always lasted at least 14 days and eight times a year 10 days lasted 15 days and once a year, 10 days lasted 16 days.

New Federal Rules Frequently Asked Questions, available at http://www.utd.uscourts.gov/documents/rules_faq.html.

Because intermediate weekends and holidays were excluded from only the under-eleven-day calculation, there was little consistency in the amount of time a party had to file its documents, even though the number of days provided in the Federal Rules did not change. In order to avoid the continuation of this inconsistent method of counting days, these new changes were proposed.

Hence, the central change to the Federal Rules that went into effect on December 1, 2009, requires parties to now "count every day, including intermediate Saturdays, Sundays, and legal holidays" when calculating deadlines in federal court. Fed. R. Civ. Pro. 6(a)(1)(B). In order to compensate for the shortened period this would create, most of the time periods for filing documents were extended. These two changes – counting every calendar day and extending time periods – makes it so that essentially the same amount of time is available under the new rules as was provided under the old rules. Thus, while the changes seem significant, the actual impact on civil trial practice is small. While the intent may have been to make the system simpler, as with any change, the new timing rules will take some getting used to.

CHANGES TO DEADLINES IN THE FEDERAL RULES

Generally speaking, time periods have been modified to fall within multiples of seven, and the following can be said about

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the changes to the rules:

- Five day deadlines became seven-day deadlines;
- Ten and 15 day deadlines became 14-day deadlines;
- 20 day deadlines became 21 day deadlines.

See Louise York, *Memo re: Time Calculation Changes* (Dec, 9, 2009) *available at* http://www.utd.uscourts.gov/documents/timecomp_memo.pdf.

Since not all of the deadlines fall squarely within these general parameters, the following discussion identifies the changes to some of the more commonly encountered deadlines. As with all things legal, certain exceptions to the timing descriptions below do apply, and you must always consult the rules to reach the appropriate conclusion based on the facts of your case.

Answer/Motions to Dismiss

Prior to this recent change, an answer or motion to strike or dismiss generally had to be filed within 20 days after service of the complaint. *See id.,* and 12(f) (pre-Dec. 1, 2009). Under the new Federal Rules, an answer or motion to strike or dismiss must be filed within 21 days. *See* Fed. R. Civ. Pro. 12(a)(1)(A)(i), 12(b), and 12(f). Similarly, a pleading could be amended any time within 20 days of service of the complaint, but now the time period has been extended to 21 days. *Compare* Fed. R. Civ. Pro. 15(a)(a)(1) (pre-Dec. 1, 2009) *to* Fed. R. Civ. Pro. 15(a)(1). Responsive pleadings required after denial of a Rule 12 motion previously had to be served within 10 days after notice of the court's action. *See* Fed. R. Civ. Pro. 12(4) (pre-Dec. 1, 2009). With the change, the time period is now 14 days after notice of the court's action. *See* Fed. R. Civ. Pro. 12(a)(4). If a motion to amend has been granted, the time period for answering the amended complaint has been modified from 10 days to 14 days. *Compare* Fed. R. Civ. Pro. 15(a)(3) (pre-Dec, 1, 2009) *to* Fed. R. Civ. Pro. 15(a)(3).

Summary Judgment Motions

Previously, the Federal Rules did not contain deadlines for filing summary judgment motions. *See* Fed. R. Civ. Pro. 56(c) (pre-December 2009). The changes that went into effect on December 1, 2009 now contain a deadline that applies "unless a different time is set by local rule or the court orders otherwise." Fed. R. Civ. Pro. 56(c). While it is important to note this change, the local rules for the Utah federal district court prescribe a different time period regarding summary judgment that is discussed below.

Post Judgment Motions

One of the biggest changes resulting from these new federal rules is the extended time periods regarding post-trial motions. Under the new changes to the Federal Rules, a Rule 52 motion to amend or make additional findings and a Rule 59 motion for new trial or to alter or amend a judgment must be filed within 28 days after entry of judgment. *See* Fed. R. Civ. Pro. 52(b), 59(b), (e). Since the rules previously allowed a party only 10 days to file a motion, this represents a truly significant change. The deadline for filing notices of appeals has not changed and remains 30 days for most cases. *See* Fed. R. App. Pro. 4(a)(1)(A). Thus, the new extended deadlines in the Federal Rules for filing post-trial motions now fall very close to the deadline for filing appeals.

Other Changes to the Federal Rules

While most timeframes are calculated in terms of days, the changes to the Federal Rules also address the situation where a time period is stated in hours. *See* Fed. R. Civ. Pro. 6(a)(2). In addition, the new Federal Rules define when the last day ends, which is now "for electronic filing, at midnight in the court's time zone." *Id.* 6(a)(4). Many will be happy to know that Rule 6(e) (also known as the "mailing rule") was not modified and still allows additional time after certain kinds of service. *See id.* 6(e).

CHANGES TO THE LOCAL RULES OF THE UTAH FEDERAL DISTRICT COURT

Changes to the local rules governing the Utah federal district court also went into effect on December 1, 2009. The main changes relevant to timing are found in DUCivR7-1(b)(4). The local rule previously required that responses to motions pursuant to Rule 12(b) (motion to dismiss), Rule 12(c) (motion for judgment on the pleading), and Rule 56 (summary judgment) be filed

within 30 days after service. Now responses must be filed within 28 days after service of the motion. *See* DUCivR. 7-1(b)(4)(A). A reply must be filed within 14 days after service of the opposition memorandum. *See id.*

Changes were likewise made to the timing for responding to all other motions, including motions pursuant to Rule 65 (injunctive relief). According to the new rule, responses to all other types of motions must be filed within 14 days (previously 15 days) of service, and reply memoranda must be filed within 14 days (previously 7 days) of service of the memorandum in opposition. *See* DUCivR 7-1(b)(4)(B)

Under the new rules, a bill of costs must be filed within 14 days after entry of the final judgment. *See* DUCivR 54-2(a). Objections to the bill of costs must be filed within 14 days after filing of the bill of costs. *See* DUCivR 54-2(b). The taxation of costs may be reviewed if "a motion for review is filed within seven days after entry on the docket of the clerk's action." DUCivR 54-2(d). The time period for filing a motion for attorney's fees did not change and remains 14 days after entry of a judgment. *See* DUCivR 54-2(f).

PROPOSED CHANGES TO THE UTAH RULES OF CIVIL PROCEDURE

It appears that state courts will be following the federal courts' lead on abolishing the differing counting of weekends and holidays based on whether the time period is over 10 days. On July 7, 2008, the Utah Supreme Court and the Utah Judicial Council sought comments on a proposed change to Rule 6 of the Utah Rules of Civil Procedure ("Utah Rules"). These proposed changes largely mirror the timing changes in the Federal Rules that went into effect on December 1, 2009. Together with the proposed change, the Judicial Council prepared a table listing by rule the deadline changes resulting from the adoption of the proposed Rule 6. One significant difference is that this proposed change eliminates the "mailing rule." Those interested may view the proposed change at http://www.utcourts.gov/resources/rules/comments/20080707/; however, it should be noted that the comment period has long passed. The proposed change to Rule 6 is not yet final and is still under consideration. It is not yet known when a final decision will be made by the Utah Supreme Court or the Utah Judicial Council regarding this proposed change to the Utah Rules.

CONCLUSION

The changes to the Federal Rules and the local rules now make deadlines more uniform in calculation and duration. The changes should not significantly affect civil trial practice. But the change will inevitably cause problems for those who fail to bear in mind two important facts: (1) most of the deadlines in the Federal Rules have changed, and (2) every day must now be counted for calendaring all deadlines specified in the Federal Rules. With these new changes to the Federal Rules simplifying the calendaring process, worries about calculating deadlines should swiftly become a thing of the past.

CHANGES TO FEDERAL TIMING RULES
(Abridged Summary)[1]

Before: If time period was less than 11 days, then you did not count intermediate weekends and holidays.

Now: **Count Every Day**

Pleading	Previously	Now
Answer	20 days	21 days
Counterclaim Answer	20 days	21 days
Motion to Strike/ Dismiss/More Definite	20 days	21 days
Amend Pleadings	20 days	21 days after service
Answer After Motion	10 days	14 days after entry
Response to Amended Pleadings	10 days	14 days after service
Opposing Motion for Summary Judgment	None	14 days after service
Reply to Motion for Summary Judgment	None	14 days after service
Motion for Judgment as a Matter of Law	10 days after entry of judgment	28 days after entry of judgment
Motion to Amend Findings	10 days after entry of judgment	28 days after entry of judgment
Motion for New Trial/ Alter or Amend	10 days after entry of judgment	28 days after entry of judgment
Memoranda Opposing Motions (generally)	15 days	14 days
Reply Memoranda	7 days	14 days
Memoranda Opposing 12(b), 12(c), and 56 Motions	30 days	28 days
Reply Memoranda 12(b), 12(c), and 56 Motions	10 days	14 days

1. This table **does not include all timing changes,** only some of the more common ones. Please make sure to check the rules for changes that affect your particular issue.

The look has changed, but our principles remain constant.

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Justice Michael J. Wilkins & Judge Diane W. Wilkins A Case Study in Partnership & Service

by Stephanie Wilkins Pugsley

On May 15, 2010, a chapter in Utah's judiciary closes. With the departure of Justice Michael J. Wilkins from the Utah Supreme Court, Utah's first and only husband/wife judge team will have fully retired. Judge Diane W. Wilkins retired in November 2008, after 19 years on the Second District Juvenile Court. Between them, they served for more than 35 years. Their service is noteworthy for their example of a true partnership and the path they forged for couples who may follow.

Diane, a northern California native, began her education at Berkeley with pre-med aspirations. However, with the unrest of the early-60s, coupled with a counselor's discouraging comments that as a woman she would have to be better than all of the male applicants to have any chance of admission to any medical school, she transferred to Provo, Utah. In the 1960s, that was like jumping from the frying pan into the freezer.

Mike grew up in Utah. During high school "on a quick tongue and fast footwork" he worked full time as a radio rock & roll disc jockey, restored a 1959 MG, and graduated with the Class of 1966 from Olympus High. He then enrolled at the University of Utah, where he met the auburn-haired surfer girl from California.

The 19- and 20-year-olds married in 1967. Within six months, Mike joined the Army and the Vietnam War. They celebrated their first wedding anniversary picnicking on a bench outside the barracks at Fort Ord, California. They spent their second anniversary apart – Mike was in training in Virginia, and Diane was in California awaiting the birth of their first child. Mike spent the next four years serving as an intelligence officer, and the family lived mostly in Massachusetts. Shortly after the birth of their second daughter, Mike was on active orders for service in Vietnam when Uncle Sam offered him an early release from the Army. He accepted the offer, and 10 days later the little family returned to the beach at Santa Cruz, California, once more as civilians and students.

As a poor student, and a husband and father of a family of four, Mike wanted an education sufficient to be his "own boss." He knew no lawyers, nor doctors. He concluded doctors had the better life and set his mind on medical school. Diane supported the family while Mike returned to school at the University of Utah. As the couple contemplated school, they discussed not only his plans, but hers. They asked, "Why not complete both educations at the same time?" She did not want to return to study nursing, the women's substitute for medical school at the time. He asked her what she really wanted to do, and she replied, "Become a lawyer." He said, "Why not?"

As students, they managed their lives with careful scheduling and little sleep. Mike worked two and sometimes three jobs while carrying a full pre-med academic load. Diane also carried a full academic schedule, sewed clothing for the family, canned fruits and vegetables, budgeted their modest income, and cared for their two little girls. They lived in a small student apartment in the University Village. Studying was often done sitting on the grass outside while the little girls played on the playground. Despite the busy time, Mike and Diane encouraged their girls to be aware of the world around by taking them on outings on the bus to the zoo, local museums, and weekend camping trips.

Mike took the medical school admission test and, as a back-up, the law school admission test. Both scores were high. Utah's law school would admit him without finishing his undergraduate degree, and without waiting an additional year to apply. Utah's medical school would not. Stanford law would also admit him but he would have to wait a year. Worse yet, Stanford's tuition for a single year was nearly 10 times as much as tuition at the University of Utah. The price was far too high for a couple committed to "his and hers" graduate degrees. Mike applied for law school at the University of Utah in July of 1974, started in August of 1974, and finished his undergraduate degree concurrently with his first year of law school.

A year later, Diane completed her undergraduate degree and began law school at the University of Utah as well. They took turns being "morning mommy" and "afternoon mommy," the name they gave to the tasks associated with raising two small daughters, and later a son, born at the end of Diane's first year of law school. Mike became skilled at ponytails and ballet buns. Diane added

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law clerking to her daily tasks. Both Diane and Mike attended parent teacher conferences, traded off driving carpools to ballet, piano lessons, cub scouts, and attending elementary school field trips. They were as diligent at attending their children's school performances as they were at attending to their own studies. However, they quickly learned that discussions of the law had to be restricted to after the children were in bed, once it became obvious that dinner table talk of torts resulted in flying peas.

Mike worked multiple jobs through law school and took summer semester both years so as to complete his studies by December, 1976. He clerked for both the Utah Supreme Court and a "downtown firm" prior to graduation. However, Mike wanted his own practice and, as was his plan, he bravely hung out his shingle after admission to the Bar.

To accommodate the birth of their son, Diane extended her studies one semester and completed her legal education in December of 1978, formally graduating with the class of 1979. She was offered a full-time position with the Utah Attorney General's Office, where she had been clerking. As was not uncommon for women at the time, she experienced many struggles due to her gender. Unfortunately, the offer was withdrawn the day before the bar exam. Fortunately she soon found work in the Salt Lake County Attorney's Office.

She became a seasoned trial attorney in the family support and recovery division of the Salt Lake County Attorney's Office, securing support payments, establishing paternity, and dealing with strained, torn, and dysfunctional families. Diane then moved to the Attorney General's Office, where she was one of very few female attorneys. She represented the juvenile bench, the Board of Juvenile Court Judges, and handled all juvenile court appeals before these were heard by the Utah Supreme Court, and later by the Utah Court of Appeals.

Unfortunately, women in the AG's office at that time were not being paid or promoted equally with men, and Diane concluded that her career required a less-biased environment as a springboard. At her departure, she purposefully and openly encouraged the needed change in pay and promotion for her female colleagues at the AG's office, which ensued shortly thereafter.

Leaving the AG's office brought about the birth of Wilkins & Wilkins, which somehow mixed a commercial, construction, corporate practice with a family and insurance defense practice. Talk of children and lawn care managed to sneak into partners' meetings. On top of their private practices, both Diane and Mike were actively engaged in their local community and the legal community. For example, she helped establish the Women Lawyers of Utah, serving as its first president. As their children grew, Diane significantly reduced her private practice to spend more time at home.

Diane was unable to resist the return to public service and, at the request of Governor Norman Bangerter in 1988, she became his Deputy Chief of Staff. Her legal skills and knowledge of state government, gleaned from representation of multiple state agencies as an Assistant AG, made her a valuable addition to his personal staff. Diane's quick mind and tight organizational skills allowed her not only to grasp the complexities of state-wide issues, but to propose and implement significant policy improvements within her areas of responsibility, including: commerce, economic development, Indian tribal relations, constituent services, and legislative relations. When in 1990 a position on the juvenile court became available in the Second District where they lived, she applied without mentioning it to her boss, feeling that it would be unfair to the other applicants. He appointed her anyway. Some in the legal community and some news outlets, unaware of her refusal to take advantage of her access to the governor, decried her appointment as one of political payoff, and one devoid of qualifications. The criticism was unjustified and unfair.

Once Diane returned to full-time work, Mike and Diane artfully balanced three teenagers and two careers. As in the earlier days of their marriage, they shared many of the duties that traditionally fell on women. Mike and Diane were both skilled cooks, providing home-cooked meals every night. They valued gathering their family around the table together each evening. They taught their children to cook. They divided the tasks of laundry, carpools, running to the grocery store, helping with their son's Eagle Scout project, running to ballet, trips to the veterinarian, struggling with algebra, and working on science fair projects. Mike and Diane also expected their children to help carry the family load and taught them to work at an early age. Chores were divvied out and expected to be done before teens could hang out. Expectations were high, but the rewards were more than worth the effort.

Judge Diane Wilkins was one to whom patrons of the court, staff, and the community at large looked for innovation, leadership, and thoughtful, even-handed application of the law. She took her role seriously, and was instrumental in designing new tools for the court. She and her clerks were the first to craft standard language for orders that permitted immediate delivery of signed orders to court patrons. Previously, delays in delivery of orders allowed for misunderstanding and missed opportunities. She pioneered intensive supervision for young offenders, young sex offenders, and delinquency drug court. These efforts, and many others, were simply an extension of her conviction that early intervention, with clear and certain consequences, could redirect youngsters and families into more law-abiding and successful lives. Her efforts were often unnoticed, but eventually proved to be highly successful. At retirement, she received numerous letters from families, youth, and probation staff thanking her for her efforts in such a difficult and thankless job. Few lawyers enjoy opportunities for "feel good moments." She created them.

In the meantime, Mike was a lawyer in small-firm private practice in Salt Lake City, focused on commercial, construction, and corporate litigation from graduation until his appointment to the Court of Appeals in 1994. Just shy of finishing his Ph.D. in political science, Mike was encouraged to apply for the Court of Appeals and was appointed by Governor Mike Leavitt in August 1994. At age 46, three weeks prior to taking the bench, Mike closed his practice and took a three-week vacation. It was the first vacation, or break from work of any kind, that he had taken in more than 28 years (since high school) that extended for more than a week.

Upon his return, Chief Justice Michael Zimmerman administered the oath privately to Justice Wilkins with just his wife and children present in advance of the public ceremony. At that time, the Chief Justice reminded Justice Wilkins that he would always be the "junior" judge in the family. This is a fact about which the couple joked for years.

As a member of the Court of Appeals, Justice (then-Judge) Wilkins was mentored by his six colleagues. Their congenial and collaborative approach to the work gave him confidence to participate and offer suggestions. He takes great pride in the establishment of the Appellate Mediation Office at the Court. During Justice Wilkins' term as presiding judge, Judge Norman Jackson advanced the idea that appellate mediation should be added to the court's bag of tools. Justice Wilkins took this idea and ran with it. With Judge Jackson, staff attorney Karin Hobbs, and the support of his colleagues on the Court, Justice Wilkins organized the appellate mediation program that continues today. Justice Wilkins' personal relationship with many members of the state legislature, hard work, and his "outside-the-box" thinking, made the office a reality. He secured rules, statutes, funding, and instituted training and evaluation. With persistence, he found that initially-reluctant counsel and parties could be persuaded, and the appellate mediator resolved as many cases as a judge could in a year's time. That success continues today and has been accepted as a valuable and fiscally-efficient part of the appellate system.

In 2000, Justice Wilkins joined the Utah Supreme Court. Unlike any husband/wife team before them, Judge Diane Wilkins swore in Justice Mike Wilkins as a member of the Utah Supreme Court. And he has twice administered the oath of office to her. While at the Utah Supreme Court, Justice Wilkins put his accumulated experience and knowledge to good use, authoring many difficult decisions, and serving on numerous judicial and civic committees. Justice Wilkins's sharp mind and love of learning led him back to the University of Virginia for an advanced law degree in 2001. His wealth of knowledge, coupled with humor, has made him a popular speaker and lecturer. He is an advocate for civility and professionalism. He has travelled internationally to Mexico teaching

and lecturing about the rule of law and the independence of the judiciary. He is one of Utah's commissioners on the Uniform Law Commission. He has mentored new lawyers, students, and members of the Bar, as well as students while an adjunct professor at the J. Reuben Clark College of Law at Brigham Young University. As a team, both Judge and Justice Wilkins have travelled twice to the Ukraine to teach about our independent judiciary.

Justice Mike Wilkins says that leaving the Court comes at a good time in his life. When asked to name his most significant cases, he responds simply that every case reaching the Supreme Court is "incredibly important" to those involved. He looks forward to the next phase in his career, utilizing the experience afforded him on the bench as he begins a new chapter as a mediator. He has been trained as a mediator both in Utah and at Pepperdine University's Straus Institute for Dispute Resolution. His creative approach to problem solving will serve him well in this new endeavor.

Judge Diane Wilkins has always been drawn to issues and opportunities concerning families and children. As a lawyer, a judge, a citizen, a mother, and a wife, she found that her greatest positive influences lay in working to improve children's and families' lives.

By those who know my parents and the pace at which they live their lives, I am often asked what they are going to do with all the spare time in retirement. They will spend more time traveling, gardening, and doing projects together. They recently completed the restoration of a pioneer farmstead and two small outbuildings in Centerville, for which they were recognized by the Utah Heritage Foundation. Justice Wilkins did much of the construction work himself, referring to it as a nice contrast to his "day job." They are usually found together, reading, planning travel, or simply in what Justice Wilkins calls "companionable silence." They still do not discuss legal issues at family dinners, because a new generation may throw peas. And they do still love each other.

I love my parents. They did a great job showing us how to be all we wanted to be personally, while still empowering us as children and putting time with family first in almost all cases. My sister is a great mother to her nearly-adult children. My brother is a world-class architect living in Chicago. I am the only lawyer out of the bunch – a lawyer, married to a lawyer, juggling my own four kids. As a woman lawyer, I appreciate the barriers that have been removed for me. I cannot accurately describe how much I believe we owe to couples like my parents. They both demonstrate the best in cooperative and loving support for each other and devotion to public service. My dad could not have done it without my mom, and my mom could not have done it without my dad. My siblings, my children, our legal community, and I, are the better for it.

The Hidden Cost of Stress

by Mary Jane E. Wagg

A certain amount of stress is to be expected in any lawyer's life. But, have you ever asked yourself why or wondered about the long-term effects of constant stress? Google "lawyer" and "suicide" and you will get 5,730,000 results. Replace "suicide" with "stress" and it is a sobering 7,980,000. Our profession demands empathy and aggression in equal measure. Our clients expect around-the-clock accessibility and accountability. Our bottom lines require a constant stream of billable hours and positive cash flow. Over the last several decades, the work day has expanded and it is harder than ever to get your mind out of the office, even when your body is out of the office. So it is no wonder lawyers feel stressed out and suffer from depression and struggle with addiction at greater rates than the general public.

It is not that we do not want to exercise, get enough sleep, eat right, spend quality time with family and friends – of course we do – but time comes at a premium. So we make compromises and sacrifices every day. An hour in the gym might be a trade-off for an hour less sleep. Breakfast with the kids might mean a fast-food dinner at your desk. An unexpected TRO hearing might mean canceling plans with friends. There are going to be times when a lawyer's schedule is out of his or her control; for the other times, when we do have choices, are all these compromises actually saving time, or costing us more?

It depends. Although we react to it in different ways, and whether we are conscious of it or not, we all experience stress – and all these daily compromises can contribute to stress. Stress is not abnormal and is not always negative; it is a natural physical and psychological reaction to stimuli in our lives. Some stress is absolutely necessary to living organisms, and individuals naturally react differently to stress. We are all equipped with a biological thermostat designed to reserve certain bodily responses – the release of adrenaline, increased heart rate, panic, and the fight-or-flight response – for life-threatening events. Psychologists have found, however, that the experience of stress in the past magnifies your reactivity to stress in the future. Rather than raising our tolerance to stress, chronic stress can make people sensitized, or acutely sensitive, to stress.

Stress activates the same areas of the brain associated with eating, satiety, aggression, and immune response, and sensitization to stress leads the brain to re-circuit itself in response to stress. Once that happens, the slightest stressor can trigger a cascade of chemical reactions in the brain and body that assault us from within. We may realize it is irrational to get worked up over a normal, insignificant event – like running late for an appointment, missing a train, or literally spilling milk – but our brain and body act like our life is on the line.

This makes biological sense when you consider that stress is controlled, so to speak, by the hypothalamus – a relatively small area of the brain that is closely connected with pituitary and adrenal glands. The hypothalamus is central in regulating blood pressure, heart rate, body temperature, sleep patterns, hunger and thirst, reproductive functions, and more. Hence, the profound effects stress can have on a variety of biological functions.

Psychologists have found that when the body responds to the stress of everyday life with the same surge of chemicals released during life-threatening circumstances, the body literally attacks itself. Chronic stress wears down the immune system, increasing the likelihood of illness, infection, and disease. It can weaken the heart, leading to strokes and heart disease. Hormones unleashed by stress can erode the digestive tract and lungs, resulting in ulcers, abdominal pain, and asthma. Stress can also manifest itself as muscle tension, headaches, and back pain.

The effects are not just physical; stress can affect cognition, too. If you experience a lack of motivation, loss of desire, memory problems, inability to concentrate, indecision, impatience, or confusion, stress may be to blame.

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So how do we deal with sensitization to stress? How do we quell the biological damage of constant deadlines and too little sleep? There is no one-size-fits-all remedy, but there are many things you can do to start desensitizing yourself to stress.

Through "mindfulness meditation," from Buddhist tradition, a practitioner develops an awareness of the body's stress response and, through practice, learns how to interrupt it. With daily practice of 20 to 40 minutes, you may be able to retrieve the feeling of relaxation during meditation with just a few breaths.

Another widely studied and effective stress reliever is the "relaxation response" pioneered by Harvard's Herbert Benson, M.D. It can be practiced anywhere, anytime you feel stressed.

- Sit or recline comfortably. Close your eyes, if you can, and relax your muscles.

- Breathe deeply. To cultivate a deeper breath, place one hand below your ribcage, over your diaphragm, and the other hand on your sternum. Breathe in slowly through your nose; as you do, you should feel your belly expand, not your chest.

- Slowly exhale, focusing on your breathing.

- If thoughts intrude, acknowledge them but allow them to pass and continue to focus on your breathing.

Practicing the relaxation response for 10 to 20 minutes once a day can calm your mood and help see you through stressful situations.

For others, exercise, yoga, gardening, visualization techniques, and listening to music can help. Utah Lawyers Helping Lawyers (http://www.lawyershelpinglawyers.org/) offers confidential peer-to-peer mentoring for members of the Bar whose professional performance is or may be impaired because of mental illness, emotional distress, substance abuse, or any other disabling condition or circumstance. Blomquist Hale Consulting also provides a Utah State Bar approved lawyer assistance program and free counseling. Recognizing a stressful situation and taking a few breaths to remove yourself from it can help to interrupt – and eventually reverse – the damaging effects of stress sensitization.

Parr Brown is pleased to announce…

ROGER D. HENRIKSEN has been named President of the Firm.

Mr. Henriksen, an attorney with Parr Brown since 1984, focuses his practice in the areas of construction, real property and industrial contracting. He provides legal services in areas such as land use planning and entitlements, service and supply contracts, joint ventures, acquisitions and divestitures, leases, and transportation contracts. He is also experienced in administrative proceedings, including land use, property tax appeals, and lobbying for and drafting of laws and regulations. A graduate of the University of Utah, Mr. Henriksen earned his B.S. degree in Accounting, magna cum laude, and his J.D. from the University of Utah, Order of the Coif, where he served as Executive Editor of the Utah Law Review. He clerked for the Honorable Judge Alden J. Anderson, United States District Court for the District of Utah.

JAMES S. WRIGHT has been named a Shareholder.

Mr. Wright will continue his practice as a member of the firm's Real Estate and Construction group which advises some of the region's largest construction contractors as well as prosecutes and defends construction related cases in state and federal courts and through alternative dispute resolution. Mr. Wright received his B.A., *cum laude,* from Brigham Young University in 2002 and earned his J.D. from Harvard Law School in 2005. Prior to joining Parr Brown, Wright was an associate with the Salt Lake office of O'Melveny & Myers.

AUSTIN J. RITER has joined as an Associate.

Mr. Riter is a member of the firm's litigation section. He received his B.A. from Yale University, summa cum laude, in 2003 and is a William H. Leary Scholar. He earned his Juris Doctor from the University of Utah, Order of the Coif, where he was Editor-in-Chief of the Utah Law Review. Prior to joining Parr Brown, Mr. Riter served as a judicial law clerk for the Honorable Paul G. Cassell, U.S. District Judge for the U.S. District of Utah; the Honorable Jennifer W. Elrod, U.S. Circuit Court Judge for the U.S. Court of Appeals for the Fifth Circuit; and the Honorable Milan D. Smith., Jr., U.S. Circuit Court Judge for the U.S. Court of Appeals for the ninth Circuit.

ALLISON G. BEHJANI has joined as an Associate.

Ms. Behjani will focus her practice in the areas of corporate and real estate law. She received her B.A. degree in History, *magna cum laude* from Brigham Young University in 2005 and earned her Juris Doctor from the S.J. Quinney College of Law, *Order of the Coif* in 2008 where she served as the Symposium Editor for the *Utah Law Review.* Prior to joining Parr Brown, she served as a judicial law clerk for the Honorable Ronald E. Nehring of the Utah Supreme Court.

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Irony Is Alive and Well in the Utah Bar Journal

by Gary G. Sackett

Two Hypotheticals

As a preliminary exercise, consider medical patient *P,* who is currently under the care of physician *D1. D1* has advised *P* that *P* should undergo spinal surgery to relieve major back pain. *P* decides that, before going under the knife, *P* would like a second opinion on the matter and consults privately with *D2,* who examines and diagnoses *P* and suggests a period of therapeutic treatment before making a final decision on surgery. Is *D2* out of line for talking to *D1's* patient? No, of course not. No one would question the prudence of *P's* action, or the propriety of *D2's* responding to *P's* request for a second opinion before making such a life-affecting decision.

Now change patient *P* to client *C,* and *D1* and *D2* to lawyers *L1* and *L2,* respectively. *L1* has advised *C* to become a plaintiff in a major lawsuit that has the potential for exposure to a significant counterclaim against *C. C* is inclined to go forward, but wants to consult *L2* privately to get a second opinion before proceeding with *L1.* No one would seriously suggest that *L2* should be constrained from providing such additional advice as *C* might seek on such an important matter, independent of whether *L1* was aware of the contact.

This brings us to two items that appear, maybe serendipitously – maybe not, in the January-February 2010 issue of the *Utah Bar Journal:* Meb Anderson's article *Ethical Conundrum? Try Asking the Ethics Advisory Opinion Committee* and a report ("Disciplinary Note") on page 47 about a lawyer who provided legal services to a "mature" minor whose best interests were already represented by a court-appointed guardian ad litem (GAL).

Irony in the *Bar Journal*

A thoughtful article by Mr. Anderson, a member of the Ethics Advisory Opinion Committee (the "Ethics Committee"),[1] urges lawyers to seek ethical guidance from that committee when in doubt about an ethical issue. In the *Attorney Discipline* section of the same issue, a scant 16 pages further on, the Office of Professional Conduct ("OPC"), which authors the entries in this section,[2] pointedly warns Utah lawyers that the opinions of the Ethics Committee cannot be relied upon and are "inconclusive":

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

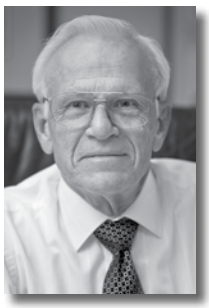
Attorney Discipline, Utah Bar J., Jan.-Feb. 2010, at 47. The irony of these two items being published within a few pages of each other is conspicuous and palpable.

The warning in the Disciplinary Note that the Ethics Committee's opinions are not binding on OPC is technically accurate as of 2007, but there are two major problems with it: (a) It sends a dreadful message to Utah attorneys – namely, if you have an ethical dilemma about which you prudently seek and obtain thoughtful, reasoned advice from the Ethics Committee, that and $3.00 may get you a latté at Starbucks and very little else. After reading these items in the *Bar Journal,* an anonymous member of the Ethics Committee noted that, "The lesson is, if we [the Committee] say you *can't* do it, don't do it; and if we say you *can* do it, don't do it." (b) The Disciplinary Note appears to have been unnecessary to conclude that a private admonition was appropriate disciplinary action in the case at hand and, accordingly, it was unnecessary to negate the salutary effects of Mr. Anderson's otherwise timely article.

Factual Setting

The disciplinary action that led to this paradoxical situation arose when a "mature" minor became dissatisfied with having had no contact for two years from his court-appointed GAL and, accordingly, sought assistance from another, private attorney.[3] The private attorney, being concerned about a possible violation of Rule 4.2,[4] which prohibits certain direct contacts with parties known to be represented by counsel, prudently researched the issue and found Utah State Bar Advisory Opinion 07-02 that addressed, in part, a nearly identical situation. Utah State Bar Ethics Advisory Opinion Committee, Op. 07-02 (2007).

GARY G. SACKETT is of Counsel at Jones, Waldo, Holbrook & McDonough, P.C. Mr. Sackett served as Chair of the Ethics Advisory Opinion Committee for 11 years and is a member of the Utah Supreme Court Advisory Committee on the Rules of Professional Conduct.



Opinion 07-02 primarily focused on the normal situation of a minor who is not legally competent to make reasoned decisions, but the end of the opinion addressed a situation involving a "mature" minor whose personal wishes might be different from the societal norm of "his best interests." The opinion cites Utah Ethics Advisory Opinion 110, which confirmed the general proposition that a currently represented client has every right to seek a second opinion from an independent lawyer (*L2* in the opening example) and that the second lawyer does not violate Rule 4.2 by providing such an opinion. *See id.,* Op. 110 (1993). On that basis, Opinion 07-02 concluded: "[I]f 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 by speaking with the minor, even if the communication is without the GAL's prior permission or consent." *Id.,* Op. 07-02, ¶ 23.

Having found Opinion 07-02 in his research, the attorney reasonably believed that he could entertain the mature minor's plea for assistance in dealing with a non-responsive GAL. However, the Disciplinary Note indicates that, following that consultation, the attorney went beyond the action that Opinion 07-02 had approved. After consulting with the minor, the minor was apparently told that the attorney could represent him in a currently pending court proceeding. The attorney then filed a notice of appearance in the minor's case in which the GAL was already the attorney of record. The attorney appears, in effect, to have attempted to usurp the position of the duly appointed GAL.[5] Nothing in Opinion 07-02 could be construed to provide such license.

Historical Perspective

Before an analysis of the paradoxical picture painted by these two items, a historical context may be useful.

Before 1995, the procedural rules for the Ethics Committee were not set out in substantial detail. In about 1994, the Committee undertook to develop a more detailed set of procedural rules, which the Utah State Bar Commission first adopted on December 1, 1995, and approved on December 6, 1996, with minor modifications.

Both as a matter of practice prior to 1995 and as incorporated in the 1995 rules, the Ethics Committee's opinions were subject to Bar Commission approval. Approval was typically obtained by an in-person presentation by the Ethics Committee Chair to the Bar Commission. After discussion, the Bar Commission would vote on whether to issue the opinion, return it to the Ethics Committee for further consideration or modification, or – rarely – reject it. Over the years, several opinions the Ethics Committee issued generated controversy among various factions of the practicing bar that spawned major campaigns by lawyers – both on their own behalf and for their clients – to oppose certain Ethics Committee opinions before the Commission. In a few cases, the issues became highly charged, complete with intense lobbying of individual Commissioners by proponents or opponents of a particular opinion.

After a number of these contentious proceedings, the Commission concluded in 2001 that a better way to handle these matters and eliminate the lobbying of Commissioners was to give initial issuance authority directly to the Ethics Committee. A key ingredient to this procedural change was a well-defined process allowing lawyers and certain others to take a direct formal appeal to the Bar Commission. The rules also provide an interested party the opportunity to seek reconsideration before the Ethics Committee. This is optional and is not a required step in taking an appeal to the Bar Commission.

Under the auspices of the Bar Commission, a special subcommittee drafted a comprehensive set of rules governing appeals to the Commission that were presented to and approved by the Bar Commission in late 2001. *See* Utah State Bar Rules Governing the Ethics Advisory Opinion Committee § VI, *available at* www.utahbar.org/rules_ops_pols/rules_governing_eaoc.html; *see also* Ethics Advisory Opinion Committee Rules of Procedure § III(e), *available at* www.utahbar.org/rules_ops_pols/eaoc_rop.html. As a part of the comprehensive Commission consideration of the Ethics Committee's rules to make the opinion process less political and more definitive, the Commission had also approved a provision that made the opinions of the Committee binding on OPC. The rule amendments the Bar Commission adopted in October 2001 provided: "Compliance with an ethics advisory opinion shall be considered evidence of good-faith compliance with the Rules of Professional Conduct. Opinions are binding interpretations of the Rules of Professional Conduct in matters within the Board's jurisdiction. *Opinions shall bind the Office of Professional Conduct.*" Utah State Bar Rules Governing Ethics Advisory Opinion Committee § V(b) (2001) (emphasis added).

After the rule had been in effect for more than five years, the Chief Justice of the Utah Supreme Court in late 2006 raised the issue of the extent to which the Ethics Committee's opinions should be binding on the Bar's prosecutors, the OPC.

At the Chief Justice's request, the matter was discussed at length within the Ethics Committee and the Bar Commission. One of the several attempts to "soften" the hard-and-fast binding effect on OPC of then-Rule V(b) without reducing the Ethics Committee's opinions to mere musings of a group of volunteer lawyers was the following:

> A Utah lawyer's compliance with an ethics advisory opinion shall be considered evidence of good-faith compliance with the Rules of Professional Conduct. In any disciplinary action brought against an attorney, the attorney will be presumed to have acted in compliance with the Rules if the attorney's actions are substantially the same as actions found to be in compliance with the Rules by one or more currently in-force formal opinions of the Ethics Advisory Opinion Committee. This presumption is subject to rebuttal

by the establishment before the applicable tribunal that any Committee opinion on which the attorney has relied either (i) is inapplicable on the facts of the attorney's alleged violation of the Rules, or (ii) is a clearly erroneous interpretation or application of the Rules with respect to the subject behavior.

Memorandum from Gary Sackett to the Ethics Committee (April 24, 2007) (on file with the Ethics Committee).

This appeared to the Ethics Committee to provide a middle ground on this issue. But, OPC vigorously opposed this proposal and all other modification short of giving OPC sole final authority to prosecute members of the Bar without being bound by the opinions of the Ethics Committee. Representatives from OPC – one of whom sits as a non-voting *ex officio* member of the Ethics Committee – repeatedly assured and reassured the Committee that it was highly unlikely that OPC would ever prosecute an attorney who had complied with an Ethics Committee opinion.

After the extensive consideration of the issue, the Chief Justice and the Supreme Court in 2007 required that Rule V be modified to read: "When issued and published by the Committee, an Ethics Opinion shall be advisory in nature. A Utah lawyer who acts in accordance with an Ethics Opinion enjoys a rebuttable presumption of having abided by the Utah Rules of Professional Conduct." Utah State Bar Rules Governing Ethics Advisory Opinion Committee § V (2009).

Analysis

There are several aspects of the Disciplinary Note that bear consideration.

The attorney's initial action in responding to a request from a mature minor for advice cannot, by itself, reasonably be construed as a violation of Rule 4.2. If it were, then *no* attorney could render a second opinion to anyone who is currently represented by counsel but wants a fresh set of eyes on their legal problems, unless the current attorney was willing to consent. This would thwart a person who wanted a private second opinion without "firing" the original attorney. Such a result would be fundamentally wrong and was never the intent of Rule 4.2. The Rules of Professional Conduct were not designed, nor should they be interpreted, to form a barrier to a person who seeks legal advice from more than one source. *See* Utah R. Prof'l Conduct R. 4.2, cmt. [6] ("This Rule does not preclude communication with a represented person who is seeking a second opinion from a lawyer who is not otherwise representing a client in the matter.").[6]

One result of the Disciplinary Note is to throw the entire issue of second opinions into a state of uncertainty and confusion. The Note reports that the lawyer was found to have violated Rule 4.2(a), which indicates that the very act of communicating with a person who was seeking legal advice in addition to the advice (or absence of advice) from the minor's court-appointed attorney was a violation. There is nothing in the Disciplinary Note to distinguish the minor's request of a second lawyer for such advice from the request of any other person who has a lawyer and wants to obtain a second opinion.

OPC's finger-wagging language in the Disciplinary Note leaves the practicing bar in a no-man's-land with respect to second opinions and Rule 4.2. Will a lawyer who responds to a request for a second opinion without the consent of the client's first attorney get crosswise with OPC's interpretation of Rule 4.2? After all, if OPC chose to ignore

the result of Opinion 07-02 in this case, will it also choose to reject the underlying opinion, No. 110, which explicitly approved providing second opinions without obtaining Rule 4.2 consent from the first lawyer? Sorry, but Utah attorneys will have to operate without guidance, because – as the Disciplinary Note makes perfectly clear – OPC is as free to decide to "rebut" Opinion 110 as it was to rebut Opinion 07-02.

Utah State Bar members have now been put on notice that they may take little comfort in the analysis and conclusions of the 200 opinions issued by the Ethics Committee since 1975. Not only does the Disciplinary Note point out that the conclusions of the Ethics Committee's opinions are "rebuttable," but the Note goes further and characterizes the ethics opinions as "inconclusive." This term is a construct of OPC as author of the Disciplinary Note; it does not appear in the Bar's rules governing the Ethics Committee or in the Ethics Committee's procedural rules. *See* Utah Rules Governing Ethics Advisory Opinion Committee, § V; *see also* Ethics Advisory Opinion Committee Rules of Procedure § V(b).

Now there is no "safe harbor" for the prudent lawyer who aspires to verify that an action to be taken does not run afoul of an ethical obligation. But, if OPC has the controlling word on any such action, why not seek an opinion from that office? Answer: OPC does not issue "advisory" opinions. If OPC responds to an inquiry about the ethical propriety of a given course of action, it always qualifies the advice with (a) a standard this-opinion-is-not-binding-on-our-office disclaimer and – the irony intensifies – (b) a suggestion that the attorney seek a formal opinion from the Ethics Committee. From the OPC pages of the Bar's website:

> [A]dvice given by the OPC on the Hotline is not intended to be legally binding on the office. In this regard, you [the inquiring lawyer] are told: This is an informal opinion of our office, based upon a reading of the Rules of Professional Conduct. You should read the rules and exercise [your] own judgment. Formal opinions can be requested from the Utah State Bar's Ethics Advisory Opinion Committee.

The Utah State Bar's OPC Ethics Hotline For Attorneys, *available at* http://www.utahbar.org/opc/opc_ethics_hotline.html.

One cannot dismiss this conundrum by suggesting that lawyers should always apply the Rules of Professional Conduct conservatively in their practice and avoid actions that might be in the interstices of the black letter rules. That, of course, is not practical and is often not consistent with the lawyer's duties to clients to pursue their legal interests with all due vigor and zeal. *See, e.g.,* Utah Rules Prof'l Conduct, Preamble § [9]. It is not clear how it furthers the administration of justice and provision of service to clients by foreclosing procedures that would allow attorneys attempting to fulfill their ethical obligations to obtain definitive guidance from the very institution that regulates them.

Importantly, it appears to have been unnecessary to raise this OPC-has-the-last-word-in-ethics issue in the discipline of this attorney and in OPC's blunt message to attorneys in the Disciplinary Note. It is a well-established American jurisprudential principle that tribunals should generally decide issues on narrow or factual grounds when possible, without resorting to establishing broad principles. That path appears to have been available in this case, but OPC as both prosecutor and reporter of the matter chose not to adhere to this principle.

The attorney's actions in this case of inserting himself in place of the GAL in ongoing litigation went further than what Opinion 07-02 gave license for. In that regard, the attorney may properly have been subject to discipline. But merely advising a mature minor who sought "outside" advice should not have been construed as a violation of Rule 4.2 and should not have been the focus of the attorney's discipline. Using the professional-conduct rules to deny a mature minor justifiable relief from a system that may have, for one reason or another, failed to provide adequate legal protection to him, is inconsistent with promoting the administration of justice.

As reported in the Disciplinary Note, the lawyer's transgression against the judicial system was not in the act of consulting with a mature minor who had apparently been neglected by his GAL, but in his apparent attempt to displace or otherwise supplant

the GAL as the representative of the best interests of the minor. Such activities constituted a fundamental breach of professional responsibility and appear to be the kinds of actions that Rule 8.4(d) contemplates: "It is professional misconduct for a lawyer to… engage in conduct that is prejudicial to the administration of justice." Sup. Ct. R. of Prof'l Practice 8.4(d).

Had OPC prosecuted on that basis and written a corresponding report in the Disciplinary Action section of the *Bar Journal,* the "warning" about the non-binding nature of the Ethics Committee's opinions would not have been necessary, and the mixed messages to Utah lawyers would not have struck such a discordant and confusing note.

It is also notable that the minutes of the Ethics Committee meetings at which Opinion 07-02 was discussed do not reflect that OPC's Ethics Committee representative raised any objection or other concern about the "mature minor exception" during the course of the Ethics Committee's final adoption of the opinion. The Ethics Committee voted 9-0 to issue the opinion, with one abstention. *See* Ethics Committee Minutes for May 8, 2007 meeting (on file with the Ethics Committee). Perhaps more importantly, OPC did not seek reconsideration of the opinion before the Ethics Committee, and it did not seek to have the Bar Commission review it and overturn or modify it, both of which are its prerogatives under both the Ethics Committee's enabling rules and its procedural rules, *see* R. Governing Ethics Adv. Op. Comm. §VI; Ethics Adv. Op. Comm. R. Proc. § III(e), and it did not take any other action indicating its disagreement with the conclusions of Opinion 07-02.

If OPC's position is at odds with an Ethics Committee opinion, OPC should at least make its opposition, and its intent to disregard the opinion, publicly known so that attorneys may make informed judgments and govern themselves accordingly, lest they step in a hidden bear trap.

In effect, OPC possesses near-absolute veto power over the Ethics Committee's opinions. And, this power is even more problematic than a "normal" veto, as it takes the form of a "springing veto." That is, the veto doesn't become apparent until it "springs" to life when OPC takes action against a lawyer who has relied on an opinion of the Ethics Committee.

A final observation: The Disciplinary Note sends a discouraging message to lawyers who are serving, or might be inclined to serve, on the Ethics Committee. The unnecessary statement of OPC authority has the real effect of diminishing the value of the volunteer services rendered by the Bar members, many of whom donate significant time and resources to elevate their profession and to assist other lawyers in establishing where they can and cannot go in the realm of proper professional conduct.

In the final analysis, these ironically juxtaposed items in the *Utah Bar Journal* highlight the need for a definitive means for a lawyer to establish that a proposed course of action in furtherance of clients' interests is inside the perimeter drawn by the Rules of Professional Conduct. Currently, there is no such mechanism, as the OPC Disciplinary Note has emphatically made clear to the nearly 10,000 members of the Utah State Bar.

1. The Ethics Advisory Opinion Committee is a committee of the Utah State Bar under the general authority of the Utah Supreme Court.
2. The summaries published in the Attorney Discipline section are not directly attributed, but it is well established that the OPC, in its prosecutorial role for the Bar, provides the text for the items in that section. *See Pendleton v. Utah State Bar,* 2000 UT 96, ¶ 6, 16 P.3d 1230.
3. The genders of the participants are not indicated in the Disciplinary Note. Masculine pronouns are used generically in this article.
4. Utah Rule 4.2 of the Supreme Court Rules of Professional Practice is quite different from the ABA Model Rule 4.2 in several respects, but the applicable provisions for this case are not substantively different.
5. The liberal use of such hedge words as "appear" and "seem" are required in this discussion, as the only facts in the case are those set forth in the Disciplinary Note. The proceedings of the Ethics and Discipline Committee in cases resulting in a private admonition are confidential and not available to the public. Accordingly, there is some uncertainty about the full factual situation. That, however, does not detract from the point of this article – namely, the OPC's citation of the non-binding nature of ethics opinions is inconsistent with the action urged in Mr. Anderson's article.
6. Comment [6] was not a part of the Utah Rules of Professional Conduct or the ABA Model Rules in 1993 when Opinion 110 was issued. *See* Annotated Model Rules of Professional Conduct 393 (ABA 6th ed. 2007).

The Guantánamo Lawyers

Edited by Mark P. Denbeaux and Jonathan Hafetz

Reviewed by John West

The measure of a country is how it acts in time of peril

– Brigadier General David M. Brahms

As an undergraduate at BYU, I eventually realized that my political science major, while interesting, was not likely going to land me a job. So I decided that law school was the next logical step, and that I could, perhaps, get a taste of the experience by taking an undergrad constitutional law class. Most of the concepts and cases learned in that class have since fallen prey to the distortions and shadings of an imperfect memory. But one thing I do remember is the Korematsu line of cases dealing with the internment of many Japanese Americans in what were euphemistically called relocation centers. I remember being surprised and embarrassed at the denials of due process that those camps represented. I also remember thinking that surely such a thing could never happen in America again – "surely not now." That was in 1980.

Despite a half century of jurisprudence and a general and gradual increase in civil liberties, an attack on American soil still has the frightening ability to erode that progress. To paraphrase Yoda – fear leads to anger. Anger leads to hate. Hate leads to the dark side.

In *The Guantánamo Lawyers*, the lawyers who have defended and who continue to defend detainees at Guantánamo have contributed the stories of some of the struggles, obstacles, and frustrations they and their clients have faced. Most of the narratives are frightening. Many are heartrending. Some are humorous. While some of the Guantánamo lawyers are specialists in criminal and constitutional law, many others practice everything from business law to family law. The common thread is keenly-felt commitment to the rule of law and due process. Most of these lawyers have contributed time and resources without compensation. Others actively engaged in fund raising in order to represent what the government referred to as "the worst of the worst."

Interestingly, as the Guantánamo lawyers dug into the histories of their clients, they discovered that many of the detainees at Guantánamo were not captured on the battlefield. More than a few were people who were denounced by enemies or opportunists and sold to American forces for money.

The frustrations of the Guantánamo lawyers are innumerable. A short list is illustrative:

- The government would not allow a lawyer to represent a detainee unless the detainee signed a request for the representation of the lawyer. Detainees were very suspicious of the lawyers – partly because one of the government interrogation techniques had been to impersonate lawyers.
- Lawyers and detainees were frequently not allowed to see government evidence.
- Detainees could not call witnesses.
- Even when the government's own investigation exonerated a detainee, he could still be held for years.
- The government tortured the detainees, both physically and psychologically.
- Lawyers could not keep the notes of their conversations with their clients. Instead the notes had to be surrendered to the government and could only be reviewed by the lawyer by traveling to one of a handful of repositories.

Clearly, *The Guantánamo Lawyers* is a compilation of narratives written from a certain point of view. It is undeniably a piece of advocacy and an indictment of the Bush Administration's Guantánamo policy. And because it consists primarily of the stories of some of the detainees and those who are trying to defend them, it is persuasive advocacy.

Regardless of your politics, regardless of your most basic beliefs about the Constitution, you cannot read *The Guantanamo Lawyers* without reexamining what the Bill of Rights really means in America in the 21st century.

JOHN WEST is a trial attorney at the Salt Lake Legal Defender Association.

Brett Foster

Grant Foster

HOLLAND&HART LLP

Brad Jensen

Matt Horlacher

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Contact:
Grant Foster
gfoster@hollandhart.com
Brett Foster
bfoster@hollandhart.com

President-Elect and Bar Commission Election Results

The Utah State Bar is pleased to congratulate Rod Snow on his election as President-elect of the Bar. Rod will serve as President-Elect for the 2010-2011 year and then become President for for 2011-2012. He received 92.31% of the 1910 votes cast. Congratulations go to the other successful candidates, Felshaw King who was re-elected in the 2nd Division, and John Lund and Su Chon who were elected in the 3rd Division. Sincere thanks also to candidates Trent Nelson in the 2nd Division, and Dickson Burton and Rex Huang in the 3rd Division for getting out there and campaigning and helping create interest and dialogue in the commission races.

Rod Snow
President-Elect

Felshaw King
Second Division

John Lund
Third Division

Su Chon
Third Division

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the March 18, 2010 Commission meeting held in Salt Lake City at the Law & Justice Center.

1. The Commission voted to create a Disaster Response Committee to be chaired by Salt Lake City Attorney Ed Rutan with the charge of preparing for and dealing with unmet legal needs in the aftermath of a natural or manmade disaster.

2. The Commission recommended that the Bar contract with Manexa for a one year period based on their proposal and create a committee to review other database providers over the year and provide a recommendation. Rusty Vetter was asked to chair the committee.

3. The Commission asked Katherine Fox to provide another written report on the tax exemption appeal.

4. John C. Beaslin, John H. Gothard, Jr., Dennis L. Judd, and G. Mark Thomas were selected to be nominated to the Governor's office for appointment to the Eighth Judicial Nominating Commission.

5. The Commission voted to adopt a formal policy that the Commission's liaison to the Governmental Relations Committee and the Commission's representative to the Judicial Council interface regularly with the Executive Committee, beginning in November through March, to coordinate actions and activities involving the Bar and the courts in the legislative session and determine what issues, if any, needed follow-up and work.

6. The Commission voted to adopt the following recommendations from the Subcommittee Report on the Office of Professional Conduct and the Consumer Assistance Program:

   Recommendation 1: Clarify the intake procedure between and OPC and CAP to ensure that a non-written complaint about an attorney is ultimately treated the same as if it had been submitted in writing.

   Recommendation 2: Clarify the rule and provide guidance to the Bar's receptionist about the OPC/CAP intake process.

   Recommendation 3: Develop rules or protocols for CAP in order to provide guidance and direction to the person who will succeed Jeannine Timothy, including the intake process.

   Recommendation 4: That OPC work on earlier screening-out of frivolous or non-meritorious cases. Consider having a senior volunteer lawyer participate in OPC's weekly screening meetings to help bridge the experience gap of OPC's staff attorneys and to help with the screening and prosecutorial decisions. The severity of an ethics violation should be as much of a factor in the charging decision as whether there is credible evidence that a violation occurred. A senior volunteer lawyer should participate in OPC's meetings as a consultant with non-binding authority as a member of the Committee screening cases, but the consultant would not need to be present for a meeting as long as he/she had been invited. Four to six consultants will be selected by the Executive Committee.

Recommendation 5: That the Bar provide mechanisms for greater utilization of the OPC Diversion Program and that the diversion committee be asked to determine whether the process could be streamlined and the availability of diversion could be better marketed.

Recommendation 6: OPC should initiate investigations if they determine possible violations of the rules via the public domain, and that such investigation should be expedited.

Recommendation 7: The Bar should promote awareness and increased use by Bar members of the Ethics Hotline.

Recommendation 8: OPC should provide better training to screening panel members about their role in the disciplinary process, clarification of their relationship with OPC, the burden of proof that must be met by OPC, cross examination of witnesses, and the absence of a presumption in favor of accepting the recommendations of OPC.

Recommendation 9: More solo and small firm practice lawyers or lawyers who practice family law or criminal law should be appointed to serve as screening panel members.

Recommendation 10: OPC and CAP should be involved in the full development and execution of these recommendations.

7. Steve Owens agreed to write a *Bar Journal* article discussing the work of OPC, the CAP, and the review committee and outlining the recommendations of the Commission.
8. Curtis Jensen agreed to work with the Ethics Advisory Opinion Committee on reviewing that policy and making recommendations.
9. The Commission voted to reimburse victims of misconduct performed by deceased and disabled lawyers that were included in the most recent report of the Client Security Fund Committee, but the Review Committee did not make a proposal on a policy for disbursements for deceased and disabled lawyers generally.
10. The Commission voted that if claims on the Client Security Fund had a potential to be over the claim limit then the Client Security Fund Committee or the Commission could hold off on making payments and aggregate claims for a pro rata payout.
11. The Commission voted that there be a 4-year statute of limitations beginning with the date that a claim arises instead of the date that discipline was imposed.
12. The Commission voted to charge sections for the actual aggregate work provided by staff for administrative, accounting, technology, and communications services instead of charging them 20% of dues collected.
13. R. Lee Saber was appointed to be the Bar's representative to the AOC's Technology Committee.
14. The minutes of the January 22, 2010 meeting were approved with one amendment proposed by Christian Clinger.

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

Notice of Ethics & Discipline Committee Vacancies

The Bar is seeking interested volunteers to fill vacancies on the Ethics & Discipline Committee of the Utah Supreme Court. The Ethics & Discipline Committee is divided into four panels, which hear all informal complaints charging unethical or unprofessional conduct against members of the Bar and determine whether or not informal disciplinary action should result from the complaint or whether a formal complaint should be filed in district court against the respondent attorney. Appointments to the Ethics & Discipline Committee are made by the Utah Supreme Court.

Please send a resume, no later than June 1, 2010, to:

Utah Supreme Court
c/o Pat Bartholomew, Appellate Court Administrator
P.O. Box 140210 • Salt Lake City, Utah 84114-0210
E-mail: pathb@email.utcourts.gov

Notice of Petition for Reinstatement to the Utah State Bar by Russell T. Doncouse

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 Respondent's Verified Petition for Reinstatement and Affidavit of Compliance ("Petition") filed by Russell T. Doncouse in *In the Matter of the Discipline of Russell T. Doncouse,* Second Judicial District Court, Civil No. 020900608. Any individuals wishing to oppose or concur with the Petition are requested to do so within 30 days of the date of this publication by filing notice with the District Court.

Notice of Legislative Rebate

Bar policies and procedures provide that any member may receive a proportionate dues rebate for legislative related expenditures by notifying the Executive Director: John C. Baldwin, 645 South 200 East, Salt Lake City, UT 84111.

Pro Bono Honor Roll

Andres Alarcon – Family Law Clinic
Kent Alderman – Guardianship Case
Nicholas Angelides – Senior Cases
Ron Ball – Ogden Legal Clinic
Allyson Barker – Family Law Clinic
Lauren Barros – Family Law / LGBT Law Clinics
Jonathan Benson – Immigration Clinic
Tyler Berg – Ogden Legal Clinic
Maria-Nicolle Beringer – Domestic / Bankruptcy Cases
Jonathan D. Bletzacker – Family Law Clinic
Jennifer Bogart – Guadalupe Clinic
Kevin Bolander – Housing Case
Wendy Bradford – Family Law Clinic
Steven D. Burt – Foreclosure Case
Daniel Burton – Bankruptcy Hotline
Matthew Carling – Domestic Case
Kevin Deiber – Family Law Clinic
Jeremy Delicino – Guadalupe Clinic
Tadd Dietz – Guadalupe Clinic
Mark Emmett – Bankruptcy Case
Kyle Fielding – Guadalupe Clinic
Keri Gardner – Family Law Clinic
Jeffry Gittins – Guadalupe Clinic
Esperanza Granados – Immigration Clinic
Jason Grant – Family Law Clinic
Sheleigh Harding – Family Law Clinic
Kathryn Harstad – Guadalupe / LGBT Law Clinics
Lincoln Harris – Bankruptcy Case
Garth Heiner – Guadalupe Clinic
April Hollingsworth – Guadalupe / LGBT Law Clinics
Melanie Hopkinson – Family Law Clinic
Kyle Hoskins – Farmington Clinic
Bart Johnsen – LGBT Law Clinic
Louise Knauer – Family Law / LGBT Law Clinics
Steven Kuhnhausen – Domestic Case
Tim Larsen – Bankruptcy Case
John Larson – Bankruptcy Hotline
Jared Lawrence – Immigration Clinic
Kim Luhn – LGBT Law Clinic
William Marsden – Guadalupe Clinic
Holly Nelson – Family Law Clinic
Kate Noel – Guadalupe Clinic
Ellen O'Hara – Family Law Clinic
Matthew Olsen – Paternity Case
Todd Olsen – Family Law Clinic
Rachel Otto – Guadalupe & LGBT Law Clinics /Employment Case
Candice Pitcher – LGBT Law Clinic
Silvia Pena-Chacon – Domestic Tribal Court Case
Christopher Preston – Guadalupe Clinic
Stewart Ralphs – Family Law / LGBT Law Clinics
Rebecca Ryon – Protective Order Case
Brent Salazar-Hall – Family Law Clinic
Lauren Scholnick – Guadalupe Clinic
William Shinen – Provo Clinic / Domestic Case
Brad Smith – Landlord / Tenant Case
Linda Smith – Family Law Clinic
Kathryn Steffey – Guadalupe Clinic
Steven Stewart – Guadalupe Clinic
Virginia Sudbury – Family Law / LGBT Law Clinics
Jessica Taylor – Family Law Clinic
Jory Trease – Bankruptcy Case
Joy Walters – Bankruptcy Case / Family Law Clinic
Murry Warhank – Guadalupe Clinic
Tracey Watson – Family Law Clinic
Troy Wilson – Guardianship Case
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.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH – PUBLIC NOTICE

Re-Appointment of Incumbent Full-Time United States Magistrate Judge

The current term of United States Magistrate Judge David Nuffer, serving at the Salt Lake City headquarters of the United States District Court for the District of Utah, will expire on January 16, 2011. The Court is required to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term as provided by law.

The duties of a full-time magistrate judge include the conduct of preliminary proceedings in criminal cases, the trial and disposition of certain misdemeanor cases, the handling of civil matters referred by the Court, and the conduct of various pre-trial matters as directed by the Court.

Comments from members of the Bar and the public are invited as to whether incumbent full-time United States Magistrate Judge David Nuffer should be recommended by the panel for reappointment by the Court. All comments will be treated confidentially. Comments should be directed to:

D. Mark Jones, Clerk of Court
United States District Court
Frank E. Moss United States Courthouse
350 South Main Street, Suite 150 • Salt Lake City, UT 84101

Comments must be received no later than Friday, July 2, 2010.

Utah State Bar 2010 Spring Convention Award Winners

During the Utah State Bar's 2010 Spring Convention in St. George, Utah, the following awards were presented:

EVELYN J. FURSE
Dorathy Merrill Brothers Award

LISA A. YERKOVICH
Dorathy Merrill Brothers Award

MELANIE J. VARTABEDIAN
Dorathy Merrill Brothers Award

TRYSTAN B. SMITH
Raymond S. Uno Award

2010 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2010 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Friday, September 3, 2010. The award categories include:

1. Distinguished Community Member Award;
2. Professionalism Award; and
3. *Pro Bono* Lawyer of the Year.

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

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 2010, and ends June 30, 2011. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee prior to adoption of the final budget by the Bar Commission at its June 4, 2010 meeting.

The Commission is interested in assuring that the process includes as much feedback by as many members as possible. A copy of the proposed budget, in its most current permutation, is available for inspection and comment at www.utahbar.org.

Please contact John Baldwin at the Bar Office with your questions or comments: (801) 531-9077, jbaldwin@utahbar.org.

MCLE Cycle Change

Recent Supreme Court rule revisions conform MCLE and the Bar's licensing periods to run concurrently. **Even year compliance attorneys' cycle began January 1, 2009 and will end June 30, 2010.** Odd year compliance attorneys will have a compliance cycle that will run January 1, 2010 and will end June 30, 2011. Active Status Lawyers complying 2010 and 2011 are required to complete a minimum of 18 hours of accredited CLE, including a minimum of two hours of accredited ethics or professional responsibility. One of the two hours of ethics or professional responsibility shall be in the area of professionalism and civility. *(A minimum of nine hours must be live CLE.)* Please visit www.utahmcle.org for a complete explanation of the rule change and a breakdown of the requirements.

Online Licensing

The annual Bar licensing renewal process will begin in May and will now be done only on-line. Sealed cards will be mailed the first week of June and will include a login and password to access the renewal form and the steps to re-license. No separate form will be sent in the mail. Licensing forms and fees are due July 1 and will be late August 1.

We are increasing the use of technology to improve communications and save time and resources. Utah Supreme Court Rule 14-507 now requires lawyers to provide their current e-mail address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org. If you do not have an e-mail address or do not use e-mail, you may receive a printed licensing form by contacting licensing@utahbar.org.

Bar Thank You and Welcome to New Admittees

New admittees will be welcomed into the Utah State Bar at the May 18, 2010 admission ceremony to be held at noon in Room 255 of the Salt Palace. Refreshments will be provided after the ceremony.

A sincere thank you goes to all the attorneys who donated their time to assist with the February 2010 Bar exam. Many attorneys volunteered their time to review the Bar exam questions and grade the exams. The Bar greatly appreciates the contribution made by these individuals and gives a big thank you to the following:

BAR EXAM QUESTION REVIEWERS

Craig Adamson	David Castleton	Gary Johnson	Robert Rees
Michael Allen	Lynn Davies	Abby Magrane	Paul Simmons
Carl Barton	Brent Giauque	Terrie McIntosh	Robert Thorup
Wayne Bennett	Jim Hanks	Langdon Owens, Jr.	Steven Tyler
Branden Burningham	Elizabeth Hruby Mills	J. Bruce Reading	

BAR EXAMINERS

Mark H. Anderson	David Eckersley	Patrick Lindsay	Thomas Seiler
Mark Astling	Lonnie Eliason	Phil Lowry	Mike Sikora
Justin Baer	Russ Fericks	Tony Mejia	Nathan Skeen
Allyson Barker	Michael Ford	Lewis Miller	Leslie Slaugh
Joseph Barrett	Robert Freeman	Tom Mitchell	Alan Stewart
Ray Barrios	Ramona Garcia	Doug Monson	Charles Stormont
Brent Bartholomew	Michael Garrett	Kim Neville	Engels Tejeda
Sara Becker	Marji Hanson	Jamie Nopper	Steve Tingey
Wayne Bennett	Aaron Harris	Eric Olson	Heather Thuet
Matt Boley	David Heinhold	Kerry Owens	Ann Tolley
Anneliese Booher	Michael Howell	Jonathan Parry	Padma Veeru-Collings
Sara Bouley	Craig Johnson	Chad Platt	Kelly Walker
David Broadbent	Randy Johnson	Stephen Quesenberry	Paul Werner
Bruce Burt	Lloyd Jones	Kenneth Reich	Elizabeth Whitsett
Craig Carlile	Jim Kennicott	Peter (Rocky) Rognlie	Jason Wilcox
Jonathan Cavender	Lee Killian	Maybell Romero	Judy Wolferts
Gary Chrystler	Ben Kotter	Keven Rowe	James Wood
Marina Condas Gianoulis	David Lambert	Ann Rozycki	Brent Wride
Kelly Dewsnup	David Leigh	Ira Rubinfeld	John Zidow
	Greg Lindley	Dean Saunders	

Attorney Discipline

Since the publication of the Jan/Feb issue of the *Utah Bar Journal,* there has been some discussion among members of the Bar regarding a notice in the Attorney Discipline section. That notice concerned a respondent's reliance upon an opinion issued by the Ethics Advisory Opinion Committee. To provide some clarification to this discussion, the OPC is printing this letter, which was the source material for the disciplinary note:

Supreme Court of Utah
450 South State Street
P.O. Box 140210
Salt Lake City, Utah 84114-0210

Appellate Clerks' Office
Telephone (801) 578-3900
Fax (801) 578-3999
Supreme Court Reception 238-7967

Christine M. Durham
Chief Justice

Michael J. Wilkins
Associate Chief Justice

Matthew B. Durrant
Justice

Jill N. Parrish
Justice

Ronald E. Nehring
Justice

Marilyn M. Branch
Appellate Court Administrator

Pat M. Bartholomew
Clerk

April 5, 2007

Augustus G. Chin, President
Utah State Bar

Dear Gus:

At a recent court conference, the justices discussed the treatment of opinions issued by the Ethics Advisory Opinion Committee of the Utah State Bar and reviewed your letter of December 8, 2006, as well as the memoranda prepared by Gary Sackett and Billy Walker.

As you know, lawyer discipline is a Supreme Court responsibility. The Office of Professional Conduct ("OPC") works under the Court's direction and regularly reports to it. The Court expects the OPC to take action whenever it believes a disciplinary rule has been violated. It is the Court's view that the OPC cannot adequately perform this function if it is bound by the opinions issued by the Ethics Advisory Opinion Committee.

The Court values and appreciates the excellent work of the Ethics Advisory Opinion Committee. It has relied upon the committee's analysis and substantive research in the past, and it will continue to do so in the future. As I stated in my letter to you of August 10, 2006, the Court believes that a lawyer who acts in accordance with an opinion issued by the Ethics Advisory Opinion Committee should enjoy a rebuttable presumption of having abided by the Rules of Professional Conduct. However, that presumption should not be conclusive, and it is important for the Court to have the opportunity to address interpretations of the Rules of Discipline about which there may be uncertainty.

In view of its position, the Court requests the Bar Commission to make whatever changes are necessary to the rules governing the Ethics Advisory Opinion Committee to provide that the committee's opinions are advisory only.

Thank you for your attention to this matter.

Sincerely,

Christine M. Durham
Chief Justice

cc: Billy Walker
John Baldwin

ADMONITION

On March 24, 2010, 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), 1.8(h) (Conflict of Interest: Current Clients: Specific Rules), 1.15(c) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

A client retained an attorney to assist in having the client's sister appointed as personal representative of the client's late father's estate and to help resolve estate issues. The attorney did not act with reasonable diligence or promptness in accomplishing these objectives. The attorney claimed the lack of diligence was because the client did not want to pay the attorney to accomplish this task. The attorney's claim was undermined by the fact that within days of the client obtaining a new lawyer, the client's sister was appointed the personal representative of the estate. The attorney did not accomplish in four months what the client's new attorney did in three days. The attorney's fee agreement with the client contains a provision that prospectively limits the attorney's potential liability for malpractice. The client had no opportunity to seek advice of separate counsel on that provision. In this case, the attorney charged the client a retainer, which was deposited in the attorney's operating account.

PUBLIC REPRIMAND

On February 10, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Brian W. Steffensen for violation of Rules 1.5(a) (Fees), 1.5(b) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Steffensen met with a potential client for a free consultation. The client met with Mr. Steffensen for a second time and paid for the consultation. Mr. Steffensen did not explain the terms of his retention. Mr. Steffensen charged his client and failed to perform any meaningful work on the case. In this respect, Mr. Steffensen did not file a response to a lawsuit that had been filed against his client and failed to file for a continuance of an upcoming court hearing.

Aggravating factor: dishonest or selfish motive.

PUBLIC REPRIMAND

On February 9, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Bruce L. Nelson for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 4.2(a) (Communications with Persons Represented by Counsel), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Nelson was hired to represent a client in a divorce matter. Mr. Nelson failed to respond to a counterclaim made against his client. Mr. Nelson failed to respond to a Motion for Entry of the Divorce Decree and a Default Judgment was entered against his client. Mr. Nelson counseled his client to give up certain rights with respect to a Protective Order. Mr. Nelson failed to communicate with his client when representing the client and then tried to contact his former client without the consent or permission of his client's new attorney after the client hired someone else. The client incurred significant attorney's fees as a result of Mr. Nelson's actions. Mr. Nelson also failed to respond to OPC's lawful request for information.

Aggravating factors: failure to cooperate with the OPC, prior record of discipline.

PUBLIC REPRIMAND

On February 9, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Franklin R. Brussow for violation of Rules 1.15(d) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. On March 11, 2010, Mr. Brussow filed a Petition/Request for Review with the Utah Supreme Court.

In summary:

Mr. Brussow was hired to represent a client in court. Mr. Brussow failed to provide an accounting to his client when one was requested. Mr. Brussow could not completely account for his fees and did not know how much his client had paid. Mr. Brussow's billing records were inadequate and incomplete. Mr. Brussow failed to provide his client the file upon request. Mr. Brussow failed to provide his client's file to his client's new attorney when it was requested of him. Mr. Brussow held his client's file while demanding payment of a third-party bill by his client in exchange for the file.

PUBLIC REPRIMAND

On March 18, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Roberto G. Culas for violation of Rules 1.1 (Competence), 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants),

and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Culas was the managing attorney in many cases he had with the Workers Compensation Fund. Mr. Culas admitted that he lacked the requisite skill and knowledge to handle Worker Compensation cases. Mr. Culas' paralegal was assisting Mr. Culas in the Workers Compensation matters. Mr. Culas failed to have sufficient measures and training in place to ensure his paralegal's conduct was professional and compatible with the Rules of Professional Conduct. The paralegal's conduct included holding himself out as an attorney. The paralegal demanded information he was not entitled to by law.

Aggravating factor: Mr. Culas' prior disciplinary history.

PUBLIC REPRIMAND
On March 24, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against J. Kent Holland for violation of Rules 1.15(a) (Safekeeping Property), 1.15(d) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Holland received funds from a client who hired an associate in his office. Mr. Holland deposited the funds into his client trust account. At one point the associate attorney left the office and took the client and client file with him. The young associate requested the unearned funds left in the account. Mr. Holland sent the check to the associate but did not let the client know what had happened to the funds. The client, on several occasions, requested accounting of the funds from Mr. Holland. Mr. Holland failed to provide the client with an accounting or refund. Mr. Holland failed to explain to the client what had happened to the funds in the trust account or provide any documentation for more than a year. Mr. Holland failed to respond to the OPC after requests were made and failed to provide the necessary documentation establishing what happened to the client's funds, until he presented the documentation to the Screening Panel of the Ethics and Discipline Committee.

PUBLIC REPRIMAND
On March 24, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against S. Austin Johnson for violation of Rules 1.4(a) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Johnson was hired to assist a client in obtaining a labor certification. Mr. Johnson failed to communicate with his client. Mr. Johnson failed to keep his client informed about the progress of the case. The client tried repeatedly to reach Mr. Johnson, but was never successful. Mr. Johnson only communicated with the client after the client filed the Bar complaint against him. Mr. Johnson failed to notify his client of the relocation of his office. Mr. Johnson failed to comply with reasonable requests for filing materials. Mr. Johnson did not provide key documents to the client until the day of the Screening Panel Hearing of the Ethics and Discipline Committee. Mr. Johnson failed to provide the entire file to the client as requested. The Panel found injury in that the client has had to hire another lawyer and pay additional, substantial fees.

PUBLIC REPRIMAND
On March 24, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against S. Austin Johnson for violation of Rules 1.15(d) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Johnson represented several patients of a clinic in connection with vehicular accidents. Mr. Johnson failed to timely notify the doctor at the clinic of settlements with clients for which the doctor had provided medical services. Mr. Johnson failed to disburse funds owed to the doctor and the clinic when the cases were settled by his office and only provided funds to the clinic after the Bar complaint was filed against him. Mr. Johnson failed to provide an accounting to the doctor even after several requests. Mr. Johnson failed to respond to the OPC's request for information. Mr. Johnson caused injury to the clinic, the doctor, and to his clients by his failure to disburse the funds in a timely fashion.

INTERIM SUSPENSION
On January 26, 2010, the Honorable Paul G. Maughan, Third Judicial District Court, entered an Order of Interim Suspension Pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability, suspending Jeffrey M. Gallup from the practice of law pending final disposition of the Complaint filed against him.

In summary:
On January 22, 2009, Mr. Gallup entered a no contest plea to one count of Violation of a Protective Order, a 3rd degree felony. On April 30, 2009, Mr. Gallup entered a guilty plea to one count of Violation of a Protective Order, a 3rd degree felony. On June 30,

2009, Mr. Gallup entered a guilty plea to one count of Violation of a Protective Order, a 3rd degree felony. On August 18, 2009, Mr. Gallup entered a guilty plea to two counts of Driving Under the Influence of Alcohol/Drugs. The interim suspension is based upon the felony convictions.

RESIGNATION WITH DISCIPLINE PENDING

On February 24, 2010, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Richard D. Wyss II for violation of Rules 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

On December 1, 2008, Mr. Wyss pleaded guilty to one count of Making a False Statement, a felony, pursuant to United States Code 18 § 1001(a)(2). Mr. Wyss was sentenced to 36 months probation, $100 assessment, $188,548.92 in restitution, and the performance of 300 hours of community service.

SUSPENSION

On March 9, 2010, the Honorable Bruce Lubeck, Third District Court entered an Order of Discipline: Suspension for three years against Brian R. Rayve for violation of Rules 1.3 (Diligence), 1.5(a) (Fees), 1.15(d) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Rayve was retained by a client to perform some trademark work. Mr. Rayve was paid but failed to perform any substantive work on the case. Mr. Rayve failed to provide an accounting to his client. Mr. Rayve sent his client an email asking for information so he could do the work on the case. The client had previously provided all of the information necessary to do the work. When his client requested a refund of the fee paid, Mr. Rayve refused to refund any portion of the fee. Mr. Rayve failed to respond to the Notice of Informal Complaint. Mr. Rayve failed to attend the Screening Panel Hearing of the Ethics and Discipline Committee.

Aggravating circumstances include: a pattern of misconduct; refusal to acknowledge the wrongful nature of the misconduct; a lack of good faith effort to make restitution or to rectify the consequences of the misconduct involved (including filing papers with a tribunal while suspended); substantial experience in the practice of law; a prior record of discipline; and obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary authority.

SUSPENSION

On February 24, 2010, the Honorable Tyrone E. Medley, Third District Court entered an Order of Discipline: Suspension for three years beginning June 1, 2010, against Justin K. Roberts for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 1.15(b) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 3.2 (Expediting Litigation), 8.1(a) and (b) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary there are six matters:

Mr. Roberts was hired to represent clients in a lawsuit, to raise counterclaim issues, and to bring a different civil lawsuit against another party. Mr. Roberts failed to enter his appearance in one of the civil matters. Mr. Roberts did not pursue the other civil matter and did not timely explain his case strategy to his client. The client contacted Mr. Roberts for a status update. Mr. Roberts failed to keep his client informed about the status of his cases. When the representation was terminated, the client requested a refund and an accounting of the retainer. Mr. Roberts failed to timely provide his client with an accounting of the retainer fees. Mr. Roberts did not refund any of the retainer. Mr. Roberts failed to file a notice of withdrawal in one of the civil cases. Mr. Roberts did not forward notice of the Order to Show Cause to his former client which Mr. Roberts received after his services were terminated. Mr. Roberts failed to timely respond to the OPC's Notice of Informal Complaint ("NOIC").

In another matter, Mr. Roberts was hired to defend a client against a domestic violence charge and represent the client in a divorce. Mr. Roberts informed the client that he would reset the arraignment hearing. At the next meeting, Mr. Roberts advised the client he did not need to attend the arraignment and gave the client a new court date. Mr. Roberts did not obtain an Order from the court continuing the arraignment. Mr. Roberts did not attend the arraignment and the court issued a bench warrant for his client. After reaching a stipulated settlement in the divorce, the court directed Mr. Roberts to file an Affidavit of Jurisdiction and Grounds along with the Findings of Fact, Conclusions of Law and Decree of Divorce. Mr. Roberts did not timely file the paperwork needed to finalize the divorce matter. Mr. Roberts failed to return his client's calls for status information about the divorce. When the client was able to find Mr. Roberts, Mr. Roberts informed the client that he filed the documents requested by the court but the court lost the documents and he would re-file them. By the time of the filing of the informal Bar complaint against Mr. Roberts, the documents requested by the court had

not been filed with the court. Mr. Roberts failed to timely respond to the OPC's NOIC.

In another matter, Mr. Roberts was hired to represent a client in a divorce. Mr. Roberts did not timely file a petition for divorce and serve it. Mr. Roberts informed the client that he would reset the Order to Show Cause Hearing for another date with the court. Mr. Roberts informed the client that he changed the hearing date with the court and that he did not need to appear in court. Mr. Roberts did not file a Motion to Continue the Order to Show Cause Hearing with the court and did not appear for the hearing. At the Order to Show Cause Hearing, the court granted the requests of the client's spouse based on Mr. Roberts' client's failure to appear. Mr. Roberts failed to answer his client's requests for information about the case. Mr. Roberts failed to explain to his client the options regarding setting aside the Order from the Order to Show Cause Hearing. The client gave Mr. Roberts' office a letter from the Office of Recovery Services ("ORS") regarding unpaid child support. Mr. Roberts failed to timely contact his client about the ORS letter. Mr. Roberts failed to timely respond to the OPC's NOIC.

In another matter, Mr. Roberts was hired to pursue a tort claim. Since his client's claims were based on repressed memories of abuse as a child, an expert witness would be needed to testify concerning the client's repressed memories to prove the claim. Mr. Roberts failed to fully research expert witnesses to prepare the case prior to filing the complaint. Mr. Roberts requested that the prison officials serve the defendant in prison but he failed to timely follow up to ensure that the correct inmate had been served. Mr. Roberts failed to obtain a certificate of service of the summons or other proof of service on the defendant. Mr. Roberts failed to file any proof of service of the summons in the case. Mr. Roberts failed to return his client's telephone calls for information about the status of the case. The court dismissed the complaint for failure to prosecute. Mr. Roberts failed to inform his client about the dismissal of his complaint. Without consulting with his client about the dismissal and re-filing of the complaint, Mr. Roberts re-filed the complaint. Mr. Roberts failed to take the steps necessary to perfect service of process within the 120 days after the filing of the second complaint. Mr. Roberts failed to explain to the client the ramifications of failing to timely complete service of process of the second complaint. Mr. Roberts failed to timely respond to the OPC's NOIC.

In another matter, Mr. Roberts was hired to continue work on a pending tort case. Opposing counsel filed a motion to dismiss the complaint for failure to prosecute. The client paid Mr. Roberts a flat fee for the tort case. The client gave Mr. Roberts a signed and notarized statement for Mr. Roberts to immediately file with the court. Mr. Roberts did not file the notarized document with the court. Mr. Roberts did not enter an appearance of counsel for the tort case and failed to respond to the Motion to Dismiss to preserve his client's claim. Mr. Roberts did not request an extension of time to respond to the Motion to Dismiss from opposing counsel or the court. Mr. Roberts did not keep his client informed about the case. The client called Mr. Roberts several times for information about the case. Mr. Roberts did not return his client's voicemail messages. The client learned from the court that the case had been dismissed with prejudice for failure to prosecute. The client requested that Mr. Roberts refund the attorney's fees that were paid and return the client's file. He did not refund any of the attorney's fees he collected, nor did he return the file to the client. Mr. Roberts made material misrepresentations to the Screening Panel of the Ethics and Discipline Committee in response to the client's complaint regarding discussions he had with his client and documents he claimed to have given to his client.

In the last matter, Mr. Roberts was hired to represent a client in an adoption and termination of parental rights matter for a child in the client's care. Mr. Roberts verbally agreed to handle the case for a flat fee plus costs. During the initial meeting, Mr. Roberts discussed filing a motion with the court for alternate service. Mr. Roberts misrepresented to the client that he filed the adoption petition and a Motion for Alternate Service for the birth parents with the Third District Court around February 2007. The client called Mr. Roberts multiple times to inquire when the birth mother would be served. Mr. Roberts failed to return most of his client's requests for information about the case. Mr. Roberts misrepresented to the client that the judge had approved the motion for alternate service before it was filed. Mr. Roberts did not give his client the case number or the judge assigned to the case upon the client's request. Months later, Mr. Roberts informed his client that the court clerks had lost the paperwork, so he would have to re-file the case. The client paid Mr. Roberts cash for publication of the summons upon Mr. Robert's request. Mr. Roberts did not place the legal notice. The client terminated Mr. Roberts' representation. By the time the representation was terminated, Mr. Roberts had filed the petition and alternate service motion and was awaiting the court's ruling regarding the motion. The client requested a full refund of the fees paid for Mr. Roberts' legal fees and the costs paid for publication of the summons. The client also requested the return of the file. Mr. Roberts refused to refund any of the fees and failed to refund the money paid for the publication of the summons. Mr. Roberts failed to provide his client the file.

Upcoming Events

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.*

Law Day Luncheon and Race

On May 1 of each year, the American Bar Association and the Utah State Bar celebrate Law Day. To honor the rule of law, the YLD will hold its annual Law Day Luncheon on Friday, April 30 at 12:00 noon at the Little America Hotel. Additional information is available at www.utahyounglawyers.org and www.utahbar.org.

On May 15, YLD members are encouraged to participate in the 28th Annual Law Day 5K Run & Walk celebrating "Law in the 21st Century – The Race To Justice." Race begins at 8:00 a.m. at the S. J. Quinney College of Law at the University of Utah. Registration, awards and other information is available at https://utahbar.org/lawday/Welcome.html or www.andjusticeforall.org.

The 2010 Law Day Theme is "Enduring Traditions, Emerging Challenges: In a global era, matters such as human rights, criminal justice, intellectual property, business transactions, dispute resolution, human migration, and environmental regulation become not just international issues-between nations-but shared concerns. Law Day 2010 provides us with an opportunity to understand and appreciate the emerging challenges and enduring traditions of law in the 21st century."

Speed Networking Event

Date: May 13, 2010

Time: 6:00 – 7:30 p.m.

Location: The Alta Club, 100 East South Temple, Salt Lake City, Utah

What: Socializing, drinks, and Hors D'oeuvres

Cost: Free

In an effort to assist young lawyers in the current economic climate, the YLD and the Utah Minority Bar Association are collaborating on the second annual Speed Networking Event, where young lawyers can connect with senior attorneys to discuss the legal profession and seek advice in advancing their careers during an economically challenging time. If you would like to attend as a young lawyer, or as senior attorney, please call or email James Bergstedt (801) 524-1000, jcb@princeyeates.com. Space is limited, so call in advance to reserve your space.

In addition, during May and June the YLD will be hosting networking events and service projects with two young professional organizations, the Mountain West Association of Corporate Counsel and the United Way Young Leaders. As of the date of publication, the date and time of each event are still to be determined. Please visit www.utahyounglawyers.org for additional information.

Wills for Heroes

Sandy, Utah

Date: May 16, 2010

Time: 10:00 a.m. – 5:00 p.m.

Location: Sandy City Police Department
10000 South Centennial Parkway
Sandy, Utah 84070

First responders should contact:

BL Smith
POST Region III Training Coordinator
Office 801 568-7240
FAX 801 568-7226

Weber County, Utah

Date: June 19, 2010

Time: 10:00 a.m. – TBD

The location of this event is to be determined, but the event will be servicing Weber County. Please continue monitoring the Wills For Heroes Website at www.utahyounglawyers.org. First Responders

should contact Kim Holden at kholden@utah.gov. As usual attorney training will take place at 10:00 the day of the event.

The Wills for Heroes program was predicated upon the alarming fact that an overwhelmingly large number of first responders – 80 to 90 percent – do not have simple wills or any type of estate planning documentation, although they regularly risk their lives in the line of duty. The objective of the Wills for Heroes program is to provide free estate planning documents to firefighters, police officers, paramedics, corrections and probation officers and other first responders and their spouses or domestic partners. 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: May 4, 11, 18, 25 and June 8, 15, 22, 29

Time: 5:00 – 7:00 p.m.

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

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 1,100 individuals meet with a volunteer attorney for a brief one-on-one consultation at no cost. Individuals who wish to meet with an attorney must call eight days in advance to make an appointment, (801) 297-7037. 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: May 5, 19 and June 2, 16

Time: 6:00 – 8:00 p.m.

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

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: May 12, 26

Times: 6:00 p.m. – 8:00 p.m.

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

The Citizenship Initiative 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 is on-going, but there are no events for this project set for May and June. However, the Cinderella Project is always accepting donations. To make a donation, or to volunteer for this program, contact Angelina Tsu at angelina.tsu@zionsbancorp.com.

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.

Young Lawyers Division Executive Board Meeting

Dates: May 5 and June 2

Times: 12:00 p.m.

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

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. The YLD elections are going to be held in June, the date and time are still to be determined.

The Law School Dilemma

by Steven A. Morley

Have you ever heard an attorney comment on how indispensible his or her paralegal is? Maybe you have overheard an attorney say something like, "My paralegal runs things so well at my firm that all I am good for is my signature." When paralegals get to the point in their careers that they are literally doing everything an attorney does except establish the attorney-client relationship, set legal fees, or give legal advice; *i.e.,* the things paralegals are prohibited from doing, *see* Guideline 3 of the ABA Model Guidelines for the Utilization of Paralegal Services (2004), it is conceivable that such paralegals might have thoughts like, "Why am I doing all the attorney's work and not getting paid the attorney's salary?"

While this is a hypothetical scenario (tongue in cheek), there might be paralegals out there who would like to become attorneys by going to law school to further their already established legal careers. It is ironic, however, that the most weight given by law school admission committees is the applicant's LSAT score and undergraduate GPA. Some law schools profess to consider life experiences or "other relevant factors" in their admission decision making process, but the truth of the matter is that the LSAT and undergraduate GPA must carry the day for an applicant to stand a chance at getting into law school. Due to the recent downturn in the economy, law school applications across the country are rapidly increasing, and it is becoming more competitive than ever to get into law school.

Would it not make sense that someone who has real world legal experience and who is an "attorney by proxy" could likely thrive in the legal career field as an attorney? And, more than likely, such a person probably has a genuine love for the law that a lot of law school students quickly learn they do not have, or they realize they have gone too far in law school to back out.

Law schools must have some way of filtering the thousands of applications they receive each year. They principally use the applicant's LSAT score and GPA. However, it is arguable that the LSAT is not a true measure of a person's abilities, nor is it a measure of how well a person will do in law school. We can all think of law school students who practically aced the LSAT when they took the test on a dare or because they had nothing better to do that particular Saturday. And we all know of those who did well on the LSAT but struggled or ended up dropping out of law school, because it was too hard or they did not enjoy the law or for a myriad other reasons. On the flip side, we can all think of those students who did average or poorly on the LSAT who somehow got into law school by the skin of their teeth and went on to excel and thrive in law school, because they actually wanted to be there, they had a passion for the law, and practicing law was what they really wanted to do for a career. While individuals such as paralegals generally have a love of the law and have been working in the legal career field, entrance into law school for them is such a competitive beast that most such applicants are denied, because they were not able to decipher the LSAT enigma or their undergraduate grades were not high enough, or both.

Allowing for an alternative method to sit for the bar exam and become a lawyer is not a novel idea. At the time the American Bar Association was founded in 1878, "lawyers….trained under a system of apprenticeship." *See* http://www.abanet.org/about/history.html. Not until recently, within the last 50 years or so, did many states adopt the ABA's recommendation that a person should not be allowed to sit for the bar exam unless that person graduated from an ABA approved law school. The Code of Recommended Standards for Bar Examiners was first adopted in 1959 where "a most important change [to the eligibility of applicants to the bar was] the elimination of private study, correspondence school study and law office training. The Code thus recognize[d] that other methods of preparation inferior to that obtained in approved law schools should not be permitted."

STEVEN A. MORLEY is a paralegal at the US Attorney's Office specializing in Asset Forfeiture.

See Homer D. Crotty, *Better Lawyers for Tomorrow: Code of Standards for Bar Examiners,* 45 A.B.A. J. 583, 584 (1959); *See also ABA's Comprehensive Guide to Bar Admission Requirements,* Sec. II, Para 6 (2009). Before this switch, graduation from an ABA approved law school was not a prerequisite to taking some state's bar examinations. Rather, one approach to becoming a licensed attorney was from on-the-job training as an apprentice. Isn't a paralegal receiving precisely this kind of training on a daily basis?

Some well known American lawyers who never attended law school or did not finish law school include Abraham Lincoln, John Jay, John Marshall, Patrick Henry, and Strom Thurmond. Today, apprenticeships, reading the law, or law study programs are not entirely extinct. In fact, current Vermont Supreme Court Justice Marilyn Skoglund never went to law school. *See* Vermont Supreme Court Justice Biographies *available at* http://www.vermontjudiciary.org/GTC/Supreme/JusticesBios.aspx. Having an alternative approach to becoming a lawyer offers the opportunity to practice law to those that might not otherwise be able to attend law school for whatever reason. Currently, the states of California, Vermont, Virginia, and Washington allow for a person to apply to sit for the bar exam without having set foot in law school, but only after completing some form of law study program. California's bar exam statistics from 2005 to 2009 show that 45.3% of all General Bar Exam takers passed, while 10.6% of the 4-Year Qualification non-law-school examinees passed the General Bar Exam. Vermont's bar exam statistics from 2005 to 2009 show that 70.7% of all bar exam takers passed, while 30.8% of the Law Office Study non-law-school examinees passed. Virginia's bar exam statistics from 2000 to 2009 show that 67% of all bar exam takers passed, while 23% of the Law Reader Program non-law-school examinees passed. Even more impressive, Washington's bar exam statistics from 2000 to 2009 show that less than 1% of all examinees were part of the Law Clerk non-law-school program, yet of those Law Clerk bar examinees, 90% passed the bar exam during this time period.[1]

As it currently stands under the Utah Supreme Court Rules of Professional Practice, Rules 14-703(a)(3) and 14-704(a)(3) only allow for licensure of certain applicants who "ha[ve] graduated with a first professional degree in law (Juris Doctorate or Bachelor of Laws) from an [ABA] approved law school." Interestingly, in the recent Utah Supreme Court decision of *In Re Anthony,* 2010 UT 3, 225 P.3d 198, the Utah Supreme Court granted a waiver of the ABA law school requirement for an attorney applicant imposed by Rule 14-704(a)(3) to petitioner Thomas E. Anthony. While Anthony had graduated from a non-ABA approved law school in California in 1980, his petition for a waiver of the ABA law school requirement was granted when the court said

> While the rules governing [bar] admission stand as important safeguards against incompetent and unethical representation, strict adherence to the rules in every case may undermine, rather than further, these goals. And where the goal of ensuring competent representation would not be advanced by a strict application of the rules governing admission, we have contemplated that rules may be waived in appropriate cases.

Id. ¶ 15.

The court "…ma[d]e clear that a waiver of the Bar's ABA accreditation requirement may be obtained in an appropriate case," but went on to "decline to set out any specific standard for evaluating petitions for waiver…." *Id.* ¶ 16. It is interesting to note that the court recognized Anthony's argument when he "acknowledge[d] the relevance of an attorney's law school education to admission decisions generally, [but] argue[d] that, at some point in an attorney's career, the law school experience fades into insignificance and becomes irrelevant in determining an individual's competency to practice law." *Id.* ¶ 13 (Internal quotations omitted).

In light of the highly unstable economy, more states, including Utah, should at least consider the idea of alternative methods

Supervising Attorneys and Paralegals
Your Attendance is Requested:

At a luncheon honoring Utah Paralegals
Hosted by
The Paralegal Division of the Utah State Bar
& Legal Assistants Association of Utah

Thursday, May 20, 2010 at 12:00 Noon
Sheraton Hotel • 150 West 500 South, Salt Lake City, Utah

Keynote Speaker: Mayor Ralph Becker
"Lifelong Leadership
Beyond the Legal Profession"

1.0 hour CLE Credit and Lunch
Cost is $30 per Person

Register by phone at (801) 257-7220
by May 17, 2010
No shows will be billed

for allowing a person to sit for the bar exam and become a practicing attorney. As recent as August 26, 2009, the New York Times reported that the hiring of newly-graduated, top-tier law school students has dropped off so sharply that the best and brightest law school graduates are forced to take lower paying jobs if they can find jobs at all.

> After he lost his job as a television reporter two years ago, Derek Fanciullo considered law school, thinking it was a historically sure bet. He took out "a ferocious amount of debt," he said – $210,000, to be exact – and enrolled last September [2008] in the School of Law at New York University. "It was thought to be this green pasture of stability, a more comfortable life," said Mr. Fanciullo, who had heard that 90 percent of N.Y.U. law graduates land jobs at firms, and counted on that to repay his loans. "It was almost written in stone that you'll end up in a law firm, almost like a birthright."

Gerry Shih, *Downturn Dims Prospects Even at Top Law Schools,* N.Y. Times, August 26, 2009. Partly due to economic factors, the trend of law schools seems to be that of increasing law school tuition. This translates into three or more years of accumulated law school debt that may take a lifetime to repay at the lower-than-expected salaries recent law school graduates are earning. The current job market is so bad that many law school graduates are even taking jobs as paralegals, hoping that with time they will be able to become paid as an associate in the firm once a position becomes available. Even some potential law school attendees are becoming dissuaded from attending law school because of the volatile job market after law school.

Some advantages of having an alternative approach to becoming a licensed attorney by apprenticeship or law study program include: (1) no student loans to repay; (2) sitting for the bar in roughly the same amount of time as a law school graduate; and (3) having direct attorney mentoring in real world legal scenarios. Some disadvantages to becoming a licensed attorney by way of apprenticeship or law study program include: (1) severe limitations on the kinds of jobs one can apply for;[2] and (2) possible stigma associated with the lack of the J.D. credential behind one's name. I would not dare argue with Justice Skoglund that the legal training she received was inferior in any way to that of a law school student.

Those individuals who want to become practicing lawyers should at least have another avenue available to them besides the highly competitive and seemingly insurmountable law school route. After all, there is no guarantee of a job after law school, but there is a guarantee of the debt associated with law school as a constant and gloomy reminder of the long road ahead to pay off that debt. Wouldn't practicing law be much more enjoyable knowing that one is practicing because of the love of the law rather than practicing because of the burden to repay student loans?

1. All data comprising these statistics were obtained from the respective state bar associations.
2. For example, most, if not all, attorney jobs with the federal government listed on www.usajobs.gov require that the applicant hold a J.D. from an accredited law school.

Upcoming Paralegal Division Events

May 3rd	Law Day Run
May 20th	Annual Paralegal Day Luncheon w/1 hour CLE at the Sheraton
June 18th	Annual Paralegal Division Meeting w/6 hours CLE at the Law and Justice Center
July 14–17th	Utah State Bar Annual Convention in Sun Valley, Idaho

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
05/11/10	**Gotcha's in Criminal Law.** 4:30 – 7:45 pm. Jeremy Delicino, Criminal Defense Attorney – *Avoiding Pretrial Pitfalls, Being Prepared for Court, and Learning to Swim: Getting in Over Your Head.* Teresa Welch, Salt Lake Legal Defender Association – *Dealing with Unfamiliar and Unpredictable Judges.* Sam Newton, Criminal Defense Attorney and Criminal Justice Professor, Weber State University – *An Ounce of Prevention: Developing Good Client Relations.* $75 for active under 3, $90 for all others.	3 CLE/NLCLE
05/13/10	**Mentor Training and Orientation.** 9:00 – 11:00 am. An Introduction to Mentoring and an Overview of NLTP. Hon. Clark Waddoups, U.S. District Court for the District of Utah – *Being a Mentor.* Free to Utah Supreme Court Appointed Mentors.	2 hrs. incl. 1 Ethics & 1 Prof.
05/14/10	**Annual Family Law Section Seminar.** 8:30 am – 5:00 pm (approx.) Topics will include: Legislative Update; Case Law Update; Impediments to Settlement; Collections 101; Ethics – A Comedy Troupe Presentation with Billy Walker; OMG! Things You Should Know, But Don't; Judge's and Commissioner's Panel. $130 Section Members, $80 Paralegal Division Members, $180 others.	Appox. 6 (incl. 1 Ethics)
05/19/10	**Real Property Section Annual Meeting.** 7:30 am – 2:00 pm. *Court of Appeals Update: Real Property Cases* with Judge Gregory Orme, Utah Court of Appeals. *Supreme Court Update: Real Property Cases* with Justice Ronald Nehring, Utah Supreme Court. *Legislative Review* with Paxton Guymon, Miller Guymon P.C. *Four Decades of Change in Basic Property Law: Some Funny Things That Have Happened to Property Law Since You Were in Law School* with David A. Thomas, co-author of Utah Real Property Law. *Civility* with Professor James Gordon, BYU Law School. $90 members, $150 non-members.	5 incl. 1 Civility/ Prof./Ethics
05/24/10	**Health Care Reform: Compliance Changes for Employers, Carriers, and Individuals.** 12:00 – 2:00 pm. Sibyl C. Bogardus, JD, Chief Compliance Officer – Western Region Employee Benefits Hub International. $45 (incl. lunch) also via telephone.	1.5
06/03/10	**Resolving Conflict: Be Ethical, Be Professional, Be Wise.** 9:00 am – 12:00 pm. *Resolving Disputes With Civility and Professionalism,* with Nate Alder (moderator), Michael Zimmerman, Palmer DePaulis, and Hon. Wm. B. Bohling. *Human Experience and Neuroscientific Considerations in Communication and Conflict,* with Meggan Stein, Velvet Rodriguez-Poston, Karin Hobbs, and Wm. B. Bohling. *Approaching Dispute Resolution and Negotiations through Enlightened Perspectives on Ethics and Effectiveness,* Josh King, Paul Felt, Hon. William B. Bohling, and Karin Hobbs.	1 hr. Prof. 2 hrs. Ethics
06/09/10	**Clarence Darrow: Crimes, Causes and Courtroom.** Webcast featuring Graham Thatcher as Clarence Darrow. 10:00 am – 1:15 pm. $189.	3 self study
06/18/10	**How Smart is Emotional Intelligence (EQ)? A Civility and Professionalism Workshop for Legal Professionals.** 8:45 am – 12:00 pm. Presenter: Colette Herrick, Insight Shift. $150 (includes SEI Emotional Intelligence Assessment – $50 value).	3 Prof./Civility

For more information or to register for a CLE visit: **www.utahbar.org/cle**

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