Utah Bar JOURNAL

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Nov/Dec 2012

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Cover Art

October snowfall in Neff's Canyon, Utah, taken by first time contributor David R. York, Salt Lake City.

Members of the Utah State Bar or Paralegal Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the Utah Bar Journal should send their photographs (compact disk or print), along with a description of where the photographs were taken, to Randy Romrell, Regence BlueCross BlueShield of Utah, P.O. Box 30270, Salt Lake City, Utah 84130-0270, or by e-mail .jpg attachment to randy.romrell@cambiahealth.com. Only the highest quality resolution and clarity (in focus) will be acceptable for the cover. Photos must be a minimum of 300 dpi at the full 8.5" x 11" size, or in other words 2600 pixels wide by 3400 pixels tall. If non-digital photographs are sent, please include a pre-addressed, stamped envelope if you would like the photo returned, and write your name and address on the back of the photo.

Interested in writing an article for the Utah Bar Journal?

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

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

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

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

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

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

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

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

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

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Letter to the Editor

Dear Editor:

In the Sep/Oct 2012 *Bar Journal* our Bar President propounds two ways the Bar can better serve lawyers. One way is to inform the public of the "countless and unacknowledged hours of service to the public" freely contributed by lawyers. Also, there is hope of providing Bar services which are not "inefficient." I applaud both efforts and suggest Bar Commissioners lead by example.

I have always assumed Bar Commissioners to be volunteers, who contribute "countless and unacknowledged hours of service." Theoretically, volunteers should not expect payment of any kind, nor take advantage of their volunteerism. But, according to the 2012 Bar budget, it appears that Commissioners are "inefficient" volunteers.

Commissioners spend $49,300.00 traveling to various national and regional conferences. They get mileage, lodging and meals paid for while attending the Summer Conference in Sun Valley. Commission "retreat" funds, with food, beverage and meeting facilities total $36,317.00, were partially spent at the Stein Erickson Lodge in Deer Valley. And, the Bar President has a $29,800.00 "expense" fund. In total, the Commission/Special Projects budget is $155,600.00. This amount does not reflect additional Bar employee costs, who also attend the same conferences and retreats.

Voluntarily, Commissioners should do with less luxurious retreats. They should travel at their own expense, as other "volunteers" do, when attending Bar conferences and programs. (I would make an exception for any Commissioner who is a provider of Modest Means legal services.) Then you will truly know the spirit of "service to the public." Speaking of luxurious accommodation, Commission discussion about raising dues to build a new Bar building does not reflect the "modest means" of our times. I vote no on the new building, increased dues and trips to Sun Valley and Deer Valley on my dime.

Michael N. Martinez

Letter Submission Guidelines

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

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

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

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

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

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

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

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

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

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How We See Ourselves

by Lori W. Nelson

As many of you know, in December, 2011, the Utah State Bar had Dan Jones & Associates conduct a survey of Bar members on several issues. Over fifty-two percent of the membership responded, making the survey statistically very representative. One of the categories included questions on Courts, Professionalism & Civility, Job Satisfaction, Public Image, Pro Bono, and Diversity.

The survey results of the questions in this category were unexpected. Contrary to anecdotal information, a huge majority of Bar members are satisfied with the Utah State courts and staff. The courts have been doing a great job being more responsive and trying to ensure that the needs of the public are being met in an efficient way. These efforts are reflected in the survey results.

> *"Forty-eight percent of us believe the public views us negatively. Sixty-four percent of us believe the public thinks we manipulate the legal system."*

Other results were not as unexpected. For instance, on Professionalism and Civility, it was apparent from the survey results that our perception of civility is not improving. Twenty-three percent of us believe civility is declining while only nine percent believe it is improving. Most of us, however, are satisfied with the efforts that are being made to improve civility.

Because of this prevailing view of civility, there will be a civility panel at the Fall Forum, November 9, 2012. The American Board of Trial Advocates put together the materials and panel for the presentation. The publication put out by ABOTA, *Civility Matters*, has several beneficial articles regarding civility and professionalism.

In the publication, William B. Smith, from Abramson Smith Waldsmith, LLP, sets out three primary reasons why, as attorneys, we should be civil: (1) Incivility hurts our clients by driving up costs and leading to unnecessary litigation, (2) Incivility hurts attorneys by destroying individual reputations, and (3) Incivility hurts the profession by increasing the negative perception of lawyers in the eyes of the public.

Along with increasing civility, the Bar wants to improve the public image of lawyers by publicizing the good works attorneys do. Many of you have received requests for information regarding what lawyers are doing to serve their communities outside of their legal work. If we are able to get this information out to the public we can begin to turn the tide of negative opinion. Please provide your stories, or the stories of those you work with, so we can help the public learn of the generous volunteer work done by lawyers.

Aside from civility, the Bar's survey had interesting results on how lawyers view themselves and on how we believe the public views us. Forty-eight percent of us believe the public views us negatively. Sixty-four percent of us believe the public thinks we manipulate the legal system. Seventy-two percent of us believe the public thinks we charge too much. Forty percent of us think that the public believes that lawyer advertising is misleading and the same percentage feel that the public thinks we put our interests ahead of theirs.

These results are especially interesting because only attorneys were surveyed, not

the public. The results reflect what we believe the public thinks, and therefore reflects in some part what we think about ourselves. This negative view is consistent with the survey results which found that one-third of Utah lawyers are dissatisfied with their careers overall, especially in the areas of compensation and work-life balance.

A separate series of survey questions dealt with Economic Issues and Professional Liability Insurance. The survey there also had results that were unexpected. Forty-seven percent of our lawyers make less than $100,000 per year. Seventy-two percent make less than $150,000. Starting salaries are less than $60,000 for twenty-three percent of the sixty-nine percent reporting. The salary ranges are significantly less than we believe the public thinks we make.

Many of us do not have health insurance and/or pay at least a portion of the health insurance premium directly. One-fifth of our members have no professional liability insurance, citing cost as the principal factor.

Hourly billing remains prominent, although over one-third of attorneys in private practice report that clients are requesting or demanding alternative billing arrangements. The survey results and comments indicate that alternative billing arrangements will have to become much more common as market forces are requiring greater responsiveness to client's demands. The Utah Supreme Court just issued an opinion, *In the Matter of the Discipline of Nathan. N. Jardine*, 2012 UT 67, which discusses the propriety of flat fee billing and non-refundable retainers. Alternative billing methods will become more of an issue, which we will have to address as many of us will be asked to provide this type of service in the coming months and years.

Of great concern from the survey were the results regarding pro bono service. Thirty percent of Utah lawyers do no pro bono work at all. Forty percent do between one and five hours a month. Only thirty percent say they do more than six hours of pro bono work per month. The survey indicated that eighty-four percent were constrained from doing pro bono by lack of money, time, and/or employer requirements. Added to these

statistics is the fact that only one-third of us make financial contributions to provide legal aid for the poor. Given the great need for assistance, especially in this economy, more of us should be doing more. As retired Justice Sandra Day O'Connor aptly stated:

> Certainly, life as a lawyer is a bit more complex today than it was a century ago. The ever-increasing pressures of the legal marketplace, the need to bill hours, to market to clients, and to attend to the bottom line, have made fulfilling the responsibilities of community service quite difficult. But public service marks the difference between a business and a profession. While a business can afford to focus solely on profits, a profession cannot. It must devote itself first to the community it is responsible to serve. I can imagine no greater duty than fulfilling this obligation. And I can imagine no greater pleasure.

Justice Sandra Day O'Connor, 78 Or. L. Rev. 385, 391 (1999).

Asking for pro bono work seems like one more thing we have to do, but the service we render is invaluable to those who need our help. The service we do in other ways is also noteworthy. We had 174 lawyers teaching in 193 classrooms on Constitution Day, instructing high school and middle school kids about our system of government. It was very successful and we anticipate making it an annual event. We also want to have lawyers in classrooms throughout the year for other schools and teachers whose schedules did not work on Constitution Day. Thanks to all of you who participated.

The profession asks a lot of you and the Bar Commission is grateful for your service. Because of its awareness of all you do, we want to highlight the existing member benefits. Right now you can access the information by visiting www.utahbar.org and clicking on Benefits Vendor Directory on the lower right hand side of the page www.utahbar.org/members/member_benefits.html (this will get better with the roll-out of the new website this fall). There you will see the benefits that are available, including AAA membership, Budget and Hertz rental car discounts, T-Mobile pricing plans, various insurance options, law practice management options, litigation support, Jazz ticket and clothing discounts, and technology options. We are going to work in the next year to increase and improve our member benefits.

Last, on the Bar's web page you will find more information about the coming summer convention to be held in Snowmass/Aspen. Room rates at the convention hotel, recently purchased and newly remodeled by Westin, start at $159. In the condominium complexes on the mountain, a two bedroom premier is $225, and a two bedroom valley view is $255. Studio condominiums start at $99. You can find the entire list of lodging options at www.utahbar.org/cle/summerconvention/snowmasslodging.html.

Justice Scalia will be presenting the Saturday keynote and Dr. William Meinecke, of the Holocaust Museum in Washington D.C., will present on Friday. He will speak on the failure of the legal system in Nazi Germany. His comments encompass the role of judges in allowing Nazi Germany to succeed and how Hitler "used democracy to destroy democracy." His comments will be relevant to all of us as we continue to try to enforce the rule of law in our state and country.

The food is great in Snowmass/Aspen, and the activities are varied and family oriented. The fishing is top-notch, the golf is amazing and the river rafting is terrific. There is something for everyone. Aside from the great pricing for accommodations, the large range of activities is another reason this location was chosen for next summer's convention.

We hope to see you all at the convention and at the Fall Forum in November.

An adventure is only an inconvenience rightly considered. An inconvenience is only an adventure wrongly considered.

– G. K. Chesterton

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Where Many Litigators Still Fear to Tread: Adapting to Mediation

by Stephen D. Kelson

INTRODUCTION

Most litigators would agree that mediation is a helpful process in the attempt to resolve disputes before they reach trial. However, many attorneys often unsuspectingly obstruct their clients' ability to achieve resolution of their disputes in mediation, and thus prolong legal disputes and underlying conflicts, due to their assumed role and inability to adapt to the mediation process.

The following discussion briefly examines: (1) the attorney's role and philosophical assumptions in legal disputes; (2) the attorney's philosophical conflict with mediation; (3) contentious tactics employed by attorneys; (4) the unfortunate results of employing contentious tactics in mediation; and (5) simple recommendations to help attorneys make the most of mediation and better serve the interests of their clients.

THE ATTORNEY'S ROLE AND PHILOSOPHICAL ASSUMPTION IN LEGAL DISPUTES

In general, by the time parties seek an attorney, they have already invested themselves emotionally and financially in their legal dispute. It then becomes the attorney's job, as a provider of professional services, to define the needs of the client. *See* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*…, 15 Law & Soc'y Rev. 631. 645 (1981). The method attorneys apply to define these needs is instilled in them through law school training and has been characterized by Leonard Riskin, Professor of Law at the University of Florida Levin College of Law, as "the lawyer's standard philosophical map" (standard philosophical map). Chris Guthrie, *The Lawyer's Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering*, 6 Harv. Negot. L. Rev. 145, 155 (Spring 2001). This philosophical map is governed by two significant assumptions: (1) that disputants are adversaries, where one must win and one must lose and (2) disputes may be resolved through the application of law to facts of a given case. *See id.; see also* Leonard L. Riskin, *Mediation and Lawyers*, 43 Ohio St. L.J. 29, 36 (1982). This philosophy is instilled in law school where attorneys are taught "to put people and events into categories that are legally meaningful, to think in terms of rights and duties established by rules, [and] to focus on acts more than persons." Riskin, 43 Ohio St. L.J. 29, 45.

In the practice of law, the assumptions of the standard philosophical map are regularly encouraged through regular application, the legal process itself, and procedural rules and the professional standards. With these experiences and standards, attorneys apply themselves to a given case by primarily behaving in an evaluative manner, focusing upon the parties' rights and duties under the law, determining the strengths and weaknesses in legal positions, and deciding how to exploit these positions to the clients' advantage. The duty to zealously represent clients by focusing upon disputes in an evaluative manner discourages attorneys from concerning themselves with their opponents' situation and the ultimate results caused by the application of the standard philosophical map. Victory by attorneys on both sides becomes solely defined by the size of the monetary judgment. *See id*. at 44.

The standard philosophical map may also affect the manner in which attorneys live their personal lives away from work. Researchers

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have concluded that attorneys generally apply "'a cognitive and rational outlook'" on the world, have underdeveloped emotional and interpersonal skills, and "tend toward an adversarial orientation." *See* Guthrie, 6 Harv. Negot. L. Rev. 145, 156 (citation omitted). Whether or not the attorney's standard philosophical map is the cause of these deficiencies, it arguably reinforces them, and provides attorneys the excuse and/or justification that "this is how an attorney acts."

THE ATTORNEY'S PHILOSOPHICAL CONFLICT WITH MEDIATION

Attorneys often find themselves confused by the mediation process after they have spent years learning and honing evaluative and adversarial skills which are based on the standard philosophical map. While the standard philosophical map assumes that disputants are adversaries, where one must win and one must lose, and disputes are resolved through the application of law to facts of a given case, mediation has its own distinct philosophy, which assumes that (1) parties can work together and cooperate to create solutions in which each gains and (2) the parties can resolve their conflict without being limited by strict rules of procedure and substantive law (the mediation philosophical map). *See* Riskin, 43 Ohio St. L.J. 29, 34.

My personal experience has revealed that attorneys who are ingrained with the standard philosophical map react to mediation in one of three ways. First, some attorneys adapt to the circumstances once they gain an understanding of the difference between the philosophies of litigation and mediation. This ability to adapt is usually due to each attorney's personal disposition, as well as training in alternative dispute resolution and prior experiences in mediation. Second, some attorneys' "fight or flight" mechanism appears to kick in when they are confused and unprepared for the philosophical differences that are required in the mediation process. These attorneys revert to what they know best: the standard philosophical map. Third, some attorneys fail to distinguish the difference between the philosophical assumptions between litigation and mediation, or simply refuse to set aside any part of the standard philosophical map, and proceed in mediation as if it were a trial.

CONTENTIOUS TACTICS EMPLOYED BY ATTORNEYS

Reliance upon the standard philosophical map often undermines mediation's overarching purpose, which is to resolve disputes. While attorneys and clients alike can create any number of challenges, the application of the standard philosophical map prior to and during mediation often creates and fosters serious pitfalls which prevent the parties from achieving resolution. One of the most serious pitfalls created by the standard philosophical map is the employment of contentious tactics, which regularly escalates the conflict between the parties, and the legal dispute, instead of resolving it.

When attorneys rely on the standard philosophical map, they often intentionally and unintentionally adopt a hierarchy of contentious tactics to achieve victory against the opposing party and counsel prior to and during mediation. Some of these contentious tactics include: (1) integration, (2) promises, (3) gamesmanship, (4) shaming, (5) persuasive arguments, (6) tit-for-tat, (7) threats, (8) coercive commitments, and (9) violence. These contentious tactics are often applied sequentially; however, some tactics may be skipped as a conflict escalates. *See* Dean G. Pruitt & Sung Hee Kim, *Social Conflict: Escalation, Stalemate, and Settlement* 63-84 (3d ed. 2003); *see also* Stephen Potter & Frank Wilson, *The Theory and Practice of Gamesmanship: The Art of Winning Games Without Actually Cheating* (1948). Arguably, the hierarchical order of contentious tactics may differ based on how the tactics are employed. While some of these tactics are not inherently inappropriate, others – and the methods in which an attorney employs them – both violate the Utah Standards of Professionalism and Civility and can be destructive to achieving resolution of disputes in mediation.

> *"When attorneys focus too much on advocating their clients' positions in mediation, they…lose sight of the fact that it is the other party and not the mediator who needs to be persuaded."*

Integration

Integration is a tactic employed in an effort to "butter-up" an opposing party or counsel through flattery, charm, and guile, with the intention of coercing the party into concessions. Some methods used to achieve this end are (a) exaggerating admirable qualities in order to make it difficult to be disliked, (b) expressing agreement with another's opinions to express similar attitudes, (c) giving "favors" to be liked, and (d) using indirect methods of "tooting their own horn." *See* Pruitt, *Social Conflict* at 65. For example, an experienced attorney might use this tactic by making exaggerated compliments to a less experienced opponent, sharing "war stories" about many successful trials, and recommending a "joint" course of action based on the experienced attorney's knowledge of similar cases. If an opponent is unaware this tactic is being employed, it can be a very cheap and effective way to resolve a dispute. However, if detected, it can backfire by diminishing trust between counsel and escalating the dispute. *See id*.

Promises

Promises provide an exchange for compliance, which creates a sense of indebtedness to the one who makes the promise. However, successful promises can be very expensive, tend to require increased rewards in exchange for further compliance, can create undue dependence, and are often costly to break. Moreover, failing to provide a sufficient promise can result in failing to resolve a dispute and offending an opponent. *See id.* at 67-68.

Gamesmanship

Gamesmanship is far too common in the practice of law, and is regularly employed with the hope of pushing the other party and their counsel off balance. Some common examples of gamesmanship include preparing and filing a complaint which contains unfounded allegations in order to increase the cost of litigation, serving unnecessary discovery requests, the failure or refusal to provide requisite discovery responses, delay, name calling, offensive statements, etc. Attorneys regularly see through these tactics, resulting in a rapid escalation of the dispute.

Shaming

Shaming is the act of causing another to feel the emotion of shame, often by publicizing inappropriate conduct. While shaming is a highly effective way to obtain compliance with social norms and the standards of practice, it often backfires. If a party perceives the shaming as unjustified, it can result in anger and aggression, and can damage the relationship between the attorneys and parties. *See id*. at 69-70. For example, it is unusual for an attorney not to take offense when faced with a Rule 11 motion. Where the relationship between the attorneys is unsound before

a Rule 11 motion is filed, the motion often results in anger, a professional grudge, and escalation of the existing dispute.

Persuasive Arguments

There is nothing necessarily wrong with attorneys advocating their clients' position to a limited extent in mediation. According to experienced mediators, the most persuasive communicators in mediation spend about ten percent of the time advocating their viewpoints. *See* Betsy A. Miller & David G. Seibel, *Untapped Potential: – Creating a Systematic Model for Mediation Preparation*, 64 J. Disp. Resol. 50, 53 (May-July 2009). However, many attorneys cling to the standard philosophical map and spend far too much time advocating legal positions to the disadvantage of both themselves and their clients.

When attorneys focus too much on advocating their clients' positions in mediation, they present their opening and comments to the mediator as if the mediator were a judge or the jury, and attempt to persuade the mediator that their position is correct. In doing so, they often overlook the interests of the other party, and lose sight of the fact that it is the other party and not the mediator who needs to be persuaded. *See* Tom Arnold, *20 Common Errors in Mediation Advocacy*, 13 Alternatives to High Cost Litig. 69, 70 (May 1995).

Tit-for-Tat

"Tit-for-tat" is the tactic of modifying another party's behavior by providing a reward when there is cooperation and punishment for noncooperation. While this tactic, if properly utilized, can help to modify an opponent's behavior and illicit cooperation in mediation, it can easily backfire if it is incorrectly applied or if its intent is misunderstood. *See* Dean G. Pruitt & Sung Hee Kim, *Social Conflict: Escalation, Stalemate, and Settlement*, 70-71 (3d ed. 2003). For example, if two attorneys employ tit-for-tat in a negotiation, without making their intent known, the tactic can result in a chain of punishing, retaliatory behavior, which dramatically escalates the dispute.

Threats

In order for a threat to be effective, the harm must be worse than any gain from compliance, and it must be credible. Threats can be very effective, cost nothing if they work, can always be taken back, and are often consistent with an individual's sense of justice. However, threats are generally resented and often destroy relationships by creating distrust. Moreover, fulfilling a threat can be very expensive and time consuming, and can escalate the conflict. *See id*. at 71-75. The most common threat made by attorneys in mediation, of course, is to take a case to trial.

Coercive Commitments

Coercive commitments are escalated threats, indicating "I have started doing something that punishes you and will continue doing it until you conform to my wishes." *Id*. at 75. This tactic is similar to playing the "game of chicken," where both parties may be substantially harmed if one party does not relent. Utilizing this tactic, the weaker party is generally in the stronger position, especially where the weaker party has "nothing to lose." Coercive commitments often result in conflict escalation, where neither side can change its position without losing face. *See id*. at 75-79. For example, in a divorce case, an attorney may use a coercive commitment, with authority from the client, and threaten the opposing party to either accept an unfair settlement offer or all joint assets will be spent to fight any different division of assets.

Violence

It is never appropriate behavior for an attorney to initiate or instigate violence. Unfortunately, it does occur. In 2006, the Utah State Bar conducted the first statewide survey of violence

against the legal profession in the United States. *See* Stephen D. Kelson, *Violence Against the Utah Legal Profession – a Statewide Survey*, 9 Utah Bar J. 4, 8 July/Aug. 2006. The results presented a startling picture of the level and kinds of violence experienced by members of the Utah Bar, including incidents of violence perpetrated by opposing counsel. Some reported examples include:

- Hit by opposing counsel in a deposition, requiring a hospital visit.
- "In the heat of the moment after a hearing where opposing counsel lost, opposing counsel grabbed me by the tie and tried to drag me out of [the] courtroom to discuss the matter further."
- "Opposing counsel suggested we step out into the parking lot to settle the matter at issue."
- "In the federal courthouse…I was threatened by oppos[ing] counsel in the elevator with a weapon."
- "Opposing counsel made threats against counsel and client suggesting damage to property and person…attorney subsequently disbarred."
- "On one occasion I was physically assaulted by another attorney outside my office."

It goes without saying that violence in mediation is unlikely to promote resolution.

THE UNFORTUNATE RESULTS OF EMPLOYING CONTENTIOUS TACTICS IN MEDIATION

Attorneys who employ contentious tactics in mediation often believe they gain a professional advantage by demonstrating resolve. Instead, such advocacy results in the escalation of the dispute, poor decision making, and the failure to achieve their clients' interests.

Too much advocacy during mediation can harm the potential of reaching resolution. It wastes the opportunity to learn helpful information from the other party and to reach a mutually acceptable and swift resolution of the dispute. Too much advocacy also results in attorneys and their clients "anchoring" (placing over-reliance on a particular fact or piece of information) and becoming overconfident in their own view of the dispute, resulting in decision-making errors that undermine otherwise potential resolutions. *See* Donald R. Philbin Jr., *Decisional Errors: Why We Make Them and How to Address Them*, 64 J. Disp. Resol. 64, 66 (Nov.-Jan. 2010). Having created anchors, attorneys lock themselves and their clients into their positions and subsequent offers, from which they find it difficult to move. *See* Douglas E. Noll, *Mediation: The Myth of the Mediator as Settlement Broker*, 64 J. Disp. Resol. 42, 48 (May-July 2009). Moreover, over-advocacy often results in the escalation of emotions and the untimely termination of mediation.

It is important to keep a clear head and a professional distance from a dispute to properly evaluate your client's position in mediation. The more contentious a dispute and mediation becomes, the more likely an attorney becomes emotionally involved and entrenched in positions, which can lead to decision-making errors. A 2008 study of 2,054 California civil cases, decided between 2002 and 2005, examined whether, and under what circumstances, the parties did better at trial than they could have through settlement. The study showed that in only 15% of the cases, both sides did better at trial than their last settlement offer before trial. On average, in 60% of the cases, plaintiffs did worse at trial than the last settlement offer, and in 25% of the cases, defendants did worse at trial than the last settlement offer. *See* Randall Kiser, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients* 42-45 (2010). A significant step to overcome decision-making errors in mediation is to seek independent views, keep emotions in check and examine the facts, recognize that circumstances matter, and consider your alternatives. *See id*. at 107-08.

SIMPLE RECOMMENDATIONS

Contentious tactics are overwhelmingly counterproductive in mediation, create bad feelings between counsel and the parties, cause opposing counsel and parties to react and strengthen their resolution to "fight it out," and inevitably lengthen the time it takes to otherwise come to a resolution. These tactics often produce a worse outcome. When an attorney is going to attend mediation, the following recommendations should be used to avoid falling into the pitfalls of contentious tactics.

Prepare for Mediation

According to the author and mediator William Ury, "Most negotiations are won or lost even before the talking begins, depending on the quality of preparation." William Ury, *Getting Past No: Negotiating Your Way From Confrontation to Cooperation* 16 (1993). Many attorneys still only have a general understanding of mediation and haven't taken the opportunity to educate themselves about the process. It is more difficult to adapt to the philosophy of

mediation when you don't understand the process. A decision to "wing it" at mediation by just showing up to trade numbers is not zealous representation of the client, is unproductive and regularly backfires.

Attorneys who fail to educate themselves for mediation similarly fail to educate and prepare their clients, making the mediation process more difficult and less beneficial for the parties. Attorneys should prepare themselves for mediation by educating themselves about: (1) the mediation process in general, (2) the attorney's different philosophical role in mediation as opposed to litigation, and (3) how the specific mediation will be conducted, and the roles of the participants. With this foundation, attorneys can then educate and better prepare their clients for mediation, evaluate the best alternative to a negotiated agreement (BATNA) and the worst alternative to a negotiated agreement (WATNA), and plan their negotiation strategy.

Focus on Interests

A central role of an attorney is the ability to communicate and express his or her clients' interests (why they want particular options). Attorneys who focus on advocacy commonly lose sight of the interests in the case, and anchor themselves in extreme positions. Attorneys who focus on their clients' interests permit their clients to have more control of the outcome in the dispute and to reach an acceptable resolution.

Don't Resort to Uncivil Contentious Tactics

The Utah Standards of Professionalism and Civility provide a baseline for attorney conduct. Where some attorneys might believe that employing uncivil contentious tactics will give them "the edge" and help them "win" in mediation, such is not the case. As discussed by Justice Richard D. Fybel of the California Court of Appeal, for District Four, Division Three (Santa Ana): "The Rambo, ethically-challenged lawyers are not better lawyers and do not achieve better results for their clients.…People are not persuaded by obnoxious or unethical tactics. Intimidation is overrated as a litigation tool." Justice Richard D. Fybel, *Honest Lawyers Make Good Lawyers: Thoughts on Ethics and Civility in the Legal Profession*, 19 Utah Bar J. 7, 11-12, Nov./Dec. 2006.

Contentious tactics used by opposing counsel do not justify reciprocal responses, and escalate rather than resolve conflicts in mediation. Take the high road for both you and your client. When such conduct occurs in mediation, request ground rules to the mediation, drop your volume, take a break to cool down and check yourself from replying in kind, or request a caucus to allow the mediator to address the uncivil behavior. If necessary, request that the parties be separated for "shuttle mediation," allowing the mediator to filter out the offending attorney's uncivil behavior. Most importantly, focus on your client's interests.

CONCLUSION

Nearly every legal dispute has its distinct challenges. Attorneys who rely upon and cling to the standard philosophical map in mediation add to these challenges and unsuspectingly obstruct the mediation process by intentionally and unintentionally employing contentious tactics. The failure to adapt to the mediation process and employment of contentious tactics regularly results in inadequate preparation, over-advocacy, and over-aggressive and uncivil behavior. This only prevents the client from potentially achieving his or her interests through mediation. By preparing for mediation, attorneys will better understand the differences between the mediation philosophy and the standard philosophical map, adapt to the mediation process, instead of falling back on and employing uncivil contentious tactics in the mediation process, and better serve the client's interests in mediation.

Guardianships: The Fine Line Between Protection and Exploitation

by Kristin K. Woods

A guardianship can be an essential tool for a spouse, child, or other caregiver who is charged with managing and protecting the assets of a loved one who is no longer able to make responsible decisions. However, because there are emergency provisions within Utah's guardianship statutes that allow for an immediate, temporary guardianship, there exists the potential for abuse. The severe and potentially devastating impact that a guardianship has upon the rights of the ward requires members of the Utah legal community, both attorneys and judges, to pursue and decide guardianship cases with caution and discernment.

Utah Code section 75-5-310 provides the procedure for one to acquire a temporary guardianship. This statute states that if an emergency exists, or if an already appointed guardian is not performing his or her duties, and the court finds that the welfare of an incapacitated person "requires immediate action," the court may, without notice, appoint a temporary guardian to serve for a period of not more than thirty days. Utah Code Ann. § 75-5-310(1) (Michie 1993). As an apparent safeguard against potential abuses, the statute also requires the court to hold a hearing to consider the appropriateness of the temporary guardianship within five days of the appointment of the temporary guardian. The ward must be noticed of this hearing, and the court "may appoint an appropriate official or attorney to represent that person in the proceeding" unless the ward retains his or her own attorney. *Id.* § 75-5-310(2).

Utilizing section 75-5-310 can be a necessary and even lifesaving tool in appropriate circumstances where a proposed ward is in immediate physical or financial danger. However, the statute leaves room for a nefarious or misinformed person to misuse this statute to gain control over a person and their assets without due process. The language of the statute reveals important and practical realities. For one thing, in order to grant a temporary guardianship, the judge must be able to make a quick determination that the proposed ward is, in fact, "incapacitated." Utah Code section 75-1-201(22) provides that the definition of an "incapacitated person" is "any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause, except minority, to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions." Utah Code Ann. § 75-1-201(22) (Michie Supp. 2012). Most often the petitioner will submit an affidavit and/or a letter from a medical provider or other material witness that provides the judge with enough information to determine that the proposed ward appears to be incapacitated on the basis of the facts. Because the judge is being presented this information ex parte and without notice to the proposed ward, the greatest potential for abuse exists at this initial stage. Theoretically, a person could submit fraudulent documents to the court and the judge would have no way of knowing this. Although this risk of fraud exists in any ex parte proceeding, in guardianship proceedings this reality is especially daunting because the appointment of a guardian removes the ward's ability to make his own decisions and allows the guardian access to financial accounts. Once under a guardianship, the constitutional rights of the ward are limited, and in some cases stripped, and the ward is completely dependent upon the authority of his guardian.

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The second implication within the language of section 75-5-310 is that the judge must make a quick determination that the proposed ward's welfare is in danger such that "immediate action" is required. *See id.* § 75-5-310(1). Again, the petitioner usually submits to the judge an affidavit containing facts that explain to the judge what the emergency situation is. As the judge is forced to rely solely upon the ex parte testimony of the petitioner, there is again the risk of abuse. Typically this exigent situation must be one that causes the judge to determine that the situation is so serious, and the proposed ward's welfare faces such harm, that if an immediate order is not issued harm will occur to the ward that is more serious than the harm of the appointment of a guardian without due process. Again, the judge is forced to act solely from the petitioner's evidence and testimony, which creates a possibility of abuse.

The third reality of section 75-5-310 arises if the judge determines that he or she is persuaded by the evidence presented and grants the temporary guardianship. Once this happens, the ward may not be able to contest the order appointing the temporary guardian for a time period of up to five days. While the ward is stuck, waiting for the hearing, the temporary guardian will have already been authorized by court order to act in all respects for the ward, including accessing assets and making business and healthcare decisions for the ward. During this period of time the ward is absolutely vulnerable, financially and physically, to the guardian. If the guardian has indeed pursued the guardianship for nefarious purposes, the five days in between the issuance of the order and the hearing provide plenty of time for the guardian to access, and potentially convert or sell, assets, or to disrupt the ward's living situation in some way, such as admitting them into a care facility against their wishes.

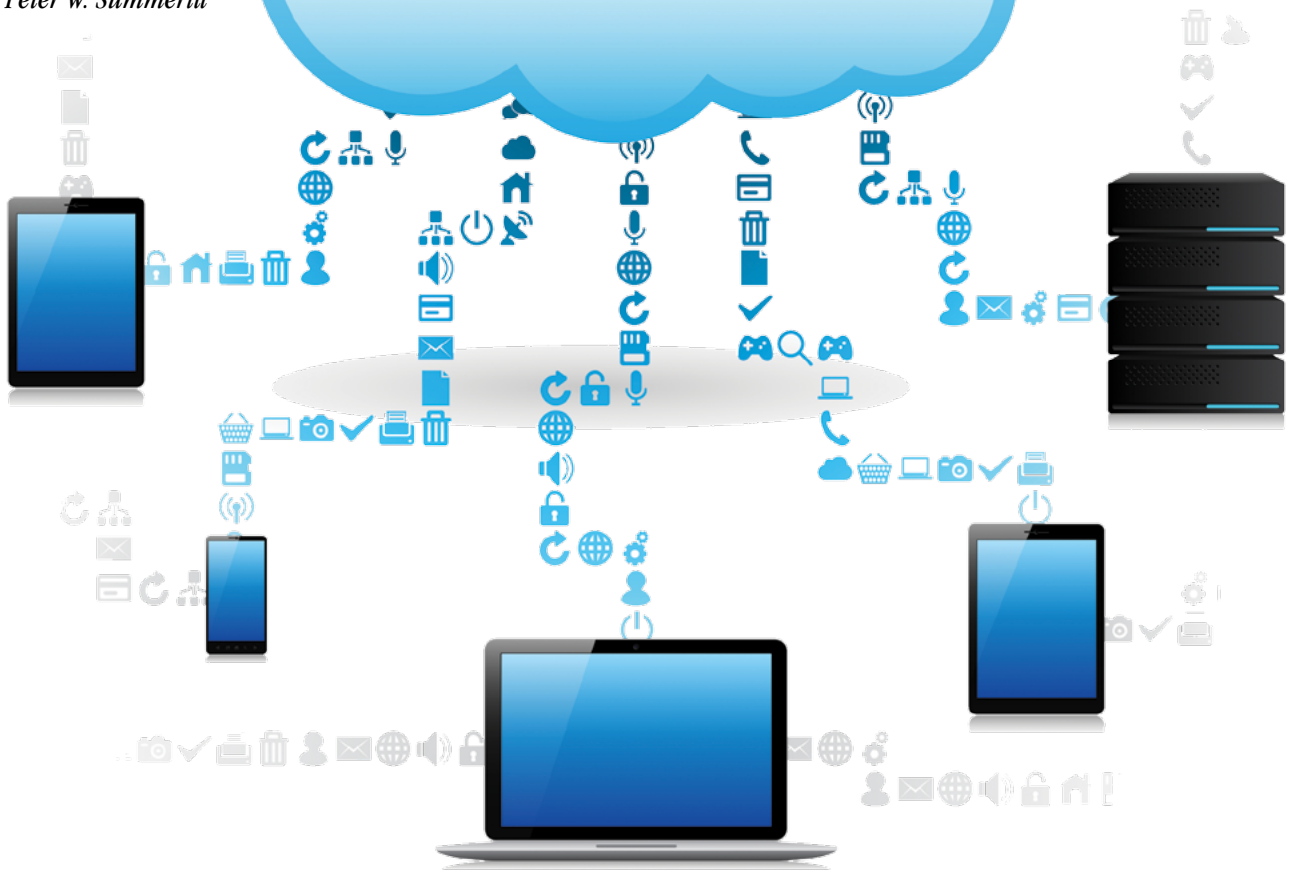
"When a guardianship is granted, the ward's constitutional rights to life, liberty, and property can be limited or completely denied by the appointed guardian."

In circumstances where section 75-5-310 is being misused, it is almost never the obvious bad actor with evil intentions who is pursuing the guardianship. More often than not it is a frustrated spouse or family member who has simply grown tired of the hassle created by the decisions of an aging loved one. In these situations, many times the family member simply desires to acquire control of the finances because they disagree with the manner or method in which the proposed ward handles their affairs, even though that manner or method may not be harmful. This is where a competent and keen attorney can be useful in guiding a potential guardianship petitioner away from guardianship, and towards a less-extreme estate planning solution, such as a power of attorney. This course of action would allow the parties to cooperate financially, but spares the potential ward from being stripped of all his or her decision-making power and constitutional rights.

Unfortunately, the possibility for abuse of the guardianship statutes seems to be becoming more and more real. The MetLife Study of Elder Financial Abuse, released in June 2011, estimates the annual financial loss to elders by exploitation to be at least $2.9 billion, which represents a 12% increase from the figures reported in 2008. When a guardianship is granted, the ward's constitutional rights to life, liberty, and property can be limited or completely denied by the appointed guardian. The severity of this legal remedy is desirable and allowed because there are incapacitated people who absolutely need others to step in at some point as guardians, and to protect them physically and financially. However, in many cases the delineation between an incapacitated person and a healthy person is not so clear, and necessitates extreme caution on the part of the attorneys and judges involved. The affidavits and other evidence submitted by the petitioner should be scrutinized carefully by the court before appointing a temporary guardian, and if it is later discovered that the petitioner has exaggerated the exigent nature of the temporary guardianship or falsified evidence, sanctions should swiftly issue and be enforced to the fullest extent. The practical reality is that legal professionals are often involved in these situations, and because of this they must act cautiously to make sure that section 75-5-310 is not being used to add to the ever-rising, staggering, and devastating statistics of elder exploitation.

Cloud Computing: Silver Lining or Rainy Day?

by Peter W. Summerill



What Is Cloud Computing?

Cloud computing can be defined in a variety of different ways. These definitions can include a number of arcane and difficult to understand computing concepts. However, the simple definition is that cloud computing means your stuff is stored somewhere other than the computer in front of you. A very simple example is everyday e-mail. If you use a service such as Yahoo!, Google's Gmail, or Microsoft's online services, all of your e-mail is stored online, in "the cloud." More recently, services have successfully expanded beyond e-mail. The advancement of technology allows companies to provide a vast array of hosted, online, 24-7 availability to your information and software from anywhere. The services have expanded to include legal specific practice management software such as time and billing, calendaring, messaging, and file sharing. These cloud services allow smaller firms and solo practitioners to access and deploy high-end software solutions at an affordable price, and also provide more efficient and economical services to their clients.

You Can't Teleport to the Information, But You Can Teleport the Information to You.

Imagine sitting in court and pulling up your entire client file, including all contact information, all phone calls that you have made, all e-mail that you may have sent, and any documents associated with the file, including pleadings, correspondence, and evidentiary materials. Imagine being able to log new billable hours and activities associated with the client matter automatically and before you ever even returned to the office. Finally, imagine that all of this information, your e-mail,

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phone notes, billing entries and file documents, are fully indexed and searchable, from an interface available on your smart phone such as an iPhone or Android. RocketMatter (www.rocketmatter.com) and Clio (www.goclio.com), the two main players in the cloud-based practice management arena, offer this very functionality. Each of these services exist entirely in "the cloud." Because each service exists in the cloud, all of your client-matter information is available anywhere that you can gain Internet access. Additionally, each has optimized its online interface for access via smartphones.

Other services can seamlessly synchronize all of the files on your laptop with those of your paralegal, secretary, and law partners. Any change made to a file by your paralegal is almost instantaneously synchronized to your laptop over the Internet. This means you could be in a client meeting in Phoenix while your paralegal makes alterations and finalizes a contract/pleading in Salt Lake City. So long as you have an Internet connection, the changes your paralegal makes will be synchronized to your laptop almost immediately for review and approval by the client. An additional benefit to such synchronization services is that you have now effectively backed up that same file across all computers using the service. If your office scans all incoming mail, you will always have a redundant backup of your entire paper file. Even if an earthquake were to level your law office and destroy every desktop computer in the office, all of your client file documents would still exist independently both "in the cloud" and on your laptop. Under this scenario, your laptop could even be destroyed and, so long as you are able to regain Internet access at some point, you would be able to access and retrieve every document scanned or created by you and your firm.

Dropbox (www.dropbox.com), Box (www.box.com), and SugarSync (www.sugarsync.com) all provide cloud-based synchronization services that leverage the Internet. Considering that these services provide a seamless off-site backup to all of your designated client-matter folders, it may be malpractice to refuse to consider these services as part of your law office practice management strategy. The question, of course, is to what extent use of a cloud service can be done in compliance with both the rules of professional responsibility and the ability to maintain privacy and security.

Professional Responsibility Rules and Malpractice Considerations of Cloud Computing.

Of course, as with any new technology, there is a fear of the unfamiliar. Objections raised against using cloud-based technology fall into two broad categories: security and privacy. Under the first category, Luddites complain that the services are by definition "insecure" because they are cloud-based and therefore subject to hacking; i.e., unauthorized access by third parties. Additionally, the security objection claims that cloud services might fail, thereby causing either the inability to access or sudden disappearance of your information. The second category of objection, privacy, suggests that individuals outside of the law firm may gain access to or view sensitive client information as part of a service agreement with the provider. This privacy objection stems from the belief that employees of the cloud service may have access to client information as a result of simply maintaining the servers on which the information is stored. However, neither security nor privacy concerns preclude the ability to leverage cloud-based technologies for the benefit of your practice and your clients. A review of the relevant rules of professional responsibility demonstrates that you can use these services without becoming a "technology expert."

Lawyers have an ethical obligation to maintain the confidentiality and security of their clients' property. Cloud computing implicates, at the very least, Rule 1.6(a) of the Utah Rules of Professional Conduct: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."

The comments to this rule indicate that a lawyer "must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure." *See* Utah R. of Prof'l Conduct 1.6, cmt. 16. When transmitting a communication, the lawyer "must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure." *Id.* R. 1.6, cmt. 17. At about this point, lawyers start to get nervous about using cloud services. All manner of bogeymen start to come to mind: "hackers" and the "wild west" nature of the Internet; third-party cloud service providers gaining access to client information, to name a few. Some go so far as to claim that "informed consent" of the client becomes necessary prior to using such services and that the services implicate Rule 5.3, "Responsibilities Regarding Nonlawyer Assistants." *Id.* R. 5.3. These positions either fundamentally fail to understand the nature of cloud services or overstate the duties of lawyers.

First, the duties of a lawyer to maintain confidentiality are not boundless. Rule 1.6 "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy." *Id.* R. 1.6. Additionally, Rule 1.0 defines "reasonable" or "reasonably" when used in relation to conduct by a lawyer to mean "the conduct of a reasonably prudent and competent lawyer." *Id.* R. 1.0. Ethical and pragmatic considerations simply do not impose upon a lawyer an obligation to undertake herculean measures. In short, to comply with the rules of professional responsibility, a lawyer need not safeguard client information like a penguin on an egg at the North Pole. So long as the lawyer has used available security measures and acted reasonably with regard to maintaining privacy and security, their obligations and duties have been met.

> *"[T]he affordability of cloud computing allows small firms and solos to leverage the technology and provide a higher quality, more efficient service to their clients."*

Second, the misunderstanding regarding cloud services further conflates the problem. Using a cloud-based service that provides secure connections to your data and prohibits direct access to the information by their employees represents reasonable compliance with a lawyer's obligations to maintain confidentiality. Any lawyer who connects to the federal court PACER system is already engaged in a "cloud" service. The PACER system offers a "secure connection" between the system and your computer. Any lawyer who uses online banking is similarly conducting business through a cloud-based service. Any lawyer who has taken a phone call on their cell phone is employing technology not directly subject to their control. Indeed, any lawyer who *mails a letter* is using a service with employees who are not subject to their direct control. No one would seriously consider the mailman to be a "non-lawyer assistant," and it is equally absurd to impose supervisory duties over the providers of cloud-based software.

Real world, and reasonable, considerations that a lawyer should employ when evaluating a cloud service should include the following:

- Is my information safe while in transit? This is typically referred to as Secure Sockets Layer (SSL) and it ensures that all data is encrypted prior to transmission and sent in a secure form until it is unlocked and stored at the service side.

- Is the information secure once it is stored on the cloud service? You must read the privacy, service level agreement and terms of service by the cloud provider. Although not a guarantee of privacy/security, reviewing these agreements is a necessary step. Think of it as analogous to reading your lease prior to moving into new office space. Can your landlord walk into your office at any given time? Or, do you have a reasonable expectation of privacy based upon the leasing agreement?

- Is the information "captive" to the cloud provider? This question requires determining whether your information is available "outside" the cloud service. If you can download and open a local copy of your information or access it through another application, then the information is not captive.

Real World Application – Dropbox as an Example

For purposes of this article, we will walk through these considerations using the cloud service Dropbox as an example. Dropbox does indeed encrypt the information end-to-end. *See* Dropbox – Terms, *available at* https://www.dropbox.com/privacy#terms (last visited Feb. 14, 2012). So, a file created by your paralegal is "encrypted" as it travels from her computer to the cloud and then back down to your computer. This ensures that at no point along the path can a third-party gain access to the file. Second, the file is stored "in the cloud" using a secure

server, and only you or your authorized employees have direct access to the files. According to the privacy policy at Dropbox, "we won't share your content with others, including law enforcement, for any purpose unless you direct us to." *See id.* Lastly, because the files themselves are available and accessible directly on your computer, even without Internet access, the files are not captive or held in a proprietary format. Therefore, even if the Dropbox service disappeared tomorrow or there was an Internet outage, you can still access all of your documents.

Some may balk at the "guarantee" that Dropbox will not share your files with others. Indeed, this is perhaps the "weakest" link in the privacy, confidentiality, and security chain. However, the same argument that "anyone" could hack their way onto Dropbox servers and gain access to the data is the same argument that can be made for the front door, back door, or side window of your office. Given the ease with which someone could access your physical office, it is far more likely that there would be a loss of confidentiality, privacy, or security through the physical files themselves than through a highly encrypted and secured computer storage server. Or, as a more direct analogy, if a thief broke into your office and stole your "private" server, could you replicate your files at all? In a way, Dropbox provides a service which makes your practice more secure without compromising confidentiality in any meaningful way. At the very least, a reasonable analysis of the service confirms that you can not only meet your professional responsibilities, but you can also improve the efficiency of your practice and ability to serve clients by using such cloud computing options.

Conclusion

Cloud-based computing is quickly reaching a level of maturity at which it will become ubiquitous. Cloud computing allows access to client-matter information regardless of platform and often accommodates newer, more portable forms such as iPads and smartphones. Further, the affordability of cloud computing allows small firms and solos to leverage the technology and provide a higher quality, more efficient service to their clients. Finally, in many instances, the simple fact that cloud computing automatically employs encryption and creates a redundant copy of information actually helps lawyers stay in compliance with their obligations to maintain privacy and security of client information.

Season's Greetings

by Learned Ham

Budget season for the in-house lawyer. Every Faustian bargain has a price tag. Sure, we kept lawyers never have to worry about billing and collection or client development, but we do have department budgets. I know, law firms have budgets, too: salaries and benefits, rent, copier leases, CLE in the Greater Antilles, receptions for summer clerks in the Lesser Antilles, retirement parties in the Leeward Antilles, partner retreats in the Windward Antilles, Christmas parties in the French Antilles, strategy sessions in the Dutch Antilles, and malpractice premiums. You will have noticed that I did not mention client entertainment in any of the Antilles. I appreciate the gesture, but accepting your offer would violate the Gifts and Gratuities section of the Code of Conduct you drafted for me. Thanks anyway. But back to budgets. I have to budget for all that stuff, too – plus your fees.

"As I write this, I'm waiting for your responses to my emails asking you to predict: (a) what I will ask you to do next year; and (b) what it will cost."

By the time you read this, budget season will be over. As I write this, I'm waiting for your responses to my emails asking you to predict: (a) what I will ask you to do next year; and (b) what it will cost.

If that sounds unfair, well, I'm happy to stipulate to that. I've raised the same complaint with my CFO. I've tried explaining that 95% of what I spend each year is determined by: (i) what customers and competitors decide to sue us for; (ii) what regulators decide to investigate us for; and (iii) what the supply chain and marketing departments decide to do that will cause (i) or (ii) (usually both). And all three of those can be hard to predict. CFO doesn't care. CFO just wants a number. CFO not like words.

It's an exercise in creative fiction. Theater of the Absurd. Samuel Beckett, Eugene Ionesco, name-that-GC. I will spend hours looking at what I spent last year, what I've spent so far this year, and imagining everything that will go wrong next year and assigning numbers to it. Then I spread-sheet it, total it up, and send it to CFO with pages of explanations that start to sound a lot like the qualifications you staple to your opinion letters. CFO doesn't read explanations. CFO doesn't care. CFO says everything will be fine so long as number = .93X (where X = last year's number). Sisyphus pushes the rock back up the hill.

It's part of the annual cycle.

In the springtime the forsythia turn yellow, and you get messages from me explaining that cash flow is tight and all non-essential work must be deferred until the second half of the year. We sell in the spring, so supply chain is bleeding money and our customers won't be paying us until the fall.

In the summer the lawn turns yellow, and you get messages from me explaining that it's budget season and CFO needs numbers. Little numbers. Smaller numbers than last year.

In the fall the aspens turn yellow, and you get messages from me explaining that I'm over budget and all non-essential work must be deferred until January. You're not the only one suffering. I have dimmed the lights and cancelled the department retreat in the Antilles.

In the winter the snow turns yellow, and you get messages from me explaining that I need major concessions on hourly rates because we've retained cost-cutting consultants (again) who are: (1) making my life a living hell; and (2) urging me to

outsource you to Bangalore.

The seasonal cycle takes place against a background of some things that, gratefully, remain constant throughout the year:

- You must submit bills by the 3rd day of the month following the month in which the work was performed. This allows CFO to accrue expenses in the correct period.

- There are no exceptions to the preceding rule, except two: invoices for work done during June and December must be submitted by June 20th and December 20th respectively. Yes, I know that's impossible. What's your point?

- I will not pay you for 120 days after receiving your bill. Pull out our engagement letter and you'll see that I cleverly crossed out 15 or 30 or whatever unrealistic number you put in there and replaced it with 120. Or maybe 180 if I was in a real shareholder-value-creation mood. This is called "good payables management." My mortgage lender would call it "an event of default." Mortgage lenders don't appreciate the concept of value creation.

Here's the thing. I am rewarded, not for good results, but for minimizing what I pay you, and for delaying that payment as long as possible. Did you notice how quiet everything just got? Like all the air just got sucked out of the room. Like when Dave Bowman enters the stargate in *2001: A Space Odyssey*. Like that day in second grade when Merlin Marcovecchio announced during show-and-tell that there is no Santa Claus.

But speaking of Santa Claus, a funny thing happens at the end of the year. As if visited by Jacob Marley and the ghosts of Christmas Past, Present, and Future, CFO suddenly sends me a panicked email to pay every invoice I've got before December 31, and pre-pay next year if possible. It's not exactly an expression of good will toward all humankind. It's our credit agreement (which is pretty much the same thing, according to lenders' counsel).

The credit agreement has an excess cash flow sweep, and the last thing in the world we want to do is send cash to the banks. If we wanted the banks to have that money, why would we have borrowed it in the first place? If I give the banks all my money in December, how am I going to pay your bill in January? That would be your August bill, if you're keeping score.

There's a practice pointer here for the alert transactional lawyer. When the bank asks for a cash flow sweep, push back, but not too hard. You need to get a concession to sell it to me, but the cash flow sweep is your friend. It's a way to ensure that after being strung along by me all year long, you'll get brought current by year-end (which will get you a better room at the partner retreat on St. Lucia).

This might all sound a little depressing, where I pay you less so I'll have more. And I grant you there are a few subtle hints in that direction, but I want to end on a high note. Something we can all agree on. And this is the trump card that changes the game from zero-sum to win-win. EBITDA. When they get around to re-making The Graduate, in addition to making Benjamin Braddock a martial arts action hero like the new Sherlock Holmes, the dialogue will be revised as follows:

Mr. McGuire: I just want to say one word to you. Just one word.

Ben: Yes, sir.

Mr. McGuire: Are you listening?

Ben: Yes, I am.

Mr. McGuire: EBITDA.

EBITDA is earnings before interest, taxes, depreciation, and amortization. But the devil is in the details. It can be before other stuff, too. And the more stuff it comes before, the bigger and better it is.

The calculation of EBITDA – being a non-GAAP financial measure – is truly elastic. As a result, what I am about to say might not apply to every definition of EBITDA that you are likely to encounter in your practice. Lawyerly disclaimer safely behind us, *my* EBITDA also comes before extraordinary expenses. EBITDA is reduced by ordinary expenses (bad), but not by extraordinary expenses (good).

This is the holy grail: my budget limits my ordinary expenses, but not my extraordinary expenses – and my compensation is tied to EBITDA. I think we can all agree that your work this year has been truly extraordinary.

Article

Red Mass

by Scott R. Sabey

Cathedral of the Madeleine | © 2012 Laniece Roberts

The other day the Utah Italian Society sent me an email from the St. Thomas More Society inviting me to attend the Red Mass being held at the Cathedral of the Madeleine, September 21, 2012. While I am always interested in what the Italian community is doing here in Utah (I served an LDS mission in Italy), I had no idea what the Red Mass was about, so I decided to attend.

It is, quite simply, a mass for justice. It derives its name from the red vestments, worn traditionally by judges, and it is intended for members of the legal profession and all those involved in the administration of justice. The Red Mass was first celebrated in the early 1200s in Paris, France, and quickly spread around Europe. It has been celebrated in the United States for more than 135 years. Since 1953, on the first Sunday in October, the Red Mass has been held in the Cathedral of St. Matthew the Apostle in Washington, D.C., with the participation of the members of the U.S. Supreme Court. In fact, the first time it was held, there were no Catholic members of the Supreme Court of the United States, so the "Catholic Seat" had to be filled by Justice Sherman Minton, who although he was Protestant, had a wife who was Catholic.

As a result of the efforts of the St. Thomas More Society (the patron saint of lawyers), the Red Mass has been conducted at the Cathedral of the Madeleine in Salt Lake for the last five years. I was impressed with the level of participation at the Mass. I saw attorneys I know from around town, attorneys who own companies rather than practice law, and a number of judges from both the State and Federal Courts.

The Cathedral of the Madeleine is a grand, beautiful, yet peaceful building. Bishop John C. Wester, with the assistance of Monsignor Joseph Mayo, was very welcoming of all who attended. Bishop Wester talked about the need for justice in society and a solid judicial system. He recognized the contributions of judges, lawyers, police, military, and corrections officers. He gave special recognition to those individuals who gave their lives in the service of others, naming each of them. The Mass sought the blessings of God on all those involved in the administration of justice, to have an open mind and compassionate heart, and to do our best in serving others.

The time I was in attendance was a wonderful opportunity to rise above the billable hour and contemplate the profound impact that the practice of law has on the lives of people every day. I left feeling at peace and recommitted to the proud profession we call the practice of law. I hope to see you there next year!

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An Overview of FAA Enforcement Actions

by Peyton H. Robinson

The aviation industry is highly regulated by the Federal Aviation Administration (FAA). Pilots, airlines, flight schools, maintenance shops, fractional ownership businesses, charter operations, and others in the industry have to contend with strict regulations and potentially severe penalties for missteps. An alleged violation of a regulation could mean an enforcement action against the business or individual and is where an attorney's assistance could be critical. Yet many lawyers do not know what processes may apply in FAA investigations and prosecutions.

This article provides a high-level overview of FAA enforcement actions, and is intended to help enlighten lawyers advising aviation clients about what processes apply. The majority of this discussion focuses on procedures affecting the approximate 670,000 pilots holding active airmen certificates, including nearly 7,600 that are located in Utah (database available at http://www.faa.gov). However, FAA processes affect aviation businesses as well (and many aviation businesses in Utah are owned by pilots).

The FAA Can Investigate Potential Violations

The Federal Aviation Act authorizes the Administrator of the FAA to conduct investigations, hold hearings, issue subpoenas, require the production of relevant documents, records, and property, and take evidence and depositions. *See* 14 C.F.R. § 13.3 (2012); *see also* 49 U.S.C. §§ 40113, 44709, 46101 (2006). On the FAA side, the lead investigator will typically be an Aviation Safety Inspector (ASI) from the Flight Standards District Office (FSDO, commonly called fizz-doe) with jurisdiction over the area where the potential violation occurred. The ASI could be involved due to a regularly scheduled audit, an ASI-initiated check, an Air Traffic Control (ATC) report, a witness report, an accident, or any other number of ways a violation may appear to have occurred.

Results of an FAA Investigation

Generally, seven things can occur as a result of an FAA investigation:

(1) No action;

(2) Oral or written counseling;

(3) Administrative action;

(4) Remedial training;

(5) Request for reexamination;

(6) Legal enforcement action; and

(7) Criminal action.

The first two results are minor in relative terms, and criminal action is beyond the scope of this article. Since the first two events result in no material action (though doubtless there could be a lot of stress and concern), and the last could be its own article, I will focus on items three through six.

Administrative Action

An administrative action represents the first significant step in an FAA enforcement action. The FAA officially recognizes two types of administrative actions: a "warning notice" and a "letter of correction." *See* 14 C.F.R. § 13.11. If legal enforcement action (discussed below) is not required, such as in the more serious strata of errors, the administrative action may be

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approved. The purpose is to bring the incident to the attention of the alleged violator, document corrective action if required, encourage future compliance, and provide a record for the FAA. In administrative action cases, there is evidence to show some violation, but the action does not officially charge the person or entity with a violation. *See* FAA Order 2150.3B with Change 4 Included, Chapter 5.3.a, *available at* http://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.information/documentid/17213.

A warning notice is a letter or form addressed to the violator that points out the facts and circumstances of the incident involved, and that the violator's action or inaction appears to be contrary to the regulations, but does not warrant legal action. The warning notice requests future compliance with statutory and regulatory requirements.

A letter of correction serves the same purpose as a warning notice but is generally used where the violator agrees to take some action within a certain period of time. The purpose of the correction letter is to bring attention to the apparent violation and to document action that has been or will be taken to correct the situation. Typically, the FAA issues two letters. The first letter states the agreement for the violator to take some action by a specific date. The second letter then acknowledges that the required action was completed (or not completed, with potential sanctions to follow).

The FAA considers the following factors when determining whether to allow administrative action instead of a more serious sanction:

> (1) Legal enforcement action is not required by law, and administrative action would serve as an adequate deterrent to future violations;
>
> (2) For pilots, he or she is otherwise qualified for an airman's certificate;
>
> (3) The violation was inadvertent and not purposeful;
>
> (4) There was not a substantial disregard for safety or security, and there were no aggravating circumstances;
>
> (5) The alleged violator has a constructive attitude toward complying with the regulations; and
>
> (6) There is not a trend of noncompliance indicated by past violations.

See id. FAA Order 2150.3B, Chapter 5.4.b.

Remedial Training

Remedial training might be an option for an airman being investigated for a potential violation. Take for example the following scenario: a pilot takes off under instrument flight rules and is given a heading and altitude by ATC. However, the pilot fumbles with the autopilot on takeoff and is unable to program it correctly to handle the instructions, deviates from the heading and altitude, causes ATC to divert an incoming aircraft to avoid a mid-air collision, and thereby finds him or herself in trouble. In this case, remedial training on autopilot operation and instrument skills might be required to keep the airman's certificate.

In cases where remedial training is an option, pilots should generally take it (if he or she wants to continue to fly). It may be offered as part of an administrative action, such as with a letter of correction, and it may be included with a Letter of Investigation (LOI) at the start of a legal enforcement action. If the training is available, it will be specific to the event that led to the enforcement action. The pilot will sign an agreement to undergo specific training from a flight instructor designated by the FAA. A letter will outline the reason for the training, the date by which it must be completed, and contact information for the instructor.

The factors the FAA considers for remedial training are as follows:

> (1) Can future compliance reasonably be ensured through remedial training alone;
>
> (2) Does the airman display a constructive attitude;
>
> (3) Does the conduct display a reasonable basis to question the airman's qualifications (e.g., false medical records, or other core requirement issues);
>
> (4) Does the airman have a record of enforcement actions; and
>
> (5) Was the conduct deliberate, grossly negligent, or a criminal offense?

See id. FAA Order 2150.3B, Chapter 5.9.d

Request for Reexamination

A request for a reexamination, or "709 Ride," is surely one of the more stressful events for a pilot and deserves serious

attention. It is authorized under 49 U.S.C. § 44709(a). The statute allows the Administrator of the FAA to investigate whether a pilot should be allowed to exercise the privileges of his or her airman's certificate. The FAA does not view the 709 Ride as a punitive measure, and completion of the Ride is only one factor in proving qualification for a certificate or rating. For example, if an airman is subject to legal enforcement proceedings, the satisfactory completion of a 709 Ride does not preclude further actions by the FAA. *See id*. FAA Order 2150.3B, Chapter 5.6.a.

The reexamination is limited to the reason for the request, and will be stated in the correspondence to the pilot. The pilot can request to change an inspector or FSDO but may need to temporarily surrender his or her airman's certificate pending reexamination. Any airman subject to a 709 Ride should, at a minimum, get training before the FAA reexamination and log it. The pre-Ride training will demonstrate appropriate attention to the issue, and show a desire to be compliant with FAA rules.

According to FAA Order 2150.3B, the failure or refusal to submit to a 709 Ride can lead to the issuance of an emergency order suspending the pilot's certificate. Some allowances can be made for weather or conveniences of the airman, but they are not unlimited. If the pilot fully cooperates, and yet still (for whatever reason) fails the 709 Ride, the pilot may be able to try again; however, the FAA will typically only allow two attempts to pass. *See id*. FAA Order 2150.3B, Chapter 5.6.d(3).

Legal Enforcement Action

The consequences for the pilot or business in a legal enforcement action can be catastrophic. At this stage, the FAA is considering a more severe sanction, such as suspension or revocation of the airman's certificate, or the potential imposition of civil penalties. The FAA attorneys are now involved, rather than just the local FSDO, and the airman or business must respond to the legal action or be subject to sanctions.

Generally, a legal enforcement action is initiated against an airman or aviation business in four ways:

(1) Letter of Investigation;

(2) Notice of Proposed Certificate Action;

(3) Notice of Proposed Civil Penalty; or

(4) Order of Suspension, Revocation, or Civil Penalty.

The LOI is merely a notice to the airman or business that a formal investigation is ongoing. A response by the subject of the investigation is not required, and any response may be used as evidence against the airman.

If pilot remedial training is offered in the LOI, then the pilot must respond if remedial training is desired. There are some important strategic considerations in responding to the LOI. For example, a response can indicate a desire to comply with the regulations and show cooperation with the FAA's rules. On the other hand, inadvertent missteps in a response can lead to greater sanctions than would have otherwise been the case if the investigation subject had said nothing.

The Notice of Proposed Certificate Action (NPCA) is a demand from the FAA for the airman or business to respond or else to have his or her certificate suspended or revoked. The NPCA will typically offer a series of options:

(1) Admit the charges and surrender the certificate (foregoing later appeal);

(2) Respond to the NPCA with an answer or explanation, including any evidence;

(3) Request the FAA issue an order suspending the certificate, so that an appeal may be taken to the National Transportation Safety Board (NTSB); or

(4) Request an informal conference with an FAA attorney.

See 14 C.F.R. § 13.19(c) (2012); *see also* FAA Order 250.3B, Chapter 6.10.c. If the recipient of the NPCA fails to respond, an order of suspension or revocation will be issued. An appeal to the NTSB may still be made at that time, but the failure to respond or appeal when given an opportunity to do so will mean the order of suspension will stand. For example, in *Administrator v. Reid*, NTSB Order No. EA-5150 (2005), the pilot failed to appeal the original order of suspension. When the pilot was later assessed a civil penalty for the failure to surrender his airman and medical certificates as a result of the order, the pilot was prevented from contesting the original order of suspension.

The request for an informal conference with the FAA attorney handling the case can be part of the response, along with an explanation. The informal conference is "confidential," but discussions in the conference may still be used for impeachment in a later hearing for any statements that are inconsistent with representations made at the conference. The certificate holder or his or her attorney should obtain the FAA's Enforcement Investigative Report (EIR) before the conference. The EIR will explain the Aviation Safety Inspector's (ASI's) view of the case, and represent the FAA attorney's starting assessment of the case. If the ASI or FAA attorney are unwilling to hear the airman's side of a case (e.g., whether some action was reasonable), then the certificate holder retains the right to appeal from a certificate action. The informal conference is not necessarily the last chance to be heard.

A civil penalty is most commonly asserted against companies or entities versus individual airmen. However, under certain circumstances, such as refusal to comply with an order to surrender the airman's certificate, a monetary penalty may be part of the FAA sanction. Options for the airman in responding to a Notice of Proposed Civil Penalty (NPCP) include:

(1) Pay the penalty or an agreed upon amount;

(2) Answer the charges in writing;

(3) Submit a written request for an informal conference; or

(4) Request that an order be issued so that an appeal can be made to the NTSB.

See 14 C.F.R. § 13.18(d). Failure to timely respond to a NPCP will lead to an order of assessment against the airman. A timely appeal may still be filed with the NTSB after an order assessing a civil penalty is issued, but time constraints are tight. Failure to pursue administrative remedies (such as appeals) can mean the pilot forfeits the right to challenge the fine.

Appeals

Where the FAA has issued an order of suspension, revocation, or civil penalty, an appeal to the NTSB is possible. The appeal of an FAA enforcement action is formally to the NTSB, but first goes to an administrative law judge (ALJ) for hearing. After the ALJ issues an initial decision, a further appeal may be taken to the full NTSB (the Board). The Board's consideration of issues on appeal from the ALJ is limited, primarily to errors of procedure, whether substantial questions are raised, or whether the findings

of fact are adequately supported. *See* 49 C.F.R § 821.49 (2012).

After the Board issues a decision, the airman may take an appeal to the D.C. Court of Appeals for the District of Columbia, or to the circuit court of appeals in the area where the airman lives or has a principal place of business. Both the FAA and the airman may appeal the Board's final decision. Depending on the circumstances, the Board may allow a delay in the effective date of an order while the appeal is taken to the circuit court.

Expunction

For many years, the FAA has had a policy of expunging certain enforcement actions after a period of time from a pilot's record. In "no action" cases, the records of an FAA contact are removed after ninety days. In administrative actions, such as the warning letter, the record is expunged after two years from the issuance of the action.

For the more serious legal actions, the pilots' records used to be expunged in five years, but a 2010 amendment to the Pilot Records Improvement Action (PRIA) led to a change in FAA policy. Now there is no expunction of legal actions (certificate actions or civil penalties) pending the FAA figuring out how to comply with the new PRIA provisions. *See* FAA Policy Statement on Expungement of Certain Enforcement Actions, 76 Fed. Reg. 7893, 7893-94 (Feb. 11, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-02-11/pdf/2011-3101.pdf; *see also Pilot Records Expungement Policy Changes, Frequently Asked Questions*, *available at* http://www.faa.gov/pilots/lic_cert/pria/guidance/pilotfaq/.

Aviation Safety Reporting System

The Aviation Safety Reporting System (ASRS) is operated by the National Aeronautics and Space Administration (NASA). The ASRS began soon after the crash of Trans World Airlines Flight 514 on Dec. 1, 1974, as one of several safety initiatives to increase information reporting. *See* Bruce Landsberg, *Landmark Accident: Cleared for the Approach, One accident led to many changes*, 41 AOPA Safety Publications/Articles (June 1998), *available at* http://www.aopa.org/asf/asfarticles/sp9806.html.

Where a pilot has made an inadvertent error and possibly violated a regulation, the pilot may file a report with NASA. The program is voluntary, confidential, and non-punitive. If the

incident is the subject of an enforcement action thereafter, the pilot could still be found in violation, but will escape the certificate suspension time or civil penalty if a report was timely filed. Some people call it a "get out of jail free card," but in practice, it provides no protection for criminal violations. Still, when contacted by an airman for legal advice concerning an incident, the use of the ASRS should be one of the first considerations.

The pilot has to prove that a report was filed, and it is time critical – a report must be filed within ten days of the event, or within ten days of the date when the airman was aware or should have been aware of the event. The report can be made online or a form may be obtained from the ASRS website and mailed. *See http://asrs.arc.nasa.gov*. In either case, the airman receives a time-stamped ticket showing the report was timely filed.

A relatively new ASRS Advisory Circular provides a general discussion of the program, *see* AC 00-46E – Aviation Safety Reporting Program, *available at* http://www.faa.gov/regulations_policies/advisory_circulars/index.cfm/go/document.information/documentID/1019713, and notes that 14 C.F.R. § 91.25 limits the use of the report in any disciplinary action except accidents and criminal offenses, *see* 14 C.F.R. § 91.25 (2012). There are a few other limitations discussed as well.

The potential violation must have been "inadvertent and not deliberate." The airman must not have had a finding of a violation in the prior five years before the event (but ASRS reports can be filed as often as needed). The alleged violation cannot have involved a question of competency or qualification for the certificate (i.e., such as a false statement on a medical form), and as noted above, the event cannot have involved a criminal offense or an accident.

The New Pilot's Bill of Rights

The "Pilot's Bill of Rights" was signed into law by President Obama on August 3, 2012. *See* S. 1335, 112th Cong. (2012), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s1335enr/pdf/BILLS-112s1335enr.pdf. The Pilot's Bill of Rights gives pilots who may be subject to enforcement actions some much needed help in obtaining a fair process or hearing. Some significant points are:

(1) The Federal Rules of Civil Procedure and the Federal Rules of Evidence now apply "to the extent practical." *See id*. § 2(a). Before the law, such rules were more general guidelines.

(2) The FAA must now provide "timely, written notification to an individual who is the subject of an [FAA] investigation relating to the approval, denial, suspension, modification, or revocation of an airman certificate under chapter 447 of title 49, United States Code." *Id*. § 2(b)(1). There is an exception, but for the most part, airmen will now be advised promptly if they are subject to an investigation.

(3) The NTSB is no longer bound by FAA interpretations of its rules. This has been a huge issue in some cases. Although it is not clear at this early stage how the FAA will respond, the new law may at least allow an airman to have more of an argument that the FAA is not being fair in interpreting its own rules.

(4) Airmen can obtain air traffic control and flight service station data, or other information from a "government contractor that provides operational services to the Federal Aviation Administration, including control towers and flight service stations." *Id*. § 2(b)(4)(C)(i). In the past, such contractors would refuse to provide records of briefings because they were not bound by the Freedom of Information Act.

(5) Procedures for Appeals have opened up a little to allow an airman, at his or her election, to go to the local federal district court for review, instead of having to go up through the NTSB and then to the circuit courts.

(6) The FAA has to begin a "Notice to Airmen Improvement Program." *Id*. § 3(a)(1). The goal is to improve the dissemination system and access to data, both current and archival.

(7) The Comptroller General must begin a review of the FAA's medical certification process. One of the significant goals is to "avoid unnecessary allegations that an individual has intentionally falsified answers on the form." *Id*. § 4(b)(1)(D).

The FAA and the NTSB have already issued some public statements about the new law, but more guidance is still to come.

Utah Fellows, American Academy of Matrimonial Lawyers and the Family Law Section of the Utah State Bar

Friday, December 7, 2012
645 South 200 East, Salt Lake City, Utah
8 CLE Credits

7:50–8:00 am	Welcome & Introduction: David S. Dolowitz
8:00–8:15 am	**Tax Update:** David S. Dolowitz
8:15–9:25 am	Dr. Monica Christy and Judge Douglas Thomas – ***Rule 4-903 How is it Working?***
9:25–9:50 am	Judge Douglas Thomas – ***Rule 108 and Informal Custody Trials***
9:50–10:00 am	Break
10:00–11:30 am	Judge Jon Memmott – ***Parenting Plan*** (Rick Jackman)
11:30 am–12:10 pm	Brad Townsend – ***Determining Income***
12:10–1:00 pm	Lunch
1:00–2:00 pm	Laura Morgan – ***Impact of Addiction on Child Support, Custody, and Parent Time***
2:00–3:30 pm	Karin Hobbs and Dr. Valerie Hale – ***Rule 4-903 Conferences***
3:30–3:40 pm	Break
3:40–4:00 pm	**Introduction to Handling Hague Convention Cases**
4:00–5:00 pm	**Hot Tips** (Utah Fellows) Neil B. Crist, Bert L. Dart, David S. Dolowitz, Sharon A. Donovan, Brian R. Florence, Frederick N. Green, Larry E. Jones, Kent M. Kasting, Louise T. Knauer, A. Howard Lundgren, Ellen M. Maycock, Sally B. McMinimee, Don R. Peterson, Dena C. Sarandos, Clark W. Sessions, John D. Sheaffer, Jr., and Brent D. Young

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The Dollars and Sense of Divorce: The Role of Certified Divorce Financial Analysts in Divorce

by Lorraine P. Brown and Billy Peterson

"'Only people who have what you want can take you where you say you want to go.'"

– Pauline Tesler[1]

Today's divorcing couples face different and far more complex challenges than divorcing couples forty years ago. Multiple incomes, combined families, alternative lifestyles, new retirement and investment options, and an unpredictable economic landscape present new issues which challenge the traditional, and almost exclusively, legal, response to divorce. After all, divorce is more than the dissolution of a marital contract; it is an emotional gauntlet, a parenting journey, and, most significantly, a financial restructuring. In light of these realities, it is time we rethink the legal paradigm for divorce and acknowledge that the fracture of American families is more than a legal phenomenon and demands a multi-professional response.

Attorneys are generally first-tier responders to divorcing parties, together with counselors, accountants, and forensic experts. What is missing in this first-tier response, however, is the financial analyst. The Certified Divorce Financial Analyst® (CDFA™) offers a second, equally indispensable professional tier, specifically trained to assist divorcing couples resolve the financial issues of their divorce. Unlike financial planners and accountants – whose expertise generally extends only to questions of accounting and profitability – CDFAs are specifically trained to evaluate and plan for the short and long-term consequences of divorce. Their role is to assure that clients and their attorneys fully understand the parameters and consequences of all financial decisions incident to divorce. This information is critical to decision-making, but frequently beyond the expertise of the family law practitioner. Without this information, both the divorcing client and attorney may unwittingly act on assumptions that, though successful in achieving a settlement, work against the client's long-term interests and financial goals. Just what are these mistaken assumptions? Consider the following:

This couple's financial health will improve once they divorce. Although the reasons for divorce are generally unrelated to financial health, many divorcing clients perceive that their financial well-being will improve once they independently control their assets. This is not usually true. Dividing one household in two leads to many new and often overlooked expenses. One utility bill, one phone bill, one garbage bill suddenly doubles, not to mention the cost savings of purchasing household goods and services such as cleaners, kitchen items and lawn care for a single family unit rather than separate units. The sad reality is that financial hardship accompanies almost all divorces, and those who do regain their

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pre-divorce financial status do so only over the long term.[2]

My client should keep the marital home.

Although maintaining the status quo may enhance your client's sense of security and ease the discomfort of divorce in the short term, keeping the marital home may be a financial liability, realized fully only in the months and years following divorce. Capital gains exposure, mortgage terms, property taxes and other fixed expenses may no longer be affordable after factoring in the lifestyle changes that frequently accompany divorce. In some situations it is better to sell the home and find another one that is smaller and less expensive to pay for and maintain. It may actually be a better idea to start fresh in another home. Aside from the financial considerations, there may be too many memories attached to the marital home to allow the client to move forward emotionally. Some of the ways to handle the marital home are:

- One spouse can buy the other out by refinancing the home or by trading the home for other property. Special care should be taken to match cost basis and tax liabilities on assets that are traded.

- Both parties can hold it jointly for a number of years – for instance, until the parent who has custody of the children remarries, or the children reach a certain age, after which the home is sold and proceeds divided in some fashion. In many cases, the party who remains in the home pays the mortgage and taxes and gets credit for any reduction in principal on the mortgage from the date of the divorce until the date that the home is sold or one party buys the other out. Major repairs are often divided between the parties, with the person who advances the money for repairs being repaid at the time of the closing on sale or buyout of the home. Note – this option doesn't work well if the parties are at odds with one another and unlikely to cooperate.

A dollar of child support equals a dollar of spousal support.

Alimony, or spousal support is deductible to the payor spouse, child support is not. However, child support is relatively easy to modify post divorce, while alimony is not. The tradeoff between deductibility and modifiability frequently tempts parties to mix the obligation to create the most predictability, at the lowest cost, for the payor spouse. This is not always wise. The ideal split between child support and alimony can only be derived by measuring the present value of alimony and child support proposals against income projections for your client. Best estimates, guess work and personal preferences are simply inadequate substitutes for informed decision-making in this arena.

All investment assets are created equal.

There are typically two types of assets: Marital and Separate Property. Marital investment assets may include CDs, IRAs, stock options, securities, 401(k)s, 403(b)s, pension plans, real property, annuities, life insurance and basically anything that was acquired during or as a result of the marriage. Inheritances received by one spouse should be maintained as separate property in many cases. Once commingled, those assets become marital property. The first step in dividing marital assets is determining where and what they are. The discovery process can be informal or formal. The informal way is to exchange lists of your assets and debts in an affidavit form. This method should only be used if the client is sure that he or she knows everything that exists in the estate; if the client is not sure, then a more formal means of discovery should be utilized. This could entail interrogatories, depositions and extensive review of tax returns.

Marital debt should be divided equally.

Generally, parties attempt to equalize the dollar value of marital debt, with each party assuming the debt on the asset they receive. Although fair, such a plan for distributing debt may not be optimal. In addition to the dollar amount of existing debt, practitioners should consider the interest rate on debt, whether debt payments are tax deductible, and whether the asset will appreciate in value over time. Sometimes a party can be held liable for debts they did not incur. Be very diligent about your client's exposure to spousal debt. Before the divorce is final, advise your client to get a copy of his or her credit report and close out all joint accounts and joint credit lines. Credit cards issued in joint names should be monitored closely or potentially cancelled and reissued in separate names if possible without harming credit.

An equal division of assets is a fair division.

Asset divisions based solely on the equalization of current values are often inequitable. Intangibles, such as job skills, education

and ability to earn, must be identified and factored into any asset division. Also, marital assets may have varying degrees of growth potential. One bundle of assets may grow significantly more than another over five, ten, or twenty years. Trading their share of a spouse's pension for the marital home is one of the most common mistakes divorcing people make. Even though the values can be equal at the time of divorce, they are apples and oranges. A house requires income to pay for repairs, maintenance, improvements, and property taxes; a pension, however, produces income without costing income. A fifty-fifty division of assets may sound equal, and it may in fact be equal in value at divorce, but it rarely ends up providing equal long-term outcomes. Division of some marital assets may also impose penalties or tax liability on the receiving spouse. These factors significantly impact the valuation of marital assets and must be part of any distribution decision.

Tax law has no bearing on the division of marital assets. Tax law has enormous implications for divorcing clients but is rarely addressed. For instance, one spouse may decide to take $100,000 of bank savings, CDs or bonds, and in return permit the other to keep the $100,000 401(k). This is most definitely not an equal split net of taxes since the 401(k) is 100% pretax. Another common mistake is to not consider the tax status of the martial home pre-divorce. It might pay to sell the home pre-divorce in order to receive the full benefit of the $250,000 capital gain exclusion per person. If the home is awarded to one spouse and later sold for a $400,000 capital gain, the spouse may pay a significant amount of tax that could have been avoided.

"A fifty-fifty division of assets may sound equal, and it may in fact be equal in value at divorce, but it rarely ends up providing equal long-term outcomes."

The age of the parties is irrelevant to the divorce settlement. Age impacts every divorce settlement. Age determines the length of each party's income stream. Age determines the viability of any attempt to obtain training and reenter the workforce. Age determines access to retirement benefits, social security benefits, and also health insurance coverage in the form of Medicare. Age impacts every alimony award and may also bear on requests for rehabilitative alimony and the division of assets and liabilities.

Involving a CDFA will increase the cost of divorce. Although retaining a CDFA will increase costs for divorcing clients, keep in mind that the real cost of divorce includes the frustration and expense of correcting mistakes, which could potentially be avoided by utilizing a CDFA. Teaming with a CDFA saves attorneys time and uncertainty and moves cases forward in a cost-efficient and effective way. Furthermore, fees for tax planning, deriving taxable income, and securing an interest in a qualified retirement plan, whether paid to an attorney or a CDFA, are typically tax deductible. *See* I.R.C. §§ 162, 212, 263 (2000). Good teamwork between an attorney and a CDFA has the potential to pay dividends for clients.[3]

The CDFA can be a valuable resource for the family law practitioner and his or her divorcing clients, particularly those clients with high incomes, clients who own businesses, investment or retirement assets, are subject to capital gains tax, or are self-employed or facing retirement. A CDFA can play a vital role in managing the financial future of your clients and their families and setting them on the road to a bright financial future.

1. Susan Pease Gadoua, *Contemplating Divorce: Will the Future of Family Law Look Like Integrated Medicine?*, Psychology Today, June 5, 2011, http://www.psychologytoday.com/blog/contemplating-divorce/201106/will-the-future-family-law-look-integrated-medicine (quoting Pauline Tesler).

2. Patricia A. McManus & Thomas A. DiPrete, *Losers and Winners: The Financial Consequences of Separation and Divorce for Men*, 66 American Sociological Review 2, 246-68 (2001); Pamela J. Smock, *The Economic Costs of Marital Disruption for Young Women over the Past Two Decades*, 30 Demography 3, 353-371 (1993).

3. Terry M. Hargrave & Peter M. Walzer, *The Tax Deductibility of Attorneys' Fees in a Marital Dissolution*, (2006), http://tax wizard.com/attorney.html (Review of case law and regulations interpreting I.R.C. §§ 162, 212, 263, and services that qualify as "tax planning" under I.R.C. § 212).

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Changes May Be Coming to the RPC – or Are they Already Here?

by Keith A. Call

On August 6, 2012, the ABA House of Delegates – the governing body over the Model Rules of Professional Conduct – adopted some important amendments that will impact your practice. Of course, Utah lawyers are governed by the Utah Rules of Professional Conduct, not the Model Rules. But the Model Rules form an important body of common law and are a harbinger of likely future changes to the Utah Rules.

The new amendments reflect an effort to address the increased use of technology in law practice and in daily life. They reflect a critical need for all lawyers, young and old, to be familiar with the impact of technology on the law.

Here is a quick summary of the most important changes:

Technophobes: Beware

Everyone: Pay Attention

The ABA amended the comments to Rule 1.1 (Competence) to state that a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*. ABA Model Rules of Prof'l Conduct, R. 1.1, cmt. 8 (2012). The ABA also added a provision to Rule 1.6 (Confidentiality) stating that a lawyer "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure" of information relating to a client. *Id*. R. 1.6(c). And comments to Rule 5.3 (Non-Lawyer Assistants) impose expanded responsibilities on lawyers to ensure that outside vendors and others (including document management companies, data storage companies, etc.) comply with the lawyer's professional obligations. *Id*. R. 5.3, cmt. 3.

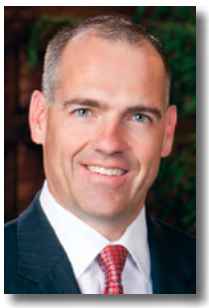
Wow! These are significant changes. The scope of these expanded duties is yet to be fully defined. But it is clear that technophobic lawyers can no longer ignore computers and other emerging technologies. They at least need to associate with someone who is competent in these areas. All of us should seek more competence in such things as information retention and destruction policies, information preservation issues, and e-discovery.

On a related issue, Rule 4.4 (Respect for Rights of Third Persons) continues to require a lawyer to notify the sender upon receipt of a document that the lawyer knows or should know was inadvertently sent. The ABA amended this rule to specifically include electronically stored information and amended the comment to specifically address ESI, including metadata. *Id*. R. 4.4(b) and cmt. 2.

Advertising

The old Model Rule 7.2 (and Utah's current Rule 7.2) generally prohibits a lawyer from giving anything of value for recommending the lawyer's services, except for payment of such things as "reasonable costs of advertisements" or the "usual charges" of certain lawyer referral services. *See* ABA Model Rules of Prof'l Conduct R. 7.2(b) (2009); Utah Rules of Prof'l Conduct, R. 7.2(b) (2012). Application of the old rule was pretty clear in the case of television or yellow pages advertisements. But it is

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



extremely murky in the world of internet referral services such as Legal Match, Total Attorneys, Groupon, Martindale-Hubble.com, and others. One ambiguity is whether such services are "recommending" the lawyer's services in exchange for a referral fee.

The ABA addresses this issue in amendments to a Rule 7.2 comment by defining the word "recommendation" as "communication…[that] endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities." ABA Model Rules of Prof'l Conduct, R. 7.2, cmt. 5 (2012). A lawyer may pay others for internet-based client leads as long as the lead generator does not "recommend" the lawyer, does not make false or misleading communications about the lawyer, and meets certain other conditions. In short, you cannot pay a lead generator to "recommend" you and you cannot pay a lead generator whose advertisements violate other ethics rules. *Id*.

Direct Client Solicitation

The ABA has amended Rule 7.3 (Direct Contact with Prospective Clients) in an effort to bring more clarity to the definition of "solicitation" in the internet world. For example, are you "soliciting" a client when you participate in a chat group on LinkedIn, or when your pop-up ad appears in response to a particular internet search?

"A lawyer's duties to understand technology and operate ethically in its realms are clearly expanding."

A new comment defines a "solicitation" as a "targeted communication initiated by a lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood to provide, legal services." *Id*. R. 7.3, cmt. 1. A lawyer's communication will not typically be considered a "solicitation" if it is directed to the general public, if it is in response to a request for information, or if it is automatically generated in response to internet searches. *Id*.

Formation of Attorney-Client Relationship

Amendments to Rule 1.18 (Duties to Prospective Client) and its comments seek to add clarity to the formation of an attorney-client relationship through internet and other similar communications, and to clarify the lawyer's duties to prospective clients. These new rules expand a lawyer's duties to prospective clients, even though they are not clients. For example, if your website (or other advertisement) requests or invites the submission of information about potential representation without clear and understandable warnings, you may be restrained by obligations of confidentiality from the moment a prospective client sends you information about their case. The amendments also clarify that a person can be a prospective client through internet or email consultations, even though there have been no oral discussions. *See id*. R. 1.18 and cmt. 2.

Multi-jurisdictional Practice and Lawyer Mobility

The ABA adopted a new stand-alone "Model Rule on Practice Pending Admission." In general, the rule provides that a lawyer who has been practicing in another state for three out of the last five years may practice law for up to 365 days in a new state where the lawyer is not yet licensed. The lawyer must associate with counsel licensed in the new jurisdiction. ABA Model Rule on Practice Pending Admission (2012). The ABA also amended Rule 5.5 (Unauthorized Practice of Law) to authorize practice in a new jurisdiction under the new Rule on Practice Pending Admission. *See* ABA Model Rules of Prof'l Conduct, R. 5.5(d)(2) and cmt. 18 (2012).

These new rules are intended to address situations where a lawyer must relocate to a new state before he can become licensed in the new state. These new rules include several conditions, so read them carefully if they apply to you.

Conclusion

A lawyer's duties to understand technology and operate ethically in its realms are clearly expanding. This is certainly a boon to the CLE industry. It will hopefully improve the legal profession as well.

Winning at Deposition

by D. Shane Read

Reviewed by Jack T. Nelson

Winning at Deposition presents a well-structured and relatively concise reference for depositions, as a whole, within a lawyer's practice. From taking a deposition, to preparing clients before they are deposed, to using deposition testimony at trial, Read provides a good general overview of where the deposition fits within the scope of civil litigation.

An excerpt from page 36 of *Winning at Deposition.*

BE SKEPTICAL OF YOUR CLIENT'S STORY

A big mistake to avoid is to buy hook, line, and sinker into your client's story. It is not that clients always lie, but it is certainly true that they are often mistaken about details and frequently exaggerate the wrong the other side committed. More important, clients are almost always in denial to some extent about their wrongdoings. Clients typically will claim that they have done nothing wrong when facts later prove otherwise. You need to learn every important thing about your case as soon as possible so you can develop a theory and theme for the case that will ring true for the jury.

While the overall themes of being prepared, not letting opposing counsel get to you, and keeping your cool should come as no surprise, the book makes its strongest points with the specific practice pointers. Everything, from where to sit, to limiting your introductory questions, to suggestions for outlining a deposition for impeachment use at trial, are addressed in a clear and easy to read narrative. A thorough index also helps the reader identify any areas he or she may want to review to brush up on a particular topic.

In combination with these practice pointers, Read does an excellent job using specific examples from high profile depositions to provide concrete applications of his suggested techniques. Excerpts from the depositions of Bill Gates, OJ Simpson and others are used to demonstrate both the good and bad in real world situations. As a final overview, two of the last chapters present a review of Bill Clinton's deposition and grand jury testimony related to the Linda Jones and Monica Lewinsky scandals. The use of these actual deposition transcripts not only helps to solidify the ideas presented, but given most readers' general familiarity of these high profile cases, it also helps to keep the book readable from start to finish. (Readers should be aware that, given the nature of the Clinton scandal, the Clinton testimony does get a little racy.)

Overall, particularly for a starting practitioner, *Winning at Deposition* presents an excellent "how to" resource for conducting and defending depositions. While it certainly is no substitute for experience, it may help new attorneys skip a few avoidable mistakes along the way. Additionally, even for a seasoned attorney, *Winning at Deposition* provides helpful tips to help increase efficiency and decrease headaches with difficult witnesses and opposing counsel.

JACK T. NELSON is an associate of the firm of Manning Curtis Bradshaw & Bednar. He practices primarily in the areas of medical malpractice and commercial litigation.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the September 28, 2012 Commission Meeting held at the Law & Justice Center in Salt Lake City.

1. Paul Durham was selected to receive the Bar's Professionalism Award at the Fall Forum.

2. William Morrison was selected to receive the Bar's Pro Bono Award at the Fall Forum.

3. Mary Kay Griffin was selected to receive the Bar's Community Member Award at the Fall Forum.

4. David Leta and Thomas Vaughn were selected to receive the Bar's Outstanding Mentor Award at the Fall Forum.

5. Brent Johnson was selected to receive the Bar's Heart and Hands Award at the Utah Non-Profits Association Philanthropy Day Luncheon.

6. The Commission approved the CLE Advisory Committee Mission Statement.

7. Nate Alder was selected as a Bar Commission Delegate to the American Bar Association House of Delegates.

8. The Minutes from the August 24 and 25, 2012 Commission meeting and retreat were approved via the Consent Agenda, with one change to reflect that Eve Furse was in attendance on the 5th.

9. Commissioners will evaluate whether to make the Civics Classroom Education Program an annual event.

10. Commissioners were asked to continue work on individual committee assignments and projects.

11. Commissioners were encouraged to sign up for Modest Means opportunities as mentors, or to serve on panels.

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

Supreme Court Seeks Attorneys to Serve on Diversion Committee

The Utah Supreme Court is seeking applicants to fill a vacancy on the Utah State Bar's Diversion Committee. Pursuant to Rule 14-533 of the Rules of Lawyer Discipline and Disability, the Diversion Committee works in consultation with OPC to negotiate, execute and monitor diversion contracts with lawyers against whom informal complaints have been filed. Appointments are for a three year term. No lawyer may serve more than two consecutive terms as a member of the Committee. Interested attorneys should submit a resume and letter indicating interest and qualifications to:

Diane Abegglen
Appellate Court Administrator
Utah Supreme Court
P.O. Box 140210
Salt Lake City, UT 84114-0210

Applications must be received no later than November 30, 2012.

Sandy Justice Court Seeks Pro-tem Judges

Beginning in January, 2013, the Sandy Justice Court would like to provide qualified attorneys (*See* Rule 11-202(1) U.C.J.A. for qualifications) an opportunity to serve as pro-tem judges on a rotating basis for the court's Tuesday afternoon small claims trial calendar. To start, attorneys interested in providing this volunteer service should send a cover letter and resume to the court contact: Jay Carey, Court Administrator, Sandy Justice Court, 210 W. Sego Lily Dr., Sandy, UT 84070. The presiding judge will forward the names of successful applicants to the State Supreme Court for approval and appointment in conformance with Utah Code section 78A-8-108. The primary contact for questions is Jay Carey, 801-568-6092.

Notice of Bar Commission Election

SECOND AND THIRD DIVISIONS

Nominations to the office of Bar Commissioner are hereby solicited for two members from the Third Division and one member from the Second Division, each to serve a three-year term. Terms will begin in July 2013. To be eligible for the office of Commissioner from a division, the nominee's business mailing address must be in that division as shown by the records of the Bar. Applicants must be nominated by a written petition of ten or more members of the Bar in good standing whose business mailing addresses are in the division from which the election is to be held. Nominating petitions are available at http://www.utahbar.org/elections/commission_elections.html. Completed petitions must be submitted to John C. Baldwin, Executive Director, no later than February 1, 2013 by 5:00 p.m.

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1, 2013 with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15th.

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

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

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

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

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

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

Notice of Bar Election

PRESIDENT-ELECT

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

NOTICE: Balloting will be done electronically. Ballots will be e-mailed on or about April 1, 2013 with balloting to be completed and ballots received by the Bar office by 5:00 p.m. April 15, 2013.

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

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

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

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

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

Twenty-Third Annual

Lawyers & Court Personnel Food & Winter Clothing Drive

for the Less Fortunate

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

Selected Shelters

The Rescue Mission

Women & Children in Jeopardy Program

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

Drop Date

December 14, 2012 • 7:30 a.m. to 6:00 p.m.

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

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

Volunteers Needed

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

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

Sponsored by the Utah State Bar

Thank You!

What is Needed?

All Types of Food

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

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

New & Used Winter & Other Clothing

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

New or Used Misc. for Children

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

Personal Care Kits

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

UTAH STATE BAR

Spring Convention in St. George

2013

MARCH 14-16

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Use your smartphone to scan the code with a QR Reader

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Full online Brochure/Registration will be available January 7, 2013 and in the Jan/Feb 2013 edition of the *Utah Bar Journal*.

2013 "Spring Convention in St. George" Accommodations

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

Hotel	Rate (Does not include 11.45% tax)	Block Size	Release Date	Miles from Dixie Center to Hotel
Ambassador Inn (435) 673-7900 / ambassadorinn.net	$100 Including Tax!	10–DQ	2/15/13	0.4
Best Western Abbey Inn (435) 652-1234 / bwabbeyinn.com	$119	20	2/14/13	1
Clarion Suites (fka Comfort Suites) (435) 673-7000 / stgeorgeclarionsuites.com	$89	10	2/14/13	1
Comfort Inn (435) 628-8544 / comfortinn.com/	$109	20	3/15/13	0.4
Courtyard by Marriott (435) 986-0555 / marriott.com/courtyard/travel.mi	$149	10–Q 10–K	2/15/13	4
Crystal Inn Hotel & Suites (fka Hilton) (435) 688-7477 / crystalinns.com	$92 +$10 for poolside room	13–Q 6–K	2/18/13	1
Fairfield Inn (435) 673-6066 / marriott.com	$95	15–DBL 15–K	2/15/13	0.2
Green Valley Spa & Resort (435) 628-8060 / greenvalleyspa.com	$99*–$220.50 *10% discount for a 3 night minimum stay	10 1–3 bdrm condos	2/01/13	5
Hampton Inn (435) 652-1200 / hamptoninn.net	$115	30–DQ	2/10/13	3
Hilton Garden Inn (435) 634-4100 / stgeorge.hgi.com	$132–K $142–2Q's	30	02/13/13	0.1
LaQuinta Inns & Suites (435) 674-2664 / lq.com	$99	10–K	2/21/13	3
Lexington Hotel & Conference Center (fka Holiday Inn) (435) 628-4235 / lexingtonhotels.com/property.cfm?idp=22049	$95	15	2/21/13	3
Ramada Inn (800) 713-9435 / ramadainn.net	$89	20	2/14/13	3
St. George Inn & Suites (fka Budget Inn & Suites) (435) 673-6661 / www.stgeorgeinnhotel.com	$99 $99 $85	8–K 5–DQ 2–Single Q	2/13/13	1

Notice of Verified Petition for Reinstatement by Larry A. Kirkham

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 Larry A. Kirkham in *In the Matter of the Discipline of Larry A. Kirkham*, Third Judicial District Court, Civil No. 070901366. 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 Petition for Reinstatement to the Utah State Bar by Michael Humiston

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 the Verified Petition for Reinstatement ("Petition") filed by Michael Humiston, in *In the Matter of the Discipline of Michael L. Humiston*, Fourth Judicial District Court, Civil No. 100402805. 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.

Civics Committee Teaches Civics Courses in Utah Schools

by Angelina Tsu & Benson Hathaway, Co-chairs, Civics Education Committee

On September 17, 2012, nearly 200 attorneys, law students, and judges left their offices and headed out to elementary, junior high, and high school classes across the state to volunteer as teachers in the Utah State Bar's Civics Education Program. Utah Supreme Court Justice Christine Durham did not have to travel far to find her students. She hosted a class of seniors from West High School in the Utah Supreme Court's courtroom. Federal District Court Judge Dee Benson traveled south to Springville High School to teach a class of AP U.S. History students. Utah Court of Appeals Judge Gregory Orme traveled north to his "alma mater" Mount Ogden Junior High School to participate. The lesson for the day focused on fundamental principles outlined in the U.S. Constitution. The key issues: separation of powers and the importance of an independent judiciary.

In July of 2011, the Utah State Bar Commission created the Civics Education Committee to develop a one-hour course to be taught in schools across the state. After the Committee developed the course materials and launched a successful pilot, then Bar President Rodney Snow invited members of the Utah State Bar to volunteer to teach this Constitution course in schools across the state. The Civics Education Committee set a goal to offer the course to 100 high school, junior high school, and other students throughout the State of Utah in conjunction with Constitution Day on September 17, 2012.

To reach its goal, the Civics Education Committee reached out to school districts, Boys and Girls Clubs and community Youth Councils across the State and invited them to participate in the program. More than 250 teachers and other organizers expressed an interest in participating in the program.

The Civics Education Committee is pleased to announce that it exceeded its goal. On Constitution Day, September 17, 2012, 174 judges, lawyers, and law school students went into 193 classrooms in fifteen counties to teach this Constitution course to approximately 15,000 youth across the State. The Bar Commission and the Civics Education Committee extend their heartfelt thanks to all who volunteered for making this event possible.

The Civics Education Committee received positive feedback from attorneys and educators. Doug Monson, an attorney at Ray Quinney & Nebeker, recruited his wife, Lisa, to help with his class of fifty fifth-grade students at Boulden Elementary School. Together they made costumes for the kids to don as they role-played the trial of Cinderella and her wicked stepsisters. Doug wondered as he entered the classroom whether all the time preparing was worth it. In the end, he reported that the children's enthusiasm, participation, and questions made it well worth the effort. "We had a great time," reported Doug, "and the wicked stepsisters were acquitted."

Kevin Bennett taught 250 students in eight sessions over two days at Hurricane Middle School. Lt. Col. Cornell Evans reported

"mission accomplished" having taught "a boatload of eager young minds from South Davis Jr. High" to appreciate "our Constitution a little bit better." After teaching seven classes totaling nearly 300 students, Gary Bell eagerly announced, "if you need any help like this in the future, let me know – I'd do it again."

Participating educators were also pleased:

> *I want to express my appreciation for your time today in my classroom…we are very lucky as Americans to have the different branches of government and laws that protect our freedoms. Thank you for coming prepared and sharing your experiences with my students. You are welcome to come back next year!*

Eric Bailey, Social Studies Teacher, Bonneville Junior High

> *Thank you for all of your work!!! On behalf of my department, we really appreciate lawyers taking time to teach this important subject matter to our students.*

Lark Woodbury, Social Studies Department Chair

> *Community support for education is essential if we want to accomplish our goals with our students. Thanks for the help.*

Rusty Taylor, Principal, Desert Hills High School

There are still several classes that requested the course but were unable to receive the instruction on September 17. We are in the process of recruiting additional attorney volunteers to meet this need. If you are interested in participating, please contact Christy Abad at christy.abad@utahbar.org. Further, the Committee plans to replicate the event next year on or near Constitution Day, Tuesday September 17, 2013, and would like to increase the pool of volunteer lawyers given the overwhelming demand. If you are interested in participating in this program in the future please contact Christy Abad using the contact information above.

On behalf of the Bar Commission and Civics Education Committee, we extend special thank you to the following participants:

A. Dennis Norton	Justice Christine Durham	E. Jay Overson
Andrew Dougherty	Christopher Wharton	Elizabeth Butler
Angelina Tsu	Clover Meaders	Eric Clarke
Ariel Chino	Lt. Col. Cornell Evans	Eric Todd Johnson
Austin Hepworth	Curtis Jensen	Frances M. Palacios
Bilinda K. Townsend	Cynthia Daniels	Gabrielle Lee Caruso
Bill O. Heder	Dan Black	Gary Bell
Benjamin Harmon	Daniel M. Woods	Greg Constandinos
Brandon G. Wood	David Tuckett	Greg Hoole
Brandon Mark	David C. Handy	Judge Gregory K. Orme
Brent Johnson	David J. Bird	I. Robert Wall
Bret Reich	David L. Miller	J.D. Lyons
Brian E. Brower	David Lauritzen	Jacob Briggs
Bryan Quesenberry	Deborah Bulkeley	Jacob Ong
Cameron Diehl	Judge Dee Benson	Jacob S. Gunter
Camille S. Williams	Diana Parker	James D. Gilson
Chase Adams	Douglas M. Monson	James Palmer
Chip Shaner	Dwayne A. Vance	Jamis M. Gardner

Jane Jessica Lloyd
Jeannine Pappas Timothy
Jed K. Burton
Jessica McAuliffe
Jill O. Jasperson
John Lund
John Mukum Mbaku
John Neville
John S. Kirkham
Jonathan Bachison
Justin Baer
K. Jake Graff
Kara Pettit
Kate Conyers
Katherine Judd
Kathryn Holt
Kathryn N. Nester
Kathy A.F. Davis
Katie Priest
Kelsy Young
Ken Allsop
Ken Bresin
Ken Johnson
Kendall S. Peterson
Kent Hart
Kevin Bennett
Kimberly Barnes
Kristal Bowman-Carter
Kurt Hawes
Lacee Whimpey
Langdon T. Owen, Jr.
Laura Marquez
Leah Jensen Bennion
Lowry Snow
Mara Brown
Marco Kunz
Matthew Ridd Hall
Matthew Tenney
Matthew Thue
Meagan Rudd
Melanie F. Mitchell
Melinda Hill
Melissa Barbanell
Michael Cragun
Michael Erickson
Michael Mathie
Mike Leavitt
Morris Haggerty
Nathan Buttars
Nathan Denney
Nathan Mitchell
Nicholas Wells
Nicole R. Call
Patricia Abbott Lammi
Paul H. Roberts
Rand Henderson
Randy Allen
Rebecca Van Tassell
Richard C. Williams
Richard Call Terry
Rob Latham
Robert A. Echard
Robert M. Anderson
Robert Rees
Rod Andreason
Rodney G. Snow
Ryan D. Tenney
Ryan Fisher
Ryan Oldroyd
Ryan Stones
S. Junior Baker
Samantha Hunn
Sarah Starkey
Scott A. Woodbury
Shane Manwaring
Shannon Johnson
Shannon Zollinger
Sheila Page
Skye E. Lazaro
Spencer Lewis
Stephanie Hollist
Stephanie Saperstein
Stevan Baxter
Steven Johnson
Steven K. Beck
T. Richard Davis
Tammy Georgelas
Tatiana Christensen
Ted Paulsen
Ted Weckel
Tim Anderson
Todd Weiler
Tyler J. Berg
Vernon F. Romney
Virginia C. Lee
Von J. Christiansen
Walt Romney
Willard Bishop
Will Carlson
Judge William Thurman

LAW FIRMS

Clyde Snow & Sessions
Hillyard Anderson & Olsen, PC
Jones Waldo Holbrook & McDonough
Kirton McConkie
Snow Jensen & Reece

Pro Bono Honor Roll

Abbott Lammi, Patricia – Domestic Case

Adamson, Jeremy – Tuesday Night Bar

Amann, Paul – Tuesday Night Bar

Anderson, Skyler – Immigration Clinic

Andrews, Joan – Tuesday Night Bar

Angelides, Nicholas – Senior Cases

Askar, Jamshid – Tuesday Night Bar

Averett, Steve – Family Justice Clinic

Bagley, John – Bankruptcy Case

Baker, James – Senior Center Legal Clinic

Barlow, Craig – Tuesday Night Bar

Barnett, Dan – Tuesday Night Bar

Baron, Bryan – Domestic Case

Barrus, Craig – Family Justice Clinic

Beck, Sarah – Debtors Counseling Clinic

Beckstrom, Britt – SUBA Talk to a Lawyer

Bennett, Gracelyn – Bankruptcy Hotline

Bennett, MaryAnn – Debtors Counseling Clinic; Bankruptcy Hotline

Beringer, Maria-Nicolle – Bankruptcy Hotline

Bertelsen, Sharon – Senior Center Legal Clinic

Black, Michael – Tuesday Night Bar

Blotter, Scott – Bankruptcy Case

Bogart, Jennifer – Street Law Legal Clinic

Bradshaw, Donna – Cedar City Clinic; Domestic Case

Briggs, Jacob – Consumer Case, Service Member Attorney Volunteer Case

Brindley, Brent – SUBA Talk to a Lawyer

Brown-Roberts, Kathie – Senior Center Legal Clinic

Buhler, Stephen – Domestic Case

Buhman, Camille – Family Justice Clinic

Bush, Rex – SUBA Talk to a Lawyer

Carroll, Nathan – Bankruptcy Case

Chandler, Josh – Tuesday Night Bar

Cheney, Jess – Tuesday Night Bar

Chipman, Brent – Domestic Case

Christensen, Stephanie – Family Justice Clinic

Clark, Melanie – Senior Center Legal Clinic

Conley, Elizabeth – Senior Center Legal Clinic

Cook, David – Bankruptcy Case

Cornish, Rita – Tuesday Night Bar

Crismon, Sue – Employment Law Clinic; American Indian Clinic

Culas, Robert – American Indian Clinic

Davidson, Ruth – Domestic Case

Dodd, Paul – Domestic Case

Dolowitz, D. Sandy – Domestic Case

Donosso, Yvette – Tuesday Night Bar

Elliott, Miriah – Rainbow Law Clinic

Emmett, Mark – Bankruptcy Case

Farrell, Nicole – Tuesday Night Bar

Ferguson, Phillip – Senior Center Legal Clinic

Fisher, Langdon – Family Law Clinic

Fox, Richard – Housing Case

Gillespie, Dorothy – Family Justice Clinic

Gittens, Jeff – Street Law Legal Clinic

Gordon, Ben – SUBA Talk to a Lawyer

Guerisoli, Rick – SUBA Case

Hall, Brent – Family Law Clinic

Hansen, Rebecca – Family Justice Clinic

Hart, Laurie – Senior Center Legal Clinic

Hartstad, Kass – Street Law Legal Clinic

Hawkes, Danielle – Street Law Legal Clinic

Hendrix, Rori – Domestic Case

Herrera, Kim – Immigration Clinic

Holje, Michael – Tuesday Night Bar

Hollingsworth, April – Street Law Legal Clinic

Holm, Floyd – SUBA Talk to a Lawyer

Hoskins, Kyle – Layton Family Law Clinic

Jensen, Leah – SUBA Talk to a Lawyer

Jensen, Matthew – Street Law Legal Clinic

Jensen, Michael – Senior Center Legal Clinic

Jones, Jenny – SUBA Talk to a Lawyer; SUBA Case

Julien, Stephen – Cedar City Clinic; Domestic Case

Kessler, Jay – Senior Center Legal Clinic

Knauer, Louise – Family Law Clinic

Labrum, Jed – Domestic Case

Latham, Rob – SUBA Talk to a Lawyer

Leavitt, Mike – SUBA Talk to a Lawyer

Lee, Terrell – Senior Center Legal Clinic

Lisonbee, Elizabeth – Layton Family Law Clinic

Lund, Topher – SUBA Talk to a Lawyer

Lundberg, Michael – Service Member Attorney Volunteer Case

Mann, Ramona – Domestic Case

Mares, Robert – Family Law Clinic

McCoy II, Harry – Senior Center Legal Clinic

McCullough, Jeremy – SUBA Talk to a Lawyer

Mellem, Alissa – Tuesday Night Bar

Mellen, Rick – SUBA Case

Memmoh, Alicia – Family Law Clinic

Miller, Nathan – Senior Center Legal Clinic

Mitchell, Kareema – Immigration Clinic

Miya, Stephanie – Employment Law Clinic

Morrison, William – Bankruptcy Case

Morrow, Carolyn – Family Law Clinic

Msazik, Rich – Tuesday Night Bar

Munson, Edward – Tuesday Night Bar

Murphy, Carol – American Indian Clinic

Nelson, Trent – Family Law Clinic

O'Neil, Shauna – Bankruptcy Hotline; Debtors Counseling Clinc; Family Law Clinic

Otto, Rachel – Street Law Legal Clinic

Paul, Valerie – Family Justice Clinic

Paulsen, Ted – Senior Center Legal Clinic

Peterson, Jessica – Tuesday Night Bar

Pettey, Bryce – Tuesday Night Bar

Poulson, Cynthia – Tuesday Night Bar

Preston, Chris – Street Law Legal Clinic

Ralphs, Stewart – Family Law Clinic

Redd, Steven – Tuesday Night Bar

Rice, Robert – Domestic Case

Richards, Jason – Bankruptcy Case
Riter, Austin – Tuesday Night Bar
Rogers, Christopher – Bankruptcy Case
Saunders, Robert – Park City Clinics
Scholnick, Lauren – Street Law Legal Clinic
Scott, Kent – Consumer Case
Semmel, Jane – Senior Center Legal Clinic
Shaw, LaShel – Bankruptcy Case
Simcox, Jeff – Street Law Legal Clinic
Sinclair, Cory – Tuesday Night Bar
Smith, Linda – Family Law Clinic
Snow, Lowry – SUBA Talk to a Lawyer
Snyder, Robert – Trafficking Case
Sorensen, C. Mathew – Domestic Case
Stoddard, Bryan – Domestic Case
Tanner, Brian – Immigration Clinic
Thatcher, Michael – Tuesday Night Bar
Thorne, Jonathan – Street Law Legal Clinic
Thorpe, Scott – Senior Center Legal Clinic
Timothy, Jeannine – Senior Center Legal Clinic
Tobler, Daniel – SUBA Talk to a Lawyer
Wharton, Chris – Rainbow Law Clinic
Wilcox, Morgan – Family Law Clinic
Williams, Tasha – Street Law Legal Clinic
Williams, Timothy – Senior Center Legal Clinic
Winn, Matthew – SUBA Case
Winsor, Robert – SUBA Talk to a Lawyer
Winzeler, Zach – Tuesday Night Bar
Wycoff, Bruce – Tuesday Night Bar
Yancey, Sharia – Domestic Case
Yauncy, Russell – Family Law Clinic
Young, Kelsy – Tuesday Night Bar
Zidow, John – Tuesday Night Bar

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in August and September 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.

It's Not Too Late!

If you "checked yes" and haven't filled out your survey yet, please do it today so the Commission can match you with cases in your practice area.

If you haven't yet signed up for the new statewide Pro Bono Commission program, you can still fill out the survey and sign up to choose a pro bono case. ***Visit the link below today!***

https://www.surveymonkey.com/s/CheckYes2012

UTAH STATE BAR Pro Bono Commission
Lend a "Learned Hand"

Attorney Discipline

UTAH STATE BAR ETHICS HOTLINE

Call the Bar's Ethics Hotline at (801) 531-9110 Monday through Friday from 8:00 a.m. to 5:00 p.m. for fast, informal ethics advice. Leave a detailed message describing the problem and within a twenty-four-hour workday period, a lawyer from the Office of Professional Conduct will give you ethical help about small everyday matters and larger complex issues.

More information about the **Bar's Ethics Hotline** may be found at www.utahbar.org/opc/opc_ethics_hotline.html. Information about the formal Ethics Advisory Opinion process can be found at www.utahbar.org/rules_ops_pols/index_of_opinions.html.

ADMONITION

On June 28, 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 Allocation of Authority Between Client and Lawyer), 1.4(a) (Communication), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney acted negligently in stipulating to the Memorandum of Understanding and causing the dismissal of the client's case after the attorney's office received the client's faxed letter stating that the client had reconsidered the settlement and did not want the Memorandum of Understanding submitted to the Court. The attorney's conduct caused potential injury because the client's decision on this matter should have been honored and the client should have been allowed an opportunity to challenge the enforcement of the Memorandum of Understanding. The attorney did subsequently file a motion to set aside the divorce decree; however, that motion was denied. The attorney negligently failed to reasonably communicate with the client prior to stipulating to the divorce decree.

ADMONITION

On August 8, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was hired to have a juvenile's criminal record expunged. The attorney failed to reasonably communicate with his clients. The attorney failed to timely respond to the OPC's request for information. The attorney was negligent and his misconduct inflicted little or no injury.

Aggravating factors:

Prior discipline history and substantial experience in the practice.

Mitigating factors:

Remorse and recent personal issues.

PUBLIC REPRIMAND

On August 27, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Kimberly J. Trupiano, for violation of Rules 3.3(a) (Candor Toward the Tribunal), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

A pro se individual pleaded guilty to criminal charges; was placed on probation; fined and ordered to complete further evaluation. Almost two years after the conviction, the judge was notified that the individual had not paid the fines nor completed the evaluation. The individual failed to appear and a warrant was issued for his arrest. Four years after the warrant was issued, Ms. Trupiano made a motion to recall the warrant on the individual on the basis that he had been deported shortly after his plea and sentencing so he could not complete the criminal

matter. The documents filed by Ms. Trupiano implied that the individual had remained outside the country since his deportation. At the same time that Ms. Trupiano filed her motion to recall the warrant, Ms. Trupiano was representing the individual in a child custody matter in Utah that was scheduled to be heard approximately nine days after she had filed the motion to recall the warrant. Among the documents that Ms. Trupiano filed as part of the motion to recall and subsequent hearing on behalf of the individual was a non-notarized affidavit giving Ms. Trupiano permission to represent the individual. A notarized affidavit would have revealed that the individual was presently living in Kansas. In response to questions from the judge about Ms. Trupiano's client's sentencing, Ms. Trupiano never clarified that her client had returned to the United States after deportation. Ms. Trupiano phrased her responses to avoid disclosing her client's location and trips to Utah. Ms. Trupiano's statements were misleading and in fact misled the prosecution and the Court and she did nothing to correct the misrepresentation. The level of injury is injury to the legal system.

Mitigating factors:
No prior discipline; inexperience in the law; value of her services to the community; the judge's belief that Ms. Trupiano is a good lawyer.

SUSPENSION AND PROBATION

On August 20, 2012, the Honorable L. A. Dever, Third Judicial District Court, entered an Order of Sanction suspending D. Scott Berrett from the practice of law for three years and placing him on probation for three years for violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), 1.5(c) (Fees), 1.15(a) (Safekeeping Property), 1.15(c) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), 8.4(d) (Misconduct) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary there are eight matters:
In the first matter, a client hired Mr. Berrett to assist the client in collecting funds from the client's client. In the second matter, a client provided Mr. Berrett with customer files in order to collect debts owed to a financial group. In the third matter, a client hired Mr. Berrett to represent the client in matters relating to the custody and visitation of a child. In the fourth matter, Mr. Berrett represented a client on a personal injury when he was associated with a law firm. In the fifth matter, the client retained Mr. Berrett to represent the client regarding three personal injury matters. In the sixth matter, a client paid Mr. Berrett to represent the client in a divorce case. In the

seventh matter, a client hired Mr. Berrett to pursue a civil suit. In the eighth matter, a client hired Mr. Berrett via telephone, after receiving an advertising mailer from Mr. Berrett that referred to charges pending against the client.

In one matter Mr. Berrett lacked sufficient experience to properly complete the work he was hired to perform. In six matters Mr. Berret failed to abide by his client's objectives with regard to their matters. In all matters Mr. Berrett failed to pursue the cases in a timely manner or failed to complete any meaningful work on the cases. In all matters Mr. Berrett failed to communicate with his clients by failing to return calls, emails, and text messages and failing to respond to faxes or mailed correspondence. In four of the matters Mr. Berrett failed to reasonably explain matters to his clients so they could make informed decisions about their cases. In four matters Mr. Berrett charged an unreasonable fee when he failed to perform any meaningful work on the matters. In three of the matters Mr. Berrett failed to have a written fee agreement with his clients. In one matter Mr. Berrett did not keep funds the clients paid separate from his own property. In one matter Mr. Berrett withdrew fees that were unearned. In seven matters Mr. Berrett failed to return the clients' files and/or return any unearned fees when requested. In all matters Mr. Berrett failed to appear at the Screening Panel hearing. In five of the matters Mr. Berrett misrepresented the status of the case to his clients. In four of the matters Mr. Berrett failed to pursue the matters, thereby engaging in conduct that was prejudicial to the administration of justice.

Aggravating factors:
Prior record of discipline; dishonest or selfish motive; pattern of misconduct; multiple offenses; and substantial experience in the practice of law.

Ethics Hotline

(801) 531-9110

Fast, free, informal ethics advice from the Bar.

Monday – Friday
8:00 am – 5:00 pm

For more information about the Bar's Ethics Hotline, please visit

www.utahbar.org/opc/opc_ethics_hotline.html

YLD President's Message

by Katherine A. Conyers

All members in the Utah State Bar in good standing and (1) under thirty-six years of age or (2) who have been admitted to their first state bar for less than five years, regardless of age, are automatically members of YLD. There is no need to sign up or pay dues to be a member. So why should you participate in the Young Lawyers Division of the Utah State Bar (YLD), when you already have so much going on? Unquestionably, you are busy with work – perhaps concerned with billable hours at a large firm or building your solo practice – and you also have family, friends, and other meaningful things in your life.

First, YLD gives members an opportunity to use their law degrees as most hoped to do after law school – to help people. YLD members volunteer with well-established projects like Tuesday Night Bar, Wills For Heroes, and Serving Our Seniors, as well as new programs like Help R.I.S.E. In this new program – rolling out this fall – volunteer attorneys will provide pro bono representation in bankruptcy, custody and/or child support, and landlord/tenant matters to individuals in the federal court's mental health and drug courts who have been selected to participate in the court's Re-entry Independence through Sustainable Efforts (R.I.S.E.) program.

Second, YLD gives members access to free, quality CLEs, specifically through its Practice in a Flash program. Practice in a Flash is designed to help young lawyers by providing resources that make the process of opening and operating a solo or small practice easier and safer. The program will provide a website with tools and information about how to avoid malpractice complaints, comply with ethical rules, as well as suggest marketing strategies to help young lawyers succeed. The program also has a CLE series focused on the basic fundamentals of various practice areas.

YLD also offers members valuable networking opportunities. Almost every month, YLD hosts networking events where members have the opportunity to meet each other and build meaningful relationships. The favorite of these events is the annual Speed Networking Event held in late spring. At this event, young lawyers have the opportunity to meet judges and other more experienced Bar members in a fun, relaxed environment, allowing for meaningful connections and conversations to occur, and providing a place where young lawyers can seek advice in advancing their careers.

If that isn't enough, YLD provides members with numerous opportunities for community service. One program added last year – the Choose Law project – is a public education program that seeks to improve the civics education taught to Utah high school students by teaching them about the important role that law and lawyers play in society and the diverse careers that a law degree can provide. Volunteer attorneys also encourage students to complete and continue their education regardless of socio-economic and other barriers.

Last, but not least, YLD provides members opportunities to have fun, gain leadership skills, and get even more involved with the legal community through its Board, committees, and liaison positions. Over fifty young lawyers dedicate time and effort to make YLD successful, and each one deserves special recognition. Since there is not enough space in this journal to do them that sort of justice, these individuals and their positions are listed below. Please find these individuals and thank them for what they do for YLD. Without their hard work, YLD couldn't do all of the things it does for its members.

This article has only given a brief overview of what YLD does and some of the programs it offers. For more information about YLD events and programs and for a calendar of events, visit its website at www.utahyounglawyers.org. Hopefully, though, this article was enough for you to determine that there are many answers to the main question posed and that all of them involve you becoming an overall better lawyer.

2012–2013 Young Lawyers Division Board

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President-Elect: Gabriel White
Secretary: Kat Judd
Treasurer: Scott Powers
Past President: Jenifer Tomchak

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Roger Tsai
Michael Young
Kelly Fowler
Patrick Burt

And Justice for All
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Erik Olsen
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Candice Pitcher

Bar Convention
Patricia Kuendig
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Gabriel White
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Elizabeth Adoyo (Bar Liaison)

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Law Day
Breanne Miller

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Tasha Williams (Cinderella Boutique)
Betsy Haws (Choose Law)
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Publicity/Social Media
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Kelly Latimer
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Sarah Spencer
Adam Clark
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Tuesday Night Bar
Zack Winzeler
Sanna-Rae Taylor

Wednesday Night Bar
Gabe White

Wills for Heroes
Blake Hamilton
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Utah Bar Journal
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What Every Lawyer Should Know About Appeals

by Noella Sudbury

An appeal is not a do-over. The appellate process is unique, complex, and structured in favor of affirming the trial court's decision. Recent Utah court statistics indicate that in the Utah Court of Appeals, an appellant generally prevails less than 10% of the time. Although the appellate process can be daunting and unpredictable, the following five tips will help lawyers avoid common pitfalls and find their way to a prevailing path:

The appellate process begins at the trial level.

In more than 10% of cases issued this year, an appellate court has declined to reach one or more of the claims on appeal due to a lawyer's failure to preserve the issue for appellate review. For this reason, when a lawyer tries a case, the lawyer must always have the appeal in mind. To preserve an issue for appeal, a lawyer must present the issue "to the district court in such a way that the court has an opportunity to rule on [it]." *Patterson v. Patterson*, 2011 UT 68, ¶ 12, 266 P.3d 828 (internal quotations marks omitted). Proper preservation requires a specific and timely objection on the record and citation to legal authority to support it. It requires an attorney to anticipate objections before trial even begins and to prepare a list of objections for trial with supporting law. The more you prepare the objections before trial, the better your objections will be, and the more you will have to work with on appeal. Finally, you *must make objections*, even if you are afraid it will annoy the judge. If you do not, you risk the likely outcome that an appellate court will decline to review the issue on appeal.

Losing a case does not mean that you should file an appeal.

Many appeals that are lost should not have been filed in the first place. One should not advise a client to appeal merely because the trial court erred or because the client does not like the result. All trial courts err and many clients are dissatisfied, but this does not mean you have an appeal-worthy issue. Instead, whether to appeal depends upon a careful and realistic weighing of the costs and potential benefits to the client. Important considerations may include whether arguments are preserved, what standard of review will apply, whether the error was substantial enough to warrant reversal, and whether the relief in the appellate court will conclude the case, or simply result in a new trial. If the best you can achieve is a new trial, then in determining whether an appeal is worthwhile, you must consider the likelihood of success in the new trial and the time and cost of re-trying the case.

The standard of review matters.

When drafting an appellate brief, it may be tempting to paste a quote from a case containing the applicable standard of review without revisiting the standard again in the remainder of the brief. Do not do this. Probably the most important lesson I learned as an appellate clerk is that the standard of review matters and must often be litigated as fiercely as the substantive issues in the case. A lawyer should identify the standard of review before deciding whether to appeal. Fact-intensive issues may require an appellate court to defer to the trial court's findings, making the standard of review determinative. Other cases may involve purely legal questions which enjoy a de novo standard of review. And some issues may be mixed questions, trigger multiple standards of review, or involve an appellate issue where the exact standard is unsettled. Spend time determining which standards are applicable and be sure to explain to the court how the standard of review should impact the outcome of your case. Don't be afraid to be creative. If there is gray area surrounding what standard of review applies to a particular issue, reference the discussion in the recently published case *In re Adoption of Baby B.*, 2012 UT 8, ¶¶ 40-47, 270 P.3d 486, for guidance.

Know the procedural rules.

There are sixty rules of appellate procedure and many other procedural doctrines in the case law that impact how your appeal will be resolved. If these rules are not carefully followed, you run the risk that the appellate court will dispose of your

NOELLA SUDBURY served as a law clerk for the Honorable Ronald E. Nehring of the Utah Supreme Court. She is currently an associate at the appellate law firm of Zimmerman Jones Booher LLC.

appeal on procedural grounds. For this reason, any lawyer attempting to appeal must become familiar with these rules and follow them. Some common procedural mistakes include:

a. Failing to file a timely notice of appeal. A notice of appeal must be filed within thirty days after judgment is entered. Motions to reconsider and motions filed under Rule 60 will not toll the time for appeal. If you are planning to file one of these motions, file the notice of appeal first to ensure the appeal is timely filed. Consult Rule 4 of the Utah Rules of Appellate Procedure for additional guidance.

b. Failing to appeal from a final judgment. If a lawyer tries to appeal from an order or judgment that is not final, an appellate court will lack jurisdiction over the appeal unless the order has been properly certified under Utah Rule of Civil Procedure 54(b) or the appellate court has granted a petition to pursue an interlocutory appeal.

c. Failing to marshal the evidence. Any time an appellant challenges a judge or jury's findings of fact, the appellant must marshal all of the evidence that supports the findings or verdict. Proper marshaling requires the appellant to list all of the evidence that supports the factual findings, and then demonstrate that, despite this evidence, the evidence is still insufficient to support the trial court's findings or the jury's verdict. To signal to the court that proper marshaling has occurred, it is generally a good idea to include a separate marshaling section in your appellate brief.

d. Inadequate briefing. Under Utah Rule of Appellate Procedure 24, an appellate court may decline to address your arguments if they are inadequately briefed. Arguments should contain Utah law to support them, citations to the record, reference the reasoning of the lower court, and otherwise provide meaningful analysis. The Utah Supreme Court has recently opined that inadequate briefing may also occur when an appellee fails to directly respond to the arguments of the appellant. *Broderick v. Apartment Mgmt. Consultants, LLC*, 2012 UT 17, ¶¶ 10, 20, 279 P.3d 391.

e. Failing to separately argue the prejudice prong. Every trial court error is not a reversible error. Many cases are affirmed on appeal because a lawyer failed to demonstrate prejudice. For this reason, it is critical not only to demonstrate that an error exists, but also to show that it impacted the outcome. It is generally a good idea to include a separate section in your brief containing an analysis of the prejudice prong.

Attach all of the important documents to your brief and ask someone to read your brief before you file it.

People often forget that the first person to read your brief is often a brand new law school graduate who knows very little about the practice of law. For this reason, it is important to include background information when necessary, thoroughly explain, and be sure that every argument flows logically from start to finish. Anyone who picks up your brief should be able to understand it, even if they know nothing about the case or the area of law. Having others, even non-lawyers, read your brief will help you to identify unclear parts of the narrative and weaknesses in your arguments.

> *"Anyone who picks up your brief should be able to understand it, even if they know nothing about the case or the area of law."*

Lawyers should also attach to their briefs any important documents from the record needed to resolve the issues on appeal. An appellate judge may read your brief anywhere and likely will read it only once before argument. Therefore, any document that you think the judge should see before reaching what most likely will be a definitive decision should be attached to the brief. If you file a good brief and include all the necessary attachments, you will waste less time at oral argument clarifying confusion and explaining where to find things in the record. As a result, you will have more time to convince the court that you should prevail.

Finally, every young lawyer filing an appeal should find a good mentor. Consult with someone in your firm who has appellate experience or talk to someone outside of your firm who is familiar with the process. Even seasoned lawyers can benefit from another person's experience and perspective.

CLE Calendar

DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
11/07/12	**Webcast: Impeach Justice Douglas!** 10:00 am – 1:15 pm. Anecdote, humor and painful remembrances are used to explore some of the most explosive issues of William O. Douglas' thirty-six year tenure on the U.S. Supreme Court. He addresses the issues about which he was most passionate as he reflects on *Brown v. Board of Education*, the "McCarthy Era" and the Vietnam War. William O. Douglas left a legacy that calls for vigilance to protect human rights and action to protect the earth's environment. $159.	3–3.6 hrs. self-study
11/8–11/9/12	**2012 Fall Forum.** Little America Hotel.	up to 8 hrs.*
11/14/12	**Webcast: Maxims, Monarchy and Sir Thomas More.** 10:00 am – 12:30 pm. Featuring Graham Thatcher as Sir Thomas More. This drama takes the audience into the last intensely intimate hour with Thomas More just before his execution in 1535 for high treason. Still wrestling with the moral dilemmas that led him to the block, he cracks jokes, makes up songs, takes jabs at his tormentors and eventually finds peace in his fate. $119.	2.25–2.7 hrs. self-study
11/28/12	**Webcast: Lincoln on Professionalism.** 10:00 – 11:00 am. Using an engaging documentary-style format, Abraham Lincoln's exemplary qualities of legal and personal professionalism come to life. There will be a live chat room discussion with a moderator for attendees to explore the current context for Lincoln's model of professionalism. $79.	1–1.2 hrs. self-study
11/29/12	**NLTP Mentor Training and Orientation.** 9:00 – 11:00 am. Featured speakers: Honorable Clark Waddoups, Laura Rasmussen – Farr, Kaufman, Sullivan, Jensen, Olds, Rasmussen & Nichols, Elizabeth Wright – New Lawyer Training Program Coordinator. The event is free and continental breakfast will be served.	2 hrs. 1 Ethics & 1 Prof
12/04/12	**Mandatory NLTP Orientation.** 12:00 – 1:30 pm. Event is free. Bring your own lunch, drinks will be provided. You must register for the orientation or there may not be materials or a chair for you.	TBA
12/05/12	**Webcast: The Art of Advocacy – What Can Lawyers Learn from Actors.** 10:00 am – 1:30 pm. Session 1: Acting Like a Human Being – Demeanor and Skills in Storytelling (Opening and Closing). Session 2: Actor/Playwright Meets Lawyer – Inflection, Orchestration, and Meter (Closing Argument). Session 3: Directing the Trial – Skills in Questioning and Controlling Focus (Direct and Cross). Program includes a live chat room in which attendees can discuss these communication issues with the presenters. $159.	3–4 hrs. self-study
12/12/12	**Webcast: Thurgood Marshall's Coming!** 10:00 am – 1:00 pm. Featuring T. Mychael Rambo as Justice Thurgood Marshall. Winner of the ABA 2005 Silver Gavel Honorable Mention Award in Theatre! Using Marshall's own writings and reflections, the play explores racism and civil rights and provides an engaging tool to facilitate discussion about these issues, not only in the legal profession, but in society at large. $159.	2.75–3.3 hrs. self-study
12/19/12	**Webcast: Ben Franklin on Ethics.** 10:00 – 11:15 pm. Franklin speaks of the importance of ethical practices and the spirit of Pro Bono Publico as the underpinnings of a virtuous life. Topics include Ethics in Documentation, Ethics and Relationships, Ethics and Fees, Ethics and Loyalty and the importance of Humility and Honesty. A live chat room discussion with Ben and a moderator concludes the program. $79.	1–1.5 hrs. self-study
12/20/12	**Benson & Mangrum on Utah Evidence.** 8:30 am – 4:30 pm, approx. Litigation section members without book: $190, others $242.50. Litigation section members with book: $300, others $352.50	6.5 hrs. (incl. 1 hr. Prof/Civ)
12/26/12	**Webcast: Clarence Darrow: Crimes, Causes, and the Courtroom.** 10:00 am – 1:30 pm. Featuring Graham Thatcher as Clarence Darrow. Using Darrow's own thoughts and courtroom summations, the movie explores timeless social, legal and ethical issues and provides a fresh and engaging tool to facilitate discussion of ethical behavior in and out of the courtroom. $159.	3–3.6 hrs. self-study

*CLE hours are approximate and subject to change.

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