Utah Bar JOURNAL

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Volume 25 No. 1
Jan/Feb 2012

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Utah Bar® JOURNAL

Volume 25 No. 1
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Cover Art

South Fork, Provo Canyon, taken by Cristina Pianezzola, Orem.

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 Utah 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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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.*

Letter to the Editor

Dear Editor:

My friend, Richard J. Leedy, Esq., died on November 10, 2011. He was one of the "Lions" of the legal profession, an exceptional lawyer who revolutionized the practice of securities law through his vigorous and innovative tactics beginning in the late 1960s and early 1970s from his white carpeted suite of offices he shared with his partner, Joseph H. Bottum, III, Esq. (deceased) in the Newhouse Building in Salt Lake City, Utah. "Dapper" would have been an understatement for Dick's daily apparel, while "rumpled" clearly fit the deep base toned voice of Joe bellowing "Bottum here!," whenever he answered the telephone. They were quite a pair!

Dick endured two painful surgeries last summer that eventually resulted in his death; he did not go without a valiant fight. I attended a memorial for Dick on the evening of November 15, and before arriving, I told my wife, Stacy, that it would be a very interesting evening; I was not disappointed. Well over two hundred paid their respects, only a handful of whom I knew, and it was a fitting reminder of the many varied lives Dick had touched during his years with us.

Dick was a very good friend, and despite all of his brash antics, he was a quiet man, even shy. We knew each other's families and secretaries, mostly by stories, or in the case of my secretary, Sheryl, by legend. He often called Sheryl to see how I was doing, which would prompt a call from me to him to see how he was doing; or he would come to my mind, and I would call him. The conversations were always short, but personal, "Everything OK," the "Family fine." I am going to miss those calls, and Dick. I hope they have our mutual favorite – cheese crackers, peanut butter and mustard, ready for him; maybe even a few fried chicken livers; we loved and enjoyed them together so many times. Keep smiling, Dick. You're in tall cotton now!

Leonard W. Burningham

Letter Submission Guidelines

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.

2. No one person shall have more than one letter to the editor published every six months.

3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal,* and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.

4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.

5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.

6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.

7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.

8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

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A lot is going on at Kirton McConkie. We recently expanded our Salt Lake City offices to include the brand new Kirton McConkie Building at 50 East South Temple. While we are retaining our existing location at 60 East South Temple, 45 of our lawyers will move to the new building to accommodate our growth.

In addition, we redesigned our logo. The bold, contemporary look of the redesign represents how our attorneys transform legal complexity into comprehensive solutions for our clients.

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Bar Commission Adopts New Policy on Inclusion and Diversity: It is No Longer Black and White

by Rodney G. Snow

With Martin Luther King Jr. Day this month, we should consider how close we are to living the dream – in particular, Dr. King's dream that his children will "live in a nation where they will not be judged by the color of their skin but by the content of their character." Please indulge a few observations regarding diversity from an aging white Bar president. Many of you have worked hard at improving diversity in the legal profession, including our law firms and the bench. We have adopted policies, recruited, and trained with the goal of increasing diversity. We have had some success and some failures. Still we have pursued. We thank you for your efforts at inclusion and diversity. Too often you do not get the recognition for what has been accomplished and for what you have attempted to accomplish in the diversity arena. But reevaluation now and then is a good thing for us all.

Last year the ABA published its report on the Presidential Diversity Initiative – "Diversity in the Legal Profession – The Next Steps." The report deals explicitly with race and ethnicity, gender, sexual orientation, and disabilities. *See* ABA's Presidential Initiative Comm'n on Diversity, *The ABA's Diversity in the Legal Profession: The Next Steps*, http://www.americanbarfoundation.org/uploads/cms/documents/aba_diversity_report_2010.pdf. I recommend the report to each of you and believe that you will get a great deal out of it, as did I. Of particular interest in the report is the concept that diversity training is a journey and not a destination. The report describes the advantages of a diverse workforce: "A diverse workforce within legal and judicial offices exhibits different perspectives, life experiences, linguistic and cultural skills, and knowledge about international markets, legal regimes, different geographies, and current events." *Id*. at 9.

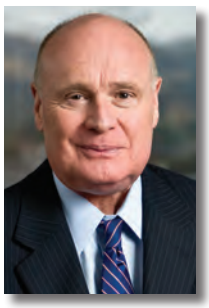
The ABA report stresses the importance of understanding implicit bias, learning to recognize it and ways to work with it so it does not impact, in a negative way, our decisions. I am hopeful the Bar will sponsor some "implicit bias" CLE and training in the near future. I have encouraged the CLE Advisory Committee to work with the Bar to develop an implicit bias training program.

> *"The [ABA] report…states [that] we are less racially diverse than most other professions and that racial diversity has slowed considerably since 1995."*

The ABA report is not particularly complimentary of the legal profession when it comes to race issues. The report states we are less racially diverse than most other professions and that racial diversity has slowed considerably since 1995.

The first step the report urges bar associations to take is to adopt a policy on diversity. To that end, several weeks ago the Bar Commission began developing a new policy statement on diversity, studying other state and ABA inclusion statements. The language (not the concept) was debated by your Bar Commission in vigorous e-mail exchanges, at the Bar leadership retreat at the end of August and again at the October Bar Commission

Rod expresses his appreciation to Margaret Plane and Eve Furst for their assistance in initiating the first draft of the inclusion statement which ultimately led to the one the Commission adopted; and Rod also thanks Eve for her suggestions regarding this article.



meeting. The Executive Committee then took the suggestions of several Commissioners and proposed a final version of the statement at the Commission meeting on December 2nd, which was held at the Community Legal Center in Salt Lake City. Below is the statement unanimously adopted by the Commission:

Utah State Bar Statement on Diversity and Inclusion

The Bar values engaging all persons fully, including persons of different ages, disabilities, economic status, ethnicities, genders, geographic regions, national origins, sexual orientations, practice settings and areas, and races and religions. Inclusion is critical to the success of the Bar, the legal profession and the judicial system.

The Bar shall strive to:

1. Increase members' awareness of implicit and explicit biases and their impact on people, the workplace, and the profession;
2. Make Bar services and activities open, available, and accessible to all members;
3. Support the efforts of all members in reaching their highest professional potential;
4. Reach out to all members to welcome them to Bar activities, committees, and sections; and
5. Promote a culture that values all members of the legal profession and the judicial system.

"Inclusion" is the new goal that goes beyond diversity. It has a broader reach, speaking in terms of making people of all backgrounds feel a part of the legal community, not just tolerated by it. We hope the Commission's statement expresses all of our aspirations. It presents what the Commission would like the Bar as an organization to strive for in a world that is becoming increasingly diverse, complex, divisive, and interesting, all in the same moment. We sincerely hope you will embrace this new policy, talk about it in your organizations and implement its goals.

On October 21st of this year, the Utah Minority Bar Association (UMBA) celebrated twenty years of diversity. Judge Raymond Uno,

Judge Raymond Uno, founding member of UMBA, was interned in a concentration camp during World War II.

a founding member of UMBA, was the keynote speaker. Judge Uno is a classic example of hard work and accomplishment. His first job was as a dishwasher at Heart Mountain, Wyoming Concentration Camp where he and his family were incarcerated for three years during World War II. Then he became a gandy dancer (railroad track laborer). He entered the military at age seventeen and became attached to a military intelligence unit. He is a Korean War veteran. He went on to become an attorney and a Third District Court Judge. Other founding members include Judge Glenn K. Iwasaki, Judge Tyrone E. Medley, Judge C. Dane Nolan, and Judge William A. Thorne, Jr. The Bar Commission

extends its warm congratulations for the excellent work and progress UMBA has made on behalf of so many minorities.

In light of Martin Luther King Jr. Day this month, some have suggested we should do more as a Bar to honor Dr. King and raise the level of consciousness regarding racial inequality. Most of our universities in the state have sponsored some remarkable activities on Martin Luther King Jr. Day. *See A Judicial Invitation*, by Judge Lynn W. Davis of the Fourth Judicial District Court regarding Dr. King on page 12 of this issue.

Obviously a great deal of progress has been made. We need only look at our history to confirm the efforts this nation has made to eradicate racial inequality. Let me refer you to an early example that may not be as well known.

Robert Gould Shaw ("Shaw") was born on October 10, 1837, to a family of wealthy merchants in New York.[1] His parents were well-connected progressive reformers and abolitionists. At an early age, Shaw and his parents moved to Massachusetts. Shaw studied in Europe and at Harvard. He joined the Union army as the Civil War was ramping up and eventually became a commissioned officer in the 2nd Massachusetts Regiment. Shaw fought in the battle of Antietam under McClellan against Lee's armies. It was a horrible battle that resulted in the highest causalities suffered on a single day in all the wars in American history. Shaw was wounded in the battle and fell unconscious. He was awakened by a black grave digger. A week later, January 1, 1863, Lincoln issued the Emancipation Proclamation, freeing the slaves. Shortly thereafter, Shaw was offered the command of the 54th Massachusetts Infantry – a Regiment of African Americans. African Americans from all over the northeast enlisted.

Shaw and his fellow officers were impressed with the discipline and development of their new recruits. On June 30, 1863, Shaw's men were to receive their Union pay. They were aggrieved to discover that the standard monthly pay and allowance they had been promised had been reduced for "colored regiments" to ten dollars. Shaw was incensed and ordered his men to refuse all pay until full pay was offered to his Regiment. The Union Army acquiesced to Shaw's demands.

Later, Shaw badgered his superiors into allowing his Regiment to engage in battle with their white brothers. Shaw knew his troops would acquit themselves well in battle and wanted the Union to see firsthand their obvious prejudices were unfounded. The chance came as the Union planned to take Charleston and Ft. Sumter. Having repelled a rebel force on James Island, the 54th was ordered to Morris Island where they were invited to lead an assault on Ft. Wagner – an incredibly dangerous assignment. It was not an order but a request Shaw could have refused. He did as his soldiers expected; he accepted the challenge. "Shaw knew the key to Charleston lay at the end of the beach. If black men could storm the fort and open the door to the birthplace of the rebellion, the symbolism would be enormous."[2] Shaw also had a premonition he would not survive the battle. Still he insisted on taking his African American troops into this historic battle.

Library of Congress

Colonel Robert Gould Shaw

On July 18, the 54th marched through thirteen supporting regiments of cheering white troops. Running shoulder to shoulder due to the narrowness of the beach, Shaw's Regiment charged. As they came within 200 yards of Fts. Wagner and Sumter, Confederate artillery opened fire on Shaw. As they approached within 100 yards, 1,700 Confederate soldiers opened fire on the 54th. They fought on Ft. Wagner's walls for over an hour before a retreat was ordered. Shaw was shot

through the heart as he climbed over the wall at Ft. Wagner. Almost half of the Regiment was killed, wounded or captured.[3]

Shaw was buried in a common grave with his fallen troops. When a Union officer approached under a flag of truce to claim the body of his fellow officer, it is reported the Confederate commander turned him back saying, "We buried him with his [blacks]." When word of this offense reached Robert Shaw's father, Francis Shaw, he responded that there could be "no holier place." Francis Shaw wrote the War Department to insist that his son's grave not be disturbed.

"When word of this offense reached Robert Shaw's father… he responded that there could be 'no holier place.' Francis Shaw wrote the War Department to insist that his son's grave not be disturbed."

A nurse who treated some of the wounded after the failed attack noted how anxious they were about the fate of Colonel Shaw and how deeply they grieved when they learned he had perished. "They loved him," she wrote.[4]

This small yet powerful piece of history inspires me to do what I can, both as Bar President and as an individual, to "rise up and live out the true meaning of [this nation's] creed: 'We hold these truths to be self-evident, that all men are created equal.'" I hope we all can find inspiration in the coming months to live the dream.

1. This summary of Robert Shaw and the 54th Massachusetts Infantry is based on the books, *Where Death and Glory Meet: Colonol Robert Gould Shaw* and *the 54th Massachusetts Infantry;* and *Blue-Eyed Child of Fortune: The Civil War Letters of Colonel Robert Gould Shaw*, both by Russell Duncan.
2. Duncan, ed., *Blue-Eyed Child of Fortune*.
3. *See id*.
4. News of the Regiment's courage caused many African Americans to enlist in the Union Army. By the end of the Civil War nearly 180,000 African Americans had enlisted. President Lincoln expressed that a significant reason for Union victory was attributable to this fact.

A Judicial Invitation

by Judge Lynn W. Davis

"Almost always, the creative, dedicated minority has made the world better."
– Reverend Dr. Martin Luther King Jr.

For a long time I have contemplated how we could pay greater tribute to Dr. Martin Luther King Jr. I wish to encourage the Utah State Bar and its members to be more involved in celebrating Martin Luther King Jr. Day. It has been my experience that we each can play a more supportive and impassioned role.

Opportunities to be involved abound in our communities. Utah Valley University, for example, now in its eighteenth annual celebration, has invited Julian Bond to be its guest this year. Last year Ambassador Andrew Young was featured. Two years ago, the Brown sisters of the 1954 U.S. Supreme Court case of *Brown v. Board of Education of Topeka*, 74 S. Ct. 686 (1954), were honored guests. The University, as part of its "being engaged" philosophy, welcomes and encourages lawyers to be involved in presentations and panels, as well as serving as speakers and moderators. The work of the Martin Luther King Advisory Board has been exceptional and serves as an example after which our own efforts could be patterned.

Linda Brown (left) and Cheryl Brown-Henderson (right), daughters of the plaintiff in Brown v. Board of Education, with Judge Lynn W. Davis (center).

The NAACP Salt Lake Branch sponsors a luncheon each year on Martin Luther King Jr. Day at the Little America Hotel. The public is cordially invited to enjoy the atmosphere of tribute where they listen to guest speakers.

Brigham Young University sponsors an annual candle light march/vigil. That tradition, which started with a handful of us twenty years ago, now routinely has over five hundred marchers. Last year, Darius Grey gave a very poignant and touching tribute to Dr. King at the end of the march.

The University of Utah has traditionally conducted two or three days of events honoring Dr. King. Such celebrations are duplicated, principally in college and university communities, throughout the State of Utah.

When my children were young, I took them to meet Rosa Parks. She was warm, attentive, friendly, and responsive to our young daughters and tenderly and lovingly embraced them. That very personal interaction with such an iconic figure in such a historic setting continues to be an unforgettable, exceptional and treasured memory in our lives. Unfortunately, no other members of the Bar were present to greet and be enriched by this civil rights heroine.

If we cannot participate in such celebrations, I've contemplated how we can still pay tribute to this ongoing movement. One

thought was that we simply take the time to read some of Dr. King's speeches. I would recommend "Eulogy for the Martyred Children," "I Have a Dream," and "Letter from Birmingham City Jail." They are lifting, stirring, thought provoking, life changing homilies from which we as individuals and as a legal community could greatly benefit.

I would encourage the Utah State Bar, in each January issue of the *Utah Bar Journal*, to publish a list of local celebrations honoring Dr. King, together with contact information. I would further encourage the *Utah Bar Journal*, also in each January issue, to publish a tribute to Dr. King and other leaders in this historic movement. We could solicit contributions from civil rights leaders, as well as practicing attorneys, judges, students, and others.

> *"Life's most persistent and urgent question is 'What are you doing for others?'"*
>
> *– Reverend Martin Luther King, Jr.*

I believe that our support has been very measured and that we ought to step forward in our celebratory participation and charitable service. We must do more!

May we each thoughtfully consider the Reverend Dr. Martin Luther King Jr.'s simple, but profound, interrogatory: ***"Life's most persistent and urgent question is 'What are you doing for others?'"***

Thank you for considering these reflections.

Respectfully,

Judge Lynn W. Davis
Fourth District Court

The Face of the Judiciary: Utah's Justice Courts

by Judge Paul C. Farr

Justice Courts and the Public

For the majority of Utah residents, their contact with the court system, if any, will be with a justice court. In fiscal year 2010, the district courts throughout the state received 225,438 case filings. *See* Utah State Courts, http://www.utcourts.gov/stats/files/2010FY/district/0-Statewide.pdf. During the same time period the justice courts received 584,909. *See id.*, http://www.utcourts.gov/stats/files/2010FY/justice/0-Statewide.pdf. Granted, the cases being filed in justice courts are not as complex as those in the district court, and certainly the stakes are not as high. However, by volume, Utah's justice courts see over twice as many cases (i.e., individuals) as the district courts. A Utah resident that finds him or herself in court is more than twice as likely to appear before a justice court judge as he or she would before a district court judge.[1]

> *"Some members of the Bar look down upon, or even have contempt for, the justice court system."*

For the majority of Utahns, perceptions about the judicial system are being created in the justice courts. Additionally, what an individual experiences in justice court is likely to affect the way he or she views the judicial system as a whole. Many individuals do not know the difference between a justice court and a district court, or between a city attorney and a district attorney. As a lawyer, we are a district court judge, a justice court judge, or a court clerk, but to most individuals we are all lumped together as the "system." This is a system that can be complicated and intimidating and that the average Utahn knows little about.

Because of the important role justice courts play, the actual quality as well as the public perception of those courts should be a topic of serious concern to the Bar.

Justice Courts and the Bar

The experience of the average resident is different than the experience of most members of the Bar. There are a small number of prosecutors and defense attorneys that practice heavily in justice courts. Additionally, some attorneys in civil practice may occasionally find themselves handling a small claims action in a justice court. However, for the majority of attorneys, their primary contact with the court system is in the district courts. Their experience in the justice courts is minimal, at best. This results in the justice courts being overlooked, to some extent, by a majority of the Bar.

The result of all of this is a vastly different experience of the judicial system by lawyers and the public. The face of the judiciary for many lawyers is not the justice courts, but may be the Matheson courthouse or the thirty judges who preside in the Third District. Include the training, experience, and comfort members of the Bar have with the courts, and perceptions of the judicial system are going to be very different among these two groups.

We also cannot ignore the elephant in the room. Some members of the Bar look down upon, or even have contempt for, the justice court system. Even those who do not have such disdain or contempt still may not give the justice courts the

JUDGE PAUL C. FARR is a graduate of the J. Reuben Clark Law School at BYU, and has been a member of the Utah State Bar for the past eleven years. Judge Farr is a full-time justice court judge serving the cities of Herriman and Lehi.

attention and importance they deserve. There may be many reasons for this attitude. One reason that has been expressed to this author on prior occasions is the fact that justice court judges are not required to be lawyers and many serve part-time.[2] Additionally, procedures and practices may vary significantly from justice court to justice court, and there is little perceived oversight due to a lack of having a "record." Whether these issues create real concern has been the subject of much study and legislation (enacted and not). However, whether or not these concerns are justified, the fact is that the "perception" is there. If the Bar has a negative perception of the justice courts, how can we expect the public's perception to be any better?

The public's perception of the judicial system is being created in the justice courts. If we truly want to improve the public's opinion of the judicial system as a whole, we need to focus more time and energy on improving the quality and image of the justice courts. This must start with the Bar. Justice courts truly are the "face of the judiciary" for most Utahns.

Justice Courts as Revenue Generators

In the last year justice courts have been portrayed by the media as revenue generators for the municipalities they serve. However, this is nothing new. This criticism has been going on for years. Is this a fair criticism?

According to the Justice Court Revenue Report for fiscal year 2010, justice courts statewide collected $86,503,361.32. First, of the 584,909 cases heard by justice courts, only 19,543 were small claims cases. *See* Utah State Courts, http://www.utcourts.gov/stats/files/2010FY/justice/0-Statewide.pdf. The remainder (565,366) were criminal or traffic cases, where fines may be imposed.[3] *See id*. This averages out to only $152.73 in fines per criminal/traffic case filed.

As a society we have determined that fines are an appropriate punishment for violation of the law. We abandoned floggings, stocks, and pillories some time ago. Section 76-3-201(2) of the Utah Code provides:

> (2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:
>
> (a) to pay a fine;
>
> (b) to removal or disqualification from public or private office;
>
> (c) to probation unless otherwise specifically provided by law;
>
> (d) to imprisonment;
>
> (e) on or after April 27, 1992, to life in prison without parole; or
>
> (f) to death.

Utah Code Ann. § 76-3-201(2) (Supp. 2011).

Further, the Utah State Legislature, through the Utah Code, has set forth the maximum fine amounts that may be imposed for a

particular offense (class B misdemeanor $1000, class C misdemeanor or Infraction $750). *See id.* § 76-3-301 (2008). The legislature has also tasked the Judicial Council with creating a uniform fine schedule, which it has done. *See* Uniform Fine/Bail Forfeiture Schedule, (July 2001), http://www.utcourts.gov/resources/rules/ucja/appen/c_fineba/FineBail_Schedule.pdf . The schedule states, "It is the intent of the Uniform Fine/Bail Schedule to provide assistance to the sentencing judge in determining the appropriate fine or bail to be assessed in a particular case and to minimize disparity of fines/bails imposed by different courts for similar offenses." *Id.* at 1. This schedule is closely followed by judges. In fact, the court's computer system (Coris) automatically generates the fine amount suggested by the schedule and includes it on the docket for the court's convenience. The schedule further states that, "The penalty for all public offenses should include a financial sanction as a minimum base from which the judge may determine the total sentence, dependent upon aggravating and/or mitigating circumstances of an individual case." *Id.*

Based on the forgoing, fines are an appropriate and minimum sanction for those who violate the law. This has been established by the Utah Legislature, not the justice courts. Maximum amounts, as well as uniform and recommended amounts, have also been established; again, not by the justice courts. It is also not the justice courts that are citing, or prosecuting, these individuals. Nevertheless, it is the justice courts that take the majority of the criticism on this issue.

Of the fine amounts actually imposed by the justice courts, approximately one-third of that money is not kept by the justice courts or the municipality. Section 78A-2-601 of the Utah Code provides that all criminal convictions (including moving traffic violations) be subject to a $33 security surcharge. *See* Utah Code Ann. § 78A-2-601(1) (Supp. 2011). Section 51-9-401 of the Utah Code further provides that a surcharge of 90% be paid on felonies, class A misdemeanors, and non-traffic class B misdemeanors, and a 35% surcharge be paid on all other criminal/traffic offenses. *See id.* § 51-9-401(1)(a)(b)(i), (ii). In other words, a $1000 fine on a class B misdemeanor becomes $1933. Pursuant to these statutes, a substantial portion of the money collected by local justice courts goes to the State, not the municipalities they serve.

According to the Justice Court Revenue Report for fiscal year 2010, of the $85 million collected, $28 million was for surcharges that were being collected by the State, and not kept by the local municipality. Where does the remainder of that money go? That $57 million is used to operate the 134 city and county justice courts around the state. (In comparison, the State of Utah's 2010 budget was $4.8 billion. The State Court system operated on a $130 million budget.)

Benefits of Justice Courts

Article VIII of the Utah State Constitution established the "Judicial Department" or the Judiciary in the State of Utah. *See* Utah Const. art. VIII, §§ 1-16. As we all know from elementary school, the judiciary is an independent, third branch of government. Article VIII, section 1 provides for the creation of "[c]ourts not of record." *See id.* § 1. These courts not of record have been created, and are known as the justice courts. *See* Utah Code Ann. §§ 78A-7-101, *et seq*. While they may be operated by municipalities, justice courts are part of the independent, judicial branch of government. This principle is sometimes confused not only by the public, but by the municipalities and even the courts themselves. While justice courts may share buildings, staff, and funds with the rest of the city's operations, it should always be remembered that justice courts are a part of the independent, judicial branch of government.

Justice courts are created and operated by municipalities largely as a service and a convenience for their citizens. If not for justice courts, an individual charged with a misdemeanor or traffic offense in Sandy, for example, would have to travel to the District Court in West Jordan or downtown Salt Lake City, or to the county justice court in Salt Lake. An individual charged in Bullfrog would have to travel to the District Court in Kanab, 315 miles away, or to a county justice court. By creating justice courts, residents of a community can have their misdemeanor, traffic, and small claims cases heard in the community in which they live.

Justice courts are also specialists. These courts focus on relatively simple traffic, misdemeanor, and small claims cases. The attorneys, judges, clerks, and others working in this system become very familiar and proficient handling these cases. As a result of this proficiency, as well as the less complex nature of the cases, justice courts can handle a great volume of cases in a short period of time. Imagine the outcry if a resident charged with a

speeding ticket had to wade through a crowded district court calendar to have their case heard.

Contrary to public perception, most municipalities do not establish justice courts to bring in revenue. Many of the justice courts operating around the State cost the municipality more money than they generate. They are established to better serve the public. The justice courts protect the constitutional rights of citizens throughout the state, in a more convenient location, and with fewer burdens on their time, than could otherwise be done.

Improvement and Reform

The Administrative Office of the Courts, along with the legislature, has taken steps over the last several years to improve the quality and image of the justice courts. In 2007, the Judicial Council submitted several recommendations to further these goals. Some have been implemented by legislation; others have not. The 2007 recommendations that have been enacted include the following:

- The judicial selection procedure has changed. Prior to 2008, when a justice court judge position became available, that position was filled solely by the appointment of the local government authority (mayor, council, etc.). They could appoint whomever they chose. Now, when a position becomes available, municipalities are required to advertise the position. The applicants are screened by a nominating committee, which is made up of members of the Bar, local government representatives, and private citizens. Selection is based upon merit. The nominating commission then forwards the names of the three to five finalists to the mayor/council for the final selection, which is then certified by the Judicial Council. The purpose of this change was to ensure the most qualified applicant was being selected and that it was not just a political favor. This is now the same system used to select district court judges.

- As of 2009, justice court judges began serving six-year terms and were to be subject to unopposed retention elections. This is also the same system used for district court judges.

The purpose of this change was to insulate the judge from pressure from the municipality. The judge can focus on making the correct and just legal decision, without worrying about the status of his or her job.

- Justice court judges' pay has also been determined by statute. It is to be between 50-90% of a district court judge's salary. Further, the judge's pay may not be reduced during his or her term in office. Again, this insulates the judge from the municipality, and prevents any concern that the judge will be persuaded by a fear that his or her pay could be affected by his or her decisions.

In the last legislative session, section 78A-7-103 of the Utah Code was amended to require that justice courts record their proceedings (audio only) and maintain those recordings for one year. *See* Utah Code Ann. § 78A-7-103(3) (Supp. 2011). While these recordings will presumably not be a "record" to use on appeal, it will allow for review of the conduct of justice court judges, as well as of attorneys and defendants. Contrary to what some may think, this is actually a measure welcomed by many judges who feel that such recordings will provide a valuable defense to meritless claims and allegations, as well as provide a tool for self improvement. Additionally, there are some judges (just like in any profession) that likely merit discipline on occasion. These recordings should help to improve (or remove) such judges, and improve the overall performance and perception of the justice courts.

Additional recommendations to improve the quality and perception of the justice courts should be seriously considered. These efforts should not be left to the media, or even to the legislature. Rather, the Bar, including all of its members, should play a larger role in this endeavor. Together, the Bar comprises an impressive group that has practiced in courts at every level of the municipal, state, and federal systems. They have seen good judges. They have seen bad judges. They have seen systems that work and systems that do not. The Bar should encourage efforts to improve the quality and perception of the justice courts. This can take place not only through actual reforms, but also through education. Let's correct those issues that need to be corrected, and let's change inaccurate or unfair perceptions through education.

Conclusion: The Face of the Judiciary

Justice courts truly are the face of the judiciary for most Utahns. The justice court system is a good system that provides a valuable service to the citizens of this state. However, no system is perfect. The Bar should lead efforts to improve the quality of the justice courts. The Bar should also lead efforts to improve the public perception of the justice courts through example and education. This is in the Bar's best interest. As the justice courts are perceived, so too will the entire judicial system be perceived. Let's put our best face forward.

1. According to the Utah State Court's website, there are seventy-one district court judges and 108 justice court judges currently serving in Utah. *See* Utah State Courts, http://www.utcourts.gov/courts/dist/overview.htm; http://www.utcourts.gov/courts/just/overview.htm.

2. Of the ninety-five justice court judges listed on the Utah State Court's website, forty-one have law degrees, with twenty-three of those forty-one serving in the Third District. *See id.*, http://www.utcourts.gov/judgesbios/.

3. In contrast, the district courts received only 73,626 criminal and traffic cases, i.e., cases in which fines may be imposed, during the same time period. *See id.*, http://www.utcourts.gov/stats/files/2010FY/district/0-Statewide.pdf.

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Loss of Chance Damages Brought to Life

by Jeffrey D. Gooch & Megan J. Grant

Introduction

In 2005 the Utah Supreme Court reversed a widely held belief – that loss of chance was not a viable tort theory – with its holding in *Medved v. Glenn*, 2005 UT 77, 125 P.3d 913. While the court's decision and language in dicta could be understood to mean that loss of chance always was a viable theory, the court nevertheless declared that its holding in *Medved* "should be applied only prospectively," in order to "avoid the substantial injustice that may otherwise flow from [the decision]." *Id*. at ¶ 17.

The clarification that *Medved* provided opened up a whole new world in the area of medical malpractice tort law: loss of chance as a distinct element of damage. For this reason, it is important for legal practitioners, patients, and physicians alike to understand the wide scope of this tort theory. Much of it is unexplored as of yet. For example, in what situations can loss of chance occur? What should be considered in quantifying the damage incurred when a chance is lost? How should a jury be instructed on this point? These and similar questions require exploration.

Traditional Malpractice

Medical malpractice is a claim for negligence. A showing of negligence requires four things. There must have been (1) a legal duty, (2) a breach of the legal duty, (3) proof that the breach was the probable cause of the injury at issue, and (4) actual damages. In other words, "[n]egligence is the failure to do what a reasonable and prudent person would have done under the circumstances, or doing what such person under such circumstances would not have done. The fault may be in acting or omitting to act." *Meese v. Brigham Young Univ.*, 639 P.2d 720, 723 (Utah 1981).

Using this formulation, traditional medical malpractice cases hinged on the "all or nothing rule." *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 829 (Mass. 2008). Under this rule, a plaintiff could only prevail if he or she could show that a physician's negligence more likely than not caused the injury or death. If so, the plaintiff was awarded full damages. If not, however, the plaintiff would recover nothing. In layman's terms, this rule ensured that a patient with a preexisting condition that gave him or her a less than even chance of survival could never prevail against a physician with a claim for negligence. *See id*. at 829-30. In such cases, because it would be impossible to show that any act of the physician was the more than likely cause of the damage – even if there were actions that severely decreased the patient's chances – the causation requirement would fail and the patient would recover nothing. *See Massachusetts Supreme Judicial Court Accepts Loss of a Chance in Medical Malpractice Suits. – Matsuyama v. Birnbaum*, 890 N.E.2d 819 (Mass. 2008), 122 Harv. L. Rev. 1247, 1247 (2009). This "all or nothing rule" provided a virtual shield of immunity for medical practitioners whenever dealing with a patient with a less than 50% chance of survival, even though the Utah Constitution guarantees that "[t]he right of action to recover damages for injuries resulting in

JEFFREY D. GOOCH is the owner of The Gooch Firm, P.C.

MEGAN J. GRANT graduated from law school in 2010 and works part-time with the Gooch Firm, P.C.

death, shall never be abrogated." Utah Const. art. 16 § 5.

Loss of Chance

Loss of chance refers to the argument that "better results [for the patient] allegedly would have occurred if the patient's condition had been properly diagnosed and treated earlier than it was." Martin J. McMahon, Annotation, *Medical Malpractice: Measure and Elements of Damages in Actions Based on Loss of Chance*, 81 A.L.R.4th 485 (1990). This loss of chance may be the loss of the chance to obtain better results, to require less intrusive or less extensive treatment, as in a case in which a misdiagnosis leads to amputation of a limb. It could also be the loss of the chance to live as long as could have been expected, or even, in some cases, to survive at all. Unlike other malpractice cases, loss of chance theory recognizes that "death or worsening of the condition might have occurred in any event." *Id*. However, "the patient alleges that timely treatment would have improved the patient's chances, regardless of how low a percentage chance of cure existed at the time of the alleged malpractice." *Id*.

This theory gives a name to the actual damage that is incurred when, due to a physician's negligence, a patient is deprived of the full potential of timely medical care. It gives a voice to patients who, though given a less than 50% chance of survival, nonetheless have the same right to competent medical care as all other patients. As the court in *Matsuyama* recognized, this doctrine

> views a person's prospects for surviving a serious medical condition as something of value, even if the possibility of recovery was less than even prior to the physician's tortious conduct. Where a physician's negligence reduces or eliminates the patient's prospects for achieving a more favorable medical outcome, the physician has harmed the patient and is liable for damages.

890 N.E.2d at 823.

Loss of Chance Damages

As the loss of chance theory gains momentum in courts throughout the United States, the issue of how to calculate monetary damages is a recurring question. Courts are holding or implying that loss of chance itself is a distinct element of damage, but it is not always easy to figure out how such damage should be quantified. *See* McMahon, *Medical Malpractice*. Thus far, some courts have employed a mathematical formula called the proportional damages approach. This formula is outlined in *Matsuyama*.

> In applying [this formula], the court must first measure the monetary value of the patient's full life expectancy and, if relevant, work life expectancy as it would in any wrongful death case. But the defendant must then be held liable only for the portion of that value that the defendant's negligence destroyed.
>
> (1) The fact finder must first calculate the total amount of damages allowable for the death under the wrongful death statute…or, in the case of medical malpractice not resulting in death, the full amount of damages allowable for the injury. This is the amount to which the decedent would be entitled if the case were not a loss of chance case: the full amount of compensation for the decedent's death or injury.
>
> (2) The fact finder must next calculate the patient's chance of survival or cure immediately preceding ("but for") the medical malpractice.
>
> (3) The fact finder must then calculate the chance of survival or cure that the patient had as a result of the medical malpractice.
>
> (4) The fact finder must then subtract the amount derived in step 3 from the amount derived in step 2.
>
> (5) The fact finder must then multiply the amount determined in step 1 by the percentage calculated in step 4 to derive the proportional damages award for loss of chance.

Matsuyama, 890 N.E.2d at 839-40 (footnote and citation omitted).

A real-world example of this formula put to use could yield a scenario such as the following. Say a patient undergoes routine screening for breast cancer, after which her physician misreads the results and does not properly diagnose the cancer that is, in fact, present. Three years later, this same patient receives another mammogram by a different physician, who this time properly diagnoses her with late-stage breast cancer, giving her only a 30% chance of survival or cure.

The patient has the results of her first screening reviewed by her new physician, and the original misdiagnosis is discovered. It is clear from the images produced during the first screening that, had the cancer been properly diagnosed three years earlier, the patient would have had a 75% chance of survival or cure. In a subsequent medical malpractice lawsuit, brought while the patient is still alive, how would this patient's loss of chance damages be quantified?

Using the formula as noted above, several calculations would need to take place. First, under one possible formulation of damages, even though the patient is still alive, a court could calculate the full damages allowable as if it were a wrongful death lawsuit. This is done because the injury caused by the malpractice is loss of chance of survival. It is an invisible injury, but one that has the potential to hasten death or even destroy the possibility of cure for a patient who is already suffering. Thus, a percentage of wrongful death damages can be a proper award. Wrongful death damages include, among other things, the monetary value of the patient's life expectancy and work life expectancy, as it was before her physician's negligence (e.g., $450,000).

It should be noted that if, for example, the malpractice required the patient to undergo a mastectomy when she otherwise would not have had to, but did not otherwise decrease her chance of survival, damages would be calculated based on the amount that a patient could be awarded for a wrongful mastectomy. (Of course, this supposes the term of art "wrongful" as it is used in "wrongful death" – it is wrongful merely because it would not have been necessary absent the malpractice.) If the patient would have had only a 10% chance of needing a mastectomy but for the malpractice, but then had to lose her breast, the patient would receive 90% of the full damages allowable for a wrongful mastectomy. This is an example of loss of chance for less intrusive treatment, the second type of case referenced by *Matsuyama*: "[1] in the case

of medical malpractice not resulting in death, the full amount of damages allowable for the injury…" *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 839-40 (Mass. 2008).

Next, based on the medical records, in particular the results of the original mammogram, the court would calculate the patient's chance of survival or cure immediately preceding the first physician's negligence (75%).

Third, the court would calculate the patient's chance of survival or cure at the time of the correct diagnosis; i.e., the chance of survival or cure the patient had as a result of the negligence (30%).

Subtracting the amount derived in the third step (30%) from the amount derived in the second step (75%) will provide the percentage of chance lost (45%). It is this percentage that the court then multiples the full wrongful death damages amount by, to arrive at the proportional damages award for loss of chance ($213,750). Using this formula ensures that the negligent medical provider is only held responsible for the amount of damages that his or her negligence actually caused.

A similar outcome was reached using this formula in *Matsuyama*, even though the patient in that case had already died. *See id.* at 823. Because the entire percentage of survival at the time of the malpractice was lost (by the patient's death), the jury

> calculated [loss of chance damages] as follows: they awarded $875,000 as "full" wrongful death damages, and found that Matsuyama was suffering from stage II adenocarcinoma at the time of [his physician's] initial negligence and had a 37.5% chance of survival at that time. They awarded the plaintiff "final" loss of chance damages of $328,125 ($875,000 multiplied by .375).

Id. at 827-28.

The "full" wrongful death damages "figure was an aggregate amount that included, in the words of the special [jury] question,

losses for Matsuyama's 'expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice.'" *Matsuyama v. Birnbaum*, 890 N.E.2d 819, 839-40 (Mass. 2008).

So Where Do We Go From Here?

The loss of chance doctrine has the potential to provide reparations in countless cases where real injury is incurred, but where the law formerly did not provide a remedy. A plaintiff whose chances for survival have been diminished through the wrongful conduct of others may now be awarded wrongful death damages while he or she is still alive. However, there are several obstacles to overcome before the doctrine can be effectively utilized in Utah courts.

First, as of yet there are no jury instructions in Utah for the doctrine. Furthermore, whether or not the medical malpractice damages cap will apply to loss of chance damages has yet to be settled. This second issue was addressed in part by *Bybee v. Abdulla*, 2008 UT 35, 189 P.3d 40, wherein the court held that the Medical Malpractice Act did not bar plaintiff-heirs from bringing a wrongful death lawsuit when the patient-decedent had signed an arbitration clause. *Id.* at ¶ 40. The court clarified that heirs suffer injuries separate and distinct from any injuries suffered by the patient-decedent, and as such are free to pursue wrongful death actions unhindered by at least one of the limitations set down in the Medical Malpractice Act. *See id*. at ¶¶ 32-33.

Following this reasoning, plaintiffs in wrongful death suits are arguing with increasing frequency that the Medical Malpractice Act damages cap is another limitation that should not apply to them. These plaintiff-heirs have, after all, suffered a separate and distinct injury, one that should be calculated differently than that suffered by a still-living patient, and one that likely was not contemplated when the damages cap of the Medical Malpractice Act was written.

Thus, because plaintiffs in loss of chance cases are also seeking wrongful death damages, this same argument will likely be utilized to urge courts to recognize the unique nature of the damages involved, and calculate them outside of the Medical Malpractices Act damages cap.

Jury Instructions

Starting with the Model Utah Jury Instructions section for wrongful death[1] and taking into account the change in circumstances that a loss of chance case entails, the following is an example of what loss of chance jury instructions could include:

> **LOSS OF CHANCE DAMAGES**
>
> Damages include an amount that will compensate [plaintiff] for the loss suffered due to [plaintiff]'s decreased chance of survival. Calculate the amount based on what [plaintiff] would have been able to contribute to [plaintiff]'s household if [plaintiff]'s full work and life expectancies, taken prior to the tortious conduct, had not decreased. Consider the following:
>
> (1) The loss of financial support that [plaintiff] and household would likely have received, or been entitled to receive, from [plaintiff] had [plaintiff] lived as long as was expected, prior to the medical malpractice.
>
> (2) The loss of love, companionship, society, comfort, care, protection and affection which [plaintiff]'s household will lose earlier than they would have, because of [plaintiff]'s decreased chance.
>
> (3) The age, health and life expectancies of [plaintiff] and [plaintiff]'s household immediately prior to the death.
>
> (4) The loss or reduction of inheritance from [plaintiff] that [plaintiff]'s household is likely to suffer because of [plaintiff]'s early death.
>
> (5) Any other evidence of assistance or benefit that [plaintiff]'s household would likely have received had [plaintiff]'s life expectancy been unaffected.

Conclusion

Medved v. Glenn, 2005 UT 77, 125 P.3d 913, has brought to life a once-dormant damage concept, loss of chance. We look forward to closely following this new doctrine's evolution in Utah jurisprudence.

1. Model Utah Jury Instructions, Wrongful Death – Adult, §27.9

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E-mail Privacy

by Keith A. Call

Like most people, I have a love-hate relationship with my e-mail. I love the convenience of communicating with groups of people at once, especially at irregular times. But I absolutely hate how e-mail tries to take over my law practice and my life.

A friend recently told me that he was on the verge of "e-mail bankruptcy." He was so overloaded with e-mails that he was simply going to delete all of them – read and unread. Anyone who had a message they really wanted him to read was going to have to send him a new "claim."

> *"[D]on't be surprised if you end up seeing your own e-mails on your opponent's exhibit list."*

Love it or hate it, e-mail transmission is here to stay, at least until they perfect telepathic transmission. In order to maximize e-mail efficiency and minimize e-mail misery, here are some ideas that will help keep your attorney-client e-mails private instead of seeing them listed as your adversary's "Exhibit A."

E-mail Communication is Allowed

Fortunately, Utah recognizes that generally there is a reasonable expectation of privacy when communicating through unencrypted e-mail. *See* Utah State Bar Ethics Advisory Op. Comm., Op. 00-01 (2000). So, as a baseline, lawyers can transmit confidential client communications through e-mail without violating the confidentiality requirements of Utah Rule of Professional Conduct 1.6. *See* Utah R. Prof'l Conduct 1.6.

That is not a free pass, however. As explained below, careless e-mail communication can still get you into ethical trouble.

Lawyers Must Warn Clients about the Risks of E-mail

Imagine lawyer "Larry" is advising client "Carl" about a potential dispute Carl has with his employer "BigCo." Should Larry advise Carl about the risks of using BigCo's computers or e-mail accounts to communicate with Larry? The answer is, "Absolutely!"

The American Bar Association recently issued an opinion that concluded:

> A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011).

Many employers have policies that allow the employer to access and review all activity on company computers and servers. That may include the "private" communications a lawyer has with his or her client about the client's dispute with the client's employer. If you don't warn your clients when there is a significant risk that

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

others may access the client's e-mails, don't be surprised if you end up seeing your own e-mails on your opponent's exhibit list.

Must Adverse Third Parties Disclose the Receipt of Private E-mails?

Now, imagine BigCo gathers all of its electronically stored information and delivers it to BigCo's outside litigation counsel "BigLawyer." Upon review, BigLawyer discovers BigLawyer possesses dozens of "private" e-mails between Larry and Carl. Is BigLawyer obligated to disclose that BigLawyer possesses those "private" e-mails?

Utah Rule of Professional Conduct 4.4(b) provides, "A lawyer who receives a document relating to the representation of the lawyer's client and knows or should know that the document was inadvertently sent shall promptly notify the sender." Utah R. Prof'l Conduct 4.4(b). According to a recent opinion from the American Bar Association, Rule 4.4(b) would not require BigLawyer to return or even disclose the fact that she possesses Larry's and Carl's "private" e-mails. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-460 (2011). The opinion reasons that the e-mails were not "inadvertently sent." *See id.* Rather, both the employee and his lawyer intentionally sent the e-mails. *See id*. Apparently, the fact that they exchanged the e-mails using the employer's computer and e-mail account eliminated the reasonable expectation of privacy. *See id*. The opinion concludes that any such disclosure obligation is governed by the applicable rules of civil procedure, court decisions or other law, and not the Rules of Professional Conduct. *See id*. (Note that ABA opinions are instructive for Utah lawyers, but they may not be binding.)

The lesson here is to pay attention to what computers and what e-mail domains you and your client use to communicate. If there is a significant risk that an employer or other third party may have access to the e-mails, play it safe and use a different mode of communication. At a minimum, you have an ethical obligation to advise your client of the risks. Finally, consider how these rules might apply to other forms of communication, such as text messages using an employer-issued smart phone.

Helf v. Chevron: *A Workers' Comp and Personal Injury Game Changer*

by Andrew E. Draxton

The Exclusive Remedy Provision ("Provision") of the Utah Workers' Compensation Act ("WCA") is not so exclusive. The Utah Supreme Court previously recognized the validity of a claim for an intentional tort notwithstanding the Provision. *See Helf v. Chevron*, 2009 UT 11, ¶ 18, 203 P.3d 962 (citing *Bryan v. Utah Int'l*, 533 P.2d 892, 894 (Utah 1975)). Despite the exception discussed in *Bryan*, prior to *Helf*, workplace injuries short of intentional torts seemed to remain the sole province of the WCA claims process. The longstanding litmus test for a Workers' Compensation case required: (1) an employee, (2) injured, (3) in the "course of," or because of, his or her employment. *See* Utah Code Ann. § 34A-2-105(1) (2011); *see also Bryan* 533 P.2d at 893. But then the court decided *Helf*.

In *Helf*, the court acknowledged that Utah's Workers' Compensation Act provides an exclusive remedy for employees seeking to recover for injuries incurred on the job due to the negligence of an employer or co-employee. *See Helf*, 2009 UT 11, ¶ 16. However, the court recognized a new exception to this general rule, as discussed below. The *Helf* case presents new practical issues for all attorneys involved in personal injury litigation. For plaintiffs' attorneys: a new avenue for recovery. For the defense bar: a potential basis for corporate liability to be mindful of. And for in-house counsel: a point of discussion to be raised with employers and commercial insurance providers.

The *Helf* ruling changes Workers' Compensation and personal injury practices, and practitioners should apprise themselves of the scope and impact of the ruling.

THE GENERAL PROHIBITION ON SUITS AGAINST EMPLOYERS BY THEIR EMPLOYEES

Under the Provision, absent other malfeasance by an employer – such as the employer's failure to carry Workers' Compensation Insurance, *see* Utah Code Ann. § 34A-2-207 – employers generally enjoy insulation from suit by employees injured on the job. *See id.* § 34A-2-105(1) (2008).

THE PURPOSE OF THE EXCLUSIVE REMEDY PROVISION

The Provision offers a *quid pro quo*. *See Helf*, 2009 UT 11, ¶ 16 (citing *Shattuck-Owen v. Snowbird Corp.*, 2000 UT 94, ¶ 19, 16 P.3d 555). It affords employees a "simple, adequate, and speedy remedy" for injuries sustained on the job, but bars negligence lawsuits against the employer or another employee. *Id.* ¶ 16 (citing *Park Utah Consol. Mines Co. v. Indus. Comm'n*, 84 Utah 481, 36 P.2d 979, 981 (1934)).

THE UNFORTUNATE IMPACT OF THE PROVISION

For the most part, the Provision has served its purpose – workers have received care for injuries suffered on the job. But sometimes the Provision causes employers to operate their businesses with a disregard for employee safety. I have seen many cases where an employee was seriously injured (nearly killed) on the job site because of the employer's abject indifference. Though the employer did not act intentionally, the employer's conduct was more egregious than simple negligence or gross negligence. After filing suit, the employer always moved to dismiss under the Provision. *Helf* may now preclude the previously expected result of a dismissal.

The fact pattern in *Helf* is tragic. At the time of her injury, Jenna Helf was working at Chevron's Salt Lake City Refinery. *See Helf v. Chevron*, 2009 UT 11, ¶ 1, 203 P.3d 962. Ms. Helf arrived at work on January 28, 1999, for the evening shift. *See id.* ¶ 9. Earlier in the day, Chevron supervisors had witnessed the effect a new "open-air" refining process had on employees – it caused employees to fall ill, requiring that they be sent home. *See id.* ¶ 8.

ANDREW E. DRAXTON is currently seeking opportunities to make use of, and build upon, his experience in motion practice.

In spite of the indications, Ms. Helf "was not told about the earlier reaction, nor was she told about the hazardous conditions indicated by the plant alarms…or…[that] employees…were sent home due to illness…." *Id.* ¶ 9. Beyond failing to mention what had happened earlier, Ms. Helf was not told "that she would need respiratory protection for this job, despite the fact that her supervisors knew that injury was substantially certain to occur if she initiated the chemical reaction without respiratory protection." *Id.* Ms. Helf followed her supervisor's instructions, initiated the process, producing noxious gases that caused her to vomit and pass out. *See id.* ¶ 10. She eventually came to, stopped the process, and returned to the building, suffering from the exposure to high levels of toxic gases. *See id.* She was not provided with treatment or information about the chemicals she had been exposed to. *See id.* Following the incident, the Occupational Health and Safety Division of the Utah Labor Commission cited Chevron for the event. *See id.*

Following the incident, Ms. Helf filed suit against Chevron, alleging willful misconduct, intentional nonfeasance, negligent infliction of emotional distress, and intentional infliction of emotional distress. *See id.* ¶ 12. Chevron responded with a motion to dismiss, arguing that the Provision barred Ms. Helf's claims. *See id.* ¶ 13. The district court granted Chevron's motion. *Id.* Ms. Helf appealed the district court's dismissal of Chevron. *Id.*

The Workers' Compensation Act, including the Provision, is in place to promote industry in Utah. *See id.* ¶ 51 (citing *Collier v. Wagner Castings Co.*, 408 N.E.2d 198, 203 (1980)). However, as noted by Justice Parrish in her opinion, "the legislature could not be presumed to have intended to permit an intentional tortfeasor to shift his liability to a fund paid for with premiums collected from innocent employers." *Id.* ¶ 51. The unintended negative impact of the Provision has been put in check by the *Helf* decision, but only to the extent that: (1) plaintiff and Workers' Compensation practitioners effectively pursue *Helf* claims to keep the workforce safe and to remind employers of their responsibilities to employees; (2) the defense bar passes the word along to clients of the new standard; and (3) in-house counsel is ever vigilant of employer's safety practices. It's no longer an option for employers to run amok, disregarding the health and safety of employees, only to hide behind the Provision – and rightfully so.

HELF V. CHEVRON: AN EXCEPTION TO THE PROVISION

The *Helf* opinion legitimized an important exception to the exclusive remedy provision: the "intentional injury" exception (Exception). Although an exception for an employer's intentional torts existed before *Helf*, the Exception *Helf* recognized reaches – despite its name – beyond an employer's or a co-employee's intentional torts. The Exception reaches acts that indicate that the employer "know[s] or expect[s] that a specific employee will be injured doing a specific task." *Id.* ¶ 43. Before arriving at its holding, the *Helf* court discussed the development of the intentional injury exception in Utah cases. *See id.* ¶¶ 21-24.

Bryan v. Utah International, 533 P.2d 892 (Utah 1975), allowed suit for the intentional tort of an employee's supervisor, in spite of the Provision. *See id.* at 894; *see also Helf*, 2009 UT 11, ¶ 21.

In *Mounteer v. Utah Power & Light*, 823 P.2d 1055 (Utah 1991), the court upheld the dismissal of an employee's claim for damages due to the lack of evidence that the employer "directed or intended" Mounteer's co-employee's injurious act. *See id.* at 1058; *see also Helf v. Chevron*, 2009 UT 11, ¶ 22, 203 P.3d 962.

Lantz v. National Semiconductor Corp., 775 P.2d 937 (Utah Ct. App. 1989), provided a similar set of facts to the *Helf* facts, though there were no allegations that the chemical spill was "expected or intentional." *Id.* at 938. The *Lantz* plaintiff only alleged that injury was "substantially certain" to result. *See Helf*, 2009 UT 11, ¶ 23. Such allegations were insufficient to trigger the intentional injury exception, and the court of appeals deemed the facts subject to the exclusive remedy provision. *See Lantz*, 775 P.2d at 939-40 (quoting *Hildebrandt v. Whirlpool Corp.*, 364 N.W.2d 394, 396 (Minn. 1985)); *see also Helf*, 2009 UT 11, ¶ 23.

Helf expands on the above string of cases addressing the Provision. In addition to discussing *Bryan, Mounteer*, and *Lantz*, Justice Parrish's opinion touches upon a number of cases from sister jurisdictions, eventually arriving at the following holding:

> We therefore hold that the "intent to injure" standard requires a specific mental state in which the actor knew or expected that injury would be the consequence of his action. To demonstrate intent, a plaintiff may show that the actor desired the consequences of his actions, or that the actor believed the consequences were virtually certain to result. But a plaintiff may not demonstrate intent by showing merely that some injury was substantially certain to occur at some time. For a workplace injury to qualify as an intentional injury under the Act, the employer or supervisor must know or expect that the assigned task will injure the particular employee that undertakes it. In other words, the employer must know or expect that a specific employee will be injured doing a specific task.

Helf, 2009 UT 11, ¶ 43.

While the holding stops short of providing a form for proper *Helf* pleadings, it goes a long way in that direction. In my time spent drafting *Helf* complaints and crafting successful arguments responding to motions to dismiss, I have always relied on the holding in *Helf*, steering clear of the temptation to throw in "knew or should have known." Instead, I always pled the facts in my clients' cases that satisfied the standard adopted in *Helf* – that the actor knew or expected that injury would be the consequence of his action. *See id*.

The *Helf* inquiry is not complete once an intentional injury is established and pled. Upon finding that the *Helf* intentional injury standard is satisfied, an additional consideration is whether there is *respondeat superior* liability for an employee's actions, insofar as the employee's actions caused the injury. The *Helf* court discussed the issue, finding *respondeat superior* liability for the acts of Ms. Helf's supervisors. *See id.* ¶¶ 47-49. As mentioned in the opinion, three elements must be fulfilled to subject a corporation to liability for the acts of its employee: (1) the employee's conduct must "be of the general kind the employee is employed to perform," (2) the conduct must "occur within the hours of the employee's work and the ordinary spatial boundaries of the employment," and (3) the conduct must "be motivated, at least in part, by the purpose of serving the employer's interest." *Id*. ¶ 48 (citing *Clark v. Pangan*, 2000 UT 37, ¶ 8, 998 P.2d 268).

DIFFICULTIES OF *HELF* IN PRACTICE TODAY

Novelty

The first problem faced with *Helf* pleadings is the novelty of the decision and its conflict with longstanding thought patterns. The district court in *Helf* summarily dismissed Ms. Helf's case. *See id.* ¶ 13. Other courts in Utah may be tempted to do the same. Few published opinions have addressed *Helf* since the opinion was handed down. It is currently a creature of the district courts. Elucidation of the doctrine for personal injury, Workers' Compensation, and insurance practice depends on informed pleading, argument, and, when necessary, the appeal of *Helf* cases.

Helf Facts Can Easily be Overlooked

A *Helf* fact pattern brings to mind a Workers' Compensation fact pattern if not for careful consideration of the *Helf* holding and the facts as applied. In addressing a workplace injury case, all attorneys in the game have their own related and overlapping concerns. Plaintiff practitioners need to be aware of *Helf* and mindful of how they plead a *Helf* case; the defense bar needs to be creative in its response, looking beyond the exclusive remedy to find further defenses; Workers' Compensation practitioners need to be aware of the facts that may lend themselves to a *Helf* case; and in-house counsel needs to remind employers of the responsibility to employees and the ramifications of *Helf*.

Judgments – Who Pays Them

Commercial insurance companies are often disinclined to pay judgments for injuries incurred by employees while in the course and scope of their employment, often contracting out of responsibility for such injuries. Whether Utah courts would enforce insurance contract provisions that limit liability for *Helf* job site injuries remains unresolved. Oftentimes, commercial liability insurance contract language indicates something akin to "Any injury that is covered by Workers' Compensation is not covered by this policy."

For a plaintiff's attorney, the problem with *Helf* claims is the need for a "deep pocket." Should a plaintiff adequately prove a *Helf* case, winning a judgment, the battle is not yet over. Without a solvent corporation, there may be no recovery in light of customary commercial insurance clauses. For a defense practitioner, a viable *Helf* claim could bankrupt a corporation should the commercial insurance carrier hold fast to a policy exclusion for workplace injuries of employees.

CONCLUSION

Helf represents a change in tide for employee rights. The case serves to alleviate inequity that might otherwise result. It prevents employers from running roughshod over employee rights. It tempers statutory language that might allow employer transgressions without repercussion. Now it's up to practitioners to ensure that the *Helf* standard serves its purpose – bettering the lives of all that live and work in Utah.

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Used and Useful Principle: Still Relevant in Utah

by Vicki M. Baldwin & J. Robert Malko

Introduction

Within the framework of revenue requirement regulation, the principle of used and useful appears to have been somewhat forgotten in today's world of least cost planning and future test periods. However, the used and useful principle has a relatively long history in the regulation of electric utilities and there is little, if anything, to suggest that it has been legally overruled in Utah.

The concept that capital assets must be physically used and useful to current ratepayers before those ratepayers can be asked to pay the costs associated with them is a fundamental principle of utility regulation. This means that the assets must be commercially in-service, title of ownership has to have passed to the utility,[1] and the assets have to have become a productive source of value. This is what triggers capital recovery of the engineered, furnished, and installed cost of the asset. Failure to adhere to the principle of used and useful in the physical sense leads to a mismatch between the timing of capital cost recognition and the income effect that occurs when an asset is put into service. It also leads to a mismatch between the ratepayers who are paying for the service versus the ratepayers who are receiving the service.

While a future test year provides a sharing of risks for items such as fuel, purchased power, labor, benefits, administration, etc., which have a price and volume risk profile, construction has a completely different risk profile. With construction, the price risk is solved by the bidding process so that it is transferred to the contractor. That leaves the completion risk – whether the asset is operational on time, or completed at all. Under Utah law, it is the investor who is supposed to bear the risk of loss as a developer of a public utility.

Used and useful has always provided the "bright-line" demarcation for the risk of completion of construction. Nevertheless, that does not mean the utility is without recovery during that time. The utility is collecting its allowance of funds used during construction ("AFUDC"). In Utah, it also has the option of filing for recovery of major plant additions.

The Principle of Used and Useful Is the Bedrock of Utility Regulation.

In determining whether the state of Illinois had taken the property of grain warehousemen by legislating a maximum rate for grain storage, the United States Supreme Court in *Munn v. Illinois*, 94 U.S. 113 (1876), set forth the historic theory underlying public regulation of private property:

> [W]hen private property is affected with a public interest, it ceases to be juris privati only.... Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Id. at 126 (citation and internal quotation marks omitted).

Several years later, in *Smyth v. Ames*, 169 U.S. 466 (1898), the Court formulated for the first time a coherent test of the extent to which regulated companies were protected from legislative expropriation on behalf of the public. *See id*. at 546-47. In doing so, the Court, in weighing the considerations of equity between the interests of the providers and the consumers of a

VICKI M. BALDWIN is a shareholder at the law firm Parsons Behle & Latimer and located in that firm's Salt Lake City, Utah office. She is licensed to practice in Utah and Nevada. A substantial portion of her practice is devoted to utility regulatory issues. Ms. Baldwin also serves on the Board of Trustees for the S. J. Quinney School of Law at the University of Utah.

J. ROBERT MALKO is a Professor of Corporate Finance at the Jon M. Huntsman School of Business at Utah State University. He previously served as Chief Economist at the Public Service Commission of Wisconsin and as a Program Manager at the Electric Power Research Institute. Dr. Malko has served as President of the Society of Utility and Regulatory Financial Analysts.

service, tied together what is or is not physically used and useful to the public service being provided. *See id*.

> We hold, however, that the *basis of all calculations* as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair *value of the property being used by it for the convenience of the public*.... What the company is entitled to ask is a fair return upon the value of *that which it employs for the public convenience*. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.

Id. (emphases added); *see also W. Ohio Gas Co. v. Pub. Utils. Comm'n*, 294 U.S. 63, 66 (1935) (basing decision in part on the "final order of valuation, made in January, 1932, whereby the value of property in Lima, [Ohio,] *used and useful for the business*, was fixed" (emphasis added)); *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692 (1923) ("A public utility is entitled to such rates as will permit it to earn a return on the value of the property *which it employs for the convenience of the public*." (emphasis added)).

The *Smyth* Court set forth the idea that the only property eligible to earn a rate of return is the property used to serve the public. *See Smyth*, 169 U.S. at 546-47. The public can demand physical use of such property so the regulated entity is entitled to earn a rate of return on that property. *See id*.

Thereafter, the principle of used and useful became widely used not only to identify those assets that were "taken for public use" and for which private companies were entitled to a fair return from the public, but also to serve the role of placing definite limitations on the cost responsibilities of the persons receiving utility services.[2] Justice Cardozo explained this approach in *Columbus Gas & Fuel Co. v. Public Utilities Commission*:

> There will be no need in the computation of the rate base to include the market or the book value of fields not presently in use, unless the time for using them is so near that they may be said, at least by analogy, to have the quality of working capital. The arrival of that time cannot be known in advance through the application of a formula, but within the margin of a fair discretion must be determined for every producer by the triers of the facts in the light of all the circumstances. The burden is on the gas company to supply whatever testimony may be necessary to enable court or board to make the requisite division. Leases bought with income, the proceeds of the sale of gas, and thus paid for in last analysis through the contributions of consumers, *ought not in fairness to be capitalized until present or imminent need for use as sources of supply shall have brought them into the base upon which profits must be earned. To capitalize them sooner is to build the rate structure of the business upon assets held in idleness to abide the uses of the future*.

292 U.S. 398, 406-07 (1934) (emphasis added).

Another good example is *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938). In this case, the Denver Union Stock Yard Company challenged the rates set for its services by the Secretary of Agriculture as being confiscatory. *See id*. at 473-74, The Court affirmed after reviewing the evidence, which demonstrated that the Secretary had only excluded property not physically used and useful for performance of stockyard services covered by the rates. *See id.* at 475.

The Court's decision in *Federal Power Commission v. Hope Natural Gas Co*., 320 U.S. 591 (1944), shifted rate base formulation from fair value to prudent investment, but the physical used and useful test prevailed. *See id*. at 603-06. For example, in *Tennessee Gas Pipeline Co. v. FERC*, 606 F.2d 1094 (D.C. Cir. 1979), the Court of Appeals for the District of Columbia held,

In *Smyth v. Ames*, the Supreme Court articulated the guiding

principle that

> "the basis of all calculations as to the reasonableness of rates to be charged by a (public utility) must be the fair value of the property being used by it for the convenience of the public." *Although methods for determining values of rate base items have evolved since Smyth v. Ames, the precept endures that an item may be included in a rate base only when it is 'used and useful' in providing service. In other words, current rate payers should bear only legitimate costs of providing service to them.* The FPC [forerunner to FERC] early adopted the "used and useful" standard and has not departed from it without careful consideration of the wisdom of requiring current rate payers to bear costs of providing future service.

Smyth v. Ames, 169 U.S. 466, 546 (1898) (emphasis added) (citations omitted); *see also Natural Gas Pipeline Co. of Am. v. FERC*, 765 F.2d 1155, 1157 (D.C. Cir. 1985) ("In calculating the utility's cost of service the Commission includes its operating expenses, depreciation expenses, taxes, and a reasonable return on the net valuation of the property devoted to the public service.... The Commission decides what property is devoted to the public service by asking whether the property is 'used and useful' in serving the public." (citation omitted)); *In re S. Nat'l Gas Co.*, 130 FERC P 61,193 at ¶ 30, 2010 (noting that in establishing rates, FERC has traditionally included only costs relating to utility plant that is physically used and useful in providing utility service).

Later, some type of cost recovery was allowed in certain narrow cases and for many nuclear power plants that were planned in the 1960s and 1970s, but that were either cancelled or abandoned while only partially built. The regulatory and legal decisions regarding these assets established the economic used and useful concept. *See* Jonathan A. Lesser, *The Used and Useful Test: Implications for a Restructured Electric Industry*, 23 Energy L.J. 349 (2002). That concept is not discussed here. The subject of this article pertains only to the physical used and useful principle for regulatory cost recovery, which still prevails in Utah.

The Principle of Used and Useful Has Long Been a Core Precept of Utah Law.

As the Utah Supreme Court has held,

> [U]nder the general concepts of public utility law, *risk capital is provided by the investor; it is this group which bears the risk of loss as developer of a public utility*. It is only to the extent the facilities developed are used and useful to the consumer that they are included in the rate base.

Comm. of Consumer Servs. v. Pub. Serv. Comm'n, 595 P.2d 871, 874 (Utah 1979) (*Wexpro Case*) (emphasis added). In the *Wexpro Case*, the Utah Supreme Court noted that the commission had modified the traditional principles of utility law in this particular case based on the broad statutory definition of gas plant, which allowed undeveloped acreage to be deemed an asset used and useful to the rate payers in the production of gas. *See id*. at 875. The used and useful principle was still followed, but the broad statutory definition of gas plant expanded the asset to which it could be applied. *See id*. Therefore, "a utility is usually precluded from including in the rate base any capital asset, until it is developed, and then only to the extent the asset is used and useful in rendering the consumer service." *Id.; see also Utah Dep't of Bus. Reg. v. Pub. Serv. Comm'n*, 614 P.2d 1242, 1248 (Utah 1980) ("A just and reasonable rate is one that is sufficient to permit the utility to recover its cost of service and a reasonable return on the value of *property devoted to public use*." (emphasis added)). The Wexpro court relied on long established Utah law for its decision.

In 1944, the Utah Supreme Court affirmed the ruling of the Utah Public Service Commission ("Commission") directing a reduction in rates charged by the electric utility because the "just and proper rate base for the [utility] is the amount actually and 'prudently invested' in the property used and useful in rendering Utah service." *Utah Power & Light Co. v. Pub. Serv. Comm'n*, 152 P.2d 542, 546 (Utah 1944). In that case, the Utah Supreme Court took considerable effort to explain the long development of the physical used and useful principle. *See id.* at 551. In doing so, the court noted,

> The *Denver Stock Yard* case is of interest because of the fact that it was decided during a period when it appeared that important limitations were being placed on the "fair value" doctrine of *Smyth v. Ames*, yet it emphatically laid down the rule that as of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates not per se excessive and extortionate, sufficient to yield a reasonable rate of return *upon the value of property used, at the time it is being used, to render the services*.

Id. (emphasis added) (internal quotation marks omitted). In a separate part of the case, wherein the court discussed the calculation of net income, it stated, "[T]he public should not in any event be forced to pay rates based on the amount paid in by

stockholders *unless the amount paid is represented in properties used and useful in serving the public*." *Id*. at 570 (emphasis added).

While it is true that in this case the Utah Supreme Court was evaluating the use of fair value of regulatory assets in setting rates, it did so in the context of implementing the used and useful principle and explaining the continuing importance of that principle to rate making. For instance, the court noted that despite the United States Supreme Court's decision in *Federal Power Commission v. Hope Natural Gas Co*., 320 U.S. 591 (1944), to abandon the fair value rule, the utility had insisted the Commission was required to fix utility rates on a fair value basis. *See Utah Power & Light*, 152 P.2d at 546. The court then noted that the Commission had instead adopted a directly contrary position based on used and useful assets. *See id*. The Commission had "held that the just and proper rate base for the Company [wa]s the amount actually and 'prudently invested' in *the property used and useful in rendering Utah service*." *Id*. (emphasis added).

The court further noted that when the United States Supreme Court developed the "fair value" rule as the test of reasonableness of rates in *Smyth v. Ames*, it specifically "announced the rule that the owner of private property devoted to a public use is entitled to a 'fair return' on the 'fair value' of his *property devoted to public use*." *Id*. at 548 (emphasis added). Note, the court did not state that the return was provided on property *to be* devoted to public use in the future, but to property devoted to public use.

The Utah Supreme Court also noted that the *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470 (1938), case "is worthy of note in the development of the law in this regard." *Id*. at 550. In fact, the Utah court specifically mentioned this case:

> [B]ecause of the fact that it was decided during a period when it appeared that important limitations were being placed on the "fair value" doctrine of *Smyth v. Ames*, yet it emphatically laid down the rule that "as of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates not per se excessive and extortionate, sufficient to yield a reasonable rate of return *upon the value of property used, at the time it is being used, to render the services.*"

Id. at 551 (emphasis added) (citations omitted). The used and useful principle was critical to the Utah Supreme Court's holding to affirm the Commission's decision to abandon the fair value analysis and rule that the "just and proper rate base for the Company [wa]s the amount actually and 'prudently invested' in *the property used and useful in rendering Utah service*." *Id*. at 546, 558 (emphasis added). In *Terra Utilities, Inc. v. Public Service Commission*, 575 P.2d 1029 (Utah 1978), the Utah Supreme Court affirmed the Commission's decision to reject a proposed rate increase for water and sewer services in a development project. *See id*. at 1033. The *Terra* court upheld the Commission's decision that because at the time only 20.76% of the water system was physically used and useful and only 19.83% of the sewer system was physically used and useful, the proposed rates that intended to include 100% of the costs of each were not just and reasonable. *See id*. at 1031-32.

The Commission has consistently relied on the physical "used and useful" principle.

> [R]atepayers should not bear the overall authorized return until such time as an asset becomes a productive source of service revenue or expense savings. At that time, full cost recovery occurs as the entire investment is included in rate base and then depreciated.... *We continue to uphold the efficacy of the used and useful ratemaking principle because it demarcates an asset's in-service and productive status which in turn triggers capital recovery of the engineered, furnished and installed cost of the asset, including capitalized interest*.

In re U.S. W. Commc'ns, Inc., Docket No. 97-049-08 (Utah P.S.C. Dec. 4, 1997) (emphasis added); *see also In re SCSC, Inc*., Docket No. 94-2196-01, 1994 WL 570658 (Utah P.S.C. Sept. 15, 1994) (ordering that "it must be absolutely clear that the rate-payer is not being asked to cover the cost of a system which is larger than needed (and thus not used and useful)").

Summary

The used and useful test is clearly not unusable and useless in the world of traditional regulation. It is still viable and valuable in Utah and is one of the regulatory oversight tools that should be used to protect ratepayers.

1. Often title of ownership does not pass to the utility until the asset becomes commercially in-service. If the utility begins recovering costs before the facilities become used and useful, ratepayers are paying the electric utility for assets it actually does not even yet own.
2. The used and useful principle is thus a balancing between the public service provider and the public. The public has certain rights to what is otherwise private property and the public must pay for those rights, but only to the extent that the public may actually physically enjoy those rights.

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the December 2, 2011 Commission Meeting held at the Law & Justice Center in Salt Lake City.

1. The Bar Commission approved final Utah State Bar Statement on Diversity and Inclusion.

2. The Bar Commission adopted a resolution supporting the building of a new S.J. Quinney College of Law building.

3. The Bar Commission approved the current claims submitted by the Client Security Fund Committee.

4. The Bar Commission approved Maybell Romero, Miles Jensen, Brad Bearnson, and Nathan Hult as nominees for the 1st District Nominating Commission. Two lawyers are appointed by the Governor from a list of four nominees provided by the Bar.

5. The Bar Commission approved Mara Brown, Catherine Hoskins, Patrick Tan, Kristopher Kaufman, Brent Manning, and James Hasenyager for the 2nd District Nominating Commission. Two lawyers are appointed by the Governor from a list of six nominees provided by the Bar.

6. The Bar Commission approved Carl Boyd, Ross Blackham, Charlotte Mecham, and David VanDyke for the 6th District Nominating Commission. Two lawyers are appointed by the Governor from a list of four nominees provided by the Bar.

7. The Bar Commission approved the amended audit for fiscal year ending June 30, 2011.

8. The Bar Commission approved the Minutes of October 28, 2011 Commission Meeting.

9. The Bar Commission noted two upcoming events with the Utah Legislature to calendar; the Lawyer / Legislator Breakfast on January 27, 2012, and the Utah Bar Day at the Capitol on February 16, 2012.

10. Bar Commissioners continue their work on the Lawyer Advertising Committee, the Lawyer Referral Service Review Committee, the Pro Bono Commission, the Modest Means Committee, and the High School Education Committee.

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

Utah State Bar Statement on Diversity and Inclusion

December 2, 2011

The Bar values engaging all persons fully, including persons of different ages, disabilities, economic status, ethnicities, genders, geographic regions, national origins, sexual orientations, practice settings and areas, and races and religions. Inclusion is critical to the success of the Bar, the legal profession and the judicial system.

The Bar shall strive to:

1. Increase members' awareness of implicit and explicit biases and their impact on people, the workplace, and the profession;
2. Make Bar services and activities open, available, and accessible to all members;
3. Support the efforts of all members in reaching their highest professional potential;
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Fall Forum Award Recipients

Congratulations to the following members of the legal community who were honored with awards at the 2011 Fall Forum:

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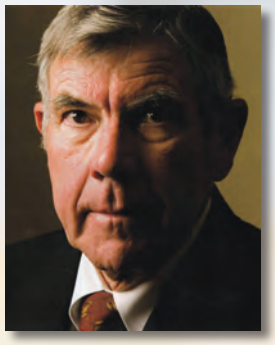
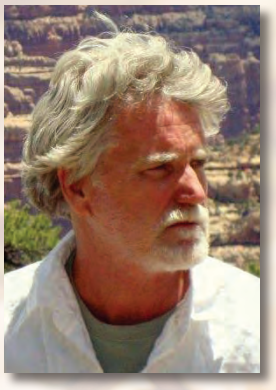
Professionalism Award



Robert D. Myrick
Community Member of the Year Award

Steven H. Stewart
Pro Bono Service Award



Francis J. Carney
Lifetime Service Award

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Lifetime Service Award

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V. Lowry Snow
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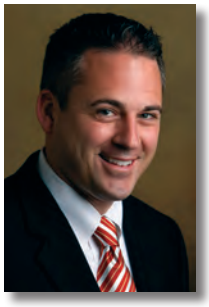
Francis M. Wikstrom
Lifetime Service Award

2011 Utah Bar Journal *Cover of the Year*

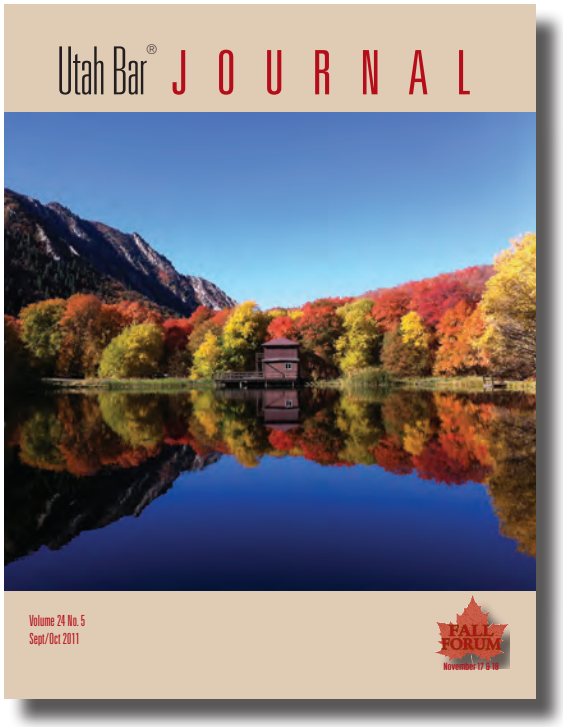
The winner of the *Utah Bar Journal* Cover of the Year award for 2011 is first-time contributor, Craig R. Kleinman, City Prosecutor for Midvale, Utah. His photo, "Fall Scene at Camp Tracy in Mill Creek Canyon" appeared on the cover of the Sep/Oct issue.



Craig R. Kleinman

Congratulations to Craig, and thanks to all eighty-eight contributors over the past twenty-three years who have provided photographs for the covers. Four out of six of the cover photos in 2011 were submitted by first-time contributors.

Members of the Utah State Bar or Paralegal Division of the Bar who would like to have a photograph considered for the cover of a future issue of the *Bar Journal* should see "Cover Art" on page 4 of this issue for submission guidelines.



2012 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2012 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession. Award applications must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, February 6, 2012. You may also fax a nomination to (801) 531-0660 or email to adminasst@utahbar.org.

1. **Dorathy Merrill Brothers Award –** For the Advancement of Women in the Legal Profession.

2. **Raymond S. Uno Award –** For the Advancement of Minorities in the Legal Profession.

2012 Utah State Lawyer Legislative Directory

Patrice Arent (D) – District 36 (Elected to House: 1996, Elected to Senate: 2002, Re-Elected to House 2010)

Education: B.S., University of Utah; J.D., Cornell University

Committee Assignments: Appropriations – Higher Education. Interim – Education; Judiciary, Law Enforcement & Criminal Justice. Standing – House Education, House Law Enforcement & Criminal Justice; Legislative Information Technology Steering.

Practice Areas: Adjunct Professor, S.J. Quinney College of Law – University of Utah; Past experience: Former Division Chief – Utah Attorney General's Office, Former Associate General Counsel to the Utah Legislature, and private practice

F. LaVar Christensen (R) – District 48 (Elected to House: 2002, Re-elected 2010)

Education: B.A., Brigham Young University; J.D., University of the Pacific, McGeorge School of Law

Committee Assignments: Appropriations – Public Education. Interim – Education; Judiciary, Law Enforcement & Criminal Justice. Standing – House Education; House Judiciary; Water Issues Task Force.

Practice Areas: Mediator and Dispute Resolution, Real Estate Development and Construction, Civil Litigation, Family Law, General Business, and Contracts.

Derek Brown (R) – District 49 (Elected to House: 2010)

Education: B.A., Brigham Young University; J.D., Pepperdine Law School

Committee Assignments: Appropriations – Infrastructure & General Government Subcommittee. Interim – Business & Labor; Judiciary, Law Enforcement & Criminal Justice. Standing – House Business & Labor, House Judiciary.

Practice Areas: General Business, Education, Technology, and Intellectual Property.

Kenneth R. Ivory (R) – District 47 (Elected to House: 2010)

Education: B.A., Brigham Young University; J.D., California Western School of Law

Committee Assignments: Appropriations – Public Education. Interim – Judiciary, Law Enforcement & Criminal Justice; Public Utilities & Technology. Standing – House Judiciary; House Public Utilities & Technology.

Practice Areas: Mediation, General Business, Commercial Litigation, and Estate Planning

Brian King (D) – District 28 (Elected to House: 2008) **MINORITY ASSISTANT WHIP**

Education: B.S., University of Utah; J.D., University of Utah College of Law

Committee Assignments: Appropriations – Business, Economic Development & Labor Subcommittee; Executive. Interim – Government Operations & Political Subdivisions; Judiciary, Law Enforcement & Criminal Justice. Standing – House Ethics; House Judiciary; House Management; House Revenue & Taxation; Legislative Management; Redistricting; Utah Constitutional Revision Commission.

Practice Areas: Representing claimants with life, health, and disability claims; class actions.

Kay L. McIff (R) – District 70 (Elected to House: 2006)

Education: B.S., Utah State University; J.D., University of Utah College of Law

Committee Assignments: Appropriations – Higher Education. Interim – Education; Judiciary, Law Enforcement & Criminal Justice. Standing – Higher Education; House Judiciary; Native American Legislative Liaison; Water Issues Task Force.

Practice Areas: Former presiding judge for the Sixth District Court, 1994–2005. Before his appointment, he had a successful law practice for many years, most recently as a partner in the McIff Firm.

Kraig J. Powell (R) – District 54 (Elected to House: 2008)

Education: B.A., Willamette University; M.A., University of Virginia; J.D., University of Virginia School of Law; Ph.D., University of Virginia Woodrow Wilson School of Government

Committee Assignments: Appropriations – Social Services. Interim – Government Operations & Political Subdivisions; Transportation. Standing – House Education; House Government Operations.

Practice Areas: Powell Potter & Poulsen, PLLC; Municipal and Governmental Entity Representation; and Zoning and Land Use

Lyle W. Hillyard (R) – District 25 (Elected to House: 1980; Elected to Senate: 1984)

Education: B.S., Utah State University; J.D., University of Utah College of Law

Committee Assignments: Appropriations – Executive (Chair), Infrastructure & General Government Subcommittee, Public Education Subcommittee. Standing – Education; Judiciary, Law Enforcement & Criminal Justice. Interim – Education; Judiciary, Law Enforcement & Criminal Justice; Legislative Process (Co-Chair): Senate Judicial Confirmation; Senate Judiciary, Law Enforcement & Criminal Justice Confirmation; Utah Commission on Uniform State Laws; Utah Tax Review.

Practice Areas: Family Law, Personal Injury, and Criminal Defense

Mark B. Madsen (R) – District 13 (Elected to Senate: 2004)

Education: B.A., George Mason University, Fairfax, VA; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Appropriations – Infrastructure & General Government, Public Education. Standing – Senate Health & Human Services; Senate Judiciary, Law Enforcement & Criminal Justice (Chair); Senate Rules. Interim – Health & Human Services; Judiciary, Law Enforcement & Criminal Justice (Chair); Administrative Rules Review; Judicial Rules Review (Chair); Senate Education Confirmation; Senate Judicial Confirmation; Senate Judiciary, Law Enforcement & Criminal Justice Confirmation; Utah International Relations & Trade Commission (Co-Chair).

Practice Area: Eagle Mountain Properties of Utah, LLC

Benjamin M. McAdams (D) – District 2 (Appointed to Senate: 2009)

Education: B.A., University of Utah; J.D., Columbia Law School

Committee Assignments: Appropriations – Executive, Executive Offices & Criminal Justice. Standing – Senate Ethics; Senate Judiciary, Law Enforcement & Criminal Justice; Senate Revenue & Taxation. Interim – Public Utilities & Technology; Revenue & Taxation; Administrative Rules Review; Legislative Management; Redistricting; Senate Judicial Confirmation; Senate Judiciary, Law Enforcement & Criminal Justice Confirmation; Senate Revenue & Taxation Confirmation; Utah Constitutional Revision Commission; Utah Tax Review Commission; Water Issues Task Force; Utah Waterways Task Force.

Practice Area: Salt Lake City Corporation

Ross I. Romero (D) – District 7 (Elected to Senate: 2004) **MINORITY LEADER**

Education: B.S., University of Utah; J.D., University of Michigan Law School

Committee Assignments: Appropriations – Executive, Higher Education. Standing – Judiciary, Law Enforcement & Criminal Justice, Revenue & Taxation. Interim – Government Operations & Political Subdivisions; Judiciary, Law Enforcement & Criminal Justice; Legislative Audit Subcommittee; Legislative Management; Legislative Records; Rural Development Legislative Liaison; Senate Business & Labor Confirmation; Subcommittee on Oversight.

Practice Areas: Civil Litigation, Labor & Employment, Intellectual Property/Information Technology, and Government Relations & Insurance Tort

Stephen H. Urquhart (R) – District 29 (Elected to House: 2000; Elected to Senate: 2008)

Education: B.S., Williams College; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Appropriations – Business, Economic Development & Labor Appropriations Subcommittee; Higher Education Appropriations Subcommittee (Chair). Standing – Senate Business & Labor Committee; Senate Judiciary, Law Enforcement & Criminal Justice. Interim – Judiciary, Law Enforcement & Criminal Justice; Public Utilities & Technology; Senate Education Confirmation.

John L. Valentine (R) – District 14 (Elected to House: 1988; Appointed to Senate: 1998; Elected to Senate: 2000)

Education: B.S., Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Appropriations – Executive Offices & Criminal Justice, Higher Education Subcommittee. Standing – Senate Business & Labor (Chair), Senate Ethics, Senate Revenue & Taxation Committee. Interim – Business & Labor (Chair), Revenue & Taxation, Judicial Rules Review, Senate Business & Labor Confirmation (Chair), Utah Constitutional Revision Commission.

Practice Areas: Corporate, Estate Planning, and Tax

Congratulations to New Admittees

Congratulations to the new lawyers sworn in at the joint admissions ceremony to the Utah Supreme Court and the U.S. District Court of Utah held on October 31, 2011.

Jose A. Abarca
Graeme L. Abraham
Jeffrey M. Adams
Jared M. Aizad
Joseph Z. Alisa
Scott S. Allen
Parker A. Allred
Joseph A. Andelin
Mckenzie Armstrong
Edwin R. Ashton
Ian A. Atzet
Glenn S. Bacal
Cristie Dawn C. Bake
Mason F. Baker
Spencer R. Banks
Travis R. Banta
Stephen M. Barnes
Bryan R. Baron
Paul T. Basmajian
Nathan P. Bastar
Lance E. Bastian
Allison G. Belnap
Timothy K. Bennett
John R. Berger
Steven H. Bergman
Joshua P. Berrett
Justin G. Berube
Ruth M.O. Bigler
Jodi Borgeson
Brandon S. Boulter
Kim M. Bowman
Kristal M. Bowman-Carter
Justin B. Bradshaw
Cory L. Broadbent
Leah M. Bryner
Cade B. Buck
Deborah L. Bulkeley
James S. Bullough
Brett T. Bunkall
Chad R. Burgin
Erin K. Burke
Elizabeth M. Butler
Nathan A. Buttars
Erin E. Byington
Ryan C. Cadwallader
Jonathan W. Call
Ariel C. Calmes
Angela Carlisle
Jamie Carpenter
Nathan J. Carroll
Lena Cetvei
Adam C. Channer
Eric W. Chesley
Jared C. Clark
Vanessa P. Clayton
Jared R. Coburn
Nicole A. Colby
Joshua T. Collins
Jonathan L. Cook
John C. Cooper
Clayton J. Cox
Ross N. Crandall
Matthew B. Crane
Christopher K. Crockett
Monte O. Crockett
Jordan S. Cullimore
Andrew T. Curtis
Daniel C. Dansie
Andrew D. Day
Amy N. Dearden
Mary E. Decker
Blakely J. Denny
Robert T. Denny
Michele L. Devlin
Jonathan R. Dotson
Jason J. Driggs
James C. Dunkelberger
Kyle D. Duren
Benjamin R. Dyer
Jacquelyn P. Eckert
David S. Einfeldt
Angela H. Elmore
K. Keith Facer
Andrew R. Fackrell
Leah M. Farrell
Thomas W. Farrell
Joshua Fawson
Amra Ferhatbegovic
Seth C. Finlinson
Justin K. Flanagan
Crystal L. Flynn
Alexandra H. Foster
S. Michael Gadd
Kerry K. Galusha
Nathan R. Garcia
Nathan T. George
Lance D. Gibson
Graham J. Gilbert
Brooke C. Goosman
Jeffrey J. Gorringe
Kevin O. Grange
Clifford D. Gravett
Joshua M. Green
Ashley M. Gregson
Allison K. Griffiths
Jess H. Griffiths
Tracy S. Gruber
Daniel R. Gubler
Robert A. Gurr
Aaron S. Gwilliam
William M. Hains
Andrew R. Hale
William M. Hall
Christopher K. Hallstrom
Jeffrey R. Handy
Brian L. Hansen
Elicia M. Hansen
Gregory B. Hansen
Thomas C. Hardy
Brittani S. Harris
Matt W. Harrison
Jacob F. Hart
Michael S. Haslam
Nathan P. Hatch
Jonathan W. Heaton
Erik S. Helgesen
Kurt M. Helgesen
Brian M. Higley
Brandon M. Hill
Joshua G. Hillyard
Joseph B. Hinckley
Rebecca J. Holt
Andrew R. Hopkins
David R. Hopkinson
Jennifer S. Horne
Mariah L. Hornok
Christopher W. Hughes
Brooke R. Hullinger
Landon T. Ipson
Bret R. James
Camille J. Jarvis
Mark O. Jarvis
Christopher T. Jennings
Micah B. Jeppsen
Amanda E. Jex
Gretchen H. Johns
Brooke Johnson
Freyja R. Johnson
Tsutomu L. Johnson
Vanner L. Johnson
Marc C. Jones
Marlesse D. Jones
Lucy R. Juarez
Arminda I. Jurgenson
Kyle J. Kaiser
Christian S. Kelsey
Beth E. Kennedy
Jacob P. Kent
Christian A. Kesselring
Justin J. Keys
Jennifer M. Knowles
Elizabeth A. Knudson
Courtney C. Koehler
Jay B. Kronmiller
Jennifer J. Ku
Timothy J. Kuhn
Trevor V. Kuresa
Christopher A. Lacombe
Kurt W. Laird
Tyler S. LaMarr
Nathan V. Langston
W Thor Larson
Steven M. Lau
Alema T. Leota
Nathan E. Lloyd
David W. Lott
Zachary P. Lowe
Nadia D. Mahallati
Emily A. Makin
Jeffrey D. Mann
Ross E. Martin
Joseph L. May
Eli W. McCann
Martin J. McCue
Lauren A. McGee
Alicia M. Memmott
Tara L. Merrill
Matthew D. Messina
Braden J. Montierth
Christopher A. Morales
Bryson B. Morgan
Dena L. Morgan
Clint R. Morin
Dallin T. Morrow
Matthew D. Mower
Felicity Murphy
Michele M. Myer
William H. Nebeker
Ammon G. Nelson
Jessica M. Nelson
John T. Nelson
Sarah R. Nelson
Jessyca M. Newman
Brett T. Nichols
Seth A. Nielsen
Sara M. Nielson
Christine C. Olcott
Eric W. Olsen
Mitchell J. Olsen
Sarah H. Orme
Joseph V. Osmond
Aaron M. Pacini
Spencer W. Park
Dustin M. Parmley
Benjamin D. Patterson
Valerie Paul
Emily L. Paulos
Dennis W. Pawelek
Anne T. Pearman
Ashley A. Peck
Richard J. Pehrson
Carsten A. Peterson
Gray E. Petty
Christine R. Poleshuk
James A. Potter
Justin S. Pratt
Nathan L. Prete
Brian R. Price
Stephen E. Pulley
Jordan M. Putnam
Beth J. Ranschau
Chad C. Rasmussen
Jon A. Reed
Anne B. Richman
Sean M. Ricks
Daniel G. Riggs
Daniel R. Roberts
D. R. Robison
Eryn B. Rogers
Steven M. Rogers
Mark C. Rose
Dallas J. Rosevear
Brandon H. Rufener
Jeffrey M. Sanchez
Bradley J. Sanders
Tiffany D. Sato
Lisa M. Semanoff
Lashel Shaw
Douglas C. Shumway
Denise L. Siegenthaler
Elizabeth L. Silvestrini
Emily R. Simpson
Shane W. Simpson
Robert T. Spjute
Robert N. Stander
Ryan J. Stanger
Greg A. Stebbing
Michael S. Steck
Jacob A. Stewart
Owen N. Stewart
Andrew C. Stoddard
Katy R. Strand
Peter J. Strand
Tanner A. Strickland Lenart
Jeremy S. Stuart
James M. Swan
Marcie R. Swenson
Brian K. Tanner
Laura H. Tanner
Jeremiah R. Taylor
Mark B. Thornton
David R. Todd
Stephen G. Tryon
Robert E. Udall
Melissa A. Ure
Colby B. Vogt
Kreg E. Wagner
Scott V. Walsh
Jennifer P. Wayas
Rachel L. Wertheimer
Kingston W. White
Analise Q. Wilson
Brooke D. Winters
Emory C. Wogenstahl
Matthew H. Wood
Kaye Lynn Wootton
Kevin R. Worthy

House Counsel
Bradley S. Simpson

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

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

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

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

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

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

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

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

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

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

2012 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2012 Summer Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org, no later than Friday, May 18, 2012. The award categories include:

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

Utah State Bar Ethics Advisory Opinion Committee Opinion No. 11-02 – Issued November 8, 2011

ISSUE:
If an indigent litigation client asks his attorney for a financial gift, is the attorney permitted to provide that charitable gift or do the Utah Rules of Professional Conduct prohibit doing so?

OPINION:
Utah Rule 1.8(e) prohibits "financial assistance" in connection with litigation, which includes paying living expenses for a client. However, a lawyer representing an indigent client may pay court costs, expenses of litigation and "minor expenses reasonably connected to the litigation." The rule does not prohibit occasional small charitable gifts.

BACKGROUND:
The attorney represents, by appointment, a death row inmate in a state habeas corpus matter. The client has asked the attorney to contribute a regular sum each month to the client's prison account for his personal use (e.g. purchase of items from the commissary such as snacks, items of clothing, entertainment such as a television, radio or CD player.) The attorney suggests that many such clients suffer from mental illness and that CLE events have suggested making such charitable donations to elicit trust from difficult clients. Death row inmates have their basic needs provided for (food, clothing, necessary toiletries, paper) and are permitted to spend up to a certain amount each month in the commissary for items beyond this. They may earn some small amount of money doing prison work and may receive gifts.

ANALYSIS:
This situation is addressed by Rule 1.8(e) of the Utah Rules of Professional Conduct. It is useful to understand the common law history leading up to this rule, to consider cases and opinions from other jurisdictions, and lastly to be aware of the differences between Utah's version of this rule and the Model Rules of Professional Conduct and other states' rules.

Utah's Rule 1.8, like the Model Rule, is entitled "Conflict of Interest: Current Clients: Specific Rules." Utah Rule 1.8(e) reads in relevant part:

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

Hazard and Hodes' *The Law of Lawyering* explains that Rule 1.8 "presents a series of specific applications of the basic conflicts of interest principles…. [where] most…involve situations in which the lawyer's own interests threaten to adversely affect the representation…."[1] Regarding the specific prohibition of providing financial assistance to a client in connection with litigation addressed in Model Rule 1.8(e), Hazard et al. note that this rule derived from the common law prohibition of champerty and maintenance.[2]

> Champerty[3] consisted of 'investing' in the cause of action of another by buying a certain percentage of the hoped-for recovery.… Maintenance was a similar offense, where the form of investment was providing living or other expenses to a client so that the litigation could be carried on. The prohibition applied to lawyers and nonlawyers alike and was generally enforced via the criminal law. The main harm… was said to be 'stirring up litigation.' It was feared that plaintiffs would be encouraged to bring suits they would otherwise forgo, thus adding to the public cost of administering justice, imposing unjust burdens on defendants, and enriching lawyers.[4]

The ban against "maintenance" under the Code of Professional Responsibility (DR 5-103(B)) contained a compromise, permitting advancement of litigation expenses so long as they were loans that must be repaid.[5] This change was made, "lest indigent or even middle class plaintiffs forgo meritorious claims ….'"[6] When the Model Rules were first drafted, it was proposed that an attorney be permitted to advance living expenses as well.[7] However, the ABA House of Delegate rejected that proposal, but liberalized the rule to permit the litigation costs be advanced without guarantee of repayment.[8] Model Rule 1.8(e) currently provides:

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

The Comment to the Model Rules explains the current provision as follows:

> **Financial Assistance**
> [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Since the initial adoption of the Model Rules, Rule 1.8(e), a handful of proposals to liberalize this rule[9] have been made or adopted. Note that while the Model Rule permits only "expenses of litigation" be advanced, Utah Rule 1.8(e) further permits the lawyer of an indigent client to also pay "minor expenses reasonably connected to the litigation."[10] The Utah Comments, including but augmenting the Model Rule Comments, explain:

> [10]…Similarly, an exception allowing lawyers representing indigent clients to pay…minor sums reasonably connected to the litigation, such as the cost of maintaining nominal basic local telephone service or providing bus passes to enable the indigent client to have means of contact with the lawyer during litigation, regardless of whether these funds will be repaid, is warranted.
>
> [10a] Relative to the ABA Model Rule, Utah Rule 1.8(e)(2) broadens the scope of direct support that a lawyer may provide to indigent clients to cover minor expenses reasonably connected to the litigation. This would include, for example, financial assistance in providing transportation, communications or lodging that would be required or desirable to assist the indigent client in the course of the litigation.

Accordingly, when considering decisions or ethics opinions from other states, it is important to note any differences that exist between that state's rule and Utah's rule.

States that have adopted the Model Rule limitations, permitting only the payment of court costs, have found violations in these circumstances: *Matter of Minor Child K.A.H*, 967 P.2d 91 (Alaska, 1985) (in wrongful death action attorney advanced over $6000 in living expenses and sought reimbursement, which the court denied); *Attorney Grievance Commission of Maryland v. Pennington*, 733 A.2d 1029 (Maryland, 1997) (attorney loaned money to employment discrimination client and was reprimanded); *Cleveland Bar Association v. Nusbaum*, 753 N.E.2d 183 (Ohio, 2001) (attorney advanced $26,000 in living expenses to motorcycle accident victim for living expenses and was publically reprimanded); *State of Oklahoma Bar Association v. Smolen*, 17 P.3d 456 (Okla., 2000) (attorney loaned workers compensation client (s) money for living expenses and was suspended for 60 days given prior disciplinary proceedings). More serious discipline was meted out when advancing funds to clients was only one of multiple ethical violations in *In the Matter of Discipline of Mines*, 612 N.W.2d 619 (SD., 2000) and *In the Matter of Strait*, 540 S.E. 2d 460 (S.C. 2000). It is worth noting that all of these cases involved a client who sought to recover money damages and an attorney who expected to be reimbursed out of the funds ultimately received.

A handful of cases and ethics opinions based on the Model Rule version of the prohibition nevertheless permit charity to a client when there is no expectation of repayment and there is no promise of "financial assistance in order to establish and maintain employment." *Florida Bar v. Taylor*, 648 So.2d 1190, 1192 (Fla., 1995) (attorney persuaded partner to give a poor client $200 and gave used clothing to the client's child held to not violate the rule). *See also Louisiana State Bar Association v. Edwins*, 329 So. 437 (La., 1976) (attorney advanced over $2000 in medical and living expenses after having been retained, but court found no violation as these payments were "akin" to litigation expenses). The Maryland State Bar Committee on Ethics opined that "a gift of a small sum of money, without conditions of repayment" is not prohibited, Maryland Ethics Docket 00-42, but later clarified that it is a violation to provide housing or other financial assistance in connection with litigation, distinguishing the prior case as permitting a "de minimus gift." Maryland Ethics Docket 2001-10. Finally, most closely related to the facts of this inquiry, the Virginia Bar issued Legal Ethics Opinion 1830 which addressed whether a public defender was permitted to provide "nominal amounts of money" to incarcerated clients to "buy personal items or food beyond that regularly provided to inmates." Even though dealing with the Model Rule total prohibition, this Opinion approved providing "nominal funds… on an occasional basis to assist an indigent client for small and

assorted commissary purchases that have nothing to do with the litigation." This Opinion reasoned that such nominal gifts to defense clients were not "in connection with" that litigation.

The commentators, cases and opinions appear to be uniform in recognizing the purposes behind the current prophylactic prohibition. The original goal of not stirring up litigation is no longer a justification for this rule. The United State Supreme Court has made clear, in finding lawyer's advertising to be protected commercial speech, that there is no state interest in suppressing litigation in general as an individual has a right to seek judicial redress for wrongs he has suffered.[11] Indeed, many of the cases recognize that an injustice is done to an impoverished client who is forced to settle because he cannot support himself throughout the litigation.[12] However, some limits are justified in order to prevent a conflict of interest between attorney and client and to prevent a "bidding war"[13] between lawyers that could negatively affect the client's ability to retain the best counsel.

Most courts believe the conflict of interest is heightened when the lawyer become a creditor as well as counsel.[14] "If large sums of money are advanced to maintain the client's lifestyle, settlement may be frustrated."[15] On the other hand, the Mississippi Court, adopting a variation allowing for some limited payment of living expenses to impoverished clients, argued that it was inconsistent to assert "that a lawyer's interest in recovering moneys lent to a client for living and medical expenses would affect his judgment while the prospect of losing possibly vast sums advanced in the form of litigation expenses would not."[16] These conflict of interest concerns are most relevant in cases in which the lawyer stands to recover his fees through the case, and less germane when the lawyer is appointed or pro bono.

The second consideration is that "in choosing an attorney, a client's judgment should always be based on his confidence in the character and capability of the attorney" rather than on which attorney can best support the client.[17] "Clients should not be influenced to seek representation based on the ease with which monies can be obtained, in the form of advancements, from certain law firms or attorneys."[18] Hazard and Hodes opine that "a bright line drawn between expenses of litigation and living expenses is a sensible one. One concern voiced by the critics…was that lawyers might 'purchase' clients with lucrative cases…."[19]

With this background, it is now appropriate to turn to the Utah Rule, which is more permissive than the Model Rules or than any of the rules relied upon above. Utah's Rule 1.8(e) provides:

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

There are three questions that should be addressed: 1) are sums paid to a prisoner's personal account "financial assistance…in connection with…litigation," 2) and if so, are they "reasonably connected to the litigation," and if so, what is a "minor expense"?

There is an argument that a "gift" is not "financial assistance" which carried the day with the Florida court and the Virginia and Maryland Ethics committees. Indeed, law firms sending holiday fruit baskets or providing valuable tickets to sporting events for litigation clients have never been condemned in a disciplinary case or ethics opinion to our knowledge, perhaps because they are not seen as "financial assistance." Thus, gratuities appear to be permitted provided they do not create a conflict of interest or provide a significant economic incentive for a litigation client to retain one firm rather than another. Small contributions to an inmate's account might be permitted on this basis. Indeed, it would seem anomalous and ungenerous that a law firm might give small gifts to wealthy clients but not to impoverished clients who might actually be in need.

However, all courts and ethics committees except the Florida Court and Virginia and Maryland Ethics committees have concluded that ANY money paid to a litigation client is "financial assistance in connection with litigation." All courts and committees have concluded that paying "living expenses" is "in connection with litigation." This is the only sensible conclusion when a payment or gift would reasonably be expected to induce the client to continue with the case in order to obtain the gift rather than obtain a favorable outcome in litigation. In this case, while the attorney may well be under-paid by the state and there may be few attorneys bidding for death penalty habeas cases, nevertheless, where the attorney has any financial incentive, the Committee concludes that financial assistance to a client should be seen as "in connection with litigation." While there may be a case in which charity to a client has no effect on the client's selection of a lawyer – say a pro bono attorney pursuing a default divorce without expectation of payment providing Christmas presents for the client's impoverished and unsupported child – this is not such a case. Here the requester informs the Committee that he would make a gift in order to "elicit trust from a very difficult client." Thus, we will analyze this situation as if the gift was "financial assistance in connection with ligation."

The second question is whether payments to a prisoner's personal account are "minor expenses reasonably connected to the litigation." This requires both determining what a "minor expense" is and what expense is "connected to the litigation." With respect to the second point, it would seem anomalous to conclude that the same words "in connection with litigation" and "connected to the litigation" sweep broadly to cover any and all expenditure, but then must be read narrowly to permit "minor expenses." Accordingly, we conclude that the words mean the same thing in Rule 1.8(e) and 1.8(e)(2).

Having reached that conclusion, it follows that the Utah Rules permit "minor expenses" or "financial assistance…that would be required or desirable." Comment [10a]. Here the client is asking for regular monthly payments and in an amount equal to the maximum he is permitted to spend in the commissary. Conceding to this request would be akin to paying all his "living expenses" as it would eliminate any need for the client to engage in prison work, and thus would be forbidden. We also note that no opinion approved of an agreement in which the attorney is obligated to pay a regular fee to retain the client. Indeed, that would violate both the principle of having the client have free choice as to whether to litigate and the principle of avoiding conflicts of interest.

However, an occasional "minor" gift to the inmate would seem to be within both the letter and the spirit of Utah's rule. The Utah comments suggest payment for telephone service and for bus passes (which would be valuable beyond the case) is permitted. One would imagine payment for a meal during an attorney-client meeting would also be permitted. Payment to an inmate's personal account to permit the inmate to buy a snack or toiletry item seems similarly permissible. Accordingly, small and occasional charitable gifts by attorneys who are not seeking reimbursement and which would not influence the client to retain or remain with that attorney, should be permitted under Utah's Rule 1.8(e).

Two final points are worth noting. While the Rules of Professional Conduct do not define "indigent client," a Utah attorney would be well advised to consult the definition of "indigent" under Utah's criminal law (below 150% of poverty),[20] Utah's statute regarding waiving fees for "impecunious" clients[21] (undefined), the qualifications for charitable legal assistance at Utah Legal Services, Inc. (125% of poverty)[22] and the Legal Aid Society of Salt Lake County (200% of poverty)[23] based on the federal poverty law guidelines[24] in determining whether to pay "minor expenses reasonably connected to" litigation for a client.

Finally this rule prohibiting or limiting gifts to impoverished clients is only applicable in the litigation context. Thus, Rule 1.8(e) does not prohibit an attorney who is drafting a will for an impoverished senior from giving this client a gift. However, the concern regarding conflicts of interest under Rule 1.7 would remain. An attorney who undertakes to provide non-litigation clients with substantial gifts may create a conflict that would impair the attorney-client relationship. (For example the attorney may delay or postpone the legal work, fearing the client will ask for more gifts at their next meeting.)

1. Geoffrey Hazard & W. William Hodes, *The Law of Lawyering* §12.2 (3rd ed., 2011).
2. *Id*. at § 12.11.
3. Rule 1.8(i) of both the Utah and the Model Rules of Professional Conduct carries on the prohibition of investing in the client's case: "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except.… a lien authorized by law to secure the lawyer's fee or expenses; and…contract…for a reasonable contingent fee.…"
4. *Id*.
5. *Id*.
6. *Id*. at §12.12
7. *Id*.
8. *Id*.
9. The American Law Institute proposed permitting loans to clients, but ultimately dropped that idea. Hazard & Hodes, §12.12, note 1. The following states permit, in limited and strictly controlled circumstances, the advancement of living expenses: Alabama, California, Louisiana, Mississippi, Minnesota, Montana, North Dakota, Texas, *See Oklahoma Bar Ass'n v. Smolen*, 17 P.3d 456, 459 (2000).
10. This change to the Utah Rule was made when Utah adopted the Ethics 2000 amendments in November, 2005.
11. *Shapiro v. Kentucky Bar Assn*., 486 U.S. 466 (1988).
12. "If an impoverished person is unable to secure subsistence from some source during disability, he may be deprived of the only effective means by which he can wait out the necessary delays that result from litigation to enforce his cause of action. He may, for reasons of economic necessity and physical need, be forced to settle his claim for an inadequate amount." *Louisiana State Bar Ass'n v. Edwins*, 329 So.2d 437, 446 (1976)
13. *Mississippi Bar v. Attorney HH*, 671 So.2d 1293, 1296 Miss. 1995) withdrawn, substitute opinion, reh'g denied, 1998 Miss. LEXIS 75 (Miss. 1996).
14. *Oklahoma Bar Ass'n v. Smolen*, 17 P.3d at 462.
15. *In re: Application of G.M*., 797 So.2d 931, 935 (Miss., 2001).
16. *Attorney AAA v. Mississippi Bar*, 735 So.2d 294, 299 (Miss., 1999), citing *The Mississippi Bar v. Attorney HH*, 671 So.2d 1293 (Miss. 1995).
17. *In re: Application of G.M.*, 797 So.2d at 935.
18. *Attorney Griev. Comm. v. Kandel*, 341 Md. 113, 563 A.2d 387, 390 (1989). (public reprimand for advancing living expenses, including medical treatment).
19. Hazard & Hodes, *supra note* 1, at §12.12.
20. Utah Code Ann. § 77-32-202 (2010).
21. Utah Code Ann. § 78A-2-302 (2010). 'The Board of District Court Judges has decided that if you have completed a financial statement to qualify for representation by Utah Legal Services or The Legal Aid Society of Salt Lake, you may use that financial statement with your Motion and Affidavit to Waive Fees, rather than completing the court form." http://www.utcourts.gov/resources/forms/waiver/
22. http://www.utahlegalservices.org/public/do_i_qualify
23. http://www.legalaidsocietyofsaltlake.org/index.php?o=income-guidelines
24. https://www.cms.gov/MedicaidEligibility/downloads/POV10Combo.pdf\

Utah State Bar Ethics Advisory Opinion Committee Opinion No. 11-03 – Issued November 15, 2011

ISSUE:

Is it a violation of the Utah Rules of Professional Conduct for an attorney to ask a law student to undertake research using the law student's free account and in breach of the student's contract with Lexis and/or Westlaw?

OPINION:

A lawyer who encourages or participates in a law student's violation of the student's contractual obligation to the electronic research service violates the Rules of Professional Conduct.

BACKGROUND:

Certain electronic research services such as WESTLAW and LEXIS allow law students access to their services. That access is given to further the student's education. The student is required to sign an agreement that the services will be used only for educational or non-profit use.

For example, Westlaw limits the student's use to "Educational Purposes." That term means:

> If User is a career services personnel, Educational Purposes include Westlaw access and use solely for placement purposes. Any other use, including any use in connection with User's employment outside of the Law School and any Student internship or externship, is prohibited. Notwithstanding the foregoing, User may, however, access Westlaw by means of User's Law Student Password for purposes of unpaid public internships or externships (excluding those sponsored by a state or local government or a court. Any other use, including any use in connection with the employment or externship of User, if User is a student, is prohibited…)

Lexis defines appropriate use as:

> Students may request access to LexisNexis using their Law School Education ID… for academic purposes. Academic purposes include, but are not limited to:
>
> Research skill improvement, such as improving research efficiency and sharpening your area of law research skills as you prepare for practice
>
> Summer School or course work
>
> Work as a professor's research assistant
>
> Internship or externship for school credit
>
> Study for the Bar Exam

"Academic purposes" do not include research conducted for a law firm, corporation, or other entity (other than a professor or law school) that is paying the student to conduct research, or that is passing along the cost of research to a third party. These are deemed "commercial purposes."[1]

Numerous students have reported that practicing attorneys have conditioned initial or continuing employment as a law clerk upon the student's violation of the agreement with the research services. In other instances, lawyers have knowingly used information retrieved from the electronic services in violation of the student's contractual agreement.

ANALYSIS

When a lawyer hires a law clerk, the lawyer is hiring the clerk for the clerk's services and not for access to the electronic database. The lawyer has no expectation that the law clerk will breach the contractual obligations for the benefit of the lawyer. Indeed, the lawyer's obligation is to make certain that the law clerk not violate any of the contractual duties and responsibilities.

Rules of Professional Conduct, Rule 5.3 place obligations on a lawyer supervising non-lawyer assistants. A lawyer with supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Further, the lawyer violates ethical obligations if the lawyer orders or with knowledge of the specific conduct (misuse of the electronic services) ratifies conduct of the non-lawyer which would be a violation of the lawyer's own ethical duties. Finally, it is a violation of Rule 5.3 if the lawyer knows of unethical conduct by the non-lawyer and does not take steps to avoid the misconduct or take reasonable remedial actions.

Misuse of the student's educational privileges is a theft of services. (Utah Code Ann. §76-6-409) The companies have specifically limited the use of their products to non-profit or educational uses. The lawyer hiring a law student has no reasonable expectation that the law student will violate her contractual obligation to refrain from the use of those services in a for-profit situation. A theft of services is a violation of Rule 8.4(b). It is a criminal act, which, depending upon the amount of services wrongfully appropriated, could range anywhere from a Class B Misdemeanor to a Second Degree Felony. (Utah Code Ann. §76-6-412) Such a criminal act reflects adversely upon the lawyer's honesty if the lawyer specifically directs the student to violate her contract. It is also a criminal act and an ethical violation if the lawyer indirectly encourages the contractual breach through the coercion of the law student. See Utah Code Ann. §76-2-202 regarding criminal responsibility for the conduct of another person.

Requiring, encouraging or even tolerating the violation of the law student's contractual obligation to refrain from using the services for profit is also conduct involving dishonesty or misrepresentation. It therefore is also a violation of Rule 8.4(c).

Requiring, expecting or profiting from a student's violation of the contractual obligations is not protected by Ethics Opinion 98. That Opinion deals with the engagement of a third party to perform services for the client. The opinion specifically excluded conduct which amounts to dishonesty, fraud, deceit or misrepresentation by the attorney.

Misuse of the student's privileges is dishonest. Allowing, expecting or not rectifying the student's contractual breach of the contract violates the duty of supervision imposed upon the lawyer-employer.

1. The Westlaw and Lexis contracts we cite are current as of November 2011.

Ethics Hotline

(801) 531-9110

Fast, free, informal ethics advice from the Bar.

Monday – Friday
8:00 am – 5:00 pm

For more information about the Bar's Ethics Hotline, please visit
www.utahbar.org/opc/opc_ethics_hotline.html

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 October 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 1.8(a) (Conflict of Interest: Current Clients: Specific Rules) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney entered into a personal business transaction with the client without (a) reducing the terms of the transaction to writing; (b) advising the client to seek independent legal counsel; and (c) receiving informed written consent from the client. The attorney's conduct was knowing and caused significant injury to the client.

Mitigating factors: Lack of prior discipline; Absence of dishonest motive; Timely effort to rectify situation by putting agreement in writing and paying a portion of the loan back; A cooperative attitude in the disciplinary proceedings, including conceding mistakes during the Screening Panel Hearing; Remorse.

PUBLIC REPRIMAND
On September 20, 2011, the Honorable Thomas Low, Fourth District Court entered an Order of Discipline: Public Reprimand against Gary L. Blatter, for violation of Rules 8.4(d) (Misconduct) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
A client met with a legal assistant with the law firm of Gary Blatter & Associates to represent her in divorce proceedings. The client paid a retainer to Blatter & Associates. Later the same day that she hired the firm, the client had second thoughts and contacted the legal assistant and told him to hold off on filing the divorce papers. Later, the client called Blatter & Associates and instructed the legal assistant to go forward with the divorce. Several months later the client's husband had not been served with divorce papers, so the client spoke with a legal assistant by telephone and terminated the firm's representation. The legal assistant indicated that there would be a refund to the client. After six weeks had passed, the client received a check and a statement for services. The client had not previously received any statements from Blatter & Associates. After the client filed a Bar complaint, Mr. Blatter prepared a proposed settlement agreement for the client to sign. The purpose of the proposed settlement agreement was for the client to drop her Bar complaint in exchange for $2500.

PUBLIC REPRIMAND
On September 19, 2011, the Honorable Glenn K. Iwasaki, Third District Court entered an Order of Discipline: Public Reprimand against Roberto G. Culas, for violation of Rules 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants),

5.3(c) (Responsibilities Regarding Nonlawyer Assistants), 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice lf Law), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Mr. Culas hired Jamis Johnson and Paul Schwenke to work as paralegals for him. When Mr. Culas hired Mr. Johnson and Mr. Schwenke, he knew that both had been disbarred for misconduct and that neither was licensed to practice law in Utah. Jamis Johnson and Paul Schwenke had a business called HOLD. Mr. Culas rented office space in the same building with HOLD. At some point, Mr. Johnson began providing legal advice to HOLD clients. Mr. Johnson also prepared legal documents on behalf of HOLD clients that were submitted to the court. The documents were stamped with Mr. Culas' signature stamp and purported to have been filed by him. At all times at issue, the HOLD clients believed that Mr. Johnson was an attorney. Mr. Johnson wrote letters on behalf of the HOLD clients representing that he was an attorney working for Mr. Culas. An opposing attorney met with and communicated with Mr. Johnson, believing that he was a licensed attorney working for Mr. Culas. A memorandum was filed in Third District Court, with Mr. Culas as the attorney representing the HOLD clients, and including the stamped signature of Mr. Culas. Mr. Culas represented to the court that he had not prepared the document, although the document bore his signature.

PUBLIC REPRIMAND
On September 21, 2011, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Charles A. Schultz for violation of Rules 1.1 (Competence), 3.5(d) (Impartiality and Decorum of the Tribunal), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
In papers to the court, Mr. Schultz made continued miscitation of statutes which was more than a mere "typo." The miscitation was noted by the District Court and not corrected on appeal. Mr. Schultz intentionally omitted the title of "judge" in referring to Justice Court Judges as a sign of disrespect and in protest intended to disrupt the court room and the administration of justice. In responding to the OPC's inquiries, Mr. Schultz utilized the lowercase "j" in the word "judge," continuing the showing of a lack of respect. Mr. Schultz's behavior throughout the process was disrespectful, unprofessional and intended to prejudice the administration of justice. Mr. Schultz referred to judges as "revenue collectors in black dresses." Mr. Schultz submitted a declaration of his client that contained disparaging remarks. The remarks called opposing counsel a "lying piece of trash" and made other inappropriate and unprofessional comments. Mr. Schultz also used derogatory language to describe the investigation at the OPC. Mr. Schultz repeatedly cited the OPC's investigation as "asinine" and "absolute nonsense." Mr. Schultz violated the Rules of Professional Conduct knowingly and intentionally. The level of injury is significant in that the profession as a whole (and the public) is affected by this negative behavior and it contributes to an unprofessional view of lawyers.

Aggravating factor:
Prior discipline.

PUBLIC REPRIMAND
On October 17, 2011, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against David O. Black for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.5(b) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
A client hired Mr. Black to represent her in three matters: a divorce case; a protective order case; and a criminal case.

With respect to fees:
Mr. Black promised to charge a rate of $150 an hour but then later billed his client at the rate of $275 an hour. An integration clause in the Fee Agreement was not a defense or excuse for an ethical violation. Mr. Black also inadvertently charged 3.0 hours for his and the client's attendance at an August hearing in the criminal proceeding. However, no parties or their attorneys appeared at the hearing because the hearing had been cancelled. Despite the incorrect billing charge, Mr. Black has neither reversed the charge nor refunded the fees paid against this charge.

With respect to competence:
Mr. Black advised his client to continue filing for unemployment benefits rather than seeking temporary support. Mr. Black claims he told his client that temporary support would require a "claim that she was incapable of working which would have been inconsistent with her claim for unemployment," and that she elected to continue seeking unemployment benefits. However, the client's subsequent counsel secured temporary benefits for her while she continued to receive unemployment benefits.

With respect to diligence:
Mr. Black was not diligent in pursuing temporary support for his client as she repeatedly requested. Mr. Black's office did attempt to obtain financial information from the client's ex, but

their efforts to obtain voluntary compliance took four months, which was unreasonable in light of the client's circumstances and the need for immediate relief and the other avenues available for more expedited production (or estimation) of the necessary information.

With respect to communication:
Mr. Black did not reasonably respond to his client's repeated requests for communications, personal meetings and preparation sessions throughout the representation. Apart from his attendance at hearings with his client, Mr. Black's bill discloses only limited contacts between Mr. Black and his client. Likewise, the substance of the emails reflect very little direct contact between the client and Mr. Black. Mr. Black concedes that he overestimated his capability to emotionally handle the communications demands imposed by a client with his client's emotional needs.

All of Mr. Black's misconduct was negligent and caused a level of harm to the client.

INTERIM SUSPENSION
On September 19, 2011, the Honorable Denise P. Lindberg, Third Judicial District Court, entered an Order of Interim Suspension Pursuant to Rule 14-519 of the Rules of Lawyer Discipline and Disability, suspending Cheri K. Gochberg from the practice of law pending final disposition of the Complaint filed against her.

In summary:
On November 5, 2010, Ms. Gochberg was charged with Driving Under the Influence of Alcohol and/or Drugs (four counts), Possession or Use of A Controlled Substance (two counts), Reckless Driving, and No Proof of Insurance. On March 25, 2011, Ms. Gochberg pled guilty to and was convicted of Driving Under the Influence of Alcohol or Drugs, a third degree felony, for that incident.

On March 4, 2011, Ms. Gochberg was charged with Driving Under the Influence of Alcohol and/or Drugs while an Alcohol Restricted Driver. On March 28, 2011, Ms. Gochberg pled guilty to and was convicted of Driving Under the Influence of Alcohol or Drugs, a third degree felony. These felony convictions were Ms. Gochberg's fourth and fifth related DUI convictions within the last ten years. The interim suspension is based upon the felony convictions.

The Nuts and Bolts of Divorce

by Jared Hales

Editor's Note: *This article is the first in a series summarizing CLE presentations given as part of the YLD's "Practice in a Flash" program, which is introduced in this edition of the Utah Bar Journal beginning on page 59.*

Many young attorneys who are looking to establish their own clientele will find opportunities to represent a client in a divorce. Even if you do not have any desire to handle a divorce case, just having people know you are an attorney means you will likely be asked by a family member, friend, or stranger you meet a question about divorce. Each divorce case is very fact specific and how the statutes and case law are applied can vary from district to district. It is important for every young attorney representing a client in a divorce to be well versed in the applicable statutes and case law. The purpose of this article is to provide young attorneys with a basic overview of the most common divorce issues and applicable statutes.

> *"When you have a client tell you he or she wants custody of the children, you will need to find out what your client means by custody."*

JURISDICTION AND VENUE

You will first need to determine whether a district court in Utah has jurisdiction over your client's divorce case. Utah courts have jurisdiction to dissolve a marriage between two parties where the petitioner or respondent is a bona fide resident of the county where the divorce action is brought for at least three months prior to filing a petition for divorce. *See* Utah Code Ann. § 30-3-1 (2007). Utah has child custody jurisdiction if Utah is the home state of the child at the time the petition is filed or if Utah was the home state of the child within six months prior to the filing of the petition and one of the parent's lives in Utah. *See id.* § 78B-13-201 (2008). Utah is the "home state" if the child "lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding." *Id.* § 78B-13-102(7).

CHILD CUSTODY AND PARENT-TIME

Custody is the most misunderstood issue by clients going through a divorce. When you have a client tell you he or she wants custody of the children, you will need to find out what your client means by custody. Occasionally, I have had a client tell me that he or she wants custody because the client does not want to lose the right to see the children. In discussing custody with clients, you may find that it is more productive to discuss what time sharing with the children might look like during a typical two-week period of time rather than just asking whether or not your client wants custody. Nevertheless, it is important to know the different types of custody and how custody is defined.

Physical Custody

Physical custody is defined by the number of overnights each parent spends with their child. There are three types of physical custody: First, primary physical custody where one parent has at least 253 overnights with the child. Second, joint physical custody "means the child stays with each parent overnight for more than

JARED HALES practices family law with Parsons Behle & Latimer. Mr. Hales is a member of the Utah State Bar Family Law Executive Committee, the Young Lawyer's Division Executive Committee, and has been an Instructor in the Political Science Department at Utah State University.

30% of the year, and both parents contribute to the expenses of the child in addition to paying child support." *Id.* § 30-3-10.1(2) (2007). In other words, if each parent has at least 111 overnights the parties have joint physical custody. Third, split custody means that each parent has primary physical custody of at least one child. If custody is contested the parties may employ a custody evaluator who is appointed by order of the court pursuant to Rule 4-903 of the Utah Rules of Judicial Administration.

Legal Custody

There are two types of legal custody: Joint legal custody is defined as "the sharing of the rights, privileges, duties, and powers of a parent by both parents, where specified." *Id.* § 30-3-10.1(1). Sole legal custody places those rights, privileges, duties, and powers of a parent with one parent.

Parenting Plan

In any case where a party requests joint physical and/or legal custody the requesting parent must file a proposed parenting plan at the time the party files a petition or an answer to a petition. *See id.* § 30-3-10.8. If one party files a proposed parenting plan, the opposing party must then file his or her own proposed parenting plan to avoid having the court enter the initial parenting plan by default. The required contents of a parenting plan are found in Utah Code section 30-3-10.9. *See id.* §30-3-10.9. In drafting a parenting plan, remember that the specific rights shared by the parents as part of joint legal custody (e.g., joint decision-making on the children's education, health, religion, etc.) must be specifically stated as part of the parenting plan.

Parent-time

In determining parent-time, the court must consider the best interests of the children. For children between the ages of five and eighteen, the minimum parent-time schedule is one evening per week from 5:30 p.m. until 8:30 p.m. and alternating weekends beginning at 6:00 p.m. on Friday until 7:00 p.m. the following Sunday. *See* Utah Code Ann. § 30-3-35(2) (Supp. 2011). Parent-time may begin after school on the midweek and weekend visits if the parent exercising parent-time is available. *See id.* § 30-3-35. Utah Code section 30-3-35 also provides for the division of holidays, birthdays, extended parent-time during the summer, and other days the children are not in school. *See id.* For children under five years of age, a different minimum parent-time schedule can be found in Utah Code section 30-3-35.5. *See id.*

Relocation of a Parent

If one parent moves 150 or more miles away from the residence specified in the decree, parent-time will normally have to be adjusted. *See id.* Utah Code section 30-3-37 specifies the requirements for a relocating parent, a parent-time schedule that may be adopted, and how the expense of travel for parent-time may be shared if the parents do not agree otherwise. *See id.* § 30-3-37.

Divorce Education and Orientation Courses for Divorcing Parents

During your initial meeting with a client or potential client, you will want to mention that Utah requires divorcing parents to attend a divorce education course and divorce orientation course. *See id.* §§ 30-3-11.3, –11.4. These courses are taught back-to-back in one evening. Further information regarding the courses, including the schedule, can be found at: http://www.utcourts.gov/specproj/dived.htm .

CHILD SUPPORT

Determining child support is a simple task if both parents are employed. Child support is based upon the child support tables found in Utah Code section 78B-12-301. Child support varies depending on whether the parties have sole, joint, or split physical custody of the children. Easy to use child support calculators can be found at: http://www.utcourts.gov/childsupport/calculator. Child support is based on the gross income of each party from one full-time job. *See* Utah Code Ann. § 78B-12-203(2) (2008).

If one of the parents is self-employed, gross income is determined by "subtracting necessary expenses required for self-employment or business operation from gross receipts." Utah Code Ann. § 78B-12-203(4)(a). If a party is unemployed or underemployed, the court may impute income to that parent. In imputing income the court will look at the parent's employment history, employment opportunities, qualifications, and earnings for persons in the same occupation and geographical area. *See id.* § 78B-12-203(7)(b). If a parent has no recent work history the court will impute at least minimum wage except under certain circumstances found in Utah Code section 78B-12-203(7)(d). *See id.* When you have a client tell you that his or her number one priority is to not pay child support to the other parent because that parent will not spend a dime of it on the children, keep in mind that it is the very rare case where the court will not order child support. Child support is for the support of the children and not for the parties to simply waive.

A decree of divorce must provide for how the children's medical insurance and out-of-pocket medical expenses will be paid. Utah Code section 78B-12-212 provides that the parties share equally the out-of-pocket costs of medical insurance and uninsured "reasonable and necessary" medical expenses incurred for the minor children. *See id.* Utah Code section 78B-12-214 provides that the parties share equally the cost of work-related child-care expenses. *See id.*

Finally, the award of tax exemptions for the minor children should be addressed in every decree of divorce involving children. In determining which parent should be awarded the tax exemption, the court must consider the relative financial contribution each parent makes to raising the children and the relative tax benefit to each parent. In practice, the tax exemption is usually alternated or divided between parents.

ALIMONY

In determining alimony, there is no table to consult like child support. Instead, the court must consider the following factors outlined in Utah Code section 30-3-5(8)(a):

(i) the financial condition and needs of the recipient spouse;

(ii) the recipient's earning capacity or ability to produce income;

(iii) the ability of the payor spouse to provide support;

(iv) the length of the marriage;

(v) whether the recipient spouse has custody of minor children requiring support;

(vi) whether the recipient spouse worked in a business owned or operated by the payor spouse; and

(vii) whether the recipient spouse directly contributed to any increase in the payor spouse's skill by paying for education received by the payor spouse or allowing the payor spouse to attend school during the marriage.

See Utah Code Ann. § 30-3-5(8)(a)(Supp. 2011).

The first three factors are typically given the most attention by the court. Unlike child support, the court can consider all sources of income for purposes of calculating alimony (e.g., second job, trust income, etc.). You may have opposing counsel argue that in determining alimony the court should simply equalize the parties' incomes. Keep in mind that the district courts must go through the traditional needs analysis found in section 30-3-35

rather than simply equalizing the parties' income. *See Jensen v. Jensen*, 2008 UT App 392, ¶¶ 13-14, 197 P.3d 117. The court should equalize the parties' incomes "only in those situations in which one party does not earn enough to cover his or her demonstrated needs and the other party does not have the ability to pay enough to cover those needs." *Sellers v. Sellers*, 2010 UT App 393, ¶ 3, 246 P.3d 173. Alimony terminates upon the death, remarriage, or cohabitation of the payee. *See* Utah Code Ann. § 30-3-5. When advising a client on alimony you should remember that alimony is taxable to the payee and tax deductible to the payor.

DIVIDING PROPERTY

After advising your client on custody and support for the children and the parties, the next topic is what to do with all of the personal and real property. Where clients used to argue over who gets the house, given the current real estate market we often find our clients arguing over who has to take the house. There is little statutory guidance on dividing property. Although there is no fixed formula for the division of marital property, "marital property is typically awarded so that each spouse receives a roughly equal share." *Thompson v. Thompson*, 2009 UT App 101, ¶ 8, 208 P.3d 539. Marital property is property obtained during the marriage that is not the separate property of either party. "Generally, premarital property, gifts, and inheritances may be viewed as separate property, and the spouse bringing such separate property into the marriage may retain it following the marriage." *Keiter v. Keiter*, 2010 UT App 169, ¶ 22, 235 P.3d 782. The exceptions to the general rule regarding separate property include if the property has been commingled to the point it loses its separate character, the other spouse has augmented, maintained or protected the separate property, and "whether the distribution achieves a fair, just, and equitable result." *Id.*

Most retirement plans are divided according to the Woodward formula. *See Woodward v. Woodward*, 656 P.2d 431 (Utah 1982). The *Woodward* formula takes the total number of months of service during the marriage as a numerator over the total number of months of service at the job. *See id.* at 433. The court enters a Qualified Domestic Relations Order ("QDRO") that divides a retirement account and allows a party to avoid having the division of the account be a taxable event and subject to early withdrawal penalties. The party receiving retirement funds can choose to have the retirement funds paid directly to the party or deposited into a separate retirement account.

DIVIDING DEBTS

Debts incurred during the marriage are typically considered marital debts subject to division by the court. Marital debts may be divided based on either party's ability to pay the debt. When advising clients remember that the creditor is not bound by the division of the debt so even if the court orders one party to pay the debt, if both parties are jointly and severally liable for the debt, the creditor may come after either party. If possible, your clients will avoid future litigation if debts are ordered to be paid by the party whose name is on the debt.

ATTORNEY'S FEES

Rule 102 of the Utah Rules of Civil Procedure provides the basis for a request for attorney's fees. Rule 102(b) provides the following standard for an award of fees:

> (b)(1) the moving party lacks the financial resources to pay the costs and fees;
>
> (b)(2) the non moving party has the financial resources to pay the costs and fees;
>
> (b)(3) the costs and fees are necessary for the proper prosecution or defense of the action; and
>
> (b)(4) the amount of the costs and fees are reasonable.

Attorneys often make a request for attorney's fees without going through the analysis provided in Rule 102. Each request for attorney's fees should be accompanied by an affidavit of the party requesting fees addressing subsections (b)(1) and (b)(2) and an affidavit from the attorney addressing subsections (b)(3) and (b)(4).

NINETY-DAY WAITING PERIOD

Utah Code section 30-3-18 provides that a Decree of Divorce will not be entered until ninety days have passed from the date of filing of a petition for divorce. The ninety-day waiting period does not apply if both parties take the educational course for divorcing parents (if the parties have children) or if the court for good cause otherwise agrees (e.g., the stipulation of the parties).

PROCEDURE

Motions filed by either party in a domestic relations case in the First, Second, Third, and Fourth districts are governed by Rule 101 of the Utah Rules of Civil Procedure. Rule 101 has different timelines than Rule 7 for filing motions, responses, and replies. Rule 26 was recently enacted and requires the parties to provide early in the divorce process more documentation of financial information than was previously required. Familiarize yourselves with the documentation you will be required to provide to the court on behalf of your client pursuant to Rule 26. The most important financial document you must provide to the court is a Financial Declaration that will provide you and the court a snapshot of your client's financial situation.

MODIFICATIONS OF FINAL DOMESTIC RELATIONS ORDER

Courts in domestic relations matters have "continuing jurisdiction to make subsequent changes or new order for the custody of the children and their support, maintenance, health, and dental care, and for distribution of the property and obligations for debts as is reasonable and necessary." Utah Code Ann. § 30-3-5(3) (Supp. 2011).

Child Support

Child support can be modified by the Office of Recovery Services or by the court. Child support can only be made retroactive to the date of service of the motion or petition to modify child support. *See* Utah R. Civ. P. 106. Child support can be modified two different ways. First, child support can be modified by motion at least three years after the child support order is entered if there is a 10% or more difference in the amount of support that would be paid. *See* Utah Code Ann. § 78B-12-210. Child support can be modified by motion under these circumstances because a party does not need to show a change in circumstances beyond the 10% change to the child support amount. Secondly, child support can be changed by petition to modify prior to three years after the order is entered if there has been a material and substantial change in circumstances since entry of the decree of divorce. Utah Code section 78B-12-210(9)(b) specifically enumerates what may be considered a change in circumstances. For example, a 30% or more difference in the income of one of the parties resulting in at least a 15% change in support is considered evidence of a change in circumstances.

Custody

Modifying a custody order involves a two-step process: (1) you must demonstrate a substantial and material change in circumstances; and (2) a change in custody is in the best interest of the children. Rule 106 of the Utah Rules of Civil Procedure states that there should be no temporary change of custody unless there is immediate and irreparable harm to the children or to ratify a previous agreement of the parties. *See* Utah R. Civ. P. 106.

Having a basic understanding of family law can be helpful to any attorney whether you intend to make family law part of your practice, want to be able to at least have an understanding of the basics if someone asks you a family law question, or decide after learning more about family law that you never want to handle a divorce case. The best advice I would give to a young attorney handling that first divorce case is to familiarize yourself with the applicable laws and also get to know a more experienced family law attorney who is willing to be a mentor and advisor to you. Although the practice of family law can be frustrating, it gives young attorneys the opportunity to really make a difference in the life of a client and to handle a case from beginning to end.

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Candice Pitcher - Select Portfolio Management
Eric Olson - Eisenberg & Gilchrist
Jonathan Benns (bracket and rules) – Maschoff Gilmore & Israelsen

Practice in a Flash: Helping Lawyers Hang a Shingle

by Gabriel White

Practice in a Flash is designed to support lawyers moving into solo or small firm practice because of economic circumstances that block traditional avenues of legal employment. It is an electronic platform that will provide new lawyers with basic practice forms, entry level CLE, and other helpful information on how to start and manage a law firm. Once the electronic program is released in the spring of 2012, it will give new lawyers advice on topics such as how to rent and open an office, hire staff, and market themselves to public. Adapted from a similar program in Texas, Practice in a Flash will give young attorneys important resources that can bridge the gap between a law school education and advice from colleagues and mentors.

Many students choose to study law because it is a safety net. At least part of the reason that many of us decided to go to law school was the promise of a high-paying, high-demand job in an interesting and challenging field. However, in this economy, yesterday's promise is today's fantasy. Reports of layoffs, hiring freezes, and even the occasional law firm implosion have radically changed the appearance of the legal marketplace. Law firms are reluctant to hire due to economic pressures, and new lawyers are at a disadvantage, often competing for entry level jobs with experienced lawyers laid off from larger firms. Even highly qualified graduates from good schools may face a debilitating job search stretching from weeks to months.

Faced with such bleak prospects, many young lawyers are turning away from traditional employment avenues and choosing to open their own firms. Some lawyers hang out a shingle as a temporary way to make ends meet; others are pursuing dreams of independence in their working lives. Whatever the reason, going solo is a scary prospect for many new attorneys. Small business ownership carries serious risks, and law school doesn't train businesspeople. Torts and property classes don't cover marketing, fair hiring practices, or how to manage client expectations. With a few exceptions, modern law schools are still largely academic institutions that do not provide the practical experience that a student needs to pick up a diploma, don a suit, and open for business. With its unwritten rules, special regulations, and fiduciary duties, entering the solo practice of law is intimidating.

Similarly, there is only so much that mentors and colleagues can do to help. Colleagues at new firms are competitors, and may be reluctant to hand over advice in critical areas. Anyway, if the blind lead the blind, both may fall into the proverbial ditch. On the other hand, mentors are required to have at least seven years of experience, and thus are far removed from the plight of the recently graduated lawyer. Even if they accurately remember the harried and frenetic days of the newly-minted lawyer, most qualified mentors haven't recently opened their own solo law practice. With a few exceptions, mentors who have experience with getting a business license and opening a trust account did so in a vastly different business environment. Concepts like the virtual office, online research platforms, and pay-per-click advertising were unknown even five years ago. These sage advisors can provide invaluable information to young lawyers, but their ability to help with the practical problems of opening an office is limited.

Practice in a Flash overcomes these limitations. Its advice is drawn from a wide range of business professionals, attorneys, and service providers. New lawyers will get advice on malpractice insurance from insurance companies and attorneys who defend legal malpractice claims. The program will include marketing advice from advertising professionals and direction from lawyers who have recently gone out on their own and made it work. Perhaps most appealing to young lawyers, the program includes video CLE that provides a basic, step-by-step approach on how to handle types of cases that are conducive to small firm practice, such as family law and DUI defense, and a guide on how to avoid the Office of Professional Conduct. Ultimately, the Practice in Flash program will provide a lifeline that young lawyers can use to make their practices successful even in difficult economic times.

GABRIEL WHITE practices plaintiffs' personal injury, construction, and commercial litigation at the law firm of Christensen & Jensen. He is currently serving as the chair of the CLE Committee of the Young Lawyers Division of the Utah State Bar.

Young Lawyers of the Year: Kelly Latimer and Christina Micken

True heroism is remarkably sober, very undramatic. It is not the urge to surpass all others at whatever cost, but the urge to serve others at whatever cost.

– Arthur Ashe

This quote aptly describes the heroic efforts of Christina Micken and Kelly Latimer, who were recognized as the 2011 Young Lawyers of the Year for their exemplary service to the Utah legal community throughout the last decade. Kelly and Christina have worked tirelessly and spent a considerable amount of time away from their families and already busy legal careers to help others through community service, increasing availability of legal services to the underserved population in the Salt Lake area, and increasing opportunities for young lawyers to gain relevant legal experience.

Their long history of service began in 2003, when Kelly joined the Young Lawyers Division's (YLD) Executive Council as the chair of its Community Service Committee. A year later, Christina joined Kelly as co-chair of the Community Service Committee. The dynamic duo has been leading the YLD's service and pro bono efforts ever since. During their reign as co-chairs of the Community Service Committee, Kelly and Christina initiated many new programs that are now a regular part of YLD's community service events. They spearheaded the first annual Professional Clothing Drive to gather lightly-used professional clothing for the benefit of low-income men and women who are trying to re-enter the workforce. They also organized the first ever YWCA Game Night, during which attorneys and their families spend the evening playing games with the women and children living at the YWCA domestic violence shelter. In addition to a number of other events benefiting the Road Home, the Utah Food Bank, and the Children's Justice Center, Kelly and Christina were the

driving force behind establishing a living wills clinic at the Utah AIDS Foundation.

Christina and Kelly were such powerful leaders of the Community Service Committee, in 2006, they were asked to co-chair one of the YLD's most time-consuming committees: the Tuesday Night Bar Committee. Tuesday Night Bar is a weekly collaboration between YLD and the Utah State Bar to provide pro bono legal counseling and information to low-income residents of Utah. Kelly and Christina willingly accepted the challenge and, during their four-year leadership, the program received national recognition from the American Bar Association for being a Best Service-to-the-Public Project, described as a "model for execution of a successful pro bono project that engages both the public and the bar."[1] Their dedication to the program included not only regularly volunteering at the weekly pro bono clinic – they have been volunteers since 2001 – but also recruiting and training attorney volunteers and team leaders, organizing continuing legal education events, and assisting other local bar associations to establish similar programs outside of Salt Lake. Christina and Kelly continue to serve as Tuesday Night Bar team leaders today.

"As the result of Kelly and Christina's efforts, thousands of Utahns have been helped. They are true examples of not only what can be done, but what we, as attorneys, should strive to be doing."

In 2010, Kelly and Christina were again asked to step into a new leadership role as co-chairs of the newly-formed Recession Response Committee. They took on this challenge with as much enthusiasm as their past projects, and organized a series of free CLE's aimed at helping attorneys impacted by the economic downturn develop new legal skills or explore alternate career paths. As part of this role, they are currently working with the Utah Chapter of the Federal Bar Association to implement a program that would give under-employed attorneys an opportunity to gain valuable legal experience by volunteering as attorneys on a limited basis and under the supervision of mentors for participants in the U.S. Federal District Court, District of Utah's mental- and drug-court re-entry program, Reentry Independence through Sustainable Efforts (R.I.S.E). This program, titled Help R.I.S.E., will not only prepare attorneys for practice, but also provide valuable services to vulnerable members of the community.

As the result of Kelly and Christina's efforts, thousands of Utahns have been helped. They are true examples of not only what can be done, but what we, as attorneys, should strive to be doing.

1. Phillip Long, *Utah YLD's Formula for Pro Bono Success*, The Affiliate, Vol. 3, No. 2 (Nov./Dec. 2009).

Kelly J. Latimer is currently an Attorney-Advisor for the United States Department of the Interior's Office of Hearings and Appeals, which serves as the Department's administrative trial court for cases involving the use and disposition of public lands and resources. Prior to joining the Hearings Division, Kelly served as a judicial clerk to the Honorable Dale A. Kimball of the United States District Court, District of Utah. She graduated from the University of Utah College of Law in 2001, where she was a William H. Leary Scholar and the managing editor of the *Journal of Land, Resources & Environmental Law*.

Christina L. Micken is currently a partner with the law firm of Bean & Micken, where she has practiced law since 2002. The primary focus of her practice is family law, including adoptions, child custody disputes, divorces, and paternity actions. For the past four years, she has been the attorney coach for the Kaysville Junior High Mock Trial team who participate in the Utah Law Related Education Project Mock Trial Competition. She also volunteers at two monthly legal clinics and at Protective Order and Stalking Injunction hearings.

Did You Know…

That there are many benefits to being a member of the Paralegal Division? Aside from the obvious benefits of CLE and networking opportunities, I would like to share just a few of the other benefits that people may not know about or may have forgotten.

1. *Utah Bar Journal*

2. Blomquist Hale counseling services – counseling services are free to you and every member of your household for issues such as family problems, stress, depression, anxiety, personal cash management difficulties, elder care challenges, assessment of drug/alcohol dependence, and any other issues impairing your work or personal lives. There are no co-pays and no deductibles. http://www.utahbar.org/members/blomquisthale.html

3. Community Service Opportunities

4. Discounts at various businesses including: AAA, Budget, Hertz, JoS. A. Bank Clothiers, Sport Mall, and T-Mobile. http://www.utahbar.org/members/member_benefits.html

5. Discounted registration fees at Utah State Bar sponsored CLE events, i.e., Spring Convention, Summer Convention, and Fall Forum.

6. Job Announcements

7. Salary Survey

I encourage you to take a look at the Bar's website and Member Benefits page and take advantage of benefits when you need them.

Coming Soon to a Computer Near You – 2012 Paralegal Salary/Benefits Survey

Plan to go online to the Paralegal Division website at: http://www.utahbar.org/sections/paralegals/Welcome.html to find the link for the survey. The survey will be open for responses between April 1, 2012 and April 30, 2012.

Reminders will come via E-bulletin and in the March/April *Bar Journal* as well as an announcement at the Mid-Year Meeting in March in St. George.

Put it on your calendar NOW to remember to take the survey and tell all your paralegal friends to participate. They don't have to be a member of the Paralegal Division of the Utah State Bar to participate. The more participants we have, the more helpful the information will be!

We are excited to also announce that included in the 2012 summary of the salary results, we will be providing a comparison of the salary results by county in order to make the information as useful as possible.

So if you know of, or work with, paralegals employed in a county in other Regions, please encourage their participation.

For your convenience, here is the link for the survey that will be found on your Paralegal Division website: https://www.surveymonkey.com/s/2011ParalegalDivisionSurvey.

Call for Nominations for the Paralegal of the Year Award

The Paralegal of the Year Award -— presented by the Paralegal Division of the Utah State Bar and the Utah Paralegal Association, is the top award to recognize individuals who have shown excellence as a paralegal. This award recognizes this achievement. We invite you to submit nominations of those individuals who have met this standard. Please consider taking the time to recognize an outstanding paralegal.

Nominating a paralegal is the perfect way to ensure that their hard work is recognized not only by their organization but by the legal community. This will be their opportunity to shine. Nomination forms and additional information are available by contacting: **Suzanne Potts, spotts@clarksondraper.com**.

The deadline for nominations is April 2012. The award will be presented at the Paralegal Day luncheon held in May 2012.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
01/11/12	**Opening a Probate:** 1:00–2:00 pm. $35 per session or all three for $99. Topics include: • Decision to Open a Probate? • Definitions • Notice to Heirs & Devisees • Who Can Open a Probate? • Initial Pleadings • How to File a Probate	1 hr. self-study
01/18/12	**OPC Ethics School:** 9:00 am–3:45 pm. $175 before 01/06/12, $200 after. Topics include: • How to Avoid Complaints • Your Duty to Clients • Professionalism & Civility • How to Effectively Respond to Complaints • How to Set Up a Trust Account • Law Office Management • Avoiding Conflicts of Interest	6 hrs (5 Ethics, 1 Prof/Civ)
01/19 & 01/20/12	**Dabney on Utah Workers Compensation – a Seminar to Jump-Start Your Utah Workers Compensation Practice.** For new and experienced attorneys. 8:30 am–5:00 pm. Utah attorneys with 10+ years of practice: $1500; Utah Attorneys with 5+ years of practice: $1200; Utah attorneys with 5 or fewer years of practice: $900; Paralegals, Legal Assistants, and Legal Secretaries: $550. Topics include: • Initial Claim Intake Forms & Checklists • Significant Case Law and Statutory and Regulatory References You Need to Know • Discovery Tools: Interrogatories, Requests for Production of Documents & Depositions and more • Pre-trial Disclocure Forms – the Good, the Bad, and the Ugly • Hearings – The Ultimate Checklist • Utah Law Digest – 42 pages of the Best Cases and the Cases You Need to Know About • Settlements & Mediations – Strategies to Consider, Players You Need to Know • The Big Bad Gorilla of Annuities and What Your Clients Really do With Their Money • Physical and Mental Impairment Ratings	14 hrs. includes 1 hr. Ethics
02/08/12	**Administering a Probate:** 1:00–2:00 pm. $35 per session or all three for $99. Topics include: • Obtaining a Tax ID • Marshall the Assets • Accountings • Notice to Creditors • What Assets Belong in the Probate Estate	1 hr. self-study
02/16/12	**Utah State Bar Day at the Legislature.** Approximately 8:30 am–noon. State Office Building Auditorium.	3 hrs.
02/16/12	**Evening With the Third District Court.** Approximately 6:00–8:00 pm.	2 hrs.
02/17/12	**I.P. Summit.** Little America Hotel. Approximatey 8:30 am–5:00 pm.	8.5 hrs.
03/14/12	**Closing a Probate:** 1:00–2:00 pm. $35 per session or all three for $99. Topics include: • Decision to Close Formally or Informally • Final Accounting • Pleadings • How to Close a Probate (Filing Process)	1 hr. self-study

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

Classified Ads

RATES & DEADLINES

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

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

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

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POSITIONS AVAILABLE

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

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EXECUTIVE OFFICES
Phone: (801) 531-9077
Fax: (801) 531-0660
Website: www.utahbar.org

John C. Baldwin
Executive Director
(801) 297-7028

Richard M. Dibblee
Assistant Executive Director
(801) 297-7029

Christy J. Abad
Executive Secretary
(801) 297-7031

Katherine A. Fox
General Counsel
(801) 297-7047

Nancy Rosecrans
General Counsel Assistant
(801) 297-7057

Ronna Leyba
Building Coordinator
(801) 297-7030

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Receptionist
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Consumer Assistance Director
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& MEMBER SERVICES
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Director, Group Services
(801) 297-7033
E-mail: choward@utahbar.org

Marion Eldredge
CLE Assistant, Member Services
(801) 297-7036
E-mail: benefits@utahbar.org

Megan Facer
CLE Assistant, Section Support,
Tuesday Night Bar
(801) 297-7032

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Diana Gough
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Brandon Sturm
Web Content Coordinator
(801) 297-7051

OFFICE OF PROFESSIONAL CONDUCT
Phone: (801) 531-9110
Fax: (801) 531-9912
E-mail: opc@utahbar.org

Billy L. Walker
Senior Counsel
(801) 297-7039

Todd Wahlquist
Deputy Senior Counsel
(801) 297-7054

Diane Akiyama
Assistant Counsel
(801) 297-7038

Adam C. Bevis
Assistant Counsel
(801) 297-7042

Sharadee Fleming
Assistant Counsel
(801) 297-7040

Barbara Townsend
Assistant Counsel
(801) 297-7041

Ingrid Westphal Kelson
Paralegal
(801) 297-7044

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