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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.

The Utah Bar Journal

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Cover Art

Mount Nebo in Winter, by first-time contributor, Justin Bond, Layton, Utah.

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.

Letters Submission Guidelines:

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

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

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

President-Elect & Bar Commission Candidates

Candidates for President-Elect

CHRISTIAN CLINGER

Leadership. Experience. Vision. These are characteristics that you must look for in your next President-Elect. My leadership and experience have been proven as a Bar Commissioner for six years, a Bar Executive Committee member for four years, and service on more than fifteen Bar planning and review committees. I also have twenty years of governmental relations experience. As an owner of a law firm and a mediation institute, I have sound business judgment. These experiences qualify me to serve as President-Elect.

The Bar has the responsibility, "To lead society in the creation of a justice system that is understood, valued, respected, and accessible to all." To carry out this charge, we must assure continued proper management of the Bar. First, I pledge to implement a detailed Operations Review of the Bar. Second, to have a justice system that is understood, valued and respected, I propose a civics education program celebrating the 225th anniversary of the U.S. Constitution. This program would be similar to the ABA's commemoration in 1987. Finally, to have an accessible justice system, I plan to implement a new statewide lawyer referral program.

To learn more, please contact me at cwclinger@clingerlaw.com or 801-273-3902. I ask for your support.

LORI NELSON

I am running for Bar President to continue my service to the membership. My goal in serving the Bar has been to affect policies and change that impact members. This includes chairing the diversion rule committee, working on the OPC review committee, and participating with the mentoring committee.

My work in the Bar began in 1996 when I joined Dart Adamson and Donovan. I had only been working there five minutes when Bert Dart, past Bar President, told me my greatest satisfaction in the practice of law would be giving back in service to Bar members. I have been active in Bar service ever since.

I have chaired the executive committee of the Family Law Section, currently co-chair the Governmental Relations committee, and I have served on the Executive Committee of the Bar Commission for five of my six years of service.

I am a partner at Jones Waldo Holbrook & McDonough. I have worked in a solo practice, in a small/medium firm and now a large firm. I was a single mother when I began to practice law and understand what our young members are facing in this difficult employment climate.

Thank you for your support and vote.

Candidate for the First Division

Uncontested Election: According to the Utah State Bar Bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected." Herm Olsen is running uncontested in the First Division and will therefore be declared elected.

HERM OLSEN

I was admitted to the Utah State Bar in 1976 and the Navajo Nation Trial Bar in 1977. My education includes: B.S., Utah State University, magna cum laude; J.D. from the University of Utah. I have been a member of the District of Columbia Bar, Navajo Nation Bar, and the American Association for Justice. I serve on the Board of Directors for the Navajo Legal Aid Services, 1993–present. I was President of the Cache Chamber of Commerce, 2005-2006. My practice areas are personal injury, municipal law, and criminal defense. Prior to returning to Utah in 1980, I worked for the U. S. House of Representatives, Appropriations Committee, and served as Congressman Gunn McKay's legislative counsel.

I have appreciated the opportunity of serving as the Bar Commissioner representing the First Division. As a practicing attorney for over thirty years, I hope to bring to the Bar a sense of awareness for small firm practice. Bar leadership has done an excellent job of keeping members informed and providing meaningful input to legislative initiatives. We must remain vigilant in protecting Utah citizens' rights of and ensuring access to the legal system from increasing attacks by special interest groups. I appreciate your support.

Candidates for the Third Division

H. DICKSON BURTON

I have had the honor of serving as a Bar Commissioner this past year and would welcome the opportunity to serve a full term. I will continue to do my best to help the Bar provide attorneys with the services they need in a fiscally conservative way, as well as to help preserve the quality of the bar and the independence of the judiciary.

To introduce myself to those who don't know me, I have been a member of the Utah Bar for twenty-seven years. I am the senior litigator at TraskBritt, where I am also a director and member of the firm's three-person Management Committee. In addition to litigating Intellectual Property disputes in Utah and in courts around the country, I often serve as a mediator, arbitrator and expert witness in various patent, trademark and trade secret disputes.

As a Bar Commissioner, I look forward to helping our profession face a variety of challenges from a changing economy to a changing public image. In doing so, we need to continue to be proactive and well-prepared as we seek to transform these challenges into opportunities, while at the same time preserving core principles of professionalism and integrity. Thank you for your support.

JOHN JOHNSON

I ask for your consideration as a Third Division Bar Commissioner. I represent two unique aspects that are seldom seen on the Bar Commission: a solo practitioner and a criminal defense attorney. I can be a "voice" to membership segments that are seldom heard or represented.

I have practiced law for over twenty-five years. I am currently a board member of Lawyers Helping Lawyers. I am familiar with the courts, the community of civil and criminal trial attorneys, and the challenges we face in solving clients' disputes. I also know the personal issues that lawyers experience as a result of the pressures of providing a competent practice.

My goals as a Bar Commissioner are to continue the help the Bar provide needed services for its members, improve outreach and mentoring of new admittees, and support the Bar's efforts to provide legal services to those who need it the most and can afford it the least. I also believe in increased visibility and accountability of services the Bar provides.

I believe in my role as a lawyer, and will do my best to provide Utah attorneys with the services they deserve from a Bar Commission member. I would appreciate your support.

EVE FURSE

I volunteer to help the Bar carry out its mission by serving as Third Division Commissioner. Through serving as an *ex officio* Bar Commissioner, working on the CLE Committee, and acting as Screening Panel Vice Chair on the Utah Supreme Court's Ethics and Discipline Committee, I have engaged with a variety of the critical functions of the Utah State Bar. These involvements exposed me to the assortment of important roles the Bar fills, which it can only do with the help of its members.

Having worked both in government – Senior City Attorney, Salt Lake City Corporation – and private practice – Covington & Burling and Giauque, Crockett, Bendinger, & Peterson – gives me understanding for the challenges of practicing in different settings. With the economic, political, and social pressures facing the legal profession, the Bar has a critical role to play representing Utah lawyers. As Commissioner I will work to make the Bar support you through fiscally responsible and efficient action. Please let me know your concerns, needs, and suggestions: 801-554-4672 or evefurse@yahoo.com.

As with my prior endeavors, I commit to work diligently to represent your needs both within the Bar and in the community at large. Please support my candidacy for Commissioner.

ROBERT O. RICE

I can't escape the fact that I like lawyers and the practice of law. My father was a judge for thirty-five years, my close friends are attorneys and I've been practicing at Ray Quinney and Nebeker since becoming a lawyer in 1993. During this time, I have come to know and respect many of you, which prompts me now to ask to serve as a Third Division Bar Commissioner.

I bring the following experience to the task. I was President of the Salt Lake County Bar (2007), President of the Legal Aid Society (2008), and currently serve on the Federal Local Rules Committee. I was a Young Lawyers Division officer and currently mentor young lawyers as a member of Ray Quinney's Recruiting Committee. I litigate in courts throughout the country as a member of my firm's litigation section.

If elected, I will focus on supporting your practices while ensuring that the Bar is not an unnecessary hindrance to your business. I am committed to the conservative management of the Bar's budget, funded by your Bar dues, the New Lawyer Training Program, diversity in our Bar and protecting judicial independence. I ask for, and would be honored to receive, your vote.

Civility Matters

by Robert L. Jeffs

Sitting in a deposition of an opposing party, I run through the options available to me as opposing counsel makes his tenth speaking objection designed to coach the witness on how he should respond to my question. I have already asked my colleague to limit his objections pursuant to the Rules of Civil Procedure. My options include: 1) reach across the table and constrict opposing counsel's windpipe so no more sound comes out; 2) inform counsel that if he continues to coach his client, he will do so without his front teeth; 3) comment on opposing counsel's pedigree and invite him to meet me at the Courthouse to continue our discussion. Recognizing that my list of options may be influenced by my rising temperature, I decide I should take a recess to reconsider my options.

Fortunately, the break gives me the chance to remember that civility is a two-way street. After I calm down, I am able to formulate a more rational response that actually defuses the situation rather than escalating it. Not only did I avoid behavior that might reflect badly on the profession, my client benefitted from not incurring attorneys' fees in a dispute tangential to the matter being litigated.

> *"[T]ry as I might, I can't find an exception in the Standards of Professionalism and Civility that provides I only need to act civil when opposing counsel is civil."*

Concerns of civility and the tempering of speech that is discordant or contentious have received a substantial amount of both national and local attention in recent months. Highlighted by the shooting of Gabrielle Giffords and Federal Judge John Roll, the nation seems truly interested in promoting civility. Locally, Mayor Becker of Salt Lake City and Lt. Governor Greg Bell co-chair the Utah Civility and Community 2011 Initiative. Former Utah Bar President Steve Owens sits on that Initiative on behalf of the Utah State Bar.

As the members of the Bar know, the Utah Courts and the Utah State Bar were on the forefront of the issue, adopting the Utah Standards of Professionalism and Civility several years ago. Lawyers have always held themselves to high standards of professionalism and ethical conduct. The Standards of Professionalism and Civility provide practical guidance for our day-to-day interaction with other attorneys, the Court and the public. The media enjoys portraying attorneys as a caricature, emphasizing aggressive, rude, or unethical behavior. I am proud to report that most of the attorneys I have the pleasure to deal with are defined more by their collegiality, professionalism, courtesy, and ethical conduct.

Many members of the Bar or the Court have written or spoken about those Standards of Professionalism and Civility. Hopefully, all of the members of the Bar are now familiar with the Standards and strive to incorporate the principles into their practice. I wish I were always a model of Professionalism and Civility. Unfortunately, at times I succumb to the pressures of a busy litigation practice and the contention inherent in our work and stray from those principles. I know I am not alone. I have on occasion been on the receiving end of uncivil or unprofessional conduct. But when I reflect on those occasions, I come to the realization that often my own conduct, my frustration, my anger or impatience played a significant role in escalating the problem rather than diffusing the situation.

While it is an easy justification for unprofessional conduct when you were not the first violator, that you are simply responding in kind to the conduct of opposing counsel. But try as I might, I can't find an exception in the Standards of Professionalism and Civility that provides I only need to act civil when opposing counsel is civil. Based on my own experience, civility and professionalism invites civility and professionalism even in the face of uncivil behavior.

As a profession, I hope we continue to be on the leading edge of the civility movement. We are uniquely positioned in our role as problem solvers, as counselors, as advocates in contentious, acrimonious, and emotionally charged disputes to set an example for the community to foster civility.

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Writing to Persuade

by Bryan J. Pattison

"What kind of lawyer are you?" The answer, of course, is easy: "I'm a litigator," you respond. As you bask in the glow of that term and envision yourself in the courtroom shredding a witness on cross, you get the follow up question: "So what do you spend most of your time doing?" You think back to the past week. Then the week before that. The picture of the cross-examination fades. Time to come clean. "Writing," you answer.

A litigator is a lot of things, chief among them a professional writer. But unlike other professional writers, "litigators" typically don't view themselves as professional writers. This makes no sense. As legal writing guru Bryan Garner puts it, "There are only two things lawyers get paid for: writing persuasively and speaking persuasively." Bryan A. Garner, *Garner on Language and Writing* 20 (2009). While both are essential, it may not matter how dazzling you are at trial, if you can't write well enough to avoid summary judgment, you may never get there. And even if you win at trial, the victory may be short-lived if you can't write an effective appellate brief to keep the judgment intact. Yes, I'm painting with broad brush strokes here, but you get the point. Persuasive writing is essential.

When you think about it, legal writing is relatively simple. The goal is well-defined and the audience clear. But for whatever reason, every day across this state, lawyers stuff courthouses with briefs and memoranda that miss the mark. This article is intended to bring a renewed focus on the importance of legal writing. To help with this task I enlisted the assistance of some of the "Deciders," who were more than willing to offer tips, suggestions, and words of advice on what lawyers can do to improve the persuasive quality of their writing.

The Mindset of a Writer

A common complaint from judges is a general one: The quality of legal writing is just not very good. All too often it's rambling, disjointed, stream of consciousness nonsense. For example, when asked what things bog a judge down and what is the quickest way to lose your judge's attention, Judge Wallace A. Lee of the Sixth District Court offered a single answer: "Long, run-on sentences and paragraphs."

In my view, the best explanation for what causes this type of writing is from writing professor John Trimble. He characterizes it as "unconscious" writing: "The unconscious writer is like a person who turns his chair away from his listener, mumbles at length to the wall, and then heads for home without a backward glance." John R. Trimble, *Writing with Style* 5 (2d ed. 2000). The unconscious writer forgets that someone else will be trying to make sense of what he or she is writing. *See id.* at 4. But as Trimble explains, writing, at its core, "is one person earnestly attempting to communicate with another. Implicitly, then, it involves the reader as much as the writer, since the success of the communication depends solely on how the reader receives it." *Id.* at 5. The successful writer – the professional – is fully aware of and writes with the reader in mind.

What were you thinking about the last time you wrote a brief or trial court memorandum? Sticking it to opposing counsel? Sticking it to the trial judge who botched your case? Impressing your client with your mastery of legalese? Or perhaps just getting something on paper and filed before the 5:00 p.m. deadline? If so, hit reset. Because the success of your writing depends solely on how the judge receives it, the starting point to persuasive legal writing is to write with your judicial reader in mind.

Use a Scalpel, Not a Shotgun

With your judicial reader in focus, you can now deliver what he or she wants. What is that? Here are a few things:

Judge Derek P. Pullan of the Fourth District Court:

> Persuasive writing is concise and focused. Delete anything that distracts from the argument. This takes time and discipline. Many over-length memoranda could be reduced to ten pages of argument without

BRYAN J. PATTISON is a shareholder in the St. George office of Durham Jones & Pinegar. He is a member of the Supreme Court's Advisory Committee on Rules of Appellate Procedure and also serves as a member of the Executive Committee of the Utah Bar's Litigation Section.

compromising content or persuasion.

Finally, the content – not the length – of string cites persuades. A parenthetical summary of the rule for which each case is cited is like a gift. Better than a string cite, choose the two or three cases most closely aligned with the facts of your client's case. Describe the facts and legal reasoning of the court. Then explain why these cases are controlling or should be followed as persuasive authority.

Judge Kate A. Toomey of the Third District Court:

Substance matters most, of course, but looks count for something. Avoid crowding and clutter, use an easily read typeface and font size, and spend some time making sure that the margins are where they belong for both headings and text. Use periods and paragraphs. Don't overdo it with capital letters, underlining, and boldface: it wears me out, and I have to suppress the feeling that the writer is using emphasis in an effort to overcome lack of substantive merit. Likewise, avoid plowing ground you've already plowed. Sometimes a point bears repeating, but the editor in me can't resist observing that pages could be reduced to paragraphs if only the drafter would take a little more care, and the resulting brevity serves in subtle ways to make the memorandum more appealing to read.

U.S. Magistrate Judge David Nuffer suggests that you do the following before you file your brief: "Have a person unfamiliar with your case read your written work. If they don't get it, a judge won't either." In addition, "Always read your writing out loud. This reveals difficult constructions." In other words, don't use your decider as a guinea pig for your writing.

Finally, because you are asking a judge to spend the time to read your submission carefully (split infinitive), the least you can do is proof the thing before you file it. U.S. Magistrate Judge Paul M. Warner cautions: "Ensure that your memoranda and briefs are free of errors. Typos and citation mistakes reflect poorly on your credibility and attention to detail."

The Fifth Floor

Perhaps in no other court is your writing more outcome determinative than when you are filing something on Matheson's Fifth Floor – home to the Utah Supreme Court and Utah Court of Appeals. At that point, the record is what it is. The testimony is etched in stone. Your only chance is to write your way out of it.

But before you start hammering away on your appellate brief, take a step back and think not only about what your argument is, but how you want to present it to the court. Judge J. Frederic Voros, Jr. of the Utah Court of Appeals sets the frame: "The advocate sees the appeal as a contest to be won; the judge sees it as a problem to be solved. Consequently, to win the contest, the advocate must show the judge how to solve the problem."

With that in mind, the rest should be easy. But if you spend any time reading the opinions of our appellate courts you would think there is a shortage of rule books. All too often those opinions contain cautionary tales of what happens when the briefing requirements of the Utah Rules of Appellate Procedure are ignored. Learn from those opinions. Don't draft a brief that gives an appellate judge a hankering to make you famous.

In this regard, no Rule of Appellate Procedure allows, implies, or remotely suggests that appellate briefing is nothing more than taking whatever you filed in the trial court, re-packaging it with a fancy blue or red cover, and filing it with the appellate court in the hopes of a better (blue) or the same (red) result. Rather, the Rules of Appellate Procedure give you an "opportunity" to do so much more. Judge Gregory K. Orme of the Utah Court of Appeals:

> Two opportunities are often missed in briefing. I think it's because they are left to the end, and counsel are at that point so anxious to get the darn thing filed that these two items get short shrift if they get any "shrift" at all.
>
> The first is the OPPORTUNITY to include an addendum, which does not count against the page limit! I frequently marvel at how many lawyers pass up the opportunity to include key documents – the pivotal insurance policy, the challenged jury instructions, the lease at the center of the dispute – at the back of their briefs. It is apparently thought unnecessary because these items are included in the record on appeal. Here's the reality check: I don't read briefs while sitting in the Records Room in the appellate clerk's office. It's stuffy in there, and there aren't any chairs. Just box after box after box of records. I usually read briefs at home. Sometimes at a local restaurant; sometimes on an airplane; sometimes sitting by a campfire. I appreciate the practitioners who make my job easier by including legible copies of the important documents right in the brief, so I have ready access to them while reading the arguments involving these very documents.
>
> The second is the OPPORTUNITY to sell me on an argument before I even read the argument. Rule 24 calls for each brief to include a summary of the arguments. Many practitioners view this as a throw-away, and include just enough verbiage under the Summary of Argument heading so they can consider the requirement satisfied. Our best practitioners realize this is an important opportunity to "pre-sell" their argument. A well done summary will pique my interest, or provide me a road map of where the ensuing detailed arguments will take me, or suggest a reason for skepticism in considering the other side's position even before I pick up that brief. Think of the Summary of Argument as an executive summary introducing a long business report. Pretend that the reader won't read any more than the Summary. That's not the case, of course, but if you approach it from that vantage point, you will write that key section of the brief in a manner commensurate with its importance.

On the Clock

Judges are human. I know this because I spotted one at Wal-Mart once. They have lives outside the courtroom and their time, like yours, is valuable. As such, deliver the information, deliver it quick, and make it enjoyable (or, at the very least, painless) to read.

U.S. District Judge Dale A. Kimball states it simply: "Get to the point. Be as concise as possible." Judge Warner echoes that view: "Most judges have heavy dockets. Time is a precious commodity for the courts. Therefore, remember no judge appreciates verbosity. Question every word you put in your brief or memorandum."

In fact, according to Bryan Garner, "Every brief should make its primary point within 90 seconds." Bryan A. Garner, *The Winning Brief* 55 (2d ed. 2004). This means that within ninety seconds "the judge understands the basic question, the answer, and the reasons for that answer." *Id*. With this in mind, have you ever stood up in court to deliver an argument only to have the judge say, "No need, counsel, you had me at 'Comes Now.'" I doubt it. So why start each brief with "COMES NOW, by and through, yada yada yada"? All it amounts to is a repeat of information already contained in your case caption. As such, I suspect that most judges have developed a habit of skipping forward in search of something that matters – so much for being concise and getting to the point. Here's an idea, throw caution to the wind and replace this archaic opener with something meaningful. Of the judges I polled, none were against a short introduction (emphasis on short) or opening summary; rather, they would welcome it.

Five Things to Never Do

Here are five things to never do, courtesy of U.S. District Judge Ted Stewart:

1. Overstate your own case (either the law or the facts).
2. Misrepresent your opponent's case.

3. Personalize the case or demonize your opponent.

4. Suggest that a contrary ruling (either past or future) from a judge was due to his/her prejudice against you.

5. Develop a reputation as a "churner" – an attorney who files unjustified motions for ulterior motives: for example, to wear down an opponent, to over-stretch the opponent's resources, to look good to a client, or to keep the judge from focusing on what really matters.

Your Reputation Precedes You

Judge Stewart's last point shows that your reputation and credibility can be as important as the content of your written submission. A charlatan with a golden pen is still a charlatan. Thus, don't do anything to undermine your credibility. According to Judge Lee, the quickest way to lose your credibility is to "cite a case that is no longer valid or doesn't stand for the proposition cited." These comments are echoed by other judges. Judge Warner says, "Make sure the cases you cite really stand for the proposition cited. Also ensure that any cases you have cited have not been recently overruled." These things seem obvious and fundamental. But if the Deciders believe it necessary to point them out, it's safe to assume there are violators out there among us.

For the rest of us, a stellar reputation is not a license to have the court accept something as fact or law merely because you said so. Judge Voros: "Do not expect the reader to take your word for anything. Support assertions of fact with citations to the record; support assertions of law with citations to authority."

Do Your Talking on the Field

Let's take a quick detour to the greatest place on earth – the football field. Now, which type of player do you prefer: The trash talker or the player that lets his play do the talking for him? I suspect your answer is the latter. You want the player that lets his performance speak for itself. You want the guy who drags three tacklers to get an extra yard; not the guy mouthing off the night before. You want the player that does his talking on the field.

Persuasive legal writing is no different. Let your play – your analysis and mastery of the facts and law – do the talking. Your decider will appreciate it.

Judge Pullan:

> Hyperbole, personal attacks, and overstatement do nothing to advance the argument. They literally stop the judicial reader in his tracks. More important, a resort to these methods suggests weakness on the merits. If opposing counsel's argument is "specious," "absurd," "unhelpful," "simple-minded," or "outrageous," then sound legal analysis will eliminate any need to label it so.

Judge Nuffer:

> Avoid overstatement of assumed motives and characterizations of tactics: "[Party] began its attacks against [Opposing Attorney] by sending him a personal subpoena during the holidays on December 29, 2008 in an attempt… to ruin [Attorney's] holidays." "[Party] engaged in Gestapo tactics in serving [Opposing Attorney] with the [other] subpoena in his law office…."

Judge Warner:

> Be temperate in your writing. Judges are not persuaded by the use of inflammatory language or rhetorical questions. Nor are they persuaded by the overuse of bold type, italics, underlining, exclamation points, etc. Resist the temptation to use any of these techniques. They do nothing but harm your credibility and the merit of your arguments.

A Motley Assortment of Things

Judge Kimball recommends that you actually respond to your opponent's arguments and resist throwing in the kitchen sink:

- "Lawyers should address all of the arguments of their opponents. It is puzzling when this is not done."
- "Try to avoid advancing unpersuasive arguments. Those types of arguments detract from good arguments."

Judge Nuffer suggests a few things to avoid (in case you're skimming, the examples he provides are of what not to do):

- Avoid bizarre figures of speech:

  > Even if it is necessary to reschedule the trial date, it is difficult to see how this is unfair to the defendant. 'Unfairness' is often tossed out as a reason for the court to do, or not do, something. Like the cry of the loon, it is haunting, but often without substance.

- Avoid unintelligible titles:

  > Corrigendum to Declaration of [Name] and Memorandum of Points and Authorities Submitted in Support of Plaintiffs' Opposition to Defendant [Name] Motion to Amend Scheduling Order and Request for Scheduling Conference.

  . . . and a few things to do:

  - Use Tables of Contents. It is a road map to your story.
  - Take a Bryan Garner seminar and/or use his books.

Lastly

Seek to improve. Whether you write with the eloquence of Justice Robert Jackson or like a kid holding a Crayola (or somewhere in between), you can and should seek to improve your legal writing. Following these tips and suggestions is a start. But don't stop there. Follow Judge Nuffer's suggestion and pick up an actual book on legal writing. After all, you are a professional.

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Settle Down Now: Insurer and Policyholder Roles in Resolving Liability Claims

by Mark W. Dykes

Background

If you negligently injure someone, your liability insurer, subject to policy terms and applicable law, will defend you against a lawsuit if you are sued, and indemnify you against any resulting judgment. The insurer will also decide whether to settle with the plaintiff.

Concerning the right to settle, the "no-action" clause contained in standard form liability policies precludes any action against the insurer to recover indemnity payments until the insured's legal liability to pay has been established by final judgment after a trial, or there has been an "agreed settlement," defined as a settlement to which the insurer has consented. The purpose of this "agreed settlement" language is to "protect the insurance company against the danger of collusive settlements between the insured and a third party." *Gibbs M. Smith, Inc. v. U.S. Fid. & Guar. Co.*, 949 P.2d 337, 344 (Utah 1997).

The no-action clause, on its own, would thus preclude any action against the insurer to recover on a settlement made between the insured and plaintiff without the insurer's consent. However, "'it is well settled that, at least after a denial of liability by an insurer, the insured may enter into a settlement with a third party without prejudicing its rights against the insurer.'" *Id.* at 344 (citation omitted).

In *Benjamin v. Amica Mutual Insurance Co.*, 2006 UT 37, 140 P.3d 1210, the Utah Supreme Court revisited this issue. More recently, the United States District Court for the District of Utah has addressed a variation on the issue. *See Rupp v. Transcon. Ins. Co.*, 627 F. Supp. 2d 1304 (2008).

Benjamin's facts have been set forth in great detail in an article appearing in a previous issue of the Utah Bar Journal. *See* Will Fontenot, *Civil Crime: The Effect of a Guilty Plea on an Insurance Policy's Criminal Act Exclusion*, 23 Utah Bar Journal No. 5, 24 (2010). For our purposes, Benjamin was sued for sexual harassment by two female co-workers, Borthick and Allen, each of whom alleged both intentional torts and negligent infliction of emotional distress. *See Benjamin*, 2006 UT 37, ¶ 2. Benjamin's liability insurer ceased its defense of the Borthick case when it decided that Benjamin's actions against Borthick were intentional, and thus outside the scope of insurance coverage (which provides coverage for the results of negligently, not intentionally, inflicted harm).

The jury held for Borthick on the negligent infliction of emotional distress claim, but rejected the claims for intentional tort. The court then entered judgment notwithstanding the verdict, finding that worker's compensation was Borthick's sole remedy. *See id.* ¶ 7.

Benjamin then settled both suits. Amica declined to participate. Benjamin sued Amica for breach of the duty of good faith and fair dealing arising from its withdrawal from the Borthick suit and its failure to participate in the settlements. The case reached the Utah Supreme Court, which then held:

> Because Borthick and Allen alleged that Benjamin negligently and unintentionally inflicted emotional distress upon them, Amica had a duty to defend Benjamin until it could establish that those claims were not supported by the facts. Where factual questions render coverage uncertain, as is the case here, the insurer must defend until those uncertainties can be resolved against coverage.

Id. ¶ 22. As a sidebar issue, short of taking the case through trial, Amica likely could *not* have "establish[ed] that [the negligence] claims were not supported by the facts," at least not without prejudice to the insured. *Id.*

To resolve coverage disputes, insurers normally bring separate declaratory judgment actions against the insured. Sometimes, the coverage dispute has nothing to do with the underlying lawsuit, as when, for example, an insurer disputes that the driver of the car that caused the wreck was actually an insured.

Often, however, a factual dispute giving rise to the coverage question is also a factual dispute in the plaintiff's underlying lawsuit against the insured, and *Benjamin* presents the classic case: did Benjamin intentionally cause harm (not covered) or negligently cause harm (potentially covered)? *See Montrose*

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Chem. Corp. v. Superior Court, 861 P.2d 1153, 1162 (Cal. 1993) ("[W]hen the third party seeks damages on account of the insured's negligence, and the insurer seeks to avoid providing a defense by arguing that its insured harmed the third party by intentional conduct, the potential that the insurer's proof will prejudice its insured in the underlying litigation is obvious.").

"To eliminate the risk of inconsistent factual determinations that could prejudice the insured" in such cases, the declaratory action will normally be stayed. *Id. See also Cal. Ins. Guarantee Ass'n v. Superior Court*, 231 Cal. App. 3d 1617, 1627 (1991) ("[A] separate declaratory action where the coverage question turns on facts to be litigated in the underlying action (*e.g.,* whether the insured acted 'intentionally') is not permitted."). *But see Fire Ins. Exch. v. Estate of Therkelsen*, 2001 UT 48, 27 P.3d 555 (affirming an insurer summary judgment in a coverage action arising from a shooting, even though the underlying case had not gone to judgment and contained allegations of both negligent – defendant really intended only to scare, not shoot, the plaintiff – and intentional harm). *See also id.* ¶ 15 ("'every man must be held to intend the natural and probable consequences of his deeds.'" (citations omitted)). *But see Benjamin v. Amica Mut. Ins. Co.*, 2006 UT 37, ¶ 24, 140 P.3d 1210 ("Inferences and assumptions about an insured's intent to injure are improper . . . .").

Having boycotted the settlement talks, the *Benjamin* insurer was precluded from "second-guessing Benjamin's decision to settle." *Id.* ¶ 29. Hence, "Benjamin's settlement agreements with Borthick and Allen render[ed] him legally liable for damages. Amica is therefore contractually obligated to indemnify Benjamin for any amount he paid to settle the negligent infliction of emotional distress claims." *Id.* ¶ 30.

Two points:

- Under the no-action clause, unaddressed in *Benjamin*, only "legal liability" coupled with an actual trial or agreed settlement counts. Benjamin prevailed at trial because of the worker's compensation issue, and the insurer had not agreed to the settlement.

- Normally, although "a settlement is presumptive evidence of the liability of the insured and the amount of damages[,]" the insurer may "rebut[] this presumption by showing that the settlement was unreasonable or in bad faith." *Griggs v. Bertram*, 443 A.2d 163, 172 (N.J. 1982). In saying that the insurer had to cover "any amount" paid to settle the negligence claims, was *Benjamin* holding that the insurer had no right to challenge the amount?

Notwithstanding these issues, the *Benjamin* fact pattern (insurer withdraws from defense; case goes to judgment) is perhaps the easiest kind of case for a court to justify avoiding the no-action clause. But what happens when an insurer *agrees* to defend, but not to settle, and the underlying plaintiff and insured settle anyway?

In *Rupp v. Transcontinental Insurance Co.*, 627 F. Supp. 2d 1304 (2008), a construction-zone car accident rendered Mrs. Rupp a quadriplegic. *See id.* at 1308. Mrs. Rupp sued Granite Construction Company of Utah ("Granite"), alleging that Granite had negligently designed the traffic control plan for the zone. *See id.* Granite tendered defense to its insurers.

Granite and its primary insurers strongly disagreed over the risk of liability posed. Primary policy limits were $4 million. The primary insurers offered $1.5 to $2 million to settle. Legal experts opined that the verdict would be higher. *See id.* at 1326.

If an insurer improperly declines a settlement within the limits of the policy, it will be held liable for any subsequent judgment, even if in excess of the policy. *See Ammerman v. Farmers Ins. Exch.*, 450 P.2d 460 (Utah 1969). But after Granite's primary insurers declined several demands for a policy-limits settlement, the Rupps, Granite, and Granite's excess insurer decided to settle *before* trial, and thus before any judgment could issue:

1. Granite and the excess insurer agreed to pay a combined total of $3 million to the Rupps, *see Rupp*, 627 F. Supp. 2d at 1312,

2. Granite agreed to entry of a stipulated judgment against it in the amount of $8 million, *see id*. at 1313, provided however, that

3. The Rupps signed a covenant not to execute or enforce the judgment against Granite, *see id*., and

4. Granite assigned to the Rupps whatever bad-faith claims it had against its insurers. *See id*. at 1312.

The primary insurers were not given notice of these discussions, and did not learn of the stipulated judgment until after it had been entered. The Rupps then sued the insurers to enforce the stipulated judgment as well as the bad-faith claims that Granite had assigned to them. *See id.* at 1313.

In a summary judgment motion, the insurers argued that Granite had failed to comply with the no-action clause because the case had never gone to trial and the insurers had not consented to the settlement, and further that because the case had not gone to trial, the stipulated judgment was "not a reliable measure of damages in the underlying action…." *Id*. at 1317.

As to the no-action clause, the court recognized that the case before it did not involve, as did *Benjamin*, an insurer who disclaimed coverage and declined to defend, but determined that the issue was one of degrees: "Breach of the duty to defend and a repudiation of coverage is arguably more extreme conduct, but the duty to accept reasonable settlement offers within policy limits when faced with the significant likelihood of an excess judgment…is an extension of that duty to defend." *Id*. at 1324. *See also Twin City Fire Ins. Co. v. Country Mut. Ins. Co.*, 23 F.3d 1175, 1179 (7th Cir. 1994) ("A standard provision in liability-insurance contracts gives the insurer control over the defense of any claim against the insured, and an implied correlative of this right is the duty not to gamble with the insured's money by forgoing reasonable opportunities to settle a claim on terms that will protect the insured against an excess judgment.").

The *Rupp* court determined, based on *Gibbs M. Smith, Inc. v. United States Fidelity & Guaranty Co.*, 949 P.2d 337 (Utah 1997), and *Benjamin v. Amica Mutual Insurance Co*, 2006 UT 37, 140 P.3d 1210, that "if the Utah Supreme Court were to face the issue here, it would hold that an insured facing the significant likelihood of an excess judgment is not required to take the case to trial before a cause of action for bad faith accrues[,]"and that the "no-action" clause could not be enforced in such circumstances. *Id*. at 1324. *See also Crawford v. Infinity Ins. Co*., 139 F. Supp. 2d 1226, 1231 (D. Wyo. 2001) (rejecting argument that only an insurer's outright denial of duty to defend releases insured from no-action clause).

Of course, an insured has little incentive to enter into such a settlement absent assurances that the plaintiff will cease its pursuit of the insured. Hence, the stipulated judgment by the plaintiff against the insured is almost invariably subject to a covenant not to execute that judgment. Although a minority of courts have deemed the covenant not to sue to be an outright release by the plaintiff of the insured, and the underlying judgment a nullity (thus releasing the insurer as well, whose liability depends on the insured being legally obligated to pay damages), *see, e.g., Gainsco Ins. Co. v. Amoco Prod. Co.*, 53 P.3d 1051, 1061 (Wyo. 2002) (collecting cases but rejecting minority view), the Utah Supreme Court long ago ruled that a stipulated judgment is still a judgment, and that the use of a covenant not to execute does not change this. *See Ammerman v. Farmers Ins. Exch*., 450 P.2d 460, 462–63 (Utah 1969) *See also Griggs v. Bertram*, 443 A.2d 163, 174 (N.J. 1982) ("A majority of courts have permitted an injured plaintiff to recover from the insurer despite a covenant to seek relief only from the insurer.")

The *Rupp* court's decision was, however, only to deny the insurers' motion for summary judgment on the effect of the no-action clause. The *Rupp* court did not rule on the underlying factual issues of whether the insurers had acted in bad faith in failing to accept the settlement, *see Rupp v. Transcon. Ins. Co.*, 627 F. Supp. 2d 1304, 1325–26 (2008), nor on the insurers' assertion that the settlement was collusive and in bad faith. *See id*. at 1326.

Finally: the *Rupp* policies excluded coverage for punitive damages. *See id*. at 1309. Utah's insurance code (when choice-of-law dictates the application of Utah law) regardless forbids insurers to "insure or attempt to insure" against punitive damages. *See* Utah Code Ann. § 31A-20-101(4) (2010). The settlement offers at issue in *Rupp* waived punitive damages against the insureds, a fact the court deemed significant. *See Rupp*, 627 F. Supp.2d at 1324, 1326.

However, although "the insurer's obligation to *defend* extends to [uninsurable] punitive damage claims, provided the policy does not conspicuously disclaim this duty[,]" *J.B. Aguerre, Inc. v. Am. Guarantee & Liab. Ins. Co*., 59 Cal. App. 4th 6, 14 (1997), the insurer's duty to settle when uninsurable punitive damages are on the horizon is a complicated matter, one not directly addressed in *Rupp. Magnum Foods, Inc. v. Continental Casualty Co*., 36 F.3d 1491 (10th Cir. 1994), is a leading case on the insurer's duty in such circumstances, and *J.B. Aguerre* also contains a nice discussion. *See J.B. Aguerre*, 59 Cal. App. 4th at 13-15.

What Result if the Insurer Wants to Settle and the Insured Does Not?

Concerning an insurer's evaluation of a settlement offer, "'[t]he governing standard is whether a prudent insurer would have accepted the settlement offer if it alone were to be liable for the entire judgment.'" *Gainsco Ins. Co*., 53 P.3d at 1058 (quoting *Betts v. Allstate Ins. Co*., 154 Cal. App. 3d 688 (1984)). In California, anyway, the insurer may consider only whether "the ultimate judgment is likely to exceed the amount of the settlement offer[,]" and neither policy limits nor a "belief that the policy does not provide coverage" may "affect a decision as to whether the settlement offer in question is a reasonable one." *Johansen v. Cal. State Auto. Ass'n Inter-Insurance Bureau*, 538 P.2d 744, 748 (Cal. 1975).

In response to an insurer argument that this rule "requires an insurer to settle in all cases irrespective of whether the policy provides coverage," *id*. at 750, the *Johansen* court noted that the insurer remained free simply to deny coverage and litigate the issue, but at the risk of being wrong (and thus liable for the entire settlement), and also that an insurer "retains the ability to enter an agreement with the insured reserving its right to assert a defense of noncoverage even if it accepts a settlement offer." *Id*.

Johansen thus referred to a policyholder "agreement" to a potential later recoupment of settlement payments. In *Blue Ridge Insurance Co. v. Jacobsen (Blue Ridge I)*, 197 F.3d 1008 (9th Cir. 1999), the Ninth Circuit asked the California Supreme Court if the insurer can settle over the *objection* of the

insured and still recover the settlement payments from the insured if the insurer can show that the claims were not covered. *See id.* at 1009. The answer was "yes." *See Blue Ridge Ins. Co. v. Jacobsen (Blue Ridge II)*, 22 P.3d 313 (Cal. 2001).

In *Blue Ridge*, a Rottweiler badly mauled its owner. *See Blue Ridge II*, 22 P.3d at 314. The owner sued the Jacobsens, who had brokered the sale of the dog. *See id.* The Jacobsens tendered defense to Blue Ridge, their homeowner insurer. *See id.* Blue Ridge defended under a reservation of rights, asserting that the policy excluded business pursuits, and included a reservation of rights to recover any funds paid in settlement. *See id.* at 314-15. Although Blue Ridge also sought to adjudicate its coverage duties via a separate declaratory judgment action in federal court, the Jacobsens (invoking the "declaratory actions cannot prejudice the insured" rule) successfully moved for a stay of that action pending outcome of the plaintiffs' underlying lawsuit. *See id.* at 315.

Plaintiffs' counsel sent a policy limits ($300,000) demand to Blue Ridge, specifically stating that plaintiffs' intention was "to 'open up' or 'delimit' the policy" if Blue Ridge declined the offer and "an eight figure judgment" resulted, *id.*, whereupon plaintiffs would accept from the insureds an assignment of their claims for bad faith against Blue Ridge for "failure to settle this case within policy limits when presented with the opportunity." *Id.*

Blue Ridge told the Jacobsens that it wished to settle, but on condition that the Jacobsens agree to reimburse Blue Ridge for the settlement amount if Blue Ridge later prevailed in the separate coverage action. *See id.* In the alternative, Blue Ridge asked the Jacobsens, if such was their position, affirmatively to state their belief that the plaintiffs' offer was unreasonable (which would get the insurer off the hook in any subsequent bad-faith refusal to settle litigation), and in the alternative yet again, to assume their own defense. *See id.*

Refusing all these approaches, the Jacobsens told Blue Ridge that if it deemed the settlement demand reasonable, it was obligated to settle, if it did not settle, it "face[d] the prospect of having 'blown' its policy limits[,]" *id.* (emphasis omitted), but that the Jacobsens would not agree to any settlement that permitted Blue Ridge to recoup funds from them if the claims ultimately proved outside the scope of coverage.

Harking back to the settlement duties imposed on the insurer by *Johansen v. California State Automobile Association Inter-Insurance Bureau*, 538 P.3d 744 (Cal. 1975), (which preclude the insurer from considering coverage issues or policy limits in assaying a settlement), *Blue Ridge II* concluded:

> In light of *Johansen*, were we to conclude insureds could, as in this case, refuse to assume their own defense, insisting an insurer settle a lawsuit or risk a bad faith action, but at the same time refuse to agree the insurer could seek reimbursement should the claim not be covered, the resulting Catch-22 would force insurers to indemnify noncovered claims. If an insurer could not unilaterally reserve its right to later assert noncoverage of any settled claim, it would have no practical avenue of recourse other than to settle and forgo reimbursement.

Blue Ridge Ins. Co. v. Jacobsen, 22 P.3d 313, 321 (Cal. 2001). *But see Tex. Assn. of Counties Cnty. Gov't Risk Mgmt. Pool v. Matagorda Cnty.*, 52 S.W.3d 128, 135 (Tex. 2000) (rejecting rule later adopted by *Blue Ridge II*; "an insurer who cannot obtain the insured's consent to settle may 'seek prompt resolution of the coverage dispute in a declaratory judgment action' prior to the time the insured's liability is decided in the underlying suit.") (quoted in *Blue Ridge II*, at 323).

To support its decision that settlement payments may be recouped, *Blue Ridge II* further invoked *Buss v. Superior Court*, 16 Cal. 4th 35 (1997), a decision where the court had held that the insurer may unilaterally reserve the right to recover payments made in defense of claims that ultimately turn out, once the dust has settled, not to be covered.

Blue Ridge II and *Buss* seem to have become the majority rule, *see Lumbermens Mut. Cas. Co. v. RGIS Inventory Specialists, LLC,* 2010 WL 2017272, *4 (S.D.N.Y. May 20, 2010), although the *Buss* rule (permitting the insurer to recoup defense costs for uncovered claims) in particular has come in for criticism. *See generally Am. & Foreign Ins. Co. v. Jerry's Sport Ctr., Inc.*, 2 A.3d 526 (Pa. 2010) (rejecting *Buss* and providing an exhaustive study of decisions to date).

As to Utah, although in *Benjamin v. Amica Mutual Insurance Co.*, 2006 UT 37, 140 P.3d 1210, the Utah Supreme Court adopted the standard rule that in a case involving both covered and noncovered claims, the insurer must defend all claims until it can sort out which claims are not covered, *see id.* ¶ 25, (again, *when* is the appropriate time for the insurer to do this?), I am aware of no Utah decision squarely addressing the issues addressed in *Blue Ridge II* and *Buss*.

Conclusion

For both policyholders and insurers, the decision of whether to settle a third-party claim puts into motion scores of moving parts and legal relationships, and ultimately leaves the decision in the hands of the lawyer's (and client's) judgment about what the future of the litigation may hold. Because a court will often review that judgment, it pays to be well-versed in applicable law before deciding whether to sign on the dotted line.

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Taking and Defending Effective Depositions under Rule 30(b)(6)

by Tanya N. Lewis

Every attorney knows what it means to take the deposition of an individual, whether the deponent is a party to civil litigation or a non-party witness with knowledge pertaining to an issue in the case. But what about an organization? Information about how a company or organization conducts its operations, hires and trains its employees, handles its accounting and finances, or performs safety inspection may be crucial to proving either liability or damages, depending on the case. How can a party (whether a plaintiff or a defendant) obtain valuable, relevant testimony on these or other subjects from what may seem like a faceless entity?

The 30(b)(6) Deposition, Generally

The Federal and Utah Rules of Civil Procedure both anticipated the need for verbal testimony to be taken from a corporation, limited liability company, or other organizational entity, and set forth special guidelines under Federal Rule 30(b)(6) and Utah Rule 30(b)(6), respectively. Both the Federal and Utah rules permit (and require) a party seeking a deposition from an entity to direct a deposition notice to the entity that sets forth the subject matters of the desired testimony from whom testimony is sought. The Utah rule states:

> A party may in the notice and in a subpoena name as the deponent a public or private corporation, a partnership, an association, or a governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This Subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

U.R.C.P. 30(b)(6). The Federal rule is similar in nature to the Utah rule and reads:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

F.R.C.P. 30(b)(6). Both rules require the deposing party to set forth in the notice, with reasonable particularity, the categories of testimony desired from the corporation or other entity.

History of and Policy Reasons for the 30(b)(6) Deposition

The section providing for 30(b)(6) depositions was added to the Federal rules in the 1970 amendments. The advisory committee noted that the 30(b)(6) deposition would improve the deposition process by reducing difficulties as to whether an employee was a "managing agent." It also was intended to reduce the instances of "passing the buck" from one employee to another by having the corporation designate which witnesses would testify.

The advisory committee notes also indicate that the rule was designed to supplement the existing practice, where the examining party designates the corporate official to be deposed. It provides for the examining party to take additional fact witness depositions

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(other than the deposition taken pursuant to Rule 30(b)(6)) if he or she believes that other individuals who have knowledge but who have not been deposed under 30(b)(6) should testify. For an in-depth discussion of this subject, as well as an analysis of motion practice regarding protective orders for a 30(b)(6) deposition *see Stone v. Morton Int'l, Inc.*, 170 F.R.D. 498 (D. Utah 1997).

The Subject of 30(b)(6) Depositions Has not been Litigated Significantly in Utah State Courts.

However, in *Harris v. IES Associates, Inc.*, 69 P.3d 297 (Utah Ct. App. 2003), the Utah Court of Appeals did issue an opinion regarding, among other things, the scope of questioning allowed during a 30(b)(6) deposition. Prior to trial, Harris sought to depose IES's corporate representative, and sent three notices indicating that he intended to depose the representative in regard to, inter alia, document authenticity and IES records maintained or prepared during the course of its regularly conducted business activities. During the deposition, IES's counsel objected to questions about the representative's status at IES and involvement in the production of documents requested during the course of written discovery. IES's counsel maintained that the questions were outside the scope of the 30(b)(6) notices. After thirty minutes into the deposition, counsel for IES made an oral motion for protective order and instructed the representative not to answer questions about his status and involvement in document production. Ultimately, following a hearing, the trial court found that the questions were within the scope of the notices, and that although IES's counsel could object on the record to the questions, it was improper for counsel to instruct the deponent not to answer. The court also imposed sanctions under rule 37(a)(4) of the Utah Rules of Civil Procedure, ruling that the deposition was improperly terminated. On appeal, the Utah Court of Appeals upheld the trial court's ruling and sanctions, pointing out that IES failed to discuss the scope of the three deposition notices and to identify or explain why specific questions exceeded the scope of the notices.

The *Harris* case illustrates, then, the importance of crafting adequate 30(b)(6) notices that comply with the rule. Note that the rule does not require notices to be drafted with specificity, only that they describe the matters on which testimony is sought with reasonable particularity. Therefore, in noticing a 30(b)(6) deposition, general background-type questions pertaining to the litigation itself such as those described in the *Harris* case will probably be allowed, even if there is no category set forth on the deposition notice. However, it is not a bad idea to include a separate category just for litigation of the instant matter. More importantly, *Harris* should serve as a warning to those defending 30(b)(6) depositions that a Utah court is likely to give a substantial amount of latitude to deposition takers, and that instructing a deponent not to answer questions on the grounds that the questions are outside the scope of the notice is something that should be done sparingly and at great peril, and only when the matters are obviously outside the scope of the notice.

30(b)(6) Cases in the Federal Courts

At both the state and Federal level, the 30(b)(6) deponent is not giving his personal opinions; rather, the deponent presents the

corporation's position on the topic. *See generally Sprint Commc'ns L.P. v. Theglobe.com*, 236 F.R.D. 524 (D. Kansas 2006). The *Sprint* court noted that in a 30(b)(6) deposition, there is no distinction between the corporate representative and the corporation. It further held that companies have a duty to make a conscientious, good-faith effort to designate knowledgeable persons to be deposed on behalf of the corporation and to prepare them to fully and non-evasively answer questions about the designated subject matter. It also acknowledged that the requirements on a corporation that must prepare a deponent to be deposed on the corporation's behalf may be onerous. However, it noted that the burden upon such an entity is justified, since a corporation can only act through its employees. Therefore, the requirements negate any possibility that a deposing party will be directed from one corporate representative to another, "vainly searching for a deponent who is able to provide a response which would be binding upon that corporation." *Id.* at 528. The court also suggested that a party responding to a request for a deposition of a corporate representative to testify on behalf of a corporation "prepare deponents by having them review prior fact witness deposition testimony as well as documents and deposition exhibits. Any other interpretation of the Rule would allow the responding corporation to 'sandbag' the deposition process." *Id.* (internal quotation and footnotes omitted).

The Sprint court also stated in order for the 30(b)(6) to function effectively, the requesting party state, with "painstaking specificity," the particular subject areas intended to be questioned, and that are relevant to the issues in dispute. It is important to note that this interpretation goes significantly farther than the actual language of the rule, which requires only "reasonable particularity."

Practical Tips for 30(b)(6) Deposition Notices

One of the most common mistakes is drafting a deposition notice for an entity, entitled a "Notice of 30(b)(6) Deposition," that is drafted just like any other deposition notice, without any type of description of subjects or matters on which testimony is sought. In many instances, I can usually determine what type of testimony the other side wants. However, to protect my client and to prevent misunderstandings at the time of deposition, I will usually draft and send a letter to counsel citing the rule and asking them to send an amended notice stating the categories of testimony sought.

Another problem brought to our attention recently was the opposite issue, where, for a fairly minor case, counsel prepared a 30(b)(6) notice to a corporate defendant with over 100 separate categories of testimony sought. In this instance, recommended practices would probably include attempting to work out a stipulated agreement between counsel on the areas of testimony, and, if that was not successful, seeking a protective order from the court and/or a court ruling on the subjects of testimony to be covered in the deposition.

In matters where multiple people are expected to sit for a 30(b)(6) deposition, serving the notice and coordinating schedules with the deponents far in advance of any case deadlines or discovery cutoffs is usually well-advised, especially when the party seeking testimony needs the people to be deposed in a particular order. For example, in an employment discrimination case, you may wish to take the testimony of the person most knowledgeable for hiring within the company before you were to take the testimony of the person most knowledgeable for the individual's performance during their employment. Scheduling matters can impede the 30(b)(6) process, especially if persons in an organization are scattered across multiple states, and planning ahead can save a great deal of trouble later in the case.

Rule 30(b)(6) is probably one of the least-understood (and least-complied with) discovery rules. A thorough understanding of 30(b)(6), as well as what it can and cannot do, can greatly improve an attorney's representation of corporations and other organizational entities in all types of litigation.

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Avoid Missing Deadlines by Using the Triple Play

by Keith A. Call

Have you ever experienced that sick, sinking feeling that comes from realizing you just blew an important deadline or hearing date? The kind where you felt like losing your lunch because you just messed up a case? Badly? If so, you are apparently not alone. The 2010 Annual Report of the Office of Professional Conduct reports that a surprisingly high percentage of OPC complaints are the result of attorneys missing court appearances. *See* Billy L. Walker, Utah State Bar, Office of Professional Conduct, *Annual Report: August 2010*, at 18, available at http://www.utahbar.org/opc/Assets/2009_2010_annualreport.pdf.

Luckily, this is a problem we can all fix. By implementing the triple play in your practice, you can make yourself your client's star player instead of his ethics (or malpractice) respondent. The solution can be easy and does not take much time.

To start with, you must recognize and pay attention to deadlines as they roll into your office. These deadlines take various forms, including complaints, scheduling orders, motions, notices of hearings, offers with acceptance deadlines, and so forth. Do not ignore these. Do not promise yourself you will get to them later. Do not let them pile up in your "in" box. Even if you don't deal with the substance of the document, immediately deal with the deadlines.

The triple play begins with the obvious: entering the applicable deadline on a calendar. I used to use a paper calendar, but now I use Outlook to help stay organized. The type of calendar is unimportant, but it is imperative that you have one and that you use it.

In addition to a calendar entry, each of my deadlines gets entered onto my "to do" list with a "high priority" tag. Again, I used to maintain a paper "to do" list with highlights to call my attention to important deadlines. I now use the "tasks" feature in Outlook. Outlook allows me to easily view my tasks by date, by client, or by priority. Each of my cases or client matters has at least one task (sometimes as simple as "follow up"), and I try to make sure every legal deadline has a high-priority task assigned to it. I often also give myself one-week reminder tasks to alert myself to upcoming deadlines.

The third part of the triple-play system is to enter all important deadlines on the firm's docketing system. To accomplish this simply and quickly, I keep a stack of 4" x 6" forms in my desk called "Docket Memos." Using these forms I can quickly note all lawyers and paralegals working on the case, the date and time of the deadline, the place, the nature of the deadline, and the case name. I give these forms to my secretary, who marks the forms after she has entered the information on the firm's docketing system. Once the information is entered into the firm's docket system, I automatically get two reminder emails – one eight days before the deadline and one the day before the deadline.

I can usually complete the triple play in less than five minutes for routine matters. Other than giving the Docket Memo to my secretary, I usually do not delegate the triple play, and when I do, I provide specific instructions and personally follow up.

There are other things lawyers can do to avoid missing deadlines. For example, it helps to have more than one person responsible for watching your deadlines. By involving my secretary in the docketing process and by giving her full access to my Outlook calendar and tasks, she becomes my partner in getting things done on time. By including associates and paralegals on the Docket Memo form, I make others jointly responsible for making sure my deadlines are met.

A calendar, to do lists, and docket forms are useless unless we populate them with the relevant information about deadlines and then look at them often. I review all of my appointments and tasks at least weekly, and almost always daily. And I never leave for vacation without carefully reviewing all calendar and task items to make sure they will be taken care of in my absence.

This triple-play system is easy and it takes very little time and effort. It may not work for everyone, but it is an example of a system that can help a lawyer to be aware of and avoid missing deadlines. If you do not have a triple play system of your own, I encourage you to get one.

KEITH A. CALL is a shareholder at Snow, Christensen & Martineau. His practice includes professional liability defense, IP and technology litigation, and general commercial litigation.

Stop Wasting Time: Client Engagement Procedures

by Craig E. Hughes

This article explains how basic client engagement procedures will help you avoid giving away your time. The article emphasizes how engagement procedures can increase efficiency, profitability, and professional happiness.

I discuss these engagement procedures in the context of two strangely similar, time-wasting experiences I have encountered. The experiences were separated by a number of years, but both involved many of the elements that cause an attorney to deviate from basic engagement procedures.

TWO TIME-WASTING EXPERIENCES

In relating these two experiences, I refer to the potential client as the "perpetrator" and the experiences as a "game" because the experiences exhibited numerous characteristics of a confidence game. As near as I can determine the perpetrators of this game did not know each other and the situations were not related, except for the fact that they both involved seven identical elements:

Legitimate Financial Advisors Introduced the Perpetrator to Me.

In each experience, I was first contacted by a different team of two experienced financial advisors (FAs) associated with well-known national investment firms. These FAs were not novices. Together they had an average of twenty-five years experience in dealing with high-net worth individuals. In addition to other credentials, one FA had a law degree and was a professor at a university. The sophistication and integrity of the FAs was beyond question. In each experience, the team of FAs indicated to me they had a client in need of extensive estate, tax, and business planning.

Perpetrator is Alleged to be Terminally Ill and in Need of Emergency Planning.

In the initial meeting (with advisors, attorney, client) the FAs explained that their client, the perpetrator, was terminally ill with a life expectancy of months, perhaps weeks. (The first time I experienced this game, one FA had personally seen the perpetrator bleeding from her ears and eyes in a frightening evidentiary episode of her illness.) The FAs explained that their client needed immediate, emergency estate planning.

Perpetrator Attests His/Her Net Worth Exceeds $60 million.

The FAs explained that their client, the perpetrator, had assets in excess of $60 million. Yes. In my first experience, the perpetrator confirmed that her estate was valued at $82 million. In the second experience, the perpetrator listed his net worth at $63 million.

Perpetrator Has a Relationship with Legitimate Out-of-State Law Firm.

In each experience the perpetrator gave me the name of a legitimate out-of-state law firm and stated that the attorneys at Legitimate Law Firm were representing the perpetrator's litigation and business interests, but that said attorneys recommended the perpetrator retain a Utah-licensed attorney to handle the estate planning.

Perpetrator Requests Extensive Planning Work.

In each experience, during the course of our initial interview, the perpetrator requested that I engage in extensive estate planning, including tax planning. The perpetrator requested that I work with the perpetrator's advisors and attorneys at Legitimate Law Firm in creating various entities, including charitable entities.

Perpetrator Promises Large Retainers and Bonuses.

In each situation, the perpetrator promised me a very large retainer. In the second experience, the perpetrator offered me a bonus, in addition to my hourly compensation.

In my second experience, I indicated that at the time he signed the engagement letter, the perpetrator needed to deliver a retainer check. The perpetrator responded by stating that the retainer fee funds would need to be released upon approval of his attorneys at Legitimate Law Firm. The next day, perpetrator asked for my firm's IOLTA routing number and promised that the funds would be transferred within twenty-four hours.

Perpetrator States He is Under Extreme Privacy Restrictions.

In both experiences, the perpetrator indicated that the attorneys at Legitimate Law Firm were the only ones authorized to divulge information regarding the source and details of the perpetrator's

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assets. In both experiences, the perpetrators indicated to me that they could not personally discuss with me the source and details regarding their assets, since the details were under judicial seal.

When the "judicial seal" statement arose in the second experience, I went from yellow alert to red alert. I immediately asked the FAs if they had seen any documentation confirming perpetrator's wealth or medical status. As in the first experience, the FAs in the second experience admitted that while they had talked with professionals from banks and other institutions regarding wire transfers and other issues, they had not actually seen any documentation supporting the perpetrator's statements regarding his medical condition or wealth.

At this point I closed the doors. I told the perpetrator I would be glad to work for him as soon as I received a certified check in the amount of a $10,000 retainer, along with a signed engagement letter, and an exhaustive list of specific documents. I have not heard from him again.

WHAT HAPPENED?

While this article is not about these scams, for those who want to know what finally happened, I note that in the first experience, after sending several invoices to the perpetrator, who promised but ultimately failed to pay, we stopped work. In the second experience, we shut down the perpetrator almost immediately, for several reasons as noted above and below. As near as I can determine, the perpetrators had (and still have) no substantial monetary funds. Both perpetrators continue to live here in Utah. The last I heard, each perpetrator has cordial relations with one of the FAs who referred the perpetrator to me.

In discussing these strangely similar experiences with colleagues, friends, and family, I have heard every possible explanation that would motivate these perpetrators, none of which is very convincing. The point though is that they ultimately were a terrible waste of time.

THE HARM AND THE SOLUTION

The harm I suffered in these two experiences was time (and fees) lost. Perhaps no one but an attorney can appreciate the significance of this harm. I would be surprised to know any attorney who has not suffered similar harm in giving away time (and sometimes lots of it) in the form of free advice and services. Why we harm ourselves in this manner is as varied as each situation we face.

Whatever your reasons for committing slow suicide in your practice, I am convinced an absolute commitment to the following engagement procedures will help you avoid suffering the damages caused by giving away your time.

Secure Client Information Immediately.

I would suggest that in the first minutes of meeting a client, you the attorney (not a paralegal or secretary) personally ask for the potential client's names, addresses, emails, phone numbers, and basic family information. You are not just securing information, you are observing the client and establishing expectations of openness and full disclosure. You will be pleasantly surprised at how many problems can be nipped or controlled tactfully and calmly right here, in this seemingly pedestrian procedure.

Run a Conflict Check.

Once information is secured you must run a conflict search – immediately before discussing substantive matters. Do this even if your are a small firm and you know there is no conflict. Politely removing yourself from the client's presence to run the conflict search allows you a moment to reflect on how you will approach this particular client in regard to the following engagement procedures.

Secure a Signed Engagement Letter Immediately.

An engagement letter puts in writing what you will be doing and how you will be paid. Both you and the client must sign the letter. Secure the engagement letter before giving away your time. The need to impress a potential client with extended outbursts of advice, thinking this will persuade them to retain you, reflects poorly on your confidence and muddies your otherwise calm and predetermined procedures.

Do not be afraid to have multiple engagement letters. Your first engagement letter may simply indicate you will be discussing the client's situation in detail in preparation for making decisions.

Decide beforehand never to deviate under any circumstance from securing an engagement letter. Decide now never to suspend engagement procedures based on the thrill of securing a new, exciting client, or based on a potential client's emergency – medically, physically, or financially. There is no emergency that cannot wait for your client to sign an engagement letter, even an engagement letter handwritten on a yellow pad. Securing an engagement letter forces you to take a deep breath. The habit will save you untold hours of wasted time.

In my second experience related above, my mention of an engagement letter was met with resistance that I communicate with the perpetrator's attorneys at Legitimate Law Firm. If you meet resistance regarding an engagement letter, be prepared to politely insist you have other work that needs to be done.

Secure a Retainer Fee Before Beginning Work.

Time is precious. Retainers help determine which clients are serious about receiving legal help. A legitimate client in any situation (emergency or not) should always expect to pay a retainer. You must

be prepared to walk away from people who seem to desperately need your help. This is tough. Decide now how and when you will express your charitable inclinations, and stick to your decisions.

Securing a retainer before devoting any time to a client also establishes expectations and a tone of seriousness that cannot be had any other way. You will notice that you become a better attorney by deciding never to work for free. The retainer may be a reduced, or even minimal, fee for initial consultations, but get in the habit of being paid for *any* advice you give or work you do.

The habit of regularly discounting your fees, or working on promises of payment, or giving away hours of time in consultations does not earn you any respect, will not increase your referrals, and will only result in frustration and even hatred of your profession.

Secure Detailed Documentation.
Secure detailed documentation of all your client's affairs and assets before beginning work. This careful procedure not only weeds out scams and bad clients, it immediately reveals numerous characteristics about your legitimate client (organized and calm or scattered and anxious) that will help you establish expectations and manage the client's situation most efficiently – from the beginning. Further, this policy is essential in giving accurate advice and preparing appropriate documents.

I suspect that more inadequate or inefficient legal work is done by anxious attorneys beginning their work too early, before knowing all the facts, before receiving all the information and documentation to which they are absolutely entitled – before really knowing their clients. Decline consulting with or doing any work for a client until you have all the information and documentation you need.

Reject Gifts, Bonuses, and Unreasonable Fees.
Earn your fees. Be honest. Refusal to accept gifts, bonuses, or fees in excess of community standards will protect you and your clients in a variety of circumstances. In my second experience noted above, the perpetrator said early on, "take the day off and charge me for 8 hours of work." At my rates this was $2000. The response was a gracious thank you, but no thanks – for two reasons.

First, the offer of a gift set off a reality alarm: why would a legitimate or rational client choose to pay his well-compensated attorney a bonus of $2000 after meeting the attorney only the day before? A letter of thanks, referrals, or a nice dinner – perhaps even a weekend at the client's cabin at the end of fourteen months of hard work: those are legitimate thank you's that pass the smell test. But a $2000 gift when the perpetrator had known me for only a day?

Second, to protect the validity of the potential client's legal planning and documents, I could not accept a gift that would remotely give rise to a later claim that the client was mentally off or that I was unduly influenced by the client to engage in work harmful to a potential beneficiary.

If gifts or bonuses or (more commonly) fees in excess of community standards do not strike you as strange, you are likely already doing something wrong or your ego is blinding you to a disaster in the making.

CONCLUSION
The two time-wasting experiences I describe above involved many of the elements that cause an attorney to deviate from basic client engagement procedures:

- Trusted Referral – ("Jim at ABC Bank referred this new client of his.")
- Emergency – ("The client is dying and needs work done by 1:00.")
- Excitement – ("This is significant; where will this lead!")
- Security – ("It will be nice to have some steady work.")
- Ego – ("They came to me; this will get me on the map.")

None of these elements, however, justify an attorney's deviation from complying with basic client engagement procedures. In fact, it is difficult to imagine any situation in which an attorney needs to start working for a client without first complying with basic engagement procedures.

In brief, basic client engagement procedures constitute one of the foundation cornerstones protecting an attorney and ensuring an efficient, profitable, and gratifying legal practice.

The Family Law Clinic: A Critical Service to Pro Se Litigants in Utah

by Blakely Neilson Denny

"The Clinic was the first time I had taken any steps to fight for my rights and my kids' rights. The Clinic gave me courage, and I felt I could stand up for what was right. I'm glad the Clinic was there." – Family Law Clinic Client

The Family Law Clinic has been serving low-income family law clients proceeding pro se for the past six years, and the demand for services continues to increase. For the month of March 2010, a record 124 clients attended the twice-monthly clinic at the Matheson Courthouse. The Clinic serves two critical needs in the community. First, it offers support and advice to litigants facing family law issues who are unable to afford an attorney. Second, it gives law students real-world experience in the legal field. A study being conducted by Professor Linda Smith of the University of Utah S. J. Quinney College of Law has found that not only does the Clinic offer valuable advice and a practical learning environment, but it is effective at doing so. Over 95% of pro se clients surveyed between September 2009 and June 2010 reported being satisfied with the services they received after their consultations at the Clinic.

The Clinic serves a valuable function for pro se litigants because a substantial number of those involved in family law cases do not have the aid of counsel. In 2005, 47% of Utah divorce actions proceeded without either party being represented by an attorney. *See* Committee on Resources for Self-Represented Parties, Strategic Planning Initiative, Report to the Judicial Council, 5 (July 25, 2006), available at http://www.utcourts.gov/resources/reports/docs/ProSe_Strategic_Plan-2006.pdf. In particular, 49% of petitioners and 81% of respondents in divorce actions were self-represented. *See id.* In guardianship cases in 2005, 58% of parties did not have an attorney. *See id.* While divorce and guardianship cases are serious issues that can have an everlasting effect on families, finances, and children, these high percentages suggest that a number of Utahns lack the resources to hire representation. The Family Law Clinic attempts to level the playing field by helping the clients understand the law and effectively advocate for their positions in court.

The Clinic started in the fall of 2004 as a combined project of the University of Utah's Women's Resource Center, the University of Utah's Pro Bono Initiative, and the Family Law Section of the Utah State Bar headed by attorney Louise Knauer. Originally, the Clinic was held once a month in a small room in the Union Building at the University of Utah, but as the Clinic grew, it relocated to the S.J. Quinney College of Law. In the fall of 2006, the Clinic moved to the Matheson Courthouse, where it currently operates on the first and third Wednesday of every month, with support from Utah Legal Services, Inc. and the Legal Aid Society of Salt Lake.

The Clinic attempts to provide as much information as possible to help the client navigate the legal system. Once clients arrive at the Clinic, there is a brief presentation to introduce the clients to the Utah State Courts' website. The website tour covers how to get an attorney for limited legal help and how to use the Online Court Assistance Program ("OCAP"), available at http://www.utcourts.gov/ocap/. OCAP offers commonly requested information and court documents that a client can fill out online. Following the website tour, the client meets individually with an attorney or law student volunteer to receive individualized advice about the client's case. As an additional resource to clients, the Legal Aid Society of Salt Lake opens its office in room W-15 of the Matheson Courthouse so clients can obtain legal forms and access the Utah State Courts' website.

The Clinic serves a diverse population of clients. In a sample of 484 clients who attended the Clinic from February through May 2010, the clients ranged in age from sixteen to eighty-two, with the majority of the clientele being female (62.6%). Over half (55.1%) of the clients were below the poverty line, and 85.5% of those were below the 200% poverty level and eligible for Legal Aid. Of these 484 clients, 13% reported zero for the family's monthly income.

These clients come to the Clinic for a variety of issues, but the majority have complex family law questions that involve children. The most prevalent issue is child custody (52%), but divorce (40.9%), visitation (33.5%), and child support (37.1%) are also significant issues. Many clients come to the Clinic to obtain initial orders. However, a large number have orders and need to enforce them (14.1%) or change them (28.1%). In addition to these issues, the Clinic also faces client questions dealing with child abuse, domestic violence, and termination of parental rights, among others.

Although the Clinic addresses a wide range of issues, the Clinic works

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exceptionally well. Of the 484 clinic clients mentioned above, 384 were interviewed about their experience after their consultation with a volunteer at the Clinic. These clients reported extremely high satisfaction rates. Beyond the overall high satisfaction rate (95.6%) regarding the clients' entire experience at the Clinic, clients also reported a high level of satisfaction with certain parts of their experience. In particular, clients reported a high level of satisfaction with their individual law student/attorney advisors, 96% of the survey respondents stated they were likely to recommend their legal advisor to someone else. Clients also reported they understood what their advisor told them (88.4% very much understood and 10% somewhat understood) and felt that their advisor was listening to them (91.7% felt very much listened to and 7.0% felt somewhat listened to). One client at the Clinic noted:

> [My advisor] helped me look at the law and not how I felt about the issue. He wasn't condescending or rude, and it was helpful to see the legal standpoint. He seemed to genuinely listen and allowed me to say my piece and what I wanted. I wasn't rushed and was treated like someone who had a genuine issue that needed to be solved.

Another mentioned: "My advisor specifically told me what I needed to do and where to go. To sit down and talk one on one with counsel about my specific case was so helpful."

These reactions from clients and the statistics show that the Clinic volunteers offer an invaluable service to pro se litigants. Sue Crimson, from Utah Legal Services, recruits volunteers from among the most experienced family law practitioners of the Utah Bar and attorneys from other sections of the Bar as well. In addition to these attorneys, the Clinic also has many law student volunteers. The Clinic is an opportunity for many students and attorneys to get involved in the community and creates an avenue to serve the public in the legal profession. The Clinic and the opportunity to work with experienced family law practitioners offers a learning experience for these law students and also for young attorneys just admitted to practice.

Mark Jarvis, a third-year law student and the Family Law Clinic Volunteer Coordinator for 2010-2011, noted: "It is fulfilling and rewarding when you wrap up a consultation with someone and they thank you for your help. It is gratifying to be a part of the Clinic and to alleviate some of the struggle for the clients." Sarah Brown, a second year law student at the University of Utah, had a similar experience, explaining,

> I think the most rewarding part about volunteering with the Family Law Clinic was that I could give people answers and possible solutions to problems they could not get otherwise. Clients often came with questions about how to establish paternity or get child support when they had no idea where to start, and it was nice to know that I could help them get started in the right direction.

The Clinic also provides the opportunity to interview clients and see the application of law to real-world cases. Tony Graf, a third year law student at the University of Utah who volunteers every week at the Clinic, explained:

> The most valuable experience I have had at the Clinic has been learning to work with and interview clients. I feel confident when interviewing and asking questions to clients, a confidence I would not have if I had not volunteered at the Family Law Clinic. I am looking to pursue criminal, immigration and family law post law school and feel because of the Family Law Clinic, I will be better prepared to interview and interact with clients.

Law students and attorneys also get to meet and work with experienced attorneys in the field. Mark Jarvis commented: "[The Clinic] is one of the most meaningful parts of my education, and it comes from meeting individual attorneys. Coming to the Clinic has solidified my career goals and what I want to do and the attorneys that volunteer do something that makes a difference for law students."

Even with the current enthusiasm for the Clinic, there is still a need for more volunteers. The Clinic has approximately ten attorney volunteers and fifteen law student volunteers at each session for the twice-monthly clinic; however, there is a definite need for more. While clients are overwhelmingly supportive of the Clinic, many have noticed how busy and crowded the Clinic can become. One client remarked: "More students and attorneys should be at the Clinic – there were not enough people for everyone there."

Any attorney practicing in any area can volunteer at the Clinic. Currently there are trainings twice a year; however, the Pro Bono Initiative and Utah Legal Services are willing to offer more if there is an interest. The program can even do trainings for a firm if requested. One area at the Clinic where there is a particular need is in drafting documents. Professor Smith's study shows that those clients who felt they were helped the least needed assistance in this area. There is simply too little time with the current number of volunteers for this type of help to be provided. If there were more volunteers, the Clinic could offer better brief advice services and even more comprehensive pro bono services.

The Family Law Clinic offers a necessary service to pro se family law litigants who have very few options for determining what to do with their cases. As the statistics show, the vast majority of clinic clients are satisfied with the service and are able to get help. However, the number of clients continues to grow and many clients are asking for services, such as drafting documents, that the Clinic cannot currently provide. With the growing demand, it is essential the Clinic find more volunteers to serve the public.

To volunteer at the Family Law Clinic contact:
Sue Crimson
scrimson@utahlegalservices.org
801-924-3376, outside Salt Lake County: **1-800-4245 x 3346**

Professionalism and Civility

by Judge Bruce S. Jenkins

EDITOR'S NOTE: The following remarks were made by Judge Jenkins at the Utah State Bar Ethics School at the Law and Justice Center on January 19, 2011.

A few years ago a great social counselor, Jon Kabat-Zinn, wrote a book, the title of which is intriguing. It intrigued me then. It intrigues me now. Kabat-Zinn, Jon. *Wherever You Go There You Are* (Hyperion 1994). He called the book, "Wherever You Go, There You Are."

I was asked to talk about ethics with emphasis on professionalism and civility.

Ethics is concerned with character and conduct, who you are and what you do.

Character is what distinguishes you from everybody else. When we look to the history of the word we find in its travels – from Greek to Latin to French to English – it retains its seed of original meaning as a distinctive mark or impression – a cut on a clay tablet; a brand on the forehead of a bond slave; a graphic symbol like the letter of an alphabet; and as the years rolled by, as applied to a person, it acquired a generalized sense. It came to mean an aggregate of distinctive qualities which is now equated with one's reputation. We sometimes say, "Oh, he's a character," because of his distinctive characteristics. Or we say, "he has character," again because of his distinctive characteristics. For example, trustworthy is a characteristic. Honorable is a characteristic. Kind is a characteristic. Good-hearted, well-intentioned, honest, direct, compassionate, smart, crooked, thoughtful, dishonest, inaccurate, well-prepared, sloppy, and slippery – all characteristics. Wherever you go, there you are. Which ones apply to you?

Conduct, of course, refers to how we act. In short, how we treat one another, be it client, adversary, colleague, or court.

As a professional, character and conduct are tested most dramatically when faced with choices: how do you deal with your client?; how do you deal with the professional on the other side and his client?; in litigation, how do you deal with the court?; how do you deal with facts?; how do you deal with law?; and how do you deal with the litigation process? Much of American law is process. Your level of diligence. Your level of objectivity.

A favorite story of mine about choice comes from William James, the famous psychologist and philosopher, commenting on the centuries-long conflict between those who assert we are free to choose and those called determinists, who assert that our genetic make-up and social conditioning make us choose what we choose.

Mortimer Adler relates how James tells about a man who is in a quandary. He tells the story of a man walking down the main street of a small town. The man "saw two buildings on opposite sides." Each had a sign. One said "Determinists' Club." Across the street the other had a sign which said, "League for Free Will." "He first went into the Determinists' Club and when asked why he wanted to join, he said, because I choose to," and he was thrown out. He then tried to join the League for Free Will; when asked why he wanted to join, he replied, "because I have no other choice," and again he was turned away. Adler states, "the paradoxical and circular nature of the problem caused James many sleepless nights and brought him to the edge of a nervous breakdown." Dr. Mortimer J. Adler, *Great Ideas from the Great Books*, at 150-51 (Washington Square Press 1967). Such a paradox persists in our criminal justice system when we are talking about criminal intent, or the comic who claims, "the devil made me do it," or the client who says, "God told me not to file my income tax returns," or when we talk about levels of fault like negligent, willful, intentional, reckless, accidental, and the lists of characteristics which makes us all different and all the same. James's dilemma is with us to this day. Just a few days ago in the mail was a flyer for an upcoming seminar in New York dealing with neuroscience and the law. The first item on the agenda, "The Human Mind, Free Will and the Limits of Determinism."

JUDGE BRUCE S. JENKINS is a U.S. Senior District Judge for the District of Utah. He was appointed by President Jimmy Carter in 1978.

My point, of course, is that in your work as a professional, you are faced each day with choices – some where the line between good and bad is plain and simple, and some where the ratio is 51/49. Or you face the tough problem of choosing between what is right, and right or wrong, or less wrong, or you are called upon to advise a client as to his past or future conduct where the conduct is "lawful" but, on a higher scale, not "right."

I always thought by virtue of his training and experience, a professional knows what he is doing and has good reason for doing it.

In short, he knows what he is talking about, and knows *why* he takes the position he does. He harmonizes good reasons and real reasons.

I want to talk about character in the modern general sense. I want you to look at yourself, your own view of *you*, and list in your own mind the *characteristics* which you think that you manifest each day in your relationships with your client, the attorney on the other side, and the court.

In doing so, I want you to remember the fundamental advice which has echoed down through the ages, "no man can serve two masters," and the tensions and conflicts which arise when one tries to do so. For example, when client conflict arises, and one finds himself representing a client in conflict with a prior or existing client. Large national firms have terrible trouble with that, and are always doing "conflict checks." The more subtle problems arise when you have an unexpressed conflict with the client – you need to settle the case so you can collect your fee and pay your bills, and recommending an unfair but immediate settlement to your client starts to look very attractive.

With that, and with other aspects of practice which should give you pause, let me suggest a rule of thumb – what I call my "Main and First South Rule." I probably ought to call it my Facebook rule, to keep it up-to-date. Basically, if you can't do it on First South and Main Street at high noon (or if you can't have it spread all over Facebook) then don't do it.

As professionals, we have an ethical obligation to play by the rules. In doing so, we are loyal to the process and inspire confidence in those subject to the process, and fortify them in their willingness to abide by the court's decision. We call that the process which is due.

Let me make a few practical suggestions:

- If your case is on the calendar, show up.
- If you have an unforeseen emergency, the court is as close as the nearest cell phone. Let the court know.
- If you have settled a case, immediately let the court know so that the court does not spend the weekend preparing for a case that has been resolved. ("I'm sorry judge, I settled the case and sent the papers on to the lawyer on the other side. I thought he was sending them in.")

Yet there is more to it than simply showing up. In my opinion, a professional has an ethical duty to *think*. In short, he needs to know what role he plays; he needs to know who his client is; he needs to know what he is talking about; and he needs to know, not just what, but why. There is no genuine substitute for thought.

Some lawyers are confused as to the role they play in the litigation process. It seems to be an affliction of the very young or the very old. They seem seduced by the metaphors found in media, or fiction, or the advertisements for seminars. They seem to feel that one needs to be Rambo; that litigation is war; that discovery is a chess game; that civility shows weakness; and courtesy is a character flaw. Some do it merely to impress a naive client.

"When we gather together in cities, we get along by being civil. Good lawyers know how to…help people solve disputes so that they can… put the dispute behind them."

I want to stress when it comes to character and conduct, that a client buys your services. He does not buy *you*. That is a very important distinction. He buys your services, and you owe him your best thought, and your best advice, and your best representation in court, if need be.

To help sort that out, we have to have some understanding of the ends of litigation, the purpose, the social product. We help people and institutions resolve problems in peaceful ways that they have been unable to resolve for themselves, whether it be law-oriented – giving meaning to an ambiguous statute by clarifying the ambiguity, protecting a constitutional right from government over-reaching, or creating a brand new legal proposition where none before existed – or fact-oriented – defining an event by resolving disputes of fact, of history, of conflicting versions and conflicting visions.

The fundamentals of our work in court consists of legal propositions – what the law is – and factual propositions – what is, or what happened. We apply legal propositions to facts in context to arrive at conclusions or judgments.

If we have competing legal propositions, lawyers have a professional duty to point that out to the court, and assist the court in adopting the most appropriate proposition. To my disappointment, sometimes in briefs I am provided with citations for a proposition, and no recognition at all of a competing, conflicting or subsequent proposition, sometimes even from the cited court. This sometimes happens when the written work is assigned to someone who does not appear in court.

When we have competing facts, different versions of what is, or what happened, then one has a professional duty, on behalf of one's client, to present sufficient facts to meet the rule-mandated burden – preponderance, clear and convincing, or beyond a reasonable doubt. In the process of fact-gathering, organization and presentation, it is important that we be honest, avoid deceit, be direct, and play it straight.

Because of respect for the judicial process, the results are generally accepted by the American people. I like to think that the judicial process is rational, fact-driven, value-rich, and respected for the integrity of its participants – lawyers, judges, citizen-jurors, witnesses, and the lawyers' willingness to take the necessary time to think. Let me emphasize again, thinking is a professional duty each lawyer owes his client, the court, and himself.

As part of that thinking process, one must direct his mind to the consequences of what he is asking for. What are the consequences? Is this what you really want?

A philosopher-poet, Michel Foucault, stated it this way:

people know what they do:
they frequently know why they do what they do.
But what they don't know
is what they do does.

Dreyfus, Hubert L. and Rabinow, Paul, *Michel Foucalt: Beyond Structuralism and Hermeneutics*, at 187 (Univ. Of Chicago Press, 2d ed. 1983).

I should also emphasize that you must know your client. This is not strange. It is vitally important, and particularly for government attorneys and in-house private attorneys. They often occupy similar positions.

In a government setting, with a multitude of agencies with overlapping power bases and competing missions and differing views as to what government should be doing, one has to ask, "who is the client?" Let me give you a real life example from a criminal prosecution.

One event. Narcotics. Four participants. State arrest. Cooperation with feds. Special U.S. Attorney appointment of a state attorney. Two participants prosecuted in the state system: sentenced to sixty days. Two in federal court: sentencing guidelines, twenty years. Same prosecuting attorney.

Who is my client?

Again, an example from criminal prosecutions. One event. Two semi-literate drug mules picked up on the highway. For some mysterious reason, a high-priced attorney shows up from Miami to represent them. Who indeed is your client?

I think that government attorneys, as well as in-house counsel, need to have a special gift of courage. They need to exercise their independent judgment, fortified by reason and research so that, if need be, they can tell their boss that he shouldn't do what he wants to, whether it be water-boarding, or something equally unlawful.

Ancient sources are wonderful in providing guidance in our modern world because, since the dawn of time, we have been learning how to be civilized. Civility has the same root as civilized, city, citizen, and civilization. They are related to one another.

When we gather together in cities, we get along by being *civil*. Good lawyers know to work hard to help people solve disputes so that they can get along in the future and put the dispute behind them.

One ancient source comes from China. Confucius. He advised people four or five centuries before the common era to "rectify your language. If names (labels) are not correct, language will not be in accordance with the truth of things." Confucius. *The Analects* (trans. James Legge), at Bk. XIII, ch. 3, *quoted in part in* George Seldes, ed. *The Great Thoughts*, at 91 (Ballantine Books 1985).

He is pointing out the dangers in the use of language. We use words. Words use us. If we are to be accurate, we must recognize that words are but symbols. They stand for something. In the area of truth-telling, they are used by a lawyer to describe the world. It is elementary that the word is not the thing. We don't drink the word milk. We drink milk.

In the process of thought, symbols and substance are often confused. Some symbols are specific. Our common units of measurement, for example. Words of greater generality – democracy, negligence, intent, recklessness, war, peace with honor – cry out for agreed-upon criteria, so that when the word is used, we are talking about the same thing. A professional is specific and accurate.

As Aristotle once observed, "how many a dispute could have been deflated into a single paragraph if the disputants had dared to define their terms." Lawrence J. Peter, *Peter's Quotations: Ideas For Our Time*, at 24 (Bantam Books 1977). In my opinion, a professional, to truly understand, must get behind the words to the things represented.

Let me use one example from literature on behalf of accuracy. Hardly a week goes by that someone likes to say in a newspaper or magazine that Charles Dickens wrote that "the law is a[n] ass." And then the writer takes several paragraphs to smugly agree.

Of course, Dickens himself at no time said that. The quotation is from *Oliver Twist*, and the spokesman is a character, Mr. Bumble. Quoted in this way it presents a picture opposite to that intended. The quoted passage is but a portion of what Mr. Bumble said. It is a truncated quotation, which either through ignorance or malice, leaves out its qualifying introductory clauses.

Let me quote all of the words and quote them correctly.

The conversation is about Mr. Bumble's responsibility for the acts of Mr. Bumble's wife for taking or destroying some jewelry.

"That is no excuse," replied Mr. Brownlow. "You were present on the occasion of the destruction of these trinkets and indeed are the more guilty of the two, in the eyes of the law; for the law supposes that your wife acts under your direction."

"If the law supposes that," said Mr. Bumble, "the law is a ass-a idiot."

Mr. Bumble goes on, "if that's the eye of the law, the law's a bachelor; and the worst I wish the law is, that his eye may be opened by experience – by experience."

Charles Dickens, *Oliver Twist*, at 436 (Penguin Classics, repr. ed. 2010).

Rarely a month goes by that I don't see that truncated quotation which, absent the essential "if," conveys a meaning entirely different than that intended. Civilization depends on accurate information. A lawyer has a professional duty to be accurate.

Where do we find guidance a bit more understandable than in the Rules of Professional Conduct? Ancient sources are available as well. One of the fascinating things is how consistent they are.

The ancient sages define man's basic problem as his "need to find a way to live in constructive peace in the face of forces which tend to thrust him into destructive conflict." Robert O. Ballou, *The Portable World Bible*, at 3 (Viking Penguin 1972).

The "good will religions" provide similar fundamental rules of conduct – how we treat one another. Bound up in them is how we view the world and our place in it, how we regard ourselves, and how we treat one another.

In the *Upanishads* we read: "as he acts, so will he be. He becomes pure by good deeds and bad by bad deeds. What ever deed he does, that will he reap." *[Ibid.]* at 7.

From Jesus of Nazareth: "all things whatever ye would that men should do to you, do ye even so to them: for this is the law and the prophets." Matthew 7:12 (KJV).

From the Talmud (Shabbat 31a) – Rabbi Hillel speaking: "what is hateful to you, do not to your fellow man. That is the entire law; all the rest is commentary."

Tsze-kung asked, "is there one word which may serve as a rule of practice for all one's life?" The master said, "is not Reciprocity such a word? What you do not want done to yourself, do not do to others." Confucius, *The Analects, supra* note 4, at Bk. XV, ch. 23.

Other texts express similar ideas:

"Hurt not others in ways that you yourself would find hurtful." William Safire & Leonard Safir, *Good Advice: More Than 2,000 Quotations to Help You Live Your Life*, at 139 (Times Books 1982). – Udana-Varga (Buddhism)

"No one of you is a believer until he desires for his brother that which he desires for himself." – Sunnah (Islam) *[Ibid.]*

"This is the sum of duty: do naught unto others which would cause you pain if done to you." – Mahabharata (Brahmanism) *[Ibid.]*

As you can see, how we treat one another has not been a concern of only our modern culture. The echoes of the past teach us to deal peacefully and civilly in our professional relationships.

The public forum, with the current emphasis on civility, in my opinion, could learn a lot from the actual conduct, not the media presentation, but the actual conduct of the legal profession in solving problems for their clients in a peaceful and civil way.

Just a few days ago David Brooks, a columnist for the *New York Times*, had a column in the *Deseret News*. The title was, "To Return to Civility, We Need to Recommit Ourselves to Modesty."

Treating others as you would like to be treated is the golden thread passed down to us from ancient sages of diverse backgrounds and diverse cultures and perspectives. *See generally* Huston Smith, *The World's Religions* (HarperCollins, 50th anniv. ed. 2009). I don't know of a better definition of civility, and one far easier to remember than the professional code of conduct in its evolving versions.

Like it or not, "wherever you go, there you are." Never forget that you leave your moral fingerprints on everything you touch.

Legal Beagles: Danny's Yo-Yo Adventure

by Micheline Keller and Patricia Herskovic

Illustrated by Ronald Lipking

Reviewed by Gwendolyn Afton Orme

EDITOR'S NOTE: *The* Utah Bar Journal *does not ordinarily review children's books. But then, children's books rarely, in the words of the publisher, "explore legal tenets, morals, and ethics."* Danny's Yo-Yo Adventure *is the first installment in an intended series entitled* Legal Beagles. *Book reviews appearing in the* Utah Bar Journal *are typically written by members of the Utah State Bar. An exception seemed appropriate in this case.*

There are some things I like about this book. If I read it half way through, I wouldn't want to stop. I would want to finish it. I would be in suspense. It is well written, and it tells a good story. Also, I love the drawings. They are very well done, and it is fun to go back and look at them carefully after you finish the book.

The story it tells is about a boy, Danny Beagle, who is actually a dog. (P.S. I love puppies.) It tells about what happens and how you feel if you break the rules and do something that is not right. Danny "borrows" his sister's yo-yo and loses it. And here's the main thing I don't like about the book. There were 13 pages about how he lost it. And it went on and on with an unrealistic story. The yo-yo falls out of a tree and onto a car and then falls out of the car and rolls down a hill and into a park and falls into a river and gets taken by a squirrel up a tree and, last but not least, the squirrel runs away with it. When you have almost half of the book taken up with how the yo-yo got lost, there is less space to talk about the ethical issues that are supposed to be the point of the book.

Instead of having them talk so much about how the yo-yo got lost, I would have enjoyed it more if the dilemma and the consequences of your actions were better addressed. He did give his sister a new baseball mitt to make up for it, but I think he should have been grounded or had a timeout or had no dessert or something. And also if you lose a toy that's very special to someone else, who cries that you've lost it, I think you should replace it with the same kind of toy.

> *"There should be more books that help children learn that doing the right thing may not always be the easy thing…"*

I think it is a good idea for children around the world to learn about ethics. There should be more books that help children learn that doing the right thing may not always be the easy thing, but doing the right thing pays off in the end. I am excited to see other books in the *Legal Beagle* series. But I hope the other books spend more time on the ethical dilemma and less time on the unimportant details.

GWENDOLYN AFTON ORME is a fourth-grader. One of her favorite school subjects is Ethics. She hopes to be a judge when she grows up.

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the January 28, 2011 Commission meeting held in Salt Lake City at the Law & Justice Center.

1. The Commission adopted a policy to waive registration fees for Commissioners at Bar Conventions and Bar-sponsored CLE events.
2. The Commission approved formation of Lawyer Advertising Rules Committee with targeted membership as discussed.
3. Commissioners selected Lauren Scholnick as the Dorathy Merrill Brothers Award recipient.
4. Commissioners selected Nate Alder as the Raymond S. Uno Award recipient.
5. The Commission nominated Lori Nelson and Christian Clinger as Bar President-elect candidates.
6. The Commission approved February 2011 Applicants for Bar Admission via Consent Agenda.
7. Commissioners approved December 3, 2010 Commission Minutes via Consent Agenda with one change.
8. The Commission will continue to work with Love Communications on refining public relations.
9. The Commission will continue its work on Legal Research Review Committee.
10. The Commission will continue work on Communications Committee.
11. The Commission will continue work on Modest Means Committee, including preparation of survey to lawyers.

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

2011 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2011 Summer Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org, no later than Friday, May 20, 2011. The award categories include:

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

Notice of Electronic Balloting

Utah State Bar elections have moved from the traditional paper ballots to electronic balloting. Online voting reduces the time and expense associated with printing, mailing, and tallying paper ballots and provides a simplified and secure election process. A link to the online election will be supplied in an email sent to your email address of record. Please check the Bar's website at http://www.utahbar.org/forms/members_directory_search.html to see what email information you have on file. You may update your email address information by using your Utah State Bar login at http://www.myutahbar.org. (If you do not have your login information please contact onlineservices@utahbar.org and our staff will respond to your request.) Online balloting will begin April 1 and conclude April 15, 2011. Upon request, the Bar will provide a traditional paper ballot by contacting Christy Abad at adminasst@utahbar.org.

Notice of MCLE Reporting Cycle

Remember that your MCLE hours must be completed by June and your report must be filed by July. If you have always filed in the odd year you will have a compliance cycle that will begin January 1, 2010 and will end June 30, 2011. Active Status Lawyers complying in 2011 are required to complete a minimum of eighteen hours of Utah 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. If you have any questions, please contact Sydnie Kuhre, MCLE Board Director at skuhre@utahbar.org or (801) 297-7035.

Utah Bar Foundation

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

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

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

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

Nomination forms must be received in the Foundation office no later than 5:00 pm on Wednesday, May 11, 2011 to be placed on the ballot.

The Utah Bar Foundation will be holding the Annual Meeting of the Foundation on Thursday, July 7, 2011 at 9:00 am in San Diego, California. This meeting will be held in conjunction with the Utah State Bar's Annual Meeting.

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

Utah Bar Journal archives are available at www.utahbarjournal.com.

Seeking Nominations for Distinguished Paralegal of the Year

The Paralegal Division of the Utah State Bar and Legal Assistants Association of Utah are seeking nominations for "Distinguished Paralegal of the Year." Nomination forms and additional information are available online at www.utahbar.org/sections/paralegals and www.utahparalegals.org or you may contact Suzanne Potts at spotts@clarksondraper.com. The deadline for nominations is April 15, 2011. The award will be presented at the Paralegal Day luncheon.

2011 Law Day Luncheon

Friday, April 29, 12:00 NOON
The Grand America Hotel
555 South Main Street, Salt Lake City

Awards will be given honoring:

- Art & the Law Project (Salt Lake County Bar Association)
- Essay Contest (Minority Bar Association)
- Liberty Bell Award (Young Lawyers Division)
- Pro Bono Publico Awards
- Scott M. Matheson Award (Law-Related Education Project)
- Utah's Junior & Senior High School Student Mock Trial Competition
- Young Lawyer of the Year (Young Lawyers Division)

For further information, to RSVP for the luncheon and/or to sponsor a table please contact:

Tyson Snow, (801) 559-0020

Sponsored by the Young Lawyers Division

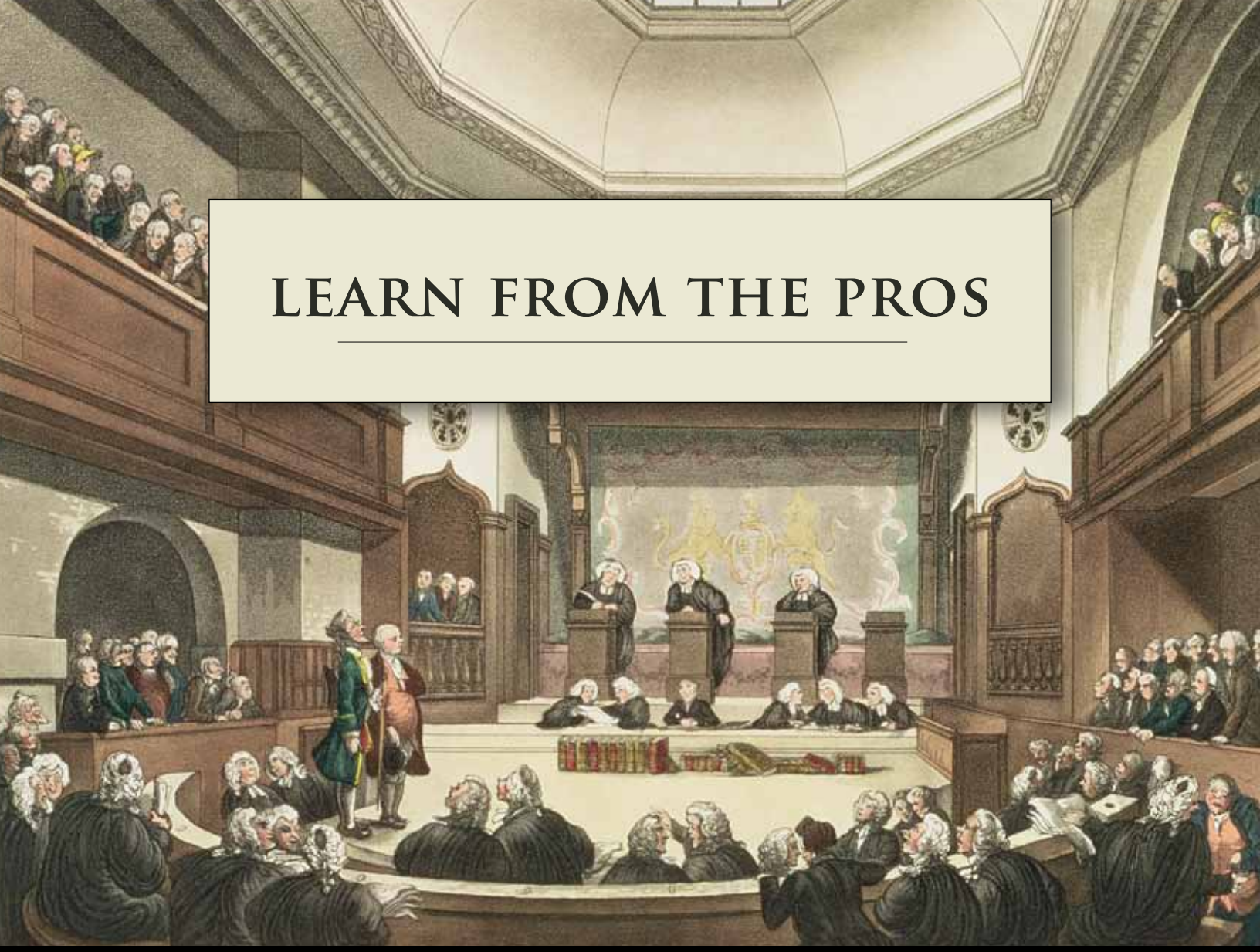
The Utah State Bar is calling for nominations for the 2010 Pro Bono Publico Awards

The deadline for nominations is April 1, 2011.

The awards will be presented at the Law Day Celebration at the Grand America Hotel on April 29, 2011.

To download a nomination form and for additional information please go to: http://www.utahbar.org/probono/pro_bono_awards.html

For questions please contact: Pro Bono Coordinator, Karolina Abuzyarova, at probono@utahbar.org or 801-297-7027



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- Resolving Conflict in the Workplace
  (April 5-6, October 25-26)
- Managing Employee Conflict
  (April 7, October 27)
- Domestic Mediation Training
  — 32-Hour Seminar (November 3, 4, 7, 8)
  — 40-Hour Seminar (November 2, 3, 4, 7, 8)
- Domestic Refresher Workshop (August 24)

Unless otherwise noted, workshops will take place at the Law & Justice Center (645 South 200 East in Salt Lake City).

Find detailed information at:
www.utahdisputeresolution.org • (801) 532-4841

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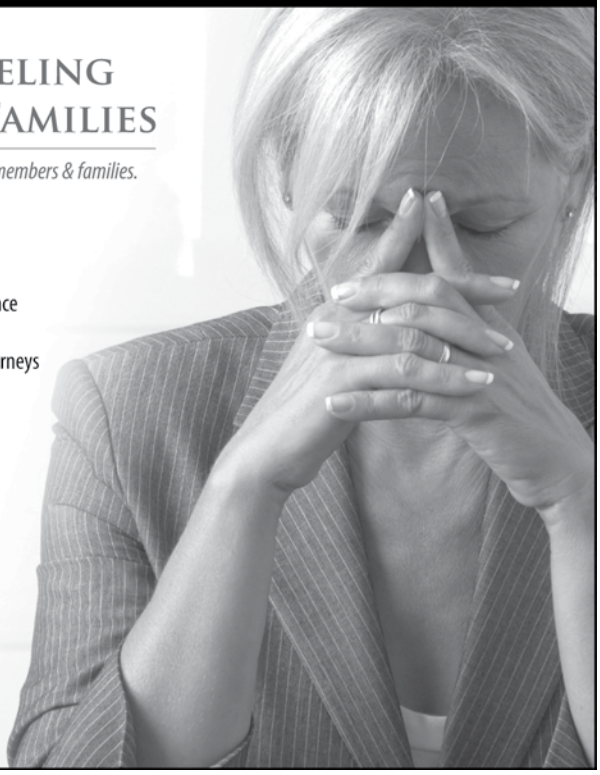

Utah State Bar Request for 2011–2012 Committee Assignment

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

Name _____ Bar No. _____

Office Address _____ Telephone_____

Email Address _____ Fax No. _____

Committee Request:

1st Choice _____ 2nd Choice _____

Committees

1. **Bar Examiner –** Drafts, reviews, and grades questions and model answers for the Bar Examination.

2. **Character and Fitness –** Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.

3. **Courts and Judges –** Coordinates the formal relationship between the judiciary and the Bar including review of the organization of the court system and recent court reorganization developments.

4. **Fall Forum –** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

5. **Fee Dispute Resolution –** Holds mediation and arbitration hearings to voluntarily resolve fee disputes between members of the Bar and clients regarding fees.

6. **Fund for Client Protection –** Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.

7. **Member Resources –** Reviews requests for sponsorship and involvement in various group benefit programs, including health and malpractice insurance and other group benefits.

8. **Pro Bono –** To encourage and enhance the delivery of pro bono legal services

9. **Spring Convention –** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

10. **Summer Convention –** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.

11. **Unauthorized Practice of Law –** Reviews and investigates complaints made regarding unauthorized practice of law and takes informal actions as well as recommends formal civil actions.

PLEASE COMPLETE FRONT & BACK OF FORM BEFORE SUBMITTING REQUEST.

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

_____
_____
_____
_____

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

_____
_____
_____
_____

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

_____
_____
_____
_____

Please list the fields in which you practice law:

_____
_____
_____
_____

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

_____
_____
_____
_____
_____

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

Date_____ **Signature** _____

Detach & Mail by June 30, 2011 to:
Rod Snow, President-Elect
645 South 200 East • Salt Lake City, UT 84111-3834

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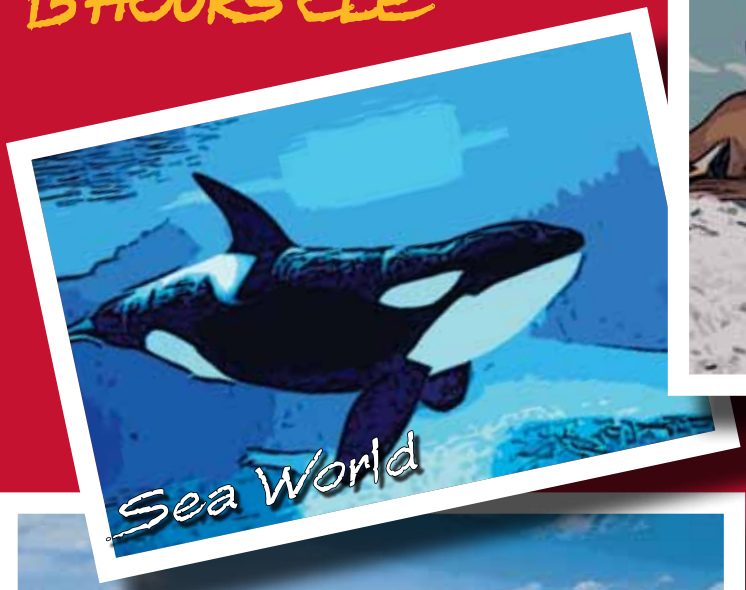


Discount room prices/reservations available **ONLY ONLINE**. Go to www.utahbar.org/cle/summerconvention/ for the "room reservations" link.

July 6–9

Pro Bono Honor Roll

Asael T. Sorensen – Legal Assistance to Military
Austin Riter – Tuesday Night Bar
Breanne Miller – Family Law Clinic
Brent Hall – Family Law Clinic
Brian W. Steffensen – Debtor's Clinic
Bryan Nalder – Tuesday Night Bar
Candice Pitcher – Rainbow Law Clinic
Carolyn Morrow – Housing Cases
Casey Jones – Tuesday Night Bar
Chris McCullock – Street Law Clinic
Christina Micken – Domestic Case
Clint Hendricks – Debtor's Clinic
Darren Reid – Tuesday Night Bar
David Peterson – Family Law Clinic
David Wilding – Family Law Clinic, Debtor's Clinic
Derek Kearl – Tuesday Night Bar
Doug Anderson – Tuesday Night Bar
Elizabeth Conley – Needs of the Elderly
Emily E. Lewis – Guadalupe Clinic
Emily Moench – Tribal Case
Esperanza Granados – Immigration Clinic
Garth Heiner – Guadalupe Clinic
Harry McCoy II – Needs of the Elderly
Heather Tanana – Guadalupe Clinic, American Indian Clinic
Herb Gillespie – Domestic Case
Jacob Crockett – Tuesday Night Bar
Jacob Santini – Tuesday Night Bar
James Blakesley – Housing Case
James L. Ahlstrom – Tuesday Night Bar
Jane Semmel – Needs of the Elderly
Jason Kane – Bankruptcy Hotline
Jay Kessler – Needs of the Elderly
Jeannine Timothy – Needs of the Elderly
Jeffery Cottle – Public Benefits Case
Jeffry Gittins – Guadaulpe Clinic
Jenifer Tomchak – Tuesday Night Bar
Jennifer Bogart – Family Law Clinic, Street Law Clinic
Jennifer Merchant – Tuesday Night Bar
Jesse Nix – Rainbow Law Clinic
Jessica McAuliffe – Needs of the Elderly
Jim Baker – Needs of the Elderly
Jonathan Benson – Immigration Clinic
Jonathan Bletzacker – Domestic Case
Jory Trease – Debtor's Clinic
Joyce Maughan – Tuesday Night Bar
Karen Allen – Rosevelt Legal Clinic
Kathie Brown Roberts – Needs of the Elderly
Kelly Latimer – Tuesday Night Bar
Kenneth Combs – Domestic Case
Kevin Bolander – Tuesday Night Bar
Langdon Fisher – Family Law Clinic
Lara Swensen – Tuesday Night Bar
Lauren Barros – Rainbow Law Clinic
Lauren Scholnick – Guadalupe Clinic
Laurie Hart – Needs of the Elderly
Leslie Orgera – Tuesday Night Bar
Liisa Hancock – Domestic Case
Linda F. Smith – Family Law Clinic
Linh N. Tran – Asylum Case
Liz Shaffer – Domestic Case
Louise Knauer – Family Law Clinic
Maria Saenz – Asylum Case, Immigration Clinic
Mark Emmett – Debtor's Clinic, Bankruptcy Case
Mary Ann May – Tuesday Night Bar
Mary Z. Silverzweig – Bankruptcy Hotline
Matthew D. Cook – Tuesday Night Bar
Matthew J. Ball – Tuesday Night Bar
Matthew Thorne – Tuesday Night Bar
Matthew Wells – Tuesday Night Bar
Melanie Clark – Needs of the Elderly
Melanie Hopkinson – Family Law Clinic
Melissa M. Bean – Tuesday Night Bar
Michael A. Jensen – Needs of the Elderly
Michael D. Black – Tuesday Night Bar
Michael W. Young – Tuesday Night Bar
Morgan Wilcox – Family Law Clinic
Nathan Miller – Needs of the Elderly
Nicholle Beringer – Bankruptcy Hotline
Nick Angelides – Senior Case
Phillip S. Ferguson – Needs of the Elderly
Rachel Otto – Guadalupe Clinic
Reef Pace – Debtor's Clinic
Robert Brown – Tuesday Night Bar
Rodney Rivers – Service Member Attorney Volunteer
Ron Ball – Farmington Clinic
Roy Schank – Bankruptcy Hotline
Russell Yauney – Family Law Clinic, Debtor's Clinic
Ryan Evershed – Domestic Case
Ryan Frazier – Housing Case
Scott L. Hansen – Service Member Attorney Volunteer
Scott Thorpe – Bankruptcy Hotline, Needs of the Elderly
Scott Trujillo – Farmington Clinic
Sharon Bertelsen – Needs of the Elderly
Sharon Preston – Habeas Corpus Case
Shauna O'Neil – Family Law Clinic, Bankruptcy Hotline
Sheleigh Harding – Family Law Clinic
Shellie Flett – Bankruptcy Hotline
Silvia Pena-Chacon – American Indian Clinic
Sonja Jorgensen – Debtor's Clinic
Stephen Knowlton – Family Law Clinic
Steve Stewart – Guadaulpe Clinic
Stewart Ralphs – Family Law Clinic
Sue Grafton – American Indian Clinic
Susan Griffith – Family Justice Center
Teresa Hansen – Family Law Clinic
Terrell R. Lee – Needs of the Elderly
Tiffany Blanchard – Domestic Case
Tiffany Panos – Guadalupe Clinic
Timothy G. Williams – Needs of the Elderly
Todd Olsen – Family Law Clinic
Tracey M. Watson – Family Law Clinic
Trent Cahill – Domestic Case
Trent Nelson – Family Law Clinic
Tyler Ayres – Habeas Corpus Case
Victor Perri – Debtor's Clinic
Wendy Bradford – 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 December 2010 and January 2011. Call Karolina Abuzyarova (801) 297-7027 or C. Sue Crismon at (801) 924-3376 to volunteer.

"and Justice for all"

29th Annual Law Day 5K Run & Walk

presented by Bank of the West

May 14, 2011 • 8:00 a.m.

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

"The Legacy of John Adams: Celebrating Equal Access to Justice"

REGISTRATION INFO: Mail or hand deliver completed registration to address listed on form (registration forms are also available online at www.andjusticeforall.org). **Registration Fee:** received by April 29 -- $25 ($10 for Baby Stroller Division), received after April 29 -- $35. Day of race registration from 7:00 a.m. to 7:45 a.m. Questions? Call 801-924-3182.

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

DATE: Saturday, May 14, 2011 at 8:00 a.m. Check-in and day-of race registration in front of the Law School from 7:00 - 7:45 a.m.

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

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

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

CHIP TIMING: Timing will be provided by Sports-Am electronic race monitoring. Each runner will be given an electronic chip to measure their exact start and finish time.

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

RECRUITER COMPETITION: It's simple, the organization who recruits the most participants for the Run will be awarded possession of the Recruiter Trophy for one year. However, all participating recruiters are awarded a prize because success of the Law Day Run depends upon our recruiters! To become the 2011 "Team Recruiter Champion," recruit the most registrants under your organization's name. Be sure the Recruiting Organization is filled in on the registration form to get competition credit.

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

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

BABY STROLLER DIVISION: To register you and your baby as a team, choose the **Baby Stroller Division**. IMPORTANT: Baby Stroller entrants register **only** in the baby stroller division. Registration for the stroller pusher is the general race registration amount ($25 pre-registration, $35 day of). Simply add on $10 for each baby you want to receive a t-shirt (baby shirts for day of registrants will be sent out later). Don't forget to fill in a t-shirt size for both adult and baby.

WHEELCHAIR DIVISION: Wheelchair participants register and compete in the **Wheel Chair Division**. Registration is the general race registration amount ($25 pre-registration, $35 day of). An award will be given to the top finisher.

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

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

REGISTRATION - "and Justice for all" Law Day 5K Run & Walk - presented by Bank of the West
May 14, 2011 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

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

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

OPTIONAL COMPETITIONS (Registrations must be received by April 29, 2011 to be entered in any of these):

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

Shirt Size (please check one)

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

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

❒ Long-sleeved T-Shirt (*add $10*)

Baby Shirt Size (*baby stroller participants only*)

❒ 12m ❒ 18m ❒ 24m ❒ Child XS

DIVISION SELECTION (circle only one division per registrant)

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

Payment

Pre-Registration *(deadline 04/29/11)*	$25.00
Baby Stroller *(add $10 per baby)*	$10.00
Long sleeved t-shirt	$10.00
Late Registration Fee *(after 04/29/11)*	$10.00
Charitable Donation to "and Justice for all"	$_____
TOTAL PAYMENT	$_____

Payment Method

❒ Check payable to "Law Day Run & Walk"

❒ Visa ❒ Mastercard ❒ American Express

Name on Card _____

Address_____

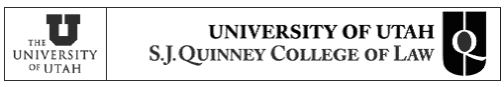
No._____ exp. _____

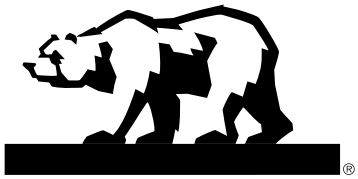
RACE WAIVER AND RELEASE: I waive and release from all liability the sponsors and organizers of the Run and all volunteers and support people associated with the Run for any injury, accident, illness, or mishap that may result from participation in the Run. I attest that I am sufficiently trained for my level of participation. I also give my permission for the free use of my name and pictures in broadcasts, video, web, newspapers, and event publications. I consent to the charging of my credit card submitted with this entry for the charges selected. I understand that entry fees are non refundable. **I agree to return the timing transponder and its attachment device to an appropriate race offical after the race. If I fail to do so, I agree to pay $3.00 to replace the timing transponder and attachment device.**

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

_____ _____

THANK YOU TO OUR MAJOR SPONSORS





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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.

Mandatory Online Licensing

The annual Bar licensing renewal process will begin June 1, 2011 and will be done again only on-line. Sealed cards will be mailed the last week of May to your address of record. (*Update your address information now at* http://www.myutahbar.org). The cards will include a login and password to access the renewal form and will outline the steps to re-license. Renewing your license online is simple and efficient, taking only about five minutes. With the online system you will be able to verify and update your unique licensure information, join Sections and specialty bars, answer a few questions, and pay all fees.

No separate licensing form will be sent in the mail. You will be asked to certify that you are the licensee identified in this renewal system. Therefore, this process should only be completed by the individual licensee - not by a secretary, office manager, or other representative. Upon completion of the renewal process, you will be shown a Certificate of License Renewal that you can print and use as a receipt for your records. This certificate can be used as proof of licensure, allowing you to continue practicing until your renewal sticker, via the U.S. postal service. If you do not receive your license in a timely manner, call (801) 531-9077.

Licensing forms and fees are due July 1 and will be late August 1. Unless the licensing form is completed online by September 1, your license will be suspended.

We are increasing the use of technology to improve communications and save time and resources. Utah Supreme Court Rule 14-507 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.

Did you know that the *Utah Bar Journal* is now on Facebook? Look us up and 'like' us today!

Notice of Petition for Readmission Utah State Bar by Len R. Eldridge

Pursuant to Rule 14-417(d), Utah Supreme Court Rules of Judicial Practice, the Utah State Bar's Office of Professional Conduct hereby publishes notice of Respondent's Verified Petition for Readmission and Affidavit of Len R. Eldridge ("Petition") filed by Len R. Eldridge in *In the Matter of the Discipline of Len R. Eldridge*, Third Judicial District Court, Civil No. 110902634. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Notice of Petition for Reinstatement to the Utah State Bar by Thomas V. Rasmussen

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 Thomas V. Rasmussen ("Petition") filed by Thomas V. Rasmussen in *In the Matter of the Discipline of Thomas V. Rasmussen*, Third Judicial District Court, Civil No. 090908841. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE
Call the Bar's Ethics Hotline at (801) 531-9110 Monday through Friday from 8:00 a.m. to 5:00 p.m. for fast, informal ethics advice. Leave a detailed message describing the problem and within a twenty-four hour workday period a lawyer from the Office of Professional Conduct will give you ethical help about small everyday matters and larger complex issues.

More information about the **Bar's Ethics Hotline** may be found at www.utahbar.org/opc/opc_ethics_hotline.html. Information about the formal Ethics Advisory Opinion process can be found at www.utahbar.org/rules_ops_pols/index_of_opinions.html.

ADMONITION
On November 29, 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 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 1.5(b) (Fees), and 1.16(d) (Declining or Terminating Representation).

In summary:
An attorney was hired to draft an estate plan and hold an amount of money for either future fees or investment. The attorney failed to explain the mechanism of a simple trust and pour-over will. The client believed that the attorney had drafted the papers so that the ex-spouse would be a beneficiary. The attorney failed to explain the purpose or use of the amount of money deposited by the client in the trust account. The attorney failed to explain the most basic aspects of estate planning to the client. When the attorney delivered the estate documents, the documents were not complete. The attorney failed to contact the client for months in order to explain what was needed to complete the documents. The attorney did not notify the client when the attorney changed firms. The attorney did not inform the client about the research the attorney had done until the attorney refunded the balance of the funds. The attorney spent only one or two hours at the most, preparing the draft documents and only one or two hours with his client during the representation. The attorney's fee was unreasonable for this amount of work.

Mitigating factors:
Lack of prior record of discipline; Personal or emotional problems: poor health.

ADMONITION
On December 28, 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), 1.4(a) (Communication), and 8.4(a) (Misconduct).

In summary:
An attorney failed for nearly two years to file a divorce petition on behalf of a client. The attorney failed to have the client's spouse served or to seek alternative service. The attorney failed to respond to the client's request for information and failed to keep the client reasonably informed about the status of the matter.

PUBLIC REPRIMAND
On November 23, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Scott C. Walker for violation of Rules 1.1 (Competence), 1.4(a) (Communication), 1.4(b) (Communication), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Walker was hired to represent a client in a debt collection matter. Mr. Walker failed to attend a pre-trial conference. Mr. Walker failed to keep his address current. Mr. Walker failed to transmit notices from the court. Mr. Walker failed to file a motion to set aside. Mr. Walker failed to stay in contact with his client and keep his client advised of the status of the case. Mr. Walker failed to explain the default judgment to the extent reasonably necessary to allow his client to make informed decisions and his client did not understand the implications or consequences until supplemental proceedings began. Mr. Walker failed to give his client notice of his personal circumstances which required termination of representation and took no steps to protect his client's interests after termination. Mr. Walker failed to respond to the Notice of Informal Complaint issued by the OPC and failed to adequately explain his non-response after acknowledging notice of disciplinary proceedings.

PUBLIC REPRIMAND
On December 6, 2010, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Joane P. White for violation of Rules 1.4(a) (Communication), 1.4(b) (Communication), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Ms. White was hired to represent a client in a custody modification

matter. Ms. White failed to reasonably consult with her client regarding a Court Order. Ms. White failed to explain to the client the Court's decision. Ms. White failed to explain to the client her rights regarding appeal. Ms. White failed to make the client aware of the date by which she needed to appeal. Ms. White failed to provide the client with a copy of the Court's Order and other information with respect to the appeal.

INTERIM SUSPENSION

On December 29, 2010, the Honorable John R. Morris, Second Judicial District Court, entered an Order of Interim Suspension Pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability, suspending Bradley N. Roylance from the practice of law pending final disposition of the Complaint filed against him.

In summary:

On March 11, 2010, Mr. Roylance entered guilty pleas to two counts of Sexual Abuse of a Minor, a class A misdemeanor. Based on the guilty pleas, on April 22, 2010, a Minutes Sentence, Judgment, and Commitment was entered against Mr. Roylance. The interim suspension is based upon the conviction.

SUSPENSION

On July 26, 2010, the Honorable Ernie W. Jones, Second District Court entered an Order of Discipline: Suspension for one year and one day against Mark A. Ferrin for violation of Rules 1.8(c) (Conflict of Interest: Current Clients: Specific Rules), 4.2(a) (Communication with Persons Represented by Counsel, 4.3 (Dealing with Unrepresented Person), 8.1 (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Ferrin prepared a will and other estate planning documents for a neighbor/client who was not related to Mr. Ferrin. The estate planning documents gave Mr. Ferrin a one-sixth interest in the residue of the estate as a testamentary gift. As part of the estate planning documents, a deed transferred the Testator's house to the Testator and the Personal Representative as joint tenants, with full rights of survivorship. Shortly before the Testator's death, Morgan Stanley issued a check ("brokerage check") to the Personal Representative in the amount of $100,306. The Personal Representative received the brokerage check after the Testator's death. Mr. Ferrin advised the Personal Representative to distribute the brokerage check immediately per the six-way residual provisions of the will. After the Personal Representative had informed Mr. Ferrin that she was represented by counsel, Mr. Ferrin communicated directly with the Personal Representative regarding her duties and the distribution of the house sale proceeds. Later, during Mr. Ferrin's subsequent communication with the Personal Representative, Mr. Ferrin did not believe the Personal Representative was represented by counsel. During the subsequent communication, Mr. Ferrin advised the Personal Representative by letter that the proceeds from the sale of the Testator's house should be treated as a testamentary gift and requested his one-sixth interest in the proceeds from the sale. Mr. Ferrin did not advise the Personal Representative to obtain counsel. The letter advised the Personal Representative not to show the letter to anyone, including her legal advisors. Mr. Ferrin made misleading statements in the disciplinary matter regarding whether he assisted in the preparation of estate planning documents and whether he knew that the Personal Representative had counsel.

SUSPENSION

On July 21, 2010, the Honorable L.A. Dever, Third District Court entered an Order of Discipline: Suspension for one year with all but 181 days stayed against Thomas V. Rasmussen for violation of Rules 8.4(d) (Misconduct) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Rasmussen served as defense counsel in a criminal matter. Mr. Rasmussen appeared in court with his client. At the hearing, the court set a trial date and informed Mr. Rasmussen of the date the jury would be summoned and informed him that plea

bargains would not be accepted after that date except on a showing of why the agreement could not have been arranged prior to that time. On the date set for summoning the jury, Mr. Rasmussen had some discussions with the prosecution about a possible plea agreement. The prosecutor reminded Mr. Rasmussen of the court's instructions, and cautioned that any plea would be conditioned upon the court's willingness to depart from its rule. The prosecutor informed Mr. Rasmussen that Mr. Rasmussen would need to confer with the court so the parties could obtain the court's approval via a telephone conference. Days after the due date given by the judge, Mr. Rasmussen sent to the prosecutor a letter reciting the plea agreement. On the same day, Mr. Rasmussen's office faxed the letter reciting the plea agreement to the court. Mr. Rasmussen did not file a motion, a written request for a scheduling conference or other written request that the court consider the plea agreement letter. During the week, the assigned judge was traveling between courts. The judge was informed by the court clerk that the letter had been received and the judge indicated that he would try to review the letter and file. The prosecutor told Mr. Rasmussen's staff that there needed to be a conference with the court regarding the plea proposal. Mr. Rasmussen did not submit any written request for a conference regarding the plea proposal to the court. Mr. Rasmussen and his staff did not contact the court and request to schedule a conference.

The judge reviewed the letter, and issued an order rejecting the plea agreement. Mr. Rasmussen filed a Motion to Recuse the assigned judge. A judge denied Mr. Rasmussen's recusal motion. Mr. Rasmussen faxed a Supplemental Affidavit of Bias in Support of Motion to Recuse and a Motion to Reconsider to the court. Mr. Rasmussen filed the supplemental Affidavit of Bias in Support of Motion to Recuse and a Motion to Reconsider even though Rule 29(c)(1)(c) restricts a party from filing more than one motion of recusal. Mr. Rasmussen had knowledge that the Motion to Recuse had been denied. Mr. Rasmussen admitted that he knew only one Motion to Recuse was allowed and yet he proceeded to file the Motion to Reconsider. Mr. Rasmussen failed to appear at the criminal trial knowing that the jury panel was present and the judge was waiting. Mr. Rasmussen stated he did not appear because he was afraid the judge would force him to go to trial.

Aggravating factors:
Prior record of discipline; Selfish or dishonest motive; Pattern of misconduct; Refusal to acknowledge the wrongful nature of the misconduct either to the client or to the disciplinary authority; Substantial experience in the practice of law.

A Good Mentor is a Young Lawyer's Defense Against Sanctions

by Angelina Tsu

From the very beginning of my legal career, I have been fascinated by, or perhaps even obsessed with, Rule 11 of the Federal Rules of Civil Procedure. As a first-year associate, I lived in constant fear of being sanctioned under Rule 11. Of course, the fear was completely irrational. As a junior associate at a large firm, my writing did not see the light of day until it had been carefully reviewed by my supervising attorney, the department chair, the firm's management committee, my assistant, her assistant, and our firm's runner. Having all of these people review my work however, did not save me from many sleepless nights spent worrying about being personally sanctioned for violating Rule 11.

> *"We can all help new lawyers avoid pitfalls of practice by guiding them and teaching them in the same manner in which we have been guided…in the profession."*

By my second year, I realized that I had to actually sign a pleading before I could be sanctioned. However, this reality did nothing to alleviate my fears. Instead, it merely transferred my fear of sanctions from myself to my supervising attorney – or whoever signed the pleadings I drafted.

By the time I finished my third year of practice, I had seen enough bad lawyering to convince me that no lawyer in Utah was ever going to be sanctioned – regardless of how improper, frivolous or unnecessary the pleadings they drafted might be. I thought of sanctions as the legal equivalent of the nuclear option – a threat of force that would never actually be used. I was wrong.

Last November, I heard that a Federal District Court judge entered an order finding, among other things, that a complaint filed by a local attorney violated Rule 11. In granting the defendant's motion to dismiss, the court awarded attorneys' fees to the defendant in excess of $25,000.00. Approximately a month later, I learned that in a separate case, the same attorney was again found to have violated Rule 11. This time, the court ordered the attorney to personally pay the fees and costs associated with the motion to dismiss.

I was shocked to hear about the sanctions, and I wanted to find out more about the attorney. As it turns out we had some things in common. We both graduated from law school and were admitted to the bar in the same year. The attorney's website expressed a clear desire to help those under-served populations who did not have access to legal services, a desire that I share.

Learning more about this attorney made me wonder what could have led to Rule 11 violations and how it was that I had been able to avoid such problems, so far. I thought of the attorneys who had helped me along my journey. I thought of Judge Dee Benson, who during my judicial clerkship taught me to be a better lawyer, a better writer, and most importantly a better person. I thought of Annette Jarvis and Steve Waterman, who spent hours reviewing and editing my work product when I was in private practice. I thought of their commitment to both our legal community and to providing the highest quality legal services. I thought about

ANGELINA TSU is an attorney in the legal department of Zions Bancorporation and president of the Young Lawyers' Division.

how their values shaped my personal perception of my obligations to the bar and our profession. I thought about Bob Goodman, Dave McGrath, and all of my current colleagues who, regardless of their workload, have never been too busy to help me work through difficult legal issues.

I wondered if the attorney who had been sanctioned had the same opportunities to be mentored by such a distinguished and generous group of attorneys, and whether the outcome would have been different if that attorney had been presented with those same opportunities. I am almost certain that it would have been different.

We can all help new lawyers avoid pitfalls of practice by guiding them and teaching them in the same manner in which we have been guided and continue to be guided in the profession. I hope you will join me in participating in one (or more) of the mentoring programs that are available through the Utah State Bar and the University of Utah. While each program is unique in its focus they all benefit our legal community. If you are unable to participate in one of the mentoring programs, I hope that more experienced lawyers will take advantage of every opportunity to kindly and considerately help young lawyers in their development, and that each young lawyer be receptive to that help. The entire legal community benefits from and depends on this positive interaction between caring, experienced lawyers and young lawyers.

For more information about the Utah State Bar's New Lawyer Training program please contact Tracy Gruber at tgruber@utahbar.org. For more information about the S.J. Quinney College of Law student mentoring program please contact Anneliese Booher at anneliese.booher@law.utah.edu. To participate in the Young Lawyers Division mentoring project, please contact Roger Tsai at rtsai@pblutah.com.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
03/17–19/11	**Spring Convention in St. George, Utah.** Speeches include: "Everything You Always Wanted to Know About the Millennial Generation (But Were Afraid to Ask)" with Dr. Kari T. Elligson, Associate Vice President for Student Development at the University of Utah. "How to Change the World by Integrating the Personal and Professional: Lawyers' Second Careers as Social Entrepreneurs" with Dr. Warner P. Woodworth, Social Entrepreneur and Professor of Organizational Leadership and Strategy at Brigham Young University.	Up to 9 hrs. incl. up to 2 hrs. Ethics, up to 1 hr. Profess., up to 2 hrs. CLE film
03/24/11	**Excellence in ADR: Mastering Process, Advocacy and Ethics.** 12:00 – 5:00 pm. This workshop will stretch your dispute resolution skills and invigorate your practice. Walk with us through a co-mediation. Hear how co-mediators coordinate, agree on strategy and move a complex case to resolution. Listen as advocates and mediators share their secret tips. Hear about emerging efforts to enhance civility. Learn about the latest ethical dilemmas facing practitioners. Join federal judges, fellow attorneys, and the federal court's roster of seasoned mediators and arbitrators for the first annual Excellence in ADR seminar to advance and improve dispute resolution. Topics include: The Speakers of a Successful Co-Mediation with speakers: Magistrate Judge David O. Nuffer, Karin S. Hobbs, Attorney/Mediator. A Touch of Civility: Pass it On with presenters: John Kesler, Attorney, Woodbury Corporation, Mayor Ralph Becker. Advocacy Genius with moderator Michele Mattsson, Chief Appellate Mediator, Utah Court of Appeals and panelists: Kent Scott, Attorney/Arbitrator/Mediator, Babcock Scott; Lauren Skolnick, Attorney, Strindberg and Skolnick; William B. Bohling, Mediator, Bohling/Hobbs Professional Mediation; Mark Wilkey, General Counsel, Central Refrigerated Service, Inc., SME Steel, Inc. Case Law Update: Confidentiality, Privilege and Attorney Malpractice.	4 hrs. including 1 hr. Ethics and 1 hr. Profess.
04/14/11	**New Lawyer Ethics Program.** 8:00 am – 12:30 pm. $75. Introduction to the Bar and to the Practice with Angelina Tsu, Young Lawyer Division Chair. Introduction to the Bar & Pro Bono Service with John C. Baldwin, Executive Director, Utah State Bar. Professionalism Civility & Practicing Law. New Lawyer Training Program with Tracy S. Gruber, Program Coordinator. Ethics, Rules, Discipline and Processes in Utah. Who Defends Your Interests? Consumer Assistance and the Discipline Process with Jeanine Timothy, CAP attorney. The Top Ten Reasons Lawyers Receive a Bar Complaint with Diane Akiyama, Office of Professional Conduct. Judging the Judges: What's Your Role? with Joanne Slotnik, Judicial Performance Evaluation Commission. A Candid Look at the Profession – Stress and Burnout with Utah Lawyers Helping Lawyers.	Satisfies New Lawyer Ethics Credit
07/06–09/11	2011 Summer Convention in San Diego. Visit www.utahbar.org/cle/summerconvention/ for the latest information and a link to the hotel reservation site.	Up to 13 hrs.

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

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