Utah Bar® JOURNAL

Volume 25 No. 3
May/June 2012

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Cover Art

Tulips, taken by Dan Anderson, Farmington, Utah.

Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the Utah Bar Journal should send their photographs (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 randy.romrell@cambiahealth.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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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 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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Education on the Fundamentals of Our Government and Democracy is on Life Support: We Can Help

by Rodney G. Snow

As a nation, we are facing some of the most difficult decisions that have challenged us in a long time. Resolving today's issues requires a citizenry that understands the fundamentals of our democracy. Unfortunately, education regarding our system of government has been lacking for many years. As reported by the Leonore Annenberg Institute for Civics at the University of Pennsylvania, the "lack of high-quality civic education in America's schools leaves millions of citizens without the wherewithal to make sense of our system of government."[1] While most high school graduates can name the three judges on American Idol, very few can provide you the number or the names of the Justices of the United States Supreme Court. Surveys conducted over the past decade by the Annenberg Public Policy Center resulted in the shocking findings listed below.

- Only one-third of Americans could name all three branches of government; one-third could not name any.
- Just over a third thought it was the intention of the Founding Fathers to have each branch hold a lot of power, but the President has the final say.
- Just under half of Americans (47%) knew that a 5–4 decision by the Supreme Court carries the same legal weight as a 9–0 ruling.
- Almost a third mistakenly believed that a U.S. Supreme Court ruling could be appealed.
- When the Supreme Court divides 5–4, roughly one in four [Americans] (23%) believed the decision was referred to Congress for resolution; 16% thought it needed to be sent back to the lower courts.[2]

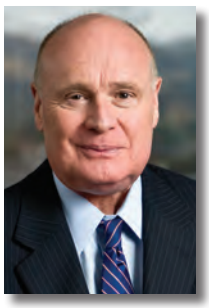
> *"Civic learning is, at its heart, necessary to preserving our system of self-government. In a representative democracy, government is only as good as the citizens who elect its leaders…."*

On the most recent National Assessment of Educational Progress for civics, more than two-thirds of all American students scored below proficient.[3]

On the same test, less than one-third of eighth graders could identify the historical purpose of the Declaration of Independence, and less than a fifth of high school seniors could explain how citizen participation benefits democracy.[4]

Civic learning is, at its heart, necessary to preserving our system of self-government. In a representative democracy, government is only as good as the citizens who elect its leaders, demand action on

Rod expresses his appreciation to Robert D. Andreasen, an associate at Clyde Snow & Sessions, for his research assistance.



> pressing issues, hold public officials accountable, and take action to help solve problems in their communities.…To neglect civic learning is to neglect a core pillar of American democracy.[5]

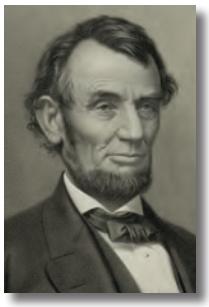
What has caused this decline in civics education over the last forty or fifty years? Some say it started with the disenchantment of the government brought on by Vietnam and Watergate.[6] A primary reason cited is the unprecedented pressure to raise student achievement now measured by the standardized examination of reading and mathematics.[7] The acronym STEM is often applied in measuring the value of success of our public and private school systems (science, technology, engineering, and math).

The No Child Left Behind, is also sharing the blame for standardized testing in math and reading. Pressure in these trends seems to have caused education regarding democratic principles to either take a back seat or disappear altogether.

Ironically, one factor driving national standardized testing for reading and STEM is an effort to maintain pace with China. Now, there's an idea – let's sacrifice education on the importance of the fundamentals of our democracy and the system we have in place to check government power to stay even with or exceed a people governed by a communist dictatorship where human rights are all but nonexistent[8] and free elections are effectively out of the question.[9]

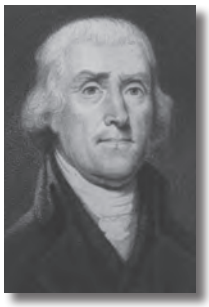
Did you know the constitution of Cuba is all but identical to ours? Many dictatorships or governments run by the military have written constitutions similar to or patterned after the United States Constitution. Why then is our government so different than that of Cuba or other countries? The people of those nations do not understand their rights and the courts exist for the government – not the people.

A citizenry educated on the concepts of our system of government is critical to our free society. As Abraham Lincoln stated:



Abraham Lincoln

Let it [reverence for the laws and Constitution] be taught in schools, seminaries and in colleges; let it be written in primers, in spelling books and in almanacs; let it be preached from the pulpit, proclaimed in legislative halls, enforced in courts of justice. In short, let it become the political religion of the nation.[10]



Thomas Jefferson

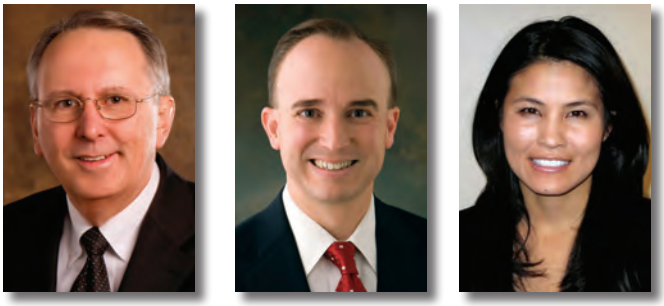
Perhaps one of the more famous quotes on this subject is that of Thomas Jefferson, "If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be."[11] In 2002, the Center for Information and Research on Civil Learning and Engagement (CIRCLE), in partnership with the Carnegie Corporation of New York, convened a series of meetings involving leading scholars and civic education practitioners to consider the current state of young people's civic learning and engagement.[12] The participants' conclusions and recommendations were summarized in a 2003 report titled *The Civic Mission of Schools*.

The key reason the CIRCLE report suggests for our failure to provide effective and meaningful civic education is the *lack of institutional commitment to formal civic education*.[13]

Civics Education Program

In some states, civics is not taught at all in junior high or high school. In Utah, civics education is a required course at the high school level. While we are fortunate in that respect, much more could be done.

In July, the Bar Commission created the "Utah State Bar Committee on Civics Education" to work with and facilitate the Bar's law-related education programs directed by Kathy Dryer. The co-chairs of this committee are Rich McKeown of Leavitt Partners; Christian Clinger at the Institute for Advanced Mediation and a member of the Bar Commission; and Angelina Tsu, who works as legal counsel to Zions Bank. Angelina served on the Bar Commission when she was president of the Young Lawyers Division. This committee, under the direction of its able co-chairs, developed a lesson plan for lawyers and judges to use to teach a one-hour civics course



Rich McKeown, Christian Clinger, and Angelina Tsu are co-chairs of the Utah State Bar Commitee on Civics Education.

in our high schools, hopefully on a semiannual basis. The lesson course is on judicial independence. Pilot programs have been run in several of our high schools and have been well received.

This is a turnkey operation. Those of you who have already volunteered to participate in this exciting project will be provided a lesson plan you can follow and enhance. Participation will not require a lot of preparation. The lesson plan objectives are:

- To support public education by supplementing high school students' classroom learning about civics, specifically learning about the judiciary and the rule of law, with an interactive program focusing on analytical and language art skills.
- To instill a sense of responsibility and participation, and appreciation for the rule of law in high school students, specifically graduating, soon-to-be-voting seniors.
- To enable students to identify the three branches of government and the role of each.
- To help students understand the concepts of "separation of powers," "checks and balances," and the role of the courts within these concepts.
- To better inform students how judges make decisions and who the court system's other players are and what roles they play.
- To explore the concept of judicial review and the role of the third branch in examining the constitutionality of written laws and statutes.

Well over 200 lawyers have volunteered for this opportunity. If you are interested in volunteering, please contact Christy Abad at the Bar office.

Choose Law Program

We have a marvelous Bar. Our lawyers provide a great deal of service, most of which goes unheralded and unnoticed. The Bar Commission expresses its gratitude for all you do. One such project that has gone on quietly is an ABA program that has been instituted by our Young Lawyers Division under the direction of Betsy Haws of Snell and Wilmer is the "Choose Law Program." The purpose of this program is to encourage students in middle school and high school and, in particular, underprivileged students in such schools to "choose law" early in their educational careers. Betsy and her dedicated committee of members have been visiting middle and high schools, and we thank them for their efforts.

Betsy Haws

The presenters in the "Choose Law Program" explain that lawyers are essentially everywhere in our society, performing many different and worthwhile tasks. As examples, the presenters show slides of Gandhi, Steve Young, Barack and Michelle Obama, Mitt Romney, Johnnie Cochran, and Abraham Lincoln, to name a few. The lesson emphasizes how rewarding it is to have a law degree to help yourself as well as your community. The duties and professional responsibilities of lawyers are explained in detail, including advising government officials; defending and prosecuting those charged with crimes; helping children in foster care; and enforcing human rights. The lesson ends by explaining what students need to do to become a lawyer. The following steps are emphasized:

1. Get good grades now.
2. Take the ACT and the SAT.
3. Graduate from college.
4. Take the LSAT.
5. Complete three years of law school and graduate.
6. Pass a Bar exam.

This is a program that gets students excited about the law and encourages them to get serious about their educational opportunities. Our congratulations to the Young Lawyers Division for developing and implementing this excellent program. Any lawyer who would like to participate in this program should contact Betsy Haws.

Books from Barristers

Another new and exciting Bar-sponsored program is "Books from Barristers." It is a program initiated by Elaina Maragakis of Ray, Quinney & Nebeker. The mission of "Books from Barristers" is to provide new books to underserved children in Utah on the topics of law, government, history, and civics. The books are donated by Utah lawyers and other generous individuals and entities. The goal of "Books from Barristers" is to encourage children to read by emphasizing the importance and value of books.

Lawyers interested in participating in this program will have the choice to either donate a specific book from a selected list or make a monetary donation for the purchase of books by the program. The books will range in price from $4-$25. This program is off to a good start. Donations may be sent to the Bar office in the name of "Books from Barristers." For additional information about "Books from Barristers," see the article on page 47.

The Bar Commission expresses its appreciation to the co-chairs and the Committee for Civics Education, the Young Lawyers Division Choose Law Committee, and the chair and committee supporting "Books from Barristers."

The Kids' Court

Kids' Court is an after school program organized and run by law students at the University of Utah S.J. Quinney College of Law. Law student volunteers teach fifth and sixth grade students about civics and our justice system at after-school programs in underserved areas in and around Salt Lake City. The program is made possible through a unique partnership involving the Minority Law Caucus, Pro Bono Initiative, and the Office of the Deans – all within the S.J. Quinney College of Law. Also partnering in this important effort are the Offices of Equity and Diversity and Student Recruitment and the College of Education at the University of Utah as well as the U.S. District Court for the District of Utah, the Utah Minority Bar Association, Holy Cross Ministries, Rose Park Elementary School, and Jackson Elementary School.

Students at the S.J. Quinney College of Law also volunteer to assist in coaching and judging high school students in annual Mock Trials.

A great deal of effort has gone into developing these programs, and this will add to what our law-related education program already accomplishes. There are, of course, other actions we can take to improve education on the fundamentals of our democracy. We can help elect people who support civics education and recognize its importance to the respective governing Boards. We can encourage teachers and administrators on an individual basis to take advantage of the Bar programs on civics education. We can help improve in our communities the "institutional commitment" to civics education. We can volunteer to participate in these programs and teach the importance of our three independent branches of government and the critical importance of an independent judiciary to middle school and high school students.

Thank you for recognizing and supporting this critical need.

1. Campaign for the Civic Mission of Schools, Guardian of Democracy: The Civic Mission of Schools, 4 (Jonathan Gould ed., 2011)
2. *See id.*
3. *See id.*
4. *See id.* at 14.
5. *See id.*
6. *See* Donovan R. Walling, *The Return of Civic Education*, 89 Phi Delta Kappan 285, 286 (2007).
7. *See id.*
8. *See, e.g.*, U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Summary at 2, U.N. Doc. E/CN.4/2006/6/Add.6 (March 10, 2006); U.N. Econ. & Soc. Council, Comm'n on Human Rights, Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, Summary at 2-3, U.N. Doc. E/CN.4/2005/6/Add.4 (Dec. 29, 2004).
9. *See also, e.g.,* Sharon LaFraniere, *Alarmed by Independent Candidates, Chinese Authorities Crack Down*, N.Y. Times, Dec. 4, 2011, at A4.
10. Lincoln, Speeches and Writings: 1832-1858, at 32-33 (Don Fehrenbacher ed., Library of America 1989).
11. Letter from Thomas Jefferson to Charles Yancey (1816).
12. Walling, *supra*, at 286.
13. *See id.*

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"Check Yes" to Lend a "Learned Hand" Utah's Pro Bono Commission

by Judge Michele M. Christiansen and Judge Royal I. Hansen

Utah State Bar President Rod Snow has invited us to deliver this month's "Commission Message" to update you regarding the Bar's newly initiated Utah State Bar Pro Bono Commission. We are thrilled to co-chair the Pro Bono Commission, a state-wide body tasked with improving voluntary *pro bono* legal services throughout the state. After months of preparation, the Pro Bono Commission held its inaugural meeting in April to launch the *pro bono* program and to begin recruiting volunteer lawyers from private law firms, government offices, and in-house counsel settings to provide vital legal services to the needy. We are especially pleased to be joined by Utah Supreme Court Justice Christine Durham and more than a dozen other dedicated volunteers who have agreed to serve as commissioners on the Pro Bono Commission. *See* sidebar listing Pro Bono Commission members.

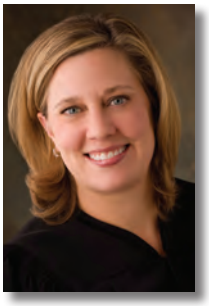
> *"On your 2012 License Renewal Form, you will be given the opportunity to check 'Yes'…[to] signify your willingness to volunteer to provide pro bono legal services on a case-by-case basis."*

In the coming months, we will provide you with information about this new and important effort, and we hope that you will seriously consider becoming involved. As Judge Learned Hand once said, "[i]f we are to keep our democracy, there must be one commandment: Thou shalt not ration justice." In keeping with this spirit, the Pro Bono Commission's motto is "Lend a 'Learned Hand'." This slogan, we believe, captures a spirit that we hope you will embrace by volunteering to provide legal services to our most needy Utahns.

In addition to the hundreds of hours the Utah State Bar has invested to develop and initiate this important program, we are pleased to announce that the Utah Judicial Council passed a resolution endorsing the Pro Bono Commission. Specifically, the Judicial Council's resolution states:

NOW THEREFORE BE IT RESOLVED, pursuant to Rule 2-201 of the Utah Rules of Judicial Administration, that the Utah Judicial Council endorses the Utah State Bar's creation of the Pro Bono Commission and urges law firms, corporate law departments, and governmental law offices to adopt *pro bono* policies and procedures to engage all lawyers in *pro bono* service that will increase access to equal justice; and

JUDGE MICHELE M. CHRISTIANSEN, of the Utah Court of Appeals, is co-chair of the Utah State Bar Pro Bono Commission.



JUDGE ROYAL I. HANSEN is the presiding judge of the Third District Court and co-chair of the Utah State Bar Pro Bono Commission.

> BE IT FURTHER RESOLVED that, subject to the Utah Code of Judicial Conduct, we support the participation of judges in Utah Pro Bono Commission and District Pro Bono Committees activities to promote the wider availability of *pro bono* services.

The Pro Bono Commission will next focus on encouraging members of the Bar to volunteer for our program. We recognize that many of you are already committed to providing *pro bono* legal services in our community, and we sincerely thank you. In fact, the Bar's recent survey, completed by over half of Utah State Bar members, revealed to us that more than 70% of those responding are already engaged in *pro bono* work on a weekly basis. The Pro Bono Commission's program is designed to reach out to those of you already providing *pro bono* legal services, and to those of you newly considering volunteering your time to provide legal representation to those in need.

On your 2012 License Renewal Form, you will be given the opportunity to check "Yes." Checking "Yes" will signify your willingness to volunteer to provide *pro bono* legal services on a case-by-case basis. The Pro Bono Commission members may be visiting you and your law firms to encourage you to check "Yes" and to provide *pro bono* legal services in Utah. Please look for electronic announcements and other promotional materials regarding your opportunity to check "Yes" and lend a "Learned Hand" in support of the Pro Bono Commission. We hope that each and every one of you, when you complete your License Renewal Form will check "Yes" for the Pro Bono Commission.

Those of you who check "Yes" will receive a brief, easy-to-complete electronic survey designed to determine your areas of interest, normal practice areas, and location. The Pro Bono Commission will then use this information to "match" volunteer lawyers with clients in need of *pro bono* legal services. The task of "matching" volunteer lawyers with *pro bono* clients will be managed by Pro Bono Committees in each of Utah's eight judicial districts. The model of "district-based" *pro bono* services is one adopted by many states throughout the West and across the nation. District-based Pro Bono Committees are better suited to efficiently distribute *pro bono* services at a local level in response to individual community needs. In addition, District Pro Bono Committees will better be able to develop programs for improving local *pro bono* programs, such as the popular Tuesday Night Bar programs and other legal clinics for low income Utahns.

Importantly, this is a volunteer program. The Pro Bono Commission is designed to give volunteer lawyers the opportunity to select from a number of cases to choose matters that match lawyer practice areas and skill sets. In those instances where, due to the vagaries of the practice of law, you do not have time to take a case, you will be free to decline it. Our Utah Rules of Professional Conduct contain aspirational goals that each Utah State Bar member provide fifty hours of *pro bono* services annually. *See* Utah R. Prof'l Conduct 6.1. But the Pro Bono Commission is a volunteer program, and the Commission is committed to respecting the busy schedules that govern the way so many of you manage your practices.

The Pro Bono Commission will be providing free CLE and training for program participants who wish to develop skills in new areas. For instance, commercial litigators can attend free CLE to develop the skills to handle domestic cases which would allow them to assist *pro bono* clients in need of basic family law legal services. In-house counsel can learn how to assist low income clients with small consumer bankruptcy matters. Transactional lawyers can attend a CLE for training on how to obtain protective orders for domestic violence victims. Retired lawyers anxious to give back to the community can brush up their skills and

prepare themselves to volunteer in the Pro Bono Commission's program. In short, the Pro Bono Commission's program takes a holistic approach to providing *pro bono* legal services, connecting needy clients with lawyers who have the skills to provide assistance where it is needed most.

The Pro Bono Commission not only needs volunteer lawyers to provide legal assistance to the needy, but also to help lead the Pro Bono Committees in Utah's eight judicial districts. Each district committee will be staffed by two co-chairs and an additional eight to ten members. The District Committees' responsibilities include developing local *pro bono* programs and ensuring that the matching of volunteer lawyers with *pro bono* clients, a process that will be largely automated and directed by the Bar's Pro Bono Coordinator, is done as effectively as possible. The Pro Bono Commission has already solicited/requested that you assist in this important aspect of the program, and we ask you to seriously consider volunteering your services on a District Pro Bono Committee.

In 2006, "and Justice for all" conducted an exhaustive study of unmet legal needs throughout the state. The conclusions reached

by the study were startling: While Utah's dedicated non-profit agencies, like Utah Legal Services, Legal Aid Society of Salt Lake, and the Disability Law Center provide exceptional service to the needy, hundreds of Utahns go without legal representation and, as a result, are denied access to justice. Accordingly, we need your help in our attempts to remedy this problem.

Only clients who meet eligibility guidelines will be permitted to participate in the program. *Pro bono* clients will be screened by Bar staff and non-profit legal service providers like Utah Legal Services. Those clients who meet the criteria for *pro bono* legal services will provide information to intake personnel who will create case summaries for each potential *pro bono* case. District Pro Bono Committees will distribute case summaries to volunteer lawyers so that they can select appropriate cases and perform necessary conflicts checks.

Volunteer lawyers will not walk the *pro bono* road alone. The Utah State Bar recently hired an attorney, Michelle V. Harvey, to serve as the Bar's Pro Bono Coordinator. Ms. Harvey, an attorney and dedicated champion of *pro bono* legal services, left her private practice to take on this unique challenge and help launch Utah's Pro Bono Commission. Her responsibilities include ensuring that volunteer lawyers enjoy the support they need in their *pro bono* cases. Ms. Harvey will also be responsible for maintaining a database of *pro bono* cases, developing case summaries, providing support to the Pro Bono Commission and the District Pro Bono Committees, and serving as the administrative support structure for the entire program.

We firmly believe that your willingness to volunteer your time and provide *pro bono* legal services will not only help fill the ever-widening gap of unmet legal needs, but will also enrich your life and your practice. Lawyers have a unique skill set that few other professionals possess. Those of you who are willing to volunteer your time can change people's lives. Participating in a matter that may seem small in scope and take an hour or two of your time can hugely benefit those in need and pay huge dividends to you by improving your level of satisfaction in your practice.

For these reasons we ask you to seize the opportunity to get involved in the Pro Bono Commission. Please check "Yes" on this year's bar License Renewal Form to lend a "Learned Hand." We look forward to working with you and thank you for your dedicated service.

UTAH STATE BAR Pro Bono Commission

Lend a "Learned Hand"

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Michelle V. Harvey – Utah State Bar Staff Liaison

"Perhaps this will refresh your memory." Ten Ways to Reduce Judicial Stress

by Judge Steven Wallace

For many years I kept before me on the bench, out of the sight of litigants, my favorite James Thurber cartoon. It is a courtroom scene, the judge on the bench, a witness on the stand, and the cross-examining lawyer, sternly pointing to a kangaroo he has in tow and facing the witness, saying: "Perhaps *this* will refresh your memory."

In the cartoon, the judge has a "Now what?" expression on his face and you just know that he's churning inside, wondering when the chief judge is going to transfer him back to probate. Of course, the whole thing is nonsensical and trying to make sense of it is part of the amusement Thurber planned. But for a real life judge, making sense of what the real lawyers are doing in a very real courtroom, at times, may stretch a jurist's very finite anti-stress capacity.

A judge needs a way to cope with everyday stressors such as lawyers with kangaroos and other adversarial shenanigans. In his or her battle against the demands of a very important, powerful job, many of the same stress-reduction techniques can be utilized that are available to other high octane professionals. Some of what follows are generally recognized stress combatants. Some are more judicially oriented than not. But all of the ten methods included here have one thing in common: the opposite of each causes stress.

Exercise Regularly

Perhaps the most important anti-stress remedy available to a judge, as with anyone else, is regular (if not daily) exercise. Visit your physician, find out what sort of fitness program is recommended for you, then – as they say – just do it.

What's important here is to find a way to make this a part of your routine, like brushing your teeth. The hardest part is dealing with the common rationalizations not to do it: I'm too tired, it's too late, it's too dark, it's too cold (hot), I don't have time, or whatever. The list can be endless. But whether it's a thirty minute walk, a jog around the park, or a treadmill in chambers, the stress-relieving benefits of aerobic exercise are well-documented.

Because I'm a morning person, I typically exercise as the day begins. Years ago, I jogged during lunch time. I have also used pre-dinner runs to work the day's stressors off, shedding courtroom frustrations and docket distractions like so many noxious microorganisms.

You need to apply the single-minded dedication that you brought to bear on getting to where you are professionally and make regular exercise something you can't live without.

Get Sufficient Sleep

Everyone needs their rest, and hard-working professionals in demanding, mentally-taxing jobs need it most of all. It shouldn't take too much effort to figure out what your minimum daily requirement is. Most of us need at least seven or eight hours of sleep per day. Perhaps there are some present-day Churchills out there who can get by with less. In any event, as with exercise, the physical and psychic benefits of sleep are not open to question. In fact, we have learned that the former promotes the latter. Just make sure that, if you exercise at the end of the day, you leave at least three hours before you go to bed.

A well-rested judge is a patient, understanding judge. On the other hand, a tired or strung-out judge is not someone any

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lawyer or litigant ought to have to suffer. Getting a good night's sleep will enhance your ability to deal with stress and add to your life span as a direct result.

Control Your Docket

This is one of those things that's easier said than done and, certainly, the subject for a whole other article. *See* Eight Rules for Judicial Time Management, Judicature Vol 91, No. 2, Sept-Oct 2007, by the author. Simply put, a judge needs to employ time management skills in controlling his or her calendar or risk being buried by it. Now, *that's* stress.

Just as "it's too cold" is a poor rationalization for not exercising, "I have too many cases" is a poor rationalization for losing control of one's docket. If you start on time, work a full day, don't feel compelled to quit at five, and keep the pressure on the lawyers to close cases, you'll have made great gains toward not letting the number of pending cases bog you down.

If you set aside time every day to work on the stacks of files on your desk, if you don't talk too much while on the bench, if you don't let the lawyers run the show, and if you minimize continuances, you'll be amazed how many cases you can close every week.

Once you have control of your docket, you have control over one of the biggest stressors in a judge's life. A judge, after all, is *supposed* to be in control. But it takes application and courage and a common sense recognition that continuance requests are not your friend. It's a fair bet that the judge who most readily grants continuances requests that lack good cause has the highest case count in the courthouse.

Actually, I have always found it amazing how readily a denial of a requested delay results in a case resolution. Perhaps that is a function of how infrequently continuance requests are grounded in real necessity. Perhaps it reflects back-against-the-wall case negotiation. In any event, the judge's docket gets managed and – as a result – the judge's stress level remains under control as well.

Decide, Then Move On

Incredibly, there are judges who shy away from making decisions. Just like the claustrophobic elevator operator, perhaps someone has been miscast. It has always both amused and annoyed me when I've seen fellow judges who seem to avoid looking across the bench at lawyers and litigants and deciding a case eyeball-to-eyeball. "I'll take it under advisement," the judge says, intending to mail them a decision.

Perhaps this is one of the reasons that experienced trial lawyers often transition so well into judgeships. They are used to the pressure of the courtroom and the constant, spur-of-the-moment decision-making process.

There's no reason why a trial level judge should not be able to make decisions in the courtroom, look the parties in the eye, and tell them who won and who lost. "Motion to suppress is granted." Unless he or she does not *know* whether it should be granted or denied, but that is a whole other issue.

The great baseball pitcher Satchel Paige once said: "Don't look back, something might be gaining on you." That philosophy has a valid application to judging and the decision-making process. Decide, then move on. Your stress level will benefit from it.

If In Doubt, Don't

The other side of the coin is another truism: a judge should not feel compelled to decide if he or she has some substantive doubt regarding what the decision ought to be. There are times when one needs to think about it, or do a little research on one's own (not that the lawyers would ever fail to provide the

court with applicable, up-to-date law), or perhaps even take some additional evidence or testimony.

Stress is a natural result from feeling forced to make a decision without an adequate comfort level. People's lives often weigh in the balance, after all. If a judge needs to take some additional time before gaining a reasonable foothold on the proper path to take, that extra effort is justified for everyone's sake, including the stress level of the judge.

Sometimes, once the evidence and the argument have been presented and the lawyers and litigants look toward the judge, awaiting the judgment, one feels pressured to satisfy that expectation. And I've already proffered Rule 4, which urges decisions to be made, but that should not push a judge into making a ruling about which he or she is not fully certain. The point is, stress-wise, harboring doubt after a decision is made is not healthy for a judge.

Keep Current in the Law

To avoid the kind of tentativeness that can intrude on the decision-making process, a judge must keep current in the law. While no one can be expected to know it all, it is a given that the lawyers cannot always be depended upon to assist the court in steering without mishap through the myriad of issues that present themselves in a busy courtroom. Without a firm base in current law regarding the most oft-occurring common substantive, procedural and evidentiary matters, a judge's decision-making comfort level can go down and his or her stress level can go up.

Even when a judge keeps current, of course, the vast quantity of material does not lend itself to immediate recall on the spur of the moment when an objection is raised or a procedure questioned. One way to maintain a tip-of-the-finger reference is a courtroom notebook, with tabbed dividers denoting subjects to which one can flip when needing to check on a recent case or a general rule. This notebook can be continually updated as one keeps current, adding whatever points of law one suspects may be encountered in the courtroom.

If a judge is not prepared to deal with an important legal issue when it presents itself, not only is the judge stressed, so are the lawyers. The uncertainty, plus the extra time taken up dealing with it, add to the burdens of the day and increase everyone's blood pressure. When a judge keeps current in the law, his or her ability to rule on matters when they occur is enhanced and, like preparedness in any endeavor, it reduces stress.

Demand Competence From Lawyers

As a judge, my positive expectations flash on when I see a competent lawyer enter the courtroom. A lawyer who knows what he or she is doing and who is prepared makes a judge's job that much easier. On the other hand, a sloppy, ill-prepared attorney can lengthen one's day as well as heighten one's stress level like a thermometer on a hotplate.

It is my observation that lawyers tend to prepare more thoroughly for those judges they know to be the most demanding. No one likes to lose, no one wants to look bad, and no lawyer wants to see that "what's wrong?" look in his or her client's eyes. Judges have every right to demand competence from lawyers in their courtroom. After all, every attorney has the ethical obligation to provide clients with competent representation.

It should be noted that it is not necessary to be dictatorial in one's demand for competence. Margaret Thatcher once observed that being a leader was like being a lady; if you have to tell folks you are, you aren't. Judges are, after all, in a unique position to communicate to counsel in ways both subtle and manifest the correct way to practice law. We do it out of our responsibility to ensure that justice is achieved. We should do it too, I suggest, for our own sakes, since competence in the courtroom reduces stress.

Avoid Guilt

It has previously been noted that a judge ought to decide, then move on. This is the psychological corollary of that, as guilt is a product of uncertainty, a first-class stressor. In this sense, guilt is a nagging, bumbling doubt, perched all too precariously upon one's robed shoulder, whispering "Why did you send that young man to jail?"

If you're not sure about a decision, you are allowed to sit on it until you reach a comfort level sufficient to reach finalization. That point was made above as well. But what a judge needs to avoid is the door ajar, the second-guessing associated with the guilt of wondering whether one's decision was right or wrong. Some appellate judge above you in the food chain will tell you if you were wrong. But when what you do for a living is make decisions, you have to make them without suffering the lingering pangs of questioning whether you did the right thing.

As with anything else that deals with the decision-making process, the link to preparedness is apparent. The more prepared one is, the less one doubts the validity of one's judgment. Guilt, wrote Marge Kennedy, is sometimes a friendly internal voice reminding

you that you're messing up. You won't be "messing up" if you are well grounded with respect to the procedural and substantive guideposts that should be at the foundation of every decision that you make. The added benefit will be that you will avoid the natural stress that preparedness overcomes.

Have Someone to Whom You Can Confide Your Experience

A judge sees a lot of unhappiness. Most of the people who find their way to the courtroom do not want to be there. In a criminal courtroom, it is nothing new to see defendants who enter through the public entrance subsequently led out through a side door to a holding cell. Notwithstanding all this hardball justice, the judge who is the focal point of the whole process must remain stoic and even-tempered, concentrating on the multiple tasks at hand. There will be plenty of wringing hands and sobbing relatives to reflect upon later, alone with one's thoughts in chambers.

If you keep this inside you it will gnaw away at your gut beyond the reach of even the strongest antacid. Any individual whose profession involves regular contact with human beings *in extremis* is at risk of major league stress. One recognized method of minimizing the effect of this kind of pressure is to get it off your chest, to be able to open up and talk about it with someone.

A judge needs a confidant, a close personal acquaintance with whom he or she can share some of the horror stories of the day. It may be a spouse, a colleague, or a close friend who understands the need for confidentiality. It will allow you an opportunity to vent and thus release some of the pressures of the day.

When one is bound to follow the law and base one's judgment upon intellectual imperative as opposed to emotion or intuition, it often leaves little room for the kind of feel-good deviations from the norm that sometimes can lessen the pressure of a difficult decision. Have a confidant with whom you can unburden yourself of these sometimes gut-wrenching professional decisions. Your stress level will benefit from the release.

Never Lose Your Sense of Humor

Dr. Dean Shibata, a neurological radiologist at the University of Rochester School of Medicine, once announced discovery of the location of our sense of humor. "It's the right frontal lobe just above the right eye," he said. Perhaps he won't mind if I laugh at the prospect of this stunning feat of detection, which he accomplished via MRI studies. He also noted that "having a sense of humor is a key part of our personalities and it can play a powerful role in balancing negative emotions."

Judges see more than their share of negative emotions; their decisions are ofttimes, in fact, the source. Much like the never popular dentist, a judge needs a tool with which to combat these unconstructive sentiments. Maintaining one's sense of humor is that tool.

"If we couldn't laugh," sings Jimmy Buffett in "Changes in Latitudes, Changes in Attitudes," "we would all go insane." Of course, this does not mean that laughter in the courtroom is appropriate. What it *does* mean, however, is that a little private levity after the fact might not be a bad idea in order to lessen the stress caused by the weight of the pressure resulting from hours on the bench affecting the lives of others.

Sometimes laughter, as the other side of pain, acts as a natural balm. Like confiding in a friend, it provides release, while not incidentally reminding us of our humanity.

So we come full circle, to Thurber's kangaroo in the courtroom. Nothing contained in the points made herein is new or innovative. It is meant simply to address a professional ailment from which judges are not immune, and suggest some solutions. "Perhaps *this* will refresh your memory."

Utah Originalism

by Troy L. Booher

Introduction

The Utah Supreme Court has had a tenuous relationship with originalism. Originalism is a collection of views unified by their treatment of events at the time constitutional text was drafted and ratified as determinative of how that text later should be interpreted. Although originalism is often associated with political Conservatism, it is worth keeping in mind that originalism produces decisions in line with other political viewpoints. Consider, for example, *State v. Hernandez*, 2011 UT 70, 268 P.3d 822, a recent case in which the Utah Supreme Court, in light of the history and original understanding of Article I, Section 13 of the Utah Constitution, held that a preliminary hearing is required not just in cases involving felonies but also in cases involving Class A misdemeanors. *See id*. 2011 UT 70, ¶ 29. While originalists look to the views of the founding generation, originalism does not require that those views track any particular political ideology.

The Utah Supreme Court has not settled on what information it will consider when interpreting the Utah Constitution. For instance, in 1993, the court described the relevant considerations as "historical and textual evidence, sister state law, and policy argument in the form of economic and sociological materials." *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 921 n.6 (Utah 1993). But in 2006, the court expressly removed "policy argument" from that list of relevant considerations and stated instead that it will consider "text, historical evidence of the state of the law when it was drafted, and Utah's particular traditions at the time of drafting." *Am. Bush v. City of S. Salt Lake*, 2006 UT 40, ¶ 12 n.3, 140 P.3d 1235. Then in 2007, the court declared that historical arguments "do not represent a *sine qua non* in constitutional analysis." *State v. Tiedeman*, 2007 UT 49, ¶ 37, 162 P.3d 1106. It again stated that relevant considerations include "historical and textual evidence, sister state law, and policy argument in the form of economic and sociological materials." *Id*.

The primary dispute emerging from those cases is not whether text and historical evidence are relevant to constitutional interpretation, but whether policy arguments also are relevant. *See, e.g., State v. Walker*, 2011 UT 53, ¶ 32 n.9, 267 P.3d 210 (Lee, J., concurring); *Am. Bush,* 2006 UT 40, ¶ 73 n.2 (Durrant, J., concurring). Viewed through the lens of originalism, that dispute can be understood in at least two ways: (i) whether originalism is the method by which the Utah Constitution should be interpreted or (ii) whether originalism authorizes courts to consider policy arguments in interpreting the Utah Constitution.

In addressing the relationship between originalism and policy, justices of the Utah Supreme Court in opinions and members of the Utah State Bar in various articles published in this *Journal* have assumed that originalism dictates the same analysis when applied to the Utah Constitution as when applied to the United States Constitution.[1] That assumption is unwarranted. Utah originalism is different because Utah history and the Utah Constitution are different. And those differences make it far from obvious that policy arguments are irrelevant when interpreting the Utah Constitution, even for originalists.

Originalism and the United States Constitution

Nearly all discussions of originalism concern how to interpret the United States Constitution. Justice Scalia has framed national debates concerning originalism in a particularly useful way, *i.e.*, as debates over whether the method of common law judging – by which judges "make" and improve the law in light of policy arguments – should be the method for interpreting constitutions and statutes.[2] Justice Scalia argues that it is undemocratic and

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illegitimate for judges to employ the common law method when interpreting legal texts such as constitutions.

The relationship between democracy and constitutionalism is too complex to summarize here. It is possible, however, to mention some of the most common arguments advanced in support of originalism that involve appeals to democratic principles.

1. Judges are not authorized to employ the common law method when interpreting constitutional text because judges are not politically accountable. Under Article III, Section 1 of the United States Constitution, federal judges have life tenure and their compensation may not be diminished. As the famous anti-federalist Brutus complained, Article III made judges "independent of the people, of the legislature, and of every power under heaven." Brutus Essay XV (Mar. 20, 1788). Because judges are not politically accountable, their decisions have democratic legitimacy only to the extent judges are merely interpreting laws enacted through appropriate democratic processes, such as ratified constitutional provisions. For that reason, judges should avoid policymaking and instead act, as Justice Roberts put it during his confirmation hearing, as umpires calling balls and strikes.[3] Originalism ensures that judges frustrate the views of current majorities only by exercising authority derived from those past supermajorities who ratified the constitutional provision under which the state action is unconstitutional.

2. Judges are not authorized to employ the common law method when interpreting constitutional text because, at the founding, it was understood that judges would enforce statutes as long as those statutes were arguably constitutional. To the extent broad constitutional language was vague or ambiguous (e.g., "freedom of speech" or "due process"), the political branches were authorized to elaborate their meaning. In 1789, not only was judicial review controversial, but, to the extent it was accepted, it was confined to declaring statutes unconstitutional only when those statutes clearly violated the Constitution. As Professor James Thayer put it a century later in 1893, judicial review "was denied by several members of the Federal convention, and was referred to as unsettled by various judges in the last two decades of the last century."[4] And when judicial review became widely accepted, the judiciary could declare statutes unconstitutional only when "the violation of the constitution is so manifest as to leave no room for reasonable doubt." *Commonwealth ex rel. O'Hara v. Smith*, 4 Binn. 117, 123 (Pa. 1811). Originalism, therefore, requires judges to defer to political branch interpretations of constitutional text as long as those interpretations fall within a range of reasonable meanings of that text. The political branches, not the judiciary, are authorized to elaborate the meaning of vague or ambiguous constitutional text. As Brutus would have put it, because the political branches are politically accountable, those branches elaborate meaning "at their peril." Brutus Essay XV.

3. Judges are not authorized to employ the common law method when interpreting constitutional text because, unlike unpopular

> common law and unpopular interpretations of statutes, both of which can be altered by statute, unpopular interpretations of the constitution are extremely difficult to alter through constitutional amendment. Arguably, legislative bodies tacitly approve of common law by failing to enact legislation to alter it and tacitly approve of judicial interpretations of statutes by failing to amend those statutes. Depending upon the nature of the legislative process, such claims of tacit consent have some purchase. But given how difficult it is to amend the United States Constitution, it is pure fiction to consider citizens as tacitly consenting to a judicial interpretation of the Constitution by failing to amend the Constitution. Because judicial interpretations of the Constitution are nearly impossible to correct through amendment, judges must interpret the Constitution in accordance with its original meaning instead of employing a common law method. Otherwise, the common law method provides a license to unelected judges to change the meaning of constitutional provisions in a way no majority, let alone a supermajority, has authorized.

The combination of those familiar arguments makes a fairly powerful point concerning the relationship between democracy and judicial interpretations of the United States Constitution. Were federal judges authorized to employ common law methods when interpreting constitutional text, five citizens (justices) with no political accountability would have authority to change the Constitution to mean something that no other citizens had authorized and that a majority of citizen realistically could not alter through constitutional amendment.

There are several responses to those arguments, none of which can be explored in any depth here. Alexander Hamilton in Federalist 78 suggested that a political check would be the executive branch's refusal to enforce the Court's decisions. As Hamilton put it, the judiciary is the least dangerous branch because it has "no influence over either the sword or the purse." The Federalist No. 78 (Alexander Hamilton). Instead, the executive branch has the sword, which it can decline to use to enforce the Court's decisions "at its peril."

Another response is that the Constitution, and especially the Bill of Rights, was designed to check future majorities as much as to enable future majorities to govern themselves, and, therefore, the anti-democratic implications should be embraced, not lamented. Arguably, even before the Bill of Rights it was understood that members of the federal judiciary would serve as a natural aristocracy, something James Madison recognized in Federalist 49. *See* The Federalist No. 49 (James Madison). In that essay, Madison articulates a number of arguments "against a frequent reference of constitutional questions to the decision of the whole society." *Id*. The "permanency" of judicial appointments would allow judges to thwart the "passions" of current majorities and provide a more stable government based upon "reason." *Id*. We created a republic with checks and balances, not a direct democracy, for that very reason.

I mention such responses only to acknowledge them, not to suggest they are decisive. And there are a number of other responses I will not mention because my point here is different. My point is that, even assuming the originalist arguments are compelling with respect to interpretation of the United States Constitution, those arguments cannot be transplanted mechanically into discussions of how to interpret the Utah Constitution. For originalists, any discussion of Utah originalism must rely upon the history surrounding the Utah Constitution.

Originalism and the Utah Constitution

To be clear, this article does not demonstrate that Utah judges are authorized to employ a common law method and consider policy arguments when interpreting the Utah Constitution. That requires much more discussion. Instead, this article suggests that it is a mistake to conclude that Utah judges are not authorized to employ the common law method when interpreting the Utah Constitution merely because federal judges are not authorized to employ the common law method when interpreting the United States Constitution.

Consider how the originalist arguments described above differ when the discussion changes to the Utah Supreme Court's authority to interpret the Utah Constitution, ratified in 1896.

1. The framers of the Utah Constitution could not have considered it inappropriate for judges to elaborate constitutional text on the ground that Utah judges were not politically accountable. In 1896, the Justices of the Utah Supreme Court were "elected by the electors of the State at large." Utah Const. art. VIII, § 2 (1896). Today, Utah judges remain subject to retention elections. While a retention election is not a political check equivalent to an election for a legislative seat, it is unclear why that would make much difference, as it is the original understanding of the role of the judiciary that matters in determining the interpretative method contemplated by the framers. In 1896, Utah judges – unlike federal judges – were politically accountable, so Utah originalism should take that into account.

2. By 1896, judicial review was widely accepted with respect to

the United States Constitution, as well as the constitutions of Utah's sister states. And it was unsettled whether judges should confine themselves to declaring statutes unconstitutional only when a statute's unconstitutionality was "so manifest as to leave no room for reasonable doubt." In fact, Professor Thayer's 1893 article mentioned above was written to point out how the judiciary had strayed from its original role with regard to constitutional interpretation. Professor Thayer lamented the fact that the practice of judges' declaring statutes unconstitutional "has already been carried much too far in some of our States."[5] And unlike the United States Supreme Court, which declared only two statutes unconstitutional in the fifty-eight years from 1789 to 1857, *see Marbury v. Madison*, 5 U.S. 137 (1803); *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the Utah Supreme Court declared as many statutes unconstitutional within its first two years, *see State v. Armstrong*, 17 Utah 166, 53 P. 981, 983 (1898) (declaring a statute unconstitutional but cautioning that "the question whether an enactment of the legislature is void because of its repugnancy to the constitution is always one of much delicacy, and in a doubtful case should seldom, if ever, be decided in the affirmative"); *In re Handley's Estate*, 15 Utah 212, 49 P. 829 (1897) (declaring unconstitutional a statute that declared all judgments entered by courts of the territory involving the rights of polygamous children to be non-final). Just prior to statehood in 1889, the Supreme Court of the Territory of Utah declared unconstitutional a statute imposing strict liability on railroad companies for injuries to livestock. *See Jensen v. Union Pac. R.R*, 6 Utah 253, 21 P. 994, 995-96 (1889). The understood scope of judicial review in Utah in 1896 may not have been the understanding in the United States in 1789.

3. Amending the Utah Constitution is not as onerous as amending the United States Constitution. While it remains difficult – and in my view should remain difficult – to amend the Utah Constitution, the danger that an unpopular interpretation of the Utah Constitution will be practically impossible to correct through the political process pales in comparison to that danger with regard to interpretations of the United States Constitution.

Those considerations reveal that the Utah Supreme Court's struggle concerning whether to consider policy arguments when interpreting the Utah Constitution perhaps should not be characterized as whether the court will adopt originalism as its method for interpreting the Utah Constitution. Instead, the issue should be characterized as whether Utah originalism sanctions judges to consider policy arguments. If in 1896 it was understood that the judiciary had authority to elaborate the broad language, or a particular vague or ambiguous provision, of the Utah Constitution, then it may be that Utah originalism authorizes – perhaps even commands – Utah judges to consider policy arguments when interpreting the Utah Constitution. For now, we can conclude that such questions cannot be answered simply by appeal to national discussions of originalism. We need Utah originalism for that.

1. *See* Paul Wake, A Precious Birthright or Federal Porridge: Which Should Utah Lawyers Choose?, Utah B. J., Jan.–Feb. 2007. *See, e.g.*, Boyd Kimball Dyer, A Conservative View of the Originalist View of the Bill of Rights, Utah B. J., Jan.–Feb. 2006; David R. McKinney, The Tyranny of the Courts, Utah B. J., Nov.–Dec. 2005; John J. Flynn, Making Law and Finding Facts" – Unavoidable Duties of an Independent Judiciary, Utah B. J., July–Aug. 2005.
2. *See* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law, 9 (Princeton University Press 1997).
3. *See* I Come Before the Committee With No Agenda. I Have No Platform, N.Y. Times, Sept. 13, 2005, at A28.
4. James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 132 (1893); *see also* Note, Judicial Check on Unconstitutional Legislation, 9 Harv. L. Rev. 277, 277 (1895) ("The exercise by the courts of this country of the power to declare acts of a co-ordinate legislature void because of unconstitutionality has become so much of a commonplace, that the peculiar circumstances which led to the establishment of the power are likely to be forgotten.").
5. Thayer, *supra* note 4 at 156.

Helping Clients Talk

by Keith A. Call

Suppose you and your client believe an obstreperous opposing counsel is standing in the way of achieving a fair settlement. Your client tells you he wants to meet with the opposing party in a private client-to-client meeting, and he wants your guidance. What kind of advice can you ethically provide?

Rule 4.2(a) states, "[A] lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.…" Utah R. Prof'l Conduct 4.2(a). Rule 8.4(a) deems it professional misconduct to attempt to violate the rules through the acts of another. *See id.* R. 8.4(a). On their face, these rules appear to be fairly restrictive on your ability to proceed.

> *"[D]on't coach your client to obtain disclosures of confidential information…to try to get admissions hurtful to your adversary. And don't try to subvert the opposing party's attorney-client relationship."*

Comment [6] to Rule 4.2 provides a little guidance. "Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." *Id.* R. 4.2, cmt. 6. Beyond these statements in the rules and comments, there is little Utah authority on the issue. And cases and opinions from other states express a wide disparity of views on how far a lawyer may go in orchestrating client-to-client communications.

May a lawyer originate the idea and encourage the client to speak directly to a represented adverse party?

Even on this simple question, ethics committees around the country are split. Some decisions and opinions appear to conclude that it is unethical for a lawyer to encourage a client to speak directly to an adverse party. One opinion even seems to conclude that the lawyer must *discourage* the client from direct communications. *See, e.g.*, Massachusetts Bar Op. 82-8 (1982) (stating that a lawyer should discourage the client from discussing settlement with the opposing party without the opposing lawyer's consent). Other opinions conclude that it is okay to invite or encourage the client to speak directly with the other party. *See, e.g.*, Oregon Ethics Op. 2005-147 (2005).

How much direction may the lawyer provide?

Some cases and opinions would preclude the lawyer from directing the content of client-to-client communications, and especially from "scripting" the conversation. Words, specific questions, or specific thoughts originating from the lawyer are often prohibited. And some opinions hold that the lawyer may not draft documents for the client to sign or deliver. *See, e.g.*, California Comm. on Prof'l Responsibility & Conduct, Formal Ethics Op. 1993-131 (1993); Massachusetts Bar Op. 11-03 (2011).

A recent opinion from the American Bar Association would liberalize these standards. The opinion reasons that an overly stringent standard would "unduly inhibit permissible and proper advice to the client regarding the content of the communication, greatly restricting the assistance the lawyer may

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appropriately give to a client." ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Opinion 11-461 (2011).

Drawing liberally from the *Restatement (Third) of the Law Governing Lawyers*, the new ABA opinion would allow lawyers to give substantial guidance regarding a client's substantive communications with the adverse party. *See id*.; Restatement (Third) of the Law Governing Lawyers § 99 cmt (k) (2000). For example, the lawyer could provide advice on the subjects to be addressed, issues to be raised, and strategies to be used. *See* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-461. A lawyer may also review, redraft, and approve a letter or set of talking points prepared by the client. *See id*. At the client's request and with certain conditions, the lawyer may even draft the basic terms of a proposed settlement agreement. *See id*.

Be conservative and play fair.

The bottom line for Utah lawyers is that the applicable standards remain unsettled. Utah's Rule 4.2 differs substantially from the ABA model rule, and it is unclear whether our Office of Professional Conduct or our courts would follow the ABA opinion or some other view. Utah lawyers should therefore play it conservatively.

Whether directly applicable in Utah or not, the recent ABA opinion teaches an important principle. In advising a client about direct party communications, every lawyer should use common playground fairness. Avoid giving any advice that would subvert the purposes of Rule 4.2, which include lawyer overreaching, uncounseled disclosure of information by the opposing party, and lawyer interference with the attorney-client relationship. In other words, don't coach your client to obtain disclosures of confidential information. Don't coach your client to try to get admissions hurtful to your adversary. And don't try to subvert the opposing party's attorney-client relationship.

In areas like this one where the law is unsettled, a little dose of conservatism and a big dose of simple fairness will help you stay out of trouble in most situations.

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Advice on Not Giving Investment Advice

by Jason D. Rogers and Brad R. Jacobsen

Many people would believe that investment advisers are only those that give opinions on which stocks, bonds, or mutual funds to buy. However, under applicable securities laws "investment adviser" is much more broadly defined than commonly thought, potentially including those who simply give general financial counseling or planning or those who recommend the purchase of a particular asset.

The question of whether or not a person is an investment adviser frequently arises in a real estate, insurance, or other sales context. Such salespeople would not generally think they are subject to the securities laws, but, depending on their activities, they may be.

The following will be addressed:

- What makes an individual an "investment adviser"?
- What steps may be taken to avoid being deemed an investment adviser?

"Investment advisers" generally must be licensed by an applicable regulator. Investment advisers are regulated by both federal and state law.

Federal Regulation

At the federal level, investment advisers are governed by the Investment Advisers Act of 1940 (the "Act"). *See* 15 U.S.C. § 806-1 *et seq*. The Act defines an investment adviser as "any person who, for compensation, engages in the business of advising others…as to the value of securities or as to the advisability of investing in, purchasing, or selling securities…." *Id*. § 806-2(a)(11). "Securities" include a broad array of instruments and agreements, including much more than the commonly-used definition of the word.

Special rules apply to investment advisers, including specific prohibitions against fraudulent practices, undisclosed conflicts of interest, fee splitting with unregistered investment advisers, deceptive advertising, limitations on referral fees, and prohibitions of certain advisory fees. Additionally, investment advisers generally must be registered with federal or state regulators. Violations of these rules can subject investment advisers to civil and criminal penalties.

The U.S. Securities and Exchange Commission (SEC) has set out the following three requirements, all of which must be satisfied to be an investment adviser. A person is an investment adviser if the person:

(1) Provides advice, or issues reports or analyses, regarding securities ("investment advice");

(2) Is in the business of providing such services; and

(3) Provides such services for compensation.

SEC Interpretive Release No. IA-1092, 1987 SEC No-Act. LEXIS 2555 (Oct. 8, 1987) (referred to as "IA-1092").

Each requirement will be discussed.

PROVIDES INVESTMENT ADVICE

There are few clear-cut rules to define investment advice. Most of the guidance has come through SEC no-action letters dealing with the following particular situations.

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General Rules

Giving advice on specific securities is investment advice, such as providing market timing services. *See* Lee F. Richardson, 1990 SEC No-Act. LEXIS 32 (Jan. 9, 1990). A person who provides advice concerning securities, even if the advice does not reference specific securities, is generally an investment adviser. *See* IA-1092. *This includes advising clients concerning the relative advantages and disadvantages of investing in securities in general as compared to other investments. See* Richard K. May, 1979 SEC No-Act. LEXIS 3967 (Dec. 11, 1979). Encouraging people to liquidate securities to purchase real estate, insurance, or other assets could be considered investment advice.

Situations That May Be Investment Advice

A person could be providing investment advice if, in the course of developing a financial program, he recommends that clients allocate certain percentages of their assets to life insurance, high yielding bonds, and mutual funds. *See* IA-1092. Investment advice also may include analyzing information to give categories of investments that similar investors historically have been satisfied with. *See* Financial Psychology Corporation, 1988 SEC No.-Act. LEXIS 413 (Mar. 23, 1988). A person providing advice as to the selection or retention of an investment manager also may be giving investment advice. *See* IA-1092.

"The line between what constitutes giving 'investment advice' (requiring a person to be licensed as an investment adviser) and what does not, unfortunately, is not a clear line."

Situations That Are Not Investment Advice

Providing general, impersonal, and historical information does not constitute investment advice. Describing investment options available through an employee benefit plan, without including analysis or recommendation with respect to options, is not investment advice. *See* Pension & Welfare Benefits Administration, 1996 SEC No-Act. LEXIS 316 (Feb. 22, 1996). Providing merely administrative or ministerial functions does not constitute investment advice. *See* League Central Credit Union, 1987 SEC No-Act. LEXIS 2369 (Aug. 21, 1987).

In another example, a publisher of a financial bulletin that indicated prices at which it recommended buying or selling publicly-traded stocks gave seminars to promote its bulletin. *See* Laketon Corporation, 1993 SEC No-Act. 912 (Jul. 26, 1993). At the seminars it offered only general, impersonal advice, explaining the statistical basis for the bulletin's recommendation, the methods it used to recommend investments and why investors should follow its approach. The seminars were not designed to require attendance for more than one session. The SEC declined to take action against the publisher based on the fact that (1) the seminars were only designed to solicit subscriptions;[1] (2) the seminars offered only general, impersonal advice about the publisher's investment strategy; and (3) each program was discrete and was not designed to attract or require attendance on more than one occasion.

The line between what constitutes giving "investment advice" (requiring a person to be licensed as an investment adviser) and what does not, unfortunately, is not a clear line. The determination of whether any person should be licensed as an investment adviser (or otherwise) will require a review of the facts and circumstances for each individual. *See* IA-1092. The SEC generally will not issue no-action letters regarding financial planning activities, so it is difficult to obtain further guidance. *See* George J. Dippold, 1990 SEC No-ACT. LEXIS 748 (May 7, 1990).

Providing general, impersonal, and historic information is not investment advice. However, personalizing the information, if it emphasizes that alternative investments are superior to securities, could become investment advice. Special care should be taken to avoid personalizing the information. Explaining options does not constitute investment advice, but recommending a particular option becomes investment advice.

THE "BUSINESS" STANDARD

The second requirement involves whether a person's activities constitute being "in the business" of an investment adviser. Giving investment advice must be a business activity occurring with some regularity, but even the frequency of giving advice is not determinative.

The SEC considers a person to be "in the business" of an investment adviser if the person satisfies any of the following three tests:

- The person *holds himself or herself out* as an investment adviser or as one who provides investment advice;

- The person receives any separate or *additional compensation* that represents a clearly definable charge for providing advice about securities or receives transaction-based compensation if the client implements the investment advice; or

- The person provides *specific investment advice* on anything other than rare, isolated and non-periodic instances. Specific investment advice does not include advice limited to a general recommendation to allocate assets in securities, life insurance, and tangible assets. *See* IA-1092.

Individuals not registered as investment advisers should never hold themselves out as investment advisers. This includes not using titles with the words "investment adviser," "financial adviser," "financial planner," "financial consultant," "financial counselor," or similar terms. Such terms should not be used for an entity name, on business cards, in an office, or in introductions.

Individuals not registered as investment advisers should not encourage others to sell securities. Additionally, they should not be compensated based on giving investment advice. Individuals not registered as investment advisers should never give any advice concerning specific securities.

COMPENSATION

The compensation element is interpreted broadly by the SEC, being satisfied by the receipt of any economic benefit, whether specifically for investment advisory services or not. *See* IA-1092. However, not charging a separate fee for investment advice may be relevant to whether a person is "in the business" of giving investment advice.

Compensation does not need to be paid by the person receiving investment advice; it may come from any source. *See* IA-1092. For example, a person providing investment advice while receiving insurance commissions would be receiving compensation within the meaning of the Act.

Since the SEC interprets this element expansively, those not registered as investment advisers should focus on not giving investment advice and avoiding being in the business of investment advisers.

EXCLUSIONS

There are exceptions to the definition of investment adviser. These include banks, lawyers, accountants, engineers, or teachers rendering such advice incidental to their professions; broker-dealers; and publications rendering impersonal investment advice. *See* 15 U.S.C. § 80b-2(a)(11). Exceptions are not discussed here.

State Regulation

States also regulate investment advisers. Investment advisers with less than $25 million in assets under management are not regulated federally, but by the states. Generally, state laws are based on the Act and the above analysis should be similar for many states. However, individual state regulations may vary.

In Utah, the Division of Securities has adopted certain rules and regulations in an attempt to add clarity to the "line" where one must be licensed as an investment adviser. Pursuant to Utah Admin. Code R164-4-2(G)(4), those engaging in any one of the following activities are required to be licensed as an investment adviser:

- A person that advertises or otherwise *holds oneself out as a provider of investment advice*;

- A person who publishes a newspaper, news column, news letter, news magazine, or business or financial publication, which, *for a fee, gives investment advice* based upon the *specific investment situations of clients*; or

- A person that receives a fee from an investment adviser for client referrals.

What constitutes "investment advice" in Utah is broadly defined. Utah statute specifically includes advising others "as to the value of securities or as to the advisability of investing in, purchasing, or selling securities" as giving investment advice. *See* Utah Code Ann. § 61-1-13(q)(i)(A)(2011). Again, this is similar to the definition of investment under the Act.

While the above distinction between giving specific advice and simply offering a "general recommendation" does not provide a clear path to follow, such a distinction should be remembered and any advice should be appropriately tailored. Individuals not registered as investment advisers, therefore, should:

- avoid giving specific securities recommendations (purchase or sale);

- structure services more along the lines of educational instruction where the client makes his/her own decisions as to allocations of financial resources;

- avoid accepting any compensation for any type of advisory or financial planning services;

- avoid holding oneself out as an financial advisor or planner; and

- seek legal advice with any questions.

As good advice to follow, insurance agents, pursuant to the rules and regulations of the Division of Insurance are restricted from using the following terms to describe their services: (i) "financial planner," (ii) "investment advisor," (iii) "financial consultant," or (iv) "financial counseling" unless they are properly licensed to do so. *See* Utah Admin. Code R590-79-6(C). Additionally, insurance agents are not permitted to represent insurance instruments as "investments." In any event, using such terms absent licensing can lead to one being found to have held oneself out as a provider of investment advice and therefore be required to be licensed to do so.

Steps to Take to Avoid Being Deemed Investment Advisers

Unlicensed individuals should NOT:

- Give advice about specific securities.

- Personalize presentations to specific individuals. This includes comparing them to other individuals who may have similar backgrounds or experiences.

- Encourage individuals to sell securities.

- Hold themselves out as investment advisers. This includes not:

  – Using titles or descriptions including the words "investment adviser," "financial adviser," "financial planner," "financial consultant," "financial counselor," or similar terms.

  – Using "investment" without specifically tying it to a non-securities asset. It is best to avoid using the term.

  – These should not be used as an entity name, on business cards, in an office or in introductions.

Unlicensed individuals SHOULD:

- Provide only general, impersonal, and historical information.

- Explain options without giving a recommendation.

WHY THIS MATTERS

In Utah, a person may not transact business as an investment adviser without being licensed. *See* Utah Code Ann. § 61-1-3(3). Acting as an unlicensed investment adviser is a third-degree felony. *See id.* § 61-1-21(1)(a). A third degree felony is punishable by up to five years in prison and a fine of up to $5,000. *See id.* §§ 76-3-203(3)(2008), – 301(1)(b).

To avoid risking such heavy penalties, attorneys should review their clients' activities to ensure that they are not acting as investment advisers without proper licensing. They should also counsel their clients with respect to their obligations to avoid giving investment advice.

The determination of whether or not investment advice is being given or if a person is acting as an investment adviser will always be determined on the particular facts and circumstances of the situation. Counsel should be very careful in advising clients as to the types of communications that are permitted in connection with any investment situation.

1. The bulletin itself was intended to be exempt based on the "publisher's exclusion" for regular financial publications.

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Recent Changes to the Lawyer's Fund for Client Protection

by Linda J. Barclay Mount

Your new client, Mrs. Y, walks into your office and presents you with a sad tale of woe. She is in the middle of a bitter divorce. You find out that she had been a client of Attorney X. She relates that she met once with Attorney X, who seemed at the time very capable and caring. Attorney X promised her that he would give her case his utmost attention and care and, in return, expected her to pay a $5,000 retainer before he began performing legal services. Mrs. Y ransacked all available sources of cash, sold her wedding ring, and took out a loan from her sister to raise the $5,000. Attorney X took the $5,000 and, then, for the next three months, failed to return Mrs. Y's telephone calls or to do any work at all. While reading the newspaper last week, Mrs. Y discovered that Attorney X had just been disbarred and was no longer in practice. She is distraught because she has just been served an Order to Show Cause by her husband and she now has no legal representation and no money. What do you, as Mrs. Y's new lawyer, do to help her?

Unfortunately, this sort of problem occurs with dismaying frequency. Accordingly, a number of states and the American Bar Association came up with a way to mitigate it. They proposed a fund, created by the state bar association or related entity, to reimburse clients for losses incurred by the dishonest conduct of their licensed attorneys. Following the American Bar Association Model Rules, and those of other states, the Utah State Bar established what is now known as the Lawyer's Fund for Client Protection (Client Security Fund or CSF or Fund). *See* Utah Sup. Ct. R. Prof'l Practice 14-902.

The purposes of the CSF are to provide meaningful prompt reimbursement to clients for losses caused by the dishonest conduct committed by lawyers admitted to practice in Utah, and, more broadly, to promote public confidence in the administration of justice and the integrity of the legal profession. *See id.* R.14-902 (a)–(b). The Fund is administered under the direction of the Utah State Bar Board of Bar Commissioners (Commission) with the assistance of the Office of Professional Conduct (OPC), with claims heard by the CSF Committee. The CSF Committee is currently comprised of a long-time chair, Judge David R. Hamilton, and several experienced lawyers. Basic administrative functions are supported by a Bar staff member. Once sufficient claims have accumulated, the staff member schedules hearings before the CSF Committee, which holds hearings several times per year. *See id.* R.14-906(c).

The CSF is funded by periodically assessing every lawyer licensed to practice and on active status in Utah. *See id.* R.14-904(c). Typically, the assessment, paid along with Bar dues, has been between $10 and $20 per year per lawyer. The Bar's Executive Director and Financial Officer determine the amount of the annual assessment based on the previous year's paid claims.

For a claim to be eligible for payment from the CSF, the loss must be caused by the dishonest conduct of the lawyer, and shall have arisen out of a lawyer/client or fiduciary relationship between the lawyer and the claimant and by reason of that relationship. *See id.* R.14-910(a). Dishonest conduct includes not only actual conversion of client funds but also failure to perform paid-for legal work. The CSF Committee also regards a lawyer's failure to maintain adequate funding in a trust account

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to cover obligations due to clients, including unearned funds, to be dishonest conduct. In Mrs. Y's case, Attorney X took her $5,000 retainer without performing any meaningful legal services, a dishonest act for CSF purposes.

You can instruct Mrs. Y to make a claim for reimbursement from the CSF by completing a form which is available through the Utah State Bar. This form requires the claimant to identify himself or herself, the lawyer, the amount paid to the lawyer, what services the lawyer was supposed to perform, the date and circumstances surrounding the loss, and the identification of anyone else to whom he or she has reported the loss. Claimant also must agree to cooperate with the CSF Committee regarding the claim, to assent to the publication of appropriate information about the claim and any reimbursement which might be made, and to provide the CSF with a pro tanto transfer of his or her rights against the lawyer and other relevant parties. *See id.* R.14-911; *see also id.* R.14-915(b), (e). The claim must be filed within one year after the date of the final order of discipline or the date of death or disability of the lawyer. *See id.* R.14-910(b).

The OPC provides available information to the CSF Committee about each claim. This process enables the CSF Committee to verify basic information about the claim. If it appears that any claim would not be eligible for reimbursement, administrative staff returns the claim to the claimant for submission of additional information. If the claimant cannot submit sufficient relevant information, the case is closed.

Once a claim has been successfully vetted, the Bar administrative staff notifies the claimant and the attorney of the date and time of the scheduled hearing. Both have a chance to respond and may appear before the CSF Committee in person or telephonically. They may either be represented by counsel or appear pro se. Prior to each hearing, the Committee Chairman describes the nature of the Fund and the requirements for reimbursement, states that no person has a legal right to reimbursement from the Fund, and notes that any payment is made as a matter of grace. *See* Utah Sup. Ct. R. Prof'l Practice 14-914. Hearings generally take fifteen to thirty minutes. The claimant is encouraged to explain the claim. If the attorney has chosen to appear, the

claimant is excused and the attorney is allowed to present his or her position. Committee members are able to ask questions of both parties to clarify their understandings of the claim.

Although the claimant has a duty to support the claim with relevant evidence, there are neither technical rules of evidence and procedure, nor witness requirements. Any relevant evidence is admissible if it is the "sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in court proceedings." *Id.* R.14-912(h). The CSF Committee will, however, consider a certified copy of an order disciplining a lawyer, or a final judgment imposing civil or criminal liability for the same dishonest act as alleged in the claim, to be evidence that the lawyer committed the dishonest act. *See id.* R.14-912(b).

After the claimant and the lawyer have left the hearing room, the Committee discusses the case and determines, on the basis of all available evidence, (1) whether the claim is payable under the rules; (2) if payable, how much should be paid; and (3) any other pertinent issues. *See id.* R.14-912(g).

"Once a lawyer has been found to have committed a dishonest act which is reimbursable from the Fund, and payment is made from the Fund, the lawyer is liable to the Fund for all the money paid out as a result...."

For a claim to be payable, the loss must have been caused by the dishonest conduct of the lawyer. *See id.* R.14-910(a). A claim is only considered if the lawyer has been disciplined to a threshold level of a public reprimand or is no longer in practice. *See id.* R.14-912(f). The OPC generally provides this evidence. Then, the Committee must find that the particular act complained of was the result of dishonest conduct. If there is an order or judgment regarding the act complained of in evidence, this determination is easily done. However, not all dishonest acts committed by a publicly disciplined lawyer come to an order or judgment, and not all acts done by the lawyer are necessarily dishonest. Accordingly, the CSF Committee may consider all the available evidence in determining whether a dishonest act actually occurred. The CSF Committee's finding of dishonest conduct is for purposes of recovery from the Fund, only, and does not constitute a finding of dishonest conduct for purposes of professional discipline. *See id.* No claim can be approved during the pendency of a disciplinary proceeding involving the conduct at issue in the claim. Any disciplinary proceeding must be concluded prior to any hearing. *See id.* R.14-912(j).

Also, for a claim to be payable, the loss must arise out of a lawyer/client or fiduciary relationship between the lawyer and the claimant and by reason of that relationship. *See id.* 14-901(a). As a general rule, the Fund cannot reimburse investment losses and loans. The CSF Committee is required to consider several factors, however, in determining whether an investment transaction or loan would not have occurred but for the attorney/client relationship and is, therefore, reimbursable: (1) the disparity in bargaining power between and respective business sophistication of the lawyer and the client; (2) the extent to which the lawyer's status overcame the client's normal prudence; (3) the extent to which the lawyer became aware of the client's financial affairs as a result of the attorney/client relationship; (4) whether a clear majority of the transaction arose out of a relationship requiring a license to practice law in Utah; and (5) the extent to which the lawyer failed to make full financial disclosure to the client. The CSF Committee also investigates whether the transaction originated with the lawyer, the lawyer's reputation and business involvement, the charge for legal as opposed to finder's fees, and the number of prior transactions in which the client had participated with the lawyer. *See id.* R.14-910(c).

Some losses are not reimbursable from the Fund, including: (1) losses incurred by close family members, partners, and associates of the lawyer; (2) losses covered by any bond, surety agreement, or insurance contract; (3) losses of any financial institution covered under a "Banker's Blanket Bond" or similar contract; (4) losses of any business entity controlled by the lawyer, close family member, partner, or associate; (5) losses

of any governmental entity or agency; (6) any assigned claims, third party claims, or claims of heirs or estates of deceased claimants; (7) claims where the claimant has failed to exhaust reasonably available remedies; (8) any investment losses, including ponzi schemes and investments or loans to any offshore entity or to any entity which claims that a benefit to the investor would be the evasion, avoidance, reduction, or sheltering of taxes; or (9) any investment that promises such a high rate of return that a reasonable and prudent person would suspect that the venture is unusually risky. *See* Utah Sup. Ct. R. Prof'l Practice R.14-911(d). Interest and other incidental or out-of-pocket expenses cannot be reimbursed from the Fund. *See id.* R.14-913(b). Despite these limitations, the Committee may pay a claim which would otherwise be excluded in cases of extreme hardship or in special or unusual circumstances. *See id*. R.14-911(e).

Once the CSF Committee arrives at a recommendation by the affirmative votes of the majority of Committee members, it provides a written recommendation for full or partial payment, or denial, to the Commission. A quorum of voting members of the Commission will then approve or deny the claim and determine the order and manner of payment, which can be made by lump sum or in installments. *See id.* R. 14-912(i).

In the event that the CSF Committee determines that there is a substantial likelihood that claims against any one lawyer may exceed the current $75,000 annual or $425,000 lifetime limit, claims may be paid on a pro rata basis or in any other equitable manner the Commission and the CSF Committee determines. *See id.* R. 14-913(e). Currently, the maximum individual claim amount is $20,000 per claim per individual claimant. *See id.* R.14-912, Advisory Committee Notes. The claim remains confidential until the CSF Committee makes a recommendation to the Commission and the Commission arrives at a final decision on the claim. *See id.* R.14-916.

Once the Commission arrives at a final decision, notice of the decision is given to the claimant and the attorney. *See id.* R.14-912(g). After this, the Commission may publicize the nature of the claim, the amount of reimbursement, and the name of the lawyer. The identity of the claimant must be kept confidential absent the claimant's specific permission. *See id.* R.14-916.

Once a lawyer has been found to have committed a dishonest act which is reimbursable from the Fund, and payment is made from the Fund, the lawyer is liable to the Fund for all money paid out as a result, including not only the payment made to the claimant, but also interest at the legal rate, an assessment of procedural costs of processing the claim, and reasonable attorney fees incurred by the OPC or any other attorney or investigator engaged to investigate and process the claim. The lawyer must pay this reimbursement as a condition of continued practice. *See id.* 14-904(e). The Bar may take any action it deems advisable to enforce this obligation. *See id.* R.14-915.

Some of the rules governing the CSF have changed recently as a result of problems raised by several incidents in which the destructive misconduct of a lawyer has produced a large number of clients with significant claims. One such matter related to claims resulting from the misconduct of Earl and Lynn Spafford. Between 1996 and 1999, this father/son team generated over $130,000 in claims against the Fund. *See* Petition To Amend Lawyer's Fund for Client Protection Rules AKA Client Security Fund Rules at 5 n.3, *In re Utah State Bar*, Docket No. 20110153 (Utah Feb. 17, 2011) (Granted on July 14, 2011) (the "Petition"). Many clients incurred losses which were not reimbursable by the Fund for a variety of reasons, including non-reimbursible "investments," making the actual losses much bigger. *See generally id.* Further, only a portion of the claims could be paid because of the then-current lower per claim limit provided by the Rules. *See generally id.*

"[R]ules governing the CSF have changed recently as a result of problems raised by several incidents in which the destructive misconduct of a lawyer has produced a large number of clients with significant claims."

The most calamitous challenge to the CSF was the Matthew T. Graff matter, which arose in the spring of 2009 in Southern Utah. On May 28, 2009, Mr. Graff was criminally charged with two counts of Unlawful Dealing of Property by a Fiduciary, a second-degree felony. *See id.* at 5. As part of formal disciplinary proceedings instituted by the OPC, Mr. Graff stipulated to an interim suspension of his Bar license on June 8, 2009. Subsequently, the Utah Supreme Court issued an Order Accepting Resignation with Discipline Pending on November 16, 2009, against Mr. Graff. He was eventually sentenced to two concurrent and one consecutive term of one to fifteen years in prison. *See id.* He is currently serving these prison terms. *See id.* at 6.

Mr. Graff had numerous clients in Iron and Washington Counties from whom he had taken nearly $2,500,000. *See id.* In some cases, Mr. Graff had done little or no work for the clients. *See id.* at 6, n.4. In others, Mr. Graff signed over case settlement proceeds, including reimbursement for medical expenses, to himself. *See id.* OPC appointed Timothy Anderson as trustee over Mr. Graff's practice who returned files to nearly 500 clients so that they could seek help elsewhere. *See id.* at 6. Other lawyers took on some of these clients as pro bono cases to help offset the damage. *See id.* The Iron County Attorney's Office recovered approximately $220,000, which was distributed to some of the victims as partial restitution. *See id.* No other recovery of funds has been made to date, and there is little hope that additional recovery will be made. *See id.*

By the fall of 2009, the CSF Committee had received over $200,000 in claims. *See id.* At that time, the Bar filed a petition to change the Fund rules. By 2010, nearly $500,000 in claims had arisen from Mr. Graff's misconduct. *See id.* A Commission committee was formed to consider how to best respond to these claims in light of the limited Fund resources. *See id.* at 7. The Commission was concerned that early claimants would end up with a disproportionate reimbursement as compared with later-filing claimants, and that the conduct of this one attorney could decimate the Fund, leaving victims of other attorneys without recourse. *See id.* The Commission was also concerned about the then-current four-year statute of limitations for filing claims. *See id.* It desired to shorten the time in which claims could be filed to encourage claimants to file as early as possible so that payments could be equitably apportioned. *See id.* Judge Hamilton, after consulting with the CSF Committee, met with the Commission and the Bar's General Counsel, Katherine Fox, to discuss these issues. *See id.* at 7-8. As a result of these discussions, the Bar, through the

petition process, presented several proposed revisions to CSF Rules to the Supreme Court, which have now been enacted into the current Utah Supreme Court Rules of Professional Practice.

The recent changes include the following: (1) more communication between involved entities and more flexibility in setting the Fund balance so that it can accommodate anticipated claims and not fall below the $200,000 minimum balance required by the Rules, *see* Utah Sup. Ct. R. Prof'l Practice 14-904(c); (2) allowing the Bar to administratively suspend a practicing lawyer's license for the period of time it takes the lawyer to reimburse the Fund for payments made as a result of his or her misconduct, *see id.* R.14-904(e)(1); (3) shortening the statute of limitations from four years from the date of the client's discovery of the misconduct to one year from the date of the final order of discipline, *see id.* R.14-910(b); (4) tying the new one-year statute of limitations to situations where the lawyer's discipline is tied to an order of formal disability and the client paid for legal services that were not performed, *see id.* R.14-910(b)(2); (5) establishing a lifetime claim limit of $425,000 per lawyer so that the fund could not be decimated by one lawyer's catastrophic dishonesty, *see id.* R.14-913(a)(1); (6) allowing the Board and Committee more discretion in paying claims that are substantially likely to exceed the annual lawyer claim limit and/or the lifetime claim limit, including the ability to make pro rata or proportional payments and full payment of small claims, *see id.* R.14-913(c); (7) raising the annual per lawyer limit from $50,000 to $75,000, *see id.* R.14-913, Advisory Committee Notes; and (8) changing the word "attorneys" to "lawyers" throughout the Rules for purposes of consistency. *See* Petition at 8–12.

Because of the Lawyer's Fund for Client Protection, you can assist Mrs. Y in filing a claim for her $5,000 with the CSF Committee. If she can establish that her loss arose from her attorney's dishonest act arising from her attorney-client relationship, she may be able to recover this money. This can not only help her to obtain her needed legal services that she has paid for and not received, it can also improve the fair and just operation of the legal system while also encouraging attorneys to behave honestly and ethically in their dealings with clients.

Reading Your Way to Stellar Legal Writing – A Review of "Building Your Best Argument"

by Cecil C. Kuhne III

Reviewed by Nicholas Clyde Mills

In overtime at the 1997 NCAA tournament, Iowa Hawkeye wrestler Lincoln McIlravy won his third national championship. I was a high school wrestler at the time and I watched and studied college wrestlers to improve my skills. Lincoln had a wrestling move that I attempted to emulate. In the move – an arm drag for those familiar with the vernacular – Lincoln would pull on his opponent's arm, causing him to be unbalanced. Lincoln would then trip his opponent and move behind to score a takedown. Lincoln used this move to win that 1997 NCAA national championship. I recorded and watched this technique repeatedly, drilled it in the wrestling room, and ended up winning some matches of my own with it.

Cecil C. Kuhne argues that an attorney could gain legal writing skills in much the same way. The thesis of his book, *Building Your Best Argument*, is that by reading and examining the best legal briefs in the country, an attorney can develop greater writing skills. To illustrate how to accomplish this task, Kuhne discusses thirteen common components required of an outstanding pleading and draws from briefs produced by the Solicitor General's office to highlight each point. Kuhne does a good job of guiding attorneys towards better writing. While Kuhne points out that there are "no magic bullets or secret formulas" to legal argument, this book will help most writers improve their skill set. *See* Cecil C. Kuhne III, Building Your Best Argument vi (ABA Publishing) (2010).

Kuhne's first chapter is a basic introduction advocating sound principles for legal writing. Thereafter, Kuhne's chapters start with a page or two of introductory material on a specific topic, followed by several examples from the Solicitor General briefs. Because he wants to focus only on the writing skills, Kuhne has removed the citations from the briefs and includes only the relevant excerpts. This allows the reader to focus solely on the principles taught and not get distracted – or bored – by a string of citations following every sentence. It makes the book much easier to read and digest quickly. The chapters are well titled, with each title containing a helpful mental cue to remind the reader of the chapter's content. For example, chapter seven is entitled "History of the Case: The Devil is in the Details" and chapter thirteen is entitled, "Obsessive-Compulsive: Organization is Key." After reading the chapter the vivid title stimulates the thought process much more than, "Case History" and "Headings for Your Brief" would have. The book's pattern makes it useful as a writing tool, because it facilitates easy review of each topic.

The best part of the book is the strength of Kuhne's writing. Chapter after chapter, I was left wanting to hear more of Kuhne's simple, but powerful pieces of advice. One of my favorites was, "[The judge] is reading not to be entertained, but to make a decision, and he rightfully expects the document before him to assist in that weighty task." *Id*. at 51. Kuhne's writing has neither footnotes nor citations. This approach gives Kuhne's writing an "insider information" feel. Each chapter reads like a patient senior partner giving sage advice to a young associate. Kuhne writes in a simple, easy-to-understand manner. His words are profound.

Kuhne has also selected some amazing examples to include in his book. While selecting good legal writing examples from the Solicitor General briefs is somewhat akin to selecting a prom date from the Dallas Cowboys Cheerleaders, the examples were really top-shelf. Each chapter had examples from several legal subjects. For example, chapter six has a constitutional, property, tax, and criminal law example. Occasionally, I found a particular example

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was difficult to understand. But because each section had four examples, I was always able to find one or two in each chapter that were familiar and easy to follow.

This book has some great practical advice coupled with really good examples. While useful to any lawyer seeking greater writing skills, this book will probably be most helpful to the young attorney. If you occasionally sit down to write and think, "Where should I start this section?" or "What should this look like?" Kuhne's book should be on your shelf. Because the advice is just one or two pages and each example is only a handful of pages, a lawyer can quickly read the parts addressing the skills they are struggling with and be given several great examples.

Building Your Best Argument has several minor shortcomings. First, the book's advice is probably simplistic for a seasoned attorney. Second, *Building Your Best Argument* doesn't have much instructional material. I was often left wondering, "Why should we do it that way?" Kuhne could have rectified this by providing a little more how-to information in some of the chapters. For example, chapter four dealt with the importance of an overview and Kuhne's introductory notes had some great content about the importance of "memorable lines" in a brief. *See id.* at 27. But he never developed nor explained how to create memorable lines. I realize that Kuhne's goal was to merely provide short summaries and great examples, and he delivered on that. But a book entitled *Building Your Best Argument* implies that the how-to will be provided. Perhaps a better title would have been "Examples of Great Arguments." Finally, and perhaps, most disappointing is the fact that Kuhne writes only about twenty-five pages of the entire book. This is unfortunate because all the counsel he gave was solid-gold. It was thoughtful and valuable. Kuhne's abilities and advice deserve to be showcased in a more exhaustive manner.

I thought this book was a good read. It is relatively short – only 265 pages – and it read very quickly. Kuhne did exactly what he set out to do. But if you are really interested in developing the quality of your briefs, I suggest that *Building Your Best Argument* is not the first book you purchase. The book is expensive – $69.95 – for what you get. Instead, you should first buy and read Bryan A. Garner's *The Winning Brief*. I suggest this for two reasons. First, Kuhne seems to be a Bryan Garner disciple of plain language. Kuhne writes in his first chapter, "Straight forward language is therefore preferred over the more pretentious and vague rhetoric." *Id*. at 5. And, "So-Called legalese is far less persuasive than straight forward and unadorned language." *Id*. Reading *The Winning Brief* will help explain the premise of Kuhne's suggestions. Second, *The Winning Brief* is more informative and is written in a way that allows for greater skill development. After you have read *The Winning Brief*, then buy *Building Your Best Argument*. It will be a great supplement and will be much more useful when you have Garner's solid foundation to build upon.

This book is published and sold by the ABA. If you do not want to purchase the book the law libraries at both the University of Utah and Brigham Young University have copies. Next time you develop writer's block, pick up *Building Your Best Argument*. Kuhne's simple profound advice and the Solicitor General's stellar examples will stimulate your writing and give you something to emulate.

Severance Damages Take a Sea-Change With Admiral Beverage

by Richard E. Danley, Jr.

Background

In October of 2011 the Utah Supreme Court issued its opinion in *Utah Department of Transportation v. Admiral Beverage Corporation*, 2011 UT 62, 693 Utah Adv. Rep. 16. The opinion has not been released for publication. *Admiral* marks a sea-change in how Utah determines severance damages involving actual takings. It allows the claimant to recover the full diminution in fair-market value, without limiting recovery under the traditional severance damage rules, simplifies the determination of loss and, for the first time awards severance damages for loss of visibility from changes made to a public highway. However, the Utah Supreme Court limited the eligibility to recover under *Admiral* to four preconditions. First, an actual taking must occur; second, the property taken must be essential to the project; third, recovery must be limited to real estate; and fourth, the loss must be caused by the taking. *See id.* ¶ 29. If these four conditions are present the supreme court said the claimant only need prove the taking of a protected property interest to be entitled to full recovery for loss under the State Constitution. *See id.* ¶ 43.

Historically, recovery for severance damages was limited by a body of common-law rules developed to determine if the loss is constitutionally protected and recoverable. For ease of reference these are referred to as "severance damage rules." The holding in *Admiral* appears to set aside some or all severance damage rules when there is a taking and permit the claimant full recovery when the lost value is caused by the taking. Under *Admiral*, portions of two lots were taken and the owner sought recovery for diminution in value from the lost view out to the east and the lost visibility from the freeway due to its elevation by twenty-eight feet. *See id.* ¶ 2. Under Utah's severance damage rules, loss of visibility from a public highway is not a protected property interest. *See State v. Harvey Real Estate*, 2002 UT 107, ¶¶ 11-14, 57 P.3d 1088. Following the severance damage rules, the lower courts in the *Admiral* case rejected recovery for any loss in value for visibility from the freeway and also applied the so called "abutment rule" to prevent recovery for the blocked view. *See Admiral*, 2011 UT 62, ¶ 7. The abutment rule prevents recovery for lost view or other damage if the improvements causing the damage are not constructed, at least in part, on the land taken from the claimant. In *Admiral* the claimant's property abutted the frontage road, not the freeway, and none of the elevated freeway was constructed on the land taken from the claimant. *See id.* ¶ 2. Taking a new direction, however, the supreme court permitted full recovery for all diminution in value for both the lost view out and the lost visibility from the elevated freeway. *See id.* ¶ 43. The *Admiral* court held no portion of the elevated freeway needed to be constructed on the property taken from the claimant for recovery to occur and revised the abutment rule so that it does not apply if the property taken is essential to the project for which the taking occurred. *See id.* ¶ 29. It also said that once a taking of a protected property interest is demonstrated (such as the taking of the owner's land) recovery for all damages caused by the taking is required under Utah law. *See id.* ¶ 31. This includes recovery for a property interest that is not a recognized or protected interest under Utah law (i.e., the loss of visibility from the freeway). The supreme court said that the constitutional requirements for just compensation from a taking are only satisfied when the owner is made whole by placing the owner in the same position he or she would have occupied but for the taking. *See id.* ¶ 28. Quoting *Stockdale v. Rio Grande Western Railway Co.*, 28 Utah 201, 77 P. 849 (Utah 1904), the court said once the landowner demonstrates an actual taking of a protected interest, the owner is entitled to just compensation to the extent of all damage suffered. *See Admiral*, 2011 UT 62, ¶ 28 (quoting *Stockdale*, 77 P. at 852).

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Severance Damages Rules.

Severance damages occur when the the public takes or damages a portion of a private owner's property, leaving the owner with some or all of the property. Traditionally the public entity with the power of eminent domain severs the owner's land by taking the portion necessary for the project and the owner keeps the remainder. Under Utah law when the public takes private property for a public use the private property owner must be compensated for both the land taken and any diminution in value caused by the severance to the land not taken. *See Harvey*, 2002 UT 107, ¶ 11. The severance damage rules limit what is recoverable and therefore constitutionally protected setting the scope of recovery and the amount the public is required to pay for the damage inflicted by the severance. Utah courts tend to view any claimed recovery which is inconsistent with the severance damage rules as being outside the scope of what is constitutionally protected. To understand the impact of the *Admiral* holding on these rules it is necessary to understand some of the rules and the fine-line distinctions with which they control and limit recovery.

In reviewing many of the severance damage cases in Utah, most of them involve some aspect of one or more of the following rules. Many of these rules overlap and they are not always consistent. As noted above, the abutment rule, discussed in *Admiral*, requires that for recovery the improvements causing the damage must be constructed in part on the land taken from the claimant; also, a similar or related rule requires that for recovery to be permitted the improvements causing the damage or loss in value must be constructed, at least in part, on the "severed land taken" from the claimant. *See generally Admiral*, 2011 UT 62, ¶¶ 17-18; *Harvey*, 2002 UT 107, ¶ 11, *Utah Dep't of Transp. v. Ivers*, 2005 UT App 519, ¶¶ 15-18, 128 P.3d 74, *reversed in part by Ivers v. Utah Dep't of Transp.*, 2007 UT 19, ¶¶ 19-26, 154 P.3d 802. Another related rule limiting recovery is the "but for" rule. But for the taking and the use of the land taken the project could not have been constructed and the damage to the severed property would not have occurred. *See Harvey*, 2002 UT 107, ¶ 11; *Utah State Rd. Comm'n v. Miya*, 526 P. 2d 926, 928-29 (Utah 1974). A separate rule requires that for there to be recovery the interest must be a "protected" or "recognized" property interest. Examples of damage held not

to be a protected interest under Utah law include interests in public roads. The loss of a property's visibility from a public road has been held not to be a protected property interest as noted above and discussed in *Harvey*, *Ivers*, and *Admiral*. The construction of public improvements entirely within the right-of-way of a public street limiting access to and use of both the street and the adjoining property by large trucks has been held to not be a protected property interest. *See Bailey Serv. & Supply Corp. v. State Rd. Comm'n*, 533 P.2d 882, 883 (Utah 1975). The relocation of a public road causing a substantial loss in traffic volume was held not to be a protected property interest. *See Admiral*, 2011 UT 62, ¶ 11; *Weber Basin Water Conservancy Dist. v. Hislop*, 12 Utah 2d 64, 362 P.2d 580, 581 (1961). Another rule prohibits recovery for "consequential damages"; it is said that all damages not caused by the taking are consequential and not within the protection of the constitution, such as the noise from a school or a road or the construction of a public road through an adjoining property in proximity to the claimant's land. *See generally Utah Dep't of Transp. v. D'Ambrosio*, 743 P. 2d 1220, 1221 (Utah 1987); *Miya*, 526 P.2d at 928; *State Rd. Comm'n v. Williams*, 22 Utah 2d 301, 452 P.2d 548 (1969); and *Bd. of Educ. of Logan City Sch. Dist. v. Croft*, 13 Utah 2d 310, 373 P.2d 697 (1962).

Similar to consequential damages is the rule for "common damages." Damages must be unique to the individual property and not common to all adjoining properties and users or they are "common" and not constitutionally protected. *See Croft*, 373 P.2d at 699. Finally, Utah courts have held that all properties have certain "appurtenant easements" or rights for air, light, access, and view that when interfered with require just compensation to the owner. *See Miya*, 526 P.2d at 928.

The primary effect of the severance damage rules is to distinguish protected property interests from those not protected (limiting recovery to protected interests) and to control severance damages. However, the potential conflict between these rules and the broad scope of the supreme court's language in *Admiral* is revealed in the opinion itself. *Admiral* requires payment for the full diminution in value for the property not taken if caused by the taking, to place the claimant in the same position he or she would have occupied but for the taking. But to achieve this holding the supreme court in *Admiral* was required to overrule part of its holding in *Ivers*, decided just four years prior to the rendering of the *Admiral* opinion, and left in confusion whether or not any severance damage rules apply when there is a taking.

Understanding the holding in *Ivers* and why the supreme court determined it does not meet constitutional muster is helpful to understanding where the supreme court is going with *Admiral* and the importance the court gives to this constitutional issue.

Ivers Case

The *Ivers* case involved a taking for the expansion and elevation of US Highway 89. *See Ivers*, 2005 UT App 519, ¶ 3. The severance was caused by the taking of a portion of the Arby's parcel fronting on US 89 in Farmington. *See id.* In addition to its taking damages, Arby's sought severance damages for loss of view and loss of visibility from the elevated highway. *See id.* ¶ 6. Material to the holding in *Ivers* is the fact that the severed property taken from Arby's was only used for the construction of a frontage road. No portion of the property taken was used for the construction of the raised highway, its footings or foundation, causing the Utah Court of Appeals to decide the case consistent with the severance damage rules. *See id.* ¶ 23. The court of appeals relied on *Miya* and said Utah property owners do not have a right to loss of visibility from the highway; but an owner of land does have an easement of view which is a private-property right that cannot be taken without just compensation. *See id.* ¶¶ 22-23. The court of appeals, however, denied recovery for the property's lost view because there was no causal nexus between the taking of the Arby's land and the lost view. In *Miya*, the viaduct blocking the claimant's view was built in part on the land taken. *See Miya*, 526 P.2d at 927-28. No part of the Arby's land taken was used in the construction of the elevated highway, only for the construction of the frontage road. The court of appeals, therefore, applied the abutment rule under *Harvey* and denied recovery.

The Utah Supreme Court in *Ivers v. Utah Department of Transportation*, 2007 UT 19, 154 P.3d 802, agreed that there could not be recovery for lost visibility, as visibility from the highway is not a protected property interest. *See id.* ¶ 1. However, the supreme court rejected the logic of the court of appeals with respect to loss of view out, holding that when property is taken as part of a single project, even if the view-impairing structure itself is constructed on property other than the condemned land, the owner may recover for loss of view if the use of the condemned property is essential to the completion of the project as a whole. *See id.* ¶ 21. The supreme court reasoned the impairment for view would not have arisen but for the condemnation, thereby preserving the abutment rule in an altered form under its opinion. *See id.* The preservation of the rule by the supreme court, however, likely evidenced its dissatisfaction with the rule

more than its desire to preserve the rule.

Admiral Decision.

The facts in *Admiral* are almost identical to those of *Ivers*, which is why the claimants had to push for a reversal of *Ivers* if they were to receive compensation for the lost visibility. In *Admiral* a portion of two lots owned by Admiral Beverage Corporation were taken as part of the reconstruction of I-15 through Salt Lake City. *See Utah Dep't of Transp. v. Admiral Beverage Corp.*, 2011 UT 62, ¶ 2, 693 Utah Adv. Rep. 16. As part of the project, the 500 West frontage road had to be relocated onto part of the two lots owned by *Admiral* to accommodate the expansion of the freeway. *See id.* No portion of the freeway or its elevated structure was located on the property taken from *Admiral*. *See id.* With these facts, the Utah Department of Transportation sought to rely on the opinion in the *Ivers* case and the absence of a protected property interest to defeat the visibility claim and the abutment rule to defeat recovery for the lost view out. The two lots abut the frontage road (500 West) and not the freeway, making this a good test of the supreme court's application of the abutment rule under *Ivers*. The court of appeals applied the abutment rule and expressly noted that the rule had not been eliminated by the *Ivers* case; the court then denied the claimant's recovery for both the view out and the lost visibility from the freeway. *Admiral* appealed the case to the supreme court.

Inasmuch as *Ivers* only permits recovery for a recognized property right, it had to be overruled if the supreme court was to permit recovery for loss of visibility from the highway. In *Admiral* the supreme court had the advantage of and looked seriously at numerous appraisals on value, both before and after the takings, as well as the testimony of several appraisers. *See id.* ¶¶ 4-5. The court expressly noted the testimony of the appraisers that to value a property, all relevant factors must be considered to determine fair-market value; and one cannot isolate and value view out separately from visibility from the road. *See id.* ¶ 39. The supreme court said they are two sides of the same coin. The supreme court accepted that to put the owner in the same position meant permitting full recovery for all value lost, including that for lost visibility from the elevated freeway and lost view out, even though the property only abutted the frontage road. *See id.* ¶¶ 28-29.

The Utah Supreme Court ruled the *Ivers* holding as unworkable; and by overruling *Ivers* the court said it was bringing the rules for recovery into conformance with the State Constitution. *See id.* ¶ 18. Quoting from *Stockdale v. Rio Grande Western Railway Co.*, 28 Utah 201, 77 P. 849 (1904), the supreme court said compensation is triggered when there is any substantial interference with private property which lessens value. *See Admiral*, 2011 UT 62, ¶ 22. The court then rejected outright any limitation on recovery by the protected property interest rule. *See id.* When measuring severance damages the court said there should not be any attempt to isolate and separately appraise any item of damage or any loss of value due to noise or any other intangible factor. *See id.* ¶ 31. Rather, the correct measure of severance damage is the damage in value to the remaining property as a whole as it will be after the construction of the improvements calculated by subtracting any benefits to the property from the harm caused by the severance and the construction of improvements. *See id.* ¶ 33. The supreme court expressly rejected any limitation on recovery based on the severance damage rules addressed in the case, but failed to state if in a taking, all or just a portion of the severance damage rules are excluded.

Focusing on the rule requiring a protected property interest for

there to be a recovery, the supreme court held the purpose of the rule is to determine at the outset if there are compensable damages due the claimant (not to limit the scope of recovery), and said there are two questions in any taking claim. *See id.* ¶ 22. The first is whether the claimant demonstrates a protectable property interest; and second, the claimant must show a taking of the protected interest. *See id.* Once the claimant shows the taking of a protected property interest, the court held the claimant is entitled to just compensation for the property taken. *See id.* With that statement the supreme court required the claimant to be made whole by placing him or her in the position they would be in but for the taking. *See id.* The landowner is entitled to compensation to the extent of all damages suffered.

Conclusion

The severance damage rules are not going away. The supreme court indicated they will control severance damage cases where there is no taking. Nonetheless, the clarity of the *Admiral* decision with its application of constitutional principles stands in stark contrast to the subjective and sometimes arbitrary nature of the severance damage rules. As such, *Admiral* appears to permanently change the course of severance damages when there is a taking. The unanswered question, however, is the scope of *Admiral* and if it eliminates severance damage rules whenever there is a taking.

It is clear that once there is a taking of a protected property interest, the claimant is entitled to recover all damages, even if part of the lost value is for an unprotected interest under Utah law. That was exactly the case with the loss of visibility from the freeway under *Admiral*. It also seems likely, given the *Ivers* and *Admiral* decisions, the abutment rule will not block recovery in the future for loss of view just because the improvements impairing the view are not constructed on the property taken, so long as the taking is part of a single project.

However, there is still much to be clarified. The Utah Department of Transportation has petitioned the supreme court for a rehearing on the impact of *Admiral* on issues involving highways and loss of traffic volume for which claimants have traditionally had no protected interest. The appraisal profession complains, with some justification, that the case fails to give adequate direction on how to value interests in real property for which Utah landowners have historically never held any interest or rights of recovery. For example, if land essential for a road is taken, does *Admiral* require the owner to be compensated for all loss in value to the remainder parcel even if the loss is for traffic volume or altered access? Furthermore, *Admiral* is silent on whether a claimant can recover consequential damages or common damages as part of its loss in a severance with a taking. Current severance damage rules would block such recovery; and *Admiral* would appear to permit some or all of such recovery. Perhaps this is the reason the opinion has still not been released for publication by the supreme court? Nonetheless, *Admiral* states clearly that to comply with the Utah Constitution, when there is a taking, the claimant must be put in as good an economic position as he or she would have been absent the taking, even if the loss is not protected under Utah law. Once the taking of a protected property interest is demonstrated, the claimant under *Admiral* is entitled to full recovery; and any decision to prevent full recovery seems unlikely to be upheld by the supreme court without its having to limit or overturn *Admiral*. As such, the intentional and clear sea-change by the supreme court's decision in *Admiral* seems to be, depending on one's viewpoint, very unlikely or inevitable.

AUTHOR'S NOTE: *The author expresses appreciation to Rick Carlton, Esq. of Zions Bank for his assistance in reading and commenting on this article.*

Books From Barristers

by Elaina M. Maragakis

It's impossible to imagine my world without books. Not only am I surrounded by them in my office, but they are packed into walls of bookshelves at home. These days, our home is filled with children's books, as well. I have crammed them into bookshelves, baskets, and bins. I have surrounded myself – and I suspect that you have, as well – in what researchers call a "print rich environment." It's little wonder that some of my earliest and fondest memories are of peeling open the pages of The Berenstain Bears or Dr. Seuss or Little Golden Books, and diving into those wonderful and classic stories.

Sadly, many children never have this experience, even though educational research is replete with evidence that reading has a powerful and direct impact on a child's success. It is such an obvious way to connect children with lifelong skills, that we often overlook it in its simplicity. The harsh reality is that many children have no access to books of their own. In fact, one study found that in low income neighborhoods, the ratio of books to children is an astonishing one book to every 300 children.[1] This unimaginable statistic is alarming and troubling, but fortunately, we have the ability to change this course one child at a time. In his book *The Read-Aloud Handbook*, author Jim Trelease explores and explains the critical nature of reading and the abundant benefits that flow from reading aloud to children. His research is a powerful testament to the transformative power of books. He writes "we have to find a way to get books into the lives of poor urban and rural children."[2]

With this simple goal in mind, it's my pleasure to introduce a new program of the Utah State Bar called "Books from Barristers." The goal of Books from Barristers is to provide children in underserved communities with new books on the topics of law, government, American history, and civics. Our hope is that if children can own their own book, they will come to understand the value of reading, which will, in turn, help to solidify a lifelong love of learning. While we hope to eventually expand the program, in its inaugural year we are targeting our efforts to first grade children located in Salt Lake, Davis, and Utah Counties.

Statistics underscore the importance of a program like Books from Barristers. A U.S. Department of Education study showed a direct correlation between the number of books at home and average test scores. This study showed that students with more than 100 books in their homes had higher test scores in science, civics, and history than those who reported having fewer books. Not surprisingly, test scores declined steadily as the number of books in the home declined.[3] Beyond success in school, frequent readers also fare better in society than their counterparts who read less. For example, proficient readers are significantly more likely to be employed than below-basic readers.[4] Notably, the benefits go far beyond the individual, and have a concrete impact on society as a whole. In its groundbreaking 2007 report titled "To Read or Not to Read," the National Endowment for the Arts reported that adults who read well are more likely to volunteer, vote, attend cultural and civic activities, and exercise.[5]

Armed with this educational research, Books from Barristers seeks to provide books to underserved children with three principles in mind: (1) value (the book must be new); (2) ownership (the book must be given to the child); and (3) investment (the child must choose the book). The first two concepts are based on the proposition explained by author Jim Trelease, namely, that "[o]wnership of a book is important, with the child's name inscribed inside, a book that doesn't have to be returned to the library or even shared with siblings."[6] Ownership of a new book conveys a sense of value, and toward that end, each book donated through the Books from Barristers program will not only be given to a child, but will also have a bookplate with a place for the child to write his or her name. The third principle, that the child will have the opportunity to choose from a selection of books, will cause the child to feel invested in the book because he or she has had a hand in selecting it. This year, we have tentatively selected five books for the program. They are:

ELAINA M. MARAGAKIS is a shareholder and director at Ray Quinney & Nebeker where her practice focuses on complex commercial litigation.

Woodrow the White House Mouse, by Peter Barnes and Cheryl Barnes

House Mouse, Senate Mouse, by Peter Barnes and Cheryl Barnes

D is for Democracy, by Elissa Grodin

If I Ran for President, by Catherine Stier

If I Were President, by Catherine Stier

Each of these books not only contains important educational lessons, but also rich text and vibrant illustrations, which helps increase the appeal of these wonderful books. And because the benefits of books are increased when people read aloud to children, Books from Barristers will also be distributing with each book a brochure for parents and other family members that discusses how to read aloud to children in a way that maximizes its effectiveness.

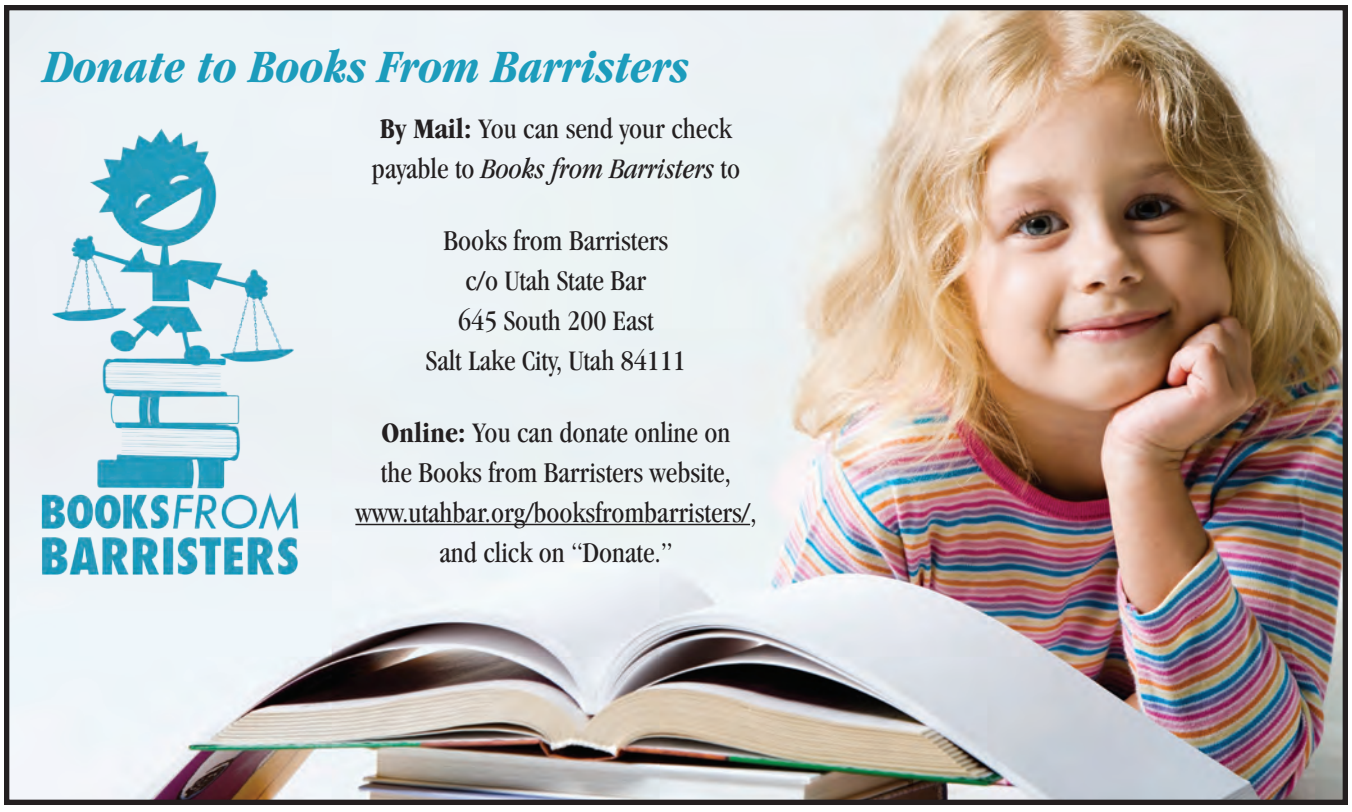
Books from Barristers differs from a traditional "book drive" because it encompasses books on topics that are traditionally of interest to lawyers. From explaining the legislative process to describing the presidential election, these books provide a basic foundation for children to learn about our system of government that we, as lawyers, interact with every day.

Moreover, because of generous in-kind donations and monetary support from the Bar, our goal is to have 100% of the proceeds donated by law firms, lawyers, and other businesses go directly to the cost of purchasing books. This means that your donation will directly benefit a Utah child. One of the most attractive aspects of this program is the fact that a modest donation can go a long way. For example, a donation of $100 will buy approximately 178 books. That means that 178 Utah school children will benefit from your generous contribution.

But our goals can only be met through the generous contributions of lawyers and others in the legal community. I invite all of you to join us in making an important contribution to children in our community!

For further resources, visit the following websites: www.trelease-on-reading.com, www.read.gov.

1. *See Handbook of Early Literacy Research,* Volume 2 at 31 (David K. Dickinson & Susan B. Neuman eds., 2006).
2. Jim Trelease, *The Read-Aloud Handbook* 122 (6th ed. 2006).
3. *See* National Endowment for the Arts, *To Read or Not To Read: A Question of National Consequence*, Research Report #47, 2007, available at www.arts.gov.
4. *See id*. at 20.
5. *See id* at 18-19.
6. Trelease, *supra* at 35.



President-Elect and Bar Commission Election Results

Congratulations to **Curtis Jensen** on his election as President-elect of the Bar. He will serve as President-elect for the 2012-2013 year and then become President for 2013-2014. Congratulations also go to **Angelina Tsu** and **Jim Gilson** who were elected from a group of very qualified commission candidates to fill the two vacant seats in the 3rd Division. Thanks goes to **Tom Seiler** and **Michael Leavitt,** who ran unopposed in the Fourth and Fifth Divisions respectively, for their service to the Bar. Sincere appreciation goes to **Grace Acosta, Christian Clinger, Susanne Gustin,** and **Benson Hathaway** for their great campaigns and thoughtful involvement in the Bar and the profession.

Curtis Jensen
President-Elect

Angelina Tsu
Third Division

Jim Gilson
Third Division

Tom Seiler
Fourth Division

Michael Leavitt
Fifth Division

Notice of MCLE Reporting Cycle

Notice of July 1, 2010 – June 30, 2012
MCLE Reporting Cycle

Due to the change in MCLE reporting deadlines, please remember that your MCLE hours must be completed by June 30th and your report must be filed by July 31st. If you have always filed in the even year, you will have a compliance cycle that began July 1, 2010, and will end June 30, 2012. Active Status Lawyers complying in 2012 are required to complete a minimum of twenty-four hours of Utah approved CLE, which shall include a minimum of three hours of accredited ethics. **One of the ethics hours shall be in the area of professionalism and civility.** (A minimum of twelve hours must be live in-person CLE.) For more information and to obtain a Certificate of Compliance, please visit our website at www.utahbar.org/mcle. If you have any questions, please contact Sydnie Kuhre, MCLE Director at sydnie.kuhre@utahbar.org or (801) 297-7035 or Ryan Rapier, MCLE Assistant at ryan.rapier@utahbar.org or (801) 297-7034.

2012 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2012 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org by Friday, September 14, 2012. The award categories include:

1. Distinguished Community Member Award

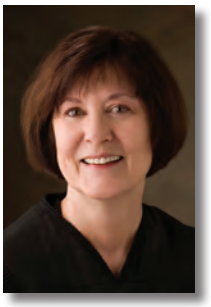
2. Professionalism Award

3. Outstanding *Pro Bono* Service Award

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

Utah State Bar 2012 Spring Convention Award Winners

During the Utah State Bar's 2012 Spring Convention in St. George the following awards were presented:



Judge Sandra N. Peuler
Dorathy Merrill Brothers Award
For the Advancement of Women
in the Legal Profession

Professor David Dominguez
Raymond S. Uno Award
For the Advancement of Minorities
in the Legal Profession

First Annual Mentor of the Year Award

The Board of Bar Commissioners is seeking nominations for the first annual New Lawyer Training Program (NLTP) Mentor of the Year award to be given at the 2012 Summer Convention in Sun Valley, Idaho. Nominations must be submitted in writing to Elizabeth Wright, Coordinator of the New Lawyer Training Program, 645 South 200 East, Salt Lake City, UT 84111, no later than 5:00 p.m. on Friday, May 18, 2012. You may also email a nomination to mentoring@utahbar.org by the same deadline.

The award will go to a mentor who mentored a new lawyer in the NLTP and who excelled in teaching a new lawyer the skills needed to be a good lawyer. The mentor of the year will have been a valued guide who helped a new lawyer understand the rules of professionalism and civility and how adherence to them benefits clients and the profession as a whole.

Please submit a short statement naming your mentor and explaining why your mentor deserves the award. Please provide specific examples of how your mentor went the extra mile in helping you during your first year of practice.

Notice of Ethics & Discipline Committee Vacancies

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

Please send a resume, no later than June 1, 2012, to:

Utah Supreme Court
c/o Diane Abegglen, Appellate Court Administrator
P.O. Box 140210
Salt Lake City, Utah 84114-0210
e-mail: dianea@email.utcourts.gov

"Like" the *Utah Bar Journal* on Facebook at:
www.facebook.com/UtahBarJournal

Commission Highlights

The Board of Bar Commissioners received the following reports and took the actions indicated during the March 15, 2012 Commission Meeting held at the Law & Justice Center in Salt Lake City.

1. The Commission approved the recommendations made by the Fund for Client Protection Committee in their March 5, 2012 report.

2. The Commission approved the Minutes of the February 13, 2012 Commission Meeting via Consent Agenda.

3. The Commission heard a report from the Pro Bono Commission. The Commission has found a video company and has scheduled filming. An RFP has been sent to BarAlliance to create a database to accommodate Pro Bono, Modest Means, and Lawyer Referral. The estimated cost for the database may be around $60,000. BarAlliance is contacting Nevada and Hawaii to see if they interest in having a similar program in order to reduce the "build" costs. The Commission has contacted various Bar Commissioners to reach out to certain judges about becoming co-chairs.

4. The Commission heard a report from the Modest Means Program Committee. The Committee visited the Wisconsin Bar to learn about their comparable program. The Committee would like to see the Utah program more aggressively promoted.

5. The Commission heard a report on the Lawyer Referral Program Committee. They reiterated the need for staff support to launch the program. There was some debate over a "flat fee" vs. a "percentage fee" in order for a lawyer to participate in the program.

6. The Commission heard a report from the Lawyer Advertising Committee. They are working on further revisions to proposed rules and discussing whether to adopt more of a Texas or Nevada model and the extent of disclosure they may require. They should have a final recommendation by the April Commission meeting.

7. The Commission discussed the results of the Membership Survey. A breakout session to discuss survey results was suggested for the Summer Convention.

8. The Commission heard a report on the High School Civics Education Program. Approximately 200 lawyers have signed up to participate thanks to President Snow's message in the recent E-bulletin. Staff is processing the volunteer applications and will be matching them to participating schools.

9. The Commission heard a report on the Bar's IT situation. Changes have been made to the server to increase bandwidth. And, BarAlliance is working on a repair list and is aware that they have to submit an RFP in order to renew their contract. Additionally, RFP's will be requested from other database providers. It was also reported that no one could be found to do a "gap study" on the shortcomings of BarAlliance leaving a Bar committee to conduct an internal review.

10. The Commission deferred discussion until the April meeting on a policy encouraging Bar Staff lawyers to do Pro Bono work until more information is received from the Pro Bono Commission and the Attorney General's Office.

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

Request for Comment on Proposed Bar Budget

The Bar staff and officers are currently preparing a proposed budget for the fiscal year which begins July 1, 2012, and ends June 30, 2013. The process being followed includes review by the Commission's Executive Committee and the Bar's Budget & Finance Committee, prior to adoption of the final budget by the Bar Commission at its June 1, 2012 meeting.

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

Please contact John Baldwin at the Bar Office with your questions or comments.

Telephone: (801) 531-9077
Email: jbaldwin@utahbar.org

American Bar Association Representative

The Bar Commission is seeking applicants to serve a two-year term as one of the Bar's two representatives in the American Bar Association's House of Delegates to replace Larry Stevens. Larry has recently been elected by the Utah members of the ABA to serve as their delegate in the House of Delegates. Margaret Plane serves as the Bar's other delegate. The term would run through the August 2014 ABA Annual Meeting.

The ABA House of Delegates meets two times a year during the ABA conventions. There will be some preparation work to review issues and communicate with the Bar Commission. The delegate is also an Ex-officio member of the Utah State Bar Commission.

Please send your letter of application and resume no later than Monday, August 6, 2012, to John C. Baldwin, Executive Director, Utah State Bar, at jbaldwin@utahbar.org or 645 South, 200 East, Salt Lake City, Utah 84111.

Mandatory Online Licensing

The annual Bar licensing renewal process will begin June 1, 2012, and will be done only on-line. Sealed cards will be mailed the last week of May to your address of record. (*Update your address information now at* www.myutahbar.org). The cards will include a login and password to access the renewal form and will outline the steps to re-license. Renewing your license online is simple and efficient, taking only about five minutes. With the online system you will be able to verify and update your unique licensure information, join Sections and specialty bars, answer a few questions, and pay all fees.

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

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

We are increasing the use of technology to improve communications and save time and resources. Utah Supreme Court Rule 14-507 requires lawyers to provide their current e-mail address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org. If you do not have an e-mail address or do not use e-mail, you may receive a printed licensing form by contacting online services at (801) 297-7051.

Notice of Legislative Rebate

Bar policies and procedures provide that any member may receive a proportionate dues rebate for legislative related expenditures by notifying the Executive Director:

John C. Baldwin
645 South 200 East
Salt Lake City, UT 84111.

Bar Thank You

Many attorneys volunteered their time to review and grade essay answers from the February 2012 Bar exam. The Bar greatly appreciates the contribution made by these individuals. A sincere thank you goes to the following:

Mark H. Anderson
Ken Ashton
P. Bruce Badger
Bart J. Bailey
J. Ray Barrios
Brent Bartholomew
Sara Bouley
Tiffany Brown
Elizabeth Butler
Callie Buys
Sarah Campbell
Jonathan Cavender
Gary Chrystler
Marina Condas Gianoulis
Tim Considine
Victor Copeland
Dan Dansie
Trevor Eldredge
Lonnie Eliason
L. Mark Ferre
Michael L. Ford
Robert Freeman
Stephen Geary
Tammy Georgelas
Alisha Giles
Marji Hanson
Paul Harman
Justin Hitt
Bob Janicki
Bill Jennings
Trevor Johnson
Tsutomu Johnson
Lee Killian
Alyssa Lambert
Derek Langton
Tanya Lewis
Michael Lichfield
Greg Lindley
Patrick Lindsay
Nathan Lyon
Terrie McIntosh
Elisabeth McOmber
Tony Mejia
Lewis Miller
Tom Mitchell
Nathan Morris
Sherilyn Olsen
Kerry Owens
Wells Parker
Jonathon Parry
Alex Pearson
Charles Perschon
Briant Platt
Chad Platt
Josh Player
Stephen Quesenberry
Bruce Reading
Robert Rees
Keven Rowe
Ann Rozycki
Ira Rubinfeld
Scott Sabey
Liz Schulte
Melanie Serassio
Jeffrey Shields
Paul Simonson
Leslie Slaugh
Jamie Sorenson
Ryan Stack
Craig Stanger
Charles Stormont
W. Kevin Tanner
Engels Tejeda
Heather Thuet
Ann Tolley
Paul Tonks
Padma Veeru-Collings
J. Kelly Walker
Paul W. Werner
Jason Wilcox
Judy Wolferts
Brock Worthen
Brent Wride
Michelle Young
John Zidow

Pro Bono Honor Roll

Aaron Millar
Adam Stevens
Adam Wahlquist
Al Pranno
Amirali Barker
Andres Alarcon
Andrew R. Kolter
April Hollingsworth
Artemis Vamianakis
Ashton Hyde
Benjamin Gordon
Blakely Denny
Brent Hall
Brian Johansen
Brian Tanner
Brittani Harris
Bryan Bryner
Bryant Keller
Camille Williams
Candice Pitcher
Cara Tangaro
Carolyn Morrow
Chase Kimball
Christian Kesselring
Christina Micken
Christine Poleshuh
Christopher Wharton
Clark Nielsen
Clayton Cox
Colin McMullin
Craig Barrus
Craig McArthur
Daniel Barnett
David Blum
David Wood
DeRae Preston
Diana Telfer
Donna Bradshaw
Elizabeth Conley
Elizabeth Lisonbee
Elizabeth Shaffer
Eric K. Johnson
Eric Peterson
Eryn Rogers
Floyd Holm
Francisco Roman
Gracelyn Bennett
Greg Hardman
Hailey Black
Harry McCoy II
Heath Snow
Heather Tanana
Jacob Dowse
Jalyn Peterson
Jane Semmel
Jason Dixon
Jay Kessler
Jeannine Timothy
Jeffery Simcox
Jeffry Gittins
Jenny Jones,
Jeremy McCullough
Jessica Couser
Jessica McAuliffe
Jessica Peterson
Jim Backman
Jim Baker
Joesph Caudell
Jon Zidow
Jonathan Thorne
Jonny Benson
Jory Trease
Joseph Stultz
Josh Chandler
Justin Ashworth
Karen Allen
Kass Harstad
Kate Conyers
Kathie Brown Roberts
Kelly Latimer
Kenneth Carr
Kimberly Herrera
Kyle Barrick
Kyle Hoskins
Langdon Fisher
Larry Meyers
Lauren Scholnick
Laurie Hart
Linda F. Smith
Linda Mount
Lorelei Naegle
Louise Knauer
Lowry Snow
Maria-Nicolle Beringer
Mark Emmett
Mark Jarvis
Marlene Gonzalez
Mary Ann May
Mary Dunn
Mary Silverzweig
MaryAnn Bennett
Matt Ball
Matthew Ence
Matthew Jensen
Melanie Clark
Michael A. Jensen
Michael Gehret
Michael Holje
Michael Welker
Morgan Wilcox
Morris Haggerty
Nathan Miller
Nicholas Angelides
O'Neil Shauna
Paige Bigelow
Paul Amann
Paul Waldron
Peter Jay
Phillip S. Ferguson
Pleasy Wayas
Rachel Otto
Rachel Pearson
Rachel S. Anderson
Robert Culas
Robert Saunders
Robert Snyder
Robert Winsor
Roy Schank
Russell Yauney
Sally McMinimee
Sarah Beck
Scott Thorpe
Scott Trujillo
Sharon Bertelsen
Sheleigh Harding
Silvia Pena-Chacon
Skyler Anderson
Solomon Chacon
Stephanie Miya
Steven Averett
Stewart Ralphs
Tanner Strickland Lenart
Terrell R. Lee
Tiffany Blanchard
Tiffany Panos
Timothy Daniels
Timothy G. Williams
Trent Nelson
Tyler Buswell
Valerie Paul
Walter Keane
William Barlow
William Carlson

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in February and March of 2012. Call Michelle V. Harvey at (801) 297-7027 or C. Sue Crismon at (801) 924-3376 to volunteer.

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 March 1, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.15(a) (Safekeeping Property) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney held personal funds in the attorney's client trust account in excess of the minimal amount allowed to maintain the account.

ADMONITION
On January 26, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.3 (Diligence), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney failed to respond to requests for admissions served on the client which resulted in the facts being deemed admitted. The attorney failed to respond to the Office of Professional Conduct's Notice of Informal Complaint. The attorney's conduct caused little harm as it is not clear whether the judge considered the deemed admissions. The attorney's conduct was negligent.

Mitigating factors:
Remorse; absence of prior record of discipline; absence of a dishonest or selfish motive.

ADMONITION
On January 26, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney failed to timely prepare documents needed to finalize a client's divorce decree. The attorney failed to diligently pursue child support issues raised by his client. The attorney failed to keep the client informed about the status of the finalization of the divorce decree. The attorney failed to inform the client about opposing counsel's motion seeking the release of the monies held in escrow that the client wanted held until the child support dispute was resolved. The attorney failed to respond to the Office of Professional Conduct's Notice of Informal Complaint. The attorney's conduct was negligent and caused little injury.

Mitigating factors:
Remorse; absence of prior record of discipline; absence of a dishonest or selfish motive.

PROBATION
On February 8, 2012, the Honorable Deno G. Himonas, Third Judicial District Court, entered an Order of Discipline: Probation against Holly J. Mahoney for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.15(d) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Ms. Mahoney was hired to represent a client regarding the special education needs of the client's son. The client paid Ms. Mahoney a retainer fee and signed a retainer agreement. Ms. Mahoney failed to file a due process request with the school on behalf of the client's son. The attorney failed to respond to

numerous e-mails and telephone calls from the client over a nine month period. Ms. Mahoney did not send monthly billing statements to the client as outlined in the retainer agreement. Due to Ms. Mahoney's lack of diligence and communication, the client terminated her services and sought new counsel. The client asked Ms. Mahoney for his file and a refund. After the client submitted his complaint to the OPC, Ms. Mahoney returned his file, but did not refund his fees. Ms. Mahoney indicated to the client that he owed additional fees but that she was willing to waive the fees and call it even.

PUBLIC REPRIMAND

On February 28, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Douglas A. Baxter, for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(b) Fees, and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Baxter failed to prosecute a case. Mr. Baxter failed to advise his client on the status of the case and failed to express his views on the merits of the case. Mr. Baxter failed to discuss the effect of the dismissal without prejudice. Mr. Baxter failed to have a clear communication on fees. In this respect, the client thought the amount paid was the total fee and Mr. Baxter thought it was a retainer. Mr. Baxter's mental state was generally negligent behavior. Mr. Baxter caused actual injury to the client in the form of stress and in the form of the dismissal of the action. Mr. Baxter's actions also damaged the legal system generally.

PUBLIC REPRIMAND

On January 26, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Jeanne T. Campbell, for violation of Rules 5.5(a) (Unauthorized Practice of Law; Multijurisdictional Practice of Law), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Ms. Campbell assisted a non-lawyer in the unauthorized practice of law when she returned phone calls to his clients while he was in the hospital. Ms. Campbell was aware that the non-lawyer was doing legal work for individuals and, at the very least, should have been aware that his preparation of bankruptcy petitions in Colorado without supervision violated the professional standards in that jurisdiction. Ms. Campbell's mental state was generally negligent in that she failed to heed a substantial risk that the non-lawyer was practicing law without a license in violation of Colorado's professional standards. Ms. Campbell's conduct did not cause injury to the client, but did cause some injury to the legal profession by allowing a non-lawyer, who failed to meet a client's needs, purport to be an attorney. Ms. Campbell failed to respond to the Office of Professional Conduct's Notice of Informal Complaint. The Notice of Informal Complaint was sent to Ms. Campbell's address of record which she did not consistently occupy. It was Ms. Campbell's obligation to take steps to ensure she received correspondence from the Bar.

PUBLIC REPRIMAND

On February 28, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Marlin G. Criddle, for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(c) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Criddle was hired to represent the Complainant in pursuing a wrongful death case on a contingency fee basis. No fee agreement was signed. Mr. Criddle failed to provide competent representation by accepting and attempting to litigate a medical malpractice/wrongful death case, for which he lacked knowledge, experience, and competence. Mr. Criddle failed to pursue the medical malpractice/wrongful death action in a reasonable time frame. Mr. Criddle failed to reasonably consult with his client regarding his client's objectives. Mr. Criddle failed to keep his client reasonably informed about the status of the action. Mr. Criddle failed to explain the dismissal options to his client so that the client could make an informed decision regarding the dismissal. Mr. Criddle's communication failures and dismissal of his client's case without consent caused injury to the public, the legal system, and his client's right to make decisions regarding the prosecution of the case.

Aggravating factors:

Vulnerability of victim; substantial experience in the practice of law; and failure to satisfy conditions of a Diversion Agreement.

Mitigating factors:
Absence of prior discipline; absence of a dishonest or selfish motive; personal or emotional problems; remorse; and acceptance of responsibility.

SUSPENSION

On January 31, 2012, the Honorable Samuel D. McVey, Fourth Judicial District Court, entered an Order of Discipline: Suspension suspending Allen F. Thomason from the practice of law for a period of one year for violation of Rules 3.3(a) and (d) (Candor Toward the Tribunal), 4.4(a) (Respect for Rights of Third Persons), 8.4(b), (c), (d), and (e) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The Complainant and his wife, had been having domestic problems and were seeking a divorce. Mr. Thomason befriended the wife and attempted to assist her with a DUI. Mr. Thomason went to the marital home on one occasion and had words with the husband. After a domestic dispute in which police were called and the wife was told to leave the home, Mr. Thomason went to the marital home on behalf of the wife and removed the locks from the doors. The husband went to the home to see if his wife was gone and saw the locks had been removed. He went into the home and encountered Mr. Thomason. After the two had words again, the husband left the home and called the police. The husband then asked his mother if she would go to the marital home and retrieve his camcorder and camera. When the mother went to the marital home to pick up the camera, Mr. Thomason confronted her and blocked her from leaving the room. Mr. Thomason told her that he was a judge and she was under arrest. After several minutes, the mother put down the camcorder and was allowed to leave the room. When the officers arrived Mr. Thomason refused to wait near the curb as instructed by the police. Mr. Thomason declared several times that the responding police officers were "under arrest." Mr. Thomason made threats against the officers, claiming that he was a judge, and held more arrest authority than the officers. Mr. Thomason was cited for "Interfering w/Legal Arrest," a violation of Utah Code Section 76-8-305, for his interference with the officers' investigation. The Provo City Justice Court held a trial where Mr. Thomason was found guilty of interfering with a legal arrest. Mr. Thomason appealed the conviction and later entered into a Diversion. After the incident at the marital home,

Mr. Thomason filed an Ex Parte Stalking Injunction against the husband, claiming that he had been assaulted when the evidence did not support this. The Ex Parte Stalking Injunction obtained by Mr. Thomason caused harm to the husband. Mr. Thomason exhibited a lack of candor in his filings with the court. Mr. Thomason attempted to delay the stalking injunction hearing so that the husband would not be able to participate in hunting season. Mr. Thomason also sent several e-mails to the husband's divorce attorney that contained numerous misrepresentations. Mr. Thomason threatened to file Judicial Conduct complaints against the police officers when he had no grounds to do so. Mr. Thomason threatened to file civil suits against the Complainants unless they dropped their Bar complaint. Mr. Thomason made unfounded accusations of unethical conduct against the husband's attorney.

DISBARMENT

On January 10, 2012, the Honorable Steven Hansen, Fourth District Court, entered Findings of Fact, Conclusions of Law and Order of Disbarment against Ross K. Moore for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.15(c) (Safekeeping Property), 1.15(d) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(b) (Misconduct), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary, there are several matters:

Mr. Moore agreed to hold in escrow a large sum of money for investors. The money was transferred by wire to Mr. Moore by a client, who was assisting with the investment of the funds. The funds were to be invested in a franchise in a particular location. Mr. Moore failed to place the funds in a separate trust account, but rather put the money in his own account. A month later, the investors requested the return of the money because the deal did not materialize and the investors wanted the money back to secure another building for the investment. Mr. Moore returned some of the funds but retained the rest. Over the next several weeks the investors demanded an accounting of the funds and demanded return of the remaining funds. Mr. Moore sent an e-mail letter to the investors stating that the money has been "illegally seized" by a bank when it had not. He told the investors that if they complained to the Bar, it would take longer and cost the investors more to get the money back. Months later, Mr. Moore had not returned the remaining funds and the investors again demanded the money. Mr. Moore continued to promise to pay but failed to pay the money. The investors called Mr. Moore several times, but the calls were not answered and messages were not returned by Mr. Moore. Mr. Moore finally met with the investors and agreed to pay an additional amount of money at a specified time. Mr. Moore indicated that the funds already paid to the investors came from funds owned by other clients. As part of a settlement agreement between Mr. Moore and the investors, the Complainant was to withdraw his Bar Complaint in exchange for the return. The investors wrote to Mr. Moore that they were in serious trouble because of the delay in the return of the money. Mr. Moore then represented that he was getting the money from a wealthy client to pay the investors. After the investors hired an attorney to assist in collecting the funds, Mr. Moore paid the investors by cashiers check. Mr. Moore had not earned any of the money entrusted to him to be held in escrow. Mr. Moore did not provide an accounting to the investors.

Mr. Moore was retained to represent a homeowner in warranty claims against her home builder. The homeowner paid Mr. Moore to prepare a demand letter listing the defects she wanted corrected. The homeowner's only contact with Mr. Moore's office was through a paralegal. Mr. Moore never completed the letter. The homeowner left several voicemails in an attempt to contact Mr. Moore or his paralegal by telephone. Mr. Moore did not return the phone calls. Mr. Moore did not respond to several e-mails sent to him and his paralegal. Eventually, all communication between the homeowner and Mr. Moore's office ceased. The homeowner tried to obtain a copy of her file, which contained original closing documents, but Mr. Moore did not return the file. When the homeowner went to Mr. Moore's office, she found it vacant.

Mr. Moore represented a client in a criminal matter. A pretrial conference was held and Mr. Moore failed to appear, although his client did appear. Another pretrial conference was held and again Mr. Moore failed to appear even though his client did appear. When the court issued an Order to Show Cause for Mr. Moore to appear and show cause why he should not be held in contempt. Mr. Moore failed to respond. The court issued a bench warrant against Mr. Moore.

Mr. Moore was retained initially to assist with the wind down of a client's company. As part of the representation, Mr. Moore was to respond in a civil case and to file petitions for personal bankruptcy for the owner and his son. Mr. Moore was paid for

the work. After the wind down of the company and after cashing out insurance policies, the owner put money in a bank account for further negotiations. Mr. Moore advised the owner to give him the money to put in his trust account for safe keeping; the owner agreed and the money was given to Mr. Moore. After retaining Mr. Moore to file a personal bankruptcy for him, the son became concerned because he had not heard from Mr. Moore. The son contacted Mr. Moore; and Mr. Moore responded by giving him a case number and stating that his bankruptcy petition had been filed. After many attempts to contact Mr. Moore without a response, the son hired a new attorney to pursue the bankruptcy. The son's new attorney discovered that no Petition for Bankruptcy had been filed and that the case number given by Mr. Moore was not valid. Mr. Moore had also failed to file an Answer in the civil matter and Judgment was entered against the owner's company in the civil case. The owner became concerned about the money he had given Mr. Moore to hold in trust and told Mr. Moore that he wanted the money returned. Mr. Moore did not respond, so the owner went to Mr. Moore's home. Mr. Moore sent a text message stating that he would send the owner the address of a bank where the owner could get the money that day. The owner did not receive the bank address and demanded his money and his files to be returned that day. In response to the demand, Mr. Moore admitted that he had not deposited the money in trust but had deposited the money into his account to secure a short term line of credit for some "deals" that Mr. Moore was making. Mr. Moore stated "if you are willing to wait six weeks without making any waves, I will happily pay you an additional $5K for your trouble." Mr. Moore stated that he would pay some of the funds and left a portion of the money in a drain spout at the owner's home texting him about where the money was. The owner asked Mr. Moore to provide an accounting of what he had done with the money; Mr. Moore did not respond. The owner's son made several attempts to get Mr. Moore to return the money, but Mr. Moore did not return calls. The owner then hired an attorney to assist in obtaining the money from Mr. Moore and to assist with his company's legal representation. The new attorney sent a letter to Mr. Moore demanding that the money be returned and that Mr. Moore provide an accounting; Mr. Moore did not respond. To date, Mr. Moore has returned only a small portion of the original funds.

The OPC served a Notice of Informal Complaint on Mr. Moore, requesting information from him in all of the matters. Mr. Moore did not respond in writing to these requests. Mr. Moore also failed to appear at the Screening Panel Hearing in two of the matters.

Aggravating factors:
Refusal to acknowledge the wrongful nature of the misconduct; dishonest or selfish motive; a pattern of misconduct; multiple offenses; vulnerability of victims; and illegal conduct.

Wills for Heroes: Protecting Those Who Protect Us

by R. Blake Hamilton

I recently attended the S.J. Quinney College of Law Career Fair on behalf of my firm, Stirba & Associates. While I was there, a first-year law student approached me and asked a surprising question. She, like many others in her class, was looking for opportunities to clerk after her first year of law school. Yet when I asked her if she had any questions about my firm, the first question she asked was: "What type of pro bono work does your firm do?" I responded that all attorneys at my firm are encouraged to find opportunities to contribute to the community by providing pro bono legal work. I then proceeded to tell her about one such opportunity that I have had the privilege of participating in.

> *"Volunteer lawyers in Utah have contributed 10,000-plus hours of pro bono legal work at events from Logan to St. George."*

On September 11, 2001, more than 400 first responders gave their lives to save their fellow Americans. Out of that tragedy arose an amazing program: Wills for Heroes. The Wills for Heroes program provides free wills, living wills, and healthcare and financial powers of attorneys to first responders and their spouses or domestic partners.

Every day, in towns and cities across the nation, including here in Utah, first responders – firefighters, police, and EMTs – put their lives at risk to protect us. We were reminded of this truth on January 4, 2012, when six police officers were shot and one killed while executing a warrant in Ogden, Utah. The Wills for Heroes program allows us as members of the Bar to provide pro bono legal work as an expression of gratitude to those who sacrifice and put themselves in harm's way to protect their communities – in our small way "protecting those who protect us." In doing so we are rewarded.

On December 2, 2011, two first responders from Northern Utah were on hand at the Utah State Bar Commission meeting to thank the Commission for the Bar's Wills for Heroes program. "Sometimes as first responders we're so busy helping other people that we forget about ourselves," said Captain Golden Barrett from the Hill Air Force Base Fire Department. "I want to say thank you very much for everything you've done for us. It really does make a difference."

Utah adopted the Wills for Heroes program in 2006, the twelfth state to do so. Since that time, the program has provided free estate planning to more than 4,000 first responders. Volunteer lawyers in Utah have contributed 10,000-plus hours of pro bono legal work at events from Logan to St. George. Wills for Heroes events are scheduled for the third Saturday of every other month. A calendar of future events and further information about the Wills for Heroes program can be found by visiting the Utah State Bar Young Lawyers Division's (YLD) informational website at http://www.utahbar.org/sections/yld/willsforheroes/Welcome.

A Wills for Heroes Event is a joint effort between a first responder department and YLD. The first responder department provides a contact person to disseminate information and coordinate appointments. The department also provides a

R. BLAKE HAMILTON is an attorney for Stirba & Associates. His primary practice is civil litigation where he defends municipalities and counties. He is the Co-Chair of the Wills for Heroes program.

classroom or a conference room with tables and chairs where the event may be held. YLD does the rest.

YLD emails the department contact a Wills for Heroes invitation to be sent to all first responders in the department. The invitation answers many frequently asked questions about the program. The first responders are asked to review and complete an estate planning questionnaire and an advanced health care directive prior to their appointment. By reviewing the questionnaire and directive ahead of time, all participating individuals are likely to consider the important decisions regarding their estate planning wishes with a loved or trusted individual prior to their appointment.

On the day of the Wills for Heroes event, YLD brings laptop computers that have been preloaded with specialized software that takes the questionnaire information and creates the living wills, and healthcare and financial powers of attorneys (all in about thirty minutes). Prior to the appointments with the first responders, YLD holds a training session in which attorney volunteers from the Bar are trained on everything they need to know to participate in this great volunteer opportunity. This training includes how to use the software and a primer on basic estate planning. It also qualifies for one hour of CLE credit (for first-time volunteers). YLD coordinates with the Paralegal Division of the Utah State Bar which ensures that all of the first responders' estate plans are witnessed and notarized on the day of the event. YLD also provides the printers, paper, and all of the materials needed for the first responders to be able to walk out of their appointments with fully executed legal estate plans.

YLD thanks all those attorneys, paralegals, and the many first responder departments around the state who have made the Wills for Heroes program a success. YLD also looks forward to many years of Wills for Heroes events in the future based on the expressed interest in the program. If you haven't had an opportunity to participate in the Wills for Heroes program, please find some time to do so. Let us not lose the ideals we had in our first year of law school, for, as Mahatma Gandhi said, "the best way to find yourself is to lose yourself in the service of others."

Jest is for all…

"There is Mother's Day and there is Father's Day. Wouldn't it be nice if there was Trustee's Day?"

Pick Your Window of Opportunity

Through NALA's Certified Paralegal examination's new computer-based testing procedures, paralegals now can choose the time and date of their examination of month-long "testing windows." During these windows, the proctored exam may be available each working day throughout the month.

September 1-30
Application deadline: August 1

Late application deadline: August 10 ($25.00 late fee)

Application fee: $250.00 for NALA members, $275.00 for non-members

ACT Test Center fees: Also apply

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The exam is offered at more than 230 computer-based ACT Test Centers designated by the ACT Testing Center Network on college campuses and other locations throughout the nation, at times and dates convenient to examinees. Schools not already ACT Test Centers may apply to NALA to become an authorized testing center for the Certified Paralegal Exam. Employers may also become testing centers for their paralegal staffs.

Visit the NALA website at www.nala.org for additional information or to apply online.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
05/03–05/05/12	**Southern Utah Federal Law Symposium.** Dixie State College Gardner Center, 225 South 700 East, St. George. 7:00 am – 5:00 pm. Members of the Federal Bar Assoc., Litigation Section, or SUBA: $150 ($325 for others) includes conference, breakfast, lunch, all CLE. Add one year FBA membership for $75. Add golf: (includes breakfast at the course, green fees, chance at prizes) $50. Add Supreme Court Admission: $200. Golfer guest fee: $75.	Up to 8.5 (incl. 1 hr. Ethics)
05/11/12	**Annual Family Law Seminar – Day With the Family Law Commissioners.** 8:00 am – 4:45 pm. University Guest House Convention Center, 110 South Fort Douglas Blvd, Salt Lake City. $175 for Family Law Section Members, $131 for Paralegal Division members, $250 all others.	7 hrs. (incl. 1 hr. Prof./Civ.)
05/11/12	**Ninth Annual Elder Law, Estate Planning & Medicaid Planning 2012.** 8:30 am – 4:30 pm.	TBA
05/14/12, 05/16/12, 05/18/12	**Court Visitor Volunteer Training.** Guardianship Monitoring Program of the Utah State Courts. 8:00 am – 12:00 pm. Matheson Courthouse, 450 South State Street, Conference Room B and C, 1st floor, Salt Lake City. No charge with volunteer commitment of one year, eight to ten hours per month. More information about the program is available at www.utcourts.gov/visitor.	10 hrs (incl. 1 hr. Prof./Civ. & 0.5 hr. Ethics)
05/16/12	**Annual Real Property Seminar.** 8:30 am – 1:30 pm. Grand America Hotel. $80 for section members, $130 others.	4 hrs. (incl. 1 hr. Ethics)
05/16/12	**Introduction to Law Office Management for New Lawyers.** 12:00 – 1:30 pm. Presenters include: Russell Minas, Russell Y. Minas, P.C.; Lincoln Mead, Utah State Bar; Denise Forsman, Marsh Insurance; Kim Paulding, Utah Bar Foundation. FREE.	NONE
05/16/12	**Your Professional Responsibility in the Event of a Disaster.** 4:00 – 6:00 pm. Free to those that are willing to be a Disaster Legal Response Volunteer Attorney, $35 for others. Topics include: "Utah Preparedness: Now," "Preparing an Emergency Response and Continuity of Operations Plan," "Preparing Your Information Technology for a Disaster."	1 hr.
05/31/12	**Annual Collection Law Seminar.** 8:00 am – 1:00 pm.	TBA
06/07/12	**NLTP Orientation for the July 2012 Mentoring Team.** 12:00 – 1:30 pm. FREE. Event is a brown bag lunch. Attendees should bring lunch and the Bar will provide drinks.	NONE
06/08/12	**Literature and the Law – Weber State University.** 8:30 am – 5:00 pm. Weber State University, Ogden, UT. Attorney Early Registration: $195, Senior & Retired Judges: $150, Legal Aid/Pro Bono Attorney: $150, Court Staff: $50, Early General Public: $75, Student: $25.	7 hrs. (incl. 2 hrs. Ethics and 1 hr. Civ.)
06/28/12	**Law Firm Practice Management: How to Successfully Start a Law Practice.** Presenter: Virginius "Jinks" Dabney, 8:00 am – 12:00 pm. Cost is $105 for members of Young Lawyer and/or Solo, Small Firm, and Rural Practice Sections; $159 for other bar members. Subjects include: • Finding a Good Office Location • Setting up an Office • The Importance of Identifying and Using a Mentor • Hiring Employees • Running your Law Practice like a Business • Marketing 101, 201, and 301 • How to Make a Good Living and a Good Life in the Practice of Law.	3 hrs. (add'l hrs. pending.)
07/11/12	**OPC Ethics School.** 9:00 am – 3:45 pm. $225 before 06/29/12, $250 after. This seminar is designed to answer questions and confront issues regarding some of the most common practical problems that the Office of Professional Conduct assists attorneys with on a daily basis. Learn about: • How to avoid Complaints • How to Set Up a Trust Account • Your Duty to Clients • Law Office Management • Professionalism & Civility • Avoiding Conflicts of Interest • How to Effectively Respond to Complaints	6 hrs. (incl. 5 hrs. Ethics & 1 hr. Prof./Civ.)
10/08/12	**New Lawyer Required Ethics Program.** 8:30 am – 12:30 pm. $75. Topics include: • Introduction to the Bar and to Practice • Pro Bono Service • Professionalism, Civility, & Practicing Law • New Lawyer Training Program • Ethics, Rules, Discipline, & Processes in Utah • Consumer Assistance & The Discipline Process • Top 10 Reasons Lawyers Receive a Bar Complaint • Profession-Stress and Burnout	Satisfies New Lawyers Ethics & Prof./Civ. for first compliance period

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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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Blackburn & Stoll seeks partner-level lawyers to join our commercial practice group. We are looking for lawyers who have 10+ years' experience in employment law, real estate, business formation/transactions, taxes, estate planning, or commercial litigation, have an established client base, but are available for consultations and transactional work as needed to complement our firm's offerings. We envision associating with attorneys interested in gaining greater control over their practices, setting their own hours, and enjoying the legal practice in a non-competitive professional atmosphere, where overhead is reasonable and compensation is directly tied to personal effort and results. Send inquiries to: resumes@blackburn-stoll.com.

Law Firm seeking experienced trial attorney for medium sized firm. Good location and benefits. Send inquiries to Confidential Box #3, Attn: Christine Critchley, Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111, or e-mail ccritchley@utahbar.org.

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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Certificate of Compliance

UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111
Telephone (801) 531-9077 / Fax (801) 531-0660

For Years _____ through _____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

_____ Email: _____

_____

Date of Activity	Sponsor Name/ Program Title	Activity Type	Regular Hours	Ethics Hours Hours	Professionalism & Civility Hours	Total Hours
		Total Hrs.				

1. Active Status Lawyer – Lawyers on active status are required to complete, during each two year fiscal period (July 1–June 30), a minimum of 24 hours of Utah accredited CLE, which shall include a minimum of three hours of accredited ethics or professional responsibility. One of the three hours of the ethics or professional responsibility shall be in the area of professionalism and civility. Please visit www.utahmcle.org for a complete explanation of Rule 14-404.

2. New Lawyer CLE requirement – Lawyers newly admitted under the Bar's full exam need to complete the following requirements during their first reporting period:

- Complete the NLTP Program during their first year of admission to the Bar, unless NLTP exemption applies.
- Attend one New Lawyer Ethics program during their first year of admission to the Bar. This requirement can be waived if the lawyer resides out-of-state.
- Complete 12 hours of Utah accredited CLE.

3. House Counsel – House Counsel Lawyers must file with the MCLE Board by July 31 of each year a Certificate of Compliance from the jurisdiction where House Counsel maintains an active license establishing that he or she has completed the hours of continuing legal education required of active attorneys in the jurisdiction where House Counsel is licensed.

EXPLANATION OF TYPE OF ACTIVITY

Rule 14-413. MCLE credit for qualified audio and video presentations; computer interactive telephonic programs; writing; lecturing; teaching; live attendance.

1. **Self-Study CLE:** No more than 12 hours of credit may be obtained through qualified audio/video presentations, computer interactive telephonic programs; writing; lecturing and teaching credit. Please visit www.utahmcle.org for a complete explanation of Rule 14-413 (a), (b), (c) and (d).
2. **Live CLE Program:** There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at a Utah accredited CLE program. **A minimum of 12 hours must be obtained through attendance at live CLE programs during a reporting period.**

THE ABOVE IS ONLY A SUMMARY. FOR A FULL EXPLANATION, SEE RULE 14-409 OF THE RULES GOVERNING MANDATORY CONTINUING LEGAL EDUCATION FOR THE STATE OF UTAH.

Rule 14-414 (a) – On or before July 31 of alternate years, each lawyer subject to MCLE requirements shall file a certificate of compliance with the Board, evidencing the lawyer's completion of accredited CLE courses or activities ending the preceding 30th day of June.

Rule 14-414 (b) – Each lawyer shall pay a filing fee in the amount of $15.00 at the time of filing the certificate of compliance. Any lawyer who fails to complete the MCLE requirement by the June 30 deadline shall be assessed a $100.00 late fee. Lawyers who fail to comply with the MCLE requirements and file within a reasonable time, as determined by the Board in its discretion, and who are subject to an administrative suspension pursuant to Rule 14-415, after the late fee has been assessed shall be assessed a $200.00 reinstatement fee, plus an additional $500.00 fee if the failure to comply is a repeat violation within the past 5 years.

Rule 14-414 (c) – Each lawyer shall maintain proof to substantiate the information provided on the certificate of compliance filed with the Board. The proof may contain, but is not limited to, certificates of completion or attendance from sponsors, certificates from course leaders, or materials related to credit. The lawyer shall retain this proof for a period of four years from the end of the period for which the Certificate of Compliance is filed. Proof shall be submitted to the Board upon written request.

I hereby certify that the information contained herein is complete and accurate. I further certify that I am familiar with the Rules and Regulations governing Mandatory Continuing Legal Education for the State of Utah including Rule 14-414.

A copy of the Supreme Court Board of Continuing Education Rules and Regulation may be viewed at www.utahmcle.org

Date: _____ Signature: _____

Make checks payable to: **Utah State Board of CLE** in the amount of ***$15*** or complete credit card information below. Returned checks will be subject to a $20 charge.

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