

Utah Bar[®] JOURNAL



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Sept/Oct 2011

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Utah Bar[®]

JOURNAL

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Cover Art

Fall scene at Camp Tracy in Mill Creek Canyon, by first-time contributor, Craig Kleinman, Salt Lake City.

Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their photographs (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.

Interested in writing an article for the Bar Journal?

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

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

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

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

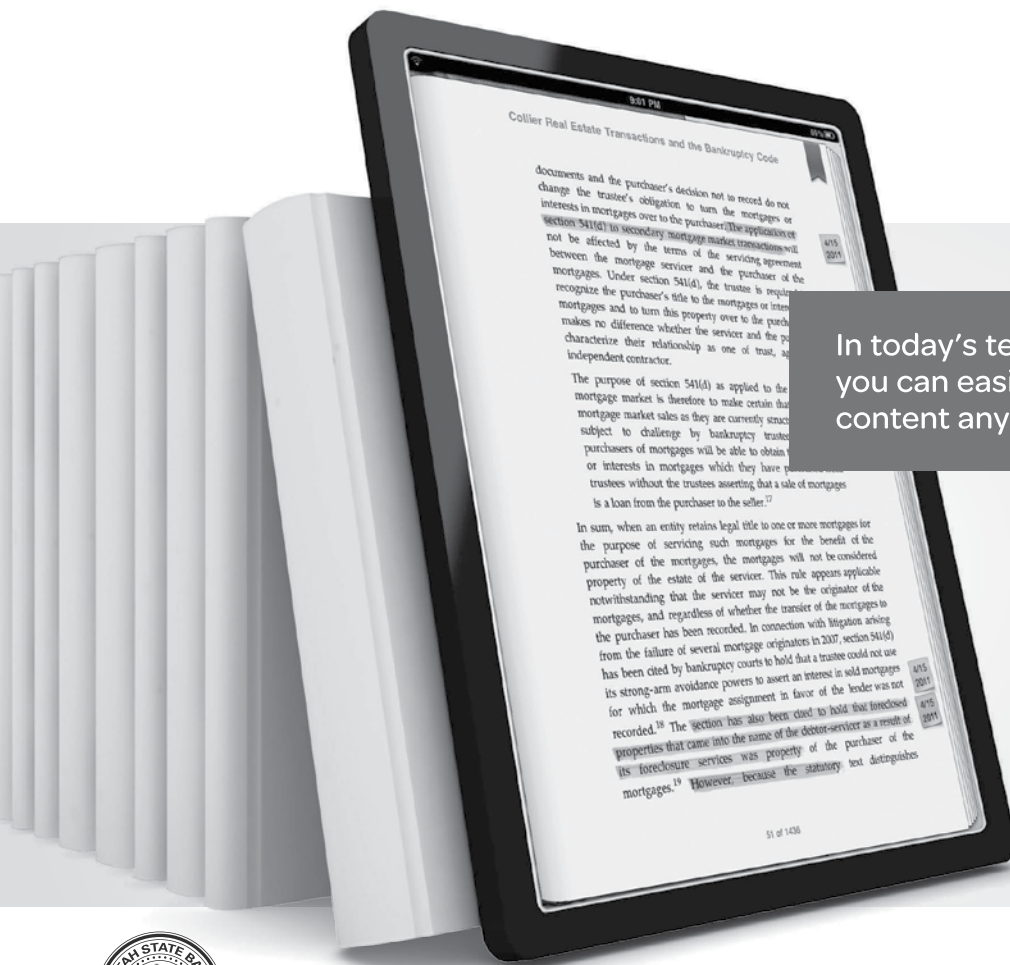
No Footnotes: Articles may not have footnotes. Endnotes will be permitted on a very limited basis, but the editorial board strongly discourages their use, and may reject any submission containing more than five endnotes. The *Utah Bar Journal* is not a law review, and articles that require substantial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

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

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

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

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



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Dear Editor:

We just opened our July/August issue of the *Journal* and saw the letter from Michael Deamer regarding mandatory CLE. We agree with his concerns. Mandatory CLE should only be imposed if an attorney demonstrates incompetence and needs a remedial course. Otherwise, CLE should be voluntary. By the way, in our experience the least useful CLE courses are generally the ethics courses.

Chris L. Schmutz
Jay R. Mohlman

Dear Editor:

This letter is in response to Mr. Michael Deamer's July/August 2011 "Letter to the Editor." The CLE process and requirements are very reasonable. Although studying, teaching, or writing on a topic may be the best learning methods, it is likely that if people were allowed to fulfill all of their CLE credits by these methods then the vast majority of attorneys would only use these methods and not attend lectures. Most people, then, would be the "teacher" and few people, if any, would attend others' presentations. If this were the case, the purpose for allowing people to prepare presentations would be frustrated. It is wise for people to attend others' lectures because they may gain insights and ideas they may not have thought of or come across in their own studying. Additionally, I have noticed several "lectures" that were not based on remote case law but, instead, were based on experiences other attorneys had with aspects of the law and/or provided very practical applications for everyday practice.

As for mandatory CLEs, they are not aimed at eliminating problems found within the Bar; there are already resources that target eliminating those problems (e.g., Utah Lawyers Helping Lawyers). Instead, CLEs are designed to help attorneys comply with one of the most important professional rules of conduct: Competency. As attorneys, we are ethically required to maintain competence in the areas of law in which we represent clients. This duty can be especially difficult because the laws can be changed or interpreted very differently over a short period of time. Having mandatory CLEs helps us ensure we are aware of those changes and represent our clients as competently as possible. Considering all of the above points, I think the CLE program is reasonable and is already liberally interpreted and applied.

Alan Curtis Taylor

Dear Editor:

I thank Robert Jeffs for his Bar service, and respond to his President's Message.

Robert wrote of "irritating calls from the public" and "calls or emails from myopic Bar members who believe the Bar is nothing more than a pestilence."

Official irritation or concern about member myopia may arise from two of the Bar's intrinsic structural flaws: dual mission and involuntary membership.

It's difficult to serve two masters: the attorneys who constitute and fund the Bar, vs. the "public" (i.e., everybody else). The Bar is not our union. But neither should we be marketed by our own Bar as a free service provider or a threat to be tightly leashed from on high.

Many states do not force admitted attorneys to be subject to "legislation" from above regarding charity, civility, CLE, and the rest. Good attorneys, like good and decent people everywhere, have an inner compass which does not require pro bono or good deeds to be publicized or reported or to attend crossword puzzle programs otherwise known as CLE.

Utah should follow the lead of Pennsylvania, New York, Massachusetts, Vermont, Maine, Maryland, Illinois, Delaware, Ohio, Indiana, Iowa, Minnesota, Tennessee, Arkansas, Kansas, and Colorado and disintegrate the Utah Bar. The above states each has a Voluntary Bar. Each Court governs attorney admission, retention, licensing, and discipline – and that's it. The Voluntary Bar serves as attorneys' union, social club, and vehicle for organizational (and publicized) good works.

I hope I am not being myopic in suggesting a libertarian alternative that half of the attorneys in America have already chosen.

R. Clayton Huntsman

Over the past several months, Kirton & McConkie has represented clients in some game-changing situations.

- Closed a **\$505 million** transaction for *Deseret Management Corporation/ Bonneville International Corporation*, the largest radio industry transaction in the country for five years and one of the top five deals in Utah in the past five years.
- Closed **\$100 million** in financing for *11 public charter schools* in Utah for the purchase, refinancing or construction of school facilities using multiple methods of financing.
- Prevailed during a two-day administrative hearing in obtaining a **\$13.5 million** payment for a client in a contract dispute.
- Served as legal counsel for *i.TV* in its strategic partnership with *AOL* to relaunch AOL's flagship television site.
- Represented a client to obtain a Utah Supreme Court reversal to deny a bank **\$3 million** in fees in a dispute over the right for the plaintiff to have a jury trial.
- Served as issuer's counsel in a **\$29.5 million** bond transaction.
- Closed a **\$185 million** letter of credit for *UTOPIA*.
- Successfully argued to have a lawsuit against California clients dismissed in Utah based on the lack of personal jurisdiction and for forum non conveniens.
- Won significant summary judgment victories for a major client in cases in Massachusetts, Illinois, California and Utah.
- Prepared a complicated ground lease, reciprocal easement and development agreement, multiple construction documents, the creation of special purpose entities, and complicated tax increment financing from multiple jurisdictions for a 220,000 square foot development.
- Representation of *ISYS Technologies* in a trademark dispute against Google.

Letters Submission Guidelines:

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

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

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

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Practicing Law, a Profession or a Business?

by Rodney G. Snow

This is my first article to the Bar membership. Thank you for your support. It is an honor to serve each of you as bar president. I most appreciate the many friends I have made over the years in the Bar. I always welcome any suggestions you have for a better Bar. In fact, I look forward to hearing from you.

While the Bar Commission will determine our priorities for the coming year, I do not anticipate any significant changes in that respect. The focus will be on civic education on the fundamentals of our democracy and the importance of the rule of law, an independent and properly supported judiciary, and access to justice.

Thank you to our past president, Rob Jeffs of Jeffs & Jeffs in Provo, Utah. Rob was instrumental in leading the Bar Commission in many key initiatives last year, including: launching the Lawyer Advertising Committee to determine if our current rules are adequate to deter misleading advertising; creating

our Modest Means Committee as a way of matching counsel at lower rates for those in our court system who need representation but otherwise could not afford it; launching an exciting public relations effort to inform the public of the many services provided to our communities by lawyers and the Bar; and implementing much-needed revised Client Security Fund rules. Rob continues to serve on the Bar Executive Committee and as a co-chair on the Lawyer Advertising Committee. He is a true professional in every sense of the word.

Congratulations to our president-elect, Lori Nelson of Jones Waldo. At the ABA convention this last week in Toronto, Canada, Lori received the Outstanding Service award from the Family Law Section and was elected as secretary of that section. We are fortunate to have Lori as our president-elect and a member of our Bar Commission.

The Law has always been a proud tradition of service. This year, we hope to continue that tradition in ways that are meaningful to our communities and responsive to the challenges of our current economy. In a paper titled "The Changing American Lawyer," Thomas D. Morgan, a Professor of Law at George Washington University Law School, noted that the legal world's game of musical chairs stopped in 2008. And didn't we all notice? We now face a much different world.

Morgan explained that in 1970, there were approximately 300,000 lawyers in the United States. Today we have approximately 1.2

million lawyers, more lawyers per capita than any place in the world. In 1960, fewer than twenty U.S. law firms had over fifty lawyers. In 1968, only twenty firms had over 100 lawyers. Today, we have two law firms with over 3500 lawyers and twenty firms with over 1000 lawyers. We are graduating approximately

40,000 law students per year with no sign of that number decreasing – even with a downturn in law school applications.

As our numbers continue to increase, we face a crisis in our public image. Recently, the Atlanta Bar Association conducted a survey regarding the public's complaints about lawyers. The results are disturbing. In summary, the public believes that (1) lawyers are more concerned about money than they are about the justice system they serve; (2) lawyers are more concerned about winning than about truthfulness and are willing to bend or break the rules with little concern that our self-regulating profession will impose sanctions; (3) our litigation system costs too much and takes too long and lawyers

"The Law has always been a proud tradition of service. This year, we hope to continue that tradition in ways that are...responsive to the challenges of our current economy."



are not motivated to change that system because it is against their self interest; and (4) lawyers, through advertising and otherwise, encourage frivolous litigation and some lawyers are not competent to handle matters they undertake.

Public education regarding our system of justice is clearly lacking. And maybe we have allowed the law to become more of a business than a profession – the profession we were thirty or more years ago. I do not underestimate the forces that drove the law practice in this direction: high overhead, including competition in salaries for new graduates, technology advances and costs, and health care and other insurance costs. Nevertheless, this business model started drowning in 2008 and may only have a few gasps of breath left in it. Change will be forced on us if we do not get ahead of it.

This is a call to reinvigorate the professional side of the law practice, to emphasize that we are people lawyers as well as business lawyers, to work together to bring down the high cost of legal fees, and to develop better and more efficient methods of providing legal services to the poor and underprivileged.

In 1986, the ABA Commission on Professionalism issued a comprehensive report entitled “In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism.” In that report, the Commission adopted the definition of “profession” espoused by Dean Roscoe Pound: “[Profession] refers to a group . . . pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of a livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.” ABA Commission on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, at 10 (1986).

Thank you for your willingness to provide public service, whether in the legislature, on a board of education, volunteering for pro bono work with Utah Legal Services, or serving on one of our many Bar committees. Let’s remember our roots and the great accomplishments of the past brought about by lawyers and continue the tradition of public service. It should not go unnoticed that the country with the most lawyers per capita remains the country with more bedrock freedom and economic opportunity than any other country in the history of the world.

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Snow, Christensen & Martineau congratulates its colleagues on a \$54 million jury verdict for the Canyons

After years of contentious litigation, John Lund and Kara Pettit recently led their trial team to secure one of the largest jury verdicts ever awarded in the State of Utah. The dispute centered on delayed development at the Canyons, a world-class mountain resort in Park City, Utah.

“Throughout this case, John and Kara aggressively pushed things forward, remaining focused on getting our story in front of a jury,” said Timothy Vetter, Vice President for the Canyons. “They positioned the case precisely where we needed it for trial. At trial, John dominated the courtroom and was masterful in his presentations to the jury.”

This outstanding result comes during the firm’s 125th year of practice and on the heels of John Lund’s recent appointment as Chair of the firm’s Commercial Litigation Practice Group.

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To Persuade a Judge, Think Like a Judge

by J. Frederic Voros, Jr.

After nearly two decades as an appellate lawyer, I was appointed to the Utah Court of Appeals. I now see the appellate process from the opposite point of view. I went from a producer of briefs and a consumer of opinions to a consumer of briefs and a producer of opinions; from a persuader to a target of others' persuasion; from interrogatee to interrogator in oral argument. This shift in perspective has raised to my level of consciousness this thought: to persuade a judge, as to catch a thief, you must think like one.

Judges and lawyers approach an appeal in fundamentally different ways. From a lawyer's point of view, the appeal is a contest to be won; from a judge's point of view, the appeal is a problem to be solved. Consequently, the best way for a lawyer to win the contest is to show the judge how to solve the problem.

Every appellate decision resolves a particular dispute. But if resolving the dispute were all we did, we would decide appeals by issuing orders rather than opinions. Every appellate decision also represents an incremental evolution in the law. We are thus in every case called upon to resolve a dispute in a way that, ideally, maintains fidelity to precedent, achieves a fair result on the facts of the case before us, and embodies – or at least does not unsettle – a just and predictable rule. We must then defend our decision in a published opinion that may govern future cases and guide the actions of non-lawyers for years to come. This is the appellate task from the judge's point of view. And I maintain that you, as an appellate lawyer, can enhance your likelihood of success on appeal by seeing the appeal from this point of view and helping the court complete this task with intellectual integrity.

What follows is a list of fifteen suggestions for the appellate lawyer. Each is a corollary of the axiom that by seeing the appeal from the court's point of view, and by helping the court to solve the problem presented by the appeal, you help your client.¹

1. Think of yourself as staff to the court.

You are, after all, an officer of the court. In fact, you swore an oath to “discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty, fidelity, professionalism,

and civility. . . .” Utah R. Prof'l Conduct, Preamble. To discharge this duty – and, I contend, better serve your client – I suggest that you think of yourself as three-fourths advocate for your client and one-fourth court staff. By court staff I mean an objective and reliable resource in the court's decision-making process. We understand that you represent your client. But because you know the case and probably the law better than we do, we need your help in solving the appeal. This means, for example, that citing favorable cases, factually distinguishing unfavorable ones, and hoping we follow the former is insufficient. We need you to show us the overarching rule that rationalizes all the cases.

2. Be candid with the court.

You will not help your cause by exaggerating the record or stretching precedent. Inevitably, some facts and cases will not support your position. Don't tiptoe around these or bury them in footnotes; show us how to deal with them. In particular, appellants who ignore unfriendly facts or precedents in their opening brief (1) lose credibility with the court, (2) imply that the omitted facts or precedents are devastating, and (3) present a generous target for opposing counsel.

3. Back up your words.

The fact that I urge candor suggests that not all lawyers are entirely candid. Appellate courts know this. Their institutional skepticism takes the form of an appellate rule requiring lawyers to support their statements with citations to authority. To comply, you must support every assertion of fact with a citation to the record and every assertion of law with a citation to legal authority. *See* Utah R. App. P. 24(a)(7) & (9). Your recitation of the procedural history of the case is not exempt from this requirement. Also, your

JUDGE J. FREDERIC VOROS, JR. was appointed to the Utah Court of Appeals by Gov. Gary R. Herbert in September 2009. Following several years in private practice, he served in the Criminal Appeals Division of the Utah Attorney General's Office from 1991-2009, the last ten years as division chief.



record cites must be to a page number in the official appellate record as paginated by the district court clerk. *See id.* R. 24(e). Citing to documents by name or by their location in your addendum, though often useful, does not satisfy rule 24.

4. The record is our universe.

You know your case, especially if you were trial counsel. Your notes and memory tell you what was said, and your files tell you what papers were filed. But our knowledge of the case is limited by law to the record on appeal. For us, anything not in the record did not happen. Consequently, you must confine your references to proceedings below to the record on appeal.

5. Use your addendum wisely.

Only one appellate record exists, but three or five judges will decide the case. That's a problem. The solution is the addendum to your brief. Think of it as a mini-record or "best-parts version" of the full record. In particular, include those documents that the judges must read to decide the issues on appeal. For example, if you are challenging the wording of a jury instruction, attach the jury instruction. (This advice is unfortunately not as obvious as you might think.) On the other hand, omit documents that are not found in the record on appeal; they lie outside the bounds

of our universe and will be stricken on motion or sua sponte. *See id.* R. 24(a)(11)(C).²

6. Remember who you're talking to.

By which I mean people – lawyers who wanted to be judges and were fortunate enough (from my point of view) to be nominated, appointed, and confirmed. Two years ago I was appearing before the court I now sit on. I am no smarter now.³ Judicial opinions speak in an authoritative voice and occasionally sound erudite. But remember that they are the product of a collaborative effort by people like you. I am neither as smart nor as learned as I may sound on paper. Bear this in mind when you decide how best to explain to me why you should win.

7. Simplify.

To paraphrase Albert Einstein, everything should be made as simple as possible, but no simpler. How do you simplify your brief?⁴ Limit your issues. Follow an obvious organizational framework. State your main point up front. Tell us what you want us to do. First explain, then persuade. Write in simple, declarative sentences. Limit the use of block quotes and footnotes. Use topic sentences. Edit for clarity. And so on.

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8. Don't forfeit your appeal.

Jurisdiction, preservation (and its appellate converse, standard of review), marshaling, adequate briefing, harmless error – these doctrines matter. And note that they favor appellees. Appellants, be vigilant!⁵ All presumptions work against you on appeal. Read the rules. If you must lose, lose on the merits, and not because your notice of appeal was untimely, or you failed to marshal, or your brief was inadequate.

9. Remember why it's called a brief.

I estimate that in an average month a judge on my court reads close to a thousand pages of briefing. Remembering that your brief is twenty or thirty or forty or (if you really must) fifty pages out of a thousand that we will read this month may help you understand why judges value concision. But making your brief leaner will not only make my life easier, it will also almost certainly make your brief better. It is a rare brief that is not improved by losing five pages.⁶

Moreover, contrary to what you might think, in most cases a long brief signals weakness, not strength. *See King v. Gildersleeve*, 21 P. 961, 962 (Cal. 1889) (“We are inclined to doubt the correctness of the ruling of the court below, on account of the extreme length of the brief of the learned counsel for respondent in its support. Knowing the abilities of counsel, and their accurate knowledge of the law, a brief of 85 pages, coming from them in support of a single ruling of the court below, casts great doubt upon such ruling.”).

10. Tell the court what's at stake.

If the issue on appeal has the potential of turning an area of Utah law on its head, please mention this. It may not affect how we see the appeal, but it may. Like most people, appellate judges prefer that as many consequences of their actions as possible be intended.

11. Recognize the tension between rule and result.

Occasionally, straightforward application of a fair (or fairly clear) rule yields what may feel like an unfair result. Judges have varying degrees of tolerance for this dissonance. So think about whether you need to explain to the court why, despite the unsatisfying result in this particular case, the rule is sound and should not be bent – or, conversely, why an exception may be made under the extraordinary circumstances of this case without undermining an otherwise just rule.

12. Be civil.

Insults usually boomerang. When you name-call or speculate on opposing counsel's motives, the reader's natural tendency, perversely enough perhaps, is to feel defensive for your opponents: surely they can't be that bad; let's just get on with business. On the other

hand, deceptions deserve the light of day. *See* Louis Brandeis, *Other People's Money* 62 (1933) (“Sunlight is said to be the best of disinfectants. . .”). But don't just tell us that the shyster on the other side distorted a witness's testimony; show us. Juxtapose the witness's testimony as it appears in opposing counsel's brief with the same testimony as it appears in the record. We will see the contrast, and feel the outrage.

13. Show me.

The show-and-tell principle is good advocacy generally. By all means tell me that you think the trial court violated the rule. But don't leave it there. You must show me the court's error: quote the rule, then quote the court's ruling. Now you have demonstrated – not just claimed – that the trial court erred.

14. Test your argument on a non-lawyer.

Technical, subtle, or counter-intuitive arguments sometimes prevail, but not usually. So before getting to court, try your argument out on an intelligent non-lawyer. An argument that persuades a thoughtful non-lawyer stands a fair chance of persuading an appellate judge.

15. Think of oral argument as conversation.

Oral argument can be intimidating, no doubt. But it is not something to be endured, like running a gauntlet. Instead, think of it as a chance to explain why, under a correct understanding of the case, you win. Sometimes the questioning can be intense, but remember that we are only trying to solve the problem before us and need your best thinking to do it.

I hope you find these suggestions helpful. I realize the approach I recommend exposes me to the charge that I am trying to trick you into doing my work. Fair enough. But don't you want to? Wouldn't you like to write the first draft of my opinion? And then take fifteen minutes or so to clear up any confusion I might have about it? That is essentially what I propose. Speaking as one who spent nearly two decades in your shoes, I maintain that you will help your client, and yourself, by helping me. And if that means you are doing some of my work, well, that's a risk that I, for one, am prepared to take.

1. These suggestions are mine alone; I do not speak for any court or any other judge.
2. Your addendum should also include “any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief.” Utah R. App. P. 24(a)(11)(A).
3. I know what you're thinking.
4. Avoid rhetorical questions, by the way.
5. I don't recommend the use of exclamation points, either.
6. I realize that editing down a brief takes time, and time is an issue for all practitioners. *See* Blaise Pascal, *Provincial Letters: Letter XVI*, 1657 (English Translation) (“I would have written a shorter letter, but I did not have the time.”).



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Utah House Bill 260: Not Your Father's Mechanics' Lien Law

by Richard E Danley, Jr. and Rick Carlton

Title insurance companies in Utah and much of the nation changed their coverage regarding mechanics' liens in 2010, in particular their coverage of broken lien priority. In a complete reversal of their prior practice, virtually all major title companies stopped insuring construction lenders as holding a first lien position when there is broken lien priority. Broken lien priority occurs when work on the property is commenced or materials are furnished prior to the recording of the deed of trust or mortgage. Previously, for established lenders and experienced, financially strong developers, it was normal and expected to have the title company insure over the broken lien priority. When a mechanics' lien claimant filed a lien or construction commenced prior to the recording of the construction lender's lien, it was common for most title companies to insure the lender as holding a first lien position, with no exception taken for the mechanics' lien claims. Suddenly in 2010 for lenders, contractors, and developers, the world changed. As mechanics' lien claims mounted in the recession, title companies refused to insure over mechanic-lien claims and title coverage was more limited, with careful underwriting of the project and a serious evaluation of the borrower's financial capacity. But what was most alarming for many contractors and developers, was that without first-lien-title coverage many construction lenders simply refused to fund projects involving broken lien priority, demanding an insured first lien for the loan.

This reversal of historic practice, even if well justified and sensible, created an immediate problem for a significant number of projects in Utah. Projects with broken lien priority required an innovative

change in the mechanics' lien laws. The refusal to issue first-lien coverage on projects with broken lien priority became an entrenched and immovable position among title insurers. As reported by Representative David R. Clark of the Utah House of Representatives,

In Utah title companies generated roughly 1% of policy revenues for title companies but were responsible for 11% of all losses and legal expenses from mechanics' lien claims. Title companies' refusal to insure with title insurance on broken lien priority issues raised the bar for everybody, including the contractors, suppliers and lenders. If we hadn't fixed it by statute then construction projects would have ground to a halt for two or three years until it corrected itself, which was not an option anybody wanted to face.

Telephone Interview with David R. Clark, Member of Utah House of Representatives (July 15, 2011); *see also* ALTA Statement for the year 2010, Schedule T-Exhibit of Premiums Written, <http://www.alta.org/industry/financial.cfm> (stating that premiums earned by title companies in 2010 were \$9,442,719,439.00 of which \$167,865,731.00 was attributable to Utah or .017%).

This viewpoint of Representative Clark and the need for a solution spurred representatives from the legislature, contractors, suppliers, lenders, and the title industry to find a solution. The result is House Bill 260 ("HB 260"), sponsored by Representative Clark. HB 260 represents a far-reaching and innovative approach to

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the problem. HB 260 was passed by the legislature and signed into law by Governor Gary R. Herbert on March 25, 2011. On August 1, 2011, HB 260 went into effect amending Utah Code Sections 14-2-5, 38-1-5, -27, -31, -32, -33. *See* Utah Code Ann. §§ 14-2-5, 38-1-5, -27, -31, -32, -33, (Supp. 2010, 2005); enacting Utah Code Sections 38-1-30.5, -31.5, -32.5 and 32.7; and, repealing Utah Code Section § 38-1-37. The new mechanics' lien revisions, according to Representative Clark,

provide priority between construction loans and mechanics' liens; modify the indexing of information by the State Construction Registry ["Registry"]; require each notice or document submitted for inclusion in the Registry to contain specific information; modify the filing to require preliminary notices; require construction lenders to file with the Registry; and, modify the relation back and priority of liens.

Telephone Interview with David R. Clark, Member of Utah House of Representatives (July 15, 2011).

Utah law recognizes that the first to record is the first in right and time and holds priority over subsequent liens. However, the

priority of the first to record has some significant exceptions, particularly with respect to mechanics' liens. Under Utah Code Section 38-1-5 (prior to HB 260), *see* Utah Code Ann. § 38-1-5 (2005), Utah recognized that the priority for a mechanics' lien claim is determined under the relation-back test using the date when the first observable work commenced or the first observable materials were delivered to the project and not the date when the individual mechanics' lien was recorded. *See EDSA/Cloward, L.L.C. v. Klibanoff*, 2005 UT App 367, ¶ 19, 122 P.3d 646. This test has often been called the first shovel in the ground test, and refers to the collective priority of all mechanics' liens for a project being tied to the date the first observable work commences on the project or materials delivered. It permits all mechanics' liens for the project to relate back to the same date when work commences. Historically, the Utah Supreme Court (for the Territory of Utah) in *Morrison v. Carey-Lombard Co.*, 33 P. 238 (Utah 1893), found the intent of these provisions was to augment, and not abridge, the rights of the laborer. The *Morrison* court explained,

It is evident from a deliberate consideration of the whole act that the legislature intended to have the lien of subcontractors attach on the date of their commencing to do work or to furnish materials.



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The owner must be presumed to observe the presence of the subcontractors and others on his property when they commence to labor or to furnish materials.

Id. at 241. Utah case law has consistently recognized the priority for a mechanics' lien claim against property is determined under the relation-back test and recognizes few exceptions. *See Calder Bros. Co. v. Anderson*, 652 P.2d 922, 924 (Utah 1982) (finding work must have been performed in connection with what is essentially a single project performed under a common plan prosecuted with reasonable promptness and without material abandonment). As such, for any trust deed or mortgage to hold priority over any mechanics' lien on the project the trust deed or mortgage had to be recorded on or before the commencement of the work. Any lender which recorded its lien after the date that observable work commences or deliveries commence runs the risk of having all construction liens for unpaid work or materials holding priority over the lender's lien.

The foregoing describes why construction lenders require the assurance of a first lien position under their title policy. As noted above, until recently the title industry met the requirement of construction lenders for first lien coverage, even on projects with broken lien priority. However, the practice of insuring lenders a first lien when there is broken lien priority potentially opens the insurer to significant liability. It encourages developers and contractors to start construction prior to the construction financing being in place and the lender's lien recorded and can be a risky practice. Reacting to their severe losses, the industry as a whole sought legislative assistance from the 2011 legislature and stopped the practice of insuring over broken lien priority. *See* ALTA Statement for the year 2010, Schedule T-Exhibit of Premiums Written, <http://www.alta.org/industry/financial.cfm> (stating that direct losses and allocated loss adjustment expenses incurred by title companies in 2010 were \$1,074,415,616 or .107% of the premiums earned).

Representative Clark states

the title industry from Washington County and UTLA requested a revision of the mechanics' lien laws for many reasons, but the three most prevalent reasons

were: first, the title industry was hemorrhaging uncontrollably due to the economic downturn compounded by mechanics' liens claims and lawsuits; second, the application of mechanics' lien laws could not be practically applied to the commencement of work standard; and third, national title companies modified their coverage on broken priority lien coverage.

Telephone Interview with David R. Clark, Member of Utah House of Representatives (July 15, 2011). As the 2011 legislature sought to address the requested revisions to the lien laws surrounding broken lien priority, the relation-back test and commencement of work provisions, which have been Utah law since 1890 when the first version of the mechanics' lien law passed in Session Laws 1890, p. 25, c. 30, § 19, they recognized that HB 260 would be the biggest change in Utah lien laws in 121 years.

"[HB 136] modified the mechanics' lien statute by requiring the development of a standardized-statewide system for the filing of notices and created...an electronic registry for providers of goods and services to a construction project."

One of the many benefits of HB 260 was the decision of the drafters to use the Registry to create a bright line test. In 2004, House Bill 136 was passed and put into law. It modified the mechanics' lien statute by requiring the development of a standardized-statewide system for the filing of notices and created an online bulletin board providing an electronic registry for providers of goods and services

to a construction project. *See* <http://scr.utah.gov>. The Registry provided the 2011 legislature with an alternative means for lien priority to be established without reliance on the "commencement of construction" test. The legislature used the Registry to give notice of all work on a project through the tax identification number of the property, set the date lien rights arise, and establish the procedure for all lien claimants to file and create their right to file a mechanics' lien. In this process, HB 260's revisions made the Registry an essential tool, tried to make it more efficient and productive, made the Registry the only means for the claimant to obtain a lien for work done, and made the Registry the means by which the First Preliminary Notice is filed and set the date by which all subsequent lien claims relate back for priority to the First Preliminary Notice by filing. The Registry became the exclusive system for filing and managing notices (preliminary for private projects and notices of commencement for public projects) and set a bright-line-filing date in an automated manner for the priority of all mechanics' lien claims. As Representative Clark

correctly notes, “now every entity involved in the construction project can file its notice using a common link to tie all lien claims to the project, i.e., tax serial numbers that are universally used by the title industry and mechanics’ lien claimants to properly lien or locate a lien on a property.” Telephone Interview with David R. Clark, Member of Utah House of Representatives (July 15, 2011).

In the opinion of the authors, the two most important changes coming out of HB 260 are (1) the complete rejection of the “commencement of work” test as the standard for determining mechanic lien priority and the date to which all future lien claims relate back and (2) the ability of the construction lender to cure broken lien priority by obtaining the first-lien position (in effect permitting the lender to buy its way to the front of the line) when the superior lien claimants voluntarily accept payment in full for their lien claims and file a withdrawal of their respective claim in the manner required.

With respect to the rejection of the commencement of work standard, the change creates a bright line test for lien commencement and removes the vagueness surrounding the commencement of work test. The commencement of work

standard was from its inception an attempt to create equity at the expense of certainty and clarity. Absent full mobilization of work crews and active work on the site, it was almost impossible for the lender or the title insurer to determine if work had commenced or materials delivered to the site, particularly if an owner or contractor intentionally sought to conceal the commencement of work on a site with no vertical improvements. Under Utah Code Section 14-1-20 as revised by HB 260, any person furnishing labor or services, equipment, or material for which a payment bond claim may be made “shall provide a preliminary notice to the designated agent as prescribed by Section 38-1-32.5, Utah Code Ann.” In addition, Utah Code Section 38-1-32.5 further provides that a person performing work on a private project shall file a preliminary notice with the Registry by the later of twenty days after commencing work or after the filing of a notice of commencement if the work commences prior to the filing of the first notice of commencement, which is effective as to all labor, service, equipment, and material furnished to the project. If the preliminary notice is not filed within the period specified then the claimant is precluded under Utah Code Section 38-1-32.5(5) from maintaining any claim before five days after the late filing of the preliminary notice. Moreover, Utah Code Section 14-1-20(2) specifies that no



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person who fails to file the preliminary notice within the required period may make a payment bond claim. Filing in the Registry in this manner creates a clear electronic record and date which is a bright line as to when the lien claim arises.

As basic as the foregoing change is from the prior procedure, it is amazing that almost no one objected after it was agreed to (a) use the Registry as the filing procedure to establish the lien date and (b) use the tax identification parcel number to act as the universal number and identification procedure to specify the property on which work is performed and each mechanic lien is claimed. These procedures enable both the claimants and the title industry to identify the property in the same way with the tax identification number and permits the title industry to search and identify all the lien claimants.

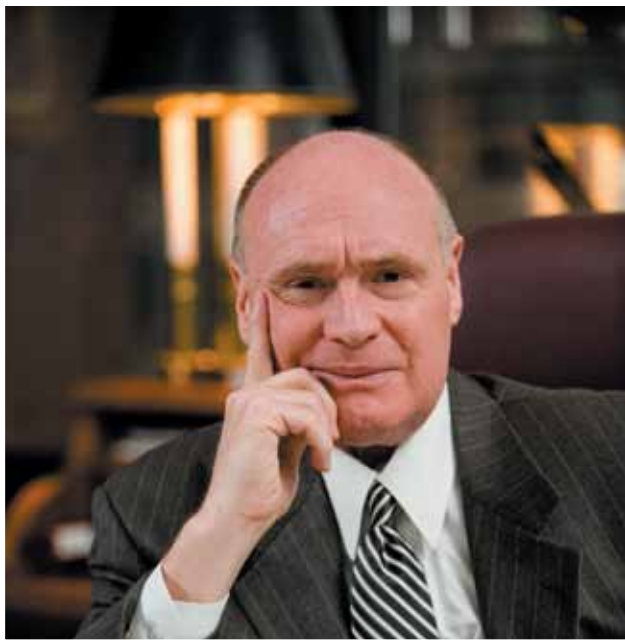
In contrast to the use of the Registry being the most practical result of HB 260, the real innovation and genius of the Act is the right under Utah Code Section 38-1-32(8) to fix the problems under broken lien priority. Utah Code Section 38-1-32(8) (a) permits the construction lien claimant to withdraw and re-file its preliminary notice; and, for the construction lender to buy its way to the front of the line and overcome the historical nightmare of broken-lien priority. Representative Clark expressly notes “a lot of the credit for the innovative change comes from the construction industry that suggested this change and played a central part in drafting the language.” Telephone Interview with David R. Clark, Member of Utah House of Representatives (July 15, 2011). This compromise under HB 260 allows the statute to work for both the lien claimant and the construction lender. However, the compromise was a surprise and unexpected because all prior proposals to allow the construction lender to buy the mechanic lien claimants’ position or to move to the front of the line had repeatedly been rejected by the construction lobby. Interestingly, as part of the compromise, HB 260 keeps the prior relation-back concept that all mechanic liens relate back to the first mechanic-lien claim; but in lieu of relating back to the first date work commenced, it relates back to the date the first preliminary notice for work was filed in the Registry. Utah Code Section 38-1-5(2) provides that a lien under this chapter relates back to and takes effect as of the first preliminary notice filing.

In the negotiations of HB 260 no contractor, supplier, or materialman would give up the existing seniority of any construction lien claim which predates the recording of the lender’s lien, even though the title insurance industry was refusing to insure broken lien priority, and construction lenders would not fund projects where the lender’s lien was not the insured first lien. In this regard, however, all parties reached an amazing compromise, i.e., Utah Code Section 38-1-36(3) (b), whereby the construction

lender can in effect buy the first lien position by the lien claimants’ accepting payment in full of their lien claims and withdrawing their filed preliminary notices. A claimant who (1) files a preliminary notice in accordance with Utah Code Section 38-1-32, (2) accepts payment in full for labor, service, equipment, and material furnished prior to the recording of the construction lender’s lien, and (3) withdraws the claimant’s preliminary notice by filing a notice of withdrawal under Utah Code Section 38-1-32(8), theoretically retains control of the process and is not required to remove its lien claim. However, acceptance of the payment and withdrawal of the lien claimant’s preliminary notice effectively allows the construction lender to cancel their lien claims and obtain a first lien on the property. *See* Utah Code Ann. § 38-1-5(3) (b) (Supp. 2010). This result occurs because upon a lien claimant’s withdrawal of its preliminary notice, any future preliminary notice claimant cannot relate back to the date of the withdrawn lien. *See id.* § 38-1-5(a).

Perhaps the material difference between the initial positions under HB 260 that were repeatedly rejected and the final accepted compromise is that under the approved compromise the lien claimant’s withdrawal of the preliminary notice requires (1) all preliminary notice claims filed prior to the recording of the construction lender’s lien to be paid in full in order to permit the construction lender to get to the front of the line and (2) the voluntary consent of the lien claimant to accept the payment and file the withdrawal. While, as noted, this process leaves the lien claimant in control (not the lender), in effect, lenders can now determine the total amount of the lien claims and the number and identity of the claimants (something that was quite impossible under the old statute). Also, the construction lender never before could know how many liens and future potential claims were senior in right and time and relate back to the commencement of work; but with the clear line imposed by the Registry and the filing of the preliminary notices that is no longer the case and all parties know the risks and costs, and have the means at hand to resolve the broken-lien priority. The only open issue when the economics make sense is the lien claimants’ willingness to cooperate.

In the experience of the authors, the give and take of the legislative process is often not the best forum for innovation and practical workable solutions. However, in the case of HB 260, the process appears to have worked well and produced an ingenious and practical solution that protects the interests of the mechanics’ lien claimants and the construction lender. HB 260 allows both the lender and the mechanics’ lien claimant to assess the risk of any project and, if it makes sense, to cooperate with each other, to permit a project with broken lien priority to move forward and to correct the priority of the broken-construction lien.



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This Is the Place

by Editor-in-Exile, Learned Ham

Years ago, a friend explained to me his driftwood theory of life. It was his opinion that planning a life is a waste of valuable time that could be much better spent playing pool. I think there was more to it than that, but that was the bottom line. He has since drifted onto the bench and would probably appreciate it if I didn't mention his name. I have recently drifted to Connecticut. In-house practice lends itself well to the driftwood theory.

Having been invited to relocate¹ to the new corporate HQ in Norwalk, I considered three important facts: (i) I don't have enough to retire; (ii) I don't want to look for another job right now; and (iii) no one in Connecticut knows me. All three weighed heavily in favor of accepting, so I did.

Like most states, Connecticut requires the registration of dangerous property (the car, the dogs, and me) with the appropriate department (motor vehicles, animal control, and the Connecticut Bar).

Vehicle safety inspections are not required – just an emission test and a VIN certification from an approved garage. The approved garage looked like an abandoned crack house. The guy with his face on the counter woke up to ask what I needed. He called out, “Hey Vinnie, how much for a VIN?” From an open door behind him the ghost of Marlon Brando wheezed: “twenty dollars. cash.” I clarified that I did not want a *new* VIN (although I'm sure they could have supplied one) all I needed was certification of the existing VIN. I paid my cash and lived to tell the tale.

The dogs were easier. A couple of rabies shots and they were in.² The Connecticut Bar is easy, too (in theory). Connecticut and Utah have reciprocity, which I had hoped would mean all I had to do was flash my Utah Bar dues-paid sticker and write a check. It's almost that easy, except you must have passed the Multistate Professional Responsibility Examination sometime within the last four years.

I'd rather have another colonoscopy than take the MPRE. Fortunately, I don't have to (I'm talking about the MPRE, not the colonoscopy, although I can understand if it's confusing – I have trouble telling the difference myself). It turns out that as an in-house lawyer with a license from a reciprocal state I can qualify as “Authorized House Counsel” – without taking the MPRE (at this point, you can hear me humming the melody of *Utah We Love Thee*). Instead, all I have to do is submit two affidavits from Connecticut lawyers attesting to my character and fitness to the Star Chamber of the Connecticut Bar Examining

Committee. Connecticut lawyers being generally honest and forthright, this has proven to be a teensy sticking point. I've been here ten months now. I only need one more affidavit.³

The affidavit I've got is from the lawyer who helped us buy our house. In Connecticut you can't buy a house without counsel.⁴ At least, not when you buy it from a guy selling it out from under his aged parents who insist it isn't for sale, but that's another story (which we won't go into at least until I get that second affidavit nailed down).

In the absence of a second affidavit, one would think that a certificate of completion of an accredited course in civility and professionalism would suffice. I've been to John Snow's civility and professionalism CLE, and John knows a thing or two about civility and professionalism. He and I once attended a settlement conference in Nevada during which the judge (who shall remain nameless because I know a thing or two about civility and professionalism) aimed an obscene gesture at opposing counsel. The case settled. John was in no way responsible for the gesture, but gets full credit for the settlement. Unfortunately, however, knowing a thing or two about civility and professionalism is no substitute for the affidavit of a Connecticut lawyer.

In the search for a second Connecticut lawyer/affiant, I've even stooped to attending church. Sort of. Unitarian. The first service we attended was called “The Miracle of Evolution.” I wore jeans. Only one speaker even mentioned God, and that was when he spilled his coffee. At the Memorial Day service we sang Pete Seeger songs. I've never enjoyed church this much in my life. I plan to keep going whether I get an affidavit out of it or not.

Connecticut is a pretty, great state. Somewhat lacking in identity, but still pretty great. Do a quick word association, what do you come up with? Anything? It's the Nutmeg State, although nutmeg has never been grown here.⁵ The license plates say it's the Constitution State, although they don't mean *that* constitution.⁶ It's a gorgeous place, but one can't help but wonder if it serves any real purpose, other than to keep New York and Boston separated.

Opening day of baseball season was cap day at my daughter's elementary school. Unthinking, I sent her out the door with a pink Red Sox cap. That evening I was greeted with, “Daddy, I need a new favorite team. Who are the New York Yankees?” She now has a pink Yankees cap.

I'm sorry about all these endnotes.⁷ They interrupt the flow of the story, making it hard to read, and giving the page an unsightly appearance – which is why the *Bar Journal* editorial staff discourages them.⁸ It's not a law review, you know. I like them because they make reading an article like going on a treasure hunt. Plus they annoy the editors.⁹ A recent edition of the *Connecticut Bar Journal* lists forty editors. The cost of a single monthly editorial lunch (not including cocktails)¹⁰ would eat up the entire annual budget of the *Utah Bar Journal*.

And speaking of lunch, there is no edible Mexican food in Connecticut. I see it on a menu and I can't resist trying, but it's as pointless as that vote I cast for Ralph Nader. Yesterday, in desperation, I ordered a chicken parmesan quesadilla. It was a deep-fried sponge dipped in ketchup and wrapped in pita bread. Probably my own fault for eating in a restaurant named after a horse.

I will not be abandoning my membership in the Utah State Bar. Not after what my ex-wife went through to get it. From my cold, dead hands. Plus it's the only thing standing between me and the MPRE. And it ensures that I will drift back to Utah at least every other year for John Snow's civility and professionalism class (which will also give me a chance to cut the grass at the home that shows no sign of selling anytime soon). No reasonable offers refused.

1. My brother-in-law prefers to call it a metastasis.
2. Rabies shots are not required for dog *owners* (although perhaps they should be) as I learned from the Fairfield County Health Department, the Connecticut State Troopers Office, a veterinarian, the ER staff, and the Connecticut State Epidemiologist after an encounter with a raccoon. No worries, I'm fine. I have paranoid delusions, shave four times a day, and can't stand the smell of garlic, but I'm fine. I'm thinking of becoming a litigator. I had a less dramatic encounter with the official State Lyme Disease Carrier – a deer tick – but that was resolved with a pair of tweezers. Deer wander through our back yard almost every morning. We thought that was cute until the neighbors explained that the deer bring busloads of ticks with them. Ticks are even more common here than hedge fund managers.
3. Collecting character and fitness affidavits reminds me of selling candy bars to raise money for little league. I wasn't any good at that, either. My mother bought them all. Maybe I could get her admitted *pro hac vice* long enough to sign an affidavit.
4. The Connecticut Bar has very effective lobbyists.
5. The origin of the nickname is unclear, although it appears to have something to do with the unscrupulousness of Connecticut merchants, who had a reputation for selling wooden nutmegs. And they want me to prove *my* character and fitness.
6. In the 1600's, some of the first European settlers in Connecticut adopted what the state's current residents emphatically believe to have been the first written social compact anywhere. That's not an undisputed claim, exactly, but that's what the license plates are talking about (and I wouldn't recommend arguing with Vinnie about anything to do with Connecticut vehicle registration).
7. This one in particular is gratuitous.
8. If you want to start a fight at an editorial staff lunch, ask whether '*Bar Journal* editorial staff' is a singular noun or a plural noun. Should I have said, "the *Bar Journal* staff discourage them?"
9. I miss you guys.
10. I'll have the Authorized House Salad, by the way.

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Counseling Individual Trustee Clients

by Robert S. Tippet

It is common for the settlor or the beneficiaries of a trust to ask a family member, a family friend, or a close family advisor, such as an accountant, to serve as trustee. The individual may have substantial experience serving as a fiduciary, or may have no such experience at all.

When counseling an individual fiduciary, the attorney should ensure that the client has a solid understanding of the powers and responsibilities associated with the job. In some cases, this may mean explaining to the client what a trust is and how it works. If the client has experience serving as a trustee, the attorney's role may be one of impressing on the client the gravity of the client's responsibilities. This article describes the basic points that an attorney should bring to the attention of an individual client who serves, or is considering serving, as a trustee.

A person may be asked to serve as trustee of either a revocable trust or an irrevocable trust. Usually, the settlor of a revocable trust serves as his or her own trustee. In most cases, therefore, a fiduciary client will be serving as trustee of an irrevocable trust. Except where otherwise indicated, the discussion in this article refers both to situations in which a person is serving as trustee of an irrevocable trust and where an individual is serving as trustee of another person's revocable trust.

Read the Trust Instrument

When counseling an individual trustee client, the attorney should read the trust instrument carefully and urge the client to do the same. The trust instrument sets forth the powers that the trustee has, the beneficiaries' rights to distributions, and the trustee's administrative responsibilities. Utah Code Section 75-7-801 requires that a trustee administer the trust in accordance with the terms of the trust instrument. *See* Utah Code Ann. § 75-7-801 (Supp. 2010). With very few exceptions that are set forth in Section 75-7-105, the terms of the trust instrument govern over the default rules that are provided in the Probate Code.

Neither the attorney nor the client should assume that he or she already knows what the trustee's powers and responsibilities are. The terms of the trust instrument govern the administration of the trust, and different trust instruments have different terms. Trustees generally have all of the powers over trust property that an individual has over his or her own assets, but trust instruments sometimes place restrictions on these powers. For example,

some trust instruments place restrictions on the ability of a trustee to borrow or to pledge trust property as collateral for a loan. The trustee must be aware of such restrictions.

Confidentiality

The terms of a trust are private, and the attorney should impress upon the client the fact that the trustee owes a duty of confidentiality to the beneficiaries with respect to the terms of the trust.

Individual trustees often overlook their duty of confidentiality when opening accounts at banks or brokerage firms. The institution will invariably ask to see a copy of the trust instrument. Instead of giving the institution a copy of the trust instrument, the trustee should generally provide a trust certification. The trust certification will contain the information the institution needs: the name and date of the trust, the name of the settlor, the name and address of the trustee, the relevant powers that the trustee holds, the respective authority held by co-trustees, and the names of any persons who have the power to revoke the trust. *See id.* § 75-7-1013. Similarly, if a copy of the trust would typically be attached to a document that will be filed as a matter of public record, a trust certification should be attached instead.

The attorney should be careful when filing petitions, complaints, and other documents that pertain to the trust with the court. Sealing of court files is generally reserved for extraordinary situations. In ordinary cases, instead of attaching a copy of the trust to the petition, the attorney should perhaps contact the court clerk about the possibility of separately submitting a copy of the trust to the judge for in camera inspection.

Trust Exists for the Benefit of the Beneficiaries

The attorney should ensure that the client understands that the overriding principle in trustee/beneficiary relationships is that

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the trust exists for the benefit of the beneficiaries, not the trustee. Utah Code Ann. § 75-7-801 (Supp. 2010). All action the trustee takes in connection with the trust must be for the benefit of the beneficiaries. The trustee must never engage in any act that benefits the trustee rather than the beneficiaries. One exception to this rule is that the trustee may receive reasonable compensation for services as trustee, as discussed below. Other narrow exceptions appear in Utah Code Section 75-7-802(8). *See id.*

No Transactions with Trust

A corollary of the rule that the trustee must act only in the best interests of the beneficiaries is that neither the trustee nor any person related to the trustee should engage in any transaction with the trust or with any trust beneficiary. The attorney will know this rule as the “duty of loyalty.” Thus, the trustee should not, in his or her individual capacity, borrow money from the trust or a trust beneficiary, nor should the trustee lend money to the trust or a trust beneficiary. The trustee should not buy property from the trust or a trust beneficiary, nor sell property to the trust or a trust beneficiary. In addition, the trustee should not usurp any opportunity that would otherwise belong to the trust. If the trustee (or a relative of the trustee, or enterprise in which the trustee has an interest) does any of these things, the beneficiaries might be able to void the transaction unless the transaction is authorized by the trust instrument, was approved by a court or was approved by the beneficiaries. *See id.* § 75-7-802.

Keep Beneficiaries Informed

The trustee must keep the beneficiaries fully informed regarding the operations of the trust. This includes providing each beneficiary with a copy of the trust instrument and sending an annual accounting to each beneficiary. *See id.* § 75-7-811. The accounting should show (i) the assets and liabilities of the trust at the beginning of the year, (ii) all income items received during the year, (iii) all expenses items paid during the year, (iv) all distributions made to beneficiaries during the year, and (v) the assets and liabilities of the trust at the end of the year. The accounting should also disclose any other matters pertaining to the trust of which the beneficiaries should be aware.

In addition, the trustee should notify the beneficiaries before the trustee takes any significant action with regard to the trust, in order to give the beneficiaries an opportunity to register objections with the trustee before the action is taken.

The trustee must also notify the beneficiaries when a new trustee takes office, when a revocable trust becomes irrevocable as a result of the settlor’s death, and when the trustee’s compensation changes. *See id.* § 75-7-811(2).

If there is a particular dilemma associated with keeping a beneficiary informed about the trust’s activities, such as where a beneficiary suffers from substance abuse, the attorney can discuss other options with the client. For example, while it is prudent for a trustee to provide a copy of the accounting to all beneficiaries, the statute requires only that a copy be sent to beneficiaries who request it. *See* Utah Code Ann. § 75-7-811(3) (Supp. 2010). In addition, some informational requirements can be, and may have been, waived by the settlor in the trust instrument.

The requirement that the trustee keep beneficiaries informed generally applies only to “qualified beneficiaries.” A qualified beneficiary is any beneficiary who is a current or permissible distributee of trust income or principal, or any beneficiary who would be a distributee if the trust terminated at the time in question. *See id.* § 75-7-103(1)(h).

In addition, if contributions to the trust are intended to qualify for the annual exclusion from the federal gift tax, it will be the responsibility of the trustee to send out the annual Crummey withdrawal notices to the beneficiaries.

Treat Beneficiaries Impartially

The trustee must treat the beneficiaries impartially, except to the extent the terms of the trust instruct the trustee to favor one beneficiary over another. *See id.* § 75-7-803.

Segregate Trust Assets

The trustee must maintain separate accounts and separate books for the trust. The trustee must not commingle the trustee’s personal funds with trust funds. *See id.* § 75-7-808.

SOCIAL SECURITY Disability Help

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File Tax Returns

An irrevocable trust is a separate tax-paying entity. If the trust does not already have a taxpayer identification number, the client will generally look to the attorney to obtain one.

It is the trustee's responsibility to file federal and state fiduciary income tax returns each year, reporting the income earned on trust assets. Preparation of these returns requires a sophisticated understanding of the income tax principles relating to trusts. The attorney should encourage the trustee to have the returns prepared by an accountant who is familiar with such returns.

Responsibly Administer the Trust

In general, the trustee must administer the trust in a prudent manner. *See* Utah Code Ann. § 75-7-804 (Supp. 2010). The trustee is responsible for protecting trust property, *see id.* § 75-7-807, enforcing claims that the trust has against other persons, *see id.* §§ 75-7-809, -810, keeping appropriate records, *see id.* § 75-7-808 and incurring only reasonable costs, *see id.* § 75-7-805. Where applicable, the duty to protect the trust property includes the duty to keep it adequately insured from loss.

Prudently Invest Trust Funds

The client may believe that the client is a sophisticated investor, and the client may in fact be such. Nonetheless, the attorney should explain that trust investments are governed by what is known as the "Prudent Investor Rule," which is codified at Utah Code Sections 75-7-901 through -907. *See id.* §§ 75-7-901, -907. This rule has several important components.

First, the trustee must hold a diversified portfolio of assets unless the trust instrument relieves the trustee of this responsibility or the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying. *See id.* § 75-7-903.

Second, the trustee must have an investment strategy with risk and return objectives that are reasonably suited to the trust, and trust investments must take into consideration the purposes, terms, distribution requirements, and other circumstances of the trust. *See id.* § 75-7-902.

Third, the trustee must weigh the following factors when making investment decisions: (a) general economic conditions; (b) the possible effect of inflation or deflation; (c) the expected tax consequences of investment decisions; (d) the role that each investment plays within the overall trust portfolio, which may include interests in closely held enterprises, tangible and intangible personal property, and real property; (e) the expected total return from income and the appreciation of capital; (f) other resources of the beneficiaries; (g) needs for liquidity, regularity of income, and preservation or appreciation of capital; and (h) an asset's special value, if any, to the purposes of the trust.

The attorney should encourage the trustee to consult with a professional financial advisor when designing and implementing an investment strategy for the trust. The trustee should not assume that the investment experience he or she brings to his or her own personal investments is sufficient for the role as a fiduciary.

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Revocable Trusts

Ordinarily, a person serves as trustee of his or her own revocable trust. If the trust is created by a husband and wife, both will often serve as co-trustees. Occasionally however, a third person is called upon to serve as trustee of a revocable trust even while the settlor of the trust is still alive. In such a case, the trustee has all of the responsibilities discussed in this article that apply to trustees of irrevocable trusts. The trustee's fiduciary duty is owed only to the settlor as long as he or she is alive. *See Utah Code Ann. §75-7-606(1) (Supp. 2010).*

Upon the death of the settlor, the revocable trust becomes an irrevocable administrative trust, and the duties discussed elsewhere in this article with respect to irrevocable trusts apply equally to the administrative trust. In addition, the trustee of an administrative trust has a variety of other responsibilities. Soon after the deceased settlor's death, the trustee must marshal the trust assets and pay the debts of the deceased settlor. The trustee must also send a notice to the trust beneficiaries within sixty days after the death of the settlor informing them of the existence of the trust. *See id. § 75-7-811(2)(c).* The trustee will be responsible for filing the deceased settlor's final personal income tax returns and the deceased settlor's estate tax return, if any. The trustee must obtain a tax identification number for the administrative trust and file the federal and state fiduciary income tax returns for the trust each year until the trust assets are distributed. The trustee will also, of course, be responsible for distributing the trust assets to the beneficiaries in a timely manner.

Co-Trustees

When more than one trustee is serving, the co-trustees must act by majority decision, unless the trust instrument provides otherwise. *See id. § 75-7-703(1).* Thus, if two trustees are serving, they must act unanimously. If more than two trustees are serving, they can act only if a majority of them concur in the proposed action.

Co-trustees are generally able to delegate their authority to act to other co-trustees, unless the trust instrument places restrictions on the ability to delegate. *See id. § 75-7-703(5).*

A trustee has a duty to monitor the actions of the co-trustee. *See id. § 75-7-703(7).*

Compensation of Trustee

A person serving as trustee is entitled to reasonable compensation, and is also entitled to reimbursement for reasonable expenses incurred in administering the trust. A very rough rule of thumb is that a non-professional trustee may receive as compensation an amount equal to between 0.40% and 1.0% of the value of the trust annually, depending on the size of the trust and the complexity of administration. Alternatively, the trustee may charge an hourly

fee, typically \$100-200. Legal fees, accounting fees, and fees of investment advisors are paid separately out of the trust.

Consequences of Breach


The attorney should explain to the client that, if the client fails to faithfully perform his or her responsibilities as trustee, the client may be subject to any of a variety of sanctions, including monetary damages, removal as trustee, denial of compensation, and the setting aside of certain transactions that the client may have entered into improperly. *See Utah Code Ann. § 75-7-1001(2) (Supp. 2010).* In order to protect him or herself from monetary damages, the trustee may want to consider obtaining errors and omissions insurance. It is rare for an individual trustee to carry such insurance, but the attorney should make the client aware of the option, since umbrella insurance policies do not usually cover liability arising out of a person's role as a fiduciary.

In extreme cases, a fiduciary may be subject to criminal liability for breach of fiduciary duty if the breach results in substantial risk of loss to the beneficiaries. *See Utah Code Ann. § 76-6-513 (Supp. 2010).*

More information can be found on this topic in The Utah Law of Trusts & Estates, a comprehensive online legal reference treatise available at www.utahestateplanning.org.


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Location Based Electronic Discovery in Criminal and Civil Litigation – Part 1

by David K. Isom

2010 was the year that geolocation technologies such as mobile social networks and check-ins exploded into general use and awareness in the United States. In the final quarter of 2010, more mobile phones (approximately 100 million) were sold worldwide than PCs (approximately ninety-two million) for the first time. See Dylan McGrath, IDC: Smartphones Out Shipped PCs in Q4 (Feb. 9, 2011, 7:05 PM), <http://www.eetimes.com/electronics-news/4213010/IDC--SmartPhones-out-shipped-PCs-in-Q4>. This article examines the impact of location technology upon civil and criminal legal processes in the United States, in two successive parts: This Part I summarizes the location based digital technology that has recently become ubiquitous and readily accessible. Part II explores the important legal and ethical issues that this technology raises for civil and criminal judicial proceedings.

PART 1: LOCATION BASED TECHNOLOGY

Four major developments in geo-technology and the way people use that technology portends a new world of location based electronic discovery (“LBED”) in civil and criminal litigation.

The first is that phones have become computers, and computers have become so small, powerful, cheap, robust, and connected – in short, so mobile – that most Americans now carry one in their purse or pocket. The second is the convergence of many location technologies that, when combined, create and store location metadata (off-screen data that makes the on-screen data work) that is becoming ever more accurate, accessible, and continuous.

The third development arises from the first two: location based services and applications (“apps”) are changing the American business and social landscape as much as any development since the advent of automobiles and highways. Because of its ability to identify and persuade prime, segregated potential customers, location based marketing is grabbing a sharply increasing percentage of companies’ advertising budgets. The fourth is that these devices and the companies, servers, and networks that support them record a flood of information that can be recovered for investigations and litigation.

Apple, Facebook, Google, and Twitter are leading the way, but a host of ingenious apps providers such as Groupon and Foursquare are adding to the location craze. Social networks on mobile devices have added dazzling (or scary) real-time location features.

A growing percentage of cell phone cameras and even camera cameras embed The Global Positioning System (“GPS”) location data in photos and videos that end up on Flickr, YouTube, and elsewhere on the Internet. Such devices relentlessly, silently, gather a person’s time-stamped locations with such precision that sometimes that individual’s speed and direction can be calculated, and record the location data on drives up to sixty-four gigabytes that keep the data for months or longer, even after deletion.

Every indication is that we have seen only the beginning of these important services and technologies. Still, surveys indicate that most people fail to appreciate how much, how persistent, and how revealing the location information is that they generate. People also fail to realize how important – whether helpful or harmful – that information is likely to be in litigation. Or they are simply willing to sacrifice some privacy for the siren benefits of mobile connectedness.

The location technology that constellated in 2010 will make location, location, and location more important in civil litigation and criminal prosecutions than ever before. *Subjective* location *data*, i.e., what people *say* about their location, such as when a person sends a text message that the individual is at a certain Starbucks – will continue to be important. But the importance of *objective* location *metadata* – what a *device* says about its own location – is growing with each new technology that frees a device to roam tethered only by electrons and leaving only digital footprints.

DAVID K. ISOM is an attorney who does corporate litigation and electronic discovery consulting at Isom Law Firm headquartered in Salt Lake City, Utah.



Overview of the New Location Technology Landscape

An increasing percentage of cell phones are “smart” devices for surfing, friending, following, texting, photographing, recording, posting, videotaping, tracking, locating, listening, watching, joining, playing, paying, and meeting. These smartphones have drives that create, receive, send, and store gigabytes of information – up to sixty-four gigabytes and climbing. The speed and storage capacity of smartphones will continue to increase and prices will continue to drop for the foreseeable future.

A 2010 Pew Research survey concluded that 85% of adult Americans had cell phones, and 96% of Americans ages fourteen to twenty-nine had cell phones. See Aaron Smith, *Gadget Ownership* (Oct. 14, 2010), <http://pewresearch.org/pubs/1763/americans-and-their-gadgets-technology-devices>. Cell phone users now send more emails and text messages by Short Message Service (“SMS”) or smartphone apps than voice calls. See Jenna Wortham, *Cellphones Now Used More for Data Than for Calls* (May 13, 2010), <http://www.nytimes.com/2010/05/14/technology/personaltech/14talk.html>.

The location information that cell phones create, reveal, and store, both in real time and in hindsight, has become robust, intimate and ever more accurate. This location technology has outpaced the awareness of all but a small fraction of those who use the phones. See Julia Angwin, *The Web’s New Gold Mine: Your Secrets* (July 30, 2010), http://online.wsj.com/article/SB10001424052748703940904575395073512989404.html?mod=what_they_know. The increase in cell phone location information is the result of the combination and increasing granularity of several technologies. A basic understanding of these technologies is helpful for understanding what location information is created and the sources from which such information may be obtained by request or subpoena for litigation. The appendix has five beginner exercises on the location functions of an iPhone.

Cell Phone Location Technology

Developments in the technology of cell phone location tracking have been spurred in part by Federal Communications Commission’s (“FCC”) regulations which required the creation and retention of location information for 911 emergency services. Cell phone providers were required by FCC regulations known as E911 to make a certain percentage of phones “location capable” by the end of 2005, see *Nuvio Corp. v. F.C.C.*, 473 F.3d 302 (D.C. Cir. 2006), and new location specifications must be met by September 11, 2012. See http://en.wikipedia.org/wiki/Enhanced_9-1-1 (last visited August 1, 2011). Taken together, these regulations require cell phone companies to assure that 95% of their phones

provide location information to local government Public Safety Answering Points (“PSAPs”) with longitude and latitude data accurate to 300 meters within six minutes of a request by a PSAP. See *id.* The FCC, in a project dubbed Next Generation 911 or NG911, is also studying how to expand 911 capabilities to allow emergency communication of geotagged photos, video, text messages, and other technologies beyond the current capability of 911 systems. See http://en.wikipedia.org/wiki/Next_generation_911.

The following are the three principal technologies that create, communicate, and store cell phone location data.

Cell Tower Data

Cell phones are called such because they receive signals from transmitters whose range encompasses a specific geographic area known as a cell. For a cell phone to be able to receive a call, the cell phone must be identified as being located within the cell whose signal covers the area in which the phone is located. This requires signals to be sent continuously between the cell phone tower and all served cell phones within the cell area. This occurs whenever a cell phone’s power is on and within the cell, even if a call is not in progress. See J. Beckwith Burr, *The Electronic*



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Communications Privacy Act of 1986: Principles for Reform, 13 (March 30, 2010), http://www.digitaldueprocess.org/files/DDP_Burr_memo.pdf.

The strength of this type of metadata for locating a cell phone is that the data are voluminous, real time, and virtually continuous. The limitations of the metadata for locating the cell phone include the fact that the metadata are voluminous and therefore unwieldy, and that the metadata generally show only that the phone is within the cell area. In some cases, cell tower data may be able to show the speed and direction of travel from cell to cell and that a person (or at least a phone) was in an overlap area between two cells. See *In re Application for an order Directing a Provider of Elec. Commc'n Serv. to Disclose*, 620 F.3d 304, 311 (3d Cir. 2010).

The diameter of the cell area depends essentially upon the density of the population of cell phone users within the cell. See *Electronic Communications Privacy Act Reform: Hearing Before the Subcomm. on the Constitution on Civil rights and Civil Liberties*, 111 CONG. 12-15 (2010) (statement of James X. Dempsey). Cell diameters can be as large as several miles, or as small as a micro cell covering only one room in a building, see *id.*, and now there are “personal” cell “towers” the size of a Rubik’s cube. See Ben Rooney, *Alcatel-Lucent Shrinks Cell Tower*, WSJ BLOG (Feb. 7, 2011, 4:00 PM), <http://blogs.wsj.com/>

tech-europe/2011/02/07/alcatel-lucent-shrinks-cell-tower-to-a-cube. “The number of cellular base stations in the U.S. has tripled over the last decade, and the rate of growth is accelerating. By one industry estimate, there are now over 251,000 reported cell sites operating in the United States.” *In re Application for Historical Cell Site Data*, 747 F. Supp. 2d 827, 832 (S.D. Tex., 2010).

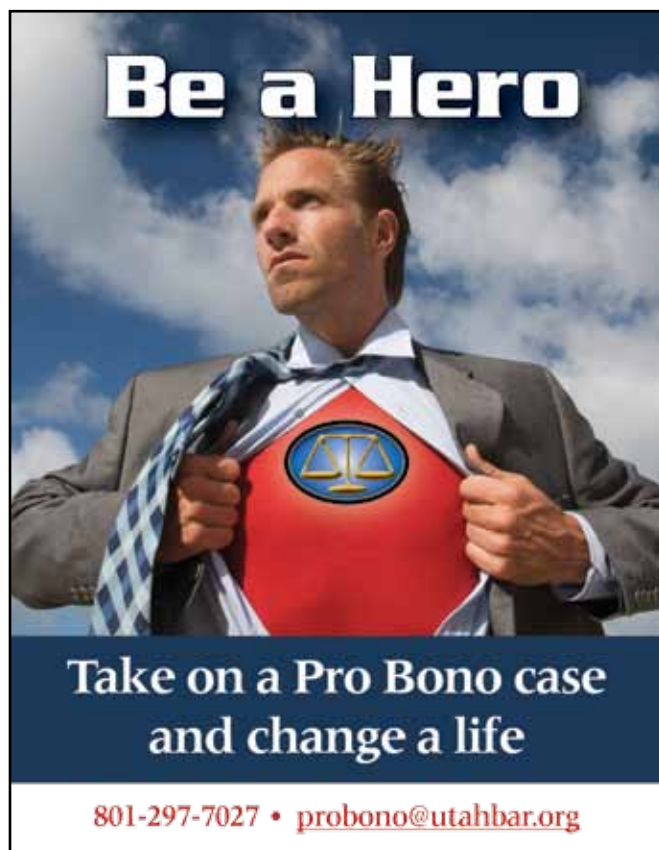
GPS and Cell Phones

GPS is a system of U.S. satellites that broadcast signals to terrestrial receivers to allow the determination of geolocation by triangulating signals from three or more satellites. GPS devices started to be included in some cell phones in the early 2000s, and the use of GPS in cell phones since then has grown dramatically. GPS is now included in most cell phones sold in the U.S. – approximately 80% of cell phones sold at the end of 2011 will have GPS. See *Press Release, HIS, Four Out of Five Cell Phones to Integrate GPS by End of 2011* (July 16, 2010), <http://www.isuppli.com/Mobile-and-Wireless-Communications/News/Pages/Four-out-of-five-Cell-Phones-to-Integrate-GPS-by-end-of-2011.aspx>. The use of navigation software in cell phones is projected to overtake personal navigation devices (“PNDs”) such as Garmin and Tom Tom by 2014, and many of the PND providers now offer navigation apps for smartphones. See *id.*

The accuracy and frequency of GPS-based location data has steadily increased. Now, Verizon’s iPhone 4 and other cell phones have GPS-enabled apps, including navigation, marketing, and social services that can create near-constant location metadata. As Verizon says: “With VZ Navigator your phone becomes a fully loaded next generation GPS... Updated every 60 seconds from 1.8 billion traffic probes in the U.S., VZ Navigator SmartTraffic gives you spoken alerts and options to reroute around traffic jams.” Verizon Wireless, http://Products.verizonwireless.com/index.aspx?id=find_navigation&CMP=KNC-PaidSearch (last visited Aug. 1, 2011).

WiFi

WiFi technology increases the ubiquity, accuracy, and reliability of cell phone location data. Use of cell phones and other devices such as laptops and tablets, e.g., iPad, using WiFi creates and stores geolocation data from Wireless Access Points (“WAP”) and Internet Protocol (“IP”) Address data, discussed in more detail below. WiFi broadcasts signals within a small area (such a private area is sometimes called an “access point” and the public area is often called a “hotspot,” but the terms are often interchangeable) and connects those signals to the Internet. Some WiFi signals



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are encrypted, and some are password protected, but many are neither encrypted nor password protected.

Cell Phone Location Based Apps and Features

By mid-2011, iPhone had over 475,000 apps (third party software that delivers services and games). See David Pogue, *Just How Many Android Tablet Apps Are There?*, N.Y. TIMES BLOG, <http://pogue.blogs.nytimes.com/2011/07/01/myster-how-many-android-tablet-apps/>. Of these, a small but growing number create and store location based data. See Frederic Lardinois, *Number of Location-Aware Apps Keeps Growing Rapidly – But Very Few are Cross-Platform*, (Feb. 5, 2010, 9:10 am), http://readwriteweb.com/archives/number_of_location-aware_apps_keeps_growing_-_but.php. More importantly, in April 2010 it was revealed that iPhones and Android-based cell phones were creating and recording nearly constant location data. After immediate congressional hearings, Apple promised to reduce the frequency and amount of location data created and stored by iPhones.

The following is a brief summary of some of the categories and uses of cell phone apps that create and store location data.

Social Networks

Social networks have become mobile. By the end of 2010, Facebook was available on 200 million phones, more than triple the number from the previous year. See Erick Tseng, *Making Mobile More Social*, THE FACEBOOK BLOG (Nov. 3, 2010, 11:15 AM), <http://blog.facebook.com/blog.php?post=446167297130>. In 2010, Facebook was granted an important geolocation patent whose purpose was summarized as follows:

Search results, including sponsored links and algorithmic search results, are generated in response to a query, and are marked based on frequency of clicks on the search results by members of social network who are within a predetermined degree of separation from the member who submitted the query. The markers are visual tags and comprise either a text string or an image.

Foursquare claims three million geo-check-ins per day in 2011. Twitter launched its first geolocation application programming interface (“API”) in late 2009, see Marshall Kirpatrick, *What Twitter’s New Geolocation Makes Possible* (Nov. 19, 2009, 4:34 PM), http://www.readwriteweb.com/archives/twitter_location_api_possible_uses.php, and has continued to expand its location services. Foursquare claims 3 million geo-check-ins per day in 2011, see <https://foursquare.com/about>, though the number of check-ins per

user may have peaked. See Guest Author, *2011: The Year the Check-in Died* (April 12, 2011, 10:00 am), http://www.readwriteweb.com/archives/2011_the_year_the_check-in_died.php.

Location Based Marketing and Services

By tracking a phone’s location, and marrying geolocation and movement data with other data about gender, income, ethnicity, age, sexual preference, and political views, marketers can multiply the effectiveness and return on investment of advertising. Economics are driving a torrid increase in location based commercial activity.

The line between social, marketing, and other types of app networks is becoming increasingly blurred. Loopt and Gowalla and Foursquare and Google Latitude are as much social as commercial, and Flickr and YouTube as much social as media.

Mobile Payments and Near Field Communication

Many credit cards have near field communication technology (“NFC”) that allows the cards to be read at a short distance. NFC is moving to cell phones. Mobile cell phone payments will expand discoverable geolocation data significantly.

Location Based Photography

Cell phone cameras with GPS typically embed photographs with longitude and latitude data that can readily be converted to address or other location information using any of a number of Internet tools, e.g., latitude conversion, see Stephen P. Morse, *Converting Addresses to/from Latitude/Longitude/Altitude in*

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One Step, <http://stevemorse.org/jcal/latlon.php> (last visited Aug. 1, 2011). This location metadata is known as Exchangeable Image File Format (“Exif”) metadata. Exif metadata can be stripped from photographs, but if not stripped will typically carry the Exif metadata when stored, emailed, or posted online, including at such sites as Twitter, Flickr, and YouTube. For instance, suppose you want to sell your motorcycle. If you take a picture of your motorcycle in front of your garage and post the photo online without scrubbing the location metadata in the photo, you take the risk that someone will read the location data embedded in the metadata, come to your place, and steal the motorcycle. See Gerald Friedland and Robin Sommer, *Cybercasing the Joint: On the Privacy Implications of Geo-Tagging* (2010), <http://www.icsi.berkeley.edu/pubs/networkingcybercasinghotsec10.pdf>; See also *I Can Stalk U*, <http://icanstalku.com>.

Geotagging photos and using geolocation data from other people’s photos are popular for lots of reasons, including building itineraries from others’ geotagged photos, see Clay Dillow, *Data-Mine Other People’s Flickr Photos to Generate Your Travel Itinerary* (June 15, 2010, 3:52 PM), <http://www.popsci.com/science/article/2010-06/mining-flickr-data-create-customized-travel-itineraries>, creating 3D and other exciting collages, see Rebecca Boyle, *Algorithm Generates a Virtual Rome in 3D from 150,000 flickr Users’ Photos* (Sept. 17, 2009, 4:51 PM), <http://www.popsci.com/gear-amp-gadgets/article/2009-09/building-virtual-cities-automatically-150000-flickr-photos>, and cataloguing photos. The price of this convenience includes divulging information that a person may not appreciate and might not want to share.

Apps

With hundreds of thousands of apps now available, and thousands of geo-apps, and more on the way, apps-engendered location metadata will continue to increase in volume and importance.

Stationary Computers: Tablets, Laptops, Desktops, Servers, and Cloud Providers

Tablets and laptops are becoming more and more like cell phones in the geolocation information that they store. Many new generation tablets and laptops have GPS, and virtually all create and store WiFi data. Thus, tablets and laptops can generate some of the same location information that cell phones create.

Stationary computers, though stationary, can be a source of important location information. For example, such computers create, transmit, receive, and store subjective location information,

e.g., a person’s statement in emails or text messages or other ESI that such person was in Topeka or will be attending the meeting in Jeffersonville, Ohio. And a stationary computer contains important location information about the computer’s user – namely that the individual is at the location of the computer engaged in certain communications or processing at the time date-stamped in the computer’s metadata.

Stationary computers, of course, can receive and store geodata from others’ mobile devices. To the extent that stationary computers are connected to, or synced with, or receive objective location data from mobile devices, those data are likely to be recoverable from the stationary computer in addition to the mobile device from which the data came.

The connection of a stationary computer to the Internet also provides complex evidence of location the accuracy and reliability of which can vary with such factors as: (1) the browser employed; (2) whether the computer is connected by WiFi or wire; (3) the Internet Service Provider, the use of a geolocation API such as Google Gears, see http://en.wikipedia.org/wiki/W3C_Geolocation_API (last visited Aug. 1, 2011), and the external Internet Protocol address, or IP address, of the computer’s connection to the Internet.

Other Location Based Technologies

The ubiquity and variety of other technologies that are generating and will generate LBED are dazzling. Radio Frequency Identification tags that give access to buildings will allow merchants in and around the building to make location based marketing pitches to a person in the building. See *Schindler Elevator Corp. v. Otis Elevator Corp.*, 593 F.3d 1275 (Fed. Cir. 2010). LBED-creating technologies will aid the tracking of animals including cattle, see *Farm-To-Consumer Legal Def. Fund v. Vilsack*, 636 F. Supp. 2d 116 (D.D.C. 2009), fish, and other wildlife. See <http://en.wikipedia.org/wiki/Telemetry> (last visited Aug. 1, 2011). From the analysis of disease, to aid in fighting wildfires, to the tracking of trucks, ships, trains, pets, children, patients, convicts, cars, and farm machinery, geolocation technologies promise to become ever more amazing, important, beneficial, and intrusive.

PART II: IMPACT OF LOCATION TECHNOLOGY ON CIVIL AND CRIMINAL LITIGATION

Part II will explore how lawyers, prosecutors and parties can use the location information from these technologies in civil and criminal proceedings, and the impact of all of this on Americans’ privacy.

1. Turn On/Off iPhone 4 GPS

a. Open Settings



b. General




c. Location Services



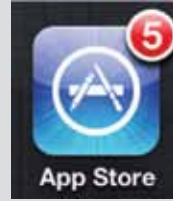
d. Location Services On/Off



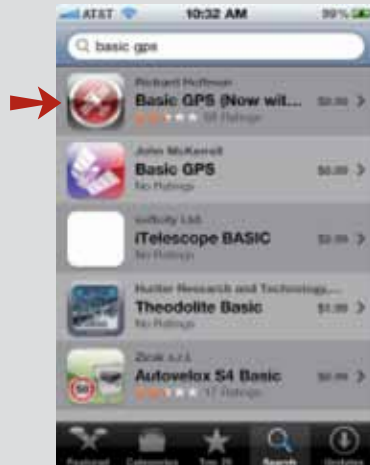
(This page also shows which apps use geolocation, and therefore create and store geolocation data on your iPhone. Notice also that the  means that the app has used GPS within the last twenty-four hours.)

2. Test Accuracy of a GPS app (this illustrates the “Basic GPS” app on an iPhone 4 – this experiment will cost 99¢)

a. Open App Store



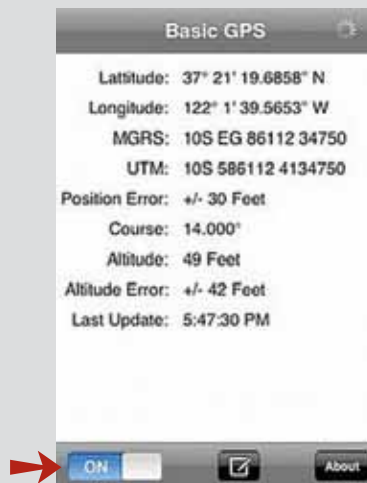
b. Enter, purchase & download “Basic GPS”



c. After installation, open the “Basic GPS” app



d. Slide “On”



e. Click “Map”



f. To see your location on a Google map image, click “hybrid.”



3. Convert Latitude and Longitude into decimal form

- Plug latitude ($33^{\circ} 39' 56.9023''$ N) and longitude ($112^{\circ} 25' 4.9213''$ W) (example from above, but use your own latitude and longitude) into conversion to such as Steve Morse's tool (<http://stevemorse.org/jcal/dms.html>).
- Convert to decimal format.

4. Convert decimal form of Latitude and Longitude into address

- Use a conversion tool such as Steve Morse's tool.

A screenshot of a web-based tool for converting decimal latitude and longitude into an address. The interface includes two input fields: 'latitude' with the value '33.66580619444444' and 'longitude' with the value '-112.41803369444445'. Below these fields is a note: 'above values must be in decimal with minus signs for south and west'. At the bottom are two buttons: 'Determine Address' and 'reset'.

5. View location metadata from GPS-activated digital photograph from camera, smartphone, Flickr, YouTube or other Internet source that includes metadata. You can find tools, both free and paid, on the Internet for viewing on your computer the metadata in photographs by searching for terms such as Exif, metadata, photo, tool and extract. Free and paid apps on smartphones make the viewing of location metadata easy. For example, the following shows how to view location metadata on a photograph taken with an iPhone camera using a free iPhone app.

- In the iPhone apps store, search for "exif photo metadata" and select an app. For example, select and download the free app "Meta."
- By selecting a photo using the Meta app, the metadata associated with the photo is displayed automatically.



- After downloading "Meta", clicking on the "Meta" icon takes you to your photos on your iPhone.



- Scroll down to find the latitude and longitude where the photo was taken.



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Client Communication

by Keith A. Call

George Bernard Shaw once said, “The greatest problem of communication is the illusion that it has been accomplished.”¹ Communication, it is safe to say, is one of the most difficult life skills to master. Perhaps just as difficult as the act of communicating is the fact that the way we communicate exposes our character, for good or for bad. Relationship coach Matt Townsend teaches that “the real power of communication comes not from the words being spoken or the flare of their delivery. The real power is always found in the character and integrity of the author behind the message.”²

According to the Utah Office of Professional Conduct, breakdowns in client communication account for nearly *one-third* of all orders of lawyer discipline.³ Here are three things to remember about communicating effectively with your clients.

1. Communicate personal conflicts.

Personal conflicts can be very hard to recognize, admit, and communicate. Utah State Bar Ethics Advisory Committee Opinion 02-08 provides some excellent guidance in this area.

In Opinion 02-08, an attorney wondered whether Utah Rule of Professional Conduct 1.4 allowed him to appear in future cases before a judge without informing his clients of a past personal dispute with the judge. The Committee applied a subjective standard. It opined that the lawyer must inform his clients if he believed the judge may harbor some ill feelings toward the attorney, but he was not required to make disclosure if he believed “in good faith” that the judge had no ill feelings. “However, the prudent attorney will also consider that, if the client is not informed of the prior complaint, he may later find himself the subject of... a bar complaint, and the lawyer should be prepared to explain his reasonable good-faith conclusion...” Utah State Bar Ethics

Advisory Opinion Committee, Op. 02-08, ¶ 10 (Sept. 18, 2008).

Rule 1.7(b)(4) requires informed consent any time the representation of the client may be “materially limited... by the personal interest of the lawyer.” See Utah R. of Prof'l Conduct 1.7(a)(2). These standards are by definition subjective. As the Committee explained well, you should either communicate potential personal conflicts to your clients, or be prepared to explain why they do not exist.

“Sometimes it is easy for lawyers to get so involved in a case and identify so much with their clients that they can forget the case is not their own.”

2. Don't forget who is boss.

Sometimes it is easy for lawyers to get so involved in a case and identify so much with their clients that they can forget the case is not their own. We become familiar with the facts (sometimes even more familiar with all the facts than the client), we understand procedure,

and we think we know strategy. In such cases it is easy to let ourselves “run” with a case, thinking we know what is best.

But the case always belongs to the client. Rule 1.4 requires a lawyer to reasonably consult with the client about the means by which the client's objectives are to be accomplished, and to keep the client reasonably informed about the status of the matter. See *id.* R. 1.4(a)(2), (3). Don't get so caught up in your client's cause that you forget to keep your client adequately informed.

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



3. Communicating with the busy or uninvolved client.

Sometimes keeping the client reasonably informed is easier said than done. Most of us have had clients who are hyper-busy or who are just bad communicators. Because good communication requires at least two parties, when the client side of the equation does not do his or her part, the lawyer faces particular challenges.

It is important to figure out how your client likes to communicate, whether by letters, email, telephone calls, or personal meetings. You should also figure out when your client is most likely to have time to give you his or her attention, whether it is early in the morning, later in the evening, or over lunch. You may need to establish regular weekly or monthly meetings at a set time and place so everyone can spend a few minutes focused on the problem or case.

In cases of unusual difficulty, you may simply have to make sure there is no communication breakdown on your end by sending all material information in writing so that there is a clear record of your efforts to communicate. If it becomes impossible to get client input on important decisions, the best course of action may be to terminate the client relationship.

1. See, e.g., *The Painter's Keys*, http://quote.robertgenn.com/auth_search.php?name=George%20Bernard%20Shaw (last visited July 15, 2011).
2. Personal Interview with Matt Townsend (July 12, 2011).
3. Billy L. Walker, Utah State Bar, Office of Professional Conduct, *Annual Report*, p.18 (Aug. 2010), available at <http://www.utahbar.org/opc/Assets/2009-2010-annualreport.pdf> (last visited July 15, 2011).

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Use it or Lose It – How To Effectively Impact the Utah Legislature

by Lorie D. Fowlke

The Utah State Legislature has been the focus of much attention for good and ill. Local newspapers and pundits frequently criticize the legislature for its conservative position on everything from gay marriage to private property rights. See Rosemary Winters, *Anti-gay Bias Pervasive in Utah, Report Says*, SALT LAKE TRIBUNE, June 19, 2011; Allen Greenblatt, *Real Power (Utah Real Estate Lobby)*, GOVERNING MAGAZINE, June 2008. The national press also gives Utah's legislature its share of attention, but more often it is for things like "best managed state," see Susan Struglinski, *Utah No. 1 for Governing*, March 4, 2008, DESERET NEWS, Mar. 4, 2008; or one of half a dozen states with a viable public employee pension plan. See Frank Keegan, *Utah Wins Public Pension Reform Award, but Still at Risk* (June 2, 2011), <http://watchdog.org/9627/utah-wins-public-pension-reform-award-but-still-is-at-risk/>.

No matter how you feel personally about the legislature, as members of the bar, we are perfectly positioned to have a significant impact on what happens there. We can and should take advantage of that opportunity.

Utah Legislature 101

In order to work with the legislature you must first understand how it works. Every state has its own legislative organization; all are similar, but each has unique characteristics. Most, but not all, have a bicameral legislature, meaning two houses. Some states call the house, the assembly. Some meet in alternate years; some meet every year for sixty days, ninety days, or even 120 days. Some balance the budget every year, while others balance it only every other year. See <http://www.ncsl.org/>. Very few states have a full-time legislature, California being a notable exception in the West.

Utah Legislature Organization

In Utah, our legislature meets every year for forty-five days, one of the shortest sessions in the nation. The Utah Constitution sets the starting date as the fourth Monday in January.¹ The forty-five days include weekends although, except for rare occasions, legislators are not in meetings on the weekends. The legislature is constitutionally mandated to balance the budget every year. See UTAH CONST. art. XIII, § 9. In addition to the forty-five days, the legislature meets once a month in committees during the "interim," the period between sessions, to study issues in more

depth than is possible during the session. Much of the legislature's work is conducted during the interim.

There are twenty-nine senators and seventy-five representatives, elected from geographic regions all over the State. In the legislature we are fond of saying that to win any vote, you need 15-38-1, i.e., votes from fifteen senators, thirty-eight representatives and one governor. House representatives are elected for two year terms; senators for four. There are no term limits. Other states have different numbers and some have term limits.

Each senate and house district is divided by population, the numbers to be roughly equal. This division occurs every ten years to reflect growth and moving patterns of the population. For example, in Utah County, the western side of the county has grown so much since the last redistricting process in 2001, that the house and senate districts are more than three times the population size of those on the eastern side of the county. This will be adjusted during the next redistricting process, which has recently begun and will be formalized in 2012. It will likely mean more districts on the western side of the county and fewer districts on the eastern side. You can keep track of the process currently on the legislative website at <http://le.utah.gov/>. Under "featured items" click on "redistricting."

The Utah Legislature has received awards for the transparency and sophistication of its website. There is a wealth of information about what the legislature has done, is doing, and is scheduled to do. The website is easy to use and stays current. The items in the left-hand column remain constant. It includes information about past and current bills, the Utah Code and Utah Constitution, information about legislators (including a map and seating chart), and a citizen's guide to the political process. The middle section

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of the home page is for current events at the legislature and changes regularly, depending on what is pending. At the time I wrote this article, there were links to interim committees, recent legislative audits, and information about GRAMA, redistricting, and immigration-related legislation.

The right-hand section of the home page is for researching any bill that was ever filed by bill number, year, legislative sponsor, or subject matter. All laws proposed by legislators are filed by bill number – either HB, for bills filed by representatives, or SB for bills filed by senators. Considering how much we, as attorneys, need to stay current on the law it is surprising we do not use this feature more often. I think attorneys would use it more if they became more familiar with it. Once a bill number is identified, there is a plethora of information available on the site, including the legislative history; legislators who voted for and against the bill; audio and video files of the floor and committee debates; if or when the bill passed; and when the governor signed the bill. All laws generally go into effect the first part of May, unless the bill itself states a different time, which happens occasionally. Check it out. When reading the actual bill, read the “long title” at the top first; it is a summary of what the bill is supposed to accomplish. It also identifies what sections of the code are enacted, amended, or repealed.

Legislators

Contrary to what you may believe by reading the local papers, most of the legislators are dedicated honest individuals who really do want to serve their communities. Many are self-employed or retired, which is becoming more and more necessary as the legislative duties continue to take up more time during the year, not just during the forty-five days of the session. In addition to the session and interim committee meetings, after the first term, legislators are invited to serve on various task forces, commissions, or boards, all of which meet regularly. Legislators also must make time to meet with their constituents, report on legislation passed, and obtain feedback for future legislation.

Of course, by virtue of the fact that a legislator must run for election every two or four years, deal with the press regularly, and frequently speak in public, the typical legislator has a healthy ego. This is a must in order to maintain any kind of equilibrium in a world where you never please everyone, and someone is always unhappy with you. While people often love or hate you, everyone wants a piece of you. A legislator is literally inundated with requests for his/her time, by mail, email, telephone, and in person. Legislators are invited to participate in every activity that has any funding from the State because everyone believes their project, program, department, or activity is worthwhile. People want the legislator to see it

from their view, so the legislature can understand what they do and will not vote to cut their funding.

Certainly, some legislators handle this dynamic better than others. While serving, I constantly reminded myself that this attention, and even adulation, is due to the position, not to any great accomplishment or intrinsic value of me personally. Of course, there is always the press and the “crazies,” i.e., chronically dissatisfied, to keep you humble. However, over the years, a few individuals have come to believe in their own importance and infallibility and have fallen, publicly, with great humiliation. Without defending their mistakes, I still recognize that they were good people who served the State well in many circumstances but who made foolish decisions, for which they paid dearly.

Working with Legislators

There are primarily two ways members of the public generally influence legislators. First is the mass communication appeal. This is when dozens, hundreds, or even thousands of people contact the legislators to express a position. Some of the most memorable have been the support for raw milk and for ATVs.

To have the greatest impact on a legislator you need to have a connection with that person, if possible. You should start with your own legislator. If you do not know the identity of your legislator, you are unfortunately not alone, or even unusual. Each of us has a state senator and representative that represent the precinct where we reside. We have different district numbers for our state house district, our state senate district, and our federal congressional district; however, our precinct number is

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always the same. You can usually locate your precinct number by looking on your county clerk's website. With your precinct number you can identify your district and elected officials. This is elementary stuff; yet, many people do not know the name of their state and local officials, let alone anything about them. You can also find your own representative or senator by checking on the state legislative website (<http://le.utah.gov/>), click on "senate" or "house" in the left-hand column and go to "district maps."

The other way to connect with a legislator is to share some expertise in an area for which a legislator is proposing legislation. Most legislators are not attorneys but have a certain policy they believe needs to be enacted. This is often based on a personal experience, a complaint from a constituent, or perhaps a legislative audit. While attorneys in the Office of Legislative Research and General Counsel generally draft the legislation, the legislator rarely has experience about the practical effect of their proposal. Often they do not consider the problems attorneys or judges might have in enforcing or interpreting what the legislator wants. Sometimes the solution the legislator has suggested may not bring about the desired result. If you, as an attorney, have knowledge about the area that is affected, you could and should contact the sponsor of the proposed legislation with your input. You often can become as involved with the legislation as you choose to be, sometimes even drafting language that you think would address the problem.

There are things you should understand about legislators if you decide to contact them, which you should do often, in order to be effective. The most important thing to understand is that most legislators are working people who have "real jobs" in addition to their work for the state. This means that they are incredibly busy people. It is hard to explain how heavily inundated legislators are with email, phone calls, invitations, and meetings. It has been compared to drinking out of a fire hose or a waterfall. The longer a legislator serves, the busier they become, as they become more involved and carry more leadership responsibilities. The barrage is daily and constant. They may be interested in what you have to say but you have to get their attention first. Make sure they know who you are and why what you have to say would be important to them. This is not because they are rude but simply because their time is full.

When you attempt to make contact with your legislator, be sure to immediately identify the context in which he/she can relate to

you, i.e., whether you are a constituent from his/her district or are interested in certain legislation he/she is proposing. Legislators should and usually do pay attention when they know it is a constituent because they rely on the voters in their district to stay in office. Most do care about their constituents and want to help them. Letting them know you are a voter will get their attention.

You should recognize that they are busy and that you appreciate their service in your behalf. You certainly do not need to grovel but respect and courtesy go a long way; this is politics after all. When speaking to legislators, you need to realize that they speak to dozens of people just like you every day. Do not be offended if they do not remember your name or what you spoke to them about, if you meet again. Be as brief as you possibly can while covering the necessary material. Have a document that clearly and succinctly states what you are telling the legislator. This should be in two parts, one with the necessary detail and references and, two, a summary. Be sure the document has all your contact

information. Identify any other constituents or organizations that also feel the way you do about the subject, or have the same concerns.

If you come to complain about a problem, bring a suggestion for a solution. Legislators receive innumerable complaints but few constructive suggestions.

"If you come to complain about a problem, bring a suggestion for a solution.... You will have a much greater impact if you have a proposal as well as a complaint."

You will have a much greater impact if you have a proposal as well as a complaint. After your initial contact, you need to follow up, probably several times. Again, this is not because legislators are rude or lazy; it is simply because they are so inundated with information and requests. Follow what happens to your proposal and contact the legislator again, and again if necessary, to ensure the message is received. If it is during the legislative session, you can do this by contacting their intern. Other than during the session, however, Utah legislators have no staff to assist, so you must try to work with them individually. The watchword is "pleasantly persistent."

Legislation

The primary purpose of the state legislature is to pass an annual budget. The legislature also makes policy decisions, which are reflected in the laws passed. By being involved in this process, we as attorneys can mitigate the effect of policies with which we may not agree, and we can help shape the policies we support. Because of our expertise in various areas, this is a meaningful service to our community.

In order to know what policies are being proposed, you need to keep abreast of what legislators are working on. While this is not always possible, much information is available relatively easily. Again, on the legislative website, on the right-hand side of the page, you can search for bills by subject matter. Legislators can start filing bills for the next session as early as May 1st of each year. If you locate a bill file that has been opened on a certain subject, you can sign up for tracking service. This is easily done with a few clicks and you will automatically receive an email whenever any action is taken on the bill. You should follow the progress of the bill so you know where it is, who is supporting or opposing it, and if it is held up somewhere.

After you locate a bill, you should review the language written by the legislative research attorneys. Perhaps you think it is a good idea but needs some tweaking. That may well happen during the legislative process, but it may not. You should contact the sponsor of the bill and make your suggestion. Perhaps you think the bill is a disaster waiting to happen. You know this because you have litigated the issue and understand the practical effect of such a policy. Whatever you think about the legislation, you should not be afraid to provide input. At the very least, you should send an email to your own legislator, telling him/her you are a constituent and you think the bill that is being sponsored by another legislator is a great idea, or is a huge mistake. Explain why. Many times legislators will receive these types of emails and subsequently go to the sponsor and question the proposal. When enough people express concerns, it can turn the tide and affect whether or not the bill will pass, or in what form it will pass.

You have now identified a problem and you want to influence the legislation. You know who your representative and senator are and have established a relationship where at least they know your name and a little bit about you. You have gone to the “meet the candidate” night and hopefully to your caucus meetings and any town halls or legislative report meetings sponsored by the legislators in your area. Now you are ready to make a difference.

Persuasion is best done one-on-one or with just a few. It is about relationships. Start early. To have an impact, do not wait until the legislative session starts. Ideally, you should begin meeting with legislators in May. That gives legislators a chance to recover from the last session, and it is when legislators begin working toward the next session. Identify the key legislators involved in making decisions about your issue. For example, if your concern is about licensing, locate the chair, vice-chair, and members of the business and labor committee. Review agendas, minutes, and materials that were distributed. Notice how members vote on certain policies. This is all available on the website under “committees” in the left-hand column.

Now go to work. Contact the chair for a meeting. Try to accommodate their schedule. You do not have to buy lunch but recognize they have another life besides the legislature and be considerate of their time. Explain how long you expect to take and stick to it. Try not to spend over thirty minutes; less is even better. Review the handout you have prepared with the legislator so they know what is relevant. Be absolutely honest and accurate in all the information you provide to any legislator. Like lawyers, legislators remember who tells the truth and who embellishes. Finally, make your presentation based upon a premise you know that particular legislator will accept philosophically.

If you really want to make a difference, you can. All you have to do is understand the process, locate who to contact, and determine when and how to do it. Legislators generally have a great deal of respect for members of the bar. You can use that credibility to better our community. As I frequently tell my children, you cannot complain about the food if you are not willing to help cook.

1. It used to be the third Monday, but political pressure finally prevailed in excluding federal holidays from the forty-five days, including Martin Luther King Day, which was the third Monday; a constitutional amendment was passed two years ago. See UTAH CONST. art. VI, § 16.

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Disasters: Are You Prepared Personally and Professionally?

by Brooke Ashton

“In fair weather prepare for foul.”
— Thomas Fuller

When I was in my third year of law school at the University of Kentucky, Hurricane Katrina hit the gulf coast. I remember watching on TV thousands of people being evacuated from their homes; helicopters air lifting stranded citizens from their roofs; stadiums filled with cots to provide some shelter to now homeless individuals. Everyone wanted to help or provide some sort of aid, either money, time, or donations.

My opportunity to help came when some of the victims were transported to Lexington, Kentucky. A group set up a legal clinic to provide legal assistance to these individuals. As a student-attorney at the law school's legal clinic, I was allowed to volunteer to help. I remember entering the clinic with a desire to assist and help and leaving the clinic with a wish that I could have done more.

This experience made me aware of the need to have some prior organization in place in order to more effectively provide legal services in the event of a disaster. So when the Utah Bar sent out notices that it was forming a committee to organize a plan for a disaster, I signed up. The Disaster Legal Response Committee was organized and has been working on coordinating and developing a plan for providing legal services for low-income individuals and small businesses in the event of a disaster.

With earthquakes, tsunamis, tornados, and other natural disasters frequently filling our television news broadcasts, not to mention the recurring theme of potential terrorist threats, there is no way to predict when a disaster will occur or the type of disaster that will occur. Because of this, one of the goals of the Disaster Legal

Response Committee is to get the Bar members thinking about preparation and being personally prepared in the event of a disaster so that they can be available to provide assistance to others.

Personal preparation is vital.

Before a person can assist others in a disaster, he or she must first be prepared himself or herself. Have you discussed what you and your family would do if there is a disaster? Do you have a way to contact family members both locally and out of state to make sure that all family members are accounted for?

Professional preparedness should not be overlooked.

Does your firm or company have a disaster plan in place? As an attorney you may have boxes of files, containing important client documents. Or perhaps you have joined the paperless revolution and instead have stored these documents on computers

and servers. However, have you taken any steps to protect this information in the event of a disaster? What does it mean for your client if suddenly the documents and evidence pertinent to the case is no longer available because your office was destroyed? Also, do you know how your clients will be able to communicate with you and how the lawyers and staff in your office will communicate with each other to get work done under emergency conditions? What about court appearances? Do you know the plan the courts have in place in the event of a disaster?

BROOKE ASHTON is an attorney with Thompson, Ostler & Olsen. She is also serving as co-chair of the Disaster Legal Response Committee.



“[O]ne of the goals of the Disaster Legal Response Committee is to get the Bar members thinking about preparation and being personally prepared...so that they can be available to provide assistance to others.”

The Disaster Legal Response Committee is encouraging bar members to first look at their own preparedness, so that they will be available to provide assistance to others. It is only after your home and law practice are secure that you are then in a position to provide assistance to others. While the committee is not providing specific guidance to firms and solo practitioners on how best to be prepared, there are many resources available. For example, Utah has some great preparedness resources. One of these sources is the Be Ready Utah program. At www.BeReadyUtah.gov there are resources for family preparedness as well as business preparedness. You can even schedule a Business Workshop with the Utah Department of Public Safety where a person from the Division of Homeland Security will talk with you about business readiness. You can download a guidebook that provides resources and weekly goals to helping your business get prepared.

Preparing to Help Others.

By planning ahead, the goal is to provide more timely and better

quality assistance in the event of a disaster. The Disaster Legal Response Committee is contacting other organizations to discuss their disaster preparedness and coordinate those efforts to be able to provide more efficient assistance in the event of a disaster. This includes working closely with the Young Lawyers Division of the Utah Bar which has an agreement with FEMA to provide some legal services in the event of a disaster. Additionally, the committee is making a list of attorney and paralegal volunteers who are willing to be contacted, and gathering resources for use by volunteer attorneys. It is the goal of the committee and the YLD to ensure that the community is prepared for a disaster and to have a plan and volunteers in place by early 2012.

If you are interested in volunteering, providing resources, or learning more about the Disaster Legal Response Committee, you can contact the Pro Bono Coordinator at the Utah Bar at 801-297-7027 or probono@utahbar.org. The committee will also have a table at the Fall Forum on November 17-18, 2011.



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October 23–29, 2011

Join us in celebrating the goodwill of Utah attorneys in increasing access to justice for all. This year's celebration includes the **Opening Ceremony** at the S.J. Quinney College of Law, **Pro Bono Social with the Judges** at the Bar, and **Pro Bono Jam** – an open to public concert by Utah attorneys and more!

**For more information contact the Utah State Bar at
801-297-7027 or probono@utahbar.org**

Notice of Petition for Reinstatement to the Utah State Bar by Mark A. Ferrin

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of Respondent's Verified Petition for Reinstatement ("Petition") filed by Mark A. Ferrin *In the Matter of the Discipline of Mark A. Ferrin*, Second Judicial District Court, Civil No. 070903677. 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.

Unauthorized Practice of Law Committee Accepting Applications

The Utah State Bar is currently accepting applications to fill vacancies on the Unauthorized Practice of Law (UPL) Committee. The UPL Committee reviews and investigates all complaints regarding unauthorized practice of law and makes recommendations to the Board of Bar Commissioners as appropriate for formal action. The UPL Committee also engages in special projects involving public awareness of UPL issues that affect the community, e.g., distributing pamphlets and media releases among the immigration community warning of unlicensed "notarios." If you want to contribute to this important function of the Bar, please submit a letter and résumé indicating your interest at your earliest convenience to:

Unauthorized Practice of Law Committee
C/O Nancy Rosecrans
Utah State Bar
645 South 200 East
Salt Lake City, UT 84111
Or via email to: Nancy.Rosecrans@utahbar.org

2011 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2011 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org by Friday, September 16, 2011. The award categories include:

1. Distinguished Community Member Award
2. Professionalism Award
3. Outstanding *Pro Bono* Service Award

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

Character and Fitness Committee Seeking New Members

The Utah State Bar is currently accepting applications to fill potential vacancies on the Character and Fitness Committee. The Character and Fitness Committee reviews applications for membership in the Bar, oversees investigations, conducts interviews and hearings and determines whether to approve or deny applications for admission to the Utah State Bar.

Attorneys interested in contributing to this vital Bar responsibility should submit a resume and a letter addressing qualifications preferably by September 16, 2011 to:

Character and Fitness Committee
Joni Dickson Seko, Admissions
645 South 200 East
Salt Lake City, UT 84111
Or via email to: joni.seko@utahbar.org



Find the support your practice needs.

The Utah Association for Justice is *the* organization for Utah trial attorneys, providing quality CLE and seminars, a variety of active Listservs, legislative representation and much more.

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For more information, please visit:
www.utahassociationforjustice.org
or call 801-531-7514

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“BAR SHARKS FOR JUSTICE”

UTAH STATE BAR YOUNG LAWYERS DIVISION
Tenth Annual Pool Tournament & Social

 **October 20th & October 27th, 2011**

Thursday Evenings Starting at 6:00pm

Match Times To Be Announced


 **Lumpy's Downtown**

145 W. Pierpont Ave, Salt Lake City

 **To register a team**

Go to www.andjusticeforall.org to download a registration form or call 801-924-3182.

Registration deadline is October 10, 2011.

 **To join in the social festivities**

Simply come to Lumpy's on any or all of the nights of play. You can socialize with old friends, meet new colleagues, and cheer on your favorite team.

Proceeds benefit “and Justice for all”

a non-profit organization providing free civil legal aid to the disadvantaged in Utah

Presenting Sponsor

CIT Bank

Venue Sponsor, Lumpy's Downtown

Printing Sponsor, Orange Legal Technologies



Lumpy's will also donate 10% of food sales

"BAR SHARKS FOR JUSTICE" TEAM REGISTRATION FORM

TEAM CONTACT _____

SPONSORING ORGANIZATION _____

PHONE () _____ EMAIL _____

☐ **\$250 TEAM SPONSOR** (\$100 for Government & Non-Profit Organizations)

Each team consists of a two-player team. However, teams have the option to switch either or both of the two players between matches (you may add/change alternate names at any time). Benefits include:

Registration for 1 two-person team
Name listed on event web page
Included in "AND JUSTICE FOR ALL" newsletter

Two travel 6-pack coolers
Recognition in Utah Bar Journal ad following the event

Player 1 _____ Player 2 _____

Alternate 1 _____ Alternate 1 _____

Alternate 2 _____ Alternate 2 _____

☐ **\$500 Team Sponsor**

Each team consists of a two-player team. However, teams have the option to switch either or both of the two players between matches (you may add/change alternate names at any time). Benefits include:

Registration for up to 2 two-person teams
Business name, logo, and link on event web page
Recognition in Utah Bar Journal ad following the event
Included in "AND JUSTICE FOR ALL" newsletter

Four travel 6-pack coolers
Logo on travel 6-pack coolers
Included in signs at the event

Player 1 _____ Player 2 _____

Alternate 1 _____ Alternate 1 _____

Alternate 2 _____ Alternate 2 _____

Player 3 _____ Player 4 _____

Alternate 1 _____ Alternate 1 _____

Alternate 2 _____ Alternate 2 _____

PAYMENT

☐ Check payable to "Utah State Bar"

☐ Visa

☐ Mastercard

☐ AMEX

☐ Discover

Send to Utah State Bar
645 S. 200 E.
Salt Lake City, UT 84111

Name on Card _____

Address _____

No. _____ exp. _____

Signature _____

Registration and fee must be received by October 10, 2011.

If you would like to order additional mini-coolers or have questions, please call Metra at (801) 924-3182

Pro Bono Honor Roll

Alex Pearson – Tuesday Night Bar
 Alisa Rogers – Immigration Clinic
 Amy Morgan – Tooele Clinic
 Anne Cameron – Domestic Case
 Benjamin Gordon – Domestic Case
 Brenda Teig – Park City Clinic
 Brent E. Johnson – Tuesday Night Bar
 Brent Hall – Family Law Clinic
 Brian Johnson – Tuesday Night Bar
 Brigman Harman – Tuesday Night Bar
 Bryan Nalder – Tuesday Night Bar
 Carolyn Morrow – Housing Case
 Catherine Hoskins – Domestic Case
 Chris Hogle – Tuesday Night Bar
 Chris Stout – Tuesday Night Bar
 Christina Micken – Legal Assistance to Military, Tuesday Night Bar
 Christopher Preston – Street Law Clinic
 Cynthia Gordon – Habeas Corpus Case
 Dale Dorius – Domestic Case
 Derek Kearn – Tuesday Night Bar
 Donald Peterson – Domestic Case
 Doug Anderson – Tuesday Night Bar
 Doug Farr – Tuesday Night Bar
 Elizabeth Conley – Senior Center Legal Clinic
 Emily Lewis – Street Law Clinic
 Eric Westerberg – Tuesday Night Bar
 Esperanza Granados – Immigration Clinic
 George Sutton – Consumer Case
 Gracelyn Bennet – Bankruptcy Hotline
 Harry McCoy II – Senior Center Legal Clinic
 Huy Vu – Family Law Clinic
 Irshad A. Aadil – Legal Assistance to Military
 Jaime Dawn Topham – Debtor's Counseling Clinic
 James Deans – Domestic Case
 Jana Tibbitts – Domestic Case
 Jane Semmel – Senior Center Legal Clinic
 Jay Kessler – Habeas Corpus Case, Senior Center Legal Clinic
 Jeannine Timothy – Senior Center Legal Clinic
 Jeff Gittins – Street Law Clinic
 Jeff Simcox – Domestic Case
 Jennifer Bogart – Street Law
 Jennifer Korb – Street Law Clinic
 Jeremy Atwood – Bankruptcy Case
 Jeremy McCullough – Bankruptcy Case

Jessica Couser – Family Law Clinic
 Jill Crane – Bankruptcy Case
 Jim Baker – Senior Center Legal Clinic
 Jom Allen – Tuesday Night Bar
 Jory Trease – Debtor's Counseling Clinic
 Joseph W. Loosle – Tuesday Night Bar
 Joyce Maughan – Tuesday Night Bar
 Karen Allen – Roosevelt Clinic
 Kate Conyers – Tuesday Night Bar
 Kathie Brown Roberts – Senior Center Legal Clinic
 Kathleen Arnovick – Domestic Case
 Kent Alderman – Domestic Case
 Kevin Bolander – Tuesday Night Bar
 Kimberly Herrera – Immigration Clinic
 Kyle Hoskins – Layton Clinic
 Landon Allred – Tuesday Night Bar
 Laura Hansen – Legal Assistance to Military
 Laurie Hart – Senior Center Legal Clinic
 Leslie Orgera – Tuesday Night Bar
 Levi Adams – Domestic Case
 Linda F. Smith – Family Law Clinic
 Liz Schulte – Tuesday Night Bar
 Lorie Fowlke – Domestic Case
 Lou Harris – Bankruptcy Case
 Maria-Niccole Beringer – Bankruptcy Hotline
 Mary Brown – Tuesday Night Bar
 Mary D. Brown – Domestic Case
 Mary Silverzweig – Bankruptcy Hotline
 Matt Ballard – Tuesday Night Bar
 Matt Thorne – Tuesday Night Bar
 Matthew Boley – Housing Case
 Megan DePaulis – Tuesday Night Bar
 Melanie Clark – Senior Center Legal Clinic
 Michael A. Jensen – Senior Center Legal Clinic
 Michael Mathie – Legal Assistance to Military
 Michael Thomas – Tuesday Night Bar
 Michele Anderson-West – Debtor's Counseling Clinic
 Michelle Harvey – Domestic Case
 Mitch Vilos – Domestic Case
 Morgan Wilcox – Family Law Clinic
 Nanci Bockelie – Housing Case
 Nathan D. Alder – Tuesday Night Bar
 Nathan Miller – Senior Center Legal Clinic

Nelson Abbott – Housing Case
 Nicholas Angelides – Senior Case
 Niel Lund – Domestic Case
 Philip Ballif – Consumer Case
 Phillip S. Ferguson – Senior Center Legal Clinic
 Rachel Otto – Street Law Clinic
 Rachel Pearson – Domestic Case
 Robert Brown – Tuesday Night Bar
 Roland Uresk – Tribal Case
 Russell Yauney – Domestic Case
 Sanna-Rae Taylor – Tuesday Night Bar
 Sarah Beck – Debtor's Counseling Clinic
 Sarah Hardy – Domestic Case
 Scott Blotter – Debtor's Counseling Clinic
 Scott Thorpe – Bankruptcy Hotline, Senior Center Legal Clinic
 Scott Trujillo – Debtor's Counseling Clinic
 Shane Marx – Family Law Clinic
 Sharon Bertelsen – Senior Center Legal Clinic
 Shauna O'Neil – Bankruptcy Hotline
 Sheleigh Harding – Family Law Clinic
 Shirlene Bastar – Probate Case
 Sidney Unrau – Domestic Case
 Silvia Pena – American Indian Clinic, Tribal Case
 Skyler Anderson – Habeas Corpus Case
 Skyler Anderson – Immigration Clinic
 Stacy McNeill – Street Law Clinic
 Stanley Adams – Domestic Case
 Stephen Knowlton – Family Law Clinic
 Stewart Ralphs – Family Law Clinic
 Sue Crismon – Street Law Clinic
 Taylor Burton – Domestic Case
 Ted Paulsen – Senior Center Legal Clinic
 Terrell R. Lee – Senior Center Legal Clinic
 Tiffany Panos – Street Law Clinic
 Timothy G. Williams – Senior Center Legal Clinic
 Tom Schofield – Tuesday Night Bar
 Tony Graf – Family Law Clinic
 Victor Copeland – Domestic Case
 Wendy Fenton – Bankruptcy Case
 William Marsden – Street Law Clinic
 Zack Winzeler – Tuesday Night Bar

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 June and July of 2011. Call Karolina Abuzyarova (801) 297-7027 or C. Sue Crismon at (801) 924-3376 to volunteer.

Honoring Utah's Women Trailblazers in the Law



Utah's Women Trailblazers – Standing L–R: Judith Wolbach (#90), Christine Soltis (#87), Rosemary Richardson (#84), Carolyn Nichols (#109), Christine S. Decker (#78), Kathlene Lowe (#103), Ellen Maycock (#82), Elizabeth Sherlock (#115), Sherri Guyon (#97), Irene Warr (#38), Anne Milne (#105), Kathryn Collard (#70), Jane Wise (#100), Cynthia Daniels (#77), Karen Williams (#55), Elizabeth Stewart (#118), Constance Lundberg (#61), Barbara Polich (#113). Seated L–R: Pam Greenwood (#59), Carol Olson (#83), Connie Holbrook (#74), Mimi Mortensen (#28), Joan Thompson (#40), Elaine Larsen (#43), Chief Justice Christine M. Durham (#72), Judy Lever (#81), Eleissa Lavelle (#102), Susan Hansen (#98)

Imagine graduating from law school only to be offered a position as the typing pool supervisor. That is exactly what happened to Elaine Larsen in 1963. Or imagine you are riding up the elevator with opposing counsel who openly discusses the merits of his case because the fact that you are a female attorney is incomprehensible. After the elevator ride, Connie Holbrook had the upper hand during courtroom introductions when the embarrassed opposing counsel member blurted, “You can’t be an attorney.”

These stories and several others were recounted on May 26, 2011, when the Women Lawyers of Utah, the Utah State Bar, the University of Utah S.J. Quinney College of Law, and the Brigham Young University J. Reuben Clark Law School honored the First

One Hundred Women Lawyers admitted to practice in Utah at a dinner held at the Grand America Hotel. In a sold-out event, over 350 attendees previewed the first public screening of a work-in-progress film dedicated to Utah’s Women Trailblazers containing interview excerpts of several of the First One Hundred group. During the evening, each of the First One Hundred women in attendance received a lovely memento key chain engraved with the words: “Utah Trailblazer,” representative of how each woman has been the key to opening the trail for women to practice law in Utah for generations to come.

As part of the project, Women Lawyers of Utah presented a booklet to each attendee containing biographies, anecdotal stories, photographs, and advice from most of the First One

Hundred women. Some stories were shared with pride or humor, and others with regret. Additionally, many of the First One Hundred acknowledged the assistance of male Bar members in advancing their opportunities and careers.

In 1872, the Utah State Bar admitted its first female lawyers, Cora Georgiana Snow Carleton, whose father was the Attorney General of the Utah Territory, and Phoebe W. Couzins, who was the third woman to graduate from a United States law school. Surprisingly, it was not until 1976 – over one hundred years later – that the Utah State Bar reached the bench mark of having one hundred women members.

The evening paid tribute to the First One Hundred women for their fortitude, perseverance, and candidness in sharing their stories with us. These women truly paved the way for women lawyers in Utah today, who make-up fewer than 25% of the Utah Bar. Speakers included Chief Justice Christine M. Durham, also one of the First One Hundred, Elder Dallin H. Oaks retired Utah Supreme Court Justice, Utah State Bar President Robert L. Jeffs, S.J. Quinney College of Law Dean Hiram Chodosh, and J. Reuben Clark Law School Associate Dean Kif Augustine-Adams. Women Lawyers of Utah Past-President, Melanie Vartabedian, who with

the 2010-11 Women Lawyers of Utah Board commissioned this special project just one year ago, provided opening and closing remarks for the event. Women Lawyers' Special Projects Committee Chair Cathleen C. Gilbert introduced the film *Women Trailblazers in the Law*.

Women Lawyers of Utah extends a special thanks to the Utah State Bar, S.J. Quinney College of Law, and J. Reuben Clark Law School for their generous co-sponsorship of this project, and also thanks the numerous other contributors to the project, who were acknowledged at the dinner, in the documentary film, and in the booklet.

The Women Trailblazers booklet can be viewed on the Women Lawyers of Utah website at: http://utahwomenlawyers.org/wp-content/uploads/First_100.pdf. The Trailblazers video can be seen on YouTube at: <http://www.youtube.com/watch?v=b3g-73GUu8c>.

Women Lawyers of Utah plans to continue their Special Project and pay tribute to these courageous women. Women Lawyers looks forward to inviting a panel of First One Hundred members to speak at its Fall Retreat, November 4-5, 2011.

“I trust the day is not far distant, when men and women shall be recognized as equal administrators of that great [bulwark] of civilization, law.”

– Phoebe W. Couzins, admitted in 1872



Utah Women Trailblazers Tell Their Stories

EDITOR'S NOTE: *Utah's Women Trailblazers were asked: What is your favorite memory of being a lawyer? As you might expect, they had some very interesting stories to tell. We thank the Trailblazers and the Women Lawyers of Utah for allowing us to share a few of our favorites here.*



Jacquie Benson Bell – #31

“One memory that makes me really laugh now was not so laughable at the time. I was appearing before Judge Ritter for the first time and was 8 months pregnant. He called for all the lawyers to stand up and when he saw me, he just kept insisting that I sit down. Before I finally got him to look at my license, he had actually threatened to have the bailiff throw me out.”

Kay Aldrich Lindsay – #50

“I first started practicing in Utah Valley in 1970. At that time there were no female attorneys around. I started as a Deputy Utah County Attorney. Soon after the Daily Herald ran a series of articles about women stepping into traditional male careers. They ran an article of me next to a female mechanic.”



Christine Meaders Durham – #72

“An occasion in Federal District Court when Judge Willis Ritter asked me (in an appearance for plaintiffs in a sex-discrimination case) if “this [was] a g__ d____, bra-burning womens’ libber case?” I said ‘yes.’”

Marlynn B. Lema – #80

“My mentor was CC Patterson, Esq. I was employed by him and one day he advised me that I was sitting on the wrong side of his desk. [Eventually,] I was admitted to, and completed, law school. When Mr. Patterson heard that I was admitted to the Bar, he walked up to me in open court and said ‘Congratulations, Madam Attorney.’ This was a very proud moment for me.”



Judy Lever – #81

“One of the early fun memories was pleasure that came in 1975 from walking in the front door to the Alta Club following the swearing in ceremony, instead of going around to the ‘womens’ door.’ I could hardly believe anyone would still expect any women to do that, let alone the members’ wives or guests. It was great fun when women finally were allowed to become members!!”



Ellen Maycock – #82

“When my 3 year old daughter asked me if men could be lawyers, too.”

Christine Fitzgerald Soltis – #87

“It was 1975 and a friend’s father arranged an interview for me with a major law firm that had never interviewed a woman for an attorney position. During the interview, my male interviewers asked how fast I could type (I denied knowing how); where I bought my clothes (I said in a store); and what method of birth control I used (I claimed to have had a vasectomy). They did not hire me. A few months later, I argued my first case before the Utah Supreme Court. One of the interviewers was the opposing counsel. I won – and none of the justices asked where I bought my clothes.”



Carolyn Nichols – #109

“I moved to Utah in 1976. After I took the bar, I was a victim of the scandal that involved the lowering the bar exam grades of dozens of out of state law school graduates. There was a concern by members of the bar that there would be too many lawyers in the state. Someone tried to keep those from out of state from becoming members of the bar by changing their grades. During the appeal process of the bar exam, I received a call from an anonymous caller asking me to meet on the corner of Second South and State at 2 am. I was told to be alone. I

showed up and was handed the evidence of the scandal; i.e., the grading sheets, showing that the grades had been lowered. I provided that evidence to D. Frank Wilkins, who then helped those out-of-state students get admitted. It was the beginning of a life of always being willing to question authority.”

Janet Hugie Smith – #116

“When I was a young associate, I was working on the weekend, got hungry and found bags of potato chips in an office, one of which I ate. It was a trial exhibit.”



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 June 17, 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 1.5(a) (Fees), 1.7 (Conflict of Interest: Current Clients), 1.16(d) (Declining or Terminating Representation), 5.1(a) (Responsibilities of Partners, Managers, and Supervisory Lawyers), 5.1(b) (Responsibilities of Partners, Managers, and Supervisory Lawyers), and 8.4(a) (Misconduct).

In summary:

The attorney concurrently represented three parties in various matters. The attorney failed to fully advise these clients of the current and/or potential conflicts. The attorney failed to obtain signed waivers from the clients. The attorney concurrently represented the parties whereby certain interests and various liabilities were shifted amongst the parties. The attorney subsequently represented one of the parties in an action brought by creditors wherein one of the other parties was a party. The first client had a valid cross-claim against the second client which the attorney failed to advise the first client of or assert in the action. These actions likely impaired the attorney's ability to effectively represent the parties. The attorney failed to provide the parties files in a timely matter. The attorney's associate violated Rule 1.7 and the attorney knew about the conduct based on the motions filed or otherwise ratified the conduct through his billing or otherwise. The attorney was aware that the associate was representing concurrently two of the parties even though their interests were adverse. The Bankruptcy Trustee recognized this conflict at the meeting of the creditors and disallowed the attorney's firm from further representation of the party. The attorney failed to submit fees for the bankruptcy court's approval and said fees were for another client and/or for unrelated matters.

Mitigating factors: Lack of prior discipline; lack of any dishonest motive; the attorney has since handed over all the files requested; recognition and remorse for his conduct.

PUBLIC REPRIMAND

On June 20, 2011, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Donald W. Winters for violation of Rules 1.3 (Diligence), 1.4 (Communication),

1.15(d) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Winters failed to respond to requests for admissions that were served on a client, which subsequently resulted in a judgment against the client. Mr. Winters failed to reasonably consult with the client to keep the client informed regarding the status of the case and to consult with the client regarding the case. Mr. Winters failed to provide an accounting of how the fees were allocated.

Aggravating factors: Prior record of discipline.

PUBLIC REPRIMAND

On June 20, 2011, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Donald W. Winters for violation of Rules 1.4(a) (Communication), 1.15(d) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Winters failed to reasonably consult with his client regarding the client's objectives and the means to accomplish the same. Mr. Winters failed to keep the client reasonably informed about the status of the matter. Mr. Winters failed to notify the client of a hearing on temporary orders. Mr. Winters failed to respond to his client's phone calls or otherwise keep the client apprised regarding the status of the case. Mr. Winters failed to account for unearned fees. Mr. Winters failed to surrender papers and property to the client. Mr. Winters failed to timely respond to the Notice of Informal Complaint.

Aggravating factors: Prior record of discipline; prior pattern of misconduct; and obstruction of the disciplinary procedure.

PUBLIC REPRIMAND

On June 20, 2011, the Honorable John Paul Anderson, Third District Court entered an Order of Discipline: Public Reprimand against Jeffrey E. Slack, for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), and

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

In summary there are two matters:

Mr. Slack was appointed to represent a client in a criminal matter in District Court. A bench trial was continued as Mr. Slack was unavailable. The client notified Mr. Slack's office that he would be out of state and unable to appear at the trial. On the day of trial, Mr. Slack appeared and notified the Court that his client would not appear but failed to provide an adequate excuse for his client's non appearance. As a result of the client's failure to appear at the trial, a warrant was issued. The client became aware of the warrant and contacted Mr. Slack's office. Mr. Slack told the client that he would have the warrant recalled, but was not successful. The client asked Mr. Slack for advice because the client had a court date in a separate matter and did not want to be arrested when he appeared in Court. Mr. Slack advised the client that it was doubtful that he would be arrested on the warrant while appearing in another Court. The client was arrested and booked on the warrant when the client appeared in Court in the other matter. The client's criminal matter was set for another trial. Prior to the trial, the client contacted Mr. Slack's office to tell him that the client had a witness that needed to appear at the trial. Mr. Slack did not contact the witness or subpoena the witness for trial.

Even though Mr. Slack had not personally spoken to his client about his appearance at trial, Mr. Slack filed a motion to continue. The bench trial was continued. Mr. Slack failed to contact the client to tell him that he had continued the trial date.

In the second matter, Mr. Slack was hired to draft separation papers to be used privately, but not to be filed with the Court. The client agreed to pay Mr. Slack for preparation of the separation papers. The client went to Mr. Slack's office to review the papers and make changes. Mr. Slack filed the client's separation papers with the Court. After the client became aware of the filing the client contacted Mr. Slack and told him to have the papers withdrawn from the public record. Mr. Slack filed a Motion to Withdraw as Counsel. Mr. Slack served the motion to withdraw on the client's spouse. Mr. Slack filed a motion to dismiss with prejudice. The judge signed an order to dismiss without prejudice. Although the case was dismissed, the papers filed remain public records. At no time did Mr. Slack petition the court to seal the file. Mr. Slack billed the client for the drafting and filing the separation papers. The client confronted Mr. Slack about the bill and was told that she would not need to pay, however the client received a bill from Mr. Slack indicating that if she did not make the payment the bill would be sent to collections. The client paid the bill in full.

RECIPROCAL DISCIPLINE

On June 13, 2011, the Honorable Glenn K. Iwasaki, Third Judicial District Court entered an Order of Discipline: Public Reprimand against Mitchell R. Barker for violation of Rules 5.5(a) (Unauthorized

Practice of Law; Multijurisdictional Practice of Law), 8.1(a) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. This was a reciprocal discipline order based upon an Order from the Supreme Court of Oregon ("Court").

In summary:

Mr. Barker was suspended from practice in Oregon for failing to comply with his continuing legal education requirements. Mr. Barker filed an appearance as counsel of record for a client in Clatsop County Circuit Court. For several months, Mr. Barker appeared on behalf of and represented the client in a legal matter in Clatsop County, Oregon. On two separate occasions, Disciplinary Counsel's Office ("DCO") requested that Mr. Barker respond to allegations that he represented his client in Oregon during a time when he was suspended from the practice of law in Oregon. In response to inquiries from DCO, Mr. Barker made representations about his involvement with the client. Although Mr. Barker was assisting the law firm in representing the client, and had never met or spoken with he client, he was aware that he had filed a notice of representation and other pleadings on the client's behalf, and had negotiated with the district attorney in that matter. Accordingly, the Supreme Court in Oregon determined that Mr. Barker's representations to DCO that he was only tangentially involved in the client's case were incomplete and inaccurate disclosures.

Mitigating factors: Personal or emotional problems.

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Utah Law & Justice Center

645 South 200 East, Suite 203 • Salt Lake City, UT 84111

FOR INFORMATION & A NEW AGENT PACKET CALL (801) 328-8229

President's Message and Invitation

by Jenifer L. Tomchak

Young attorneys often overlook the benefits of being involved in professional organizations. With so much time spent learning your new practice, it is easy to forget the importance of developing professional relationships that will help your future practice. Professional organizations create opportunities for lawyers to network with, get advice from, and commiserate with other practitioners. But these organizations also provide a forum for young attorneys to establish their reputations amongst a large group of potential referral sources. Professional organizations also often organize community service and legal education events. These events help improve the reputation of attorneys in the community, give young lawyers an opportunity to use and develop their legal skills, and, perhaps most importantly, remind us of the importance of our profession.

With these benefits in mind, I would like to invite lawyers (young and old) to take advantage of Young Lawyer's Division's monthly service, mentoring, and educational opportunities. Our Board has been working hard to develop new programs and build on existing programs to provide valuable professional development opportunities to its members.

NEW PROGRAMS

Green Utah Pledge: YLD will encourage firms and practitioners to adopt environmentally friendly practices. Those who agree to meet the requirements to participate in the American Bar Association-Environmental Protection Agency Law Office Climate Challenge will become signatories of the Green Utah Pledge and receive recognition and other membership benefits. The Utah State Bar has already started to lead the way by agreeing to replace 10% of its electricity usage with renewable wind power!

Member Challenge: Members who attend events or complete specific tasks will receive raffle tickets, which they can use to win an iPad or at least two free weeks of Lexis time, both of which were donated by Lexis.

Practice in a Flash CLE Training Series: A series of CLEs focused on the nuts and bolts of developing a practice and teaching the basic principles of different areas of the law. The CLE Committee hopes to provide participants with a flash drive containing standard forms gathered from other practitioners.

Civic Education: The Governmental Relations Committee is developing a handbook for high school students, which will explain basic civics concepts and how to participate in the political process.

Choose Law: Through partnerships with several local high schools, volunteer attorneys educate high school students from at-risk backgrounds about the legal profession and the importance of law in society.

Disaster Response: YLD is working with the Utah State Bar's Disaster Legal Response Committee to recruit volunteers trained to respond to legal issues after a disaster.

New Lawyer Training Program Mentoring Social and Open Division Night: Participants in the NLTP Mentoring Program will attend a reception where mentees will have an opportunity to socialize with their mentors, to meet other mentors in different practice areas, and to learn about the various divisions of the Utah State Bar.

Help R.I.S.E.: A program through which volunteer attorneys will provide pro bono legal representation to participants in R.I.S.E. (Reentry Independent through Sustainable Efforts), the federal re-entry drug and mental health court. Through the implementation of this program, under-employed attorneys will gain valuable legal experience under the supervision of an experienced mentor. The YLD, in collaboration with the Utah Federal Bar Association, will recruit mentors and provide a free CLE-training to the volunteers.

COMMUNITY SERVICE EVENTS

And Justice for All Phone-a-thon: YLD volunteers approach members of the Utah State Bar to raise \$5000 for And Justice for All. Each member of the YLD who donates is recognized as a member of the Justice League in the *Utah Bar Journal*.

Cinderella Project: YLD, working with Henries Dry Cleaners and Women Lawyers of Utah, collects gently worn formals and accessories to offer at boutiques to help underprivileged high school students attend their proms and homecoming dances.

Professional Clothing Drive: An annual clothing drive, where YLD collects professional clothing for the Junior League Community Closet and the Road Home to use in their job-training programs.

Serving Our Seniors: Quarterly clinics where volunteer attorneys and paralegals provide estate planning services to low-income seniors. Serving Our Seniors is also exploring the possibility of recruiting volunteers to act as payees for social security recipients who need help budgeting and controlling their money.

Tuesday Night Bar: Since October 1988, the YLD has provided pro bono in-person legal consultation to members of the underserved populations in the Salt Lake City area. During the first four Tuesdays of each month, rotating groups of attorneys from the Attorney General's Office, Durham Jones & Pinegar, Fabian & Clendenin, Holland & Hart, Kirton & McConkie, Parr Brown Gee & Loveless, Parsons Behle & Latimer, Snell & Wilmer, Stoel Rives, and the YLD Executive Council – in addition to other attorneys who generously donate their time – provide pro bono legal consultation to low-income Utahns. This program was recently recognized by the American Bar Association.

Walk Against Violence: An annual, community-wide, 5k run and 1k high-heel challenge to raise awareness about domestic violence. All proceeds benefit the YWCA.

Wednesday Night Bar: Similar to Tuesday Night Bar, Wednesday Night Bar provides pro bono legal consultation to Spanish-speaking low-income Utahns.

Wills for Heroes: One of YLD's premiere events, the Wills For Heroes Committee recruits volunteer attorneys and paralegals to hold semi-monthly clinics providing estate planning services to first responders throughout Utah.

MENTORING AND SOCIAL EVENTS

Bar Sharks for Justice: A pool tournament held at Lumpys each October. All proceeds benefit And Justice For All.

Inter-Professional Networking Events: Each year, YLD organizes events for young lawyers to network with other young professional groups in the community. This year YLD is planning a networking event with young accounting professionals and young finance professionals. YLD also hopes to join the Association of Corporate Counsel again to organize a community service project benefiting children in state custody.

Mentoring Marathon: In collaboration with the Utah Minority Bar Association, each January, YLD hosts an event for law students where students learn what it's like to practice law and valuable interviewing skills. The students also receive personalized feedback about their resumes.

Speed Networking Events: YLD hosts two events each year, during which young lawyers have an opportunity to network with a wide variety of experienced practitioners and judges.

Utah State Bar Convention Family Carnival: At the Utah State Bar's Annual Convention in Sun Valley, Idaho, the YLD runs a family carnival with games, face painting, and other activities for family to enjoy.

Young Lawyer Mentoring Socials: YLD is planning several events for young lawyers to network with each other. We have currently planned an opening picnic at Liberty Park, a reception at the spring bar convention, and a social at Squatters.



Saturday, October 22
9:00 a.m.
Liberty Park

All proceeds to benefit the YWCA.

Early Registration: (by September 15)

\$15 for adults, \$12 for Kids (2–12), Kids 2 and under are free

Registration after September 15:

\$20 for adults, \$15 for Kids (2–12), Kids 2 and under are free

For team registration,
 please see the YLD/YWCA website:
www.ywca.org

YWCA Members get \$2.50 off each race admission.

Questions? Contact Erin Middleton at emiddleton@djplaw.com;
 Liisa Hancock at lahancock@jeffslawoffice.com; or
 Artemis Vamianakis at avamianakis@fabianlaw.com

*The YWCA provides 24 hour crisis lines, domestic violence shelters; child-focused support and advocacy; transitional housing; educations, training, and employment placement, and other services for women and children in jeopardy and transitioning out of jeopardy.



COMMUNITY AND LEGAL EDUCATION EVENTS

YLD High School Debate Tournament: YLD sponsors the Young Lawyers High School Debate Tournament at Highland High School. The tournament brings together hundreds of Utah high school students for two days of team debate and speech events.

Law Day Luncheon and 5k: On May 1 of each year, the Utah State Bar and the American Bar Association celebrate Law Day. As part of Utah's annual recognition of Law Day, the YLD organizes a Law Day Luncheon, which highlights law-related activities taking place in our schools and community, and a 5k race to benefit And Justice for All.

Governmental Relations: Utah YLD members participate on the Utah State Bar Governmental Relations Committee to analyze proposed legislation during each Legislative Session and determine

whether it would affect YLD members.

Transition to Practice of Law Panel: YLD organizes a panel to present to local law schools about the transition to the practice of law.

As you can see, there are many ways to get involved. If you are interested in joining a committee or participating in YLD events, please contact me or one of the Board Members listed on the next page. You can also follow us on Facebook, Twitter, Google+, and our website, www.utahbar.org/sections/yld/.

Regardless of which organizations you participate in, the most important thing is to get involved. I hope you will choose to do so and that your experience will be professionally and personally rewarding.

2011–2012 Young Lawyers Division Board

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Message from the Chair

by Danielle Davis

As the new Chair of the Paralegal Division, I would like to take this opportunity to introduce the 2011-2012 Board of Directors and myself.

Chair-Elect – Thora Searle attended Weber State University and has spent thirty-three years working in the legal field. She worked as a legal assistant to William Thomas Thurman at McKay, Burton & Thurman for twenty-one years and currently works as a Judicial Assistant to Judge Thurman at the United States Bankruptcy Court for the District of Utah. She has served several terms as a Director of the Legal Assistant Division/Paralegal Division of the Utah State Bar serving several years as the Secretary and the Membership Chair. Thora's husband of forty-eight years passed away in January of this year so her time outside of work is devoted to her children, grandchildren, and great-grandson. She loves to spend time with them and enjoys watching them participate in soccer, softball, dance, and tumbling.

Region II Director – J. Robyn Dotterer, CP has worked as a paralegal for over twenty years and has been with Strong & Hanni for eleven years. She works with Paul M. Belnap, Stuart H. Schultz, and Andrew D. Wright in the areas of insurance defense in personal injury, insurance bad faith, and legal malpractice litigation. Robyn achieved her Certified Paralegal Degree in 1994 and is a Past President of the Legal Assistants Association of Utah. She has served on the Paralegal Division Board in several different capacities, served as a Director-at-Large, and was co-chair of the Community Service Committee and the Young Lawyer Division (YLD) Liaison for several years. Robyn is excited to be back on the Board and is looking forward to getting to know the new Division and Board members. Robyn has been married to Duane Dotterer for thirty-seven years and lives in Sandy, Utah.

Region III Director (Secretary) – Jennifer Nakai, ACP serves the counties of Juab, Millard, Utah, Wasatch, Duchesne, Uintah, and Daggett. She has worked in the legal field since 1986 and currently works as a paralegal in the Investigations Division at the Utah County Attorney's Office. Jennifer has an Associate's Degree in Paralegal Studies and is working on her Bachelor's Degree in Criminal Justice at Utah Valley University. She is a Certified Paralegal through the National Association of Legal Assistants (NALA) and also has an Advanced Certified Paralegal designation in Trial Practice.

Region IV Director – Colleen Wrigley is a paralegal with the firm of Clarkson Draper & Beckstrom in St. George.

Director at Large – Heather Allen is a paralegal at Ray Quinney & Nebeker (RQN). She has been with RQN since August 2010 and prior to that she was a paralegal at Snell & Wilmer since 2005. Heather works in product liability, personal injury/wrongful death actions, both defense and plaintiff. She graduated from Utah Valley University with a Bachelor's Degree in Paralegal Studies and a minor in Psychology. She is also involved in the community as a volunteer at Intermountain Medical Center in Murray for the parent support group associated with the Neonatal Intensive Care Unit.

Director at Large – Kimberly Brenneman is a legal assistant with the Sundance Group for in-house-counsel. She has had experience in criminal defense and family law. She is currently learning transactional law. She has six years of experience in the legal field and attended Salt Lake Community College where she received an Associate's Degree in Paralegal Studies. Kimberly is a member of the Paralegal Division of the Utah State Bar, Utah Paralegal Association, and NALA. She enjoys the outdoors, reading, and spending time with her family.

Director at Large (Parliamentarian) – Deborah Calegory (Deb) is a certified paralegal who works for the St. George office of Durham Jones & Pinegar. She has extensive experience in the areas of real estate, litigation, business and transactional law, and has worked on legal matters in Utah, Nevada, and Arizona. Deb has been active in the paralegal profession over the course of her twenty-nine year career. She prepared curriculum and provided instruction for paralegal programs for Dixie State College and the Utah Chapter of the American Paralegal Association. From 2007-2009, She was a charter member of the Paralegal Division of the Utah State Bar, and has maintained an active role in the Division since its inception. Deb has served in numerous leadership positions for the Division, including the Chair of the Division during 2001-2002. In 2008 she was selected as Utah's Distinguished Paralegal of the Year.

Deb also maintains an active role in the local St. George community. She served on the Board of Directors of Leadership Dixie (an educational program for the benefit of new and seasoned community leaders) from 2007-2009. Deb has been on the Family Selection Committee for the Habitat for Humanity of Southwest Utah since 2007, and is currently serving on the PTA Board of Directors at Snow Canyon Middle School. She is currently the chair-elect of the Southern Utah Community Center Advisory Board and will

take the reigns as the Chair in April, 2012. The Advisory Board oversees the programs and activities of the Southern Utah Community Legal Center, whose mission it is to increase access to civil legal aid for disadvantaged citizens of southern Utah.

Director at Large – Tally Ellison is a paralegal at Inthinc Technology Solutions, Inc. Tally is a former Chair of the Paralegal Division and has been involved in leadership in the paralegal community for many years having also served as President of the Legal Assistants Association of Utah (LAAU).

Director at Large (Finance Officer) – Julie Eriksson has been a paralegal for over twenty years, employed the last twelve years as a paralegal with the law firm of Christensen & Jensen, working in personal injury and civil litigation. She attended the University of Utah and Phillips Junior College graduating with an associates degree in Paralegal Studies in 1992. She has been an active participant in the Paralegal Division since its inception in 1996. Julie has served on the Board of Director's as the Continuing Legal Education Chair and Finance Officer. She is a former Chair of the Paralegal Division and a former Ex-Officio member on the Board of Bar Commissioners representing the Paralegal Division. In addition to the Paralegal Division, Julie is also a member of the LAAU and served that association in many capacities including several years as its President.

Director at Large – Kari Jimenez received her Professional Paralegal Certificate from the University of Phoenix and has over nineteen years of experience as a litigation paralegal. She has a broad spectrum of experience, which includes criminal defense, criminal prosecution, civil litigation, and in-house corporate in Cache County; civil litigation insurance defense, medical malpractice,

and products liability with the law firm Richards, Brandt, Miller & Nelson as well as in-house corporate for a mortgage servicing company in Salt Lake County and in-house corporate for a housing company in Washington County. She obtained her Real Estate license in 2005 and is currently the City Recorder for Ivins City. She received her Certified Municipal Clerks designation from the University of Utah and is currently working on her Master Municipal Clerk designation. Kari is the Southern Region Director for the Utah Paralegal Association (UPA) formerly known as LAAU. At the end of 2006, having experienced enough cold and snow, Kari and her spouse Wilson, who is originally from Ecuador, South America, and two children Garrett and Mariah, moved from Sandy, Utah to sunny St. George, Utah. Kari enjoys road and mountain biking, hiking, camping, and traveling.

Director at Large – Suzanne Potts has been a paralegal for over twenty years. She is employed by Clarkson Draper & Beckstrom in St. George, Utah, working primarily in civil litigation. Suzanne is a mediator having completed basic Mediation Training through the Utah State Bar, Alternative Dispute Resolution in 2001. She is a past member of LAAU, having served as the Southern Regional Director. She is currently a member of the Paralegal Division of the Utah State Bar and is serving as a Director at Large. She presently serves on the Paralegal of the Year Award Committee of the Division. Suzanne is very active in the community and is a public panel member for the Supreme Court Ethics and Discipline Committee, volunteer for the Southern Utah Community Legal Center as well as a paralegal member of the Board of the Southern Utah Bar Association.

Director at Large – Geneve Wanberg is a litigation paralegal at Ballard Spahr LLP. She has been a litigation paralegal for seven years and prior to that was a corporate paralegal for five

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years. She has served on the Education Committee for the past few years. She has also co-chaired the committee for the Paralegal Day Luncheon for 2011. Geneve enjoys education, from learning to teaching, and working with the education committee to create education situations that teach, assist, and inspire her fellow paralegals in Utah. In her office, she is known as the paralegal pastry chef and loves to cook. Geneve has nine grandchildren with another on the way. Her husband is a greenhouse manager for a high profile group of gardens in downtown Salt Lake City.

Director at Large – Lorraine Wardle is the senior paralegal at the firm of Thomas Henson & Associates, claims litigation counsel for State Farm Insurance. Prior to joining Henson & Associates, Lorraine worked at several highly esteemed insurance defense firms such as Richards Brandt Miller & Nelson, Dunn & Dunn, Hanson Epperson & Wallace, and Epperson & Rencher. She has been involved with the boards of both paralegal associations in Utah. Lorraine lives in West Jordan with her husband and two golden retrievers.

Carma Harper, CP is the immediate Past Chair of the Paralegal Division. She now serves as an ex-officio member of the Board and is Chairing the Membership Committee. Carma is a paralegal at the law firm of Strong & Hanni and has over eleven years of experience working on insurance defense, construction defects, and product liability defense cases. She graduated from Wasatch Career Institute's paralegal program in 1989. She is a licensed realtor for Key Realty Group in her spare time. She began her service with the Paralegal Division working on the CLE Committee,

assisting with the monthly brown bags and other CLE events. She also served as the Community Service Chair in 2009-2010 working closely with the YLD with the Wills For Heroes program. In 2009-2010, Carma served as the Region I Director, while continuing to work on the Community Service Committee. In 2010-2011, during her term as Chair of the Paralegal Division, she served as the Division's liaison to the Bar Commission. She enjoys being involved in the Paralegal Division and in the legal community. She has always strived to "Pay it Forward," by providing service to the community and by trying to be a positive influence to others.

As for me, I am a certified paralegal with the law firm of Strong & Hanni working with Peter H. Christensen in insurance defense litigation. I have worked as a paralegal for twenty years with experience in multiple areas of law. I received my paralegal certificate from Westminster College.

This is my second time around as Chair of the Paralegal Division. I served as Chair for 2005-2006 and have been involved with the Division and Utah State Bar in other capacities including Director-at-Large, Community Service Committee Chair, *Bar Journal* Committee liaison, Young Lawyers Division liaison, Governmental Relations Committee, Licensing Committee, and ex-officio member of the Board of Bar Commissioners of the Utah State Bar.

I am pleased to be involved again as Chair and look forward to working with the Board to achieve the goals of the Division and the Mission of the Utah State Bar.



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DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
09/09/11	Litigation Section CLE & Golf, Cache County. 9:00 am – 12:00 pm. Birch Creek Golf Course, 550 East 100 North, Smithfield, UT. “Enhancing Litigation Strategy and Technique with Effective use of Technology,” presented by Mike Kember with CaseRover. Litigation and Cache County Members – CLE only: \$30, CLE & Golf: \$40. Non-Members – CLE only: \$45, CLE & Golf \$65.	3 hrs. CLE with golf following
09/15/11	Family Law Primer. 4:00 – 7:15 pm. Planning committee members are Kellie Williams, John Sheaffer, Marcie Keck, Angela Fannesbeck, and Jim Hanks. \$75 for attorneys active under 3 and \$90 for others. Agenda pending.	3 hrs.
09/16/11	Litigation Section CLE & Golf, Utah County. 8:00 am – 12:00 pm. Fox Hollow Golf Course. More information TBD.	3 hrs. CLE with golf following
10/07/11	Annual Construction Law Section Seminar. Little American Hotel	TBA
10/07/11	Litigation Section CLE & Golf, St George. 8:00 am – 12:00 pm. The Ledges Golf Course.	3 hrs. CLE with golf following
10/13/11	Dispute Resolution ADR Academy. 8:00 am – 5:00 pm.	TBA
10/20/11	New Lawyer Required Ethics Program. No Admittance to this seminar after 9:00 am. Satisfies new lawyers ethics & professionalism credits for first compliance period.	
10/28/11	Cyber Law Symposium. Thanksgiving Point.	TBA
11/17 & 11/18/11	 2011 FALL FORUM  Little American Hotel, Salt Lake City. Details pending.	Up to 8.5 hrs. for both days.
12/16/11	Benson and Mangrum on Utah Evidence. 9:00 am – 5:00 pm.	Approx. 7 hrs. May include 1 hr. ethics or prof/civility

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