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Utah Bar® JOURNAL

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## *Cover Art*

*Wintery view from Skyline Drive in Sanpete County,* by the late Bret Hicken, Spanish Fork, Utah. This is the 17th photo taken by Mr. Hicken that has appeared on a *Utah Bar Journal* cover since 1997 – the most of any contributor.

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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 (compact disk or print), 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. Only the highest quality resolution and clarity (in focus) will be acceptable for the cover. Photos must be a minimum of 300 dpi at the full 8.5" x 11" size, or in other words 2600 pixels wide by 3400 pixels tall. If non-digital photographs are sent, please include a pre-addressed, stamped envelope if you would like the photo returned, and write your name and address on the back of the photo.

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

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

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# Baby Boomers Meet Millennials in the Legal Workplace: From Face-lift to Facebook[1]

*by Rodney G. Snow*

***AUTHOR'S NOTE:*** *I gratefully acknowledge the considerable assistance and input from Sarah L. Campbell, a Millennial at the Clyde Snow firm. The dialogue and events described in this article are based on personal experiences working with the under-30 demographic.*

The Millennial generation,[2] which has been defined broadly as those born between 1980 and 2000, has emerged in the legal workplace as our associates and employees. They will soon be taking on partnership and managerial roles. As a group, these Millennials are bright, optimistic, yearn for meaning and work-life balance, and have an unprecedented ability to use technology and multi-task. Technology is often thought to be the perfect replacement for the long hours to which Boomers are accustomed. Millennial traits often create conflict with other groups who currently make up the American workforce – Baby Boomers (1943-60) and Generation Xers (1961-81). The differences between generations become especially apparent in work and communication styles. Although the Millennials have been named the "toughest generation to work with,"[3] my experience is they add a dimension to the workplace that is beneficial. I've found them to be productive and energetic. And working with them can produce excellent results for clients. I'm not implying there aren't some downsides to the demographic. There are a few. Focusing on the positives seems to be the best approach for developing a good working environment and well-trained associates.

The stark reality of these generational differences hit home recently when I was looking for an associate at the office to help me with a project on a particular Friday. It was a Boomer "Red Alert." Not one of the ten could be found. Was it possible they were all sick or all taking vacation on the same day? (Probably.)

*Sarah Campbell at a Friday Millennial water ski day.*

I couldn't imagine, however, they all coincidentally left work early (it was only 1:30 p.m.). The following week I discovered the reason for the missing bodies. A "Training Day" at Willard Bay – better described as the associates skillfully maneuvering a Friday afternoon water ski trip on a partner's open-bow Sea Ray boat. The primary conspirator in the activity was a fourth-year associate who has now designated herself the firm recreational director. If your firm doesn't have one, watch out! Millennials value rest and recreation, better known as the "killer lifestyle," first coined by Generation X. I bet you already knew that!

*Katherine Judd, newly appointed recreational director at Clyde Snow.*

I consider myself a Baby Boomer by classification and enjoy reading about and working with the Millennial generation. Even so, we Boomers have all experienced some uncomfortable conversations and interactions with Millennials. Perhaps you can relate to some of the representative dialogue between me (Baby Boomer = BB) and Millennials (M) at my firm:

*J.D. Kesler, a Gen Xer who forced his way into the Millennial water ski day.*

**BB:** So, I heard you took off wake-boarding last Friday, during business hours.

**M:** Oh, [Partner X] said he'd take us on his boat. It was so fun.

**BB:** You do realize the rest of us were working?

**M:** Would you like us to invite you next time? Maybe you could bring your boat.

**BB:** Next time? Who said there was going to be a next time? And my boat is a *Saturday* boat.

**M:** It's the perfect way to create camaraderie among the associates. Plus, a little fun together is good for business. Rod, why do you still have a rolodex on your credenza?

**BB:** There are names in there from before you were born, and Outlook can get complicated and does not always work. By the way, will you stop by my office later so I can tell you where we are meeting our expert in the morning?

**M:** Why don't you just email the address to me; or better yet, send me a text.

**BB:** You do realize that I barely learned how to log on to LinkedIn, don't you? And on that subject, will you help me with something (handing Millennial a magazine of laptop computers). How much horse power do I need?

**M:** Well, that depends; what do you intend to use it for primarily?

**BB:** Well, work mainly, iTunes, you know…. You people are always making things so complicated. Look at all these options!

**M:** Did you have a chance to read that research memo I gave you yesterday? I want to know what you think of it. I'd really like to talk to you about this case I found that may change our trial strategy.

**BB:** Back when I was working at the EPA, I was assigned to the task force that drafted the regulations requiring production of unleaded gas…and Chrysler and GM sued….

**M:** Uh-huh (listening politely to a story she's heard before).

**BB:** So, I noticed you left work at 3:30 yesterday. Did you have an appointment outside the office?

**M:** Oh, I was on my way to watch my husband play volleyball. And after that I went with some YLD friends to a yoga class.

**BB:** Oh really? How much does that pay?

**M:** Don't worry, I get in my billable hours. Why are you partners so….

**BB:** Work-oriented?

**M:** We know how to get things done efficiently.

**BB:** There's no substitute for attention to detail and experience. Millennials want to run the firm the moment they walk through the door.

**M:** Boomers expect me to be at the office 24/7.

**BB:** 12-6 might be respectable. Millennials think they can get their work done from home or a beach in Hawaii.

**M:** It's called balance and an identity outside the office.

**BB:** You mean more time for texting and Facebook? We understand the importance of face time with clients. You have taken us from face-lifts to Facebook!

Complaints about Millennials include their inability to accept criticism when delivered in less than gentle terms, a sense of entitlement, and too much need for direction. Blame has been placed on the nurturing parents of Millennials (us), who are reported as showing up with their children for job interviews, and calling an employer when their son or daughter receives a bad performance review. A recent survey indicates that nearly forty percent of employers have witnessed out-of-line parental involvement at the workplace.[4] As a result of this "helicopter parenting," severe criticism should not be used with the Millennial generation because they did not receive it growing up and are not used to it. They grew up in a win-win culture where trophies were awarded for 16th place. At the same time, the Millennials' close relationships with mom and dad allow them to relate well to older generations. And because they are characteristically well-traveled and have been provided many opportunities, they are willing to question the status quo and provide valuable ideas and perspectives. Their ideas are almost always worth considering. I've noticed that Millennials are willing to tackle any project, even if it is beyond the scope of their experience and/or knowledge. And when that is the case, more often than not, they do a good job.

Every generation seems to enjoy complaining about the younger generations. As was said by Hesiod in the 8th Century BC:

> I see no hope for the future of our people if they are dependent on frivolous youth of today, for certainly all youth are reckless beyond words…. When I was young, we were taught to be discreet and respectful of elders, but the present youth are exceedingly wise [disrespectful] and impatient of restraint.

Our current young professional colleagues are energy-conscious and compassionate about the environment. I recently had lunch with Jenifer Tomchak, current president of the Young Lawyers Division. Among other things, we discussed the Rocky Mountain Power Blue Sky Program, an initiative to support renewable energy projects. Within twenty-four hours, she had me and John Baldwin committing the Bar to support the initiative. And thanks to Jon Clyde, another Millennial at my firm, I now have a blue trash can in my office. I'm still figuring out what paper products go in which can.

On Saturday morning, October 8, 2011, attorneys and employees at Clyde Snow planted some sixty trees along the Jordan River Parkway – yet another project planned by Millennials.

While it is annoying to see Millennials texting during meetings and working, at times, with their iPods or iPads ramped up, they have brought many positives to the workplace. These benefits include a renewed emphasis on effective collaboration, a fierce commitment to service (Wills for Heroes, Serving Our Seniors, The Cinderella Project, lunch seminars for the new practitioner, and raising money for victims of domestic violence, among others), and good relationship skills. They can be taught the intricacies of practicing law. A positive approach is critical. Giving their work meaning in context of client and firm needs is also key.

One day, while poking fun at a few of our Millennials, I was interrupted… "But, Rod, you know you love us…" And it is true. You just can't help caring for the under-thirty generation.

1. In developing the ideas for this article, I give credit and thanks to Susan Daicoff, professor of law at Florida Coastal School of Law, and Kari Ellingson, Ph.D at the University of Utah, a keynote speaker at the 2011 Utah State Bar Spring Convention on generational differences.

2. This article is intended as an introduction to and commentary on the characteristics of Millennials; it is not an exhaustive presentation of the subject as the Millennial generation has now become the subject of extensive research and writing and the length of this message is limited.

3. Lynne C. Lancaster and David Stillman, *The M-Factor: How the Millennial Generation is Rocking the Workplace* 6 (HarperCollins Publishers 2010).

4. *Id.* at 19.

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# Growing & Moving

***We are pleased to announce the addition of four attorneys and our move to new offices located at 15 W. South Temple, Suite 1700 Salt Lake City, Utah 84101.***

## Wayne G. Petty

Mr. Petty joins the firm from Moyle & Draper, P.C. in Salt lake City. He practices primarily in real estate law, including development and financing. Mr. Petty also maintains a practice in business and litigation law. He is a 1972 graduate of the University of Utah School of Law.

## Daniel C. Dansie

Mr. Dansie joins the firm from Holden, Kidwell, Hahn & Crapo in Idaho Falls, Idaho. He has a civil litigation and appellate practice which focuses on bankruptcy and real estate matters. He is a 2008 graduate of the S. J. Quinney College of Law at the University of Utah.

## Landon O. Sullivan

Mr. Sullivan was hired after his recent graduation from the Brigham Young University School of Law. During law school he served as an intern to the honorable Judge Samuel D. McVey of the Fourth District Court for the State of Utah. Mr. Sullivan's practice is primarily focused on bankruptcy and civil litigation.

## Justin B. Bradshaw

Mr. Bradshaw joined Prince Yeates after recently receiving a JD degree from the Brigham Young University School of Law and an MBA from the Marriott School of Management. His previous experience includes work as a corporate financial analyst with Marriott International. Mr. Bradshaw practices primarily in commercial litigation, financial transactions and business formation.

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# Referrals to the OPC

*by Judge Kate A. Toomey*

The current iteration of the Code of Judicial Conduct[1] provides that "A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority." Utah Code of Jud. Conduct R. 2.15(B). And it exhorts judges who "receive[] information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct" to "take appropriate action." *Id.* R. 2.15(D). The Comment following the rule reminds us that "[i]gnoring or denying known misconduct among…. members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system." *Id.* R. 2.15, comment [1]. On the other hand, if the judge merely has information indicating a substantial likelihood of misconduct, the appropriate action might include "communicating directly with the lawyer who may have committed the violation or reporting the suspected violation to the appropriate authority or other agency or body." *Id.* R. 2.15, comment [2].

> *"If you think you've made a mistake, act quickly to remedy it, and when you're not certain what to do, seek the advice of a respected colleague or one of the OPC's attorneys."*

As an attorney who worked for more than a decade at the Office of Professional Conduct, experience tells me that judges rarely refer information for that office's investigation, and the OPC's Annual Report for fiscal year 2010-2011 confirms that this hasn't changed in the period I've been on the bench: the judges have been the OPC's "source of information" just 1.83% of the time.[2]

At the time, I thought these low numbers might be because judges, and trial judges in particular, are reluctant to report allegations of certain kinds of misconduct until after a matter is finally concluded; doing otherwise could significantly disrupt the proceedings. Another reason, I thought, might be that many kinds of misconduct, and indeed the most frequent rule violations, are largely invisible to judges in the context of court cases – an attorney's failure to communicate with a client, for example – and other people, such as the client, are in a better position to bring these matters to the attention of the OPC. What I've learned since I've been a judge is that while conduct meeting the standard requiring judges to inform the OPC would be reported, judges rarely see things that reach that level. Much more common are the types of misconduct for which a direct communication with the lawyer would suffice, and these remedial measures would be invisible to the OPC.

But these can't be the only reasons so few referrals are made by judges considering that only a handful of them are the source of nearly all the referrals. Informal discussions with some of my colleagues suggest that attitudes differ significantly when it comes to reporting professional misconduct, and many fear that the proposed changes in the judicial performance evaluation process will inhibit such referrals even further. Additionally, it seems to me that the professional conduct and potential misconduct of the attorneys is to a great extent peripheral to what a trial court

*JUDGE KATE A. TOOMEY was appointed to the Third Judicial District Court in January 2007. She previously was employed in the Utah State Bar's Office of Professional Conduct.*

must address: the issues involved in the case before it. Our intense focus on the work at hand may inhibit us from taking a closer look at how the attorneys are performing their parts.

No one wants to be the subject of a referral to the OPC, by a judge or anyone else, and fortunately, this is easily avoided by following some simple rules. Maintain an active license if you practice law, pay your dues on time, and comply with the continuing legal education requirements. Provide competent representation, and perform your work with diligence. Communicate regularly and appropriately with your clients, and take care to safeguard their confidences. Don't overcharge them, and perform your fiduciary duties with loyalty and careful attention to detail. Avoid conflicts of interest, and withdraw from representations when you must, but do it in a manner consistent with the rule governing declining or terminating representation. *See* Utah R. Prof'l Conduct 1.16. Maintain your integrity in your dealings with your client, your colleagues, and the courts. Be aware of your responsibilities under the Rules of Professional Conduct, and to that end, from time to time review them in their entirety. If you think you've made a mistake, act quickly to remedy it, and when you're not certain what to do, seek the advice of a respected colleague or one of the OPC's attorneys.[3]

Attorneys who do these things avoid the majority of substantiated rule violations, and promote the integrity of the legal system. *See* OPC Annual Report, 2010-2011. Your colleagues and clients rely on you to observe these standards, and judges count on it, too.

1. The Code was repealed and reenacted effective April 1, 2010. Before the enactment of the current Code, Canon 3 provided that "[a] judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware." Utah Code of Jud. Conduct, Canon 3(D).
2. The OPC investigates and, when necessary, prosecutes allegations of misconduct; others, such as the Screening Panels and the district courts, determine whether the Rules of Professional Conduct have been violated.
3. The OPC attorneys answer questions on a hotline available to all members of the Utah State Bar. Be prepared to leave a message with your question, which should concern your own contemplated conduct; this permits the OPC attorney to consider and prepare for responding. Except in cases involving an emergency, you can expect to receive a prompt return call, in most cases within twenty-four business hours.

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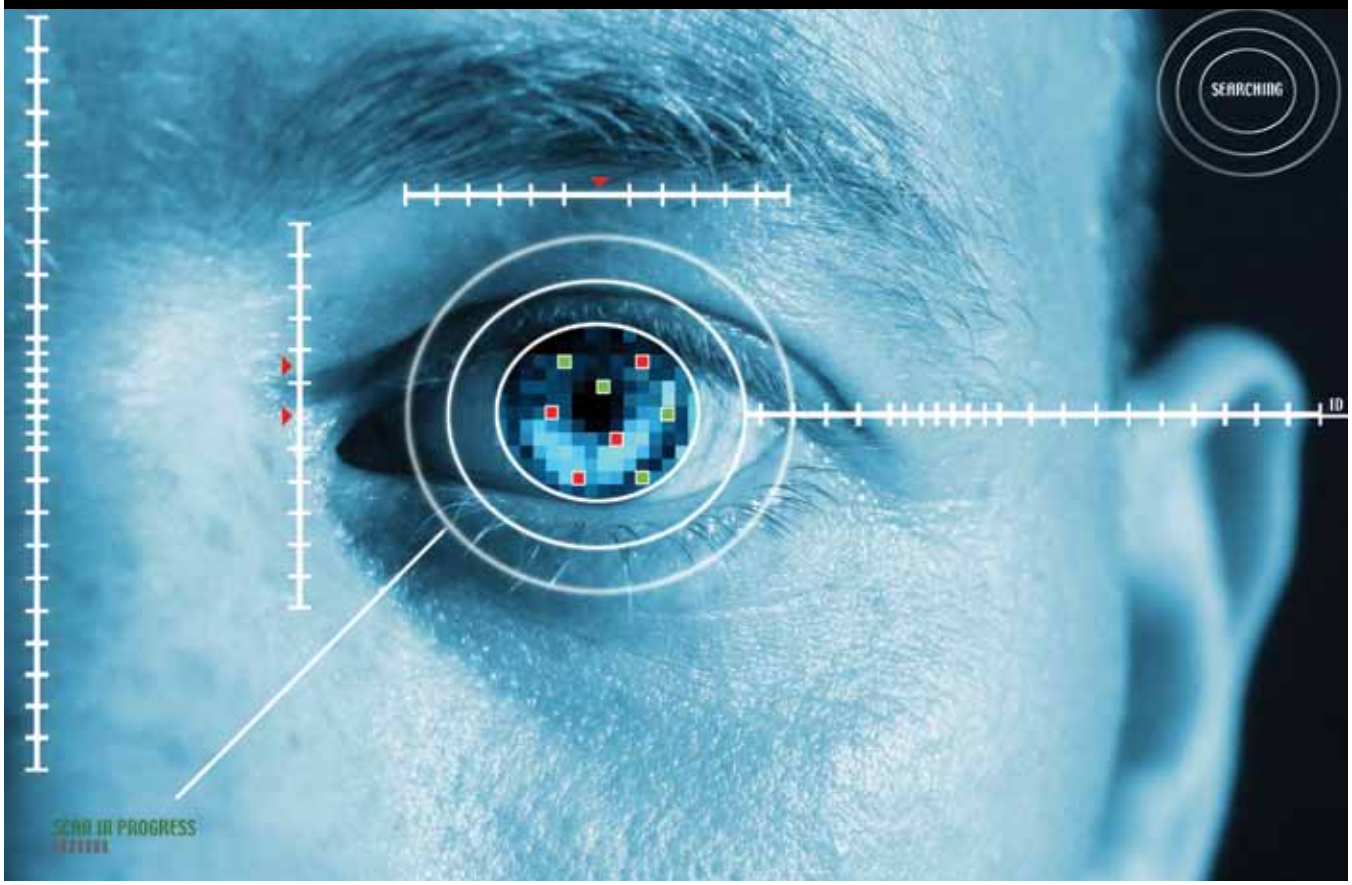


# *In Utah, Scanning a Person's Face or Iris to Determine Identity is a Search Justified Only in Limited Circumstances*

*by Adam Alba*

**INTRODUCTION**

Dozens of law enforcement groups in several states have recently outfitted police with handheld iris and face scanners to aid officers in quickly identifying a person. *See* Emily Steel & Julia Angwin, *Device Raises Fear of Facial Profiling*, The Wall St. J., July 13, 2011. The Mobile Offender Recognition and Information System ("MORIS") is a device that attaches to an iPhone and allows an officer to snap a picture of a face from up to five feet away, or scan a person's irises from up to six inches away. *See id*. The device performs "an immediate search to see if there is a match with a database of people with criminal records." *Id*. Though the device isn't yet in police hands in Utah, the manufacturer of the handheld scanner has already placed one of its less portable scanners in the Davis County Jail to prevent the mistaken release of inmates. *See* Melanie S. Welte, *Iris Scans May Prevent Mistaken Release of Inmates*, Deseret News, Feb. 28, 2010. Use of the handheld device in this state raises constitutional concerns related to search and seizure law that no court in Utah has addressed. Attorneys and

*ADAM ALBA is a trial attorney practicing indigent criminal defense at the Salt Lake Legal Defender Association.*

judges in the state should be ready to confront these issues if and when they arise.

Generally, constitutional protections against unreasonable searches are not implicated unless a search has actually occurred. The important issues practitioners must therefore consider are (1) whether a scan of a person's face or iris to determine identity constitutes a "search" that implicates constitutional protections and (2) the legal standard police must meet before effectuating the scan. In this article I take a Utah-specific approach and argue that scanning a person's face or iris to determine identity is a search under the Utah Constitution. I then argue that there are only three situations in which use of the scan is legally justified: (1) when the subject of the scan has been lawfully arrested, (2) when police are confronted with exigent circumstances *and* have probable cause to believe the subject has committed a crime, and (3) when police obtain a lawfully executed warrant.

Though Utah courts have developed "an independent body of state search and seizure law" that "provides greater protections to Utah citizens than the Fourth Amendment," I use federal Fourth Amendment precedent as a starting point. *State v. Worwood*, 164 P.3d 397, 405 (Utah 2007) (noting that analysis of federal rules governing searches "provide[s] a floor from which state constitutional law can depart. . . ."). When a Utah-specific departure from the federal "floor" is necessary, I will so note.

**SCANNING A PERSON'S FACE OR IRIS TO DETERMINE IDENTITY IS A SEARCH UNDER THE UTAH CONSTITUTION.** Article 1, Section 14 of the Utah Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated. . . ." Utah Const. art. 1 § 14. This language is nearly identical to the Fourth Amendment of the United States Constitution. *See* U.S. Const. amend. IV.

Interpretation of Article 1, Section 14 begins with an analysis of the United States Supreme Court's interpretation of the Fourth Amendment. *See Worwood*, 164 P.3d at 405. In 1967, the Supreme Court created the current test from which search and seizure analysis springs. In *United States v. Katz*, 389 U.S. 347 (1967), the Court defined the Fourth Amendment's scope of protection to include activity in which an individual has a

"reasonable expectation of privacy." *Id*. at 360 (Harlan, J., concurring). The analysis provides that a search occurs if government action violates (1) a person's expectation of privacy (2) that is reasonable. *See id*. at 360-61. If one or both of these prongs are not met, then no search has occurred, and constitutional protections are not implicated. *See id*. The Utah Supreme Court has applied the *Katz* analysis to its interpretation of the Utah Constitution. *See, e.g*., *State v. Thompson*, 810 P.2d 415 (Utah 1991).

Does a search occur under *Katz* when police use MORIS to identify a person? The answer turns on (1) whether a person has an expectation of privacy in identity procured through his or her face or iris, and (2) whether that expectation is reasonable.

**A. Most people have subjective expectations of privacy in their anonymity in public places.**

As to the first question, a normal person engaged in contemporary society probably shouldn't expect the features of his or her face or eyes to be kept private. There is a distinction, however, between expecting to be *seen*, and expecting to be *recognized*. *See* John J. Brogan, *Facing the Music: The Dubious Constitutionality of Facial Recognition Technology*, 25 Hastings Comm. & Ent L.J. 65, 84 (2002). Indeed, when one exposes his or her face and eyes to the public, he or she does not expect such features to be "tied to a veritable cornucopia of data detailing the most intimate details of [his or her] life," including where that individual is at that exact moment, who the individual might be socializing with, and what that person might be doing. *Id*. As the United States Supreme Court has noted, "[w]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S at 351. Most people would probably identify with this expectation of *anonymity* in public places.

> *"[B]y scanning a person's face or iris to procure identity, the State reveals intimate information about that person including exactly where that person is at that particular time and who he or she is."*

**B. The expectation of privacy in one's anonymity while in public is reasonable.**

The next question in the *Katz* analysis is whether this expectation is reasonable. The *Katz* Court held that a person's expectation of privacy is not reasonable if he exposes "objects, activities, or statements" to the "plain view" of third parties. *Id*. at 361 (Harlan, J., concurring). This rule has been applied to various situations. In *United States v. Miller*, 425 U.S. 435 (1976), the Court held that no search occurred when authorities viewed the defendant's bank records because a person does not have a reasonable expectation of privacy in records voluntarily exposed to a third party, the bank. *See id*. at 440-41. And in *United States v. Dionisio*, 410 U.S. 1 (1973), the Court held that the compelled display of a person's voice did not constitute a search because a person's voice is constantly exposed to the public. *See id*. at 14-15.

The "plain view" analysis is different under the Utah Constitution, however. And it is in this respect that the Utah Constitution provides greater protections to Utah citizens than the Fourth Amendment. For example, in *State v. Thompson*, 810 P.2d 415 (Utah 1991), the Utah Supreme Court considered the defendant's challenge to the state searching his bank records. *See id*. at 416. The Utah Supreme Court refused to follow *Miller*, holding instead that under the Utah Constitution, government officials obtaining and viewing a person's records on file with his bank constitutes a search. *See id*. at 418. The Utah Supreme Court held that Utah citizens "ha[ve] a right to be secure against unreasonable searches and seizures of the bank statements…and all papers which they supplied to the bank to facilitate the conduct of their financial affairs upon the reasonable assumption that the information would remain confidential." *Id*. (internal quotation marks omitted).

Quoting an Illinois state court decision, the *Thompson* court noted,

> "[I]t is reasonable for our citizens to expect that their bank records will be protected from disclosure because in the course of bank dealings, a depositor reveals many aspects of her personal affairs, opinion, habit and associations which provide a current biography of her activities. Such a biography should not be subject to an unreasonable seizure by the State government…. Since it is virtually impossible

> to participate in the economic life of contemporary society without maintaining an account with a bank, opening a bank account is not entirely volitional and should not be seen as conduct which constitutes a waiver of an expectation of privacy."

*Id.* (citation omitted) (quoting *People v. Jackson*, 452 N.E.2d 85, 89 (Ill. App. Ct. 1983)).

How is the "plain view" analysis under the Utah Constitution different than the federal model? Two factors emerge as the court's reason for its departure from the Fourth Amendment: (1) if the information revealed exposes intimate details about a person's affairs, habits, and associations, and (2) the activity being viewed by the government is necessary for engaging in contemporary society, then the court is more likely to find that a search has occurred. *See id.*

Applying these principles to face and iris scanning, it would appear that in Utah a person has a reasonable expectation of privacy in his anonymity, even though one may regularly expose one's face and eyes to public view. This finding is based on the two principles present in *Thompson*. First, by scanning a person's face or iris to procure identity, the State reveals intimate information about that person including exactly *where* that person is at that particular time and *who* he or she is. This information also has the potential to reveal the person's "affairs, opinion, habit and associations which provide a current biography of [his or her] activities…." *Id.* (internal quotation marks omitted). Second, just as opening a bank account is not a waiver of the expectation of privacy, engaging in contemporary society by walking around in public cannot be viewed as a waiver of the expectation of privacy. *See id.* Both are necessary to engage in society. Indeed, walking around in public is more primal to the engagement than opening a bank account. Neither can be viewed as a waiver of an expectation of privacy.

Another factor to consider in whether the expectation of anonymity is reasonable is the technology used by law enforcement. In *Kyllo v. United States*, 533 U.S. 27 (2001), the Court held that the government's use of an advanced thermal imaging device to monitor the thermal radiation from a person's house was a search. *See id.* at 40. The Court explained that the determination of

whether an expectation of privacy is reasonable is informed by whether the technology used by the state to gather the information is available to the public. *See id*. at 34. By using the thermal reader, a piece of advanced technology not available to the public, the police had violated Kyllo's *reasonable* expectation of privacy and conducted a search. *See id*. This is true even though the police observed something that was in "plain view" from the street, the side of the house. *See id*.

Applying *Kyllo* to the use of MORIS-like devices bolsters the conclusion that a search occurs when police use the device. The public does not have access to portable face and iris scanners that are capable of immediately identifying a person and producing a wealth of information about that person's identity, history, and precise location. Because the public does not regularly use this technology, the expectation of that technology not being used to procure one's identity becomes more reasonable.

**C. Distinguishing *Dionisio* & Fingerprint Evidence**

Some commentators have suggested that the United States Supreme Court's decision in *United States v. Dionisio*, 410 U.S. 1 (1973), supports the position that scanning a person's face to identify that person is not a search. *See, e.g.*, Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.7 (4th ed. 2010). In *Dionisio*, the Court held that obtaining a voice sample was not a search because "[l]ike a man's facial characteristics, …his voice is repeatedly produced for others to hear." *Dionisio*, 410 U.S. at 14. The Court continued, "No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world." *Id*.

*"Because fingerprinting a person to determine his identity is not a search, some might argue that scanning a person's face or iris for the same purpose is also not a search."*

Additionally, it has been held that obtaining a person's fingerprints to determine identity is not a Fourth Amendment search. *See United States v. Farias-Gonzalez*, 556 F.3d 1181, 1189 (11th Cir. 2009). Because fingerprinting a person to determine his identity is not a search, some might argue that scanning a person's face or iris for the same purpose is also not a search.

Even assuming that these decisions support the position that face and iris scans are searches, Utah courts would probably find otherwise. The crux of the decisions in *Dionisio* and the fingerprint cases is the exact line of precedent that the Utah Supreme Court has refused to follow in interpreting the Utah Constitution, namely, that a person has no expectation of privacy in objects and activities exposed to third parties. As outlined in *Thompson*, Utahns have a higher expectation of privacy in activities that have been exposed to third parties if (1) the activity can reveal intimate information about a person's habits and activities, and (2) the activity is necessary to engage in contemporary society. *See State v. Thompson*, 810 P.2d 415, 418 (Utah 1991). Accordingly, Utah courts would probably find that *Dionisio* is simply inapplicable to Utah's constitutional protections against unreasonable searches and seizures.

In sum, because most people feel a subjective expectation of privacy in their anonymity, and because that expectation is reasonable, use of the MORIS devices to reveal a person's identity is properly classified as a search under the Utah Constitution.

**THE LEGAL STANDARD NECESSARY TO EFFECTUATE A FACE OR IRIS SCAN**

If scanning a person's face or iris to determine identity is a search, what legal standard must the State meet before invading a person's privacy in this manner? At a minimum, a reasonable articulable suspicion is required just to perform the mechanics of the MORIS scan because an officer must temporarily detain a person to make that person submit to the scan. *See State v. Worwood*, 164 P.3d 397, 405-06 (Utah 2007) (holding that an officer may detain a person "if the officer has an articulable suspicion that the person has committed or is about to commit a crime" (internal quotation marks omitted)). For a proper MORIS-like scan to take place, the subject must be stationary for at least a few seconds. Accordingly, unless the subject consents to the scan, Utah courts would likely find that an officer demanding a person to submit to the scan has detained that person and must have reasonable suspicion to do so.

Does the officer need more than reasonable suspicion to effectuate the scan? Utah law provides that an officer may demand a person's identity "when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense…." Utah Code Ann. § 77-7-15 (2008);

*see also Hiibel v. Sixth Judicial Dist. Court of Nevada*, 542 U.S. 177, 190-91 (2004) (upholding state laws requiring citizens to disclose their identity when officers have reasonable suspicion to believe criminal activity may be taking place). But demanding a person's identity is not equal to scanning a person's face or iris to unequivocally determine identity. When the officer demands to know a subject's identity, there is a level of volition between the officer's request and the answer given by the subject. Scanning a person's face to identify that person removes that layer of separation.

Additionally, as outlined above, the scan actually constitutes a search because it violates a reasonable expectation of privacy. Utah law holds that "'[e]xcept in certain well-defined circumstances, a search…is not reasonable unless it is accomplished pursuant to a…warrant issued upon probable cause.'" *State v. Moreno*, 203 P.3d 1000, 1008 (Utah 2009) (quoting *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989)). Accordingly, unless a face or iris scan falls under one of the well-established exceptions to the warrant requirement, use of the MORIS device in Utah must be accompanied by a warrant.

Two exceptions to the warrant requirement may be applicable to face and iris scanning. One exception is searches incident to lawful arrests. *See, e.g., Chimel v. California*, 395 U.S. 752, 760 (1969). The only other exception that might apply is where exigent circumstances are involved. Under that exception, if "the completion of tasks associated with obtaining a warrant may place the safety of the police officers or the public at unacceptable risk or result in the destruction of essential evidence necessary to prosecute a crime," then the police may perform the search without a warrant as long as they have probable cause to believe a crime has occurred. *State v. Rodriguez*, 156 P.3d 771, 774 (Utah 2007) (holding that probable cause and exigent circumstances justified warrantless blood draw from defendant).

In sum, if this technology becomes available to police in Utah, I only see three situations in which police may be justified in using it: (1) where the subject of the scan has been lawfully arrested, (2) where police are confronted with exigent circumstances *and* have probable cause to believe the subject has committed a crime, and (3) where police obtain a lawfully executed warrant. Use of the device outside of those circumstances violates the Utah Constitution's protections against unreasonable searches.

# *Litigators Beware*

*by Keith A. Call*

In the words of my daughter, "Dad, have you ever dreamed you got to court and couldn't find your briefs?" If you have had a dream like this recently, it could be because the Utah Supreme Court just adopted the most drastic rule changes in the modern history of Utah Civil Procedure and you don't know what they are.

Here are three suggestions to help you avoid ethical trouble with the new rules.

**Crack open the book.**
Utah Rule of Professional Conduct 1.1 requires competence. Sometimes you may feel you can get away without studying amendments to the rules, figuring you can deal with the changes when they become relevant to your immediate problem. That is *not* the case with these amendments. If you practice civil litigation of any kind, you need to set aside some time to read and study these amendments. As of the date of this writing, there is a link to the new rules on the home page of the Bar's website, www.utahbar.org (last visited September 5, 2011).

There are certain to be various seminars teaching the practical application of the new rules. Take time to attend one. Better yet, become an expert on the changes and plan your own presentation. Offer to teach it in your firm or at other venues.

**Get your running shoes on.**
Utah Rule of Professional Conduct 1.3 requires diligence. The new rules demand it because they speed up the litigation process significantly. For example, instead of lollygagging around to serve disclosure statements until an agreed-upon date, plaintiffs are required to automatically serve disclosure statements within fourteen days after service of the first answer by any defendant. Defendants must serve their disclosures within twenty-eight days after the plaintiff's disclosure or that defendant's appearance, whichever is later.

The new rules also require discovery to be conducted on a faster pace. Instead of taking 240 days or longer by stipulation, the amendments require all fact discovery to be completed within 120 to 210 days (depending on the amount of the damage claim) from the first defendant's disclosure statement. Extensions by stipulation are now far more difficult to obtain.

**Pick up the phone and put it in writing.**
Utah Rule of Professional Conduct 1.4 requires careful communication with your clients. The new rules heighten this responsibility, given that most civil cases will move at a faster pace.

The new rules also create a new client-communication landmine. Before taking any discovery that extends beyond the standard time and discovery-method limits, you must file with the court a statement certifying that your client has reviewed and approved a discovery budget. Litigation budgets can be extremely difficult to prepare with any degree of accuracy, especially given the broad range of subjectivity and the different way cases can evolve. If you propose a budget that is too high, your client may choose to forgo the discovery, leaving you without critical information that could hurt you down the road. If you propose a budget that is too low, you could easily end up with an unhappy client who does not want to pay your "excessive" bill.

The best antidote to this dilemma is to communicate with your client clearly and often. Make it clear that your budget is only an estimate, and that actual fees may vary significantly. Keep your client posted along the way so your client has the information he or she needs to make informed decisions as the case progresses.

There are many other ways the new rules impact civil practice and a lawyer's ethical obligations. If you practice civil litigation, you need to take time to study these monumental changes.

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

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# *Preconstruction Service Liens: A New Chapter in Utah's Mechanics' Lien Law*

*by D. Scott DeGraffenried*

Utah's Mechanics' Lien Law comprises a technical area of the law involving many requirements and deadlines. The nuances of Utah's Mechanics' Lien Law have caused attorneys to wake up in the middle of the night hoping they complied with certain steps or did not miss one of the many imposed deadlines. Just when construction law attorneys thought we had the system mastered, the Utah Legislature made sweeping changes to Utah's Mechanics' Lien Law. *See* Utah Code Ann. §§ 38-1-1 to 38-1-37 (Supp. 2011). During the 2011 general session, the legislature passed two bills, House Bills 115 and 260, that created two types of mechanics' liens. H.B. 115 created liens for preconstruction services, which are services provided before actual construction commences, such as design, architectural, engineering, and surveying work. H.B. 260 applies to liens for construction services, which are tasks performed in the physical construction of a project. Both bills are now in effect. This article is limited to H.B. 115. The purpose of this article is to explain some of the motivations behind the bill and introduce the mechanics (no pun intended) of the newly-created preconstruction service liens.

## THE PUSH FOR H.B. 115

Utah's previous mechanics' lien statutes gave lien rights to preconstruction service providers. The problem, however, has been defining the priority of their liens. Mechanics' lien litigation often comes down to one issue: whether a mechanics' lien has priority over other encumbrances on a particular piece of property. This dispute is often referred to as one of "broken priority." The dispute usually involves the mechanics' lien claimants and the bank that holds a trust deed on the property. Under Utah's pre-2011 statutes, all mechanics' liens related back to and took effect as of the date visible construction work commenced on a project. This triggering point is known as the relation back doctrine. If visible work commenced before another encumbrance was recorded, all the lien claimants had priority over the later encumbrance.

The problem for those performing preconstruction services was that they were always at the mercy of construction commencing. An architect could spend months designing a project, performing significant services. If actual construction never commenced, however, no date was established for the architect's lien priority.

Similarly, if a preconstruction service provider performed services before a trust deed was recorded but construction began after the recording of the trust deed, the provider's lien fell in with the rest of the lien claimants. The lien would be deemed inferior to the trust deed. Simply put, preconstruction service providers were often relegated to an inferior priority position even though they performed their services early in the project.

Many found these scenarios unfair considering the significant value preconstruction service providers render to construction projects. H.B. 115 was enacted to address some of these concerns by carving out a unique priority position for preconstruction service providers. As with all mechanics' lien statutes, there are many requirements for preserving these new lien rights and strict compliance is a must. Before explaining the new priority framework, it is important to understand the steps giving rise to a preconstruction service lien.

## PROCESS FOR SECURING A PRECONSTRUCTION SERVICE LIEN

### Preconstruction Services Defined

Utah's new law provides that parties who perform preconstruction services can hold a preconstruction service lien. Utah Code Section 38-1-2(13) expressly defines what qualifies as a preconstruction service. *See* Utah Code Ann. § 38-1-2(13) (Supp. 2011). The

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services include, among others, design work, consulting, estimating, and feasibility studies. The services must be provided before construction begins and for compensation that is separate from compensation to be paid for construction services.

**Notice of Retention**

To hold a preconstruction service lien, a preconstruction service provider must file a notice of retention on the Utah State Construction Registry ("SCR"). The SCR is an online database where notices and other relevant information pertaining to mechanics' liens are filed. It is found at www.scr.utah.gov. This provides notice to a project owner of those working on the project. Utah Code Section 38-1-30.5 governs the notice of retention provisions. *See* Utah Code Ann. § 38-1-30.5. A notice of retention must be filed within twenty days of the provider commencing work. If the notice is not filed on time, the provider loses its preconstruction service lien rights.

In some instances, preconstruction service providers may have to file multiple notices of retention. If the provider works under one original contract for a project, only one notice of retention is required. (Utah Code Section 38-1-2(10) defines an original contract as a contract between a project owner and a preconstruction or construction service provider.) If a provider works under more than one original contract, separate notices of retention are required for services performed under each original contract, even if the work is performed on the same project.

Certain information must be included in a notice of retention, such as identifying information for both the preconstruction service provider and the person employing the provider, a general description of the preconstruction services, the project's owner, and information defining the project. Utah Code Section 38-1-30.5(1)(f) provides a complete list of the required content. *See id.* § 38-1-30.5(1)(f).

Preconstruction service providers should also know when preconstruction services end and construction services begin. Under Utah Code Section 38-1-4.7(3), preconstruction services are deemed complete when construction services commence. *See id.* § 38-1-4.7(3). Construction services commence when the first preliminary notice is filed with the SCR. A preliminary notice is basically the notice of retention's counterpart for construction services; it provides notice to an owner of potential construction service lien claimants and must also be filed within twenty days of when a construction service provider commences its work. This represents a change from the old triggering mechanism, which was the actual commencement of construction. If a provider filed a notice of retention but then learns that a subsequent preliminary notice has been filed, the preconstruction services are deemed complete as of the date of that filing. Any services rendered after that date, even if they are technically preconstruction services, will be considered construction services. The construction service lien provisions will then govern. In that instance, a preconstruction service provider would be required to file a preliminary notice to preserve lien rights for services provided after the first preliminary notice was filed.

Also, under Utah Code Section 38-1-3(3), a construction service lien can include amounts claimed for preconstruction services, while a preconstruction service lien cannot include amounts for construction services. *See id.* § 38-1-3(3) (Supp. 2011).We have yet to see how this will ultimately be interpreted. It arguably means that a preconstruction service provider that failed to file a notice of retention and thus lost its preconstruction service lien rights could still file a lien under the construction service lien framework, assuming it filed a preliminary notice. However, the priority rights now granted to preconstruction service providers would likely not be available.

**Notice of Preconstruction Service Lien**

If a preconstruction service provider timely filed a notice of retention and was not paid for its services, the next step is to file a notice of preconstruction service lien. According to Utah Code Section 38-1-6.7(1), a provider must record the notice with the county recorder of the county where the project is located within ninety days after completing its preconstruction services. Again, failure to

timely comply automatically bars the provider's preconstruction service lien rights. *See* Utah Code Ann. § 38-1-6.7(1).

Like the notice of retention, certain information must be included in the notice of preconstruction service lien. Utah Code Section 38-1-6.7(3)(a) provides a complete list of what is required. *See id.* § 38-1-6.7(3)(a).

After recording the notice of preconstruction service lien, Utah Code Section 38-1-6.7(4) requires the provider to send a copy of the notice to the property owner via certified mail within thirty days of recording the notice. *See id.* § 38-1-6.7(4). By doing so, the provider preserves its right to collect attorney fees and costs incurred in filing and otherwise perfecting the lien. If this is not done, the lien will still be valid, but attorney fees and costs cannot be recovered. As with all litigation, fees and costs can be substantial, so compliance is a must.

**Perfecting the Preconstruction Service Lien**

The final step is to file a lawsuit to foreclose the lien. Under Utah Code Section 38-1-11(2), the foreclosure lawsuit must be filed within 180 days after recording the lien. *See* Utah Code Ann. § 38-1-11(2). In conjunction with the lawsuit, a lien claimant must also record a lis pendens with the same county recorder where the lien was recorded, giving public notice of the lawsuit.

By strictly complying with the foregoing steps, preconstruction service providers can secure their lien rights. This is crucial in today's economy; lien rights can provide a means of collecting payment where other traditional remedies (e.g., breach of contract claims) may not be viable.



**PRIORITY FOR PRECONSTRUCTION SERVICE LIENS**

Lastly, it is important to understand the newly-granted priority rights for preconstruction service liens. Like the old law, which had a triggering point for priority purposes (the actual commencement of construction), preconstruction service liens now have a unique priority-triggering mechanism: the date on which the first notice of retention is filed. *See* Utah Code Ann. § 38-1-4.7(1) (Supp. 2011). In other words, all preconstruction service liens relate back to and take effect as of the date of the first notice of retention. They are deemed superior to subsequent encumbrances. Thus, preconstruction service providers are no longer subject to a floating or otherwise ill-defined, priority scheme.

This priority, however, is qualified. Under Utah Code Section 38-1-4.7(2), the priority can be bifurcated if there is an intervening "bona fide loan." *See id.* § 38-1-4.7(2). Any preconstruction services provided after the loan will be subordinated to the loan. This will most often apply in the context of construction loans and is best explained by way of example: Assume the first notice of retention on a project is filed on October 1, 2011, with preconstruction services commencing on that date and continuing through December 31, 2011. Assume further that a construction loan is issued and a trust deed securing the loan is recorded against the project on November 1, 2011. Under this scenario, the only portion of preconstruction service liens that will enjoy priority over the trust deed is that pertaining to the services provided before November 1st. Any portion of the preconstruction service lien for services after November 1st will be inferior to the trust deed.

While priority for preconstruction service liens is not absolute, it gives preconstruction service providers more rights than they previously had. It offers them a clear, ascertainable priority point. It also demonstrates the legislature's efforts to strive for balancing competing interests in a complex area of law.

**CONCLUSION**

As with any new statute, the new laws for preconstruction service liens will be subject to application in the construction industry and judicial interpretation. Nonetheless, the efforts behind H.B. 115 illustrate an active approach to cure a perceived unfairness, and provide preconstruction service providers a unique priority position. This article will hopefully give service providers confidence, knowing that the services they perform and their ability to get paid now enjoy more protection. For the attorneys advising them, hopefully we have a better understanding of how the process works and can avoid those middle-of-the-night panic attacks.

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# *Location-Based Electronic Discovery in Criminal and Civil Litigation – Part 2*

*by David K. Isom*

This paper examines the impact of location technology upon civil and criminal legal processes in the United States, in two parts: Part 1 summarized the location-based digital technology that has recently become ubiquitous and readily accessible. This Part 2 explores the important legal and ethical issues that location-based electronic discovery (LBED) raises for civil and criminal judicial proceedings.

## PART 2: LOCATION-BASED LAW, ETHICS AND PRIVACY

### WHY LOCATION MATTERS IN CIVIL LITIGATION AND LAW ENFORCEMENT

Good trial lawyers know that the when and where are the foundation of selling or persuading or proving the what. There are, of course, cases in which the where is undisputed, and some where it is unimportant. But when the where is disputed and important, the very ability to prove a person's location at a key moment can exonerate or inculpate.

In one case, for example, my corporate client and I were able to prove that the client had overpaid for several large commercial construction projects because subcontractors had bribed the client's purchasing agent with prostitutes and cash. We discovered this by figuring out the location of each main player at important times, which led to photos, diaries, and confessions.

The essence of many criminal prosecutions is the location of the defendant at the critical moment. Location determines alibi. The where and when often tell the who, what, and why.

### LOCATION PRIVACY

The phrase "location privacy" is emerging because it is under attack. Few Americans realize the pervasiveness, persistence, and possible impact of the location data that they are generating. Even the U.S. Air Force recently had to remind its deployed members to disable geolocation features of social networks to avoid revealing location. For those who are learning these facts, reactions range from horror to a resigned acceptance of the tolerable loss of privacy apparently necessary to enjoy the beguiling benefits of location-based services. There is no doubt that public debate about these issues is just getting started.

In the meantime, the law relating to the use and privacy of location data will continue to develop. This section summarizes important legal developments in location privacy.

Though privacy law in the United States arises from three principal sources – the U.S. and state constitutions, federal and state statutes, and federal and state case law – one principle is common to privacy law from all of these sources. That principle is that privacy analysis begins with gauging a person's "reasonable expectation of privacy" under the circumstances at issue.

A federal court in Michigan recently suggested, ironically, that the very fact that so many Americans carry GPS-enabled cellphones is evidence that they cannot reasonably expect privacy as to their location when they carry such a device. *See United States v. Walker*, 771 F. Supp. 2d 803, 810-11 (W.D. Mich. 2011). In deciding that a defendant charged with illegal drugs had no reasonable expectation against officers secretly attaching a GPS tracking device to her car, the court justified attaching the GPS device in part by saying that the attachment was no more intrusive than "duct-taping an iPhone to Defendant's bumper…." *Id.* at 811.

**Location Privacy Statutes**

The Electronic Communications Privacy Act ("ECPA"), including the Stored Communications Act ("SCA"), is the principal U.S. statute governing privacy of electronic location data. These acts are widely regarded as inadequate to clarify or control access to location data by law enforcement or civil discovery. For example, though the ECPA has been held to apply to cellphone data, the act was adopted in 1986,

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well before cellphones were publicly available. In 2010 and 2011, many congressional hearings were held, and some proposed amendments introduced, but no amendments have emerged yet.

**Location Privacy in Civil Litigation**

Though there are rare exceptions, privacy is not a bar to discovery in civil actions. The normal protection in civil litigation for private data is to allow discovery of relevant private information subject to a protective order that confines the use and communication of the private information to the parties and their counsel. Thus, LBED will rarely be barred on privacy grounds.

**Employee Privacy**

Location data on cellphones will intensify the privacy battles emerging between employees and employers over the extent to which an employee may or may not have privacy or privilege rights in data and metadata on employer's cellphones. With proper disclosures, carefully drawn policies, and clear consent, employers can access employee cellphone location metadata on cellphones owned by employers and provided to employees. Unauthorized access to such data, on the other hand, may create civil or criminal liability under the ECPA, including the SCA, and other federal and state laws. *See, e.g., Shefts v. Petrakis*, 758 F. Supp. 2d 620, 629-30 (C.D. Ill. 2010).

## RETENTION OF LOCATION DATA

A recent Wall Street Journal article examined which of 101 popular iPhone and Android apps created and stored cellphone location information. *See* Scott Thurm & Yukari Iwatani Kane, *Your Apps Are Watching You*, Wall St. J., Dec. 17, 2010, http://online.WSJ.com/article/SB10001424052748704694004576020083703574602.html. The Journal reported that forty-seven of the 101 apps in the study collected and transmitted geolocation data. *See id.* Some app providers sold the user data they collected from cellphones to third parties, including geolocation information and device ID numbers, without the user's permission or knowledge. *See id.* In both civil and criminal litigation where location is in dispute, the important question is where the relevant electronically stored location information ("ESI") is stored and for how long.

The law distinguishes three drivers for keeping ESI that might provide clues as to where to find relevant ESI for litigation:

(1) retention of ESI not compelled by law, but by inertia, inadvertence, or voluntary processes; (2) retention compelled by statute or regulation irrespective of any specific actual or foreseeable retention litigation or other dispute; and (3) preservation of information relevant to a specific actual or foreseeable litigation or other dispute.

The more that lawyers and parties to litigation understand about the technology of potentially relevant location ESI, the better and more targeted their efforts to get this information can be. These issues are usually unique to each case, but a few generalizations are useful.

First, some location metadata is required by law to be kept for a specified period. Such legal requirements for retention can provide a starting place for knowing where to search for relevant information.

Second, most American businesses retain more information than most people in the organization can imagine, or than their written document retention and destruction policies may allow. It is more difficult to destroy all copies of an electronic document in an organization than to assure that the document is retained.



Thus, public statements about what information a company destroys are often mistaken.

Third, many companies that create, store, analyze, and/or sell location data have made it clear that they retain such information for some period, sometimes for months or years.

*Flagg v. City of Detroit*, 252 F.R.D. 346 (E.D. Mich. 2008), illustrates some of these issues. There, a minor child, through his father as next friend, sued the mayor of Detroit and others alleging inadequate investigation of the 2004 shooting death of his mother. *See Flagg v. City of Detroit*, 447 F. Supp. 2d 824, 825 (E.D. Mich. 2006). Some four years after the mother's death, the plaintiff discovered that SkyTel still had text messages about the shooting that he believed might be relevant to the lawsuit. *See Flagg*, 252 F.R.D. at 347-38. The court ordered city officials to provide PIN numbers, and ordered SkyTel to produce the text messages. *See id.* at 357.

## LBED IN CRIMINAL LAW ENFORCEMENT

A recent controversial California Supreme Court case illustrates fundamental LBED issues that will be important in law enforcement and criminal prosecutions. In *People v. Diaz*, 244 P.3d 501 (Cal. 2011) (5-2 decision), Diaz was arrested and charged with selling a controlled substance. *See id.* at 503. Police grabbed Diaz's cellphone shortly after his arrest and used evidence from the cellphone to convict him. *See id.* at 502-03. Diaz claimed that the seizure and use of cellphone information violated his Fourth Amendment privilege against unreasonable searches and seizures. *See id.* at 503.

The California Supreme Court ruled 5-2 that prosecutors had a right to access Diaz's cellphone information on the ground that the phone, in Diaz's pocket when he was arrested, was in his immediate control. *See id.* at 505. Under United States Supreme Court precedent, the California court held that the phone was taken legally because it was taken "incident to a lawful arrest." *See id.* at 503-05. The dissenting justices, who would have suppressed the information from the phone, argued that a cellphone is unique from other objects that might be taken from a pocket, purse, or car incident to arrest because of the enormous store of personal and private information that can be revealed by such a mini-computer. *See id.* at 513 (Werdegar, J., dissenting in which Moreno, J., joined). The dissenting justices emphasized that "[n]ever before has it been possible to carry so much personal or business information in

one's pocket or purse." *See id.* (Werdegar, J., dissenting in which Moreno, J., joined).

## LBED IN CIVIL LITIGATION

The following electronic discovery issues will be particularly important with respect to LBED in civil lawsuits.

### Importance, Proportionality, and Cost Management

A basic issue will be whether location is important and disputed. This should be pinned down early by attorney conferences or requests for admission or otherwise. If location is clearly unimportant or uncontested, the following processes can be ignored. Until the irrelevance of location can be confirmed, however, the following issues will be important.

### Preservation

Though location metadata may well be recoverable on active computers and devices for months or longer after the metadata is deleted, the possibility that devices may be lost or destroyed, or that the deleted data may be overwritten and become undiscoverable, suggests that efforts to preserve the data should be an urgent priority early in any lawsuit.

The first focus of preservation should be the devices of parties that created the relevant location-based data – the smartphone, tablet, or other device, and any of the parties' other computers or devices that may have received the important location data by any sort of transmission, including syncing. This can be done either by making and securing a mirror image, i.e., a bit by bit forensic image of the device, and then continuing to use the device; or by replacing the device, removing its battery and antenna, and storing the device until the data is needed.

The next focus should be obtaining and preserving the location data from others who may have created or received relevant location metadata, including friends, colleagues, cloud storage facilities, servers, Internet service providers, social networks, and apps providers. Of course, knowing who may have this data and how to get or assure preservation of relevant data requires understanding the technology and the networks that may harbor the data. Prompt letters notifying parties and third parties of the scope of potentially relevant ESI, and requesting preservation of

the ESI, are important.

**Metadata and Production Format**

Metadata is obscene. Five years ago, metadata seemed obscene in the nasty sense, i.e., off-colored, dangerous, lewd, or offensive. Now it is clear that metadata is merely obscene in the other sense. The etymology of "obscene" is "ob scoena" or "off stage." That is, metadata is that part of the data that makes up an electronic document that is "off stage" or off the screen, when electronically stored information is created, transmitted, stored, and recovered. For those who understand metadata, metadata can be more useful than harmful.

Much location data is metadata. Lawyers and parties dealing with location data will need to focus on the rules and law relating to metadata.

**Subpoenas, Document Requests, and the Stored Communications Act**

The SCA, which is under Title II of the ECPA, complicates the acquisition of location data from an "electronic communication service" ("ECS") and from a "remote computing service" ("RCS"). A company might be an ECS under the SCA even without providing communication services to the public. *See Devine v. Kapasi*, 729 F. Supp. 2d 1024, 1026-28 (N.D. Ill. 2010) (mem.). Several courts have held that data held by an ESC are exempt from the reach of subpoenas in civil actions. *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 611-612 (E.D. Va. 2008). But customers can obtain their own data from an ECS and RCS. Some courts have ordered customers who are parties to civil lawsuits to request data from ECSs and RCSs that could not be subpoenaed directly by the non-customer opposing party under the SCA. *See Flagg v. City of Detroit*, 252 F.R.D. 346, 357-58 (E.D. Mich. 2008).

## ETHICS OF LBED

Most of the ethical questions about LBED lie at the intersection of the duties of competence and diligent representation, on the one hand, and the interest in privacy and privilege on the other.

Since much potentially available location data is in metadata, the recent debate about the ethics of viewing metadata is a preview of issues that will arise concerning the ethics of LBED. Note that the debate has focused on reviewing metadata in ESI *received from an opposing lawyer or party*, and not on metadata in publicly available sources.

In 2001, the New York State Bar issued an opinion that it was unethical in New York for a lawyer to "surreptitiously examine and trace e-mail and other electronic documents" received from an opponent. *See* New York State Ethics Op. 749 (2001). In 2006, the Florida Bar opined that it was unethical for a lawyer to review the metadata "that the lawyer knows or should know is not intended for the receiving lawyer." *See* Florida State Ethics Op. 06-02 (Sept. 15, 2006). The Florida opinion made it clear, however, that the ethical proscription did not apply to metadata embedded in electronic data produced in formal discovery. *See id.*

In 2006, the American Bar Association expressly rejected these approaches and opined that there was no ethical prohibition on a lawyer's review of metadata in ESI received from an opponent or opposing lawyer, at least so long as obtaining the data did not involve fraudulent, criminal deceitful, or otherwise improper conduct. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006). Though the ABA opinion does not trump the contrary rules or opinions of any state, many states, such as Colorado and Maryland, have issued opinions consonant with the ABA approach. *See* ABA, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html. The ABA maintains a webpage that collects these opinions. *See id.*

Bar associations have started to examine ethical issues relating to obtaining information from an opposing party's social network site such as Facebook, and concluded that such information can be obtained ethically so long as no fraud, deceit, or other illegal activity is involved in obtaining the information. *See* Philadelphia Bar Assoc., Prof'l Guidance Comm. Op. 2009-02; New York City Bar, Comm. on Prof'l Ethics, Formal Op. 2010-2. In 2009, the Philadelphia bar opined that it is unethical for a lawyer or his agent to request that an opponent agree to be a Facebook friend of the lawyer's agent (to get access to the person's nonpublic Facebook pages) without revealing in the friend request the agency and the purpose for the friend request. *See id.*

In 2010, the New York City Bar reached the opposite conclusion: "[W]e conclude that an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request." New York City Bar, Comm. on Prof'l Ethics, Formal Op. 2010-2.

The New York City Bar emphasized, however, that only truthful information could be used in sending such a friend request. *See id*. The bar also emphasized that, if the opponent was represented by counsel, neither the lawyer nor agent could, consistent with Rule 4.2 of the Model Rules of Professional Conduct, send a friend request or communicate in any other way with the opponent except through the opponent's attorney. *See id*. & n.4.

The pivotal issues surrounding the ethics of LBED will revolve around whether the effort needed to access location data is so heroic as to be illegal or to offend notions of privacy. At present, the following seem to be the applicable basic principles.

There is no ethical proscription against mining location metadata from publicly available sources. A person who posts a photograph on the Internet, for example, should be presumed to know that the geolocation Exif metadata associated with that posting is publicly available, even if the person does not in fact know of the metadata embedded in the photo, and even if it takes specialized knowledge or software to access that metadata. Indeed, as the importance and availability of location data becomes better known, lawyers will have an increasingly clear and urgent duty of competence to use LBED. On the other hand, it is unethical to engage in conduct that is either criminal or tortious to access the metadata. Breaking a password to get to the metadata, for example, would be unethical even if technically easy.

## LOCATION-BASED EVIDENCE

Location-based evidence will be vulnerable to several challenges. The fact that a person's cellphone was at a certain place at a certain time does not by itself prove that the cellphone's owner was there, for example. Location data can easily be spoofed for many apps, and most apps have no way to verify the reported location data. Proving or disproving spoofing requires sophistication. Data about the percentage of reliability of any given location-based app or data are scarce, and evidence of lack of consistency and reliability may prevent admission of some location data.

On the other hand, while some challenges to the admissibility of location-based data will, and should, succeed, the flood of location data that will be admitted into evidence will overwhelm the drops of rejected evidence. Especially because location metadata can be triangulated and corroborated from multiple sources in most instances, successful challenges to the admissibility of location-based evidence will be rare. Moreover, because most cases settle during discovery and before admissibility can be challenged or determined, it is location-based *discovery*, not location-based *evidence*, that will be crucial in most cases where location is relevant and disputed.

The criminal cases discussed above show that some LBED can successfully be suppressed on constitutional grounds, but the early social network and apps cases are routinely admitting such evidence, usually without serious challenge.

# *Bankruptcy Filings and Civil Litigation – Judicial Estoppel in Action*

*by Tanya N. Lewis*

**Bankruptcy Basics**

The federal government retains exclusive jurisdiction to administer the United States Bankruptcy Code, which provides relief for financially distressed individuals or corporations to obtain relief from their creditors. Most personal bankruptcies in the United States are filed under Chapter 7 or Chapter 13 of the United States Bankruptcy Code. Bankruptcies filed and granted under Chapter 7 (usually called "no-asset bankruptcy") typically provide debtors with a complete liquidation of their debts and complete relief from their creditors. When a federal bankruptcy court grants relief under Chapter 7, the debtor's obligations are paid out of the bankruptcy estate's existing assets, and most debts are usually wiped away. The case is then said to be "discharged." Bankruptcies filed under Chapter 13 place debtors in a repayment program, where they are obligated to repay all or part of their debts, usually out of future income from employment or other sources. When a bankruptcy court approves a Chapter 13 debtor's proposed repayment plan, the bankruptcy case is said to be "confirmed." Repayment plans usually range from thirty-six to sixty months.

As the United States recession entered its third full year in 2010, the number of personal bankruptcy filings in the United States increased, according to statistics provided by the American Bankruptcy Institute. *See generally* http://www.abiworld.org/Content/NavigationMenu/NewsRoom/BankruptcyStatistics/Bankruptcy_Filings_1.htm. There were slightly more than 1.5 million personal bankruptcy filings nationwide in 2010. *See generally id.* This marked a slight increase from the approximately 1.4 million filings in 2009. At the time of the publication of this article, personal bankruptcy filings were expected to decline slightly for 2011 from their 2010 level.

The ratio of personal bankruptcy filings to business filings has steadily increased over the last thirty years. In 1980, personal bankruptcy filings comprised 86% of all bankruptcy filings. By 2010, however, personal filings constituted 96% of all filings. *See generally id.*

In Utah, bankruptcy filings rose about 26% from approximately 14,000 personal bankruptcies filed in 2009 to approximately 17,000 filed in 2010. Utah ranked ninth out of all fifty states and the District of Columbia in its rate of personal bankruptcy filings in 2010; Nevada held the dubious distinction of first place. Other Western states placing high on the list included California in sixth place, Colorado in eighth place, and Arizona in tenth place. *See generally id.* As expected, the rate of personal bankruptcy filings seems to be highest in the states most affected by the mortgage and banking crisis of 2008 (also known as the "housing bubble").

**Applying Bankruptcy Filings to Civil Litigation**

The information contained in a debtor's bankruptcy filing has the ability to profoundly impact other civil cases in a few ways. First, the bankruptcy code imposes a duty upon a debtor to disclose all assets, including contingent and unliquidated claims. *See* 11 U.S.C. § 521(1). This is done in the initial petition and its accompanying statement of financial affairs. The statement of financial affairs requires a debtor to disclose any involvement in pending lawsuits. It also requests detailed information about a petitioner's income, and the sources from which it is derived, as well as information about the petitioner's monthly expenses. The petitioner must also identify and estimate the value of real property and personal property, including vehicles, as well as identify and classify debts as secured or unsecured, and identify priority or non-priority claims.

Bankruptcy filings have the potential to impact personal injury, employment, and commercial litigation cases through judicial estoppel if those claims are not listed in the debtor's bankruptcy petition. Judicial estoppel is a little-understood but powerful equitable doctrine that prohibits a party from gaining an advantage by asserting one claim or position in one case, and then later seeking an advantage by taking an inconsistent position

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either in that same case or another case. Typically, it attaches in a Chapter 7 case when the order of discharge is signed by the court. It attaches in a Chapter 13 case when the plan is confirmed and the debtor goes into repayment.

Courts across the country and in Utah have penalized bankruptcy petitioners who fail to disclose property that should be included as part of the bankruptcy estate. Many times, the court will order the civil case to be stayed so that the bankruptcy case may be re-opened by the Chapter 7 or Chapter 13 trustee, and the omitted asset can be administered to creditors, if applicable. The court, in essence, may find that the proceeds of a personal injury or employment discrimination case belong to the bankruptcy estate and not to the plaintiff who brought suit under Utah Rule of Civil Procedure 17 (in other words, finding that the debtor is not the real party in interest to bring the claim). Penalties can also include dismissal of the action that was not identified as part of the bankruptcy proceeding, if the court deems that the omission was sufficiently egregious. Consequently, judicial estoppel remains a relevant doctrine for both plaintiff and defense civil litigators.

A recent case in which a court applied judicial estoppel and dismissed a debtor's personal injury claim outright, and which Utah courts might be inclined to follow was *Eastman v. Union Pacific Railroad Co.*, 493 F.3d 1151, 1159-60 (10th Cir. 2007). The United States Court of Appeals for the Tenth Circuit found that a plaintiff took inconsistent positions in the bankruptcy and federal district courts. *See id.* at 1159. Based on the evidence, the court determined that the plaintiff knew of his pending personal injury lawsuit and did not disclose it to the bankruptcy court in his asset schedules. *See id*. The court found it unlikely that such a sizable claim could have been overlooked. *See id*. It noted that the employee had

> a motive to sweep his personal injury action 'under the rug' so he could obtain a discharge free and clear of his creditors…. And he received the benefit of a discharge without ever having disclosed his pending personal injury action against Defendants, thus providing him an unfair advantage over his creditors." *Id*. Thus, the district court's discretionary application of judicial estoppel was appropriate. The appellate court also determined that the fact the bankruptcy was later reopened and his creditors were made whole was inconsequential.

*See id*. at 1160.

In Utah, state courts have held similarly. Notable cases involving bankruptcy and/or judicial estoppel include *Orvis v. Johnson*, 2008 UT 2, ¶¶ 11-12, 177 P.3d 600 (providing an excellent analysis on the elements of judicial estoppel and noting that more than a prior inconsistent statement must be shown to prevail); *Harline v. Barker*, 912 P.2d 433, 441 (Utah 1996) (indicating that the correct argument to make may be collateral or equitable estoppels); *3D Constr. & Dev., L.L.C. v. Old Standard Life Ins. Co*., 2005 UT App 307, ¶¶ 12, 15-16, 117 P.3d 1082 (noting that requiring a showing of bad faith by the party against whom judicial estoppel is sought is a widely-accepted view and concluding that judicial estoppel would not be applied where debtor's bankruptcy petition was dismissed because relief in the prior proceeding was not obtained); *but see Stevensen v. Goodson*, 924 P.2d 339, 351-53 (Utah 1996) (finding the defendant's estoppel arguments unavailing).

In imposing a penalty, sanction, or other remedy, courts are likely to look to the facts and circumstances surrounding both the bankruptcy case and the civil case and consider several factors. The court may consider factors such as the length of time between the cases, the level of sophistication of the debtor, the size of each case, the likeliness that the debtor was acting in bad faith, and whether or not the debtor was represented by counsel.

When handling a personal injury, medical malpractice, or employment case, the prudent litigator or insurer should conduct a search of the plaintiff's bankruptcy history to determine whether that individual has ever petitioned for bankruptcy relief, and if so, under which chapter, as well as the status of the action.

**Asset and Debt Schedules: A Treasure Trove of Information**

If a party is found to have filed bankruptcy within the previous several years, some old-fashioned detective work should be employed in examining the petition and its schedules to ensure that the information they contain is consistent with other representations made by the party in the civil matter. The schedules may also be helpful in assessing the validity of a lost income claim. Debtors are required to state their monthly income and the source from which it is derived. If a debtor stated on his or her bankruptcy schedules that the debtor's monthly income was $4000 during a certain time period, and then claimed in a civil case that the debtor was actually earning $7000 per month during that same time frame for the purposes of calculating lost income in the civil case, those inconsistencies can and should be brought to the attention of the plaintiff and the court.

Furthermore, the petitioner's schedule of debts can be extremely useful in learning about pre-accident injuries and pre-existing conditions. Many bankruptcy filers owe significant amounts to medical providers, and in order for those debts to be discharged, those amounts must be identified in the petitioner's debt schedules. Reviewing bankruptcy debt schedules often divulges additional doctors, hospitals, chiropractors, and physical therapists that were never mentioned in the plaintiff's disclosures or discovery responses. Many times the treatment was for the same injury or condition that was the basis of the lawsuit, and the records can usually be subpoenaed and produced.



Here are a few real-life examples of bankruptcy and judicial estoppel in action: A few years back, I defended a wrongful-discharge/breach of contract case in federal court where the plaintiff had claimed that he owned certain intellectual property of the company that fired him. The plaintiff also alleged that he was a part-owner of the business itself, and that he was owed a substantial amount for income that had never been paid to him. Discovery on the matter was equivocal. I would not have been successful on a motion for summary judgment; there probably would have been enough evidence to proceed to trial. However, I learned that, contemporaneous to bringing the civil breach of contract action, the plaintiff had filed for a Chapter 7 bankruptcy. I obtained the petition and statement of financial affairs from PACER and learned that the plaintiff did not list any business ownership interests, intellectual property, wages owed to him, or any other items indicating that he had a bona fide ownership in the business. I filed a motion to dismiss the civil case, alleging that judicial estoppel precluded him from bringing those claims when the claimed property interests had not been identified in the bankruptcy. The judge agreed and dismissed the case with prejudice.

Also, in 2005, I handled a case in which a plaintiff sued my client, claiming, in addition to personal injuries, that his $15,000 Harley-Davidson motorcycle had been totaled in a motor vehicle accident. Liability for the accident itself was contested, so my client had not yet paid any property damage settlement. When I determined that the plaintiff had filed for bankruptcy about three months prior to the accident, I learned that he had placed the motorcycle's value at only $4500 for the purposes of his bankruptcy proceeding. At mediation, this fact was brought to the plaintiff's attention and was a factor in arriving at a settlement far less than what the plaintiff originally demanded.

**Conclusion:**

Understanding basic bankruptcy law and the principles of judicial estoppel and their effect on pending civil cases is important for both plaintiff and defense attorneys who handle personal injury and employment cases as a matter of course.


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**Loren E. Weiss** has more than 38 years of experience representing individuals and companies in white collar criminal defense matters, corporate compliance and internal investigations, and complex civil litigation. Mr. Weiss joins RQ&N's Litigation Section from a local Salt Lake City firm.

**E. Blaine Rawson** joins RQ&N's Litigation Section from a regional firm in Salt Lake City. Mr. Rawson has been practicing environmental, natural resources law, and commercial litigation since 1995.

**Mark B. Durrant** joins RQ&N's Real Estate Section from a national firm with offices in Salt Lake City. He represents clients in project financing, commercial properties, and resort development projects.

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# A Primer to the New Utah Rules of Civil Procedure

*by Joe Stultz*

The Utah Supreme Court has approved a number of substantial amendments to the Utah Rules of Civil Procedure. These amendments are effective for cases filed on or after November 1, 2011. The purpose of the amendments is to achieve the just, speedy, and inexpensive determination of every action by limiting parties to discovery that is proportional to the stakes of the litigation, curbing excessive expert discovery, and requiring the early disclosure of documents, witnesses, and evidence that a party intends to offer in its case-in-chief. What follows are some of the highlights of the changes.

**Proportionality**

Under the old rules, the standard for discovery was that parties "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending litigation." Under the new rules, discovery is subject to the "standards of proportionality" and discovery and discovery requests are proportional if: (1) "the discovery is reasonable, considering the needs of the case, the amount in controversy, the complexity of the case, the parties' resources, the importance of the issues, and the importance of the discovery in resolving the issues," Utah R. Civ. P. 26(b)(2)(A); (2) "the likely benefits of the proposed discovery outweigh the burden or expense," *id.* R. 26(b)(2)(B); (3) "the discovery is consistent with the overall case management and will further the just, speedy and inexpensive determination of the case," *id.* R. 26(b)(2)(C); (4) "the discovery is not unreasonably cumulative or duplicative," *id.* R. 26(b)(2)(D); (5) "the information cannot be obtained from another source that is more convenient, less burdensome, or less expensive," *id.* R. 26(b)(2)(E); and (6) "the party seeking discovery has not had sufficient opportunity to obtain the information by discovery or otherwise, taking into account the parties' relative access to the information," *id.* R. 26(b)(2)(F). This reference and all references hereafter are to the amended Utah Rules of Civil Procedure, which are available at http://www.utcourts.gov/resources/rules/approved/. The party seeking discovery always has the burden of showing proportionality and relevance and the court may order the requesting party to bear some or all of the costs of producing the information to achieve proportionality. *See* R. 26(b)(3).

> *"The party seeking discovery always has the burden of showing proportionality and relevance and…may…bear some or all of the costs of producing information to achieve proportionality."*

**Initial Disclosures**

Initial disclosures are now required by the plaintiff within fourteen days after service of the first answer to the complaint and by the defendant within twenty-eight days after the plaintiff's first disclosure or after that defendant's appearance, whichever is later. In addition to providing the name, address, and telephone number of individuals likely to have discoverable information, a party must now also provide the expected testimony of each fact witness that the party may call in its case-in-chief, except for an adverse party. Further, the provision allowing for "a description by category and location of…all discoverable documents" has been eliminated. It is now incumbent on a party to actually produce copies of documents and other tangible things that a party may offer in its case-in-chief, except for charts and demonstrative exhibits, which fall under the pre-trial disclosure rules. *See id.* R. 26(a)(1)(B).

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**Three Tiers and Standard Discovery**

The new rules establish three tiers of cases based on the damages pled and set limits for standard fact discovery for each tier:

| Tier | Amount of Damages | Total Fact Deposition Hours | Rule 33 Interrogatories | Rule 34 Request for Production | Rule 36 Requests for Admission | Days to Complete Standard Fact Discovery |
|---|---|---|---|---|---|---|
| 1 | $50,000 or less | 3 | 0 | 5 | 5 | 120 |
| 2 | Greater than $50,000 and less than $300,000 or non-monetary relief | 15 | 10 | 10 | 10 | 180 |
| 3 | $300,000 or more | 30 | 20 | 20 | 20 | 210 |

*See id.* R. 26(c)(5).

To obtain discovery beyond these standard limits, the parties may stipulate that extraordinary discovery is necessary and proportional and that each party has reviewed and approved a discovery budget. A party may also file a motion for extraordinary discovery under similar guidelines. However, the stipulation or motion must be filed before the close of standard discovery and after reaching the limits of standard discovery. *See id.* R. 26(c).

Under the general rules of pleading, a party who claims damages but does not plead an amount shall plead that their damages are such as to qualify for a specified tier defined by Rule 26(c)(3). A pleading that qualifies for tier 1 or tier 2 discovery shall constitute a waiver of any right to recover damages above the tier limits specified in Rule 26(c)(3), unless the pleading is amended under Rule 15. *See* Utah R. Civ. P. 8(a).

Lastly, the standard discovery and new rules on initial disclosures eliminate the need for case management orders, discovery plans, and attorney planning conferences, and those requirements are removed from the rules. *See id.* R. 26(f) (eliminated by the amendments.) Only a motion to dismiss will toll the deadlines for completing fact discovery.

**Expert Testimony**

Without waiting for a discovery request, a party shall disclose a person who may be used at trial to present evidence under Rule 702 or 703 of the Utah Rules of Evidence and who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony. The party shall give: (i) the expert's name and qualifications, including a list of all publications authored within the preceding ten years, and a list of any other cases in which the expert has testified as an expert at trial or by deposition within the preceding four years; (ii) a brief summary of the opinions to which the witness is expected to testify; (iii) all data and other information that will be relied upon by the witness in forming those opinions; and (iv) the compensation to be paid for the witness's study and testimony. Regardless of the tier of the case, further discovery may be obtained from an expert witness either by deposition *or* by written report. A deposition shall not exceed four hours and the party taking the deposition shall pay the expert's reasonable hourly fees for attendance at the deposition. A report shall contain a complete statement of all opinions the expert will offer at trial and the basis and reasons for them. An expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report. *See* Utah R. Civ. P. 26(a)(4).

If a party intends to present expert-like evidence at trial from any person other than an expert witness who is retained or specially employed to provide testimony in the case or a person whose duties as an employee of the party regularly involve giving expert testimony, that party must provide a written summary of the facts and opinions to which the witness is expected to testify, and a deposition of such a witness may not exceed four hours. *See id.*

**Timing of Expert Discovery**

The party bearing the burden of proof on the issue for which expert testimony is offered shall provide the expert witness disclosure within seven days after the close of fact discovery. Within seven days thereafter, the party opposing the expert may elect either the deposition or expert report. *If no election is made, then no further discovery of the expert shall be permitted.* The deposition shall occur, or the report shall be provided, within twenty-eight days after the election is made. The party not bearing the burden of proof shall provide the expert witness disclosure within seven days after the later of (1) the date on which the deposition/written report election was made; or (2) on receipt of the written report or the taking of the expert's deposition. Within seven days thereafter, the party opposing the expert may serve notice electing either a deposition of the expert pursuant or a written report pursuant to paragraph. The deposition shall occur, or the report shall be provided, within twenty-eight days after the election is made. *See id.* R. 26(a)(4)(C).

**Pretrial Disclosures**

Without waiting for a discovery request, a party shall separately identify witnesses that the party will call and witnesses the party may call. If the witness is solely for impeachment, the party need not identify that person. Likewise, charts and demonstrative exhibits must be produced, unless they are solely for impeachment. The required disclosures shall be made at least twenty-eight days prior to trial. At least fourteen days before trial, a party shall serve and file counter-designations of deposition testimony, objections, and grounds for the objections to the use of a deposition and to the admissibility of exhibits. *See id.* R. 26(a)(5).

**Other**

The deadline for responding to interrogatories, requests for admissions, and requests for production of documents is now twenty-eight days instead of thirty days. *See* Utah R. Civ. P. 30, 33-34. There are more specific requirements for disclosure and discovery in domestic relations actions. *See id.* R. 26.1.

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## *Notice of Petition for Reinstatement to the Utah State Bar by Stony V. Olsen*

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 Petition for Reinstatement ("Petition") filed by Stony V. Olsen in *In the Matter of the Discipline of Stony V. Olsen*, Sixth Judicial District Court, Civil No. 060600383. 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.



## *Commission Highlights*

The Board of Bar Commissioners received the following reports and took the actions indicated during the August 26th and 27th Commission Meeting and Retreat held in Deer Valley, Utah.

1. The Commission approved the July 6, 2011 Commission Minutes via Consent Agenda.

2. The Commission approved Snowmass, Colorado for the 2013 Summer Convention Location.

3. The Commission approved **Tiffany Brown** as a Co-Chair of the Bar Examiner Committee; **Tracy Gruber** as a Co-Chair of the Mentor Training and Resource Committee; and **Brad Merrill, Kara Pettit,** and **David York** as members of the Commission's Budget and Finance Committee.

4. The Commission agreed to sponsor and support further development of the Bar's High School Education Project and the work of the Bar's Pro Bono Commission; and to support the concept of the proposed Books from Barristers Project.

5. Commissioners received assignments by Rod Snow to serve as chairs and members of Bar Commission committees and commissions, and as liaisons to Bar committees, sections, and local bars.

6. Commissioners were asked to contact the committees, sections, and local bars for which they serve as liaisons and were told that Bar staff would work with Rod Snow to communicate with those committees, sections, and local bars regarding the liaison assignments.

7. The Commission agreed to continue reviewing various aspects of digital and social media to communicate Bar services, public education, and public relations.

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

# A Bold Move

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Clyde Snow & Sessions welcomes D. Loren Washburn, former deputy chief of the White Collar Crime Section at the U.S. Attorney's Office for the District of Utah, and Brent R. Baker, former senior special counsel to the SEC, to the firm's Government Investigations, Corporate Compliance and White Collar Defense Group.

*White Collar Criminal Defense*

*Corporate Compliance*

*Internal Investigations*

Back Row (left to right): Sarah L. Campbell, D. Loren Washburn, Rodney G. Snow, Brent R. Baker, Jennifer Hunter (paralegal)
Front Row (left to right): Katherine E. Judd, Jennifer A. James, Anneli R. Smith, Neil A. Kaplan

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# Spring Convention in St. George


March 15-17

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**1835 Convention Center Drive**

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www.utahbar.org

**Full online Brochure/Registration will be available January 9, 2012 and in the Jan/Feb 2012 edition of the *Utah Bar Journal*.**

# 2012 "Spring Convention in St. George" Accommodations

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

| Hotel | Rate (Does not include 11.45% tax) | Block Size | Release Date | Miles from Dixie Center to Hotel |
|---|---|---|---|---|
| Ambassador Inn<br>(435) 673-7900 / ambassadorinn.net | $99 – Thurs.<br>$119 – Fri. | 10–DQ | 2/15/12 | 0.4 |
| Best Western Abbey Inn<br>(435) 652-1234 / bwabbeyinn.com | $109 | 20 | 2/15/12 | 1 |
| Budget Inn & Suites<br>(435) 673-6661 / budgetinnstgeorge.com | $95.96 | 10–DQ/Suites | 2/13/12 | 1 |
| Clarion Suites (fka Comfort Suites)<br>(435) 673-7000 / stgeorgeclarionsuites.com | $85 | 10 | 2/15/12 | 1 |
| Comfort Inn<br>(435) 628-8544 / comfortinn.com/ | $106 | 20 | 3/15/12 | 0.4 |
| Courtyard by Marriott<br>(435) 986-0555 / marriott.com/courtyard/travel.mi | $139 | 8–Q<br>7–K | 2/15/12 | 4 |
| Crystal Inn Hotel & Suites (fka Hilton)<br>(435) 688-7477 / crystalinns.com | $89<br>+$10 for poolside room | 10–Q<br>7–K | 2/15/12 | 1 |
| Fairfield Inn<br>(435) 673-6066 / marriott.com | $95 | 20–DBL<br>10–K | 2/15/12 | 0.2 |
| Green Valley Spa & Resort<br>(435) 628-8060 / greenvalleyspa.com | $99*–$220.50<br>*10% discount for a 3 night minimum stay | 10<br>1–3 bdrm condos | 2/01/12 | 5 |
| Hampton Inn<br>(435) 652-1200 / hamptoninn.net | $105 | 30–DQ | 2/09/12 | 3 |
| Hilton Garden Inn<br>(435) 634-4100 / stgeorge.hgi.com | $132–K<br>$142–2Q's | 30 | 02/17/12 | 0.1 |
| LaQuinta Inns & Suites<br>(435) 674-2664 / lq.com | $99 | 5–K | 3/01/12 | 3 |
| Lexington Hotel & Conference Center (fka Holiday Inn)<br>(435) 628-4235 / lexingtonhotels.com/property.cfm?idp=22049 | $89 | 15 | 2/21/12 | 3 |
| Ramada Inn<br>(800) 713-9435 / ramadainn.net | $89 | 20 | 2/15/12 | 3 |

Twenty-Second Annual

# Lawyers & Court Personnel Food & Winter Clothing Drive

for the Less Fortunate

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

## Selected Shelters

The Rescue Mission

Women & Children in Jeopardy Program

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

## Drop Date

December 16, 2011 • 7:30 a.m. to 6:00 p.m.

Utah Law and Justice Center – rear dock
645 South 200 East • Salt Lake City, Utah 84111

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

## Volunteers Needed

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

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

**Sponsored by the Utah State Bar**

## Thank You!

## What is Needed?

### All Types of Food

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

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

### New & Used Winter & Other Clothing

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

### New or Used Misc. for Children

- bunkbeds & mattresses
- cribs, blankets & sheets
- children's videos
- books
- stuffed animals

### Personal Care Kits

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

## *Notice of Bar Election President-Elect*

Nominations to the office of Bar President-elect are hereby solicited. Applicants for the office of President-elect must submit their notice of candidacy to the Board of Bar Commissioners by January 1st. Applicants are given time at the January Board meeting to present their views. Secret balloting for nomination by the Board to run for the office of President-elect will then commence. Any candidate receiving the Commissioners' majority votes shall be nominated to run for the office of President-elect. Balloting shall continue until two nominees are selected.

**NOTICE:** Balloting will be done electronically. Ballots will be e-mailed on or about April 1, 2012, with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15, 2012.

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

1. space for up to a 200-word campaign message plus a photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for the March/April *Bar Journal* publications are due along with completed petitions and two photographs no later than February 1st;

2. space for up to a 500-word campaign message plus a photograph on the Utah Bar Website due February 1st;

3. a set of mailing labels for candidates who wish to send a personalized letter to Utah lawyers who are eligible to vote;

4. a one-time email campaign message to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate; and

5. candidates will be given speaking time at the Spring Convention; (1) five minutes to address the Southern Utah Bar Association luncheon attendees and, (2) five minutes to address Spring Convention attendees at Saturday's General Session.

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

# Thank You

Many attorneys volunteered their time to review and grade essay answers from the July 2011 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

Paul Amann
Mark H. Anderson
Mark Astling
Justin Baer
Joseph Barrett
J. Ray Barrios
Blake Bauman
Anneliese Booher
Sara Bouley
Tiffany Brown
Heidi Buchi
Sarah Campbell
Jonathan Cavender
Gary Chrystler
Jane Clark
Commissioner Anthony Ferdon
L. Mark Ferre
Allison Fletcher
Andrea Garland
Michael Garrett
Steve Geary
Tammy Georgelas
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David Heinhold
Kelly Hill
David Hirschi
David D. Jeffs
Casey Jewkes
Christopher Jones
Lee Killian
Ben Kotter
Karen Kreeck
Joanna Landau
Catherine M. Larson
Susan Lawrence
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Greg Lindley
Amy Livingston
Michael Lowe
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Doug Monson
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Michael F. Olmstead
Todd Olsen
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Briant Platt
Josh Player
Katherine Reymann
Chalyse Roothoff
Mandy Rose
Keven Rowe
Scott Sabey
Stephanie Saperstein
Melanie Serassio
John Sheaffer
Summer Shelton
Paul Simonson
Daniel Simpson
Leslie Slaugh
Terry Spencer
Alan Stewart
Charles Stormont
Nathaniel Swift
Heather Thuet
Steve Tingey
Ann Tolley
Paul Tonks
Billy Walker
David Walsh
Jason Wilcox
James F. Wood
Michelle Young

## *Notice of Bar Commission Election Third, Fourth, & Fifth Divisions*

Nominations to the office of Bar Commissioner are hereby solicited for two members from the Third Division, one member from the Fourth Division, and one member from the Fifth Division, each to serve a three-year term. To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar.

Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Nominating petitions may be obtained from the Utah State Bar website www.utahbar.org. Completed petitions must be received no later than February 1, 2012, by 5:00 p.m.

**NOTICE:** Balloting will be done electronically. Ballots will be e-mailed on or about April 1st with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15th.

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

1. space for up to a 200-word campaign message plus a photograph in the March/April issue of the *Utah Bar Journal*. The space may be used for biographical information, platform or other election promotion. Campaign messages for the March/April *Bar Journal* publications are due along with completed petitions and two photographs no later than February 1st;

2. space for up to a 500-word campaign message plus a photograph on the Utah Bar Website due February 1st;

3. a set of mailing labels for candidates who wish to send a personalized letter to the lawyers in their division who are eligible to vote; and

4. a one-time email campaign message to be sent by the Bar. Campaign message will be sent by the Bar within three business days of receipt from the candidate.

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

SOUTHERN UTAH BAR ASSOCIATION

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# *Pro Bono Honor Roll*

Allen Sims – Domestic Case

April Hollingsworth – Guadalupe Clinic

Bibiana Ochoa – Immigration Clinic

Brent Hall – Family Law Clinic, Domestic Case

Brian W. Steffensen – Debtor's Clinic

Bryan Bryner – Guadalupe Clinic

Candice Pitcher – Rainbow Law Clinic

Christopher Eggert – Domestic Case

Christopher Wharton – Rainbow Law Clinic

Courtney Klekas – Domestic Case

Daniel Burton – Bankruptcy Hotline

Daniel Robison – Bankruptcy Case

David Peterson – Debtor's Clinic, Family Law Clinic

David Wilding – Family Law Clinic

Deb Badger – Domestic Case

Denise Dalton – Family Law Clinic

Dixie Jackson – Family Law Clinic

Emily E. Lewis – Guadalupe Clinic

Eric Paulson – Domestic Case

Esperanza Granados – Immigration Clinic

Francisco Roman – Immigration Clinic

Garth Heiner – Guadalupe Clinic

Gracelyn Bennet – Bankruptcy Hotline

Heather Tanana – Guadalupe Clinic

James Shinault – Domestic Case

Jana Tibbitts – Family Law Clinic

Jason Grant – Family Law Clinic

Jason Kane – Bankruptcy Hotline

Jeffrey Aldous – Domestic Case

Jeffry Gittins – Guadaulpe Clinic

Jeremy McCullough – Bankruptcy Case

Jerry D. Reynolds – Domestic Case

Jesse Nix – Rainbow Law Clinic

John C. Heath – LL/Tenant Case

Jonathan Benson – Immigration Clinic

Jory Trease – Debtor's Clinic

Judith LC Ledkins – Family Law Clinic

Karen Allen – Rosevelt Legal Clinic

Kass Harstad – Guadalupe Clinic

Ken Prigmore – Domestic Case

Kerry Willets – Bankruptcy Case

Kyle Fielding – Guadalupe Clinic

Langdon Fisher – Family Law Clinic

Lauren Barros – Rainbow Law Clinic

Lauren Scholnick – Guadalupe Clinic

Linda F. Smith – Family Law Clinic

Louise Knauer – Family Law Clinic

Maria Saenz – Immigration Clinic

Mary Z. Silverzweig – Bankruptcy Hotline

Melanie Hopkinson – Family Law Clinic

Michael Melzer – Family Law Clinic

Nicholle Beringer – Bankruptcy Hotline

Philip Jones – Bankruptcy Case

Rachel Otto – Guadalupe Clinic

Robert Froerer – Domestic Case

Roberto Culas – Domestic Case

Russell Yauney – Family Law Clinic, Debtor's Clinic

Ryan Oldroyd – Immigration Clinic

Sarah Hardy – Domestic Case

Scott Thorpe – Bankruptcy Case

Shauna O'Neil – Family Law Clinic, Bankruptcy Hotline, Debtor's Clinic

Shawn Foster – Immigration Clinic

Shellie Flett – Bankruptcy Hotline, Bankruptcy Case

Skyler Anderson – Immigration Clinic

Stacey Schmidt – Domestic Case

Stacy McNeill – Guadaulpe Clinic

Stephen Knowlton – Family Law Clinic

Steve Stewart – Guadaulpe Clinic

Stewart Ralphs – Family Law Clinic

Susan Griffith – Family Law Clinic

Tadd Dietz – Guadalupe Clinic

Tiffany Panos – Family Law Clinic, Guadalupe Clinic

Todd Anderson – LL/Tenant Case

Tracey M. Watson – Family Law Clinic

Tyler Waltman – Guadalupe Clinic

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in August and September of 2011. Call C. Sue Crismon at (801) 924-3376 if you would like to volunteer.


*The New Lawyer Training Program and Utah Bar CLE presents:*

# An Introduction to the Courtroom from the Bench and the Bar

## *For New Attorneys & Their Mentors*

**Wednesday, Dec. 7, 2011**
**3:30–5:00 pm**

Courtroom of
Judge Kate Toomey
Matheson Courthouse
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Courtroom South 34

Join **DISTRICT JUDGE KATE TOOMEY**, her courtroom staff, and experienced trial lawyers **RICHARD BURBIDGE** and **FRANK CARNEY** to learn all about courtroom protocol and how to avoid those embarrassing "newbie" mistakes.

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## UTAH FELLOWS OF THE AAML

# Twentieth Annual Seminar – Special Problems in Divorce

Co-sponsored by the Family Law Section of the Utah State Bar
Friday, December 2, 2011 – 7:15 am to 5:00 pm | Saturday, December 3, 2011 – 8:00 am to 11:00 am
Law and Justice Center, 645 South 200 East, Salt Lake City, Utah

## FRIDAY, DECEMBER 2, 2011

| | |
|---|---|
| 7:15–7:45 am | Check-in |
| 7:45–8:00 am | Introduction: David S. Dolowitz |
| 8:00–9:00 am | **Successful Approaches to Mediation:** Thomas W. Wolfrum |
| 9:00–10:00 am | **Panel Discussion on Preparing for Mediation:** Karin S. Hobbs, Lisa A. Jones, Anne A. Cameron, James M. Hunnicutt, and Mary O'Donnell |
| 10:00–10:15 am | Break |
| 10:15–10:45 am | **Tax Update and Strategies:** David S. Dolowitz |
| 10:45–11:30 am | **URCP 26.1 and Other Rule Changes:** Hon. Todd M. Shaughnessy |
| 11:30 am–12:00 pm | **CESC Interactive – How Is It Working?:** Dr. Monica D. Christy |
| 12:00–12:45 pm | Lunch (provided) |
| 12:45–2:00 pm | **GPS and Cell Phone Evidence:** Todd Gabler |
| 2:00–3:15 pm | **Cross-Examination Without Discovery:** Roger J. Dodd |
| 3:15–3:30 pm | Break |
| 3:30–4:15 pm | **E-Discovery:** Todd Gabler |
| 4:15–5:00 pm | **Hot Tips** (Utah Fellows) Neil B. Crist, Bert L. Dart, David S. Dolowitz, Sharon A. Donovan, Louise T. Knauer, Brian R. Florence, Frederick N. Green, Larry E. Jones, Kent M. Kasting, A. Howard Lundgren, Ellen M. Maycock, Sally B. McMinimee, Don R. Peterson, Dena C. Sarandos, Clark W. Sessions, John D. Sheaffer, Jr., and Brent D. Young |

## SATURDAY, DECEMBER 3, 2011

| | |
|---|---|
| 8:00–11:00 am | **Ethics in Mediation – the Advocate, the Client, and the Mediator:** Frederick N. Green |

## REGISTRATION FORM:

Name:_____ Email:_____

Phone No.:_____ Bar No.:_____

Please mail this registration form with a check made out to the Utah Fellows in the amount of $220.00 to:

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299 South Main St., Suite 1300
Salt Lake City, Utah 84111

**11 CLE hours, including 3 hours of ethics (including 1 hour of professionalism and civility) on Saturday.**

Fee includes lunch on Friday and booklet. If you have questions please feel free to call Barbara at 801-535-4344 for any additional information. Thank you.

# *Utah State Bar Ethics Advisory Opinion Committee Opinion Number 11-01 – Issued August 24, 2011*

**ISSUE**

Two interrelated issues are before the Committee: First, may an attorney representing a plaintiff in a personal injury action indemnify and hold harmless a party being released from any medical expenses and/or liens which might remain unpaid after the settlement funds are fully disbursed? Second, in a personal injury action, may an attorney request another attorney to indemnify and hold harmless a party being released from any medical expenses and/or liens which might remain unpaid after the settlement funds are fully disbursed?

**OPINION**

It is a violation of the Utah Rules of Professional Conduct and improper for a plaintiff's or claimant's lawyer to personally agree to indemnify the opposing party from any and all claims by third persons to the settlement funds. As it is professional misconduct for a lawyer to "knowingly assist or induce" another lawyer to violate the Utah Rules of Professional Conduct, it is improper for a lawyer to request a plaintiff's or claimant's attorney to indemnify or hold harmless a party being released from third party claims which may remain unpaid after the settlement funds are fully disbursed.

**BACKGROUND**

It has become an increasingly prevalent practice in Utah in recent years, as it has in other states, for lawyers representing plaintiffs to be asked to indemnify the opposing party and counsel from any and all claims by third persons to the settlement proceeds. This obviously arises most commonly, but not necessarily always, in personal injury actions where third party providers of medical services have colorable claims upon the funds derived from settlement of the claimant's cause of action against a tort-feasor, usually, but not necessarily always, involving settlement funds provided by an insurer.

**ANALYSIS**

Although these specific issues have not previously come before this Committee, it has the benefit of opinions from several other states which have thoroughly analyzed the questions.[1] All have come to essentially the same conclusion the Committee has reached in this Opinion.

The Committee begins its analysis by discussing, at some length, a lawyer's duty with respect to property held for clients or third parties. It should be clearly understood that this discussion is essentially for background purposes. This Opinion is in no way contingent upon whether a third party actually has a matured equitable or legal claim interest sufficient to trigger the duties stated in Utah Rule of Professional Conduct 1.15.

The general duty of a lawyer toward clients and third parties is set forth in Utah Rule of Professional Conduct 1.15, which states as follows:

> (a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person. The account may only be maintained in a financial institution that agrees to report to the Office of Professional Conduct in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

The Committee has previously dealt with the question of a lawyer's ethical duties to a third person who claims an interest in proceeds of a personal injury settlement or award received by the lawyer.[2] That Opinion observed that Rule 1.15 of the Utah Rules of Professional Conduct specifically addresses a lawyer's duties when safekeeping property for clients or third persons. The current version of Rule 1.15(a) has been re-stated, *see supra*. However,

the pertinent portion thereof, to which Opinion 00-04 addresses itself, then Rule 1.15(b), has not. That provision of the Rule is now delineated as Rule 1.15(d), which states as follows:

> (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.[3]

In respect to this provision, Opinion 00-04 states as follows:

> When a lawyer receives funds or property and knows a third person claims an interest in the funds or property, the lawyer must first determine whether the third person has a sufficient interest to trigger the duties stated in Rule 1.15(b) [the identical language is now set forth in the current subsection 1.15(d)]. Only a matured legal or equitable claim – such as a valid assignment, a judgment lien, or a statutory lien – constitutes an interest within the meaning of Rule 1.15 so as to trigger duties to third persons under Rule 1.15. If no such interest exists, the lawyer may disburse the funds or property to the client. If such an interest exists, the lawyer must comply with the duties stated in Rule 1.15. Where the client does not have a good-faith basis to dispute the third person's interest, the lawyer must promptly notify the third person, promptly disburse any funds or property to the third person to which that person is entitled, and render a full accounting when requested. If the client has a good-faith basis to dispute the third person's interest, and instructs the lawyer not to disburse the funds or property to the third person, the lawyer must promptly notify the third person that the lawyer has received the funds or property and then must protect the funds or property until the dispute is resolved.[4]

Not all third party claims stand on the same footing. Only specific third party claims are entitled to be paid from settlement funds. Opinion 00-04 describes those types of third party claims which rise to the level of matured legal or equitable claims, thus triggering a lawyer's duties to third persons. Notwithstanding the fact that Rule 1.15 has been redrafted since that Opinion was issued,

## *Applicants Sought for First, Second, Sixth and Seventh District Trial Court Nominating Commissions*

The Bar is seeking applications from lawyers to serve on the Trial Court Nominating Commissions in the First, Second, Sixth, and Seventh Judicial Districts. The Commissions nominate judges to fill vacancies on the district court and the juvenile court within the districts. Two lawyers are appointed by the Governor in the Second District from a list of six nominees provided by the Bar. Two lawyers are appointed by the Governor in the First, Sixth, and Seventh Districts from a list of four nominees for each district provided by the Bar.

Commissioners must be citizens of the United States and residents of the district for which they seek to be nominated:

First District – Box Elder, Cache, and Rich Counties

Second District – Davis, Morgan, and Weber Counties

Sixth District – Sanpete, Sevier, Piute, Wayne, Garfield, and Kane Counties

Seventh District – Carbon, Emery, Grand, and San Juan Counties

Commissioners are appointed for one term of four years and may not serve successive terms. No more than four of the seven members of the nominating commission may be of the same political party. **You must identify your political affiliation if you are registered with a political party or indicate if you are not registered with a party and are independent.**

Submit resumes to John C. Baldwin, Executive Director, by e-mail at john.baldwin@utahbar.org, or by mail at 645 South 200 East, Salt Lake City, UT 84111. **Resumes must be received by Friday, November 25, 2011.**

neither the substance of the rule nor the analysis of the issue set forth therein has changed. An attorney grappling with a question as to whether a third party claim triggers such duties is advised to carefully review Opinion 00-04.[5] Furthermore, the important question of what level of knowledge a lawyer must have of the existence of third party claims is dealt with as follows:

Rule 1.15(b) does not specify what level of belief or knowledge a lawyer must have to impose the duties specified in the rule. We agree with the analysis of the State Bar of Arizona that a lawyer must have actual knowledge of a third party's interest before acting under Rule 1.15(b). *See* Arizona Ethics Op. 98-06 (Ariz. St. Bar June 3, 1998), www.azbar.org/ethicsopinions (level of cognition must be inferred when not specified; comments to Rule 1.15(b) concerning "just claims," and lawyer's "duty under applicable law to protect" third-party claims, and lawyer's obligation not to "unilaterally assume to arbitrate" matters between client and third party strongly infer that a lawyer must have actual knowledge of a third party's interest before acting). Under the Rules of Professional Conduct, "knowingly," "known," or "knows" "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances." Utah Rules of Professional Conduct, Preamble, comment.[6]

If a dispute arises as to entitlement to any portion of funds held by a lawyer, Rule 1.15 addresses that issue[7] in the following subsection:

> (e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

For purposes of this Opinion, suffice it to say that a lawyer's ethical duty is to protect a third person's lawful interest of which the lawyer has actual knowledge and the lawful interest must be in specific funds in the lawyer's custody and control.

With this general background regarding a lawyer's duties to third persons in relation to funds or property held by the lawyer, the primary question posed is whether a lawyer may be required to indemnify an opposing party against claims of potential but unknown third parties. As one recent prominent ethics opinion on this issue has stated,

> A personal agreement by a lawyer to indemnify the opposing party from any and all claims is distinct from an agreement by a client, or the lawyer on

> behalf of the client, guaranteeing payment of lawful claims from the funds in the lawyer's possession.
>
> Such a personal indemnification agreement by a lawyer is, in essence, an agreement by the lawyer to provide financial assistance to the client. The lawyer is undertaking an obligation to pay the client's bills. This is unethical for several reasons.[8]

The referenced Ohio opinion cites Ohio Rule of Professional Conduct 1.8(e), which is substantially the same as Utah Rule of Professional Conduct 1.8(e). Utah's Rule 1.8(e) states as follows:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
>
> (e)(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (e)(2) a lawyer representing an indigent client may pay court costs and expenses of litigation, and minor expenses reasonably connected to the litigation, on behalf of the client.

The Committee is therefore in accord with Ohio's opinion, which is consistent in substance with virtually all of the opinions referenced in footnote 1, *supra*, that neither of these exceptions applies to the issue at hand,[9] and therefore such an indemnification agreement on the part of a claimant's lawyer constitutes a violation of Rule 1.8(e).

The tension created between the lawyer, who wishes to obtain the best possible settlement for his client without putting herself personally on the line to the client's creditors, and client who may desperately want and need the settlement proceeds after what may be many months and perhaps years of litigation and/or negotiation, is simply untenable. The lawyer's interest in avoiding potential liability in an unknown amount to an unknown third party is pitted against the client's need to achieve settlement and receive funds. This poses a clear concurrent conflict of interest in violation of Utah Rule of Professional Conduct 1.7(a)(2), which states,

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> ....
>
> (a)(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

In the circumstances presented, there is a "significant risk" that the representation of a client would be "materially limited" by the lawyer's perceived responsibilities to a third person as well as by a personal interest of the lawyer. And, the Committee again concurs in the words of the Ohio Opinion, that, "(e)ven if this conflict of interest could be ameliorated under (Utah's) Rule of Professional Conduct 1.7(b), the agreement still would be improper under (Utah's) Rules 1.15 and 1.8(e) as discussed, *supra*."[10] The further observation that this Committee would make is that, because a lawyer's duty to a third party under the Rule is not distinguishable from a lawyer's duty to his or her client, it is the sense of the Committee that "informed consent" via Rule 1.7(b) would be very difficult to achieve as a practical matter, where a third party claim and a client's claim stand in pari materia, as a third party claim to specific funds carries the same weight in relation to the lawyer's duty as a lawyer's duty to his client.

Lastly, with respect to the second question put to the Committee, the Utah Rule of Professional Conduct 8.4 states that It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

As discussed previously, a plaintiff's or claimant's lawyer, on behalf of the client, may not agree to personally and generally indemnify the opposing party and his lawyer against all unpaid liens and medical expenses without violating Rules 1.7(b) and 1.8(e). Rule 8.4(a) provides that is an ethical violation for any lawyer to "induce another" to "violate the Rules of Professional Conduct." As such, the conclusion cannot be avoided that a lawyer cannot require or ask opposing counsel to agree to generally indemnify as a condition of settlement since that would constitute inducing and assisting another to violate the Rules of Professional Conduct.

**CONCLUSION**

It is a violation of the Utah Rules of Professional Conduct 1.7(a), 1.8(e) for a plaintiff's or claimant's lawyer to personally agree to indemnify an opposing party from any and all claims by third persons to settlement funds. It is professional misconduct for a lawyer to "knowingly assist or induce" another lawyer to violate the Utah Rules of Professional Conduct pursuant to Utah Rule of Professional Conduct 8.4(e). It is therefore improper for a lawyer to request or demand that a plaintiff's or claimant's attorney indemnify or hold harmless a party being released from third party claims which may remain unpaid after the settlement funds are fully disbursed.

1. Alabama State Bar, Office of General Counsel Formal Opinions, RO 2011-01 [lawyer many not indemnify opposing party, their insurer, or their lawyer for any unpaid liens

or medical expenses, nor may a lawyer request or require another lawyer to personally indemnify the lawyer's client against any unpaid liens or medical expenses as condition of settlement, citing Rules 1.7, 1.8, 8.4(a)]; OH Adv. Op. 2011-1, 2011 WL 572428 (Ohio Bd. Com. Griev. Disp.) [*See* discussion, *infra*]; State Bar of Wisconsin, O. E-87-11 ["inclusion of such indemnification and hold harmless provisions in settlement agreements is improper" under both the Code of Professional Responsibility and the Rules of Professional Conduct for Attorneys. "Accordingly, lawyers may not propose, demand or enter into such agreements."]; The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Op. 2010-03 [Plaintiff's counsel may not agree to hold defendant harmless from claims arising out of defendant's payment of settlement consideration and defendant's counsel may not ask plaintiff's counsel to provide such financial assistance, citing Rules 1.2(a), 1.7(a), 1.8(e), 1.15(c), 1.16(b), 8.4(a)]; Tennessee Sup Ct, Board of Professional Responsibility, Op. 2010-F-154 (2010) ["an attorney cannot ethically agree to such agreements and/or clauses," citing Rules 1.7(b), 2.1, 1.2 and 1.8(e)]; Missouri Sup Ct, Advisory Committee, Op. 125 (2008) ["[b]ecause an attorney who agrees to indemnify an opposing party will violate Rule 4-1.8(e), it is a violation for another attorney to request or demand that an attorney enter into such an agreement. The second attorney would violate Rule 4-8.4."]; Illinois State Bar Assn., Op. 06-01 (2006) [such an agreement constitutes the provision of financial assistance in violation of Rule 1.8(d) of the Illinois Rules of Professional Conduct. The opinion did not address whether it would also violate Rule 1.7(b)]; Indiana State Bar Assn., Op. 1 (2005) [The practice violates Rule 1.2(a), 1.7(a)(2), 1.8(e), 2.1 (a), 1.16, 1.15(d)]; State Bar of Arizona, Op. 03-05 (2003) [such agreements would violate Arizona Rules of Professional Conduct, ER 1.7, 2.1, 1.8, 1.16(a).]; Kansas Bar Assn., Op. 01-5 (2001) [signing such an agreement places the lawyer in a position where he or she creates a conflict of interest between the client and the insurance company and insured, and/or the lawyer's own interests."]; North Carolina State Bar Assn. Op. 228 (1996) [A lawyer for a personal injury client who executes an agreement to indemnify the tort-feasor's liability insurance carrier against the unpaid liens of medical providers as part of the settlement of the client's claims violates (then) Rule 5.1(b) of the North Carolina Rules of Professional Conduct.]

2. UT Eth. Op. 00-04 (Utah St. Bar), 2000 WL 815564 (Utah St. Bar).

3. *Id.*, ¶ 2.

4. *Id.*, ¶ 2.

5. Professors Hazard and Hodes have analyzed the significance of this comment (*see* current Comment 4 to Rule 1.15, which incorporates the gist of the then existing Comment to which this refers) as follows:

> The fact that a third party "expects" funds held by the lawyer to be the source of payment would not justify a lawyer's refusal to obey the instructions of his client to turn over the entire amount. The Comment to Rule 1.15 uses the phrases "just claims" and "duty under applicable law" to suggest that the third party must have a matured legal or equitable claim in order to qualify for special protection. Only in such cases may it be said that failure to recognize the third party interest is a species of fraud upon creditors or fraud upon the rendering court. (footnote omitted)

Only those claims that rise to the level of a "matured legal or equitable claim" constitute an "interest" and trigger the duties owed under Rule 1.15. For example, a valid assignment of the funds in question could be such a claim. Certainly, a statutory or judgment lien that attaches to the specific property or funds in question or a court order requiring that the specific property or funds be turned over to the third party is such an interest. A lawyer's knowledge that the client owes bills, even if the lawyer knows that the creditor expects to be paid out of the proceeds of a settlement or judgment, does not give rise to such duties unless the creditor has an interest in the proceeds within the meaning of Rule 1.15. *See id.*, ¶ 3.

6. *Id.*, n.3.

7. Nothing stated in this Opinion is intended to lead an attorney to the conclusion the she is relieved from any reporting or payment obligations imposed by the Medicare Secondary Payer Act, 42 U.S.C. §1395. *See* Tennessee Sup Ct, Board of Professional Responsibility, Op. 2010-F-154 (2010), *supra*, cited herein at n.1, for a detailed discussion of the statute, regulations and obligations thereunder.

8. OH Adv. Op. 2011-1, *supra*, cited at n.1.

9. *See id.*

10. *Id.*

# 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 July 28, 2011, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.15(a) (Safekeeping Property) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

*In summary:*
The attorney failed to maintain the client trust account where the funds were kept separate or clearly identified at all times. The attorney's conduct was negligent. There was little to no injury.

*Mitigating factors:*
Personal or emotional problems; Cooperative attitude toward proceedings; Substance abuse.

**ADMONITION**
On July 28, 2011, 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 8.4(d) (Misconduct) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

*In summary:*
The attorney charged a client for representation after the attorney had been appointed to represent the client because the client was indigent. The attorney failed to file a Motion to Withdraw once the attorney discovered that the client was no longer indigent. The attorney's conduct was negligent. The injury caused by the attorney's conduct was minimal.

*Mitigating factors:*
Absence of prior record; Imposition of other penalties or sanctions; Belief by attorney that filing client Affidavit of Indigency would cause him to reveal confidential client communications and expose the client to possible criminal charges.

**ADMONITION**
On June 30, 2011, 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 1.1 (Competence), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

*In summary:*
The attorney sought an ex-parte temporary restraining order to stop a trustee's sale that was scheduled to take place the next day. The court determined that the motion was facially defective, since it did not certify in writing what efforts the attorney had made to contact opposing counsel and did not include an affidavit or verified complaint addressing how the plaintiff might suffer irreparable injury before a hearing could be held. The judge denied the motion without prejudice so that the attorney could correct its deficiencies and issued a written order shortly after reading the motion describing its defects.

After receiving the ruling the attorney attempted to give notice to the defendant by faxing the motion and memorandum to the office and to another attorney's office; although the attorney was not sure whether the other attorney was representing the defendant. The attorney attempted to contact the other attorney by phone but was unable to reach the other attorney. The attorney was unable to fax the documents to the other attorney but eventually was able to send them by email.

The evening before the attorney sent an email to the opposing attorney advising that opposing attorney that the attorney had filed a motion for a TRO and per the judge's request, "I sent notice to you and advised you that you will have an opportunity to be heard on" a set date and time. No hearing had, in fact, been set for that day and time. The opposing attorney received the email message regarding the purported hearing and both attorneys were at the courthouse the following morning. The attorney did not provide the court a certificate describing his efforts of the preceding evening to provide notice to the opposing attorney but did file a verified copy of the complaint that morning.

The attorney stated that they did not intend that this be a full

hearing but simply a chance for the attorney to talk to the court in the presence of opposing counsel to clarify what the attorney should do to perfect the motion. The attorney believed, based on what the court clerk said, that the attorney could discuss the matter with the court the next day if opposing counsel was present.

**PUBLIC REPRIMAND**

On July 8, 2011, the Honorable Tyrone E. Medley, Third District Court, entered an Order of Discipline: Public Reprimand against Jared L. Bramwell, for violation of Rules 1.5(a) (Fees), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

*In summary:*

Mr. Bramwell was hired to represent a client in pending civil matters. Opposing counsel, in one of the cases filed a Motion for Prejudgment Writ of Attachment ("Motion") and supporting Memorandum. Mr. Bramwell filed a Memorandum in Opposition to Plaintiff's Motion for Prejudgment Writ of Attachment. Judge Robert P. Faust heard argument on the Motion. Judge Faust ruled as follows:

> "After reviewing the file and now being fully informed, the court grants the motion for the prejudgment writ of attachment against the [client's] Utah house only. The prejudgment writ of attachment is NOT against their house in Texas. The house can be sold, but the proceeds must be held in an account in Utah and cannot be distributed."

Opposing counsel mailed Mr. Bramwell a proposed Order documenting Judge Faust's ruling. Opposing counsel mailed a Prejudgment Writ of Attachment ("Writ") to Mr. Bramwell stating what Judge Faust had ruled. A Trust Deed between Jared Bramwell and the client was recorded in Salt Lake County. The stated purpose of the Trust Deed was to: (a) secure payment of attorney's fees, costs and interest in the principal sum of $500,000.00; and (b) to secure indebtedness evidenced by an attorney retainer agreement between Mr. Bramwell and the client. At the time Mr. Bramwell recorded the Trust Deed he was not owed $500,000 in attorneys fees. At most, at the time the Trust Deed was recorded, the client owed Mr. Bramwell and his firm less than $75,000. Mr. Bramwell did not send notice to opposing counsel or to the Court that the Trust Deed had been recorded. Mr. Bramwell executed and recorded the Trust Deed without notice to the opposing counsel, and during the time period after the Court had issued its ruling but before the Order had been signed. Partly because of Mr. Bramwell's actions with respect to the Trust Deed, the

Court held a two-day Contempt Hearing, but declined to hold Mr. Bramwell in contempt.

**DISBARMENT**

On August 1, 2011, the Honorable L.A. Dever, Third District Court, entered Findings of Fact, Conclusions of law, and Order of Disbarment against Thomas V. Rasmussen for previously violating the Court's Order of Sanction. Mr. Rasmussen has appealed the sanction to the Utah Supreme Court.

*In summary:*

A Sanction Order was issued by the Court on July 21, 2010. The Order provided that Rasmussen was suspended for one year with all but 181 days suspended. Pursuant to Rule 14-526(a) of the Rules of Discipline and Disability, the effective date was thirty days later on August 20, 2010. The thirty-day period provided by the Rule is to allow Mr. Rasmussen the time to wind down his practice and cease representing clients.

Mr. Rasmussen continued to practice beyond the August 20th deadline. During the period of suspension Rasmussen made thirty-six appearances in seventeen courts. There were eleven cases where Rasmussen entered an appearance on the case after the effective date of his suspension and there were nine cases where he appeared where charges were not even filed against his clients until after the effective date of his suspension. This establishes Mr. Rasmussen was taking on new matters during his suspension.

Rasmussen filed with the Court an affidavit stating that during the period of suspension he had not practiced law. The affidavit was not truthful.

Rasmussen stated in Court that he violated the suspension Order. His position was that because he needed money he had to violate the Order and practice law.

**RESIGNATION WITH DISCIPLINE PENDING**

On July 14, 2011, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Gary W. Nielsen for violation of Rules 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

*In summary:*

On March 22, 2010, Mr. Nielsen entered a guilty plea to one count of Theft, a second degree felony. Mr. Nielsen was sentenced to one year in the Summit County Jail with six years probation with Adult Probation and Parole, restitution in the amount of $346,248.58, and to not practice law in the State of Utah without the approval of the Utah State Bar.

**SUSPENSION**

On August 8, 2011, the Honorable Kate A. Toomey, Third District Court, entered Findings of Fact, Conclusions of Law, and Order of two-year suspension against John McCoy, for violation of Rules 1.15(a) (Safekeeping Property), 1.15(c) (Safekeeping Property), 8.1(d) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

*In summary:*

Mr. McCoy did not promptly withdraw earned fees from the trust account and therefore some portion of the money in the trust account belonged to him. By failing to promptly withdraw his earned fees from his trust account, he commingled his funds with client funds. Mr. McCoy had a line of credit attached to the trust account that initiated regular and automatic withdrawals in the amount of $25 per month from his trust account. Such an arrangement is improper. Mr. McCoy did not eliminate the automatic "ready credit" withdrawals until after he had appeared before a Screening Panel of the Ethics and Discipline Committee of the Utah Supreme Court.

In December 2008, Mr. McCoy issued a check written against his trust account. On January 29, 2009, there were insufficient funds in the trust account to cover a check Mr. McCoy wrote against the account. Funds belonging to his clients were used to pay monthly automatic loan withdrawals and to pay the fee for the check written against insufficient funds. Mr. McCoy failed to maintain complete account records for the funds in his trust account. There are no trust account ledgers and no client ledgers, and relying on the bank statements is insufficient because they do not provide sufficient information to appropriately manage the trust account.

Mr. McCoy suffered a near-catastrophic injury on January 5, 2009, that rendered him at least partially incapacitated for weeks. Mr. McCoy failed to respond to three demands for information from the OPC. His lack of initial response to the bank notice may be explained to some extent by his January injury, but by the time the OPC contacted him in February, he had returned to work, and by July, Mr. McCoy could have provided additional information, but did not.

*Aggravating factors:*

Prior record of discipline, multiple offenses, obstruction of the discipline proceedings, refusal to acknowledge the wrongful nature of the misconduct, substantial experience in the practice of law, and lack of a good faith effort to rectify the consequences of the misconduct.

*Mitigating factors:*

Lack of dishonest or selfish motive, good reputation in the legal community.

# 5 Reasons for Taking the CP Exam

*by Joelle Taylor*

Take a moment and ask yourself a very important career question, "Why have I not taken NALA's Certified Paralegal exam?" NALA's voluntary Certified Paralegal/Certified Legal Assistant exam is a nationally recognized exam that tests the skills and knowledge of paralegals through five sections for the federal system and laws including Communications, Ethics, Legal Research, Judgment & Analytical Ability, and Substantive Law. The Substantive Law section is further divided into five subsections. The examinee must take General Law and chooses four out of nine available legal subject. The available choices are Litigation, Criminal, Family, Estate Planning/Probate, Administrative, Bankruptcy, Contracts, Business Organization, and Real Estate. NALA reviews the test questions regularly and updates them to fit new laws.

Here are some discouraging and outdated reasons people have used to delay taking the test:

1. Inconvenient Testing Time
2. Limited Testing Sites
3. Cost
4. Specialized Practice Area
5. Extensive Study

Well, I have great news! As of September 2010, NALA has updated the test to help more paralegals take the exam and overcome some of the above excuses. This update includes changing the testing delivery from paper-pencil to computerized format and publishing the most recent edition of the CP Review Manual. This third edition was published in October 2010 to incorporate new laws and procedural updates from the last twelve years. These changes to the manual and to the test will facilitate easy test taking and limit many obstacles for the busy working person. The content of the test did not change, but NALA did remove the questions on the Judgment & Analytical section, so only an essay remains that concentrates on the person's writing skills.

**CONVENIENT TESTING TIMES**

In addition to the move to computers, NALA has opened the testing window from a two-day period, three times per year to an entire month occurring three sessions per year. The testing windows are now scheduled from January 1st–31st, May 1st–31st, and September 1st–30th. The examinee has two years to successfully complete the exam before NALA requires a new exam fee and application. This schedule gives more flexibility and control to the examinee and allows him or her to choose a manageable timetable to fit with personal and employment obligations. The former paper-pencil method crammed eight hours of testing plus travel, breaks, and lunch into two days and the examinee walked away as a temporary zombie drained of all emotions, desires, and thoughts until the brain could reboot. Now, the examinee can sit for each of the five test sections, at a time and location that is convenient to them, which can be a minimum three-day period, over four weeks, or over multiple testing windows giving time for family or community events. Spreading out the sections also will allow an individual to focus on a particular topic, take that test, have a few days rest, then repeat with the next subject until, voilà, the test is done and you can still function as a human being.

*JOELLE TAYLOR is a certified paralegal at the Law Office of Lou Gehrig Harris, Inc. She handles debtor side bankruptcy and manages the office. She received her associate of applied science degree in paralegal studies in August 2008 and passed the NALA Certified Paralegal exam in January 2009.*

**MORE TESTING LOCATIONS**

With the expanded testing windows, NALA requires the test be proctored at ACT Testing Centers or other approved sites. This change opens over 200 locations and allows paralegals in more remote areas or with low number of examinees to test without traveling out of state. However, not all ACT Testing Centers are easily accessible. Utah has locations in Sandy and Monticello. If the testing center is not in a convenient location, the individual can take the test in another state or there are options for other testing sites. Law firms and schools can apply to be testing sites with NALA for no cost. A few of the requirements to be a testing center include solid internet connection, available computers, and two proctors. All requirements are listed at www.nala.org. Persons interested in becoming a proctor have a separate application at no cost. Proctors can be attorneys, certified paralegals, HR managers, or paralegal program directors or teachers.

**COST OF EXAM**

With the computerized overhaul, cost to NALA for the test would be expected to increase, however NALA kept the exam fees the same. The total cost of taking the test may increase. The ACT Testing Centers and other approved sites are allowed to charge for each subject scheduled at its location. Here are some tips on how to lower your additional costs:

**Buy Second-Hand**

The published resources may be found online or at college bookstores at a discount. These resources include Virginia Koerselman Newman, *Certified Paralegal Exam Review Manual* (3rd Ed. 2010); *Certified Paralegal – Mock Examination and Study Guide* (4th Ed. 2005); and William Strunk, Jr. & E.B. White, *The Elements of Style* (4th Ed. 1999). Other materials can be useful and most can be found at a public library at no cost. The local paralegal associations may have information on anyone looking to sell his or her materials. In addition, if your employer has a law library, the materials may be available for your use.

**Fees Waived for Military**

NALA provides a waiver of the test fees under available G.I. Bills if you or your spouse is a member of the military. Details are provided at NALA's website, www.nala.org and included in the application form.

**Request Employment or School Become a Testing Site**

The approved testing sites may choose to charge each test taker or not charge. The sites also can choose to have the test available to certain groups or open to the public. So, if you are a student or a paralegal, talk to your supervisor about having your school or firm become a testing site. Each site needs two proctors who must apply to NALA for approval and also may choose to charge fees. Any choices the applicant makes are included at the submission of the application. The application process is easy and there is no cost to apply. The approved ACT Testing Centers include fees that cover both its site and the proctors.

**Covered Fees**

Although our nation is down in the finances, this test is an investment for you and your firm. Your employer may be willing to pay some of the cost of the exam or the resource materials. It does not hurt to ask.

**EXPAND YOUR EXPERIENCE**

You may think that it has been too long and your experience is too specialized. Well, here is your opportunity to refresh your skills and knowledge. This will show you and your attorney that you are an even greater asset to the practice. The various facets of law are interrelated such that a holistic view of the law will benefit you in your field of practice. Why not have this kind of an advantage that will promote your own success and the success of your employer?

Perhaps you do not have enough experience in a specific practice area. This test will provide you with a basic starting point and after you have successfully completed the Certified Paralegal exam, you can focus your attention on the Advanced Paralegal Certification in your desired specialty. NALA provides these additional exams and there are currently eleven possible subjects with one or two new subjects instated per year. That is another article for another time or you may check out NALA's website for more details.

**STUDY OPTIONS**

This test requires dedication, time, and extensive studying. However, you do not need to do it alone. There are local study groups, online study courses by NALA, and even college courses available. These options are additional costs after the materials

and the exam fees, but their benefits outweigh the costs. The study groups and college classes provide a disciplined time schedule and social support that is a great help. The online courses are precise and each area of focus coincides with one of the exam subjects. NALA now provides members with a yearly gift certificate that they can apply toward the cost of these online study courses.

Now consider why you *should* take the exam. Your reasons may be one or more of the following:

1. Increase Marketability
2. Credential Nationally Recognized
3. Higher Billing Rate
4. Accepted in Place of Bachelor's Degree
5. Personal Satisfaction

**MARKETABILITY**

The CP/CLA test requires examinees to demonstrate knowledge of general law and legal skills with basic information on specialized subjects. Completion of this exam shows your devotion to continuing legal education and progression and makes you a more desirable and effective legal staff member. The Certified Paralegal designation may open doors in the job market and provides more opportunities to change positions.

**Nationally Recognized**

Paralegals can use the CP or CLA credential throughout the United States without any further testing. Each region has a preferred title for the paralegal and if you need to re-locate, the credential is interchangeable. You also may ask NALA to change the designation without having to re-test. After passing the exam, you must maintain the certification with fifty continuing legal education credits (CLE) every five years. CLEs are available through the Utah State Bar, online courses, college courses, and through local paralegal associations.

**Higher Billing Rate**

Money runs the world. The paralegal billing rate your attorney uses in fee applications may be increased to a higher market rate. *See Missouri v. Jenkins*, 491 U.S. 274, 287-89 (1989). This gives a little extra to your employer and makes you invaluable to the firm.

**In Lieu of Bachelor's Degree**

Programs that offer a bachelor's degree in paralegal studies are scarce in our state. The CP/CLA designation is widely accepted here and in other states in place of a four-year degree. It may open opportunities that were previously not available to you based on a lack of higher education.

**INDIVIDUAL GRATIFICATION**

What better way to love your career than to continue learning and becoming a better paralegal. This exam not only opens more doors, but is also a great accomplishment and adds prestige to your title.

Please take advantage of this wonderful opportunity to take the Certified Paralegal/Certified Legal Assistant exam and enhance your professional career.

## *The Paralegal of the Year Award*

Presented by the Paralegal Division of the Utah State Bar and the Utah Paralegal Association, is the top award to recognize individuals who have shown excellence as a paralegal. This award recognizes this achievement.We invite you to submit nominations of those individuals who have met this standard. Please consider taking the time to recognize an outstanding paralegal. Nominating a paralegal is the perfect way to ensure that their hard work is recognized not only by their organization but by the legal community. This will be their opportunity to shine. Nomination forms and additional information are available by contacting Suzanne Potts at spotts@clarksondraper.com. The deadline for nominations is April 2012. The award will be presented at the Paralegal Day luncheon held in May 2012.

# CLE Calendar

| DATES | EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.) | CLE HRS. |
|---|---|---|
| 11/16/11 | **Webcast – Clarence Darrow: Crimes Causes and the Courtroom.** 10:00 am–1:15 pm. Featuring Graham Thatcher, Ph.D. as Clarence Darrow. Bar Member: $159, Legal Aid Attorney: 139, All others: $189. | 3 hrs. Ethics and/or Profess. self study |
| 11/17/11 | **Mentor Training and Orientation.** 12:45–3:30 pm. **This event is only open to Utah Supreme Court Approved Mentors.** Free | 1 hr. Ethics 1 hr. Prof../Civ |
| 11/17 & 11/18/11 | **2011 FALL FORUM** Little America Hotel, Salt Lake City. Thursday night: "A Mediation Tragedy," a lively performance of a misguided, ego inflated and poorly presented mediation. Friday Keynote speakers: Kerry Chlarson & Steve Mikita, "The Joy of Tenacity: Two Inspired Paths to Social Justice." Twenty-five breakout tracks to choose from. | Up to 8.5 hrs. including 2 hrs. Profess./Civility 2.5 hrs. Ethics |
| 11/30/11 | **Webcast – Maxims, Monarchy and Sir Thomas More.** 10:00 am–1:15 pm. Featuring Graham Thatcher, Ph.D. as Sir Thomas More. Bar Member: $159, Legal Aid Attorney: 139, All others: $189. | 3 hrs. Ethics and/or Profess. self study |
| 12/02/11 | **Southern Utah Bar Association – 9th Annual All Day CLE.** 8:00 am – 4:00 pm. Courtyard by Marriott, St. George. Only $125, including breakfast and lunch. | 7 hrs. |
| 12/05/11 | **Learn from a Pro – Law Practice Management.** Registration at 8:00 am. Seminar from 8:30 am–noon. $99. Jinks Dabney a 38 year veteran attorney shares his successes on the "Business" of the practice of law. | 3 hrs. |
| 12/06/11 | **All I want for the Holidays is for My Gadgets to Sync.** 12:00–1:45 pm. In the world of iPads, Smart Phones, Laptops, and other digital devices, getting them to talk to each other is a miracle. Learn how to get these gadgets to sync so that all your work transfers. Also, see some of the latest fun items to add to your holiday wish list. Brown Bag. $10, includes drinks and treat. | 1.5 hrs. |
| 12/06/11 | **Required New Lawyer Training Program Orientation.** 6:00–7:30 pm. Free. Speakers include: Magistrate Judge Brooke Wells, Former Mentee Lesley Manley, and Elizabeth Wright – NLTP Administrator. | NONE |
| 12/07/11 | **Fall Corporate Counsel Seminar – SAVE THE DATE.** 8:30 am – 1:30 pm. Includes lunch. Time subject to change. Topics and agenda on their way. | 4 hrs. includes 1 hr. Ethics |
| 12/07/11 | **Webcast – The Art of Advocacy: What Can Lawyers Learn from Actors?** 10:00 am–1:30 pm. Featuring Graham Thatcher, Ph.D. Session I: Acting Like a Human Being – Demeanor and Skills in Storytelling (Opening and Closing). Session II: Actor/Playright Meets Lawyer: Inflection, Orchestration, and Meter (Closing Argument). Session III: Directing the Trial: Skills in Questioning and Controlling Focus (Direct and Cross). Bar Member: $159, Legal Aid Attorney: 139, All others: $189. | 3 hrs. self study |
| 12/07/11 | **An Introduction to the Courtroom from the Bench and the Bar.** For New Attorneys & Their Mentors. 3:30–5:00 pm in the courtroom of Judge Kate Toomey, Matheson Courthouse, 450 South State St., Courtroom South 34. Join District Judge Kate Toomey, her courtroom staff, and experienced trial lawyers Richard Burbidge and Frank Carney to learn all about courtroom protocol, how to avoid those embarrassing "newbie" mistakes, and getting off to a good start in court. | TBA |
| 12/09/11 | **Annual Lawers Helping Lawyers Ethics Program.** 8:30 am – noon. (date/time subject to change) | 3 hrs. Ethics |
| 12/14/11 | **Webcast – Thurgood Marshall's Coming!** 10:00 am–1:15 pm. Featuring T. Mychael Rambo as Justice Thurgood Marshall. Bar Member: $159, Legal Aid Attorney: $139, All others: $189. | 3 hrs. self study |
| 12/16/11 | **Benson and Mangrum on Utah Evidence.** 9:00 am – 5:00 pm. This seminar will highlight recently decided evidentiary cases, controversial evidentiary issues, and professionalism and civility in the trial context. The authors will also explain how to use the evidentiary treatise to reduce research hours, to prepare foundation for all forms of evidence, and to present coherent evidentiary argument to the court at the time of trial. ***Books will be referenced throughout the seminar.*** Cost without book: $175 for current litigation section members, $227.50 for others. Cost with book: $285 for current litigation section members, $337.50 for others. | 6.5 hrs. includes 1 hr. Profess./Civility |
| 12/21/11 | **Webcast – Lincoln on Professionalism.** 10:00–11:00 am. Using an engaging documentary-style format, Abraham Lincoln's exemplary qualities of legal and personal professionalism come to life. There will be a live Chat Room discussion with a Moderator for attendees to explore the current context for Lincoln's model of professionalism. Bar Member: $79, Legal Aid Attorney: $59, All others: $99. | 1 hr. Ethics and/or Profess. self study |
| 12/28/11 | **Webcast – Clarence Darrow: Crimes Causes and the Courtroom.** 10:00 am–1:15 pm. Featuring Graham Thatcher, Ph.D. as Clarence Darrow. Bar Member: $159, Legal Aid Attorney: 139, All others: $189. | 3 hrs. Ethics and/or Profess. self study |

# Classified Ads

## RATES & DEADLINES

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

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

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

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

## OFFICE SPACE / SHARING

**Tired of Your Downtown Firm Taking Too Much of Your Earnings?** Large (12' x 16') or mid-size (13' x 13') office space with large windows available in the modern Parkview Plaza II across from Sugarhouse Park, near the I-80/1300 East interchange. A small reception/secretarial station is also available. We are a four lawyer firm with a general practice. Referral of some overflow work likely. Office amenities include: receptionist, waiting area, conference room, kitchen, Internet, fax, scanner/copier, notary services, and free underground parking. Rent varies depending on the relationship sought. Secretarial and billing services available. Call 801-486-1112.

**Privately owned custom law office suite, Old Mill area.** Two offices (apx. 200 sf. ea) with access to conference room, receptionist, secretarial space, small kitchen, telephone, internet, depending on terms. Contact jwc5741@gmail.com or 801-573-1489.

**Office Share:** Main floor furnished private office (apx 150 square feet). Downtown location (344 South 400 East), access to TRAX and freeway. Ample parking, wheelchair compliant, two bathrooms, space for assistance available if needed. Rent includes utilities, security, housekeeping, conference room, kitchen, receptionist. Copier and fax available. Contact Mavis 801-486-2530.

**Executive office share in Bountiful just off I-15 at 2600 South.** From $200-$650. Business center was recently renovated so there is a new parking lot, landscaping, and signage. Offices recently remodeled and are beautiful. Shared receptionist, conference room, break room, etc. Free I'net. See pictures at www.DruProperties.com. 801-397-2223.

**Would like to rent one office with paralegal space for 2-3 years in established law firm.** Would consider "of counsel" arrangement. Winding down a 40 year civil practice and would like to leave my clients in a safe harbor. Contact Jerrald D. Conder 801-359-5534.

**Perfect Court Access Location.** Seven office suite in the Salt Lake Stock and Mining Exchange Building, 39 Exchange Place, full service with reception/secretarial area and individual restrooms. Ideal for a 4 or 5 person firm. Also available one large main floor office 16' X 28' full service. Unsurpassed tenant parking with free client parking next to building. Contact Richard or Michele (801) 534-0909 or richard@tjblawyers.com.

## POSITIONS AVAILABLE

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

**Established 8-attorney firm looking to add one shareholder.** Our sharp, newly-renovated office space on Main Street in downtown Salt Lake is within one block of state and federal courthouses. Excellent opportunity for an experienced attorney tired of high overhead and traditional law firm politics wanting to practice in a collegial atmosphere. Inquire to confidential Box #29, Attn: Christine Critchley at barjournal@utahbar.org.

**VISITING PROFESSORSHIPS –** Short-term pro bono teaching appointments for lawyers with 20+ years' experience Eastern Europe and former Soviet Republics. See www.cils3.net. Contact CILS, Matzenkopfgasse 19, Salzburg 5020, Austria, email professorships@cils.org, US fax 1 (509) 356-0077.

**LLM IN INTERNATIONAL PRACTICE –** LLM from Lazarski University, Warsaw, Poland, and Center for International Legal Studies, Salzburg, Austria. Three two-week sessions over three years. See www.cils.org/Lazarski.htm. Contact CILS, Matzenkopfgasse 19, Salzburg 5020, Austria, email cils@cils.org, US fax (509) 356-0077, US tel (970) 460-1232.

## SERVICES

**Looking for elder care but can't stand the thought of a nursing home or assisted living?** In nearby Twin Falls, we provide close personal attention in quiet country setting for stroke or dementia residents. Pets allowed. Reasonable rates. Private pay. Relax and let us help! Jordana Bryan, CNA, 208-308-2600. DementiaAlternativeCare.com

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**Criminal, Appeals, Post-Conviction Remedies, Real Estate Matters, Residential and Commercial Construction.** Hershel Bullen, Phone: 801-583-1880, Fax: 801-583-1882, herschellaw@gmail.com

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

**CHILD SEXUAL ABUSE – SPECIALIZED SERVICES.** Court Testimony: interviewer bias, ineffective questioning procedures, leading or missing statement evidence, effects of poor standards. Consulting: assess for false, fabricated, misleading information/ allegations; assist in relevant motions; determine reliability/validity, relevance of charges; evaluate state's expert for admissibility. Meets all Rimmasch/Daubert standards. B.M. Giffen, Psy.D. Evidence Specialist (801) 485-4011.

**Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics:** Consultant and expert witness. Charles M. Bennett, 505 E. 200 S., Suite 200, Salt Lake City, UT 84102-0022; (801) 521-6677. Fellow, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.


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