

Utah Bar® JOURNAL

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Utah Bar[®]

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Lower Calf Creek Falls, Grand Staircase of the Escalante, taken by Craig Galli, Salt Lake City.

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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.

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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.
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President's Message

The Jewels on the Hill

by Rodney G. Snow



Construction for a new six-story law school building, designed for sixty square feet per student, may begin in the School's Centennial year, 2013.

Thank You

This is my last President's Message to the Bar. I have had the privilege of meeting many of you, including dozens of our new lawyers. I have made new friends, for which I am grateful. I continue to be impressed by the untold hours of quiet service many of you render for the benefit of the Bar and our community. For that and so many other reasons it has been an honor and pleasure to represent you as your Bar president.

Service is both a responsibility and a reward that comes with being professional. It is what distinguishes a profession from just another business.

As you renew your Bar license this year, please "Check Yes" to volunteer for the opportunity of a pro bono matter or case. Many of you will have read about or seen the video of Meghan Vogel, a track star from West Liberty Salem high school in Ohio, help Arden McMath across the finish line after she had collapsed in a 3400 meter race, ensuring that Arden finished ahead of Vogel. This moment of humanity exhibited in a competitive race should move us to offer our professional services to those who otherwise might not be able to finish their race for justice.



Photo Courtesy of University of Utah Health Care

I thank the Bar Commissioners and the Executive Committee for their hard work and support this year. Your Commission provides many hours of service to Bar matters. I acknowledge, once again, the incredible work and service of our Young Lawyers Division and their leaders. The YLD continues to show us the way with their energy, compassion, and extraordinary service. I also express my thanks to John Baldwin, Richard Dibblee, and the entire Bar staff for their patience, support, and assistance this year.

Thank you to Lori Nelson, our President Elect, who has supported and participated in the launch of our new programs and is already working hard in preparation for next year. Lori pays close attention to critical detail and will be a superb President.

I thank my firm, Clyde Snow & Sessions, and my clients for their patience and understanding this past year.

And last but not least I thank my wife Bobbi and our family for their listening ears, support and constructive suggestions.



Cancer

As many of you know, during the summer of 2002, I was diagnosed with laryngeal cancer. It was, of course, a shock. I am not a smoker. Among the possible suspects was acid reflux. I don't know many lawyers, particularly trial lawyers, who do not experience acid reflux at least occasionally. Get checked and medicated, if necessary. Maalox and Tums may not solve the problem. The "C" experience opened windows and vistas I may have otherwise missed. I am pleased to be working and enjoying life with family and colleagues. My grandchildren who are fascinated with my robot friend (electronic larynx) are persistent in learning how to use it.

I also learned to appreciate the incredible resources and talent we have in Salt Lake City, the University of Utah Medical Center and the S.J. Quinney College of Law, two bright jewels that provide unparalleled service to our community and, indeed, the entire Rocky Mountain region. Of course, there are other jewels at the University of Utah, the business and engineering schools, humanities, and many others.

The University of Utah Medical Center

It was an afternoon, as I recall. I had been to Clinic 9 to see Dr. Kim Davis. Dr. Davis was the head of ENT and a skilled head and neck cancer surgeon with a national reputation. He is compassionate and hopeful. He operated on me several times, chasing my squamous cell, well-defined cancer from one spot to another. He moved to IHC during my experience and the care was equally satisfactory. Finally, in April of 2004, after radiation failed to eradicate the cancer, Dr. Davis informed me they had played "Russian Roulette" with me long enough and that a total laryngectomy was imperative to avoid significant risk to my life. My treatment had been prolonged in an attempt to preserve all or some of my vocal chords.

On this particular afternoon, as I entered the lobby of the Medical Center while leaving my appointment, I paused for several minutes to simply observe the mass of humanity moving in, out and around. I became overwhelmed. Just the number of patients, some critically ill, coming and going was amazing. When you add the nurses, staff, residents, interns, and doctors quickly bustling here and there, I began to feel like I was in Manhattan at 9:30 a.m. as the subways emptied. This moment of observance helped me realize the good that was being done every minute, every half-hour, and hour for so many patients, some of whom would never be able to pay for the care they

were receiving.

In 2010 and 2011, University of Utah Health Care obtained a national top-10, five-star quality rating from the University Health System Consortium.¹ The University of Utah Medical Center combines excellence in patient care, the latest in medical research, and teaching to provide leading-edge medicine in a caring and personal setting. The system provides care for Utahns and residents of five surrounding states and a referral area encompassing ten percent of the continental United States.² As part of that system, the University hospitals and clinics rely on one thousand board-certified physicians who staff four University Hospitals (University Hospital, Huntsman Cancer Hospital, University Orthopaedic Center, and the University Neuropsychiatric Institute), ten community clinics, and several specialty centers.³ University of Utah Health Care is consistently ranked among US News and World Report's best hospitals, and its academic partners, the University of Utah School of Medicine and Colleges of Nursing, Pharmacy and Health, are internationally regarded research and teaching institutions.⁴

The hospital experiences over one million outpatient visits a

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year; 30,000 inpatient admissions; 25,000 surgeries; and delivery of 3500 babies, including care for 500 critically ill newborns.⁵ Care provided for patients totaled \$1,687,000,000 for fiscal year 2011. Charity services for patients unable to pay totaled \$29,000,000.⁶

Those are just a few of the statistics available regarding the excellence being demonstrated by the University of Utah Medical Center and the University of Utah Health Care system. We express our appreciation and congratulations to the University of Utah Medical Center.

S.J. Quinney College of Law, Another Jewel on the Hill

In Utah, we are fortunate to have two top-tier law schools, the J. Reuben Clark Law School at Brigham Young University and the S.J. Quinney College of Law at the University of Utah. Both law schools make substantial contributions to our community and state by way of education and public service. Dean James Rasband and Dean Hiram Chodosh have demonstrated innovation, excellence and sensitivity to the changing economic and market conditions.

The S.J. Quinney College of Law, under the leadership and direction of Dean Chodosh, received approval from the 2012 Legislature to internally bond a new \$60.5 million six-story facility to be built southeast of the current law school where Carlson Hall is located. It is hoped that groundbreaking will occur in the law school's centennial year of 2013.⁷

The new law school facility is dedicated to improving the world around it through better forms of training, insights on the critical issues of the day, and direct public service.⁸ The new law school building will facilitate the College of Law's vision. Key attributes of the new building will include:

- A wide variety of intimate learning environments for students both within and outside the classrooms.
- Advanced research areas in which faculty, staff, and students can effectively collaborate on major research projects.
- Flexible integration of technology to advance learning objectives, build community, and create broader national and

global presence for the College's programs.

- An emphasis on sustainable design and responsible resource use, with the goal of attaining LEED-Platinum certification and a commitment toward net-zero energy consumption.
- An exemplary approach to access for the disabled.
- Site and building planning that takes full advantage of exceptional views and environmental features and creates an appropriate identity for the College of Law with effective connections to the University and broader community.
- Significant commitment of space so that each student has an effective study and research space in a variety of settings and configurations. The law school is dedicated to keeping the first-year class small in size and maintaining the learning environment that comes from that dynamic. Square foot per student will be expanded from seven square feet to sixty square

feet, and the conference center/moot courtroom on the top floor will display views of the valley and handle up to 450 students and/or community members.⁹

It is hoped the new law building will be yet another

University gateway and entry point for the campus.

The new law building will be a resource to the legal community, as well as to the neighborhood and campus.

Recent major commitments from the S.J. and Jessie E. Quinney Foundation (over \$15 million) and the LDS Church (\$4 million) have facilitated the advancement of this new law facility.¹⁰

Of course, additional funds and/or commitment for funds are needed. If you or your law organization can make a commitment to the construction of this new law facility, we hope you will do so. Many lawyers and law firms have made donations and/or committed funds for the construction of this new facility. Those practicing in Utah, whether or not alumni of the U law school, are committing resources to what will be a valuable community and regional presence.

Through many of the law school's outstanding programs, their student body produces more service per student than any other

"We encourage you to become involved in your community in whatever way works with your schedule, talents, and time."

law school in the country, according to the office of the Dean. Last year alone, the student body of approximately 400 students produced over 45,000 hours of public service.¹¹ For example, according to the law school, the Pro Bono Initiative (PBI), which commenced in 2006, has contributed approximately 29,980.25 hours of public service, and has filled a total of 1282 project placements. Free Legal Clinics are an important component of the PBI – examples are the American Indian Legal Clinic, Debtor's Counseling Clinic, Family Law Clinic, Layton Family Law Clinic, Medical-Legal Clinic, Immigration Law Clinic, Rainbow Law Clinic, Street Law Clinic, and the new Employment Law Clinic.¹² All of these legal clinics are staffed by the S.J. Quinney College of Law, volunteer law students, and volunteer on-site attorneys. In addition to the foregoing programs, the S.J. Quinney College of Law offers:

- The Center for Global Justice will work to ensure the role of law in guaranteeing basic human rights, security, socioeconomic justice, economic development, good governance, and the ability of individuals to realize their full potential regardless of their differences.
- The Center for Law and Biosciences will create innovative legal and public policy solutions to challenges posed by new developments in the biosciences and health care.
- The possibility of relocating from Columbia, South Carolina the National Criminal Justice Academy, which is a national training center for state and local prosecutors and will establish the first national indigent defense counsel training program.
- The Center for Innovation in Legal Education will use technology, simulation, experiential learning, and other improved legal pedagogies to create an integrated and dynamic learning and research environment to prepare future professionals.
- National Service Academy, which will integrate all law school service programs, including clinics, pro bono initiatives, and think tanks. This will also fill a critical need for national service training, both at home and abroad, and facilitate the concept of distributing legal service to different disciplines in national universities.¹³

The S.J. Quinney College of Law has been led to new levels of community service and global involvement. The new law building will be, as described by Dean Chodosh, “a virtual teaching hospital.”¹⁴ We can be proud of both our law schools

and they deserve our support.

I conclude this last message echoing the remarks of Rob Jeffs, our past president, made in his last message. We encourage you to become involved in your community in whatever way works with your schedule, talents, and time. That might be serving in a Bar section or committee, in Bar leadership, as a state legislator, on a board of education, or volunteering to take a pro bono case by checking “yes” on your license renewal or to teach a civics course twice a year in one of our high schools. Of course, there are other community service opportunities available and we hope you will participate in those of your choice as your time and resources will allow. Again, thank you for the privilege and honor of representing you as your Bar president this past year.

Rod would like to thank Shannon Zollinger for her research assistance in preparing this message.

1. See *2011 Report to the Community*, University of Utah Hospitals and Clinics, at 3, <http://viewer.zmags.com/publication/56e89bed#56e89bed/1>.
2. See *id.* at 8-9.
3. See *id.* at 6.
4. See University of Utah Health Care, <http://healthcare.utah.edu/about/> (last visited June 11, 2012); see also *U.S. News Ranks U Programs Among The Best In Physician Assistant, Pharmacy, Nursing, Primary Care and Physical Therapy*, March 13, 2012, http://healthcare.utah.edu/publicaffairs/news/current/03-13-2012_US_News_2013_Ranking.html.
5. See *2011 Report to the Community* at 9.
6. See *id.* at 26-27.
7. See *Governor, Legislature Show Support for the U in 2012*, CONTINUUM: THE MAGAZINE OF THE UNIVERSITY OF UTAH, Summer 2012, at 4; see also Brian Maffly, *University of Utah to build new law school, revitalize campus' western gateway*, SALT LAKE TRIBUNE, March 12, 2012, available at <http://www.sltrib.com/sltrib/jazz/53684377-78/law-building-campus-chodosh.html.csp>.
8. See *Building Justice: Capital Campaign*, Executive Summary from Pre-Programming (Phase 2), S.J. Quinney College of Law.
9. See *id.*
10. See, e.g., *College of Law Announces \$4 Million Gift from LDS Church for New Facility*, ULAW TODAY, May 11, 2012, <http://today.law.utah.edu/2012/05/college-of-law-announces-4-million-gift-from-lds-church-for-new-building/>.
11. See *Building Justice Through Service*, S.J. Quinney College of Law, at 8, http://www.law.utah.edu/wp-content/uploads/Bulletin_2012.pdf.
12. See *Pro Bono Initiative: Free Brief Advice Legal Clinics*, S.J. Quinney College of Law, <http://www.law.utah.edu/probono/free-legal-clinics/>.
13. See Executive Summary from Pre-Programming (Phase 2), *supra*.
14. See Maffly, *supra* note 7.

Donor Intent and the Failure of the Honor System

by David L. Wilkinson

INTRODUCTION

The private sector of philanthropy is facing huge challenges today, at a time unfortunately when government resources to assist those in need are shrinking. The assets of charitable foundations in the USA declined by 28% in 2008 according to a study by The Chronicle of Philanthropy. See Daniel J. Popeo, Op-Ed., *Freedom of Philanthropy?*, N.Y. TIMES, Feb. 23, 2009, available at http://acreform.com/files/pdf/Freedom_of_Philanthropy.pdf. This was the biggest drop of the past four decades. The loss to the nonprofit organizations they fund and to society was actually much greater due to the multiplying effect of the charitable dollar. A study by The Philanthropic Collaborative calculated that the \$43 billion foundations distributed in 2007 generated identifiable social and economic benefits of \$368 billion. See *id.*

The decline in the value of assets of American charitable foundations is only part of the picture. Recently released IRS figures show that charitable giving declined some 20% in 2008-09. See Editorial, *Protecting Charitable giving*, DESERET NEWS, June 26, 2011.

Charities have come under fire in the eyes of Americans who count the most – those who contribute. Those Americans who contribute include 65% of all households with family incomes below \$100,000. A 2007 survey showed that 59% of over 3000 respondents were more concerned than they had been a decade earlier that their charitable donations were not getting to the people who need it the most; 46% said they are more worried today about charity fraud or theft of funds or services. See William Robertson, *Donor Intent Revisited*, THE WASHINGTON TIMES, September 28, 2008, available at <http://www.washingtontimes.com/news/2008/sep/28/donor-intent-revisited/?page=1>.

A front-burner issue is that the charitable deduction in the tax code has been under fire from President Obama and members of Congress who are looking to find ways to shrink the nation's growing deficit. See Lisa Chiu and Suzanne Perry, *Charitable Deduction Could Be Under Threat in Coming Deficit-Panel Talks*, THE CHRONICLE OF HIGHER EDUCATION, Aug. 2, 2011, available at

<http://chronicle.com/article/Charitable-Deduction-Could-Be/128480/>. Among those submitting testimony against the possible impairment of the charitable deduction was Elder Dallin H. Oaks representing Utah's largest, and one of America's largest, charities, the Church of Jesus Christ of Latter-day Saints. Quoting from his testimony: "Some also assert that reductions in the charitable deduction would not cause charitable organizations to suffer financial losses from decreased private gifts since the government would make up some of these losses by additional appropriations." Testimony Submitted by Elder Dallin H. Oaks, Senate Finance Committee Hearing, Oct. 18, 2011, available at <http://www.finance.senate.gov/imo/media/doc/Oaks%20Testimony1.pdf>. He then concludes: "[M]ost Americans would not have us relinquish the freedom and diversity of our vigorous private sector of charities in exchange for the assurance that the government would select and manage their functions." *Id.*

Donor Intent in Jeopardy

Many scholars believe a more serious threat to the health of charitable giving than the tax code is the widespread and growing disregard for donor intent by recipient charities. One law professor begins a leading law review article on the subject:

The cat is out of the bag: Donors are fast discovering what was once a well-kept secret in the philanthropic sector – that a gift to public charity donated for a specific purpose and restricted to that purpose is often used by the charity for its general operations or applied to other uses not intended by the donor.

DAVID L. WILKINSON served as the elected Utah Attorney General for two terms from 1981-1989. In that position he had a common-law duty to enforce restricted charitable gifts. He now resides in Buena Vista, Rockbridge County, Virginia, where he volunteers to assist the administration of Southern Virginia University.



Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VANDERBILT LAW REVIEW 1093, 1094 (2005).

The reason many administrators ignore donor intent lies not in their inability to understand the donor's intent but in their knowing there is no real mechanism to enforce that intent — so they can't get caught. In most states, the Attorney General is the only person recognized as having standing to enforce restricted charitable gifts. But in a majority of those states, including Utah, there is no reporting law which allows the Attorney General to monitor how each charity administers its restricted gifts. Additionally, the Attorney General gives low priority to charitable gift enforcement, leaving the charities on the honor system. The Uniform Trust Code, adopted in twenty-three states, including Utah, does give the settlor (donor) standing to enforce the restrictions on his or her own charitable gift; but that does not help if the settlor dies before the charity wants to divert the gift to another purpose. Courts are moving in the direction of recognizing standing to sue in the executor of a deceased donor or in one of the heirs. A major recent case permitted standing to a distant heir of a long-since deceased donor to challenge the

decision of the administrators of Tulane University to discontinue the operation of Newcomb College as a coordinate women's college. See *Henderson v. Admins. of Tulane Univ. of Louisiana*, 426 So.2d 291 (La. App. 4 Cir. 1983), (a continuation of *Howard v. Tulane*, 970 So.2d 21 (La. App. Ct. 2007), *vacated*, 986 So.2d 47 (La. 2008)). Earlier, the New York Court of Appeals allowed the executrix of her deceased husband's estate to sue to enforce his gift. See *Smithers v. St. Luke's-Roosevelt Hosp. Ctr.*, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001). But those cases are the exception.

In *Howard v. Tulane*, 970 So.2d 21 (La. App. Ct. 2007), *vacated*, 986 So.2d 47 (La. 2008), Judge Max Tobias, dissenting from the majority's holding that an heir does not have the right to sue for injunctive relief pursuant to the cy pres doctrine, succinctly states the case for a more liberal rule governing standing:

Finally, I note that [by agreeing with the Tulane Board we set] a very bad precedent that if allowed to stand would discourage future donations to all charitable entities... if a donor cannot rely upon... the charitable institution to honor in perpetuity the

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conditions of a donation, why would one make a donation in the first place? To assume the good faith of a charity that does not want to proceed under the cy pres doctrine to be relieved of the condition of a donation works fine in theory; in practice, I think someone ought to be able to state a cause of action and a right of action to make the charity live up to its obligation when it so graciously accepted the conditional donation in the first place.

Id. at 36 (Tobias, J., dissenting).

Legal Diversion – The Cy Pres Doctrine

Where the honor system fails is when the charity wishes to change the original purpose for the gift, giving as its reason that conditions have changed since the date of the donation. The law provides a way for the charity to do this legally, but only where pursuit of the original purpose has become “unlawful, impracticable, impossible to achieve, or wasteful.” Utah Code Ann. § 75-7-413(1) (Supp. 2011). Only a court can sanction a change and must hold a hearing to which all interested parties, including the Attorney General, are to be invited. If the original purpose of the gift is found to no longer fit the new circumstances by the narrow definition, a new purpose may be ordered which is “as near as possible” – “cy pres” in French – to the original.

A Diversion from the Donor’s Intent Only to Facilitate the Administration of the Gift is Not Authorized by the Cy Pres Doctrine

Administrators of restricted gifts frequently change the purpose of a charitable gift simply to make it easier for them to administer the gift. As an example, the Utah-based manager of a gift for student loans to be made only to foreign students for study in their own countries converted it to be available only to foreign students who had emigrated to the United States, knowing that it would be easier to collect from them than from students abroad. The manager did not seek court approval for this radical thwarting of donor intent. Astonishingly, counsel for the manager justified this turning of the donor’s intent on its head as being within the manager’s discretion.

The Failure of the Honor Code

If the charity believes that there will be no objection to whatever new purpose it has in mind, the temptation is great to forget about petitioning a court and going through what could be a time-consuming process. It is much easier to just make the change. The charity is on its honor to go through the prescribed legal channels, but often does not do it.

In preparing this article, the author attempted to ascertain informally how frequently a petition to change the purpose of a charitable gift is filed. In the Fourth District Court, neither the current nor the immediate past probate clerk could remember one such motion, going back over a decade.

Robertson v. Princeton University

That donors are more aware today of what is being done with charitable gifts than they were previously is seen in the rash of

lawsuits brought in the last decade. The most publicized recent case is *Robertson v. Princeton University*, the suit brought against Princeton University by the children of Charles and Marie Robertson, heirs to the A&P grocery fortune. *See id.*, Docket No. C-99-02 (N.J. Chancery Div., Mercer Cnty., 2002). Filed in

2002 and settled several weeks before the scheduled trial date in early 2009, the case amassed almost a half million pages of internal documents in the court file and each side reportedly spent roughly \$40 million in legal fees before the prospect of spending millions more in a trial led the parties to settle.

The *Robertson* case validates the claim by a philanthropy scholar that “no two words in the philanthropic and nonprofit world stir up more passions on all sides of the issue than the words, ‘Donor Intent.’” Presentation by Curtis W. Meadows, Jr., Waldemar A. Nielsen Issues in Philanthropy Seminar Series, Georgetown University, *Philanthropic Choice and Donor Intent: Freedom, Responsibility and Public Interest*, <http://cpnl.georgetown.edu/doc-pool/Nielsen0205meadows.pdf>.

Surge in Donor Intent Cases

Other major institutions caught up in recent donor-intent controversies – all of them involving the alleged misuse of donated

“It cannot be assumed...that [a] charity, through its lawyers and accountants, will be neutral in seeing that its administrators of gifts observe donor intent.”

funds – include Brandeis University, Florida State, the University of New Mexico, the University of South Dakota, Randolph College in Virginia (formerly Randolph-Macon Woman's College), Trinity College (of Connecticut), Vanderbilt University, Fiske University, St. Olaf College, UCLA, USC, and the Metropolitan Opera.

Two philanthropy scholars note that “While gift restrictions are not new, the increasing number of lawsuits filed by donors and their families to enforce gift intent represent an alarming recent trend.” Kathryn Miree and Winton Smith, *The Unraveling of Donor Intent: Lawsuits and Lessons*, Planned Giving Design Center (Nov. 12, 2009), available at <http://www.pgdc.com/pgdc/unraveling-donor-intent-lawsuits-and-lessons>.

Donor Intent and Ponzi Schemes

One gains an understanding of the result of gifts going awry from reading the many horror stories where innocent donors feel cheated or shortchanged in some way in their attempts to have their donations managed as they intended. “Perhaps the most common and emotionally painful risk that philanthropists face,” according to one author on the subject, “is the violation of donor

intent . . . When donor intent is flagrantly violated it is something akin to a total loss for the ‘philanthropic investor.’” Frederic J. Fransen, *Managing Wealth for Philanthropic Risk*, WESTERN WEALTH MANAGEMENT BUSINESS, Oct. 2008, Vol. 1, Issue 9, available at <http://www.donoradvising.com/pdf/WealthManagementBusiness.pdf>. The emotional impact on the donor is like that on an individual who, having invested in what turns out to be a ponzi scheme, learns that one has lost most of or all of the money invested. In Utah especially, this as well as investment-related cheating too commonly occurs within the community of a church. In the words of Diane Smart, a Salt Lake City victim of a ponzi schemer who lost \$200,000, “He was in our church. We trusted him.” Bob Carden, *Investment Fraud Isn't Relegated to Wall Street: Beware the Ponzi Schemer Next door*, THE WASHINGTON POST (May 7, 2011).

Just as Elder Oaks observed that donors do not like the government to make their philanthropic decisions for them, so they also do not like to have the administrators of their gifts unilaterally make decisions changing the purpose for which their gifts are intended.

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Essential to Hire a Lawyer and Perhaps Other Professionals

In studying the burgeoning body of literature on donor intent, one notices a common characteristic. Every article assumes that the donor will be represented by counsel. It is inconceivable to the veteran practitioners and academics that author this literature that a donor would consider making a six-figure or more gift to charity without seeking continuing help from experienced philanthropy professionals. It is sad but true that it costs money to give money away safely.

Beware of Charity's Counsel and Accountants

It is understandable that a donor, having warm feelings toward the charity to begin with, would also view with favor the lawyers and accountants working for the charity. The donor might be excused for thinking that the charity's counsel and accountants would always be looking to correct mistakes made by the charity, among other things. It cannot be assumed, however, that the charity, through its lawyers and accountants, will be neutral in seeing that its administrators of gifts observe donor intent. They are being paid to support the administrators of the gift, not to protect the donor even if he or she is not represented.

It is also a mistake to believe that a state attorney general will become involved on the side of donor intent. Although the attorney general has a common-law duty to police charitable gifts, other interests will usually take precedence. Also, most attorneys general do not want to take on a respected charity so long as money is not being stolen.

Need for Professional Advice Besides a Lawyer

For a restricted gift which will require accounting by the gift's administrator, a donor may need the advice of an accountant, both in planning and executing the restricted gift and, in monitoring the periodic accounting statements provided by the charity. The annual accounting of a loan fund and a separate fund for the benefit of schools, which was provided by a major Utah charity to members of the donor's family, was so opaque that a CPA who reviewed it concluded that its numbers were "unauditable."

Protecting One's Gift From Future Diversion

First and foremost it is essential that the donor and charity freely communicate with each other at all phases of a restricted gift and that both understand what the expectations of the other

are. It is crucial that the parties agree to any restrictions before the instrument is drafted. And the charity should understand what the donor wishes to do with the gift if the circumstances existing at the time of the donation appreciably change.

One traditional way to prevent the charity from diverting the gift away from the purpose stated is to write into the deed instrument a reverter clause, providing that if the charity no longer applies the gift as the donor intended, the gift reverts to another charity, or is to be used for another purpose chosen by the donor. There are other ways to achieve this result which an experienced trust lawyer can recommend.

The donor traditionally wishes to have the gift be "in perpetuity." But that is the feature of restricted gifts most galling to charities. As John D. Rockefeller said, "Perpetuity is a long time." And charities lose patience with gifts which can never be changed. More and more scholars advise donors to refrain from making perpetual gifts except for those to museums. They accept as reality that donor intent inevitably erodes over time.

Warren Buffet and Bill Gates do not provide that their gifts be in perpetuity. Instead they select a duration such as seventy-five years, which they calculate will be long enough to accomplish their philanthropic goal and at the same time weaken any petition to a court seeking a substituted purpose. They reason that a judge is less likely to find that the original purpose of a gift is no longer viable if he or she knows that the gift's purpose is already scheduled to end on a date certain. They thus ensure that the fund they created will be used in the way they will have set forth in the gift instrument.

Conclusion

Not all charities, of course, are as intent on pursuing their own agenda as the above text may suggest. But enough are so that a donor wishing to have his money used according to his wishes, after engaging professional assistance, should interact with every charity at arms length and plan the gift so as to retain control of it after his death. This is particularly true of gifts to higher education, a chronic violator of donor intent. Meanwhile, state legislatures need to address the woeful lack of enforcement mechanisms, a situation which currently encourages charities to further mock the broken-down honor system.



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Fee Basics

by Keith A. Call

Turn to the “Attorney Discipline” section of this or almost any other issue of the *Utah Bar Journal*, and chances are high you will see one or more cases involving violations of Utah Rule of Professional Conduct 1.5, which deals with fees. In fact, ethical violations involving fee issues comprise a large percentage of complaints lodged with the Bar’s Office of Professional Conduct. See, e.g., Utah State Bar Office of Prof’l Conduct, 2011 Annual Report, available at [http://www.utahbar.org/assets/ANNUAL Report2010-2011.pdf](http://www.utahbar.org/assets/ANNUAL%20Report2010-2011.pdf) (last visited May 31, 2012). Based on my casual review of the “Attorney Discipline” section of recent issues of the *Bar Journal*, many lawyers seem to be getting into trouble for violating some simple fee basics. Here are some ideas to help keep you safe.

When to Get It in Writing

Rule 1.5(c) requires a written fee agreement for any contingent fee case. The written agreement must be signed by the client and must explain details of how the fee will be calculated. It must spell out any costs that will be deducted from the recovery, how they will be determined, and whether the client will be responsible for them if there is no recovery. At the conclusion of a contingent fee case, the lawyer must provide a written accounting to the client that shows how the remittance to the client is calculated.

Rule 1.5(e)(2) requires a written agreement if lawyers in different firms will be sharing fees. The share each lawyer will receive must be part of the written agreement.

In non-contingent fee situations, Rule 1.5(b) requires the lawyer to communicate the basis or rate of the fee and expenses to the client, “preferably in writing.” This must be done before or

within a reasonable time after commencing the representation. There is an exception if you will charge a “regularly represented client” the same rate as you have customarily done in the past.

Don’t forget to clearly communicate any rate changes to your client. Simply increasing your hourly rate on your January invoice each year may not be sufficient, especially if the invoice does not clearly state your hourly rate. See *Severson & Werson v. Bolinger*, 235 Cal. App. 3d 1569, 1571-72 (Cal. Ct. App. 1991).

“A lawyer whose only communication about fees is in the form of an invoice is setting him or herself up for potential problems.”

Prohibited Contingent Fee Cases

Rule 1.5(d)(2) prohibits contingent fees in criminal defense cases. This rule reflects a concern for conflicts of interest that could arise in a contingent criminal defense case. For example, a

lawyer may seek to avoid a plea bargain in order to try to get an acquittal at trial.

Rule 1.5(d)(1) also prohibits contingent fees in most domestic relations matters, reflecting a public policy favoring marital reconciliation and a desire to prevent overreaching in emotionally-charged situations. The comment to the rule clarifies, however, that contingent fees are allowed in connection with post-judgment balances due under child support, alimony, or other financial orders.

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



Division of Fees

Rules 5.4(a) and 7.2(b) prohibit sharing legal fees with non-lawyers in most situations. In the case of lawyers who are not in the same law firm, Rule 1.5(e)(1) allows fee sharing, but only in proportion to the services performed by each lawyer or in cases where each lawyer assumes joint responsibility for the representation. Rule 7.2(b) prohibits referral fees in most cases.

Make Sure You Earn It and Communicate It

Lawyers' fees must always be reasonable. Rule 1.5(a) provides a non-exclusive list of factors to be used to determine whether a fee is reasonable. These factors include such things as the time and labor required, the difficulty of the issues involved, fees

customarily charged for similar services, results obtained, and the experience, reputation and ability of the lawyer. Many of these factors are very subjective and hard to precisely measure.

Perhaps the most common fee-related complaint lodged against lawyers is that the fee was not earned or was unreasonable. A neighbor of mine recently complained to me about paying a \$1000 fee to an immigration lawyer who allegedly did nothing, but kept the fee. My guess is that the breakdown was one of communication more than it was one of dishonesty. A lawyer whose only communication about fees is in the form of an invoice is setting him or herself up for potential problems. Make sure you frequently invite open discussion about your fees and most disputes can be avoided.

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ABOUT THE SPEAKER: A lawyer with the Boston firm of Nutter McClennen & Fish LLP, **NATALIE B. CHOATE** has been counseling clients regarding their retirement benefits for over 35 years. Author of the best-selling book *Life and Death Planning for Retirement Benefits* (Ataxplan Publications, www.ataxplan.com). Editorial advisor and contributing author to *Trusts & Estates*, *Ed Slott's IRA Advisor*, and *Keeping Current*. Named "Estate Planner of the Year" by the Boston Estate Planning Council. Awarded the "Distinguished Accredited Estate Planner" designation by the National Association of Estate Planning Councils. Listed in *The Best Lawyers in America*. Former regent of the American College of Trust & Estate Counsel, and former Chair of its Employee Benefits Committee. Former Chair of Boston Bar Estate Planning and ERISA Committees. Gives lectures all over the U.S. including Heckerling, Notre Dame, Southern Federal and other tax institutes. Quoted in *Wall Street Journal*, *Forbes*, *Kiplinger's* and the *New York Times*.

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Founder Dallin H. Oaks' Visit Spurs Call to Join of Utah-born American Inns of Court Movement

by Isaac D. Paxman

Introduction

Did you know that the American Inns of Court ("AIC") movement was born here in Utah? Designed to enhance the skills, professionalism, and ethics of the bar and bench, the movement has swept the country, impacting over a hundred thousand attorneys and judges over the last three decades.

Dallin H. Oaks Addresses First Inn

On January 24, 2012, Dallin H. Oaks, who helped found the AIC movement, dined with and addressed the first American Inn at an evening event held in his honor at the courtroom of the Utah Supreme Court in Salt Lake City, Utah.

Utah Chief Justice Christine M. Durham introduced Elder Oaks, as he is now known in his calling as a member of the Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints. Chief Justice Durham, a long-time member of the A. Sherman Christensen American Inn of Court I, served with then-Justice Oaks on Utah's highest court almost thirty years ago. She recalled the keen intellect, engaging stories, and warm humor Oaks brought to his interactions with fellow justices. Oaks, in turn, spoke highly of Chief Justice Durham as both judge and administrator, noting that the court was good before she arrived, but notably better after her arrival.

Oaks then recounted for those in attendance how he became involved with the founding of the AIC movement.

Oaks was president of Brigham Young University when he received a

phone call announcing that Warren E. Burger, Chief Justice of the United States Supreme Court, was vacationing in Utah and wanted to meet with Oaks and Rex E. Lee, dean of the law school at BYU. Although both Oaks and Lee had clerked for justices of the U.S. Supreme Court, Oaks noted that neither had met Burger previously.



Elder Dallin H. Oaks, who played a key role in launching the American Inns of Court movement, with Christine M. Durham, Chief Justice of the Utah Supreme Court, and Barnard N. Madsen, President of the A. Sherman Christensen American Inn of Court I and organizer of the event.

On an August morning in 1979, Oaks and Lee drove to a spot near the Upper Provo River. As they arrived at a cabin owned by O.C. Tanner, Burger greeted them in shorts, a tank top, and sandals. It is an image that Oaks said he can recall as though it was yesterday. "His distinction was far greater than his appearance," quipped Oaks. As the Chief Justice bustled in and out of the kitchen, making and serving breakfast, Oaks and Lee still had no inkling of the reason for the unusual invitation.

After the meal, however, Burger confided that he was concerned about the trial skills of American attorneys. He was impressed with the English system, with its Inns of Court and the mentoring that occurred there, and wondered if BYU would launch a pilot

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program designed to capture some of the benefits of the English model. According to Oaks, Burger chose BYU because of his high regard for Dean Rex E. Lee, former U.S. Assistant Attorney General, and because he knew that Oaks, another U.S. Supreme Court law clerk, was its president. Burger “had all the authority he needed in that room” to get an immediate decision from the university, noted Oaks. Oaks and Lee accepted the invitation, and shortly thereafter a pilot program was underway.

After speaking about his involvement with the founding of the AIC movement, Oaks spoke fondly of his four “fathers in the law,” including U.S. Chief Justice Earl Warren, for whom he clerked, and described a significant lesson learned from each of them. His points regarding Chief Justice Warren were particularly applicable to members of our legal community. During his clerkship, Oaks learned to separate his affection for the person – and respect for his or her office – from differing views with the person. Near the end of his clerkship, Oaks realized he had disagreed with Warren’s votes roughly 60% of the time – a percentage Oaks found remarkably high, given that many of the votes had no direct tie to judicial activism or any other philosophical leaning. Yet throughout his clerkship and afterward, Oaks felt both deep affection for Warren, who was good and kind to Oaks and his family, and high regard for his office. Oaks declared that our “commonwealth” would be better off if all understood and implemented this principle.

Oaks then outlined some notable features of the U.S. Supreme Court’s recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Employment Opportunity Commission*, 132 S.Ct. 694 (2012), a case holding that federal discrimination laws do not apply to a church’s hiring and firing of ministers. Then he opened the floor to questions. When an Inn member asked for advice to anyone striving to excel at their profession but also to be a good spouse and parent, Oaks struck a tone of lighthearted reassurance: “Just muddle through it,” he urged. “Speaking from my own experience, it will work out all right.”

Oaks stayed afterward to greet all who wished to meet him.¹

Other Utahns’ Involvement in Founding the AIC

Listening to Oaks caused me to reflect on his and other Utahns’ involvement with the founding of the AIC and on the ways the movement has enriched my life and practice.

Soon after the breakfast meeting described by Oaks, A. Sherman Christensen, a federal district judge in Salt Lake City, was tapped to head the pilot program. Judge Christensen, in turn, assembled a small group of attorneys, judges, and BYU law professors and law students to lend a hand. Among the initial participants were

some prominent members of our legal communities today, including Ralph L. Dewsnup and M. Dayle Jeffs. *See* Ralph L. Dewsnup, *the Genesis*, *THE BENCHER* (September/October 2004); *see also* J. Clifford Wallace, *Birth of the American Inns of Court*, 25 *BERKELEY J. INT’L L.* 101 (2007).

The initial group came up with the basic plan of monthly instructive meetings that were designed to be much more than just another method of delivering CLE credit. *See* Dewsnup, *supra* at 6.

About a year after the Inn at BYU was launched, an Inn connected with the University of Utah was formed in Salt Lake City. *See id.* at 8. And soon thereafter, Inns were created in Mississippi and Hawaii. *See id.* at 9. This rapid growth prompted Chief Justice Burger to assemble an ad hoc committee of the United States Judicial Conference, comprised largely of Utah attorneys and judges, to solidify the movement. *See id.* at 10. The committee met in Washington, DC, where the movement was formally organized into a nonprofit entity. *See id.* Over time, the AIC has grown to include more than 29,000 members (and over 100,000 alumni) in over 400 chapters nationwide.

My experience with the AIC and the British Inns

My experience with the AIC began in law school in the late 1990s. I have remained an active member since then, participating in Inns in three cities, as I’ve moved about.

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In the summer of 2003, I was chosen by the AIC to participate in a three-month-long immersion experience with the English Inns of Court, mostly shadowing barristers and judges. While there, I became enthralled with the English Inns of Court, and my grasp of the mission of the AIC deepened.

For centuries, every aspiring barrister in England has been required to associate with one of the four English Inns of Court to be called to the bar. Barristers' chambers (similar to our firms) are located primarily on the Inns of Court properties near the Royal Courts of Justice in London. The area where I spent most of my time is paved by cobblestone and lit at night by gas street lanterns. Film crews use the spot for period pieces.

Within the area is the Temple Church, as seen in the movie *The Da Vinci Code*, with Knights Templar entombed in its floor. The church was originally built in the 12th century, and by the early 15th century, Inns of Court had been formed in the surrounding area. Eventually, the king granted use of the church to two of the Inns, known as the Inner Temple and Middle Temple Inns, in exchange for the Inns' agreement to support and maintain the church. Today, you can hear the boys' choir practicing in the church as you head from the Inns of Court to the Royal Courts of Justice across the street. A church and choir supported by members of the bar across the street from royal courts? Yes, this is a world apart. Oh and did I mention that barristers wear wigs and robes?

Also captivating are the dining halls. Picture the Hogwarts dining hall from the Harry Potter movies (without the ghosts and gimmicks) and you've got the basic image. The deep history of the halls is illustrated by the fact that in 1601, the tables in Middle Temple's dining hall were pushed aside for the premiere of Shakespeare's *Twelfth Night*, attended by the queen. Over 400 years later, I got the chance to watch the same play in the same hall.

Originally, the English Inns of Court were actual inns, where members of the legal community could stay while learning the ropes of their profession. The sharing of meals and quarters by members of the legal community undoubtedly ensured a large amount of informal mentoring and contributed to the sense of collegiality among barristers. Shakespeare himself captured this culture when he wrote: "Do as the adversaries in the law, Strive mightily, and eat and drink as friends." William Shakespeare, *The Taming of the Shrew*, Act 1, Sc. 2.

While Inn members no longer reside onsite today, they do still take meals in the dining halls, and they also participate regularly in educational and other events sponsored by their respective Inns, including occasional multiple-day training sessions for younger barristers that include an overnight stay (albeit at locations away

from the Inns). And the Inn environment still signifies the collegiality and civility the legal profession can and ought to encourage.

American Inns promote these same ideals through their monthly dinners and presentations. Through these events, I have gleaned practice-tip gems and gained a connection with fellow attorneys and with judges that I have felt through no other aspect of my professional life. Beyond that, I have experienced what I think Judge Christensen was describing when he said he wanted the AIC to "renew and inspire joy and zest in trial practice. . . ." See Dewsnap, *supra* at 6.

A call to join the AIC

Through my Inn membership, I've met people from various parts of the country who are passionate about this movement. In Denver recently, I heard an attorney tell how her AIC *pupillage* (a presentation group, typically consisting of a dozen or fewer persons) met often throughout the year for lunch and special events. With emotion, she revealed that her pupillage became her primary source of support when one of her children died. Some pupillages gather at a judge's home or chambers to plan their presentations. Around the country, people have embraced this movement as their own and have adapted it to their needs and circumstances.

Here in Utah, we have Inns in Provo, Salt Lake City (two Inns), and Ogden, as well as an Inn covering Washington and Iron Counties. But we could have more than that. Idaho, with about half the population of Utah, has six Inns to Utah's five. There are states, albeit populous ones, with over thirty Inns.

It seems to me that the Wasatch front could benefit from additional Inns, perhaps specialty ones, like exist elsewhere for family law, intellectual property, and other practice areas. And perhaps there are geographical areas that could start their first Inns.

I call on more members of the Utah bar and bench to join the AIC. Let's ensure that Utah's present-day embrace of the AIC aligns fully with its role in founding the movement. To apply to join an Inn or to help create one, please visit <http://home.innsforcourt.org> and click on "Join An Inn" or "Create An Inn." Or talk to an Inn member.

I am confident that if you join, you will be amply rewarded, even as you help others enjoy more fully their lives in the law. Dayle Jeffs recently said that his participation in the AIC has easily been the most satisfying part of his professional life. If you know anything of this man's legendary career and the breadth of his service to the bar and to the courts, you know that is saying something.

1. The above portion of this article is adapted from an article slated for the May/June 2012 issue of *THE BENCHER*, the flagship magazine of the American Inns of Court.



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Congratulations and best of luck to our own Lori Nelson who will be sworn in as President of the Utah State Bar at this year's summer convention. We applaud her dedication to the legal profession, the firm and the community. The Bar is fortunate to benefit from her leadership and expertise and we are proud to have her as part of the Jones Waldo family.

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Utah Department of Health Hearing Process

by Drew B. Quinn

While relatively few people have experience filing requests for administrative hearings with the Utah Department of Health, this lack of know-how should not prevent attorneys representing medical assistance beneficiaries or providers from doing so. This area of law may afford attorneys the opportunity to provide pro bono services to Medicaid clients who can benefit from legal representation. The following article describes the steps an attorney must take to assist such a client, pro bono or otherwise.

Administrative fair hearings for Medicaid applicants, beneficiaries, or providers are an interplay of federal law, federal regulations, state law, state administrative rules, and policy and provider

contracts. This article provides the ABCs of negotiating the hearing process at the Office of Formal Hearings, Division of Medicaid and Health Financing, Utah Department of Health (“DOH”).

The right to a Medicaid hearing originates in Title XIX of the Social Security Act. The Code of Federal Regulations requires states to provide a fair hearing to a Medicaid applicant or recipient whose claim was denied, given limited authorization, not acted upon promptly, or whose previous authorized service is reduced, suspended, terminated, or denied. *See* 42 C.F.R. §§ 431.200, -201. Utah rules also grant the right to a hearing to an “aggrieved person,” which includes providers. *See generally* Utah Admin. Code R410-14. These broad provisions open the door to an applicant, recipient or provider who for some reason disputes the action taken by Medicaid. To request a hearing, the following steps must be followed.

WHERE TO FILE

Eligibility

The Department of Workforce Services (“DWS”) determines eligibility for Medicaid and other medical assistance programs such as Children’s Health Insurance Program and Primary Care Network. Appeals from denials of eligibility must be filed with DWS, except for appeals from denials of disability under the Medicaid program. Responsibility for disability appeals was

recently moved to DOH, and the request for hearing must be filed with the Office of Formal Hearings.

All Other Claims

Most appeals come from clients or providers who

either have not received, or not been paid for, medical services. The correct place for filing these and other appeals is with the Office of Formal Hearings at DOH. However, there is an extra step for Medicaid clients living along the Wasatch Front who are required to enroll with a managed care organization (“MCO”) such as Molina Healthcare or Healthy U. A client or provider who is displeased with an action taken or denial given by an MCO must file his or her appeal and complete the appeal process with the MCO before having the right to a fair hearing with the State.

“The Department of Workforce Services determines eligibility for Medicaid and other medical assistance programs....”

DREW B. QUINN is an administrative law judge at the Utah Department of Health. Most of the cases she hears involve payment of Medicaid claims or authorization for medical procedures.



WHEN TO FILE

A hearing request must be filed within thirty days of the agency's written notice of an intended action, except that an expanded time limit of ninety days in which to file an appeal is given to persons denied eligibility for Medicaid. A request must also be filed within thirty days of an appeal of a denial by an MCO.

WHAT TO FILE

A request must be in writing, and should be on the Request for Hearing form found on the Utah Medicaid website under "Forms." See <http://health.utah.gov/medicaid/pdfs/Forms/HearingRequest2010.pdf> (last visited May 30, 2012). Please fill the form out as completely as possible and include all relevant documentation. Incomplete information delays the processing of the file. If you are an attorney joining an appeal that was already initiated by a Medicaid client or provider, you must file a notice of appearance in order to have access to information about the case.

Complete information should be included with the hearing request, as indicated by the instructions on the form. Be sure to

include a copy of the denial letter or other document you are appealing. If you are appealing a denial on appeal from an MCO, please submit the final decision from the MCO. The type of issue will dictate what sort of supporting documentation is appropriate, whether it be medical records, proof of billing, or other records.

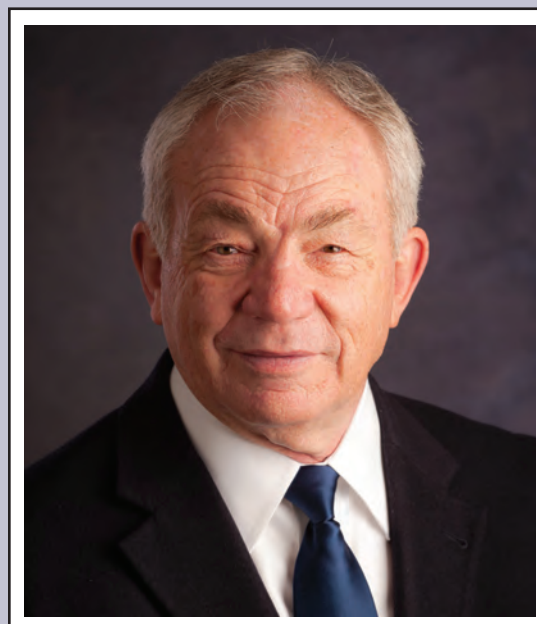
THE HEARING PROCESS

Because most petitioners in this forum are pro se, the procedures of this office are kept as informal and helpful as possible. However, a Medicaid hearing must follow the due process principles outlined in *Goldberg v. Kelly*, 397 US 254 (1970), which provides the right to a full, evidentiary hearing before an impartial hearing officer, including the right to present witnesses, confront and cross-examine adverse witnesses, and be provided the reason an action was taken or not taken. See *id.* at 266-71; 42 C.F.R. § 431.205(d). The Utah Rules of Civil Procedure do not apply, and hearsay evidence can be used to supplement or explain other evidence. Hearings must comply with the Utah Administrative Procedures Act, see generally Utah Code Ann. §§ 63G-4-101 to -601

In Memoriam

*It is with great sorrow that
Parsons Kinghorn Harris
announces the passing of
a dear friend and partner,
Gerald H. Kinghorn.*

*His extraordinary contribution
to the legal profession
will be greatly missed.*



Gerald H. Kinghorn
April 15, 1942 – May 31, 2012

(2011), and the procedure in the Office of Formal Hearings is governed by the Utah Administrative Code, *see generally* Utah Admin. Code R410-14.

After a file is opened, each timely hearing request is referred to the department within the DOH that took the action or issued the denial that is being appealed. Occasionally, if the problem is straightforward and can be solved easily, the reviewer may call the petitioner directly and work with them to resolve the issue. All others are scheduled for a prehearing conference call with the petitioner, the administrative law judge assigned to the case, and a representative of DOH.

The prehearing conference call provides an opportunity for Medicaid to explain its action or denial and the rule or policy on which it is based. The petitioner has the chance to ask questions and provide additional information that might be helpful. Our goal is to have an informative and substantive discussion about the case. A participating attorney should be prepared to explain the Medicaid action that his or her client disagrees with and why the action was erroneous, and to present the relevant federal and state laws, rules, and policies. At the conclusion of the call, if the issue is not resolved, or neither party agrees to withdraw, the case may be pended for additional information or agency review, another prehearing call, or scheduled for a formal or informal hearing. If there are no material facts at issue, the case may be briefed by the parties or submitted for decision on the existing record, and a written decision is rendered without holding a hearing.

HEARING

A hearing gives the petitioner a court-like forum in which to present witnesses, evidence, argument, and cross-examine the Medicaid witnesses. Hearings are recorded, either by an audio device or by a court reporter, depending on the expected length of the hearing and the complexity of the issues involved. A written recommended decision is thereafter given to the director of the Division of Medicaid and Health Financing, who can accept, modify, or reject the decision, and who issues a final order.

Formal v. Informal

All agency adjudicative proceedings are conducted formally unless specifically designated as informal. A party wishing his or her case to be designated as informal must make a motion to the court, alleging that changing the proceeding from formal to informal is in the public interest and that its conversion does not unfairly prejudice the rights of any party. The primary reason for asking for a change from formal to informal pertains to what court an adverse decision may be appealed.

Appeal Rights

Any party wishing to challenge a Final Agency Order has two options: judicial appeal or reconsideration. District courts have jurisdiction to review by trial de novo all final agency actions resulting from informal appeals; the Utah Court of Appeals or Utah Supreme Court hears appeals from formal hearings.¹ *See* Utah Code Ann. §§ 63G-4-402, -403 (2011). Prior to a judicial appeal, a party may

request a reconsideration of the opinion from the Medicaid director within twenty days of the release of the decision.

"A hearing gives the petitioner a court-like forum in which to present witnesses, evidence, argument, and cross-examine the Medicaid witnesses."

THE OFFICE OF INSPECTOR GENERAL

The Office of Inspector General of Medicaid Services ("OIG") was created by the

Utah Legislature during the 2011 legislative session. It is an entity separate from DOH that selects and reviews representative samples of claims submitted for reimbursement under the state Medicaid program to determine whether fraud, waste, or abuse has occurred. All questions about requests or letters that come from OIG must be directed to that office, at PO Box 143103, Salt Lake City, Utah 84114-3103, telephone 801-538-6123.

CONCLUSION

Our office tries to make the hearing process user-friendly while protecting the due process rights of the participants. If you have questions about the hearing process in general you may e-mail me at dbquinn@utah.gov or call our office at 801-538-6576.

1. The Utah Court of Appeals has original appellate jurisdiction over judicial review of every agency's decisions except for six agencies reserved to the Utah Supreme Court. *See* Utah Code Ann. §§ 78A-3-102, 4-103 (Supp. 2011).

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I Finally Got My Day in Court

by Peg McEntee

EDITOR'S NOTE: *A version of this article was previously published in the Salt Lake Tribune. The Bar Journal does not ordinarily publish material that has appeared elsewhere, but given the subject of the column, an exception seemed appropriate in this case.*

Last fall, I was talking to a top cop and mentioned I was on a list for jury duty. Don't worry, he said, they never choose cops, lawyers, or reporters.

The next morning, I reported to a Third District courthouse, where the jury pool was questioned briefly about age, profession, marriage status, children, and residence. Then the attorneys spent about ten minutes deciding which of us to keep. In the interim, the judge read us a brief history of justice, starting with the hunter-gatherers and ending with the U.S. system, which he deemed the finest in the world.

So it was with considerable surprise that, despite my profession, I was named to a six-member jury for a criminal trial. We were sworn in and took our seats. By serving as jurors, the judge told us, we would not only be doing our civic duty, we would be ennobled by the experience. Then we got down to work.

The trial involved allegations that, in the midst of an acrimonious divorce, one person violated a protective order and engaged in criminal mischief. The protocol was familiar to what I've seen covering scores of trials. The defense and prosecution offered opening statements and the first witness took the stand, describing what she believed the defendant had done. More

witnesses followed, each with his or her version of the chain of events, some in conflict with the others. Periodically, we'd be led out of court and to the jury room by a bailiff who lightened the mood with truly awful jokes, most involving Utah and BYU football players. When we returned to court, the bailiff would proclaim, "All rise for the jury!" For the first time, people were rising for me.

We were released for lunch, and I headed to a diner the bailiff recommended. As it happened, the accuser and who I assumed was an attorney were there, and I took care to sit as

far away from them as possible. Back in court, we heard a last witness, and then the defense attorney and prosecutor gave their closing arguments. But before we were led to the jury room, the judge advised us that one of the charges had been resolved.

Meantime, the criminal mischief charge had been reduced to a class B misdemeanor.

The moment the door shut, we chose a foreperson, who seemed to really want the job, then started talking. The judge had given us a general instruction on how to consider the thirty-three specific jury instructions. For example, all the jury instructions were equally important and should be thought of in the context

"On that Wednesday in October, everyone involved in that trial was fully engaged, and the urgency of the issue was palpable."

PEG McENTEE has been a journalist for thirty years. She is the Salt Lake Tribune's metro news columnist.



of all the rest. We must obey the instructions and cannot reach decisions that go against the law. (It's worth noting that after the column dealing with my jury experience ran in the *Tribune*, a gentleman brought me some literature on jury nullification.) Very important: keep an open mind and don't look at news reports regarding the case. Most important: we must agree that the prosecution has proven its case beyond a reasonable doubt to reach a verdict of guilty.

There wasn't much discussion about reasonable doubt. We agreed on its meaning and moved on. We talked intently for an hour, weighing the testimony, using common sense to figure out who had done what and why, and referring often to the instructions. Then the foreperson polled us, and we all said we couldn't get past the standard of beyond a reasonable doubt. Given the testimony, which included some unsavory family issues, we agreed the prosecution's case was just too weak to convict. We acquitted the defendant.

There are times when one's acute attention and focus is paramount. In my business, that may be big breaking news that requires absolute focus and the most ethical decision-making. On that Wednesday in October, everyone involved in that trial was fully engaged, and the urgency of the issue was palpable. After our verdict, we were ushered back to the jury room and the judge came in, sans robe, to talk with us about the experience. He listened as attentively as he had in the courtroom, and we gave him the same respect. He also said the case was weak to begin with, and apologized for wasting our time. All six of us said our time certainly was not wasted, and that we had, in fact, been ennobled.

As dusk was falling, a couple of jurors and I walked out of the courthouse together, then scattered to find our cars. It's likely we'll never see each other again, but I'll always remember that day and those good people.

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The Utah Territorial Bar Association: Our Forgotten Heritage

by Michael S. Eldredge

On the official Utah State Bar website, the history of the Utah bar before 1931 condenses into one compound sentence: “The history of the Utah State Bar began in the early 1900s with the association of several Utah lawyers hoping to improve communication within the legal community and to find ways of serving the general public.” See “Utah State Bar History & Purpose,” Utah State Bar, http://www.utahbar.org/public/bar_history_and_purpose.html, (last visited April 1, 2012). Whether because of oversight, or a generally accepted lack of relevance, the result is the same; Utah is forgetting its legal heritage, one that is as unique, colorful, and controversial as Utah’s struggle for statehood and beyond.

The seal of the Utah State Bar has emblazoned on the bottom, the year “1931.” However, regarding the organization of the legal community in Utah, 1931 is misleading. If anything, it merely commemorates the year that the Utah State Bar became integrated; all lawyers practicing in Utah were required to be members. The Utah State Bar became a creature of statute and reformed the entity of organizational existence; the people, the goals and ideals remained the same.

Utah attorneys have a heritage similar to Wisconsin, which organized in 1878. Indeed, the American Bar Association also formed in 1878, but because of its multi-jurisdiction membership it remains a voluntary organization today. Wisconsin, Utah, and several other state bar associations went from elite associations of lawyers whose membership did not include all resident attorneys, to becoming fully integrated by the mid-twentieth century. Perhaps revisiting the legal historical roots in Utah will shed some light on what may be misperceptions by many as a

gross oversight of our true legal heritage.

The Organic Act for the Territory of Utah passed on September 9, 1850, as part of the Compromises of 1850. However, Brigham Young did not receive word until the following January 28, 1851, when George Q. Cannon returned from California. Cannon had purchased an old copy of *The New York Tribune* in Los Angeles in December, delivered from a ship traveling from the Panama

overland route. Although chagrined at the changes in area and name of the State of Deseret, Young accepted his appointment as governor. See ORSON F. WHITNEY, HISTORY OF UTAH 452 (George Q. Cannon & Sons Co. 1892-1902).

Justices Lemuel G. Brandenburg and Perry Brocchus arrived in August 1851 and joined by

Zerubbabel Snow, a Mormon already residing in the territory, gave Utah its first judiciary capable of admitting lawyers to the bar of the federal courts in Utah. The dubious session, however, ended abruptly as Brandenburg and Brocchus fled the jurisdiction in September 1851 in the famous case of the “runaway judges.” Justice Snow was left behind, and on October 6, 1851, an improvised court seal was adopted. The legislative assembly authorized him to hold district court in all three districts,

“[M]ost lawyers in the 19th Century did not attend law schools, but rather... ‘read’ law under the supervision of an experienced lawyer, and serve as the lawyer’s apprentice.”

MICHAEL S. ELDREDGE has over thirty years experience in corporate, business, and securities law. He also teaches History and Political Science at the University of Phoenix.



necessitating him to admit members of the bar in the Territory of Utah. Without addressing the history of the troubles of the bench and bar of the Utah Territory over the next forty years, about which much has been written, suffice it to say that the profession of lawyering had some interesting and colorful challenges.

Throughout the latter half of the 19th Century, lawyers who wanted to practice in the Territory of Utah petitioned the Supreme Court for admission, accompanied by the recommendation of an examination committee. Once being admitted, lawyers were members of the bar of all the courts in the territory, much the same as the federal courts continue to do today.¹ In essence, there was a Bar of the Territory of Utah, but no bar association existed until 1884. Years later, the Territorial Legislature memorialized the requirements to be admitted to practice law in Section 3100, Volume 2, Page 214 of the Compiled Laws of Utah (1888), which required an applicant to be: (a) a citizen of the United States, or one who has declared his intentions to become the same in the manner as required by law, (b) that he be over the age of 21, (c) of good moral character, and (d) *possess the necessary qualifications of learning and ability*. It was the latter qualification that was anything but objective.

Education was an integral part of a lawyer's admission to a bar. The first law school in America was the Litchfield Law School in 1784, followed some sixty years later by Harvard and Yale, and in 1858 at Columbia. The pattern in all law schools was the

same, preparation of the student for apprenticeship by studying works such as Abraham Lincoln recommended: Blackstone's *Commentaries*, Chitty's *Pleadings*, and Story's *Equity and Equity Pleading*. The case method of Socratic learning did not appear until Columbus Langdell instituted it at Harvard in 1870, but by 1900 it was gaining favor over the apprenticeship method as the most efficient way to train lawyers in the eastern population centers. However, most lawyers in the 19th Century did not attend law schools, but rather chose to "read" law under the supervision of an experienced lawyer, and serve as the lawyer's apprentice. An apprenticeship would last preferably two, even three years before applying for admission to a bar. Indeed, as the website of the American Bar Association states,

The legal profession as we know it today barely existed at that time. Lawyers were generally sole practitioners who trained under a system of apprenticeship. There was no national code of ethics; there was no national organization to serve as a forum for discussion of the increasingly intricate issues involved in legal practice.

"History of the ABA," American Bar Association, http://www.americanbar.org/utility/about_the_aba/history.html, (last visited April 1, 2012).

It is more than a coincidence that the bar associations began appearing the same time legal education was undergoing changes.

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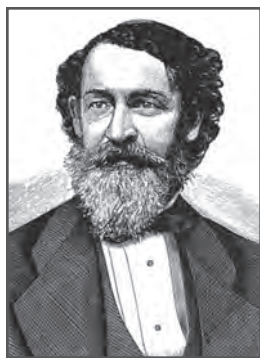
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Though the territory and state did not have a law school until the University of Utah Law School was founded in 1913, the paradigm was certainly not lost on the lawyers of Utah. Law was becoming a sophisticated and organized profession that had infinitely more objective in admission standards and rules of practice.

On January 8, 1894, Elmer B. Jones called a meeting of several attorneys to order, at the Federal Courthouse in Salt Lake City. After preliminaries, Jabez G. Sutherland, Franklin S. Richards, Richard B. Shepard, William H. King, and L. R. Rogers were appointed to form a permanent organization, constitution, and bylaws of a territorial bar association. *See* PROCEEDINGS OF THE TERRITORIAL BAR ASSOCIATION OF UTAH 4 (Salt Lake City Magazine Co. 1894).

Sutherland had been a prominent lawyer, judge, and congressman from Michigan, and came west to Utah in 1873 to seek a better climate. Although Sutherland was a “Gentile,” Brigham Young immediately retained him as counsel to the LDS Church. His good friend and colleague, Franklin S. Richards succeeded him. On January 31, 1884, Sutherland had helped organize the Salt Lake Bar Association, and served as its first president. In 1894, he was seeking to broaden the ideals of the local bar association into a territory-wide bar association. *See* 4 WHITNEY 529-532.



*Jabez G. Sutherland,
First President of the
Territorial Bar
Association of Utah*

The meeting was adjourned until January 11 in the Supreme Courtroom. At that meeting, Sutherland presented a constitution and bylaws, and upon their acceptance, he was acclaimed unanimously as president of the new Territorial Bar Association of Utah. The members next elected vice presidents for the four districts of the organization, and included Samuel R. Thurman of Provo, First District; Presley Denny of Beaver,

Second District; Charles W. Bennett of Salt Lake City, Third District; and James N. Kimball of Ogden, Fourth District. The membership then elected Parley L. Williams, John A. Marshall, Franklin S. Richards, E. M. Allison, and William H. King to the Executive Council. In addition, the committee on grievances was appointed by President Sutherland, underscoring the importance that the association placed on its relations with the public and policing the profession. The meeting closed with a call to all

lawyers in the territory wishing to become charter members of the Territorial Bar Association of Utah could do so by paying their dues within twenty days. *See* PROCEEDINGS OF THE TERRITORIAL BAR ASSOCIATION OF UTAH 1-4.

On February 16, the association met in the Supreme Courtroom at the Federal Courthouse, and had a general business meeting. The bar association clearly manifested its intent to petition the legislature for inclusion of the bar in statutes to assist the courts in such functions as establishing a territorial law library. The meeting also expressed an intent to be active in drafting a multitude of bills for consideration by the legislature, including rules regulating appeals to the Supreme Court. Finally, 73 charter members out of approximately 350 attorneys in the entire territory were admitted to the association, roughly one-fifth of the lawyer population of Utah with a standing invitation for all to join. In short, The Territorial Bar Association of Utah was doing in 1894 the same activities that The Utah State Bar does today.

On June 4, 1894, the bar association convened for the first annual meeting on June 4, 1894. The association named J. H. MacMillan, H. P. Henderson, and P. L. Williams delegates to the American Bar Association meeting being held on August 20 at Saratoga Springs, New York. Eight more attorneys were admitted at the June meeting, bringing the total to eighty-one. Jabez G. Sutherland gave the President's address, followed by Ogden Hiles, who spoke on “The Codification of the Law.” Walter Murphy also addressed the attorneys on “The Use of the Writ of Injunction to Prevent Strikes,” which, interestingly enough, held the premise that “equity and good conscience required that the employees should not cease to do their work.” The meeting adjourned until the next annual meeting on January 14-15, 1895. *See id.*

At the January 1895 gathering, Jabez G. Sutherland was again elected president for the coming year, and the emphasis of the meeting was on the upcoming Constitutional Convention in March. Seven members of the bar association were also delegates to the Constitutional Convention, and the bar was intent on being heard, especially on what would become Article VIII dealing with the Judiciary. Dennis Eichnor and Franklin S. Richards were instrumental in carrying the recommendations to the convention. The bar association admitted thirty-four new members, bringing the total membership to 115, one-third of the lawyers in Utah. After a banquet where the members had a choice of roast turkey or filet of red snapper, the association

adjourned. *See* REPORT OF THE ANNUAL MEETING OF THE TERRITORIAL BAR ASSOCIATION OF UTAH 1-7 (Grocer Printing Co. 1895).

On January 13, 1896, nine days after Utah attained statehood, the association elected Jacob S. Boreman President, and J. G. Sutherland, Franklin S. Richards, and John A. Marshall were appointed delegates to the American Bar Association meeting in August. Upon motion, the word Territorial was stricken from the name of the association, and the new name was adopted, The State Bar Association of Utah. Outgoing President Sutherland and Charles Zane addressed the convention about the change from territory to state and proudly explained the new Utah Constitution. Sixteen new members were added, and two died, bringing the total to 129. *See* REPORT OF THE ANNUAL MEETING OF THE STATE BAR ASSOCIATION OF UTAH, 1-8 (Grocer Printing Company 1896).

And so the bar association went on. After the association elected former U. S. Attorney Charles S. Varian President of the bar association in 1898, there was a three-year period between 1899 and 1901 when there was no annual meeting and interest waned. The membership fell back to about seventy-five attorneys where it remained for several years. In 1902, Varian reconvened the annual meeting. With a renewed sense of purpose, the bar again reiterated the late Jabez G. Sutherland's call for "men of learning and integrity" as the foundation of the association, which was yet to have a woman member. *See Meeting of Bar Association*, DESERET NEWS, January 21, 1902, at 5.

Disbarment proceedings increased beginning in 1903, but it seemed that the Supreme Court was loath to take away an attorney's rights to practice. In the few cases of disbarment of an attorney, it was usually for a short period of approximately sixty days. *See Case of Lawyer Silberstein*, DESERET NEWS, February 20, 1903, at 2. The bar fulfilled virtually the same function it does today wherein the bar acted as the plaintiff bringing the action in the Supreme Court. One notable disbarment in which the bar participated was Judge Orrin N. Hilton, attorney for the famous Joe Hillstrom, who was executed in Utah in 1915. At the funeral of "Joe Hill," in Chicago, Judge Hilton uttered contemptuous remarks about the Utah Supreme Court. Hilton was sarcastic in his defense and consequently disbarred on July 6, 1916. *See Hilton Disbarment is to be Started in Few Days*, SALT LAKE TELEGRAM, December 3, 1915, at 9. At the time, however, the Supreme Court did not have a *pro hac vice* provision, and just admitted to the bar attorneys from outside the jurisdiction based on their own state membership.

Further, no provisions existed for reciprocal disbarments in other states, which explains Judge Hilton's flippant attitude.

On August 16, 1915, the State Bar Association of Utah hosted the American Bar Association's annual meeting that saw Elihu Root, former U. S. Secretary of State and former Senator from New York, elected ABA President. Former President William H. Taft, a former president of the ABA, was the keynote speaker. Taft had a special affection for Utah because it was one of two states he carried in the 1912 presidential election. *See Root is Elected Head of Bar Body*, SALT LAKE TELEGRAM, August 19, 1915, at 1.

On December 3, 1923, the bar launched a massive campaign to enlist all attorneys in the state to join the association. The goal was to have all the lawyers in the state on the rolls of the bar by January 19, 1924, the scheduled annual meeting of the association. The drive fell short of its goal, but association members had the pleasure of hearing from charter member and newly appointed Associate Justice of the U. S. Supreme Court, George Sutherland (no relation to Jabez). *See Utah Lawyers Seek Members*, SALT LAKE TELEGRAM, December 5, 1923, at 19. By now, the association had gone to two meetings per year format, with the semi-annual

Weapons Case?



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- Co-author *Utah Gun Law 4th Edition*
- Federal Firearms Licensee
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- International Defensive Pistol Master

meeting being held in January, and the annual meeting in June, which saw Charles R. Hollingsworth of Ogden elected president.

On Tuesday afternoon, July 31, 1928, bar president Richard W. Young opened the annual meeting with a call to incorporate the bar association, and allow the bar to discipline its own members. The “integrated” bar was fast becoming the popular mode of organization among other state bars, and the idea interested an increasing number of lawyers in Utah. At a special meeting held on Saturday afternoon, December 29, 1928 in anticipation of the upcoming Utah legislative session, the bar recommended that the legislature integrate the bar into a corporation, and control the practice of law in Utah by a board of commissioners. *See Utah Bar Urges Board to Define Lawyers’ Status*, SALT LAKE TELEGRAM, December 30, 1928, at 2. In the 1929 session of the Utah Legislature, Senate Bill 16 was introduced for the creation of a commission of the Utah State Bar, but did not succeed in passage. The next opportunity came in the 1931 session, and this time, the bar reorganized, incorporated, and integrated, into statutory control by a board of commissioners. The new Utah State Bar required membership of every lawyer in the state, and expulsion from the bar was tantamount to disbarment. *See Utah Bar Association Meets for First Time Since Its Creation by the Legislature*, SALT LAKE TELEGRAM, June 13, 1931, at 7.

Although it is understandable why the Utah State Bar took a new direction, and reorganized as a different entity effective in 1931, it is clear that the bar considered this a reorganization from an

association to a corporation, especially because it maintained much of the old traditions of the association. Perhaps it was the stigma of a voluntary organization that never commanded the attention of all lawyers in the state, or the emphasis that the bar had new power and control. Whatever the reason, the bar adopted on its seal the year 1931, but in reality, it should never have abandoned the year 1894. The example of the State Bar of Wisconsin is germane to this discussion.

The State Bar of Wisconsin, although existing in various forms, has never lost sight of the fact that its predecessor in interest organized in 1878. Since then, it underwent reorganization in 1947, and finally, integrated by order of the Wisconsin Supreme Court in 1956. Still, it claims that the organization was founded in 1878, even though it has existed under different entities. So it should be in Utah. From 1894 to 1931, the State Bar Association of Utah was a living, viable organization. From 1931 to 1991, it became a fully integrated bar. In 1991, the entity was again changed to a nonprofit corporation, but still, fully integrated. Though its organizational entities, membership requirements, and powers changed, it is still of the same persona and spirit that existed in 1894. The identical spirit of learning and integrity continues to this day, manifest in the women and men who make up the Utah State Bar.

1. See LAWRENCE M. FRIEDMAN, *A History of American Law*, 3d ed., (New York: Simon & Schuster, 1973-2005) 495-500, for an excellent discussion of organizing the bar and admission throughout the United States in latter half of the 19th Century.

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Bert was name Outstanding Domestic Lawyer of the Year in 1986-87. He received the Professional Civility Award in 2006.



ALLISON R. LIBRETT has joined the firm as a member of the firm's family law group. Ms. Librett focuses her practice on assisting individuals with divorce, pre/post nuptial agreements, custody, paternity, modification of decrees of divorce, enforcement of decrees, adoption, grandparent rights, guardianship and protective orders.

Before joining Dart, Adamson & Donovan she was associated with Corporon & Williams and VanCott, Bagley, Cornwall & McCarthy.

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Survey Says...Mentors Reap Benefits of Mentoring

by Elizabeth A. Wright

At the Utah State Bar Summer Convention in Sun Valley, Idaho, the Bar Commission will recognize Sharon Donovan of Dart, Adamson & Donovan and Riley “Josh” Player, an Assistant District Attorney at the Salt Lake County District Attorney’s Office, as Outstanding Mentors in the New Lawyer Training Program (“NLTP”). New lawyers who have been mentored in the NLTP were invited to nominate their mentors for the first “Outstanding Mentor” award to be given in July. Though Ms. Donovan and Mr. Riley are to be commended for their outstanding service, there were many other terrific nominees. The large number of thoughtful nominations indicates that the new lawyers are truly appreciative of the time mentors devote to them and the relationship that is formed. The following comments from mentees demonstrate the significance of mentoring in the early stages of a lawyer’s career:

- “The relationship that [my mentor and I] developed through the mentoring program is one of the most valuable assets I maintain in my practice.”
- “[My mentor] guided me through my first year as an attorney and continues to do so as I become a more experienced attorney. I am a better attorney because of [my mentor’s] guidance.”
- “I gained a life-long friend and confidant.”
- “My mentor taught me how to be a good member of the legal community.”
- “[My mentor’s] encouragement and advice helped me through a very difficult first year as a new lawyer.”
- “[My mentor] was genuinely interested in making sure that I was prepared to be a well-rounded and skilled attorney.”

The Bar’s mentoring program has been humming along nicely since 2009. The NLTP requires new admittees to the Utah State Bar to work with a Utah Supreme Court Approved Mentor during their first year of practice.¹ The mentor and new lawyer are required to meet once a month for twelve months to discuss the new lawyer’s legal work, professional development, and adjustment to the practice

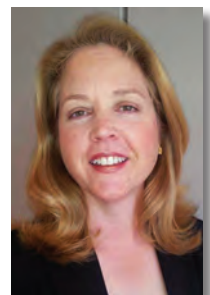
of law. They are also required to discuss the Rules of Professional Conduct as a means of more effectively teaching and fostering professionalism, ethics and civility. Both the new lawyer and the mentor receive twelve CLE credits for participating in the program. There are 804 approved mentors in the NLTP, 285 of whom are currently mentoring new lawyers. By the time this article appears in print, 561 new lawyers will have completed the program.

As Coordinator of the NLTP, I have the pleasure of interacting on a regular basis with our state’s newest lawyers and have found it extremely rewarding to work with new lawyers as they begin their careers and find their way in the profession and our legal community. I am glad to answer new lawyers’ questions about the Utah State Bar, how it works and what it offers to them professionally and personally.

However, because of the way the NLTP is designed, I have much less interaction with our NLTP mentors. I am aware of the time and effort NLTP mentors are devoting to their mentees, not only because I know what the program requires of them, but because I hear from the new lawyers about the work they do together. I know the practice of law is stressful and time consuming. I know people’s personal lives are busy. I know that mentoring hours are non-billable. So when I see and hear what NLTP mentors are doing to teach and help their mentees I am appreciative, but I also hope and wonder if they are glad they took on this huge task.

Why would a busy, experienced lawyer take the time to mentor a new lawyer? There are multiple studies and articles that discuss the benefits of mentoring for the mentor.² The benefits of mentoring include building leadership skills, expanding horizons, revitalizing an

ELIZABETH A. WRIGHT is the Coordinator of the Utah State Bar New Lawyer Training Program. She is a lawyer admitted in New York and Utah and was an Assistant Corporation Counsel for the City of New York before moving to Utah.



interest in one's own career, and expanding one's professional network. Mentoring is good for business because it helps legal organizations attract and retain good lawyers. Finally, mentoring is community service. Lawyers who are successful and/or who had mentors themselves often like and want to give back to the profession.

To find out if NLTP mentors are reaping the benefits of mentoring, the Bar did a survey of mentors in 2011. The mentors who responded all said they would mentor again and recommend mentoring to other experienced practitioners. 88.7% think that mentoring is an effective way to train new lawyers in the practice of law. 94% will maintain a relationship with their mentee. 87.3% feel they benefitted from participating as a mentor.

Here are some quotes from the survey that support what the studies say about the benefits of mentoring:

- "Mentoring made me reflect on my practice and how I could improve."
- "It is gratifying to pass on what you have learned in practice."
- "It gave me an appreciation of how hard it is to commence a practice and what 'blind spots' new lawyers have that require assistance."

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- "I had to pay much more attention to detail and it required me to make sure I understood and followed correct procedure. Mentoring required me to update myself on certain areas of the law."
- "It made me review the Rules of Professional Responsibility."
- "It helped me share my experience and advice to better help the new lawyer, which in turn made me feel better about my job as an attorney."
- "I benefited as it was a way of paying back to those that encouraged me in my early legal career."
- "I had to analyze the 'why' of things."
- "The preparation for each session was good review for me."
- "New relationships will foster career development for both parties."
- "I made a much stronger connection to the new attorney than would have taken place otherwise."
- "It is a great feeling to be a mentor. Both times have been very special, particularly at months 10, 11, 12 as you realize how much you've been able to do together."
- "I enjoyed being around enthusiastic young people."
- "Acting as a mentor showed me how much my knowledge, skills, and confidence have increased since I was a new lawyer. I confirmed that I actually know a few things about practicing law and doing it well."

The survey results mirror the scholarship about mentoring and demonstrate that mentors find the mentoring experience personally and professionally beneficial. Serving as a mentor creates an opportunity for mentors to develop new business contacts, friendships that may last a lifetime, the opportunity to pass on some of their insights from years of practice, and the satisfaction of knowing they have contributed positively to the well-being and integrity of the profession.

1. New admittees who have practiced in another jurisdiction for at least two years or who live outside of Utah are exempt from the NLTP.
2. See, e.g., Raymond A. Noe, David B. Greenberger and Sheng Wang, *Mentoring: What We Know and Where We Might Go*, 21 RESEARCH IN PERSONNEL AND HUMAN RESOURCES MANAGEMENT 129, 151 (2002); Connie R. Wanberg, Elizabeth T. Welch and Sarah A. Hezlett, *Mentoring Research: A Review and Dynamic Process Model*, 22 RESEARCH IN PERSONNEL AND HUMAN RESOURCES MANAGEMENT 39, 52-53 (2003); Sharon K. Gibson, *Being Mentored: The Experience of Women Faculty*, 30 JOURNAL OF CAREER DEVELOPMENT 173, 173 (2004).

Thank You to those who are currently mentoring a new lawyer in the New Lawyer Training Program. The future of the legal profession is stronger because of your service.

Grace Acosta	Ryan Bell	Terry Cathcart	Mr. Dana Farmer	Roger Henriksen
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The Mortgage Lender's Primer on a TILA Rescission Claim

by Aaron B. Millar

The latest statistics show that although the Utah foreclosure rate has decreased, Utah foreclosures are still quite high relative to the nation. In Q3 2011, one in 145 Utah homes was in foreclosure, sixth highest in the nation. See <http://knowledgebase.findlaw.com/kb/2011/Dec/504952.html>. Consumers often turn to consumer protection statutes, such as the federal Truth in Lending Act ("TILA"), for protection against foreclosing lenders.

Imagine this scenario: Hours before the foreclosure sale, the mortgage lender receives a fax from the defaulting borrower's lawyer stating that the borrower rescinds the loan and that the lender is obligated to reconvey its deed of trust because the finance charge in the loan disclosures was understated by \$36. The borrower further demands that the lender return all of the fees and interest payments the borrower made on the loan. Possible? Yes. Many lenders have been unprepared to confront a rescission demand under TILA. Given the tight statutory time frame and the risks involved, the lender must proceed expeditiously and with caution when responding to a rescission demand.

TILA is a strict liability statute that requires lenders to provide certain notices and disclosures to consumers so that the consumer can shop interest rates. Failure to provide accurate disclosures subjects lenders to TILA's damages and rescission remedies. If a consumer elects to rescind the loan transaction, a lender can lose its security interest in the property and be required to pay back all fees, costs, and interest payments that it received from the borrower. Just as daunting, the lender has a mere twenty days to rescind upon receipt of the borrower's rescission notice. After the lender fulfills its obligations, the borrower must tender the loan proceeds. The lender's failure to rescind can result in severe penalties. In one case outside of Utah, for example, the court held that because the lender failed to accept the borrower's valid rescission notice, the borrower did not have to tender and

was able to keep the loan proceeds. See *Family Fin. Servs. v. Spencer*, 677 A.2d 479 (Conn. App. Ct. 1995).

Notwithstanding the potentially draconian nature of rescission, the narrow drafting of TILA and the equities taken by federal courts in Utah have limited its application. Thus, a proper TILA analysis will often show that the loan at issue affords no right of rescission. The following is an issue checklist for lenders to consider upon receiving a rescission notice:

Has the statute of limitations run on the TILA rescission claim?

The TILA rescission remedy is popular among consumers because it expires three years after the loan consummation if "right of rescission" or accurate material disclosures are not given to the borrower. (In contrast, a TILA claim for damages has a short, one-year statute of limitations.) The U.S. Supreme Court has held that even if the rescission claim is brought as a defense to a foreclosure proceeding, or is in the nature of "recoupment," the three-year period is not extended. See *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998). If the borrower files for bankruptcy protection before the three-year period has run, however, the statute of limitation is extended two years.

Is the subject transaction a refinancing or a purchase money transaction?

Only refinance transactions secured by the consumer's principal

AARON B. MILLAR is Of Counsel to Walker, Steiner & Schmidt where his practice focuses on commercial litigation, family law, and bankruptcy.



dwelling have a rescission right under TILA, not loans for the purchase or construction of that property. Even if only a portion of the loan proceeds is used to construct or purchase the dwelling, the consumer may not rescind the loan.

What was the consumer's purpose in obtaining the allegedly offending loan?

Only loans obtained for personal, family, or household purposes are covered by TILA. The security for the loan is not determinative of the loan's "purpose." For example, if the borrower gives a trust deed on his home as security for a loan to further his business, the loan is not protected by TILA. To determine whether the purpose of the loan is for consumer purposes, the majority of courts look at the purpose of the original loan, not the subsequent purpose for which that loan was later refinanced.

Has the borrower alleged his ability to tender the amount of the loan?

Under TILA, the borrower need only tender the loan proceeds after the lender rescinds the loan. The majority of courts, however, have exercised their equitable powers to condition

rescission on the borrower's tender. Although the Tenth Circuit has not considered this issue, Judge Kimball followed the Circuit majority and twice held that unless the plaintiff alleges the ability to repay the loan in the borrower's rescission notice and subsequent complaint, the TILA rescission claim may be dismissed on a motion to dismiss. *See Black v. First Choice Fin., LLC*, 2011 U.S. Dist. LEXIS 133317, at **5-6 (D. Utah Nov. 18, 2011) (quoting *Sanders v. Ethington*, 2010 U.S. Dist. LEXIS 133996 (D. Utah Dec. 16, 2010)).

This view is not unanimous in Utah. Judge Campbell, for example, held that a failure to allege repayment ability is not a proper consideration on a motion to dismiss because alleging the ability to tender is not required by TILA. *See McGinnis v. GMAC Mortg. Corp.*, 2010 U.S. Dist. LEXIS 90286, at *14 (D. Utah Aug. 27, 2010). Judge Campbell also noted that generally the borrower must demonstrate an ability to tender the loan proceeds to survive a summary judgment motion. *See id.* at *13.

The minority of courts have denied conditional rescission, holding that the lender's obligation to rescind is not dependent on the borrower's ability to tender the loan amount.



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Is the alleged TILA violation a material disclosure violation or a technical violation?

If only a technical violation is alleged, rescission is unavailable – only TILA damages may be available, though subject to the one-year statute of limitations. *See id.* at *11.

Two copies of the notice of the right to rescind must be given to each person who both (1) lives in the dwelling; and (2) has an ownership interest in the dwelling, even though that person may have no personal obligation for the debt.

With respect to other required disclosures, the failure to accurately disclose any of the following will be considered a material violation subject to a three-year right of rescission: (1) annual percentage rate or “APR,” (2) finance charge,¹ (3) the amount financed, (4) the sum of the amount financed and the finance charge (termed the “total of payments”), and (5) the number, amount and due dates of payments to repay the total of payments.

Has the home been sold?

The right of rescission expires once the home is sold or title is transferred.

Has the original lender assigned the loan?

As it relates to TILA rescission, any consumer who has the right to rescind a transaction against the lender may rescind the transaction as against any assignee of the lender.

Is the subject transaction a refinancing (with no new advances) of an existing extension of credit by the same lender?

In some cases, consumers with equity in their homes have refinanced their home mortgage with the same lender multiple times in order to obtain a better interest rate. Such a consumer may be unable to rescind this refinancing transaction. A federal district court in Utah recently declined to rescind a refinanced

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loan obtained from the same lender that had originated the original loan. *See Wright v. Residential Acceptance Network*, 2011 U.S. Dist. LEXIS 104305 (D. Utah Sept. 14, 2011). The *Wright* court's rationale: TILA affords no rescission right for "a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property." 15 U.S.C. § 1635(e)(2).

Has the borrower already refinanced the allegedly offending loan?

Some courts disallow rescission of a loan subsequent to refinancing since refinancing eliminates any security interest (and rescission results in the removal of a security interest). Thus, these courts have concluded that refinancing "supersedes" the deed of trust (security interest) underlying the original loan.

Other jurisdictions have allowed rescission of a refinanced loan, noting that TILA and applicable regulations refer to a right to rescind the transaction, not just a right to rescind the security interest, and rescission would also entitle mortgagors to finance and other charges.

Federal district courts in Utah have not determined whether a loan can be rescinded after it has been refinanced.

Conclusion

A lender must act decisively when faced with a notice of rescission. If the creditor determines that the subject loan transaction may not be rescinded under TILA, then the lender should promptly petition the court for a declaration of its rights.

If the lender determines that the loan is subject to rescission, then the lender should immediately petition the court for an order allowing the lender to condition the reconveyance of its security interest on the tender of the loan proceeds the borrower received. Without such an order, after the lender reconveys its deed of trust, the borrower could sell or encumber the real property. The borrower could use the funds to pay off other debts that are non-dischargeable in bankruptcy. When the lender sues the borrower for failure to return the loan proceeds, the borrower could wait until the bankruptcy preference period had run, then file Chapter 7 bankruptcy to discharge the borrower's

duty to tender the loan proceeds to the lender, leaving the lender with a total loss on its loan. Faced with this possibility, many courts order that the deed of trust will not have to be reconveyed until the borrower tenders back the loan proceeds.

Regardless of the approach taken, the lender should take deliberate action to preserve its rights.

1. If the creditor has not yet instituted foreclosure proceedings when the borrower rescinds, the creditor's finance charge disclosure must come within one-half of one percent of the total amount of the loan to be within the permissible range of accuracy. If the creditor has initiated foreclosure, the disclosure of the finance charge will be regarded as accurate "if the amount disclosed...does not vary from the actual finance charge by more than \$ 35 or is greater than the amount required to be disclosed." 15 U.S.C. § 1635(i)(2).

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Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the June 1, 2012 Commission Meeting held at the Law & Justice Center in Salt Lake City, Utah.

1. Commissioners approved drafting a policy to create exceptions for those lawyers whose personal safety may justify keeping their public address as reported to the Bar otherwise private.
2. Commissioners approved withdrawing Ethics Advisory Opinion Committee Opinion No. 12-02 from publication (on both the website and *Bar Journal*) and to notify the committee that the Commission intends to review the opinion in light of the outcome of the pending Supreme Court case.
3. Commissioners selected Gary Crane for the Lawyer of the Year Award.
4. Commissioners selected the Hon. Royal I. Hansen for the Judge of the Year Award.
5. Commissioners selected the Pro Bono Commission for the Committee of the Year Award.
6. Commissioners selected the Estate Planning Section for the Section of the Year Award.
7. Commissioners selected Riley (Josh) Player and Sharon Donovan for the inaugural Outstanding Mentor Award.
8. Commissioners approved a contribution of \$37,500 (with \$5000 as a rollover) to the Young Lawyers Division.
9. Commissioners approved filing formal UPL injunction complaints against Robert Mac Wray and Joseph Scheeler.
10. Commissioners approved the request for an additional \$20,000 contribution to Law Related Education.

11. The Commission voted to postpone approval of the 2012-13 budget until next Commission meeting.
12. The Commission approved a \$20,000 contribution to Lawyers Helping Lawyers.
13. The Commission approved the Minutes of the April 27, 2012 Commission meeting via Consent Agenda.
14. The Commission received reports from the Lawyer Advertising Committee and from Steve Burt who discussed the HVAC retrofitting work scheduled for the Law & Justice Center. The Commission committed to continue a diligent study of the Bar's current and future needs.
15. Rod Snow led a discussion on considering whether to make donations to the new S. J. Quinney Law School building and "and Justice for All." A discussion will be scheduled for Sun Valley on these issues.

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

Notice of Verified Petition for Reinstatement by Nathan N. Jardine

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of Respondent's Verified Petition for Reinstatement ("Petition") filed by Nathan N. Jardine in *Nathan N. Jardine v. Office of Professional Conduct*, Third District Court, Civil No. 120903382. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Notice of 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.

Mandatory Online Licensing

The annual Bar licensing renewal process has started and can be done only online. Sealed cards have been mailed and include a login and password to access the renewal form and the steps to re-license online at <https://www.myutahbar.org>. **No separate form will be sent in the mail. 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.**

If you need to update your email address of record, please visit www.myutahbar.org. To receive support for your online licensing transaction, please contact us either by email to onlineservices@utahbar.org or call (801) 297-7021. Additional information on licensing policies, procedures, and guidelines can be found at <http://www.utahbar.org/licensing>.

Upon completion of the renewal process, you should receive 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 the Licensing Department at (801) 531-9077.

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
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Congratulations to **RANDON W. WILSON** for receiving the 2011 "Sugar Man of the Year" award from the Sugar Club for his significant contributions to the sugar industry including sugar beet and sugar cane producers and processors, refiners, brokers and operators from the US and abroad.



Welcome to attorney **THAD D. SEEGMILLER** who joins the St. George Office of Jones Waldo. His areas of expertise include business law, estate planning, commercial real estate and family law.



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Anderson, Rachel S. — Tuesday Night Bar	Christiansen, Travis — Bankruptcy Case	Hall, Brent — Family Law Clinic
Angelides, Nicholas — Senior Cases	Clark, Melanie R. — Senior Center Legal Clinic	Hansen-Pelcastre, Laura J. — Tuesday Night Bar
Ashworth, Justin — Family Law Clinic; Domestic Case	Clyde, Jonathan S. — Tuesday Night Bar	Harding, Sheleigh — Family Law Clinic
Averett, Steven — TLC Document Clinic	Conley, Elizabeth S. — Senior Center Legal Clinic	Harstad, Kass — Street Law Clinic
Babcock, Bruce E. — Tuesday Night Bar	Conyers, Katherine A. — Tuesday Night Bar	Hart, Laurie S. — Senior Center Legal Clinic
Backman, James — Domestic Case; TLC Document Clinic	Corbitt, Rasheedah — Family Law Clinic	Hendrix, Rori — Domestic Case
Baker, James R. — Senior Center Legal Clinic	Couser, Jessica — Family Law Clinic	Holm, Floyd — SUBA Talk to a Lawyer
Baron, Bryan — Domestic Case	Cox, Clayton — TLC Document Clinic; Family Justice Center Clinic	Hoskins, Kyle — Layton Legal Clinic
Barrus, Craig — TLC Document Clinic	Daggs, Lena — Tuesday Night Bar	Hyde, Ashton J. — Tuesday Night Bar
Beasley, Ben T. — Tuesday Night Bar	Davis, Nicole M. — Tuesday Night Bar	Jarvis, Mark — Family Law Clinic
Beck, Sarah — Debtors Counseling Clinic; Bankruptcy Hotline	Denny, Blakely J. — Tuesday Night Bar	Jaussi, Kristin — Domestic Case
Beckstrom, Britt — SUBA Talk to a Lawyer	Denton, Robert — Street Law Clinic	Jensen, Michael A. — Senior Center Legal Clinic
Belnap, Allison G. — Tuesday Night Bar	DePaulis, Megan J. — Tuesday Night Bar	Jones, Jenny — SUBA Talk to a Lawyer; Consumer Case
Bennett, Gracelyn — Bankruptcy Hotline	Dietz, Tadd — Street Law Clinic	Jones, Terry Stanley — Tuesday Night Bar
Bennett, MaryAnn — Debtors Counseling Clinic	Donovan, Sharon — Domestic Case	Julien, Stephen — Cedar City Clinic; Domestic Case
Beringer, Maria-Nicolle — Bankruptcy Hotline	Fawson, Joshua — Domestic Case	Kaas, Adam M. — Tuesday Night Bar
Bertelsen, Sharon M. — Senior Center Legal Clinic	Ferguson, Phillip S. — Senior Center Legal Clinic	Kearl, J Derek — Tuesday Night Bar
Blanchard, Tiffany — SUBA Talk to a Lawyer	Fisher, Langdon — Family Law Clinic	Kesselring, Christian — Street Law Clinic
Bradshaw, Donna — Cedar City Clinic	Forbes, Kimball — SUBA Talk to a Lawyer	Kessler, Jay L. — Senior Center Legal Clinic
Bramwell, Marie — Domestic Case	Foster, Shawn — Immigration Clinic	Kinikini, Aaron — Street Law Clinic
Breeze, Robert B. — Case	Gehret, Michael A. — Tuesday Night Bar	Knauer, Louise — Family Law Clinic
Brown, Robert R. — Tuesday Night Bar	Gillespie, Herbert — Domestic Case	Kolter, Andrew R. — Tuesday Night Bar
Brown-Roberts, Kathie — Senior Center Legal Clinic	Gladstone, Chad — American Indian Clinic	LaBatte, Catherine — Domestic Case
Cardenas, Gloria — Immigration Clinic	Gordon, Benjamin — SUBA Talk to a Lawyer; Probate Case	Latimer, Kelly J. — Tuesday Night Bar
Carr, Kenneth — Debtors Counseling Clinic	Greenwood, Christine — Consumer Case	Leach, Amy Jackson — Tuesday Night Bar

Lee, Terrell R. – Senior Center Legal Clinic	Pressley, Laura L. – Tuesday Night Bar	Tanner, Brian – Immigration Clinic
Lisonbee, Elizabeth – Layton Family Law Clinic	Ralphs, Stewart – Family Law Clinic	Tarin, Aaron – Immigration Clinic
Lousef, Jessica – Family Law Clinic	Randall, Aaron – Housing Case	Taylor, Sanna-Rae – Tuesday Night Bar
MaCanas, Janise K. – Tuesday Night Bar	Reemsnyder, Bruce D. – Tuesday Night Bar	Telfer, Diana L. – Tuesday Night Bar
Machlis, Benjamin – Tuesday Night Bar	Rinaldi, Leslie Kay – Tuesday Night Bar	Thorne, Jonathan – Street Law Clinic
Marx, Shane – Rainbow Law Clinic	Roberts, Kathie – Consumer Case	Thorpe, Scott D. – Senior Center Legal Clinic
McCoy II, Harry E. – Senior Center Legal Clinic	Robinson, Mark – Contract Case	Timothy, Jeannine P. – Senior Center Legal Clinic
Merrick, Stewart J. – Tuesday Night Bar	Roman, Francisco – Immigration Clinic	Tobler, Daniel – SUBA Talk to a Lawyer
Micken, Christina L. – Tuesday Night Bar	Rosevear, DJ – Tuesday Night Bar	Topham, Jaime – Domestic Case
Millar, Aaron – Family Law Clinic	Sansom, Stephen M. – Tuesday Night Bar	Torrey, Teresa Silcox – Tuesday Night Bar
Miller, Nathan D. – Senior Center Legal Clinic	Saunders, Robert – Park City Clinics	Trease, Jory – Debtors Counseling Clinic
Mitton, Matthew L. – Tuesday Night Bar	Savage, Bruce – Domestic Case	Turney, Kevin A. – Tuesday Night Bar
Miya, Stephanie – Medical Legal Clinic; American Indian Legal Clinic	Schank, Roy – Bankruptcy Case	Vamianakis, Artemis D – Tuesday Night Bar
Moore, Alan – Domestic Case	Scholnick, Lauren – Street Law Clinic	Walton, Sherri L. – Domestic Cases
Morrow, Carolyn – Housing Cases; Family Law Clinic	Semmel, Jane – Senior Center Legal Clinic	Wayas, Pleasy – TLC Document Clinic
Munson, Edward R. – Tuesday Night Bar	Sheffield, Richard – Contract Case	Weckel, Ted – Family Law Clinic
Murphy, Carol – American Indian Clinic	Silverzweig, Mary – Family Law Clinic	West, Orson – Domestic Case
O'Neil Shauna – Bankruptcy Hotline; Debtors Counseling Clinic	Silvestrini, Elizabeth L. – Tuesday Night Bar	Wharton, Christopher – Rainbow Law Clinic
Otto, Rachel – Street Law Clinic	Simcox, Jeffery – Street Law Clinic	Wilcox, Morgan – Family Law Clinic
Park, S. Jim – SUBA Talk to a Lawyer	Smith, Gregory – Domestic Case	Williams, Timothy G. – Senior Center Legal Clinic
Paulsen, Ted – Senior Center Legal Clinic	Smith, James – Domestic Case	Wilson, Analise Quinn – Tuesday Night Bar
Peterson, Jared – Domestic Case	Smith, Linda F. – Family Law Clinic	Winsor, Robert – SUBA Talk to a Lawyer
Peterson, Jessica G. – Tuesday Night Bar	Smith, Tiffany – Tuesday Night Bar	Wycoff, Bruce E. – Tuesday Night Bar
Petty, Bryce H. – Tuesday Night Bar	Snow, Heath – Housing Case	Yancey, Sharia – Domestic Cases
Poleshuk, Christine R. – Tuesday Night Bar	Stewart, Jacob – TLC Document Clinic	Yauney, Russell – Family Law Clinic
Pranno, Al – Family Law Clinic	Stewart, Steven – Street Law Clinic	Zollinger, Shannon Kate – Tuesday Night Bar
	Tanana, Heather – Street Law Clinic; Family Law Clinic	

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in April and May of 2012. To volunteer call Michelle V. Harvey (801) 297-7027 or C. Sue Crismon at (801) 924-3376 or go to <https://www.surveymonkey.com/s/CheckYes2012> to fill out a volunteer survey.

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Attorney Discipline

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ADMONITION

On March 15, 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 3.5(b) (Impartiality and Decorum of the Tribunal), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Utah Rules of Professional Conduct.

In summary:

The attorney represented an employer in an administrative hearing before the Workforce Services Board. After receiving an unfavorable ruling, the attorney represented the employer in an appeal of the unemployment eligibility decision before the Utah Court of Appeals. The Utah Court of Appeals affirmed the decision and issued its decision. The attorney sent a letter to the judges involved in the case. The letter was entered on the court's docket. A copy of the letter was not sent to opposing counsel on the case. The letter criticized the court's decision and asked the court to reconsider the merits of his arguments. The criticism was made in a disrespectful and condescending manner. At the time the attorney sent the letter to the judges, the time for appealing the decision had passed.

Mitigating factors:

Absence of prior discipline and absence of dishonest or selfish motive.

Aggravating factors:

Refusal to acknowledge wrongful conduct and begrudging acknowledgment that the language could be offensive.

ADMONITION


On March 22, 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 1.2(a) (Scope of Representation) and 8.4(a) (Misconduct) of the Utah Rules of Professional Conduct.

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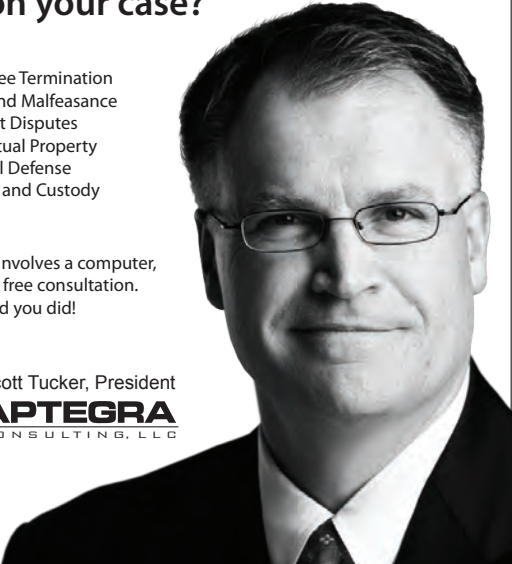
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In summary:

An attorney was hired for a bankruptcy matter. The attorney failed to adequately communicate with the client regarding the consequences of the trustees' objections. The failed communication with the clients resulted in the attorney allowing the conformation hearing to go forward with an unacceptable payment plan for the debtors. The client should have approved the payment in advance. The attorney failed to communicate with the clients regarding the consequences of the hearing and the strategy being employed. The attorney's behavior was generally negligent and caused injury.

Mitigating factors:

Lack of prior discipline.

ADMONITION

On March 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 8.4(c) (Misconduct) and 8.4(a) (Misconduct) of the Utah Rules of Professional Conduct.

In summary:

The attorney was hired to represent a client in a custody and child support matter. The attorney received an initial payment with additional payments to be paid in the future. As the representation progressed, the client was unable to make payments and the amount owed to the attorney continued to grow. The client and the attorney exchanged text messages where the attorney indicated the client could pay the bills in "other ways." In an effort to persuade the client, the attorney indicated they would write off a set amount of the bill for each "visit." Although it appears that the client considered accepting the attorney's offer, the client did so only because the client did not want the attorney to withdraw from representation. The client acknowledged that the attorney's representation was not negatively impacted by the text message exchanges. After the client submitted the complaint to the OPC, the attorney was offered a diversion, with one of the terms being that the attorney would write off the remainder of the client's bill. The attorney negligently sent an email to the client believing that the client was aware of the diversion proposal. The attorney believed that the terms of diversion were not determined with regard to whether any fee waiver would be less than the total outstanding

amount. Little injury was caused.

Mitigating factors:

Personal problems; seeking and receiving counseling; and remorse.

ADMONITION

On March 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 1.1 (Competence), 1.3 (Diligence), and 8.4(a) (Misconduct) of the Utah Rules of Professional Conduct.

In summary:

The attorney failed to review the client's documentation. The attorney failed to adequately prepare for the client's administrative hearing. The attorney failed to timely submit evidence and review documents submitted by the client and others. This resulted in little or no injury.

Mitigating factors:

Lack of prior discipline.

ADMONITION

On April 12, 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 1.4(a) (Communication), 1.15(d) (Safekeeping Property), and 8.4(a) (Misconduct) of the Utah Rules of Professional Conduct.

In summary:

Following the termination of the representation, the attorney knowingly failed to provide the former client a full accounting of the retainer despite requests for such accounting. The attorney negligently failed to keep the client reasonably informed about the status of the retainer. The attorney failed to inform the client about circumstances when disgorgement of the retainer might occur by including a disgorgement provision in the fee agreement. There was generally little or no injury because the fee was earned and reasonable in light of the services rendered.

Mitigating factors:

No prior history of discipline; no dishonest or selfish motive;

and eventual (although untimely) accounting was provided.

Aggravating factors:

Refusal to acknowledge wrongful conduct; substantial experience in practice; and vulnerability of the client.

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 Bryan T. Adamson, for violation of Rules 1.4(a) (Communication), 1.5(b) (Fees), 1.15(d) (Safekeeping Property), 7.1 (Communications Concerning a Lawyer's Services), 7.2(c) (Advertising), and 8.4(a) (Misconduct) of the Utah Rules of Professional Conduct.

In summary:

Mr. Adamson and his client entered into a contingency fee agreement wherein Mr. Adamson agreed to represent the client in a medical malpractice case. The client paid Mr. Adamson an

advance to cover filing costs. The client later sent Mr. Adamson an email terminating the representation and requesting a return of the filing costs. Mr. Adamson responded that he would not refund any money because he had spent significant hours on the case. Mr. Adamson further told the client that he would place a lien on the case if she took the case to a new attorney. Mr. Adamson told the client her case was not worth pursuing. The client sent three follow up requests for Mr. Adamson to provide an itemization of his fees. Mr. Adamson refused to provide an itemization of his fees. The client again requested that Mr. Adamson document his lien claim so that she could make a decision about whether to proceed with her case. Mr. Adamson did not respond to this request. Mr. Adamson had not done the amount of work on the case to justify the figure he used when threatening to place the lien. Mr. Adamson's yellow page advertising included a guarantee that he would pay a client \$1000 if they did not win their case. Mr. Adamson's firm website did not contain his name. Mr. Adamson was informed by the OPC that the website did not contain his name, but he failed to

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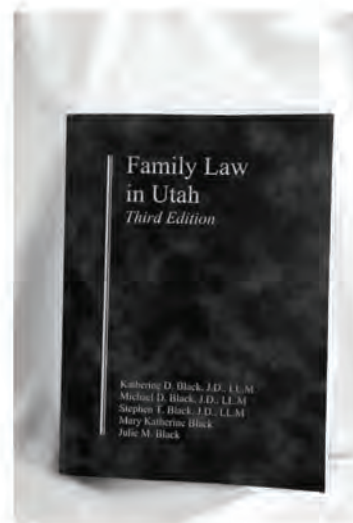
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PUBLIC REPRIMAND

On April 9, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Bryan T. Adamson, for violation of Rules 1.4(a) (Communication), 1.4(b) (Communication), 1.5(b) (Fees), 1.16(b) (Declining or Terminating Representation), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Utah Rules of Professional Conduct.

In summary:

Mr. Adamson was retained to represent a client in a divorce. The fee agreement was signed by the client's mother, who also paid the fee. The fee agreement was entitled "Stipulated Divorce Flat Fee Retainer Agreement." The fee agreement provided that the case would be handled on a flat fee basis, but in the event of trial, the client would pay an hourly rate. Mr. Adamson filed the Petition for Divorce and later sent the client an invoice for an amount over and above the flat fee already paid. Prior to sending the bill, Mr. Adamson did not communicate to the client that he had converted the case from a flat fee to an hourly rate. Later Mr. Adamson told the client he would not complete the case until the fees were paid. Mr. Adamson eventually withdrew from the case. Mr. Adamson admitted that when he withdrew from the case there was only about thirty minutes of work left to do on the case to get the divorce finalized.

SUSPENSION

On April 17, 2012, the Honorable Steven L. Hansen, Fourth District Court, entered an Order of Discipline: One Year Suspension suspending Earl B. Taylor from the practice of law for one year for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.15(a) (Safekeeping Property), 7.3(c) (Direct Contact with Prospective Clients), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Utah Rules of Professional Conduct.

In summary:

Potential clients received a form letter from Mr. Taylor advertising Mr. Taylor's bankruptcy-related services. The form letter indicated that Mr. Taylor could assist them in preventing foreclosure of their home. The phrase "Advertising Material"

was not located on the form letter or the envelope. At their initial consultation, the clients paid Mr. Taylor money toward his advance fee and provided Mr. Taylor with a packet containing their asset and debt information. Later, when the clients sought to pay the remainder of the advance fee, Mr. Taylor asked them to deposit cash directly into his personal bank account. They deposited the money into his account. During the period of the representation, Mr. Taylor did not have a client trust account. Mr. Taylor also did not place the advance fee into a client trust account. The clients were expecting to pay the remaining balance at the next court date. Mr. Taylor filed a Petition for Chapter 7 Bankruptcy on behalf of the clients. The clients paid the filing fee. Later, the clients were notified that Mr. Taylor failed to submit numerous required documents to further their Bankruptcy. Mr. Taylor had to provide the documents or the Petition would be dismissed. Mr. Taylor failed to submit the documents and the Petition was dismissed. After learning of the dismissal, the clients confronted Mr. Taylor who agreed to re-file their Petition. A second Petition was filed. The Bankruptcy Court served Mr. Taylor with a Deficiency Notice identifying numerous documents that he had failed to provide. Later the client's second Petition for Bankruptcy was dismissed. The clients contacted Mr. Taylor upon learning that their second Petition for Bankruptcy had been dismissed. Mr. Taylor indicated he would pay for and re-file the Petition for a third time. Mr. Taylor failed to file the third Petition for Bankruptcy. The clients repeatedly tried to communicate with Mr. Taylor. Mr. Taylor stopped responding to the client's telephone calls and emails. The clients were forced to retain another attorney to complete their Bankruptcy. Mr. Taylor was served with a Notice of Informal Complaint ("NOIC"). Mr. Taylor failed to submit a response to the NOIC.

SUSPENSION

On March 29, 2012, the Honorable Paul G. Maughan, Third District Court, entered an Order of Discipline: Suspension suspending Jeffrey M. Gallup from the practice of law from January 26, 2010 until March 29, 2012 for violation of Rules 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Utah Rules of Professional Conduct.

In summary:

On January 22, 2009, Mr. Gallup entered a no contest plea to one count of Violation of a Protective Order, a 3rd degree

felony. On April 30, 2009, Mr. Gallup entered a guilty plea to one count of Violation of a Protective Order, a 3rd degree felony. On June 30, 2009, Mr. Gallup entered a guilty plea to one count of Violation of a Protective Order, a 3rd degree felony. On August 18, 2009, Mr. Gallup entered a guilty plea to two counts of Driving Under the Influence of Alcohol/Drugs. Mr. Gallup was placed on interim suspension on January 26, 2010 based upon the felony convictions. The suspension was lifted on March 29, 2012 allowing Mr. Gallup to file for reinstatement when he chooses to do so.

RESIGNATION WITH DISCIPLINE PENDING

On March 28, 2012, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning Cheri K. Gochberg for violation of Rules 8.4(b) (Misconduct) and 8.4(a) (Misconduct) of the Utah Rules of Professional Conduct. The effective date of the Order is September 19, 2011.

In summary:

On November 5, 2010, Ms. Gochberg was charged with Driving Under the Influence of Alcohol and/or Drugs (4 counts), Possession or Use of A Controlled Substance (2 counts), Reckless Driving, and No Proof of Insurance. On March 25, 2011, Ms. Gochberg pled guilty to and was convicted of Driving Under the Influence of Alcohol or Drugs, a third degree felony, for that incident.

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

Ms. Gochberg was placed on interim suspension on September 19, 2011, as a result of the convictions.

DISBARMENT

On March 27, 2012, Justice Thomas R. Lee, Utah Supreme Court, issued an Opinion disbaring Clayne I. Corey from the practice of law.

In 1999, a client retained Corey & Lund to represent her in a personal injury action. The client signed a fee agreement with Corey & Lund. The fee agreement allowed for a contingent fee of 33.3% of the settlement, unless the case went to trial. The case settled prior to trial. In 2000, the client accepted a settlement offer of \$122,500. On February 25, 2000, Mr. Corey spoke with the insurance adjuster. A settlement check in the amount of \$122,500 made out to the client and to her attorney, Clayne I. Corey was issued on February 25, 2000. On February 29, 2000, \$124,803.60 was deposited into Mr. Corey's

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operating account. This amount included the client's settlement funds. Mr. Corey was the signator on this operating account and had control over the account. Mr. Corey knew early on that the client's settlement funds went into his operating account. Mr. Corey failed to deposit the client's settlement funds into a client trust account. Mr. Corey knew that checks were being written against the funds in the operating account. The account balance for the operating account went from \$128,916.14 at the end of February, 2000 to \$2909.12 at the end of June, 2000. The client did not authorize her settlement funds to be used by Mr. Corey for any purpose. She did not authorize or sign the Trust documents prepared by Mr. Corey and did not authorize or sign the Promissory Note prepared by Mr. Corey.

The client thought that the money was in Mr. Corey's trust account for safekeeping and agreed to receive \$500 payments each month for a period of time. The client received twenty-one payments of \$500. The client eventually decided that she wanted to receive the bulk of her settlement funds. The client requested a return of her file, the return of the remaining settlement money, and an accounting of her settlement. Mr. Corey failed to return his client's file. Mr. Corey failed to return unearned excess funds to his client. Mr. Corey failed to properly account for the settlement funds. Although the case settled in early 2000 Mr. Corey did not pay the majority of the lien holders until December 2000 leaving the client exposed for those bills. Mr. Corey failed to handle the third party claims in a timely way. Mr. Corey failed to protect funds belonging to his client.

Aggravating factors:

Prior discipline, pattern of carelessness relating to the safekeeping of client funds, substantial experience in the practice of law, no good faith effort to make restitution.

Mitigating factors:

Medical problems, absence of dishonest or selfish motive, remorse.

On November 23, 2010, the Honorable John Paul Kennedy, Third District Court, suspended Mr. Corey for three years, and stayed the suspension, for violation of Rules 1.15(a) (Safekeeping Property), 1.15(b) (Safekeeping Property), 1.15(c) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Utah Rules of Professional Conduct.

The OPC filed an appeal with the Utah Supreme Court. The Supreme Court's Opinion stated,

We reverse the district court and conclude that Corey should be disbarred for intentional misappropriation of [his client's] funds. We first hold that Corey's acquisition and use of [his client's] funds for the operational needs of the firm was knowing and intentional, thereby placing him squarely under a presumptive disbarment standard. Second, we hold that Corey's mental impairment does not represent truly compelling mitigation evidence sufficient to rebut the presumption of disbarment. We accordingly reverse and order that Corey be disbarred.

DISBARMENT

On January 26, 2012, the Honorable Deno Himonas, Third District Court, entered an Order of Discipline: Disbarment against Steven B. Smith for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.15(a) (Safekeeping Property), 1.15(c) (Safekeeping Property), 1.15(d) (Safekeeping Property), 1.16(d) (Declining Representation), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Utah Rules of Professional Conduct.

In summary there are three matters:

Mr. Smith filed a complaint but did not diligently prosecute the case. Mr. Smith did not inform his clients about milestones or developments in their case. Mr. Smith did not timely file a response to a Motion for Summary Judgment filed by the first defendant and did not inform his clients about the court's order granting partial summary judgment. Shortly thereafter, the first defendant passed away and Mr. Smith did not timely inform his clients about the death. Although Mr. Smith felt incompetent to pursue the claim against the estate of a deceased defendant, he did not withdraw from the representation. He informed his clients he would pursue claims against the defendant's heirs but he did not pursue the claim nor did he inform his clients that he was not pursuing the claim. Mr. Smith misled his clients about the status of their case. At an Order to Show Cause hearing, the court ordered the parties to certify the case for trial within 120 days or the case would be dismissed. Mr. Smith informed his

clients that he met with the court and opposing counsel but did not inform them the meeting was due to the court's Order to Show Cause. Mr. Smith did not timely proceed with discovery. Mr. Smith did not respond to the second defendant's motion for Summary Judgment which was granted by the court. Later, Mr. Smith informed his clients that the second defendant's attorney wanted to take their deposition and did not inform them that the court had granted summary judgment for the second defendant. The owner of the third defendant company filed an answer for the company pro se. Mr. Smith informed his clients that he would move to strike the answer for the third defendant. Mr. Smith did not move to strike the remaining third defendant's answer and did not pursue the case against the remaining defendant. Mr. Smith did not submit a certificate of readiness for trial and the court dismissed the case for lack of prosecution. Mr. Smith did not inform his clients that the court dismissed the case. Mr. Smith did not respond to the Notice of Informal Complaint served by the OPC.

In the second matter, Mr. Smith wrote a check to be paid from his attorney trust account. The check was presented for payment from funds in Mr. Smith's attorney trust account. There were insufficient funds in Mr. Smith's trust account to cover the check. A financial institution sent the OPC a notice of insufficient funds ("NSF") regarding Mr. Smith's trust account. The OPC sent Mr. Smith several requests for a written response and documentation supporting his explanation for the NSF. Mr. Smith did not respond to the OPC's request for a written response regarding the NSF. The OPC served Mr. Smith with a NOIC. Mr. Smith did not timely respond to the NOIC.

In the last matter, a client sustained severe injuries while at work. The client had settled with an insurance company; however the payments had not been made. The insurance company had become insolvent and Mr. Smith was working with an insolvency group to obtain payments for his client. The client understood Mr. Smith would be paid one-third of anything they received and would work out any fees owed to Mr. Smith's old firm from the one-third paid to Mr. Smith. The client received a partial payment from the insolvency group. After the payment was received, Mr. Smith informed the client that he was working on the case and trying to secure the additional settlement funds. Later a check was issued to the client and Steven B. Smith, Esq. as payment of \$412,500.00. The check was endorsed by Mr.

Smith. The check was deposited into Mr. Smith's trust account. The client did not endorse the check nor did the client give Mr. Smith permission to endorse the check on the client's behalf. Mr. Smith did not notify the client that Mr. Smith had received the check. Mr. Smith wrote numerous checks against his account totaling roughly about \$405,000.00. Mr. Smith continued to tell the client that he was working on the case. The client had financial difficulties due to his inability to continue his job as a result of his injuries. The client asked Mr. Smith if it was possible to get some of the settlement at that time. During the time Mr. Smith was purportedly working on the client's matter, Mr. Smith advanced the client payments that were to be deducted from the settlement monies once the settlement monies were received. Mr. Smith did not inform the client he had received the settlement funds. Mr. Smith helped the client find a third party lender to lend the client additional funds. Mr. Smith did not inform the client he had previously received the check when he helped the client find a lender. The client eventually called the insolvency group directly and was informed that two years previously a check had been issued to him and Steven B. Smith, Esq. When the client confronted Mr. Smith about the check, Mr. Smith initially indicated there had been a mistake. The client has not received the monies from the check from Mr. Smith. The client's new counsel requested the file from Mr. Smith. Mr. Smith did not timely provide the file to the client or the client's new counsel.

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Estate Planning: A Practice Management Primer

by Matthew L. Mitton

Invest in Yourself

I made a presentation last year to the Young Lawyers Division on practice management tips for new estate planning attorneys. I decided to tailor the presentation around practice management issues rather than to attempt to present a comprehensive primer on estate planning.

I mentioned to this group of new lawyers that the most rewarding thing I do as an estate planning attorney is meet with people with diverse, interesting and challenging needs and objectives. Like many of my colleagues, I am privileged to meet fascinating people who are happy to engage my services. I can't think of a better way to practice law. I spend most of my days in consultations with clients that range from two to three hours. Why bring this up? I believe it's critical to understand early in your practice what your strengths and weaknesses are before you find yourself in a state of torment. I know attorneys who don't enjoy spending hour after hour in consultations with clients; they would rather spend hours in front of the computer drafting estate planning provisions or researching complex tax matters. If you are a technician, find a practice area where those talents and strengths are needed, and where appropriate, find colleagues that can add other dimensions to your practice where you lack.

The greatest complaint clients have expressed to me as they meet with attorneys is the inability to communicate complex legal terms and ideas in a "language" they understand. The estate planning experience can be emotionally charged and complicated to begin with. If the client doesn't understand how their attorney and counselor at law can solve their legal challenges, the attorney-client relationship will fail and the efficacy of the plan will be at risk over time.

One of the best things that ever happened in my early practice was the opportunity I had to present estate planning topics to countless associations and groups throughout the state. Take

every opportunity in your new legal career to speak and teach. Make certain you practice and hone the craft of effective communication. This skill may serve you better than any other skill I know. The other skill new lawyers must fight to develop is the ability to listen when you need to listen. After three years of law school, we are anxious to tell people what we know. In my opinion, the key to every successful estate planning engagement is rooted in your ability to be an empathetic listener and effective communicator. Don't be afraid to discuss these skills with and solicit honest and constructive feedback from friends and family, or other colleagues.

Invest in Good Forms and CLE

If you are in a well-established firm with an existing estate planning practice group, you probably have great forms at your disposal; however, even the best forms can become outdated over time. Make it a point to review and update forms as a practice group at least once a year, if not more frequently.

In a small firm or solo practice, one of the most critical "practice management" decisions an estate planning attorney will make is choosing solid estate planning software and forms. In a recent conversation I had with a local banker, he remarked that most attorneys in the same geographic area would ultimately draft a "common" or "shared" trust agreement. While that might have been the case years ago, the proliferation of estate planning documents through myriad internet and publishing sources has led to a very robust "forms menu" for lawyers in every imaginable

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practice. The American Bar Association routinely sells estate planning documents and conducts CLE workshops in this area of practice. Practice management groups like WealthCounsel (wealthcounsel.com) and the American Academy of Estate Planning Attorneys (aaepa.com) cater to lawyers and firms who not only want forms, but are also willing to pay for assistance in other practice management areas. These companies provide marketing assistance, law firm profitability analysis, case mentoring, and assistance with staffing and ongoing education support. It is not inexpensive to join and pay the monthly dues for this type of service, but each lawyer needs to decide how the “business” of their practice will operate.

The American Bar Association is a great resource for estate planning forms and CLE. You can purchase materials to assist with drafting trusts, wills, powers of attorney, and other estate planning-related documents. I recently discovered a website that “links” together estate planning web sites from around the country (estateplanninglinks.com). It was through this website that I found several great estate planning resources that I use almost daily in my practice. Whether I need May’s applicable federal rate or an estate planning contact in Maine, estateplanninglinks.com and other websites provide tremendous assistance.

Your ability to stay current, relevant, and educated in this practice area is largely based, in my opinion, on your participation in CLE events. The Salt Lake Estate Planning Council meetings take place the third Wednesday of every month and the Estate Planning Section of the Utah State Bar meets the second Tuesday of each month. Well-established attorneys in this practice area generously share with their colleagues invaluable information that you may not be able to find from any other source. ALI-ABA, NBI, Lorman, and others offer classroom and online CLE events. These sources are fairly expensive, but may offer, in certain circumstances, important information for a complicated case or unique estate planning topics.

Invest in and Design a System

While it’s a cliché to say that we never learned “this or that” in law school, we have the ability to forge our own unique law-practice course. It’s perhaps just as well that no one formula for practicing law is presented in law school. As a new attorney, I was fortunate enough to learn from dozens of seasoned lawyers what it meant

to create a “systems-based” practice. In a traditional business environment, a system is typically an unflinching course all employees and management pursue to send a product or service out the front doors. Why should it be any different in a law practice? As a service-oriented practice, an estate planning attorney should create and manage a system that provides a predictable service and product for a client. While every system is different, there are fundamental components that should never be ignored. Another way to approach this is to put ourselves in the client’s shoes and analyze if they have questions like these: After our first consultation, I’m still wondering what’s next? The meeting with the attorney went well, but I am still not sure what it will cost or how long it will take to complete the documents. Should I call the attorney to ask these questions or will a staff member call me to follow up? Once a client begins to ask these and other questions about the engagement, the level of confidence drops and the attorney’s ability to keep a happy client begins to disintegrate.

Creating a system around the entire client relationship not only holds the attorney accountable for the client experience, but just as importantly, it holds the client accountable to participate in a confident and purposeful way. A good system should clearly address questions about fees, how estate planning forms are delivered and completed, the amount of time to complete the project, client-staff interaction, and more. I will say it again, if the client is asking, “I just don’t know what happens next,” the system is broken, or no system exists.

Decide how you will charge your clients. Will you offer a free initial consultation, conduct annual reviews, or bill for phone calls and e-mails? Whatever you decide, make sure you have a clear understanding with your clients, and when appropriate, put it in writing.

Invest in Your Staff

If Kathy or Carie ever leaves my practice, I will retire immediately. Kathy and Carie are members of my staff; however, I view them as my practice partners. My law practice success is directly correlated to the interaction they have with my clients. I spoke earlier about business systems in this article. Kathy and Carie continually guide clients through our estate planning “system” and remind me when I stray from the system we work hard to

implement and follow. They have been critical in shaping and changing, as needed, the systems that guide our clients through the estate planning process.

As I mentioned above, the members of your estate planning practice should be performing duties that correspond to their strengths and talents. In other words, let the technician do the technical work in your practice.

While this goes without saying, never, ever forget to offer thanks and words of encouragement to those who make your practice

successful. Whether it's a bonus that was expected or unexpected, flowers during professional assistants' week, or a sincere expression of gratitude, we need our team members' help more than they need our help. The respect and appreciation present within a successful practice group will always translate into better client-attorney relationships, practice efficiency and firm profitability.

Finally, I can't think of a better way to make a living and I certainly can't think of a better practice area. Good luck.

Young Lawyer of the Year 2011-2012: Gabriel K. White



Each year, the Young Lawyers Division has the difficult job of choosing one recipient from a stack of letters nominating outstanding and deserving candidates for the Young Lawyer of the Year Award. It is inspiring (and humbling) to read about the accomplishments that young lawyers

have achieved early in their careers. This year Gabriel ("Gabe") K. White's nomination stood out from the competition. Gabe is one of those rare individuals who has taken to heart the motto "Success comes to the person who does today what others were thinking about doing tomorrow." Seeing a need go unmet, Gabe acts quickly to address it regardless of any obstacles.

Shortly after graduating from the S.J. Quinney College of Law in 2007, Gabe joined the law firm of Christensen & Jensen. He quickly became a rising star as one of the firm's litigation and trial lawyers.

Despite his thriving practice and heavy workload, Gabe has gone out of his way to serve young lawyers and underrepresented minorities. Among his other accomplishments, Gabe single-handedly created the Wednesday Night Bar program through Young Lawyers Division in 2009. Wednesday Night

Bar is a semi-monthly legal clinic that provides low-income, Spanish-speaking Utahans with free legal advice. Gabe persisted in holding Wednesday Night Bar even when he was its only volunteer, and he is still a constant presence at the clinic. Under Gabe's leadership, the program has expanded from the Salt Lake Valley to include hundreds of Utahns throughout Northern and Central Utah. Gabe hopes to eventually grow the program to serve Southern Utah too.

Gabe has also played a pivotal role in bringing the Practice in a Flash CLE Series to Utah. This program is designed to help the record number of young lawyers that are going straight from law school to starting their own practices. In addition to in-person and online free CLE training covering a variety of basic legal issues that young lawyers commonly encounter, Practice in a Flash participants will have access to an online database and flash drives donated by Lexis. The database and flash drive will contain practice forms, practice area specific training, and practical business advice for the small business entrepreneur.

When Gabe is not busy with his practice or saving the world, he loves to spend time with his wife, Wendy, and their daughter, Percy. Together they enjoy traveling.

Thank you Gabe for your service and example.

Letter from the Chair

by Danielle Davis

One of the highlights of the year as Chair of the Paralegal Division is the Annual Paralegal Day Luncheon and CLE which was held on May 17, 2012. Paralegal Day provides an opportunity to recognize everyone that has achieved their National Certification through NALA. This year there were sixteen paralegals added to the ranks of Certified Paralegals in Utah.

Paralegal Day is also the day to recognize a paralegal who, over a long and distinguished career, has by their ethical and personal conduct, commitment and activities, exemplified for their fellow paralegals and attorneys with whom they have worked, a high standard of professionalism and who has rendered extraordinary contributions that coincide with the purposes of the Bylaws of the Paralegal Division and of the Utah Paralegal Association. This year, the Distinguished Paralegal of the Year Award was presented to Bonnie Hamp, CP.

Bonnie was nominated by her supervising attorneys, Catherine L. Brabson and Lisa R. Petersen, who provided the following information about Bonnie in their nomination submission:

Bonnie began her career in the legal profession in 1978 as a paralegal for Utah Legal Services in Ogden working with low income clients and referring pro bono cases to private counsel. In 1985 she began working in a private practice handling domestic,

corporate and administrative transportation issues before the Public Service Commission. From 1989-1993, Bonnie worked as a legal assistant with Suitter Axland Armstrong & Hanson. In 2000, Bonnie passed the National Association of Legal Assistant's Certified Paralegal exam. From 2003-2007, she worked for

Holme Roberts & Owen as a litigation paralegal.

Since 2007, Bonnie has worked for Parsons Kinghorn Harris, P.C. She initiated the conversion of an archaic conflict database where she worked with independent IT vendors to create and formulate a more efficient search mechanism for attorneys and staff to search for

potential conflicts of interest. She has assisted her attorneys with preparation for and attended numerous trials and arbitrations, including a two-week arbitration at which she organized and electronically presented and organized numerous complex financial documents and spreadsheets, resulting in a victory for the firm's client, including an award of all the firm's attorneys' fees and costs.

In 2009, Bonnie obtained her Advanced Paralegal Certification from the University of California, taking six substantive legal courses in Divorce Probate



Paralegal of the Year, Bonnie Hamp (center), with Catherine L. Brabson (left) and Lisa R. Petersen (right), who nominated her for the award.

and Estates, Bankruptcy, Water, Legal Research, and Victim Advocacy.

From 2000-2010, Bonnie served on the Unauthorized Practice of Law Committee. She has also served several years as a Director on the Paralegal Division Board including a position on the Executive Committee and elected positions for Secretary and Finance Officer. Bonnie has also been a member of the Utah Paralegal Association (fka LAAU) and served on its Board as the NALA Liaison.

Bonnie, as evidenced by all of her achievements described above, is truly an exceptional person as well as professional. She is highly motivated, talented, smart, hardworking, thoughtful, and resourceful. She has excellent people skills and works incredibly well with all attorneys, staff, clients, court personnel, and opposing counsel. She is a great writer and organizer. There is no task that Bonnie cannot undertake and she approaches every project with a

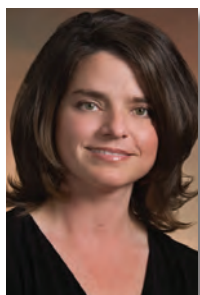
smile. Indeed, she is truly a pleasure to work with. There are few paralegals in this profession with whom either of us has ever worked who has such a broad catholicity of skills, deep integrity, genuine responsiveness, and kind temperament. We believe that she unquestionably deserves to be awarded the Distinguished Paralegal of 2012.

I have personally known Bonnie for many years and am pleased that the nomination committee felt her deserving of this year's award.

This issue of the *Bar Journal* marks the end of my term as Chair of the Paralegal Division of the Utah State Bar. Thora Searle will be taking over as Chair for the 2012-2013 year beginning in July. It has been an honor to serve on the Division's Board of Directors and on the Board of Bar Commissioners of the Utah State Bar as the Paralegal Division ex-officio member.

I look forward to working with Thora as she leads the Paralegal Division in the coming year.

Update to the Memorial Scholarship Created for Paralegal Heather Johnson Finch



Heather Finch was tragically killed in a late August 2010 airplane crash while traveling from Katmandu, Nepal to the Lukla Airport at the base of Mount Everest.



Ms. Finch, a paralegal with over twenty years of experience in the legal profession, took over as Chair of the Paralegal Division of the Utah State Bar

just two months before her tragic death. Heather was excited to be the Chair of the Division and had many exciting plans for her year of service. Heather dedicated her life to serving the legal community with countless hours of volunteering in the Utah State Bar Paralegal Division. In 2009, Finch was awarded Utah's highest honor for paralegals, the Distinguished Paralegal of the Year Award.

The Paralegal Division of the Utah State Bar, in coordination with the Finch and Johnson families and Utah Valley University, established the **Heather Johnson Finch Memorial Endowed**

Scholarship to recognize her legacy, honor her dedication to the legal profession, and ensure that her leadership efforts continued. This scholarship was designed to achieve the goals that Heather had aimed to accomplish as a leader of the paralegal community, including promoting higher education and advanced training for paralegals.

The Scholarship must raise \$30,000 to be fully funded and ensure Heather's lasting legacy. The Scholarship to date has raised \$14,134 through private donations, and through the First Annual Civility, Ethics, professionalism CLE held last June. The Division held its Second Annual Civility, Ethics and Professionalism CLE on June 26th at the Law & Justice Center. All proceeds going to the Heather Johnson Finch Memorial Endowed Scholarship. It is hoped that this scholarship will inspire generations of students as they learn about Heather's remarkable qualities. For more information about how to contribute to the Heather Johnson Finch Memorial Endowed Fund, go online to <http://www.utahparalegals.org/> or contact Nancy Smith at UVU, (801) 863-8896.

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
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: <ul style="list-style-type: none"> • How to Avoid Complaints • Your Duty to Clients • Professionalism & Civility • How to Effectively Respond to Complaints • How to Set Up a Trust Account • Law Office Management • Avoiding Conflicts of Interest 	6 hrs. (incl. 5 hrs. Ethics & 1 hr. Prof./Civ.)
08/03/12	Construction Law Section CLE & Golf. Homestead Resort, Midway, UT	3 hrs.*
08/10/12	Annual Securities Law Workshop. Downtown Marriott. Full Day CLE	6 hrs.*
08/10/12	Salt Lake County Golf & CLE. Stonebridge Golf Course. Topics TBA.	3 hrs.*
08/24/12	Cache County Golf & CLE. Birch Creek Golf Course. Topics TBA.	3 hrs.*
09/07/12	Utah County Golf & CLE. Springville Art Museum (Golf to follow at Hobbie Creek). Topics TBA.	3 hrs.*
09/20/12	Family Law Workshop (Intermediate course) Details pending.	TBA
09/28/12	Estate Distribution Planning for Retirement Benefits. An intensive, all-day workshop. Speaker: Natalie B. Choate. Sponsored by the Elder Law and Estate Planning Section. \$195 for current Elder and Estate Planning Section members, \$235 for others.	6.5 hrs.*
10/12/12	Cyberlaw Symposium. Thanksgiving Point	7 hrs.*
10/12/12	ADR Academy.	5 hrs.*
10/18/12	New Lawyer Required Ethics Program. 8:30 am – 12:30 pm. \$75. Topics include: <ul style="list-style-type: none"> • Introduction to the Bar and to Practice • Professionalism, Civility, & Practicing Law • Ethics, Rules, Discipline, & Processes in Utah • Top 10 Reasons Lawyers Receive a Bar Complaint • Pro Bono Service • New Lawyer Training Program • Consumer Assistance & The Discipline Process • Profession-Stress and Burnout 	Satisfies New Lawyers Ethics & Prof./Civ. for first compliance period
10/19/12	Literature and the Law. St. George, UT.	6 hrs.*
10/19/12	St. George Golf & CLE. The Ledges in St. George. Topics TBA.	3 hrs.
11/8–11/9/12	 2012 Fall Forum. Little America Hotel. 	up to 8.5 hrs.
12/20/12	Benson & Mangrum on Utah Evidence.	6 hrs.*

*CLE hours are approximate and subject to change.

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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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Date of Activity	Sponsor Name/ Program Title	Activity Type	Regular Hours	Ethics 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

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