

Utah Bar[®]

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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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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.

Looking Ahead

by Lori W. Nelson

As I begin the year as Bar President I want to first look back at everything Rod Snow was able to accomplish during his year. Most notable is the pro bono project designed by Rod to ensure there is pro bono coverage in each judicial district. Under the leadership of the pro bono committee headed by Rob Rice, James Backman, and Sue Crisman, the new Pro Bono Commission, chaired by Judge Michele Christiansen and Judge Royal Hansen, is prepared to get services to those in our society most in need.

Rod also moved forward the modest means project to match underemployed lawyers with low income individuals who do not qualify for a pro bono attorney. This project, spearheaded by Rob Jeffs, is also designed to meet the needs of the underserved population.

Additional projects that were launched during Rod's year include the civics education in high schools project and Books from Barristers, a project that is the brain-child of Elaina Maragakis.

Regarding civics education, the goal is to get a lawyer or judge into the high schools at least once a year to teach separation of powers, the rule of law, and the importance of law to society. This year, the civics education committee has a goal to get a lawyer or judge into high school classrooms on Monday, September 17, Constitution Day. We are seeking any help from our members who have connections with teachers or school administrators to accomplish this goal.

Rod's accomplishments are truly inspired and far-reaching. The Bar and public owe a huge debt of gratitude to Rod for his wisdom and persistence in seeing the needs and finding solutions.

Looking forward, I want first to congratulate Curtis Jensen from St. George on his election as President-Elect. He is going to be a tremendous asset to the Bar.

One of my goals this year is to work on changing the public perception of lawyers and the law. It is not just the public that has a negative perception of lawyers. Justice Stephen Breyer, in a speech given to the National Legal Center for the Public Interest on September 12, 2000, stated that "lawyers themselves increasingly describe their profession in negative terms." I believe part of the problem is that we (lawyers and public) do not have adequate insight into the good lawyers do every day.

"The members of the Bar contribute so much to society, the Bar can do more to not only acknowledge those contributions, but provide benefits that bring real value to our members."

As Justice Breyer noted, "American lawyers devote millions of unpaid hours each year to mediating disputes, representing prisoners, advising less affluent clients on family matters, and taking part in other forms of pro bono work." But that is only part of the story. Lawyers daily

give countless and unacknowledged hours of service to the public by sitting on boards, coaching sports teams, participating in home-owners associations, teaching Sunday school, serving in the legislature, and working for charities.

One such individual is my law partner George Pratt. More or less, George annually travels at his own expense to Haiti to donate service for Healing Hands for Haiti. George does not ask for, seek or desire recognition for his service. I believe that it is important, however, that recognition for his service, and the service given by so many members of the Bar, be acknowledged publicly.

I hope that making this information public



will do much to assist in changing the public perception of lawyers as well as letting us know more about the incredible individuals we work with every day.

Other goals of mine are to finalize the modest means roll-out, complete the lawyer referral service program improvements, and finalize the lawyer advertising rule changes. Lawyer advertising is another area that contributes to the negative image of lawyers. Improving the quality of lawyer advertising will also move us down the road of improving the image of lawyers in the public.

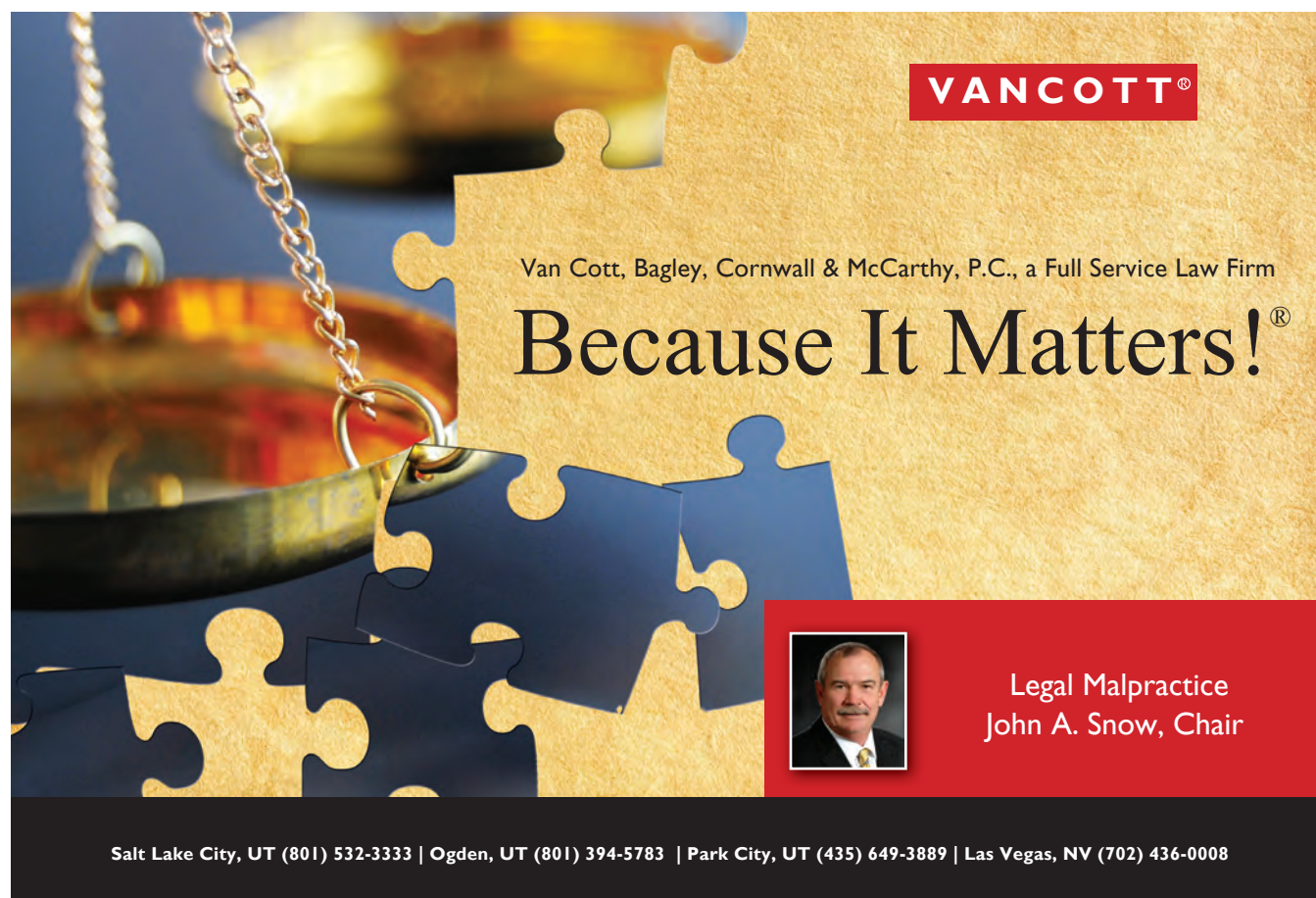
In addition, I want to review member benefits. Not only do members of the public and indeed many attorneys view lawyers negatively, lawyers view the Bar negatively. The Bar presently provides services to the members that are unknown or inefficient. The Bar Commission is focused on increasing the benefits the Bar can provide to its members. The members of the Bar contribute so much to society, the Bar can do more to not only acknowledge those contributions, but provide benefits that bring real value to our members.

One project we anticipate rolling out in the next six months is the new website. This website will give our members better access

to their personal information, legal content members can use in their work and a better lawyer referral service. The Bar is more than admissions and discipline. Our members deserve to have greater access and information into what the Bar can and does provide, as well as be a resource center for useful work-related information. This website will not only be more useful for Bar members, it will also be more accessible to the public. I believe the improved website will aid in the image of lawyers in the public.

Last, I believe one of the most important things the Bar can do is deliver high quality CLE. In that regard, we will be looking to our members for suggestions on topics, speakers, and participating on the convention committees. If you have ideas for CLE please send them to CLEideas@utahbar.org.


I am grateful for the opportunity to serve as your president for the coming year. It is humbling and an honor to serve in this capacity. It is also daunting as so many of the lawyers I will be serving are of the highest caliber, not only in terms of their legal acumen, but in the way they conduct their lives. These lawyers are the ones we should all emulate professionally and personally.



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FALL FORUM

The Fall Forum is going to be very interesting. One topic I believe will be of great interest is Ethics 20/20. The discussion will center on what the ABA is proposing for changes to the ethics rules and how those changes could impact our daily practice. The Ethics 20/20 presentation is scheduled for Thursday night, November 8.

SPRING CONVENTION – ST. GEORGE

The Spring Convention is in the planning stages and promises to provide current, relevant CLE useful to us all.

SUMMER CONVENTION – SNOWMASS/ASPEN

The summer convention for summer 2013 will be held in Snowmass, Colorado. In October 2010, while excavating for the expansion of the Ziegler Reservoir, a juvenile Columbian mammoth was discovered. The dig that followed uncovered more mammoths, a Jefferson ground sloth (think Manny and Sid from *Ice Age*, the movie), mastodons, gigantic ice age bison, a small deer, and an ancient camel. A website describing the find is www.snowmassiceage.com. One activity the Bar Commission is considering for the summer meeting is an activity for children at the Ice Age Discovery Center.

You'll be hearing more about this venue as the year progresses, and I think you'll be excited as you learn about all the activities available for every family member and the affordable lodging costs. A few links to what is available are below.

The location is family friendly;



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And the food is delicious.



Thank you again for allowing me to serve as your president. We are here to serve you.

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Modest Means Lawyer Referral Program: How You Can Make this Program Work for Your Practice

by Hon. Su J. Chon

The Utah State Bar Commission is getting ready to launch a new program called Modest Means Lawyer Referral Program (“Modest Means”).¹ You may have heard rumors about it but don’t really understand what this may mean for your practice. Modest Means will benefit both the general public and Bar members because it will facilitate the provision of affordable legal services to those who might otherwise be forced to carry out their case on their own. For pro se litigants, this could mean having legal expertise at a rate that they can afford.² For lawyers, the program will provide them with potential client referrals for paid legal services at a discounted rate.³ For the courts, this program could ease the backlog of pro se litigants who think that they cannot afford a lawyer.⁴

Modest Means will also complement the Pro Bono Commission to “Lend a Learned Hand” and reach those potential clients who may fall between the cracks in the legal system, earning too much to qualify for pro bono services, but not enough to pay for an attorney at the normal rate. Frederick Douglass said, “Where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organized conspiracy to oppress, rob and degrade them, neither persons nor property will be safe.” Modest Means is a way to help this underserved segment of society in their navigation of the justice system.

What is Modest Means?

Modest Means facilitates the matching of income eligible potential clients with lawyers who are willing to accept those clients at a discounted rate. Modest Means is a voluntary program, not mandatory. Potential clients will complete an application to determine if they meet income eligibility requirements. Upon determination that the potential clients meet income eligibility requirements, the potential clients will pay a \$25 administrative fee to receive a lawyer referral. The potential clients will be

given the lawyer’s name and will be required to contact the lawyer to initiate the case. The lawyer will agree to provide a discounted rate to the Modest Means client either on an hourly or flat fee basis. If the lawyer is contacted, the lawyer will establish the attorney-client relationship and identify how the client representation will proceed.

What are the requirements for lawyer participation?

Any lawyer may participate who is in good standing, maintains a minimum malpractice insurance policy of \$100,000, is willing to be placed on a lawyer panel, and agrees to offer discounted billing rates to Modest Means clients. The lawyer will designate the areas of law in which he/she will accept cases as well as the counties in which he/she is willing to appear.

What are the requirements for client eligibility?

The Utah Bar Commission determined that the Modest Means program would be available to persons who are at or below 300% of the Federal Poverty Guidelines. For a family of four, 300% would be an annual income of \$69,150.

Are there guidelines for fees and consultations?

The Program asks lawyers to agree to provide a discounted rate in order to participate in the program. The Bar Commission determined that lawyers should use the following schedule as a guideline in determining what that rate should be. For example,

HON. SUJ. CHON is a judge for the Third District Court, an elected Bar Commissioner, and co-chair of the Modest Means Lawyer Referral Committee.



Federal Poverty Guideline	Hourly Rate	Flat Fee
125% – 200%	Up to \$50 per hour	35% of normal rates charged by this attorney for the same service to be performed for this particular client.
200% – 300%	Up to \$75 per hour	50% of normal rates charged by this attorney for the same service to be performed for this particular client.

a lawyer may determine that a potential client may not be able to pay a rate of \$50 per hour, but could pay \$35 per hour. A different Modest Means client may only be able to afford \$45 per hour. If the lawyer is able to provide services at such a rate, then it is the lawyer's discretion to determine what the rate should be for that particular client.

Do I need to be worried about establishing an attorney-client relationship?

Yes. The Bar is providing a referral service and will not be involved in the representation. Modest Means expects the lawyer to run conflict checks and properly establish an attorney-client relationship through retainer agreements. The lawyer may also wish to independently assess a client's financial means before undertaking representation on a modest means basis.

I'm interested in taking on a case but I don't have experience in [insert law]. Can I still participate?

Yes, you can still participate in the program. We anticipate that free or low cost CLE will be provided for lawyers who are interested in taking cases in much needed areas, such as family law. We also plan to set up a group of mentors who will be available to take a call from a lawyer to answer a question on a particular area of law.

How will Modest Means help my practice?

When a new lawyer starts a law practice, some lawyers need assistance finding clients. If you're on the panel, you may get a referral that may bring in a paying client. It will also give you experience in various areas of law that you're willing to participate in.

Sometimes, a lawyer also wants to help the community but has already taken on a pro bono case. A lawyer can give back to the community additionally by taking on a Modest Means case.

How do I provide legal services?

Some lawyers may be willing to take a case and provide a discounted hourly rate for the entire representation. Lawyers may also offer services through limited scope representation, such as appearing at a critical hearing or providing specific services that both the lawyer and client have agreed upon. *See* Utah Rules of Prof'l Conduct R. 1.2(c). The lawyer should determine what will be most helpful and cost effective to a Modest Means client.

Watch for more information to come regarding the launch of the Modest Means Lawyer Referral Program. If you have additional questions, please contact the Modest Means program at modestmeans@utahbar.org. Eleanor Roosevelt once said, "Justice cannot be for one side alone, but must be for both." We encourage you to participate in this program.

1. The author would like to thank John Lund, co-chair of the Modest Means Committee; Mary Jane Ciccarello, Director of the Utah State Courts Self Help Center; and Michelle Harvey, Pro Bono Coordinator for the Utah State Bar, for their special assistance with this article.
2. And Justice for All and Utah Legal Services conducted a study of low-income individuals and their legal needs in 2005 and 2006, and presented their findings in *The Justice Gap*. Some conclusions from that study found that: low-income households encountered 92,000 civil legal problems each year; 2 out of 3 households face a civil legal problem annually; and the most needed legal areas are family law, employment, housing, and consumer law. *See* <http://www.andjusticeforall.org/The%20Justice%20Gap%20-%20Needs%20Assessment.pdf>. According to anecdotal information, these conclusions have similar impact for Modest Means individuals.
3. As of May 31, 2012, the number of active Bar members practicing in Utah was 7,821. In the last three years, 1,220 were new admittees to the Bar.
4. According to the 2006 study conducted by the Utah Judicial Council Standing Committee on Resources for Self-Represented Parties, both sides in debts collection cases were represented in only 3% of the cases. In addition, 81% of respondents in divorce cases self-represented and in evictions 97% of respondents self-represented. *See* <http://www.utcourts.gov/survey/FinalSurveyRepToCouncilfrJVB2006-11-01.pdf>. The Utah State Courts Self Help Center has seen the number of pro se litigants requesting some general legal guidance grow. In fiscal year 2011-2012, the Center responded to 8,236 contacts on legal matters while providing services throughout Utah except for in the Third and Fourth Judicial Districts. The Center expects that number to increase in the 2012-2013 fiscal year, now that the Self Help Center is available to pro se litigants statewide.

Twombly and Iqbal: *How the Supreme Court has Radically Redefined Access to the Federal Courts*

by Aaron S. Bartholomew

In 2009, the U.S. Supreme Court issued the second of two decisions that have radically altered interpretation of the general pleading requirements of the Federal Rules of Civil Procedure. Of great concern to counsel for both plaintiffs and defendants, as well as legal scholars, these decisions have had and continue to have tremendous effect in federal courts.

The *Utah Bar Journal* briefly addressed the *Twombly* case in a 2009 article, but the full import of the change in federal pleading standards has only recently been realized. See John H. Bogart, *Living with Twombly*, 22 UTAH B.J. 23 (March/April 2009). This article explores the evolution of Rule 8 pleading requirements in federal court, the Rule 8 revolution hastened in by the *Twombly* and *Iqbal* line of cases, and the consequences and criticisms of the newly-required heightened pleading requirements over the last several years since their introduction.

The Evolution of Rule 8 of the Federal Rules of Civil Procedure

Rule 8 of the Federal Rules of Civil Procedure requires a pleading to include “a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). In 1957, the U.S. Supreme Court interpreted this requirement in *Conley v. Gibson*, 355 U.S. 41 (1957), and held that a complaint should not be dismissed under Rule 12(b)(6) unless it is “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 45-46.

The *Conley* standard has governed federal civil suits for more than fifty years. Under *Conley*, plaintiffs have had the luxury of crafting general, simple pleadings and with predictability and reliability have overcome most Rule 12 motions.

Then, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the U.S. Supreme Court abrogated *Conley*, saying that its “‘no set of facts’ language has been questioned, criticized, and explained away long enough.” *Id.* at 562. The Court then

introduced a new “plausibility” standard:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint’s allegations are true. . . .

Asking for plausible grounds. . . does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. . . .

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the “plain statement” possess enough heft to “sho[w] that the pleader is entitled to relief.”

Id. at 555-56 (footnotes and citations omitted). In other words, plaintiffs must “nudge[] their claims across the line from conceivable to plausible” in order to survive. *Id.* at 570. A Rule

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12(b)(6) motion to dismiss must therefore be granted unless the pleading reaches a level of “plausibility.” *Id.* at 556.

Initial reactions to *Twombly* were mixed, perhaps partly due to the Supreme Court’s express denial that it created a heightened pleading standard. *See id.* at 569 n.14 (“[W]e do not apply any ‘heightened’ pleading standard.”). For example, Keith Bradley, writing in the *Northwestern University Law Review*, suggested that “[p]lausibility” is an element of a certain kind of antitrust conspiracy claim, not a standard for pleadings in general.” Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U.L. REV. COLLOQUY 117, 122 (2007).

Within two short years, Mr. Bradley was proven to be mistaken. In May 2009, the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), applied *Twombly* to all federal court pleading requirements.

In *Iqbal*, the Supreme Court noted that the lower court had relied on *Conley*’s “no-set-of-facts” analysis, which had subsequently been “retired” and replaced by *Twombly*’s “plausibility standard.” *Id.* at 670 (citations omitted). The Court also expressly stated that “[its] decision in *Twombly* expounded the pleading standard

for ‘all civil actions.’” *Id.* at 684.

This new “*Twombly/Iqbal*” pleading standard is not a model of clarity:

[A] pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief. . . .” [T]he pleading standard Rule 8 announces does not require “detailed factual allegations,” but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” Nor does a complaint suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.”

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw



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the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we “are not bound to accept as true a legal conclusion couched as a factual allegation.” Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not “show[n]” – “that the pleader is entitled to relief.”

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at 677-79 (citations omitted). This two-prong analysis deserves further scrutiny.

New Rule 8 Pleading Requirements:

First Prong: A Complaint Must Contain More Than “Unadorned,” But Less Than “Detailed,” Factual Allegations. Plus “Factual Allegations” v. “Conclusions of Law.”

To satisfy the first prong of the new *Twombly/Iqbal* analysis, a complaint need not contain “detailed factual allegations,” but it must include more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Id.* at 678. Practitioners should therefore take heed to augment recitation of the elements of a cause of action with factual allegations. They must also eschew confusing “facts” with “mere conclusory statements,” because while factual allegations are accepted as true, legal conclusions are not. *Id.*

Unfortunately, the distinction between “questions of law” and “questions of fact” is unclear. The U.S. Supreme Court has noted that “the appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive,” and that it has “yet to arrive at a rule or principle that will unerringly distinguish a factual finding from a legal conclusion.” *Miller v. Fenton*, 474 U.S. 104, 113 (1985) (internal quotation marks omitted).¹ The Supreme Court has also noted that

the decision to label an issue a “question of law,” a “question of fact,” or a “mixed question of law and fact” is sometimes as much a matter of allocation as it is of analysis.

At least in those instances in which Congress has not spoken and in which the issue falls somewhere between a pristine legal standard and a simple historical fact, the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.

Id. at 113-14 (citation omitted).² The Court went on to take unto itself the duty to make the “fact/law distinction” in some instances (such as First Amendment libel cases requiring proof of actual malice, or where the trier of fact has “perceived shortcomings... by way of bias or some other factor...”), while in other circumstances leaving that duty to the trial court (such as credibility of witnesses and juror bias). *Id.* at 114 (citations and internal quotation marks omitted).

How federal district and circuit courts are supposed to sort all this out is indeed “elusive.” See *id.* at 113. Some have simply thrown in the proverbial towel. See, e.g., *Florida Progress Corp. & Subsidiaries v. Comm’r*, 348 F.3d 954, 960 (11th Cir. 2003) (“[W]e too are unable to articulate a guiding principle that will ‘unerringly distinguish a factual finding from a legal conclusion....’” (citation omitted)). Others have concluded that “[s]ince a judge looks in vain for any guidance on this question in the summary judgment cases, it would appear that he is unfettered in approaching the issue analytically and pragmatically.” *Cnty. Photo Compositing Corp. v. Pawlick*, 1984 Mass. App. Div. 183 (Mass. App. Div. 1984) (citing *United States v. J.B. Williams Co., Inc.*, 498 F.2d 414, 430-31 (2nd Cir. 1974)); see also *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1126 (5th Cir. 1978).

However, a few analytical frameworks for the “fact/law distinction” have been proposed. For example, the Third Circuit has suggested the following:

The Supreme Court has written that “we [do not] yet know of any... rule or principle that will unerringly distinguish a factual finding from a legal conclusion.” However, a practical test... for determining whether a question is of fact, of law, or of both fact and law, is as follows. A question of fact can be answered solely by determining the facts of a case (without any need to know the law relevant to the case). A question of law can be answered solely by determining what relevant

law means (without any need to determine the facts of a case). A mixed question of fact and law can only be answered by both determining the facts of a case and determining what the relevant law means.

For example, imagine that a man is appealing his conviction under a law that states “it is a crime to be tall.” What kind of question is: “Was the trial court correct to find the man ‘tall’?” Can we answer it solely by determining the facts of the case? No, because even if we know the fact that the man is five feet ten inches, we do not know if he is “tall” in the sense that Congress intended the word “tall” to mean. Can we answer it solely by determining what the relevant law means without knowing the man’s height? No, because even if we know that the statute defines “tall” as “six feet or taller,” we do not know how tall the man is. Thus, we have a mixed question of fact and law. Once we know the facts of the case (that the man is five feet ten inches tall), and what the relevant law means (it is a crime to be six feet tall or taller), we can answer “no” to the question “Was the trial court correct to find the man ‘tall’?”

Interfaith Cmty. Org. v. Honeywell Int’l, Inc., 399 F.3d 248, 269 (3d Cir. 2005) (first alteration in original) (citation omitted). Elsewhere, the Eighth Circuit has promulgated an analysis “focused on whether the question at issue required the



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application of a technical, legally oriented standard or whether it required the application of a non-technical, factually oriented standard.” *Nodaway Valley Bank v. Cont’l Cas. Co.*, 916 F.2d 1362, 1364-65 (8th Cir. 1990).

The First Circuit has also suggested some broad parameters:

We are cognizant that the line between “facts” and “conclusions” is often blurred. But, there are some general parameters. Most often, facts are susceptible to objective verification. Conclusions, on the other hand, are empirically unverifiable in the usual case. They represent the pleader’s reactions to, sometimes called “inferences from,” the underlying facts. It is only when such conclusions are logically compelled, or at least supported, by the stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that “conclusions” become “facts” for pleading purposes.

Dartmouth Review v. Dartmouth Coll., 889 F.2d 13, 16 (1st Cir. 1989), (overruled by *Educadores Puertorriquenos en Accion v. Hernandez*, 367

F.3d 61 (1st Cir. 2004)). These various ideas will likely experience renewed scrutiny now that the Supreme Court has based part of the *Twombly/Iqbal* analysis on a “fact/law distinction” that, at present, lacks any coherent guidelines.

Second Prong: Assessing “Plausibility” Based on “Judicial Experience and Common Sense.”

The second prong in the *Twombly/Iqbal* analysis requires a complaint to state “a plausible claim for relief” in order to survive a motion to dismiss under Rule 12(b)(6). See *Asbcroft v. Iqbal*, 556 U.S. 662, 679 (2009) “[F]actual plausibility” is shown “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678.

Here the Supreme Court describes a spectrum in which legal claims may come to rest on factual “possibility,” “plausibility,” or “probability.” In order to survive a motion to dismiss, a claim must move “across the line” from mere “possibility” (or “conceivability”)

to “plausib[ility].” *Id.* at 683 (internal quotation marks omitted). A claim need not go beyond this area of the spectrum (into the “probability” area) in order to defeat a motion to dismiss.

The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it ‘stops short of the line between possibility and plausibility of “entitlement to relief.”’

Id. (citations omitted).

A trial court’s assessment of a claim’s plausibility is

a context-specific task that requires the reviewing court to draw on its judicial experience and common

sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not “show[n]” — “that the pleader is entitled to relief.”

Id. at 679 (citations omitted).

“[P]ractitioners...should acclimate themselves to the heightened initial scrutiny required by Twombly and Iqbal, and should invest more time and resources in pre-litigation investigation of claims...”

Criticisms and Conclusions

In sum, federal courts will now be called upon to read a complaint and decide if its “factual content” triggers a “reasonable inference” of liability sufficient to defeat a motion to dismiss, or whether it only has “well-pleaded facts” that trigger an inference of “[no] more than the mere possibility of misconduct,” which is *not* sufficient. See *id.* At present, the Utah Supreme Court has declined to adopt this heightened standard and has instead retained the “short and plain statement” first promulgated in *Conley*. See *Peak Alarm Co. v. Salt Lake City Corp.*, 2010 UT 22, ¶ 70 n.13, 243 P.3d 1221.

The aggregate impact of this new pleading standard is proving to be significant. In a *Yale Law Journal* note by Jonah Gelbach, a law student at Yale Law School and former economics professor at the University of Maryland, Mr. Gelbach describes a study by the Federal Judicial Center which suggests that defendants are more than fifty percent more likely to file a motion to dismiss

now than they were before *Twombly* and *Iqbal*. See Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2273 (2012). Mr. Gelbach goes on to suggest that a higher percentage of cases is subject to dismissal before reaching discovery, and that twenty percent more cases fail to reach discovery under the heightened pleading standards imposed by *Twombly* and *Iqbal*. See *id.* at 2277; Allison Frankel, “*Twombly, Iqbal* rulings have ‘substantial impact’: study,” available online at <http://newsandinsight.thomsonreuters.com/Legal/News/ViewNews.aspx?id=33303> (last visited May 25, 2012).

Questions also abound as to whether the *Twombly/Iqbal* standard violates the Seventh Amendment right to jury trial,³ whether it screens out “weak” claims along with “meritless” ones,⁴ whether trial courts will be able to consistently, meaningfully and fairly apply this new standard, whether it will have a disproportionately harmful effect on inherently “information poor” cases such as civil rights and employment discrimination disputes, and so forth.

Regardless of how these questions turn out, practitioners in

federal court should acclimate themselves to the heightened initial scrutiny required by *Twombly* and *Iqbal*, and should invest more time and resources in pre-litigation investigation of claims before proceeding to the pleading stage.

1. The U.S. Supreme Court did, however, describe two “well established principles” on this point: “For example, that an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact. Equally clearly, an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question.” *Miller v. Fenton*, 474 U.S. 104, 113 (1985) (citations omitted).
2. The Supreme Court has ostensibly described a *mixed* question of law and fact as “questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.” *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).
3. See “How the Supreme Court Pulled a Fast One, and America Didn’t Notice,” <http://rollback.typepad.com/campaign/2009/08/how-the-supreme-court-pulled-a-fast-one-and-america-didnt-notice.html> (last visited May 25, 2012) (“[L]itigators at least should be worried over whether or not that violates the Seventh Amendment right to a jury trial, because the Seventh Amendment says that juries are to determine facts, not judges. . .”).
4. See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 852 (2010) (“*Iqbal* applies a thick screening model that aims to screen weak as well as meritless suits, whereas *Twombly* applies a thin screening model that aims to screen only truly meritless suits. The thick screening model is highly problematic on policy grounds. . .”).

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The New Respect for Justice George Sutherland

by Andrew M. Morse

We need to name our new federal courthouse. Perhaps it should simply be known as “The United States Courthouse,” like many. But if it bears the name of an exemplary Utahn, it should be named after Justice George Sutherland, the only Utahn to serve on the United States Supreme Court.

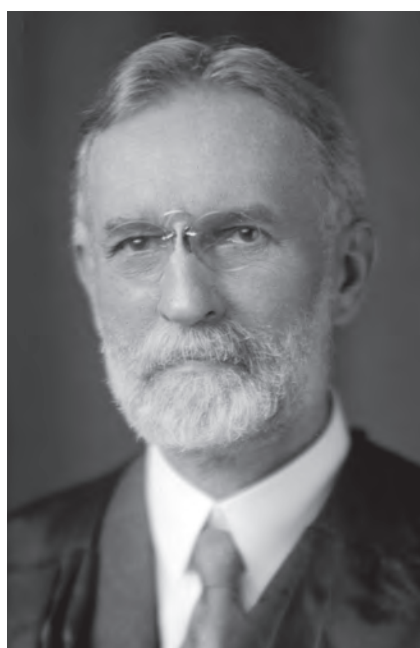
To date, Sutherland has been Utah’s most accomplished attorney, public servant, and judge. Before joining the Court, he was a renowned legal scholar and sage politician, having served in the Utah State Senate, U.S. Congress, and U.S. Senate. No past or present Utahn has done more for his state or country, or accomplished more as a lawyer.

Last October my firm, Snow, Christensen & Martineau, sponsored a commemoration highlighting this remarkable man. We commissioned a bronze bust for the Federal Courts, and made a short film for the public. See videotape: *George Sutherland – The Man / The Work / The Legacy* (2011), available at http://www.scmlaw.com/george_sutherland_commemoration. Chief Justice Durham, Judge Stewart, and Judge Benson gave thoughtful speeches exploring the new respect for Justice Sutherland. See *id.*

We learned that Sutherland was born in England in 1862 to Mormon converts. His family immigrated to Utah via an oxcart company in October 1863. The Sutherlands first settled in Springville, Utah, and then moved to Tintic, Utah where George Sutherland, Sr. sold dry goods to miners. George Sr. left the church in 1870, and young George was never baptized. For this and other biographical information, see Edward L. Carter & James C. Phillips, *The Mormon Education of a Gentile Justice: George Sutherland and Brigham Young Academy*, 33 J. SUPREME CT.

HISTORY 322 (2008). Sutherland remembered his boyhood as:

a period when life was very simple, but, as I can bear testimony, very hard as measured by present-day standards.



....

Nobody worried about child labor. The average boy of ten worked – and often worked very hard[.]

....

Society was not divided, into the idle rich and the worthy poor. There were no rich, idle, or otherwise. Everybody was poor and everybody worked. Neither the eight-hour day nor the 40 hour week had arrived. Work began when it was light enough to see and ended when it

became too dark.

A Message to the 1941 Graduating Class of Brigham Young University from Justice George Sutherland, L. Tom Perry Special Collections Library, Harold B. Lee Library, Brigham Young University, Provo, Utah, June 4, 1941, at 3-5, available at

ANDREW M. MORSE is the president of Snow Christensen & Martineau. He is the co-chair of the Utah State Bar’s Character & Fitness Committee. In his trial practice he defends police officers, truckers, and doctors.



http://www.scmlaw.come/public/1941_BYU_Commencement_Address.pdf.

He had no schooling between ages twelve and seventeen, but was taught well by his parents, as he entered the Brigham Young Academy (BYA) in 1879 as an excellent student and writer. Before that, though, he worked first in a clothing store in Salt Lake City, then as a Wells Fargo agent and as a mining recording agent until age seventeen, when his family moved to Provo. At BYA he flourished under the tutelage of renowned headmaster Karl G. Maeser, who nurtured the institution for decades.

At BYA, Sutherland made many lifelong friends. Nearly all were LDS, including Sam Thurman, later his law partner, cofounder of the predecessor firm to Snow, Christensen & Martineau, and Utah Supreme Court Chief Justice; William H. King, his future law partner and political opponent, against whom he ran for Congress in 1900 and U.S. Senate in 1916; and James E. Talmage and Richard Lyman, future Apostles of the LDS Church.

At BYA he met Rosamond Lee of Beaver, Utah. They married several years later and were together for nearly sixty years. They had three children: a boy who died at seventeen and two daughters who survived him.

Sutherland graduated from BYA in 1881, and attended the University of Michigan Law School for a year. He passed the Michigan Bar, married Rosamond Lee and moved to Provo, where he started a practice with his father, by then a self-taught lawyer.

I transacted all kinds of business, civil and criminal. A lawyer in a small town can't pick and choose – public opinion demands that he shall treat all men alike when they call for his services. I often traveled on horseback in the mountains to try cases before Justices of the Peace.

Alan Gray, *Untitled Biography of George Sutherland* 4 (1928) (unpublished biography on file with the Collections of the

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Manuscript Division, Library of Congress), *available at* http://www.scnllaw.com/public/pdfs/Untitled_Biography.pdf.

Sutherland had a well deserved reputation as a hardworking and honest family man. He was smart, empathetic, and kind.

In 1886, at age twenty-four, he partnered with Sam Thurman in a new law practice and two years later added William King. As young lawyers, he and Thurman defended nine Irish miners accused of lynching, a capital offense. The victim had murdered a teenager in a bar fight, and the teen's father led the lynch mob. All were tried at the same time; all were convicted but none was executed – a victory for Sutherland and Thurman.

Sutherland also represented many Mormon men charged with violating the Federal Edmunds Act outlawing polygamy.

Through these cases and his general character, he earned the respect of the Mormon community. At the same time he received the political support of the non-Mormon community.

In 1887, Maeser was convicted of violating the Edmunds Act. Although Sutherland did not represent Maeser, he nonetheless appeared at Maeser's sentencing and made an impassionate and successful plea imploring the Court not to jail Maeser, citing his many accomplishments at BYA. The Court did not sentence Maeser to jail, but fined him \$300, which Sutherland immediately paid to the Court.

As a young lawyer Sutherland dove into public service and politics. Between 1886 and 1890 he was an Overseer of the State Hospital in Provo. In 1890 he ran for Mayor of Provo as a Liberal Party candidate on an anti-polygamy platform, and lost. Mormon Church sanctioned polygamy soon ended in late 1890 via the Manifesto, gutting the Liberal Party of its purpose, so Sutherland became a Republican. He narrowly lost the 1892 Republican nomination for Congress.

His legal practice blossomed. In 1894, he left Thurman & Sutherland and moved to Salt Lake City where he joined the predecessor to

the Van Cott firm. In 1895, his friend and former partner Thurman served on the commission that drafted the Utah Constitution, which provided for women's suffrage, a cause for which Sutherland campaigned throughout his political career.

He helped form the Utah Bar Association in 1895, and in 1896 was elected to the first Utah State Senate. He chaired the Judiciary Committee, which drafted the first Utah Judicial and Penal Codes. Sutherland proposed Utah's first State Workers' Compensation Statute, and laws granting eminent domain to irrigators and miners.

In 1900, he narrowly defeated democrat William H. King, his old law partner, for Utah's lone U.S. Congressional seat. He remained very active in State and National Republican Party affairs, serving as a party delegate from Utah to every Republican

convention between 1900 and 1916. In his only Congressional term, he was instrumental in passing the Reclamation Act, which allowed western water projects to be engineered and financed with federal money, and allowing the West to grow much faster than it would have if water projects had been left to private and state financing.

This was a remarkable achievement for a freshman Congressman.

Sutherland did not run for a second term, so in 1903 he resumed his practice with Van Cott. In 1905 U.S. Senators were elected by State Legislators. With the endorsement of his friend U.S. Senator Reed Smoot, Sutherland prevailed in an interparty fight with incumbent Thomas Kearns. Years earlier, Sutherland had represented Smoot's father in a polygamy case.

Sutherland's two-term Senate career was stellar. Through his legal ability, affability, and hard work he accomplished much regarding women's suffrage, workers' compensation, reclamation, Indian affairs, and foreign policy. He was the driving force behind the Federal Employer Liability Act, creating a workers' compensation system. He argued that the change would increase safety.

When we are able to get to the truth as to how

"Through his legal ability, affability, and hard work [Sutherland] accomplished much regarding women's suffrage, workers' compensation, reclamation, Indian affairs, and foreign policy."

these accidents happen we will be able to apply the remedy with greater certainty, so that the law is not only just in providing compensation to all injured employees, one of the legitimate expenses of the industry, but what is perhaps still more important, it will tend greatly to reduce the number of accidents and consequently the aggregate of human suffering.

George Sutherland Speech to the Senate of the United States Workers Compensation 9 (1912) (transcript on file with the collection of the Manuscript Division, Library of Congress), *available at* http://www.scmlaw.com/public/pdfs/Speech_to_Senate.pdf.

Sutherland championed many other labor causes, earning him the praise of Samuel Gompers, President of the American Confederation of Labor.

Sutherland's Judiciary Committee rewrote the U.S. criminal and judicial codes, "a monumental task" according to Chief Justice Charles Evans Hughes. In 1907, his courtroom skills were well

displayed in the Senate where he mounted a detailed and successful defense of Senator Reed Smoot when the Senate considered expelling Smoot due to his religious and alleged polygamous practices. *See* Senator George Sutherland, Reed Smoot and Conditions in Utah (January 22, 1907), Washington Government Printing Office, *also available at* http://www.scmlaw.com/public/pdfs/Smoot_and_Cond_in_Ut.pdf.

Sutherland did all he could to pass the Nineteenth Amendment giving women the right to vote. He sponsored the Amendment in 1915, and he gave several lengthy well received speeches promoting the Amendment, including a 1914 speech where he said:

I...give my assent to woman suffrage because, as the matter appeals to me, there is no justification for denying to half our citizens the right to participate in the operations of a government which is as much their government as it is ours upon the sole ground that they happen to be born women instead of men.

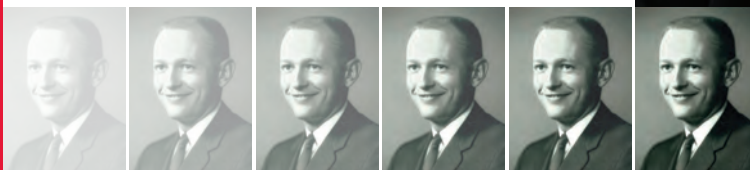
Speech of Senator George Sutherland of Utah before the Senate of

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the United States 7 (February 18, 1914), Washington Government Printing Office, *also available at* http://www.scmlaw.com/public/pdfs/Wm_Sufrg_1914_.

Sutherland was no pacifist. Contending that security should be won through vigilance and strength, he sharply criticized President Wilson's reaction to Germany's aggression. Germany's new submarine fleet had attacked shipping in the open sea, and President Wilson's apparent vacillation in 1915 gave rise to a long speech by Sutherland in the Senate, where he said:

[M]y own view of the matter is that the new weapon [the submarine] must yield to the law and not that the law must yield to the new weapon....

....

I for one am becoming sick and tired of the spineless policy of retreat and scuttle.... Instead of warning our own people to *exercise* their rights at their peril, I would like to see issued a warning to

other people to *interfere* with these rights at *their* peril. The danger of it all is that by this policy of always backing down instead of backing up we shall encourage an increased encroachment upon our rights until we shall finally be driven into crisis from which nothing but war can extricate us.

Senator George Sutherland, Neutrality and American Rights at 7, 11 (March 7, 1916), Washington Printing Office, *also available at* http://www.scmlaw.com/public/pdfs/Neutrality_and_American_Rights.pdf.

During his Senate years he was a sought after speaker on many public affairs. Meanwhile, with a growing reputation as a constitutional scholar, he argued three cases in the U.S. Supreme Court, while he was in the Senate.

In 1915 Sutherland supported the Seventeenth Amendment, which provided for popular election of United States Senators. The Amendment was adopted. In 1916 Sutherland ran for a third term against his old law partner and friend, King, and lost. Although he had not run a statewide campaign for sixteen years,



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his loss was likely due to the coattail effect of the anti-war fervor that propelled President Wilson to a second term, on the mantra that “He kept us out of war.”

The Republicans in general were badly defeated in 1916. He consoled William Howard Taft on his loss of the presidential race:

We are to pass through a period of readjustment, and the present administration, in view of its past history, is not likely to deal with the serious problems which will arise in such a way as to satisfy the country. The result will be, therefore, that we shall come back into power for a long time.

Letter from George Sutherland to William Howard Taft (Dec. 23, 1916) (unpublished manuscript on file with the Collections of the Manuscript Division, Library of Congress).

However, the Republicans won the next three presidential elections.

After Sutherland retired from the Senate, he practiced law in Washington, D.C. and argued four cases in the U.S. Supreme Court. In 1917, he was elected President of the ABA. He also gave a series of six lectures at Columbia University Law School on the Constitution and Foreign Affairs.

Always a keen political strategist, he supported Warren G. Harding’s seemingly unlikely, but successful bid for the Republican nomination. After Harding was elected he appointed Sutherland as lead counsel for the U.S. in a seven-week trial at The Hague. Sutherland was also counsel to the U.S. Delegation to the Armament talks of 1921.

On September 5, 1922, President Harding nominated Sutherland for an open seat on the United States Supreme Court. The Senate unanimously confirmed him the same day. There was acute public interest in and support for Sutherland’s appointment, because he was the first Utahn to be appointed, one of the few Senators to ascend to the bench, and was only the fourth foreign-born Justice to serve in the Court, and the first to do so since 1793.

As he had throughout every aspect of his life, Sutherland worked very hard on the Court. In fifteen years he wrote 295 majority opinions, thirty-five dissents, and one concurrence –

an average of twenty majority opinions per year, which doubled the average production of today’s Supreme Court Justices.

Sutherland’s broad life experiences, sobriety, hard work, and self-reliance brought a valuable perspective to the Court. He had grown up poor and worked extremely hard as a boy. These work habits, combined with his intellect and ambition, propelled him into the highest echelon of power on the state and national levels, exposing him to people from all walks of life. Moreover, his extensive experience in the state and national legislative branches gave him a solid foundation as a constitutional scholar and an expert in governmental affairs.

Sutherland was wary of the tyranny of the majority. He had seen temporary factions spring to life from time to time with all the answers, only to fade away leaving in their wake ill-considered legislation that often infringed on individual rights, or violated other constitutional principles. Justice Sutherland challenged the Congress, the President, and other courts in order to protect individual rights or fundamental constitutional doctrines. For an in-depth study of Justice Sutherland’s Supreme Court career, *see* Hadley Arkes, *The Return of George Sutherland: Restoring a*

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Jurisprudence of Natural Rights (1997).

Room does not allow for any exploration of Sutherland's varied opinions. That said, in *Berger v. United States*, 295 U.S. 78 (1935), he eloquently set the standard for prosecutorial misconduct. In *Berger*, an Assistant U.S. Attorney was guilty of gross misconduct during a criminal trial, *see id.* at 89. He used innuendo, misled jurors, badgered and bullied witnesses, lied about the evidence, and used undignified and intemperate arguments. *See id.* at 85-86. The trial court denied mistrial and new trial motions, and the Court of Appeals affirmed. *See id.* at 79-80. The Supreme Court reversed. *See id.* at 89. Justice Sutherland wrote that the misconduct called for a stern rebuke and repressive measures. He wrote:

The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape, or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88.

This decision better clarified the prosecutor's role and obligations and it gave trial judges a clear directive and authority to punish prosecutorial misconduct.

The most controversial opinions that Justice Sutherland wrote struck down portions of President Franklin Delano Roosevelt's New Deal legislation. When Roosevelt overwhelmingly defeated President Hoover in 1932, Congress quickly passed many acts to address the economic calamity. The laws, however, were not thoroughly assessed from a constitutional point of view before they were passed. This led to scores of court challenges, and

many laws were struck down by unanimous vote in 1934, 1935, and 1936. Others were struck down by close votes on various constitutional grounds.

After his landslide 1936 reelection, Roosevelt tried to change the size of the Supreme Court, which he saw as a roadblock to economic recovery. He proposed adding six Justices to the Court. The political upheaval that the court-packing plan sparked caused conservative Justice Owen Roberts to change his votes and to uphold the New Deal legislation. This switch of a vote and strong public opposition to court-packing led to its defeat in the Senate, and it avoided a constitutional and perhaps a national crisis. *See* Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (2010).

Justice Sutherland was bitterly disappointed with Justice Roberts's vote change. When the Supreme Court then reversed recent Supreme Court decisions, Sutherland dissented sharply, contending that political expediency had trumped constitutional principles. He retired in 1938 much to the disappointment of moderates and conservatives.

Sutherland sought no plaudits or accolades. Humble to the end, he did not mention the Supreme Court or his career in his last public address: The Convocation of the BYU Class 1941. Instead, he reminisced about Utah in the 1860s and 70s, his daylong labors as a child, and his education at his beloved Brigham Young Academy. Above all, he implored graduates to be vigilant caretakers of their character, then to focus on career, family, and church. He died in 1942. *See A Message to the 1941 Graduating Class of Brigham Young University from Justice George Sutherland*, L. Tom Perry Special Collections Library, Harold B. Lee Library, Brigham Young University, Provo, Utah, June 4, 1941, available at http://www.scmlaw.com/public/1941_BYU_Commencement_Address.pdf.

George Sutherland died seventy years ago last July. On this anniversary we should recall that our heritage and good sense teach us to honor distinguished and exemplary forefathers. To do so here our Congressional delegation should appreciate that the new respect for Sutherland makes him the presumptive choice for this high honor. Other public servants may deserve such recognition, but none deserves it more.

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Five Proportionality Principles That Can Reduce eDiscovery Costs and Burdens

by Philip J. Favro

Talk to most any enterprise about legal issues and invariably the subject of eDiscovery will come up as a thorny point. These discussions typically focus on the high costs of eDiscovery, particularly for data preservation and document review. Such costs and the inevitable delays that accompany the discovery process provide ample justification for organizations to be on the alert for ways to address these issues.

As a solution to these costs and delays, the eDiscovery cognoscenti are emphasizing the concept of “proportionality.” Proportionality typically requires that the benefits of discovery be commensurate with its corresponding burdens. *See Eisai Inc. v. Sanofi-Aventis U.S., LLC*, No. 08-4168 (MLC), 2012 WL 1299379, at *6 (D.N.J. Apr. 16, 2012) (invoking proportionality standards to deny the majority of plaintiff’s production requests). Under the Federal Rules of Civil Procedure (“Rules”), the directive that discovery be proportional is found in Rule 26. *See* FED. R. CIV. P. 26. In what may be a surprise to some practitioners, Rule 26(b)(2)(C) empowers courts to restrict the liberal bounds of federal discovery practice. For example, discovery must be limited where requests are unreasonably cumulative or duplicative, the discovery can be obtained from an alternative source that is less expensive or burdensome, or the burden or expense of the discovery outweighs its benefit.

This provision is reinforced by Rule 26(g), which imposes an express certification obligation on counsel to engage in proportional discovery or face sanctions. An additional proportionality provision specific to eDiscovery is found in Rule 26(b)(2)(B). That rule limits the discovery of electronically stored information (ESI) such as backup tapes that may not be “reasonably accessible because of undue burden or cost.” Finally, Rule 26(c) provides an enforcement mechanism for these provisions. Parties may seek protective orders under this provision, which limits or even proscribes discovery that causes “annoyance, embarrassment,

oppression, or undue burden or expense.”

While proportionality standards were underused for years after they were first included in the Rules, they are now being championed by various district and circuit courts. As more opinions are issued that analyze proportionality, several key principles are becoming apparent in this developing body of jurisprudence. To better understand these principles, it is instructive to review some of the top proportionality cases issued this year and last. These cases and the proportionality standards they espouse provide a roadmap of best practices which, if followed, will help courts, clients and counsel reduce the costs and burdens of eDiscovery.

Encourage Reasonable Discovery Efforts

The first of these cases, *Larsen v. Coldwell Banker Real Estate Corp.*, No. SACV 10-00401-AG (MLGx), 2012 WL 359466 (C.D. Cal. Feb. 2, 2012) emphasizes that discovery efforts need only satisfy a standard of reasonableness, not perfection. *See id.* In *Larsen*, the court rejected the plaintiffs’ assertion that the defendants should be made to re-do their production of documents. *See id.* at *7. The plaintiffs had argued that doing so was necessary to address certain discrepancies – including missing emails – in the defendants’ production. *See id.* The court disagreed, holding instead that plaintiffs had failed to establish that such discrepancies had prevented them from obtaining relevant information. *See id.*

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The court also held that a “do over” would violate the principles of proportionality codified in Rule 26(b)(2)(C). After reciting the proportionality language from Rule 26, the court determined that “the burden and expense to Defendants in completely reproducing its entire ESI production far outweighs any possible benefit to Plaintiffs.” *Id.* at *8. There were simply too few discrepancies identified to justify the cost of redoing the production.

The *Larsen* decision provides a reminder that organizations’ discovery efforts need not be perfect. The Rules were never intended to exact perfection in the discovery process. That misguided understanding of federal discovery practice has spawned too many expensive and futile eDiscovery sideshows. *See Brigham Young Univ. v. Pfizer, Inc.*, No. 2:06-cv-890 TS, 2012 WL 1302288, at *5-6 (D. Utah Apr. 16, 2012) (denying plaintiffs’ fourth motion for “doomsday” sanctions since evidence was destroyed pursuant to defendants’ “good faith business procedures”). Instead, the parties’ efforts must be reasonable such that the overall purposes of discovery can be fulfilled.

Discourage Unnecessary Discovery

The next case underscores the corollary principle of discouraging unnecessary discovery. In *Bottoms v. Liberty Life Assurance Co. of Boston*, No. 11-cv-01606-PAB-CBS, 2011 WL 6181423 (D. Colo. Dec. 13, 2011), the court drastically curtailed the written discovery that plaintiff sought to propound on the defendant. *See id.* Plaintiff had requested leave in this ERISA action to serve “sweeping” interrogatories and document requests to resolve the limited issue of whether the defendant had improperly denied her long-term disability benefits. *See id.* at *1, 7. Drawing on the proportionality standards under Rule 26(b)(2)(C), the court characterized the proposed discovery as “patently overbroad” and as seeking materials that were “largely irrelevant.” *Id.* at *10. The court ultimately ordered the defendant to respond to some aspects of plaintiff’s interrogatories and document demands, but not before limiting their nature and scope. *See id.*

The *Bottoms* case emphasizes what courts have been urging for years: that organizations should do away with unnecessary discovery. This typically requires counsel to steer away from boilerplate demands or “robotically recycling” requests from previous lawsuits. *See id.* at *5. Instead, lawyers should “stop and think” about what discovery is actually needed and then prepare well-tailored requests. *See id.* For as *Bottoms* teaches,

the obligation to ensure that discovery is both reasonable and proportional principally rests with the parties and their counsel.

Encourage Defensible Deletion of ESI

Another recent proportionality decision demonstrates the importance of defensibly deleting ESI, particularly for preservation purposes. In *Grabenstein v. Arrow Electronics*, No. 10-cv-02348-MSK-KLM, 2012 WL 1388595 (D. Colo. Apr. 23, 2012) the court refused to sanction a company for eliminating emails pursuant to a good faith document retention policy. *See id.* at *1. The plaintiff had argued that drastic sanctions (evidence, adverse inference and monetary) should be imposed on the company since relevant emails regarding her alleged disability were not retained in violation of an EEOC retention requirement. *Id.* at 1. The court rejected that argument, finding that sanctions were inappropriate because the emails were overwritten pursuant to a reasonable data retention policy before the common law preservation duty was triggered. *See id.* at *4.

The court also determined that sanctions would be inappropriate since plaintiff managed to obtain the destroyed emails from a third party. *See id.* at *6. Without expressly mentioning “proportionality,”

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the court implicitly drew on the “other source” language from Rule 26(b)(2)(C) to reach its “no harm, no foul” approach. Given that the plaintiff actually had the emails in question and there was no evidence suggesting other ESI had been destroyed, proportionality standards tipped the scales against sanctioning the company for not observing a regulatory retention norm.

The *Grabenstein* case reinforces the notion that a party’s preservation obligations must be analyzed through the lens of reasonableness and proportionality. *See Pippins v. KPMG LLP*, 279 F.R.D. 245, 255 (S.D.N.Y. 2012) (explaining that “proportionality is necessarily a factor in determining a party’s preservation obligations”). In addition, *Grabenstein* teaches organizations to develop and then follow reasonable retention policies that eliminate data stockpiles before litigation is reasonably anticipated. *See Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed. Cir. 2011) (approving corporate retention policies adopted for “good housekeeping” purposes). It also demonstrates the value of deploying a timely and comprehensive litigation hold to ensure that relevant ESI is retained once a preservation duty is triggered. *See Viramontes v. U.S. Bancorp*, No. 10 C 761 (N.D. Ill. Jan. 27, 2011) (denying

sanctions motion since defendant issued a timely litigation hold to preserve relevant documents once a preservation duty attached). By following these “good faith business procedures,” organizations can establish a defensible information governance plan that is consistent with principles of proportionality.

Encourage Cooperation in Discovery


The *Pippins v. KPMG L.L.P.*, 279 F.R.D. 245 (S.D.N.Y. 2012) case exemplifies how proportionality also encourages litigants to cooperate in discovery. In *Pippins*, the court ordered the defendant accounting firm to preserve thousands of employee hard drives. *See id.* at 255-56. The firm had argued that the high cost of preserving the drives was disproportionate to the value of the ESI stored on the drives. *See id.* at 249-250. Instead of preserving all of the drives, the firm hoped to maintain a reduced sample, asserting that the ESI on the sample drives would satisfy the evidentiary demands of the plaintiffs’ class action claims. *See id.* at 249.

The court rejected the proportionality argument primarily because the firm refused to permit plaintiffs or the court to analyze the ESI found on the drives. *See id.* at 254. Without any transparency into the contents of the drives, the court could not weigh the benefits of the discovery against the alleged burdens of preservation. *See id.* The court was thus left to speculate about the nature of the ESI on the drives, holding that it went to the heart of plaintiffs’ class action claims. *See id.* at 254-55. As the court caustically noted, the firm may very well have obtained the relief it requested had it engaged in “good faith negotiations” with plaintiffs over the preservation of the drives. *See id.* at 254.

The *Pippins* decision reinforces a common refrain that proportionality is generally available to those parties who have engaged in reasonable, cooperative discovery conduct. Staking out unreasonable positions in the name of zealous advocacy stands in stark contrast to the clear trend that discovery should comply with the cost-cutting mandate of Rule 1. Cooperation and proportionality are two of the principal touchstones for effectuating that mandate. As *Pippins* demonstrates, the failure to cooperate may very well foreclose proportionality considerations.

Encourage Better Information Governance Practices

Proportionality also encourages organizations to think ahead and develop effective information governance practices, a point emphasized in *Salamone v. Carter’s Retail, Inc.*, No. 09-5856 (GEB), 2011 WL 310701 (D.N.J. Jan. 28, 2011). In *Salamone*,



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the court denied a motion for protective order that the defendant retailer filed to stave off the collection of thousands of personnel files. *See id.* at *1. The retailer had argued that proportionality precluded the search and review of the personnel files. *See id.* at *6. In support of its argument, the retailer asserted that the nature, format, location and organization of the records made their review and production too burdensome: “[T]he burden of production . . . outweigh[s] any benefit to plaintiffs considering the disorganization of the information, the lack of accessible format, the significant amount of labor and costs involved, and defendant’s management structure.” *Id.* (internal quotation marks omitted).

In rejecting the retailer’s position, the court identified its information retention system as the culprit for its burdens. *See id.* at *12. That the retailer, the court found, “maintains personnel files in several locations without any uniform organizational method does not exempt Defendant from reasonable discovery obligations.” *Id.* After weighing the various factors that comprise the proportionality analysis under Rule 26(b)(2)(C), the court concluded that the probative value of production outweighed the resulting burden and expense on the retailer. *See id.*

Having an intelligent information governance process in place could have addressed the cost and logistics headaches that the retailer faced. Had the records at issue been digitized and maintained in a central archive, the retailer’s collection burdens would have been significantly minimized. Furthermore, integrating these “upstream” data retention protocols with “downstream” eDiscovery processes could have expedited the review process. The *Salamone* case teaches that an integrated information governance process, supported by effective, enabling technologies, will likely help organizations reach the objectives of proportionality by reducing discovery burdens and making them more commensurate with the demands of litigation.

Conclusion

The foregoing cases exemplify how proportionality standards can help lawyers and litigants conduct eDiscovery in an efficient and cost-effective manner. By faithfully observing these principles, organizations truly stand a better chance of conducting litigation in a “just, speedy, and inexpensive” manner. *See* FED. R. CIV. P. 1. This will ultimately reduce the costs and burdens of litigation.

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How to Develop and Maintain Good and Lasting Client Relationships With In-House Corporate Counsel

by Virginia Smith and Paul Tyler

As a profession, the practice of law is both a business for the lawyer and a service to the client. Depending on the practice and point of view, the lawyer may order these attributes differently, but care must be taken to balance them to avoid the inherent conflict of interest with the client who sees the lawyer as their advocate providing effective and efficient low cost service first and foremost. As with any service, the client expects the relationship to be a sort of professional friendship with the most important aspects being trust and good communication. The client wants to know that the lawyer has his/her every best interest in mind, including issues relating to billing, efficiency, competency, and ethics. Corporate clients with in-house counsel on staff present additional challenges. For most businesses, legal issues come with the territory, and managers quickly realize that in-house staff attorneys can do much of the routine and specialized work cheaper and more efficiently than outside counsel. When legal needs exceed staff resources, in-house lawyers act as purchasing agents for the selection, hiring, managing, and directing of outside counsel. What follows is intended to provide insight into the thinking that goes on when in-house corporate counsel retain outside counsel, highlight the expectations that in-house counsel have with regard to their outside attorneys, and identify areas where these professional relationships can be improved.

Larger companies use many different law firms based on geographies and expertise, and outside counsel should not be offended by that. Be gracious in encouraging quick calls from in-house counsel to field questions. Provide a sounding board

for us. When you start getting unexpected calls out of the blue for quick advice on an issue in your area of expertise, you should know that you have become valuable to the in-house lawyer in a way that will likely lead to additional legal work down the line. You are providing expertise that cannot be efficiently maintained in the corporate law department on a permanent basis.

Many companies now require every attorney/law firm to be vetted through a vendor management process that might include a Sensitive Information/Non-Disclosure Agreement ("NDA") and a W-9 certification of the vendor's taxpayer identification number. Most large companies have sophisticated vendor retention and tracking processes with which vendors must comply. The company may be under strict regulatory restrictions with regard to what the NDA requires of the company's outside vendors. You may need to sign the NDA in order to continue to get work from the company.

Communication

First and foremost, there can be no surprises. Outside counsel must advise in-house counsel early on of the potential for bad results as well as higher than estimated costs and deadlines that may be missed. It is not possible to over communicate. Clients need to be kept apprised of every significant potential impact or outcome that may be encountered as a result of being involved in the matter at hand. These issues could include potential adverse judgments or other financial impacts, damage to reputation, the

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sheer length of time the client may potentially be embroiled in the matter, the extensive costs and fees that could be incurred, and fines or even criminal impact. As in all relationships, good communication prevents misunderstandings and the resulting hard feelings that could negatively affect the representation. This expectation goes both ways. Encourage in-house counsel to give you explicit, unambiguous direction of what they want and expect on a specific project and from you generally so that what you produce will be what is desired. This helps avoid the write down of your bill for your work due to dissatisfaction with the final product.

Responsiveness

Act like we are your most important client. Treat us like our work is your highest priority. Delay or neglect is the number one reason given for most complaints against attorneys, and yet this is the easiest way to keep your client happy. It is so simple! Making the client feel that their case is important to you will go a long way toward a successful representation and repeat business. Be available on a moment's notice. We enjoy the more balanced lifestyle of an in-house position. You may get a call at 5 p.m. on Friday afternoon. Show that you have our back and that you will be there to support our every need. We expect you to promptly return phone calls or respond to inquiries. Few things aggravate us more than having our calls or inquiries ignored. Establish clear agreements regarding completion deadlines or timelines for longer projects. Perform timely and keep us apprised of schedules and timing. If you are unlikely to meet a deadline, advise us in advance of the deadline passing.

Be Cost Conscious

Often the biggest source of stress for in-house lawyers is anxiety about the mounting fees and costs. Companies take several actions in an attempt to control costs, including requiring budgets and/or cost estimates from outside counsel, implementing RFP bid processes to select law firms on large cases/projects, scrutinizing invoices, regularly reviewing cases, exploring alternative fee arrangements, and ramping up internal legal expertise to contain costs. In-house counsel are typically held responsible for managing outside lawyers and are accountable when the bill is out of proportion to the results achieved. In-house lawyers have to be clear about their expectations and outside lawyers must be careful not to exceed them, but often expectations about the fees and costs are not addressed until it is too late. The best practice is for outside counsel to not incur a large bill without setting proper expectations up front. Nothing is more damaging to the relationship than arguing over the bill and having to write it down. If the client requests an initial litigation plan and budget, it should be forwarded as expeditiously as possible. If you have a budget, either stick to it or obtain permission to exceed it in advance. Budgets can and do change for legitimate reasons. However, outside counsel may be asked to help the in-house lawyer explain to management why the extra costs are justified.

Status letters should be sent at regular intervals of not less than quarterly if there is activity in the case and more frequently should events warrant. These letters should contain updated assessments as to liability and evaluation of damages, as well as

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any proposed change in strategy, anticipated discovery or costs. Staff the project appropriately and provide staffing continuity whenever possible. Companies are always looking for billing discounts, so feel free to take the initiative to offer discounts, especially when you get a lot of work from a particular company. Negotiate creative billing arrangements (fixed fee, blended hourly rate, contingency fee). Should your firm desire to change any established rates or costs, such changes must be submitted to and approved by your client before they are scheduled to go into effect. Billing rates charged to subsidiaries and affiliates of the company should not exceed current rates applicable to the company. Outside counsel should consult and obtain the approval of the responsible in-house attorney prior to obtaining the services of third party consultants. The client may be able to provide or obtain such services more economically. In litigation, use document review vendors, where appropriate. Do not overkill a case, i.e. no excessive research/unnecessary memos. Just because a client wants to prevail does not mean you should file every available motion, especially those with little chance of success.

Be Right and Give Clear Advice

Do high quality work. Identify issues and advise appropriately, but make sure you understand what the client wants. Companies have lots of choices when it comes to outside counsel and you need to give the client a reason to have faith in your advice and work product. Be honest with yourself about whether your law firm has the expertise and staffing needed to handle the service being requested. In-house counsel expects the firm to volunteer its candid assessment as to whether the potential referral matter lies within the firm's areas of expertise and whether it can be handled economically and efficiently, given the firm's capabilities, current work volumes, and staffing levels. Practical, usable advice is always appreciated. In-house counsel want help in solving problems. Lengthy, rambling, expensive research, opinions and advice serve no one and foster distrust. If a project regards a matter for which there is likely no definitive response, discuss with in-house counsel whether they want you to turn over every stone or whether something less will suffice. Offer in-house counsel viable alternatives. Give recommendations along with a disclosure of risk. Keep in-house counsel abreast

of important issues and protect their interests. For the most part, the newsletters that firms send out updating clients about changes to the law or important court decisions are highly valued as tools used by in-house counsel to keep well informed.

Tell in-house counsel if their case is weak. Outside counsel must retain independence and objectivity and freely express their views. Don't be afraid to tell in-house counsel when the likelihood of success is small or the cost of a matter is excessive relative to its size. In most of these cases, it makes sense to settle early. Propose alternatives to litigation (ADR). Do not wait too long to enter into serious settlement discussions. Companies seek outside counsel proactive in timely and efficient problem resolution. In-house counsel should be notified immediately of settlement opportunities. Exploration of settlement in early stages of litigation is beneficial. Requests for settlement authority should be transmitted to the responsible

in-house counsel, who must authorize all settlement discussions.

"Do not undermine the in-house lawyers. They are in the best position to determine the organizational hierarchy within the company necessary to administer the case."

Know Who The Client Is

There are two sides to this issue. First, you should learn all you can about your client's business, strategies, policies, and corporate culture. The better you understand what

the company does and how it operates, the better you will represent the company and the more comfortable the company will be to seek your counsel. You need to understand the difficulties and risks the company is facing. You should understand that there has been a shift in the regulatory environment for many companies. Show the company that you "get" what it is dealing with.

The other side of "knowing" your client is to understand that in-house counsel are your client and they alone are authorized to select, hire, manage, and direct you, unless you are directed otherwise by in-house counsel. Do not undermine the in-house lawyers. They are in the best position to determine the organizational hierarchy within the company necessary to administer the case. Do not accept work referred directly by an employee outside the legal department without prior approval of in-house counsel or a senior company officer.

Conflicts of Interest

Always bring potential conflicts of interest to the attention of in-house counsel immediately. Attorneys are expected to have sophisticated systems to identify potential conflicts of interest. In-house counsel understand that your work with their company can tie up your law firm regarding accepting other work and that many conflicts are more technical than problematic. Most of the time, potential or theoretical conflicts will be waived once the client has been properly advised, but nothing is more offensive to the sense of trust than for a client to find out later the firm is dealing with a competitor, representing an adverse party, or suing the client in another context. Remember that companies may have subsidiaries and affiliates for whom outside counsel may not have directly performed legal work, but which probably ought to also be listed in your client database so that potential conflicts of interest can be easily identified. If the company declines to waive the conflict, it is probably because in-house counsel is aware of a dispute that could arise with the other party that may create problems for the company.

Protection of the Attorney-Client Privilege and the Work Product Doctrine

Protection of the attorney-client and work product privileges is a priority consideration to in-house counsel in referring work to outside counsel. Firms are expected to have established policies and procedures which will assure adherence to these privileges. Firms are expected to familiarize themselves with, and conform to, the company's procedures for identifying and preserving corporate confidences. All steps must be taken to protect and preserve the attorney-client and work product privileges.

Collaboration

Recognize that in-house lawyers often have extensive experience in various practice areas and are uniquely positioned to collaborate with outside counsel. Partner with in-house counsel. Do not be afraid to call on that knowledge and expertise or the knowledge that in-house counsel has of other departments as you do work for the company. Be flexible and creative in the degree of in-house counsel involvement. This collaboration can range from litigation management of outside counsel, to attorney work share, to in-house counsel doing the majority of the work on the case with outside counsel acting in an advisory role. Let in-house counsel help to develop strategy and budget. In-house counsel will determine what level of involvement they want to have. Copies of all letters, pleadings, motions, briefs, and memoranda should be sent to the responsible in-house attorney. Do not be offended if in-house counsel edits your work. Hopefully, together the

work product will be improved. Send all such documentation in a format that can be edited within a reasonable time to allow a meaningful review. If time does not permit this, the outside attorney should orally outline the strategies and objectives prior to filing. In any matter that may eventually be litigated, work with in-house counsel as early as possible to determine whether a litigation hold is needed and, if so, to put one in place. Use in-house counsel to assist with litigation holds, the collection of documents, and interviewing of company employees.

In conclusion, the most important way to gain the trust of in-house counsel and earn repeat business is to accurately perceive, interpret and accommodate our needs. That means being responsive to a fault, business oriented and problem solving in your approach, and as efficient as you can be in achieving those goals. During the course of representation, it is essential that you manage our expectations and inform us of significant impacts and exposures so that we are not surprised. If you do these simple things, we will come back time and time again and not only become your clients and colleagues, but your friends as well which creates the foundation for a satisfying, successful, and long lasting relationship.

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The Limited Scope of the Wrongful Lien Statute

by Michael Barnhill

Many litigators have had the experience of receiving a demand letter informing them that a client's lien is wrongful and that it must be removed. Many of those same attorneys have responded to complaints and petitions to nullify the supposedly wrongful lien. In Utah, many practitioners and jurists alike misapply Utah's wrongful lien statute found in the Utah Code *see* Utah Code Ann. § 38-9-1 *et seq.* The confusion occurs when the unenforceability of a lien becomes synonymous with "wrongful."

"Unenforceable" and "Wrongful" are Synonymous.

Prior to 2009, courts often held that unenforceable liens were wrongful. For example, in *Russell v. Thomas*, 2000 UT App 82, 999 P.2d 1244, a recorded notice of interest was held to be a wrongful lien because the agreement upon which the defendant relied when he filed the notice of interest did not give him an interest in the real property at issue. *See id.* ¶¶ 14-15. Similarly, in another case, a notice of interest recorded by a lien claimant was held to be wrongful because the notice of interest included land in excess of what the lien claimant could arguably claim it had a right to under the real estate contract. *See Commercial Inv. Corp. v. Siggard*, 936 P.2d 1105 (Utah Ct. App. 1997).

Courts have also held that purported mechanic's liens can be wrongful. In *Packer v. Cline*, 2004 UT App 311, 2004 WL 2021277, Cline filed a mechanic's lien that failed to substantially comply with the mechanic's lien statute because he did not include several elements required by statute. *See id.* *2-*3. Because of these deficiencies, the trial court held that the lien was not actually a mechanic's lien, was not expressly authorized by statute, and was wrongful. *Id.* *3. The Court of Appeals agreed on appeal. *Id.* *3-*4.

In each of these cases, the Utah Court of Appeals held that various liens were wrongful because they were somehow defective. These defects clearly make the liens unenforceable, but do they also make them wrongful? Prior to 2009, the answer was not clear. The case law shows that if there was a procedural

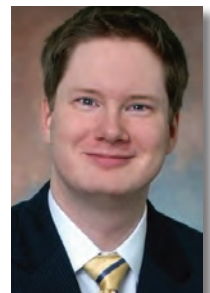
defect, or if it turned out that the party filing the lien or notice of interest somehow overstepped its bounds, courts could not only declare the lien unenforceable, but they could also find the lien to be wrongful. This subjected the lien's filer to the damages statutorily allowed in Utah Code section 38-9-1. *See* Utah Code Ann. § 38-9-1 (2010). Now, however, the Utah Supreme Court has stepped into the fray and issued two opinions that clarify the breadth of the Wrongful Lien Act as codified in section 38-9-1.

Separating Wrongfulness from Unenforceability

The first of these cases is *Hutter v. Dig-It, Inc.*, 2009 UT 69, 219 P.3d 918. This case, like the others, involved a defective lien. *See id.* Dig-It, Inc. failed to file a preliminary notice as required by the mechanic's lien statute, and this failure rendered the mechanic's lien unenforceable. *See id.* ¶ 43. The Hutters believed that the unenforceability of Dig-It's mechanic's lien made it wrongful, and they had plenty of case law to support their position. *See id.* ¶ 10. Despite the fact that the *Hutter* court agreed with the trial court that the lien was unenforceable and therefore void, making it unnecessary for the *Hutter* court to address the wrongful lien issue, the *Hutter* court took the "opportunity to clarify the reach of the Wrongful Lien Injunction Act." *Id.* ¶ 45.

On appeal, the parties agreed that a lien is wrongful under section 38-9-1 if it is not "expressly authorized" by statute; however, the parties disagreed as to the meaning of "expressly authorized." *Id.* ¶ 46. Dig-It believed that "because the right to file a mechanic's lien is granted by statute, all mechanic's liens – even if they

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ultimately prove unenforceable – are expressly authorized by statute and therefore are not wrongful liens.” *Id.* The *Hutter* court argued that the statute only authorizes liens that comply with the statute at issue and that unenforceable mechanic’s liens are not expressly authorized because they do not comply with the mechanic’s lien statute. *See id.* The *Hutter* court found that both interpretations were plausible, and held that Utah Code section 38-9-1 was ambiguous. *See id.* ¶ 49. Because of this ambiguity, the *Hutter* court examined the Wrongful Lien Act’s legislative history.

The *Hutter* court quoted three state senators who addressed the scope of the Wrongful Lien Act. Senator Carling identified a problem with the proposed language of the Wrongful Lien Injunction Act, which initially included the phrase “or otherwise invalid” when defining wrongful liens. *See id.* ¶ 50. Senator Carling brought up the example of a person who thought he had filed a valid lien that actually turned out to be invalid, and said that the “or otherwise invalid” language was too broad because it could be interpreted that such a lien was wrongful under the Wrongful Lien Act. *See id.* In response to Senator Carling’s concern, there were discussions regarding the Wrongful Lien Act’s intended purpose. *See id.* The quotations from other senators make it clear that the Wrongful Lien Act was directed only at common law liens because various groups who did not like the actions of some state legislators had filed common law liens against their property. *See id.*

Because of these statements, the *Hutter* court said, “This legislative history makes clear that the legislature intended that the definition of ‘wrongful lien’ should encompass only common law liens. Therefore, we conclude that the phrase ‘not expressly authorized by . . . statute’ in the Wrongful Lien Act does not include statutorily created liens that ultimately prove unenforceable.” *Id.* ¶ 52. The Utah Supreme Court confirmed this interpretation two years later when it said, “We note that even if there were untimely liens here, those liens would not be wrongful under the Wrongful Lien Act.” *Gen. Constr. & Dev. v. Peterson Plumbing Supply*, 2011 UT 1, ¶ 6 n.4, 248 P.3d 972.

The Utah Supreme Court has recognized that an unenforceable lien is not necessarily synonymous with a wrongful lien. It is entirely possible that a person who has filed a lien that turns out to be unenforceable and void had good reason to believe that he had a right to file a lien against property and that the lien was “expressly authorized” by statute. After *Hutter* and *Peterson Plumbing*, parties that file such liens authorized by statute will not be punished for filing a lien that they, in good faith, believed

they had a right to file. These holdings will also allow parties to better analyze liens that they believe to be wrongful.

Advising Clients

Issues involving claims of wrongful lien often occur when a mechanic’s lien or notice of interest are recorded. Property owners who believe that the lien claimant is not entitled to record a lien often threaten to enforce various claims they believe they have, including claims for wrongful liens. Attorneys advising plaintiffs regarding wrongful liens should be sure to point out that Utah Code section 38-9-7(5)(c) provides that if the court determines a lien to be valid, the court may award attorney fees and costs to the lien claimant. *See* Utah Code Ann. § 38-9-7(5)(c) (2010). When attorneys are presented with facts that may support a wrongful lien claim, they should carefully analyze the facts and consider the holdings of *Hutter* and *Peterson Plumbing* to ensure that they bring wrongful lien claims only in the proper circumstances. Otherwise, their clients are exposed to potential liability for the lien claimant’s attorney fees and costs.

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The Death Penalty: Debating the Moral, Legal, and Political Issues

Edited by Robert M. Baird & Stuart E. Rosenbaum

Reviewed by Ralph Dellapiana

“In early October 1283, Prince David of Wales was hanged, drawn, and quartered for an attack during the Easter season against the English King Edward.” *The Death Penalty: Debating the Moral, Legal, and Political Issues*, starts with a graphic look at the historical use of the death penalty, and then describes its rapidly declining use in most of the modern world.

The editors, both professors of philosophy at Baylor University in Texas, have compiled a compendium of some thirty articles by a diverse selection of authors on both sides of the issue. The book is divided into six sections, covering topics including: the history and current status of the death penalty, arguments for and against the death penalty, whether lethal injection is cruel or unusual, whether capital punishment may be applied to crimes other than murder, such as the rape of children, how DNA advances have led to the exoneration of innocent people who would otherwise have been executed, and whether obvious racial disparities in the application of the death penalty make it unconstitutional.

Historically, the book notes, the death penalty was the norm. In 7th Century B.C., the Draconian Code of Athens made the death penalty the punishment for all crimes. In Europe people were hanged, drawn and quartered or both, pressed to death under stones, or burned alive. Until almost the 20th Century, “death was a standard punishment for almost any offense against established authority” be it church or state.

Religions, ironically, have been the source of much death. “The Inquisition was a natural Catholic response to the Protestant Reformation, and it demanded death by burning at the stake for many thousand of heretics who refused to bend to the authority of Catholicism.” And, seventh-century America saw witch hunts that produced torture and execution on religious grounds. Individuals were executed for murder, burglary, forgery, arson,

and theft. Among modern religions (note that the authors discuss only Christian religions), Evangelicals support the death penalty, and Catholic and Protestant oppose it. Notably, the authors list the LDS Church separately, perhaps because of its unique position “neither promoting nor opposing” capital punishment.

It wasn’t until almost the 20th Century that the death penalty was called into question at all. The authors suggest that one reason for the common use of the death penalty in those early American times was that there were, “no prisons where offenses against community standards might be expiated by ‘serving time.’” But in modern times the death penalty has been widely disavowed as a human rights violation in most of the world. As the authors note, “in the ‘first world,’ the world of the Western democracies, the practice of capital punishment does not exist except in the United States of America.”

And even here in America there is a recent movement away from the death penalty. For example, over the last ten years, citing “evolving standards of decency,” the United States Supreme Court has found the death penalty to be “cruel and unusual punishment” when applied to the mentally retarded, see *Atkins v. Virginia*, 536 U.S. 304 (2002), to murders committed by juveniles, see *Roper v. Simmons*, 543 U.S. 551 (2005), and to crimes not involving death, such as rape of a

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child, see *Kennedy v. Louisiana*, 554 U.S. 407 (2008). And five states in the last five years have ended the use of the death penalty: New York, New Jersey, New Mexico, Illinois, and now Connecticut. Repeal legislation is pending in a few other states, and the question will be on the ballot for a referendum in California this fall.

But other states (like Utah) have continued to expand the categories of cases to which the death penalty applies, and states like Texas and Georgia have recently executed men despite evidence of potential innocence. Moreover, the majority of Americans, when asked the simple question if they are “for” or “against” the death penalty, still answer in support of it. Thus, the death penalty debate in America is pervasive and divisive. Consequently, *The Death Penalty: Debating the Moral, Legal and Political Issues* is as timely as it is informative.

Support for the death penalty is highlighted in the book. For example, the authors include the dissenting opinions in *Kennedy v. Louisiana* and other articles in favor of permitting the death penalty for non-death crimes such as child rape. And, adamant support for the necessity of the death penalty is argued in the article *The Morality of Anger*. The author here has a simple message, “We punish criminals principally in order to pay them back, and we execute the worst of them out of moral necessity.” Where “the worst of them” are concerned, the author eschews both rehabilitation and deterrence, stating, “We surely don’t expect to rehabilitate them,” and “It would be foolish to think that by punishing them we might thereby deter others.” He asserts support for his position from Simon Wiesenthal, Abraham Lincoln, Albert Camus, and William Shakespeare. And for the most pithy summary of his position he quotes Aristotle: “Anger is accompanied not only by the pain caused by the one who is the object of anger, but by the pleasure arising from the expectation of inflicting revenge on someone who is thought to deserve it.”

Several other key death penalty issues are also covered in the book. Regarding method of execution, there are seven chapters concerning lethal injection, including the main opinion from *Baze v. Rees*, 553 U.S. 35 (2008), the 2008 decision upholding lethal injection as a “humane” method of execution, as well as one dissenting and four concurring opinions.

The problem of executing innocent people has its own five-chapter

section, primarily pointing out that the technological improvements in DNA analysis have led to the exoneration and release from death row of numerous individuals. In addition, there is a 42-page article analyzing whether Texas executed an innocent man when they executed Cameron Todd Willingham for the arson death of his three small children. A panel of scientists unanimously found that “there was no scientific basis for claiming that the fire was arson, [the state] ignored evidence that contradicted their theory, had no comprehension of fire dynamics, relied on discredited folklore, and failed to eliminate potential accidental or alternative causes for the fire.” Yet, despite these serious questions about the reliability of the evidence in his case, Texas executed him anyway.

Utah has the death penalty. And there is strong general support for it despite complaints about how expensive it is, how it delays justice for the families of murder victims, how innocent people are executed, and how it is immoral to kill others except in times of war or in self-defense. Given the gravity and magnitude of the issues surrounding the death penalty, perhaps, as this book suggests, we in Utah should be open to a civil debate about the propriety of continuing to use it here.

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When it Comes to Ethics and Civility, Don't Use Your Head

by Keith A. Call

Recently, over 2,600 former players have filed nearly 100 separate lawsuits against the NFL for concussion-related injuries. The players allege the NFL concealed the long-term impacts of concussion injuries. See Nathan Fenno, *Former Redskins RB Stephen Davis Sues NFL Over Concussions*, WASH. TIMES, July 5, 2012, available at http://www.washingtontimes.com/blog/screen-play/2012/jul/5/former-redskins-rb-stephen-davis-sues-nfl-over-con/?tw_p=tw. These modern-day lawsuits are particularly interesting in light of modern day equipment – hard-shell helmets and other “protective” equipment used by football players.

Many pundits are suggesting that today's helmets are actually part of the *cause* of many of today's serious football injuries. That is because the hard-shell helmet, along with other football padding, can give a player a sense of invincibility that encourages harder, more damaging hits.

I learned this first-hand in high school. Our football team was known as a relentless, hard-hitting, and well-conditioned team. A year after I graduated I met a guy who played running back for an opposing team. Although my team lost the game, my former foe commented on how badly he was personally rocked when he played us. He was a victim of what we were taught: put your facemask in the opposing player's numbers and hold nothing back.

This phenomenon has brought several commentators to not-so-facetiously call for a ban of the football helmet. See, e.g., Reed Albergotti & Shirley S. Wang, *Is It Time to Retire the Football Helmet?*, WALL ST. J., Nov. 11, 2009, <http://online.wsj.com/article/SB10001424052748704402404574527881984299454.html>. The argument is that if football helmets were removed, players would behave better. More specifically, they would stop using their heads as weapons. There may even be empirical evidence to support this argument. Research suggests that helmeted NFL players are 25% more likely to sustain a head injury than their counterparts in the professional Australian rugby league, a comparable full-contact sport in which no helmets and no

significant padding are worn. See *id.*

What does this have to do with ethics and civility? The point I want to make is that just because you can do something under applicable rules does not mean you *should*. Good ethics and civility require more than written rules and standards. They require a good conscience and good character, traits that are developed over a lifetime of practice. And sometimes the best lessons are the ones we learn from our own mistakes.

Now, I'm not calling for a repeal of written rules and standards governing ethics or civility. They certainly have their place. Taken to its extreme, the no-helmet theory would also suggest that we replace automobile airbags with spears that would impale drivers in an accident. See John Tamny, *Memo to the NFL: To Reduce Concussions, Ban Football Helmets*, FORBES, May 27, 2012, available at <http://www.forbes.com/sites/johntamny/2012/05/27/memo-to-the-nfl-to-reduce-concussions-ban-football-helmets/>. While I'm certain such measures would drastically reduce aggressive and unsafe driving practices, I vote we stick with seatbelts and airbags.

So let's not abandon written rules of ethics and civility. But this little discourse is a public reminder to myself, and perhaps others, that using your helmeted head as a weapon is not always the best idea. Instead of always pushing the envelope on what the written rules and standards allow, perhaps we would all be better off paying a little more attention to what the little man or woman on our shoulder is trying to whisper in our ears.

KEITH A. CALL played for the 9-2 Wasatch Wasps in 1982. He is now a shareholder at Snow, Christensen & Martineau, where his practice includes professional liability defense, IP and technology litigation, and general commercial litigation.



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Michael joins the firm's Environmental, Energy & Natural Resources Practice Group, concentrating his practice on environment and natural resources counseling and litigation, focusing on Federal Endangered Species Act, water law, water rights and Clean Air Act compliance. Prior to joining Parsons Behle & Latimer, Michael was senior counsel at Crowell & Moring, LLP in Washington D.C. He has also served as legal advisor to the governors of California and Idaho. Michael is licensed in Idaho, the District of Columbia and California.

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Looking for the Lorax¹ on Utah's Capitol Hill: SB 11 and the Re-Balkanization of State Agency Administrative Procedures

by Alvin Robert Thorup

Apparently because some powerful people were unhappy with one or more decisions of the Utah Department of Environmental Quality (DEQ) and its citizen decision-making boards, likely involving hazardous waste storage, the 2012 Utah Legislature made sweeping changes in how environmental permit matters will be decided in two bills. Senate Bill 21 shrunk and revamped the boards and the substantive rules on permit matters, while Senate Bill 11 provided new administrative procedures to be followed by the DEQ in granting or denying environmental permits. Prior to S.B. 11, the DEQ, like all other state agencies, was subject to the Utah Administrative Procedures Act (UAPA). See Utah Code Ann. §§ 63G-4-101 to -401 (2011). I believe the Utah Legislature made a mistake by creating special administrative procedures for the DEQ. Instead, UAPA should continue to govern the DEQ.

First, some background

If someone looked at the Utah Code in 1981, the provisions dealing with agency administrative procedures were obviously in disarray. Between 1945 and 1981, each time a new state agency was created or a new power was given to a state agency, new and separate administrative procedures were provided for each agency. As noted in *Utah's Administrative Procedures Act: A 20-Year Perspective*:

By 1981, the Utah Code was a "crazy quilt" of varying agency procedures and varying avenues for judicial review of agency actions. Citizens were practically required to use expensive specialist lawyers with continuing experience in a particular agency in order to navigate the shoals of that particular agency's proceedings. Even skillful trial lawyers were often stymied by the Byzantine and Balkanized structure of agency hearings and

appeals in Utah. Appellate court decisions, moreover, were of limited value because the interpretation of one agency's procedural statutes might not apply to any other agency.

Alvin R. Thorup & Stephen G. Wood, *Utah's Administrative Procedures Act: A 20-Year Perspective* 22 n.19 (2009).

To correct this situation, a blue ribbon and bipartisan committee was appointed by Governor Matheson and Attorney General Wilkinson in 1982 to look at providing uniform administrative procedures for Utah state agencies. The result of this effort was the UAPA, adopted nearly unanimously by the 1987 Utah Legislature. As part of UAPA, substantially all separate agency administrative procedures, then existing outside of UAPA in the Utah Code, were repealed, and substantially every state agency, including the DEQ, was required to follow the UAPA when conducting adjudicative proceedings, like deciding whether to grant or deny a requested environmental permit. UAPA enabled ordinary citizens and their lawyers and other advisors to move from agency to agency as their business or personal needs directed them, knowing that the same procedures applied throughout state government. UAPA also allowed a reduction in the workload of the Courts given that a decision on the procedures followed in one agency would now be applicable to all agencies. See *id.* at 22-40.

ALVIN ROBERT THORUP is Deputy City Attorney at the City of West Jordan. He was a member of the Utah Administrative Law Advisory Committee and the founding chair of the Utah State Bar Administrative Law Section.



So why was S.B. 11 proposed and adopted, and why was it a mistake?

As explained by one of the supporters of S.B. 11, Steven J. Christiansen of the Parr Brown Gee & Loveless law firm, at a recent meeting of the Administrative Law Section of the Bar (materials in the possession of the author) the sponsors' thought progression went like this:

1. The federal Environmental Protection Agency was told by the courts in the early 1970s that its administrative proceedings granting or denying permits needed to use the adjudicative hearings provided by the federal Administrative Procedure Act.
2. "Similarly, in Utah the UAPA generally prescribes that the administrative hearing conducted by state agencies be conducted as 'formal' adjudicatory hearings unless designated as informal by rule...."
3. Environmental permit cases got complex and costly in the course of the hearings held at the federal and state levels.
4. The EPA concluded recently that the 1970s cases were bad

law and has now decided to only have an APA hearing if someone is aggrieved by an EPA permit decision process.

5. Utah has been experiencing complex environmental permit cases at DEQ that take a lot of time and money to resolve.
6. S.B. 11 "resolves this problem by mandating the use of EPA-like appellate-type procedures in lieu of the UAPA formal adjudicatory procedures."

The premises for S.B. 11, particularly items two and six, are flawed. Under UAPA, agency action can be initiated by the agency, i.e. an intention by DEQ to revoke an existing environmental permit; and also can be initiated by a citizen, i.e. an application for an environmental permit. *See* Utah Code Ann. § 63G-4-201 (2011). Specifically, if a citizen requests agency action, the agency will,

promptly review [the request] and shall (i) notify the requesting party...that the request is granted; or (ii) notify the requesting party...that the request is denied and, if the proceeding is a formal adjudicative proceeding, that the party may request a hearing....;

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or (iii) notify the requesting party that further proceedings are required to determine the agency's response to the request.

Id. § 63G-4-201(3)(d).

Importantly, UAPA does not require that a hearing take place prior to the DEQ at least initially deciding what it wants to do on an application, and UAPA does not prescribe how long the DEQ needs to take nor the processes it will follow to decide, at least preliminarily, whether to grant or deny the requested action, nor did it prescribe the “further proceedings” that the DEQ might go through before any hearing in order to reach a decision on the requested action. If the decision was to deny the application, then a hearing could be requested to challenge that decision. Hence the basic selling point of S.B. 11, that hearings need only take place *after* the agency first decides, is moot given that same ability under the existing UAPA.

It has been my experience over the past twenty-five years that agencies and lawyers still too often confuse and conflate adjudicative proceedings with administrative hearings. A hearing may be a part, but only a part, of an adjudicative proceeding under UAPA. Indeed the sponsors and supporters of S.B. 11 are guilty of this fallacy, as shown in the expressed reasons for S.B. 11 listed above.

If the DEQ was experiencing increasing complexity and costs in resolving permit applications, it was not because the DEQ had to follow the UAPA, but because the DEQ did not understand and take advantage of the flexibility UAPA gave it to avoid hearings in the case of a granted application.

Although it is clear that S.B. 11 was unnecessary, it passed the Utah Legislature and now it has created special adjudicative procedures for the DEQ, just the situation that UAPA was adopted to stop. That is why I call S.B. 11 the “re-Balkanization” of Utah administrative law in the title of this article.

Although I argue that S.B. 11 was unnecessary and thus was a mistake, I will allow that the “EPA-like appellate-type” hearing procedure described in S.B. 11 might be seen as a valuable new model of administrative process in the granting or denial of permits by state agencies generally. The UAPA policy decision, that all state agency administrative process should be centralized in the UAPA and be available to all agencies uniformly, *see* Alvin R. Thorup & Stephen G. Wood, *Utah's Administrative Procedures Act: A 20-Year Perspective* 85 (2009), calls for such a process to be placed within the UAPA as an alternative

available to all agencies, rather than be “Balkanized” into only the DEQ statutes.

I call upon the Utah Legislature at the next opportunity to remove the new S.B. 11 procedures from the DEQ statutes and, if deemed necessary and valuable even after this discussion in this article, place them within the UAPA as a uniform option for all agencies.

S.B. 11 is internally flawed as well. For example, while its avowed desire is to rid DEQ of “UAPA formal adjudicatory procedures” S.B. 11, lines 171-72, elsewhere the bill provides that the administrative law judge must act “in accordance with [UAPA], *following the relevant procedures for formal adjudicative proceedings.*” S.B. 11, lines 264-66, *available at* <http://le.utah.gov/~2012/bills/sbillenr/sb0011.pdf>. Another example is the confusing way that the term “request for agency action” is used in S.B. 11. This term is not defined in S.B. 11, and so I must assume its meaning is as provided in UAPA. In S.B. 11 a request for agency action is to be filed to challenge the agency's decision on a denied application for an environmental permit. Yet if a request for agency action is as defined in UAPA, the request for agency action occurred when the application was filed. The hearing takes place, within the adjudicative proceeding, only if requested by an aggrieved party.

My last problem is that in a dozen or more places in S.B. 11, the user is referred back to governing provisions of the UAPA. The frequency with which the authors of S.B. 11 cite back to UAPA is also an argument implicitly made by them that S.B. 11 really is unnecessary, or that it should have been an amendment to UAPA.

In Dr. Suess's story *The Lorax*, recently made into a movie, the Lorax announces that he “speaks for the trees.” I wish that someone would be a Lorax on Utah's capitol hill and speak for the UAPA when administrative process problems in agencies are being discussed at the Utah Legislature. All too often these process problems are not the fault of the UAPA, but are the result of agencies, courts, and legislators not understanding the UAPA and its built in flexibility, and passing that misunderstanding off as gospel to new and inexperienced legislators. Such was the case with S.B. 11.

1. “The Lorax” is a book, and a character in a book, by Theodor Geisel, a/k/a/ Dr. Seuss. It is also the name of a Universal Studios/Illumination Entertainment motion picture based on the book. The author acknowledges that The Lorax and all Dr. Seuss characters enjoy trademark and copyright protection, pursuant to rights held by Dr. Seuss Enterprises, LP.



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Eisenberg Gilchrist & Cutt has formed a Federal False Claims litigation practice group and is now accepting referral of Federal False Claims Act cases. Our lawyers are available to assist firms and clients in screening cases and handling cases on co counsel or referral basis.

EGC Attorneys Jeffrey Eisenberg, Robert Sherlock, Jeffrey Oritt and Steve Russell all have experience prosecuting litigation under the FFCA. Additionally, EGC has formed a strategic alliance with Grant & Eisenhofer, one of the nation's leading firms in prosecuting FFCA, securities, corporate governance and antitrust litigation. Grant & Eisenhofer has successfully prosecuted scores of FFCA cases and was lead counsel in a recent FFCA case against Abbott Laboratories which resulted in a \$1.6 billion dollar recovery for the United States and the whistleblower parties. Together, EGC and G&E are available to co-counsel cases brought by relators throughout the U.S.

The FFCA has been one of the most effective tools in the Government's arsenal to fight fraud and waste of the taxpayers' money. Significantly amended and strengthened in 1986, 2009, and in the Affordable Care Act of 2011, the FFCA has been used to recover \$30 billion since 1986, and over \$9 billion just in the past three years. The law is so effective largely because of its provisions that provide for the whistleblower ("Relator") to receive between 15% and 30% of the proceeds of the action. Counsel is paid hourly fees plus a contingency fee on the whistleblower's share of recovery.

Often the whistleblowers are at high positions (regional directors, compliance officers, billing supervisors, chief financial officers, compliance and ethics officers, etc.). They come forward because they have done their best, within the company, to bring wrongdoing to the attention of more senior officials who can intercede. The FFCA provides strong protection against retaliation for these whistleblowers.

In addition to the Federal False Claims Act, other laws provide for whistleblower rewards and protection against retaliation. Particularly through the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), securities law violations become covered, including violations of the Foreign Corrupt Practices Act (FCPA) and Sarbanes-Oxley.

.....
Eisenberg, Gilchrist & Cutt is also proud to announce that

ROBERT D. SHERLOCK
has become counsel to the firm

Mr. Sherlock's practice focuses on a wide range of Civil False Claims (qui tam) cases representing whistleblowers ("Relators") in many industries, and other plaintiffs' health care fraud cases. He previously spent over 18 years in a wide range of health care administrative positions including serving as the Director of Health Sciences Center Compliance for a major university health care system, and is an experienced health care attorney, investigator, compliance auditor and litigator. He has served as General Counsel, Chief Financial Officer, and Chief Operating Officer for hospitals and health care entities. His practice has also included multi-million dollar verdicts in commercial litigation, lender-liability cases, breach of fiduciary duty cases, and a variety of false claims, anti-kickback and Stark Law violations, and medical malpractice.

Mr. Sherlock is a graduate of the University of Utah College of Law where he served as Editor-in-Chief of the Utah law review and was elected to the Order of the Coif. He also has a Masters' Degree in Public Administration specializing in Health Care Administration, and taught as a full-time Collegiate Professor for the University of Maryland University College, in its Masters' Degree programs in Health Care Administration.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the July 18, 2012 Commission Meeting held at the Sun Valley Inn in Sun Valley, Idaho.

1. The Commission approved the proposed Modest Means Referral Program as outlined with implementation to be developed through the committee and staff.
2. The Commission selected Samuel Alba and Judge David Nuffer to receive Special Service Awards at the Fall Forum in recognition of their outstanding work as federal court magistrates.
3. The Commission approved John Lund to serve a three-year term as their representative to the Utah Judicial Council to replace Lori Nelson.
4. The Commission approved the 2012-2013 budget as proposed and requested further discussion on longer-term commitments.
5. The Commission approved allocating \$50,000 for a contribution to the new S.J. Quinney College of Law Building at the University of Utah and required that lawyers be able to opt out of having their pro rata portion of that amount go to the building.
6. The Commission appointed the following Committee Chairs: Admissions: Steven T. Waterman and Hon. James Z. Davis; Bar Examiner: David K. Broadbent and Tiffany M. Brown; Bar Examination Administration: Michele Ballantyne; *Bar Journal*: William D. Holyoak; Budget & Finance: Ray Westergard; Character & Fitness: Bryon Benevento and Andrew Morse; CLE Advisory: Jonathan O. Hafen; Ethics Advisory Opinion: John A. Snow; Fee Dispute Resolution: William M. Jeffs; Fund for Client Protection: David R. Hamilton; Governmental Relations: Scott R. Sabey and Paxton R. Guymon; Mentor Training and Resource: Tracy Gruber and Troy Booher; Unauthorized Practice of Law: Sarah Spencer and Jonathan Rupp; 2012 Fall Forum: Susan Peterson and Rich Hartvigsen; 2013 Summer Convention: Scott R. Sabey.
7. The Commission appointed the following ex officio members for the 2012-2013 year: the Immediate Past Bar President; the Bar's Representatives to the ABA House of Delegates; Utah's ABA Members' Representative to the ABA House of Delegates; the Utah Minority Bar Association Representative; the Women Lawyers of Utah Representative; the Paralegal Division Representative; the J. Reuben Clark Law School Dean; the S.J. Quinney College of Law Dean; and the Young Lawyers Division Representative.
8. The Commission approved Lori Nelson, Curtis Jensen, Jim Gilson, Dickson Burton, and Rod Snow as members of the Executive Committee.
9. The Commission by resolution approved the members of the Executive Committee to serve as signators on the Bar's checking accounts.
10. The Minutes of the June 1, 2012 Commission Meeting were approved by consent.
11. The April 30th Report and Recommendations of the Client Security Fund were approved by consent.
12. Rod Snow reported that the Bar Commission had been contacted by lawyers who were interested in the process by which a name for the new federal courthouse would be selected and that the Commission would determine if it would be permissible or appropriate to have any formal or informal involvement.
13. Rob Jeffs and Hon. Eve Furse distributed proposed rules to govern the dissemination of information about legal services for approval at the August Commission Meeting.
14. Rob Rice reported on the meetings held by the Pro Bono Commission; recruiting meetings being held with law firms; and the number of volunteers who have signed up to date through the "Check Yes" box on the licensing forms.
15. Angelina Tsu and Christian Clinger reported on the number of volunteers who have indicated an interest in providing classes for the Civics Education Program and the events scheduled for the fall.

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



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Pro Bono Honor Roll

Adamson, Robert Jeremy — Tuesday Night Bar
 Anderson, Skyler — Immigration Clinic
 Angelides, Nicholas — Senior Cases
 Aramburu, Troy J. — Debtors Counseling Clinic
 Arnold, Brian — Service Member Attorney Volunteer Case
 Ashworth, Justin — Family Law Clinic
 Averett, Steven — TLC Document Clinic
 Backman, James — Family Justice Clinic
 Baker, James R. — Senior Center Legal Clinic
 Ball, Matthew J. — Tuesday Night Bar
 Barrus, Craig — TLC Document Clinic
 Bean, Melissa M. — Tuesday Night Bar
 Beck, Sarah — Debtors Counseling Clinic
 Beckstrom, Britt — SUBA Talk to a Lawyer
 Bennett, MaryAnn — Debtors Counseling Clinic
 Bertelsen, Sharon M. — Senior Center Legal Clinic
 Black, Michael — Tuesday Night Bar
 Bogart, Jennifer — Street Law Clinic
 Bradshaw, Donna — Cedar City Clinic
 Brown, Mary D. — Family Law Clinic, Tuesday Night Bar
 Brown-Roberts, Kathie — Senior Center Legal Clinic
 Burgin, Chad R. — Tuesday Night Bar
 Carr, Kenneth — Debtors Counseling Clinic
 Caudell, Joseph — Immigration Clinic
 Clark, Melanie R. — Senior Center Legal Clinic
 Conley, Elizabeth S. — Senior Center Legal Clinic
 Corbitt, Rasheedah — Family Law Clinic
 Cornish, Rita M. — Tuesday Night Bar
 Denny, Blakely J. — Tuesday Night Bar
 Dixon, Jason — SUBA Talk to a Lawyer
 Ence, Matthew — SUBA Talk to a Lawyer
 Farnsworth, Justin — Family Law Clinic
 Farr, Douglas P. — Tuesday Night Bar

Ferguson, Phillip S. — Senior Center Legal Clinic
 Fisher, Langdon — Family Law Clinic
 Forbes, Kimball — SUBA Talk to a Lawyer
 Foster, Shawn — Immigration Clinic
 Gehret, Michael A. — Tuesday Night Bar
 Gordon, Benjamin — SUBA Talk to a Lawyer; Probate Case
 Gosdis, Shane — Service Member Attorney Volunteer Case
 Guerisoli, Rick — SUBA Case
 Hall, Brent — Family Law Clinic
 Hansen-Pelcastre, Laura J — Tuesday Night Bar
 Harding, Sheleigh — Family Law Clinic
 Harris, Matthew — SUBA Talk to a Lawyer
 Hart, Laurie S. — Senior Center Legal Clinic
 Hogle, Christopher R. — Tuesday Night Bar
 Hollingsworth, April — Street Law Clinic
 Holm, Floyd — SUBA Talk to a Lawyer
 Hopkinson, Melanie — Family Law Clinic
 Hoskins, Kyle — Layton Legal Clinic
 Jensen, Michael A. — Senior Center Legal Clinic
 Johnson, Cameron B. — Tuesday Night Bar
 Jones, Jenny — SUBA Talk to a Lawyer; SUBA Case
 Jones, Michael F. — Domestic Case
 Julien, Stephen — Cedar City Clinic
 Junia, Edward — SUBA Talk to a Lawyer
 Kearl, J. Derek — Tuesday Night Bar
 Kesselring, Christian — Street Law Clinic
 Kessler, Jay L. — Senior Center Legal Clinic
 Lee, Terrell R. — Senior Center Legal Clinic
 Lisonbee, Elizabeth — Layton Legal Clinic
 Lund, Topher — SUBA Talk to a Lawyer
 Machlis, Benjamin — Tuesday Night Bar
 Mares, Robert G. — Family Law Clinic
 Marx, Shane — Rainbow Law Clinic

McCoy II, Harry E. — Senior Center Legal Clinic
 McDonald, Kathleen E. — Tuesday Night Bar
 Memmott, Alicia — Family Law Clinic
 Miller, Nathan D. — Senior Center Legal Clinic
 Mitchell, Kareema — Immigration Clinic
 Mitton, Matthew L. — Tuesday Night Bar
 Miya, Stephanie — Medical Legal Clinic; Employment Law Clinic
 Morgan, Happy — Domestic Case
 Morrow, Carolyn — Housing Cases; Family Law Clinic
 Motschiedler, Susan Baird — Tuesday Night Bar
 Mouritsen, Alan S. — Tuesday Night Bar
 Munson, Edward R. — Tuesday Night Bar
 Murphy, Carol — American Indian Clinic
 Naegle, Lorelei — SUBA Talk to a Lawyer
 Ockey, Celia — Family Law Clinic
 O'Neil, Shauna — Bankruptcy Hotline; Debtors Counseling Clinic; Family Law Clinic
 Otto, Rachel — Street Law Clinic
 Park, S. Jim — SUBA Talk to a Lawyer
 Paul, Valerie — Family Justice Clinic
 Paulsen, Ted — Senior Center Legal Clinic
 Pearson, Alexander N. — Tuesday Night Bar
 Preston, R. Christopher — Street Law Clinic
 Ryan, Rebecca — Tuesday Night Bar
 Sanchez, Jeffrey M. — Tuesday Night Bar
 Saunders, Robert — Park City Clinics
 Schofield, Thomas — Tuesday Night Bar
 Schulte, Elizabeth A. — Tuesday Night Bar
 Semmel, Jane — Senior Center Legal Clinic
 Silvestrini, Elizabeth L. — Tuesday Night Bar
 Smith, J. Craig — Street Law Clinic
 Smith, Linda F. — Family Law Clinic
 Stevens, Adam — Tuesday Night Bar
 Swensen, Lara A. — Tuesday Night Bar
 Swenson, Swen R. — Tuesday Night Bar

Tanner, Brian – Immigration Clinic

Tejeda, Engels – Tuesday Night Bar

Thomas, Michael – Tuesday Night Bar

Thorne, Jonathan – Street Law Clinic

Thorne, Matthew J. – Tuesday Night Bar

Thorpe, Scott D. – Senior Center Legal Clinic

Timothy, Jeannine P. – Senior Center
Legal Clinic

Tobler, Daniel – SUBA Talk to a Lawyer

Trease, Jory – Debtors Counseling Clinic

Tyler, Steven E. – Tuesday Night Bar

Walton, Sherri L. – Family Law Clinic

Washburn, D. Loren – Tuesday Night Bar

Wayas, Pleasy – TLC Document Clinic

Weckel, Ted – Family Law Clinic

Wells, Matthew G. – Tuesday Night Bar

Wharton, Christopher – Rainbow Law Clinic

Williams, Timothy G. – Senior Center
Legal Clinic

Winn, Matthew – SUBA Case

Winsor, Robert – SUBA Talk to a Lawyer

Woods, Kristin K. – Service Member
Attorney Volunteer Case

Wycoff, Bruce E. – Tuesday Night Bar

Yancey, Sharia – Domestic Cases;
Domestic Case

Yauney, Russell – Family Law Clinic;
Domestic Case

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



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Thank You

The Utah State Bar would like to extend a special thank you to the sponsors of the 2012 Summer Convention in Sun Valley:

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

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of the Verified Petition for Reinstatement ("Petition") filed by Mark A. Ferrin, in *In the Matter of the Discipline of Mark A. Ferrin*, Second Judicial District Court, Civil No. 070903677. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Utah State Bar 2012 Summer Convention Award Winners

During the Utah State Bar's 2012 Summer Convention in Sun Valley, Idaho the following awards were presented:

Pro Bono Commission
Committee of the Year

Estate Planning Section
Section of the Year



Sharon A. Donovan
Outstanding Mentor



Riley Josh Player
Outstanding Mentor



Hon. Royal I. Hansen
Judge of the Year



Gary R. Crane
Lawyer of the Year



Francis M. Wikstrom
Lifetime Service Award

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Bar Thank You

Many attorneys volunteered their time to review the Bar exam questions and grade the exams. The Bar greatly appreciates the contribution made by these individuals who assisted with the July 2012 Bar exam. A sincere thank you goes to the following:

Ryan Andrus	Michael Ford	Michael Lichfield	Stephen Schwendiman
Michaela Andruzzi	Jesse Frederick	Patrick Lindsay	Melanie Serassio
J.D. Ashby	Michael Garrett	Dennis Lloyd	John Sheaffer, Jr.
Mark Astling	Stephen Geary	Michael Lowe	Summer Shelton
Justin Baer	Tammy Georgelas	Marc Mathis	Paul Simonson
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Brent Bartholomew	Sam Goble	Terrie McIntosh	Jamie Sorenson
Kristy Bertelsen	Jacob Gunter	Elisabeth McOmber	Ryan Stack
Karla Block	Mark Hales	Branden Miles	Charles Stormont
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Comm. Anthony Ferdon	Susan Lawrence	Ann Rozycki	
	Tanya Lewis	Stephanie Saperstein	

2012 Fall Forum Awards

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

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

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

Supreme Court Seeks Attorneys to Serve on MCLE Advisory Board

The Utah Supreme Court is seeking applicants to fill two vacancies on the Utah Mandatory Continuing Legal Education Advisory Board. The purposes and objectives of the Board include oversight of the MCLE program, accreditation of CLE courses or activities, and handling of compliance issues. Appointments are for a three year term. No lawyer may serve more than two consecutive terms as a member of the Board. 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 October 1, 2012.



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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 1, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.1 (Competence), 1.3 (Diligence), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

While representing a client on a criminal matter, the attorney failed to comply with the Appellate Court's rules and procedures in the appeal of the client's case resulting in a failure to provide competent representation to the client. While the attorney's failures did not result in injury to the client's legal interests, such failures did expose the client to potential injury and did cause harm to the public, the legal system and the profession. The attorney acted negligently and the repeated failures in connection with the appeal displayed a lack of reasonable diligence and promptness in representing the client.

ADMONITION

On June 7, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.15(a) (Safekeeping Property), 1.15(b) (Safekeeping Property), 1.15(c) (Safekeeping Property), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), 5.3(c) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney deposited unearned fees into his general operating account. The attorney did not maintain a ledger for his attorney trust account. The attorney neglected to review his firm's accounting records. The attorney kept excess earned funds in his trust

account. The attorney provided inadequate instructions to the nonlawyer staff regarding the obligation to safekeep client funds and property; the attorney simply told the assistant the account could never be overdrawn.

ADMONITION

On June 21, 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(c) (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.4(a)(2),(3) and (4) (Communication), 1.5(b) (Fees), 5.3(a) (Responsibilities Regarding Nonlawyer Assistants), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

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In summary:

The fee agreement provided that the attorney “agreed to render legal service for all aspects of the bankruptcy case, including certain listed tasks.” The attorney claims that practitioners understand that a “bankruptcy case” only extends through confirmation. The attorney did not timely explain his understanding of the limited nature of his representation to the client and failed to properly limit the scope of his representation to exclude seeking sanctions. The client raised a mortgage company’s collections contacts with the attorney’s assistant early in the relationship. The assistant told the client in several conversations to document and inform the attorney’s office of all contacts with the mortgage company so the attorney could pursue sanctions on the client’s behalf. The client repeatedly provided responsive information to the assistant, who told the client the assistant was maintaining a file so that the attorney could file for sanctions. The client repeatedly asked the attorney’s office over a period of almost two years to seek sanctions, not only for monetary recovery, but also to stop the harassment by the mortgage company. However, it was not until almost two years later that the assistant informed the client that the attorney would not seek sanctions against the mortgage company because of doubtful collectability of any judgment. A disagreement ultimately arose between the attorney and the client as to sanctions. The attorney did not consult with the client in a timely manner to resolve the disagreement over pursuit of sanctions.

The attorney’s nonlawyer assistants had most of the contact with the client, including the preparation and review of legal documents, with only limited contact between the attorney and the client. There was little or no injury from the attorney’s violations.

Mitigating factors:

Absence of prior record or discipline; absence of a dishonest or selfish motive; difficulties of a small practice representing the general public at reasonable, accessible rates.

Aggravating factor:

Committed multiple offenses with regard to the clients; refused to acknowledge the wrongful nature of his misconduct, either to the client or the disciplinary authority; restrictions against nonlawyer assistants of practicing law; substantial experience in the practice of law.

PUBLIC REPRIMAND

On June 7, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of

Discipline: Public Reprimand against C. Danny Frazier, for violation of Rules 1.3 (Diligence), 3.2 (Expediting Litigation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Frazier represented a client in a criminal matter. Mr. Frazier failed to appear at a jury trial scheduled in the matter. Mr. Frazier represented another client in a criminal matter and failed to appear at a pre-trial conference in that matter. Mr. Frazier failed to act with reasonable diligence and failed to act with commitment and dedication to the interests of his clients by failing to appear at a jury trial in one matter and a pre-trial conference in another. Mr. Frazier’s failure to appear at the trial and pretrial conference caused injury to the public, the legal system and the profession. Mr. Frazier’s failure to appear in court for the jury trial and pre-trial conference resulted in a failure to reasonably expedite his client’s cases. Mr. Frazier’s mental state was negligent.

PUBLIC REPRIMAND

On June 6, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered four Orders of Discipline: Public Reprimand against James H. Deans, for violation of Rules 1.15(a) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary, in four separate cases:

Mr. Deans presented a check to a financial institution to be paid from his IOLTA trust account. The check was returned for insufficient funds. The financial institution sent to Mr. Deans a notice that he had insufficient funds in his IOLTA trust account. The OPC sent Mr. Deans an insufficient funds letter requiring a response. Mr. Deans did not respond to the OPC’s letter. Mr. Deans did not separate his client’s funds from funds of other clients by accounting properly for each client’s funds. Mr. Deans’s negligence led to insufficient funds in his IOLTA trust account. Mr. Deans failed to provide information as properly requested by the OPC.

PUBLIC REPRIMAND

On June 28, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Ryan R. West, for violation of Rules 1.1 (Competence), 1.4(a) (Communication), 1.4(b) (Communication), 1.5(a) (Fees), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. West failed to provide competent representation to his client. Mr. West did not have a good understanding of IRS appellate procedure and as such missed opportunities to advance his clients' interest. Mr. West lacked a good understanding of Tax Court procedure. This resulted in Mr. West being unable to appear in court because of his failure to gain admission to the Bar of the Tax Court. It also resulted in Mr. West failing to challenge adequately penalties that had been assessed against his client. Mr. West's involvement of a trained tax lawyer was inadequate; he did not involve the lawyer enough in the case. Mr. West failed to communicate adequately with his client and to keep him informed about developments. There were numerous emails from the client asking for updates. The client reached out to IRS counsel because he could not obtain information from Mr. West. Mr. West admitted that earlier he had reached the conclusion that the case was unwinnable yet he failed to communicate that to the client before the eve of trial. Mr. West's waiting until the eve of the trial to explain to his clients his assessment of the case resulted in his clients feeling compelled to capitulate to the IRS's demands. In light of Mr. West's lack of experience in tax cases, the fee charged was unreasonable. The unreasonable fee caused actual injury to the client. Actual injury to the client also occurred in the form of additional lawyer fees incurred, the loss of an opportunity to challenge alleged penalties and the inability to reassess the case and perhaps settle earlier and cut off interest accrual. Mr. West's state of mind was general negligence.

INTERIM SUSPENSION

On July 6, 2012, the Honorable Marvin D. Bagley, Fifth Judicial District Court, entered an Order on Rule 14-518 Hearing granting the OPC's Petition for Interim Suspension against JoAnn S. Secrist.

In summary:

Respondent filed numerous pleadings in district and appellate courts containing statements of personal opinion that were neither relevant nor helpful to the case. The pleadings raised concerns about whether Respondent was providing adequate representation for her clients.

STAYED SUSPENSION AND PROBATION

On May 11, 2012, the Honorable Fred D. Howard, Fourth Judicial District Court, entered a Findings of Fact, Conclusions of Law, and Order of Discipline suspending Michael Humiston from the practice of law for one year, with all but three months of the suspension stayed in favor of probation for a period of nine months in violation of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.4(a) (Communication), 1.4(b) (Communication), 1.6(a) (Confidentiality of Information), 1.7(b) (Conflict of Interest: General Rule), 1.14(a) (Client Under a Disability), 1.15(a) (Safekeeping Property), 1.15(b) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 5.3(b) (Responsibilities Regarding Nonlawyer Assistants), 8.1 (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

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In summary, there are three matters.

In the first and second matters:

A tribe retained Mr. Humiston to help it establish itself as an American Indian tribe recognized by the U.S. Government. Mr. Humiston represented the tribe and the Chief Executive of the tribe, as an individual, in several lawsuits. After receiving from the Chief Executive fishing citations received by members of the tribe as evidence of encroachment on tribal sovereignty rights, Mr. Humiston entered appearances in court to defend several of the members regarding the citation prosecutions. In two cases, Mr. Humiston did not meet with the members or otherwise contact them about the citations to notify them about the individual representation. Mr. Humiston tried to remove the first member's fishing citation case to federal court without consulting with the client. Mr. Humiston did not keep the client informed or explain the removal. The state stipulated to stay prosecution of the first member's citation pending a ruling on a motion in one of the tribe's cases. Later Mr. Humiston withdrew the motion but did not notify the client about the withdrawal of the motion and the effects it could have on the prosecution stay.

Mr. Humiston filed a complaint on behalf of the second tribal member in federal court. During this time, Mr. Humiston disagreed with the Chief Executive about litigation tactics and other aspects related to the representation of the tribe and the Chief Executive. Mr. Humiston did not inform the member about the federal lawsuit until about seven months later in part because he did not want the Chief Executive to know about the lawsuit. The second tribal member eventually agreed to the representation to defend the citation case with conditions. Mr. Humiston did not advise the client that he believed one of the conditions would be inappropriate and he did not comply with all of the conditions. Later, Mr. Humiston filed an affidavit to support his motion to withdraw as counsel for the tribe. In the affidavit and later when speaking to a reporter, Mr. Humiston made statements against his client's interests. Before filing the affidavit and speaking to the media, Mr. Humiston failed to consult with his client, the Tribe, as to the veracity of the statements he made in the affidavit and to the media and he failed to consult with and obtain his client's consent to reveal information related to the representation.

While representing a client in a divorce, Mr. Humiston and his assistant took over all of the client's finances because he believed the client was unable to care for herself. Mr. Humiston and the assistant paid the client's bills but did not maintain the client's money in his trust account until the bills were paid. Although requested, the assistant and Mr. Humiston did not provide the client an accounting of her money and expenses. Mr. Humiston or his staff took possession of the client's car. The client was

initially led to believe the car was repossessed to teach her to refer debt collection calls to her attorney to handle. After the car broke down while the assistant was driving it, Mr. Humiston arranged for a mechanic to repair the car in exchange for legal work he agreed to perform for the mechanic. Mr. Humiston disclosed information about the client's family history to the mechanic without the client's permission. The client moved out of the living arrangements made by Mr. Humiston's assistant with her father's assistance. Mr. Humiston disliked the father's influence on the client. Mr. Humiston advised his new client, the mechanic, to place a lien on the client's car and refused to tell the divorce client the location of the mechanic who had the car. Mr. Humiston received settlement funds from the ex-husband for the client but he did not place the funds in his trust account or deliver them to the client. Without consulting with his client, Mr. Humiston advised the ex-husband to stop payment on the settlement funds and told him he could consider the obligation to pay suspended until he received reasonable assurance from Mr. Humiston that the client and not her father would receive the money. After the client terminated the representation and requested her file, Mr. Humiston refused to return the file directly to the client and she had to hire new counsel to get her file. In response to the client's bar complaint, Mr. Humiston informed the OPC that the ex-husband had placed a stop payment order on the settlement check and did not inform the OPC that he requested that the ex-husband place the stop payment order.

RECIPROCAL DISCIPLINE

On June 6, 2012, the Honorable Tyrone Medley, Third Judicial District Court, entered an Order of Reciprocal Discipline: Suspension suspending Richard A. Bednar from the practice of law to run concurrently with his Virginia suspension. Mr. Bednar violated the following Rules 1.3 (Diligence), 1.4 (Communication), 1.15(a) (Safekeeping Property), 1.15(c) (Safekeeping Property), 1.16 (Declining or Terminating Representation), 8.1(a) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

Mr. Bednar is a member of the Utah State Bar and is also licensed to practice law in Virginia. The Virginia State Bar Disciplinary Board issued a Memorandum Order suspending Mr. Bednar from practicing law for three years. An Order was entered in Utah based upon the discipline order in Virginia.

In summary:

In the first matter, the Complainant retained Mr. Bednar with regard to an issue relating to the Complainant's military discharge. The Complainant paid Mr. Bednar's firm a fee. Initially, Mr.

Bednar performed services but then failed to finish the work. The client called the Naval Discharge Review Board and determined that nothing had been submitted on his behalf. The Complainant filed a complaint with the Virginia State Bar. Mr. Bednar failed to file a written response to the bar complaint.

In the second matter, the Complainant alleged that over the five months preceding the filing of his complaint, he had tried without success, to have Mr. Bednar reply to him concerning having his military records submitted to the applicable military review board. Bar Counsel sent a copy of the Complainant's Bar complaint to Mr. Bednar, demanding that a written answer thereto. Mr. Bednar failed to file a written response and failed to comply with demands for information.

In the third matter, the Complainant engaged Mr. Bednar to evaluate his legal matter regarding his military discharge. The Complainant paid Mr. Bednar an advanced fee and then was unable to reach Mr. Bednar. Bar Counsel sent a copy of the Complainant's Bar complaint to Mr. Bednar, with a letter demanding that a written answer be filed. Mr. Bednar failed to file a written response.

In the fourth matter, the Complainant hired Mr. Bednar regarding a medical discharge issue involving the Navy. The Complainant was made aware that Mr. Bednar's law partner was accepting federal employment and therefore Mr. Bednar would continue with the Complainant's representation, however, the Complainant received an adverse decision from the Board for Correction of Naval Records. Mr. Bednar agreed to file a Petition with the Naval Discharge Review but never did. Mr. Bednar closed his office and moved to Utah. The Complainant did not receive notification of Mr. Bednar closing his office. An audit found that Mr. Bednar's escrow account had computational and other discrepancies.

DISBARMENT

On May 1, 2012, the Honorable Randall Skanchy, Third Judicial District Court, entered a Findings of Fact, Conclusions of Law, and Order of Disbarment against Jeremy M. Rogers for violation of Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.15(a) (Safekeeping Property), 1.15(d) (Safekeeping Property), 1.16(d) (Declining Representation), 3.14 (Meritorious Claims and Contentions), 5.3(b) and (c) (Responsibilities Regarding Nonlawyer Assistants), 8.1(b) (Bar

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Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Rogers's case was the result of four complaints that were filed against him.

In the first matter, Mr. Rogers was hired to represent a client after she was injured in a car accident. The client was treated by a Chiropractor. Mr. Rogers signed a lien for payment. He failed to put the money in his client trust account and failed to distribute funds to his client and to the Chiropractor even though numerous attempts were made to retrieve the money by both parties.

In the second matter, the clients hired Mr. Rogers and his company HELP, LLC to assist them in taking steps to delay or stop the foreclosure of their home. The fee agreement indicated that HELP would negotiate with the lender and file a case against the lender among numerous other things. The clients paid Mr. Rogers a flat fee for his services. Besides the flat fee there was also a contingency fee of 1% of any reduction in principal on the property that occurred as a result of HELP's services. Mr. Rogers advised the clients to discontinue making their monthly mortgage payments and that he would file a Complaint. For approximately six months the clients tried to communicate with

Mr. Rogers with no response. Although a Complaint was eventually filed, Mr. Rogers failed to serve it and the Complaint was dismissed along with numerous other Complaints that Mr. Rogers's filed. The clients notified Mr. Rogers that their home would be sold at auction, but Mr. Rogers did not respond and the home was eventually sold at auction. Sanctions were assessed against Mr. Rogers for filing frivolous actions. The clients asked for their files and for a full refund. Mr. Rogers did not refund any money.

In the third matter, the clients hired Mr. Rogers and his company, HELP Law who promised to file legal action within fifteen days or the client would receive his money back. The clients met with Mr. Rogers and signed a Retainer Agreement with HELP Law and with Mr. Rogers as its attorney. The clients paid a fee to Mr. Rogers. In addition to the fee, Mr. Rogers and HELP Law would receive a contingency fee of 20%. The clients attempted to contact Mr. Rogers many times to determine the status of their case. He failed to respond. The clients decided to contact the federal court and learned that no case had been filed on their behalf. After trying to reach Mr. Rogers on several occasions without response, the clients told Mr. Rogers that they did not want to proceed and wanted their money returned. The clients' home went into foreclosure and was ultimately sold in a short sale for a loss. Mr. Rogers failed to return any of the fees paid by the clients.

In the fourth matter, the clients built a home but began to experience financial difficulties and hired Mr. Rogers. A non-lawyer acting on behalf of Mr. Rogers sent the clients a Retainer Agreement. The clients paid a fee to Mr. Rogers for his representation. Numerous contacts were made with the non-lawyer over several months with the non-lawyer giving legal advice to the clients. Mr. Rogers failed to contact the clients himself. Numerous requests for information followed with no response. The clients informed Mr. Rogers of the impending sale of their home at auction with no response. A non-lawyer working for Mr. Rogers gave legal advice to the clients including attempting to assist them in filing a Bankruptcy. The clients' Petition was denied because of an improper filing. The clients' home was sold at auction. Mr. Rogers refused to return any of the clients' money even though they requested a refund.

The court found that Mr. Rogers intentionally misappropriated client funds and that there was no evidence of a truly compelling mitigating factor. The court found that the following aggravating circumstances applied: dishonest or selfish motive; pattern of misconduct; multiple offenses; refusal to acknowledge the wrongful nature of the misconduct involved, and lack of good faith effort to make restitution.

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Thinking of Swimming With the Sharks: Lessons Learned While Starting a Practice

by S. Yossouf Sharifi

Editor's Note: This article is part of a series summarizing CLE presentations given as part of the YLD's "Practice in a Flash" program.

My first client in private practice was a white supremacist prison gang leader. Odd, considering I'm Afghan and my law partner is Jewish, but he liked us and was far more pleasant than I would have thought.

We thought when we signed him up that it was a simple felony. As we started receiving the police reports, we realized our client was under investigation for an alleged murder that occurred during this simple felony.

I had been a prosecutor for Salt Lake City for a while but thought I would start my own practice out with some misdemeanors, maybe some traffic tickets, and slowly and methodically work my way up to defending felonies. Instead, we had a murder thrown in our lap as our first case.

We had two choices: send the case elsewhere due to lack of experience, or work our tails off. Since we were sick of playing Angry Birds and watching Hulu in our office all day, we chose to work our tails off. We ended up getting our client a deal that, looking back, I can't believe we got him. Probably because I was too inexperienced at the time to know that you can't push for the things I was pushing for. But we pulled it off and our client went home while the co-defendants in the case took their trips to an all-male government retreat.

That first case, in retrospect, taught me a lot of lessons about opening a practice; in fact, it taught me the most important lesson I've picked up along the way. Our firm also grew extremely fast and that quick growth has taught us lessons about running a practice we couldn't have learned any other way.

When the Young Lawyers Division asked that I write this piece, I was

excited to share these lessons with those just starting their practices. Also, if any of you young bucks run into roadblocks and need some quick advice, don't hesitate to email me at ysharifi@sb-legal.net.

Lesson 1: Make Sure this is What You Want

Do you really want to run your own business or is this just something you're doing until that big corporate law firm job comes along? I own three companies including the law firm and I can tell you one lesson that applies to all of them: if you don't have passion for what you do, you won't make it.

Times are going to get lean; they do for everyone. You're going to get clients that are so detached from reality you start wondering if you're the one who's crazy. You're going to get stiffed on bills, you're going to get yelled at by judges, and you will, at some point, question why you ever went to law school in the first place.

If you enjoy what you do and have passion, you'll get through those times with the realization that good times are just around the corner. If opening your own practice is just a place holder while you apply to other gigs, more than likely those bad times are going to crush you.

I'm a big self-help guy. One of the things that most self-help books like Anthony Robbins' *Awaken the Giant Within* and Napoleon Hill's *Think and Grow Rich* have in common is that you must ask yourself tough questions, and keep asking questions; following that thread of thought until you get to the answer you're seeking. Don't start by asking, "Do I want to open my own practice?" Start by asking,

S. YOSSOF SHARIFI is a partner at Sharifi & Baron. His practice focuses on criminal defense, family law, and plaintiff's personal injury. He also owns and operates Miracle Software Corp., developing mobile applications for the iPhone and iPad.



“What do I want out of life?” Follow that thread, work at it every day. When you get up in the morning, give it thought. When you’re drifting off to sleep, push down the mental barriers in your mind and look at yourself and your desires in as harsh and objective a light as you can. I guarantee you will be surprised by what you actually find.

If after asking yourself the tough questions and deciding that running your own law firm is what you want (rather than teaching orphans in a third-world country, for example) then it’s time to jump in with both feet, because the only way you are going to learn anything is by doing.

Lesson 2: Minimize Costs

A friend of mine opened her own practice and was spending nearly \$5000 per month on expenses right out of the gate. What she discovered was that the first few months you may not get a single client and those expenses are coming out of your pocket. The key here is to prioritize: there are some things you want to splurge on and some things you want to skimp on.

For example, in my experience, personal injury clients love flash. They love walking into their lawyers’ ostentatious offices and seeing flat-screens on the wall and leather furniture. Criminal defense clients: not so much. Depending on what field of law you choose, you’re going to have to sit down and go through all your expenses and keep only what is necessary. You’re going to want the Wii and the iPads, but are they really necessary when you’re first starting out?

If you do this objectively, you will be amazed how little you really need to start a law firm. One book I read while in law school said you need at least \$50,000 to start a law practice. I don’t know a single lawyer who would have been able to start their own practice if this were the figure. The actual figure will vary based on the fields you choose and the savings you have to feed yourself while the firm gets up and running, but I promise you it is not \$50,000.

There are a million things you can do to cut costs, but you’re going to have to get creative. Google offers phone numbers that can be transferred to your cell phone for free, there are virtual receptionists, you can go with efiles rather than paper – really think about it and cut wherever you can. Even if it’s just a few cents here and a few cents there.

Lesson 3: Hire a Good Accountant

Sweet Mother of Mercy! If you don’t listen to anything else I say, listen to this: hire a GOOD accountant. You think skydiving and being attacked by rats is scary? Try an IRS agent calling you in 2011

and saying, “Hey, we found some problems on your 2009 returns.”

Your initial inclination is going to be to go cheap, cheap, cheap. This is one of those areas I don’t recommend doing that. At first, in 2009, we got some guy that worked out of his house and did our taxes for \$75. Two years later, I was still paying for that shortcut.

That being said, the price someone charges for their services, you’ll soon learn, is not an accurate indication of the quality of their work. After our debacle with the cheap accountant, we went to the opposite extreme and hired an accounting firm that charged more per hour than we did. The day our taxes were due, I got a call from this firm saying they couldn’t get our taxes done in time. This was seven months after we hired them. I had a few choices phrases for them before threatening a malpractice suit, and our taxes, miraculously, got done and we fired them a short while later.

Recommendations from friends and family are gold in this area. But meet with the accountants, ask them questions, and see how they treat you. There are plenty of good accountants out there so don’t settle for someone you have a bad feeling about.

Lesson 4: Reread Lesson 3.

It’s that important.

Lesson 5: Don’t Take Everything that Comes Through the Door

It took me years to be able to discern when I should and should not take a case based on the client. At first, we took everything, with unpleasant consequences. There are some clients that won’t be happy no matter what you do for them. We got one client’s criminal case dismissed and she still went online and wrote a bad review about us, saying we didn’t do it fast enough. During the initial interview, I had a bad feeling about her but a pile of cash is hard to turn down when you’re starting out.

It’s going to take self-discipline on your part, but I promise you, no amount of money is worth the hassle of dealing with an impossible client.

Lesson 6: Don’t Practice Every Field of Law

I have a friend that sues the U.S. government on behalf of waterway shipping companies when the government unreasonably interferes with their delivery schedules. I had no idea that was an actual field you could go into until she told me about it. Much less that you could make a living doing it.

We all have different strengths and weaknesses. I’ve known

brilliant attorneys whose motions were like legal poetry that made judges swoon, but who couldn't walk into a criminal case and ask for a new date without nearly passing out in a packed courtroom. I've also known brilliant criminal lawyers who think they can do anything and they screw up a simple personal injury case and get sued in the six figures.

No one's forcing you to do anything you don't want to do, so why make yourself miserable? If you're not interested in bankruptcy law and don't think you'll be willing to put in the time to learn it, why take that bankruptcy case?

In one of my first jobs out of law school, I was suing companies for infringement of copyrights. I hated the work, didn't enjoy the field, and found the clients unreasonable. I couldn't jump out of that field, or a window, quickly enough. But I have friends who love intellectual property and would hate the fields of law I'm in. It's all about self-knowledge and asking yourself those tough questions about who you really are and what you really enjoy.

Lesson 7: When it Comes to Marketing, Try Everything

My partner used to get up at six in the morning on Saturdays and drag himself to an "interview" on a Spanish radio station dealing with immigration law. He hated it, especially since it took up to three hours on a Saturday morning. But he did it because we had made up our minds that we were going to try every form of advertising until we found the ones that worked for us.

This relates to the question I most get asked by young attorneys: how do I get clients? That's a tough question with an answer you're not going to like: it depends. It depends primarily on you. Are you a good salesperson? Is that really one of your strengths? Or are you more a behind-the-scenes person? If you're a terrible salesperson and don't inspire confidence in your potential clients, you're going to want marketing that creates a high volume. That way, it doesn't matter if you strike out nine times out of ten as long as you get that one.

But if you're a charismatic salesperson who can convince clients to sign up without ever having met them, the expense of high volume may not be necessary for you and you may want to find higher quality leads through different forms of advertising. Remember, your business is really just you. You're selling yourself so how you market yourself is very fact-dependent on who you are.

I will give one bit of warning: outdated advertising models. I won't mention any names (Yellow Pages, we're looking at you),

but there are some methods of advertising that worked once upon a time that just don't have the punch they used to. You can experiment with them later on when you're established, but starting out, stick with what you know will generate clients rather than rolling the dice.

You have to stay current on marketing theories and practice if you want to compete. More and more attorneys are opening their own practices and you have to stand out from the competition; not stick to dogma.

Some of the best books on marketing for lawyers are: *The Referral Engine*, by Jan Jantsch, and *Book Yourself Solid*, by Michael Port. They weren't written explicitly for lawyers, but most books I've read on marketing for lawyers are so outdated and ineffective they may as well tell you to wear a sandwich sign and walk up and down State Street.

Then again, you may hate these books and find gems trolling through the used bookstore. Just keep an open mind and try anything within reason. You never really know what is going to work and what isn't.

Final and Most Important Lesson: Guts

I think it was George S. Patton who said, "The virtue of guts makes up for almost any vice." You're going to be scared to death. You may have a family that's relying on your income from your practice. You may feel you have no idea what you're doing. You might even feel you're not smart enough to be an attorney or run a business.

All these are perfectly natural feelings. Fear can give you an edge. Or, it can take away any edge you naturally have. It can make you work, or it can destroy you.

That fear you have upon deciding to open your own practice won't go away, but you can use it to your advantage rather than have it be a handicap. I hate to end with a quote by Machiavelli, but "fortune favors the brave."

Conclusion

One thing I can say for certain in all this: ten years down the road, when you're re-writing a memo for the twentieth time for a partner who hasn't read it all the way through even once, you will regret not opening your own firm when you had the chance. Don't let it pass you by without giving it a shot.



Message from the Chair

by Thora Searle

As the new Chair of the Paralegal Division, I would like to take this opportunity to introduce myself and the 2012-2013 Board of Directors.

Thora Searle – Chair: I attended Weber State University and have spent thirty-four years working in the legal field. I worked as a legal assistant to William Thomas Thurman at McKay, Burton & Thurman for twenty-one years and currently work as a Judicial Assistant to Judge Thurman at the United States Bankruptcy Court for the District of Utah. I have served several terms as a Director at Large and also as a Regional Director of the Legal Assistant Division/Paralegal Division of the Utah State Bar. I also served several years as the Secretary and the Membership Chair. I have participated in the Wills for Heroes program and feel that this program is a great way to pay it forward. As Chair elect, I served on the Governmental Relations Committee and will serve this year on the Bar Commission of the Utah State Bar as an ex-officio member. My time outside of work is devoted to my children, grandchildren, and great-grandson. I love to spend time with them and enjoy watching them participate in soccer, softball, dance, and tumbling.

Danielle Davis, CP – Immediate Past Chair: Danielle is a certified paralegal with Strong & Hanni where she works in insurance defense litigation. She has worked as a paralegal for twenty years with experience in insurance defense, personal injury, bankruptcy, construction law, adoption, collections, and family law. She received her paralegal certificate from Westminster College. Danielle was Chair of the Paralegal Division in 2005-2006 and 2011-2012. She has served as a Director-at-Large and an ex-officio member of the Division. She has served on the *Bar Journal* Committee, Governmental Relations Committee, and Licensing Committee and served as an ex-officio member of the Bar Commission of the Utah State Bar. She is a former President, Education Chair, Parliamentarian, and Newsletter Editor for the Legal Assistants Association of Utah (LAAU) and is a member of the National Association of Legal Assistants (NALA).

Director at Large – Heather Allen: is a Paralegal at Ray Quinney & Nebeker. She has been with RQN since August 2010 and prior to that she was a paralegal at Snell & Wilmer since

2005. Heather works in product liability, personal injury/wrongful death actions, both defense and plaintiff. She graduated from Utah Valley University with a Bachelor's Degree in Paralegal Studies and a minor in Psychology. She is also involved in the community as a volunteer at Intermountain Medical Center in Murray for the parent support group associated with the Neonatal Intensive Care Unit.

Director at Large – Sharon M. Andersen: has been a paralegal for over twenty-one years. Sharon currently works as an in-house paralegal for American Family Insurance. Prior to taking the job with American Family in June 2011, Sharon worked as a litigation paralegal at Strong & Hanni Law Firm for almost four years after having worked in the civil division of Salt Lake City Attorney's office since 2004. From 1998 to 2004 Sharon worked as a paralegal in the General Counsel's offices of several corporations including IHC, Kennecott Utah Copper, and Huntsman Corporation where she assisted in a variety of litigation matters involving medical malpractice, worker's compensation, labor relations, contracts, chemical exposure, and environmental law as well as becoming contract administrator while employed at IHC. She spent the first eight years of her career in smaller law firms working primarily in family law, personal injury, insurance defense, and medical malpractice litigation. Sharon attended BYU, married and had a family, then returned to school and graduated from the Legal Assistant Program at Westminster College in 1990. Sharon served as CLE Co-Chair of the Paralegal Division from 2005-2007 and in that capacity actively participated in the Utah State Bar's Spring Convention, Annual Convention, and Fall Forum CLE committees. In August of 2006, she became Chair-Elect of the Paralegal Division and served as the Division's Governmental Relations Liaison to the Utah State Bar's Governmental Relations Committee while also serving on the Division's Executive Committee. From 2007 to 2008, Sharon served as chair of the Paralegal Division and as Ex-Officio member of the Bar Commission. From 2008 through 2010, she served as Ex Officio Director then parliamentarian for the Division. Sharon has six adult children and four grandchildren. She views her children and grandchildren as her greatest accomplishment and joy in life.

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

Director at Large – Tally Burke-Ellison: Tally is the senior corporate paralegal for inthinc Technology Solutions, Inc. inthinc is a worldwide leader in telematics, fleet solutions and driver safety technologies. Tally's passion for law began sixteen years ago at Kruse Landa Maycock & Ricks. From there she moved to Durham, Jones & Pinegar as corporate paralegal, Boart Longyear as corporate in-house paralegal, and Christiansen & Jackson. Tally received her Legal Assistant Certificate in 1996, Associate of Applied Science with a Major in Paralegal Studies in 1997, and her Associate of Science in 2005, all from Salt Lake Community College where she has also been an adjunct professor. In 2006 she received her Bachelor's Degree in Criminal Justice with a minor in Criminal Law and emphasis in Paralegal Studies from Weber State University. Her memberships include The National Association of Legal Assistants, The National Federation of Paralegal Associations, The American Bar Association Paralegal Section, The Legal Assistant's Association of Utah, Utah State Bar Association Paralegal Division. Tally is a past Chair of the Utah State Bar Paralegal Division (2004-2005), and currently serves as their Utilization Task Force Co-Chair, and on the *Bar Journal* Committee.

Director at Large (Finance Officer) – Julie Eriksson: Julie has been a paralegal for twenty-two years and an active participant in the Paralegal Division since its inception. She serves as the Finance Officer. She was the Paralegal Division Chair 2008-2009 and also served as CLE Chair of the Paralegal Division from 2007-2008 as well as Chair-Elect and served as the Division's Governmental Relations Liaison to the Utah State Bar's Governmental Relations Committee. As Chair, she represented the Paralegal Division as an Ex-Officio member of the Bar Commission. Julie is also a member of the Utah Paralegal Association and served that association in many capacities including several years as its President.

Director at Large – Krystal Hazlett: is currently a paralegal on the Special Victims Unit at the Salt Lake County District Attorney's

Office. Krystal received her paralegal degree from Salt Lake Community College and also has an Associate's degree in Criminal Justice from Salt Lake Community College and a Bachelors of Science in Sociology from The University of Utah. Prior to working at the Salt Lake County District Attorney's Office, Krystal worked at the Salt Lake City Prosecutor's Office and Ballard Spahr. Krystal is a Certified Paralegal through NALA and maintains active memberships with the Utah State Bar Paralegal Division and Utah Paralegal Association. Krystal is passionate about volunteering in her community giving her time to programs and causes such as: the Guardian ad Litem Office's CASA program (Court Appointed Special Advocate), the Utah State Bar Wills for Heroes, the Utah Food Bank senior food box deliveries, US Marine Corps Toys for Tots, and the Utah Arts Festival to name a few.

Region I Director – Carma Harper: is a Certified Paralegal employed by Strong and Hanni. She works with Robert Janicki, Michael Ford, Lance Locke, and Adam Wentz, in the areas of insurance defense, personal injury, construction litigation, real estate, and products liability. In 1997, Carma became a licensed Realtor, specializing in distressed properties and negotiations with the third party lender. She served as the Relocation Director for Century 21 Gage Froerer from 1997 until 2002. She is currently an active sells agent for Key Realty Group. Carma has served as the as the Chair of the Community Service Committee, Liaison for the YLD, Direct of Region 1 and Chair of the Paralegal Division. She has also served as a Commissioner for the Utah State Bar. In March 2008, Carma worked closely with the YLD by coordinating witnesses and notaries to participate in the Wills for Heroes. To date thousands of free Wills have been prepared and executed for the First Responders in Utah. Carma is married to Scott Harper, they have six children between them and nineteen grandchildren who are the light of her life.

Director at Large – Kari Jimenez: received her Professional Paralegal Certificate from the University of Phoenix and has over nineteen years of experience as a litigation paralegal. She has a broad spectrum of experience which includes criminal defense, criminal prosecution, civil litigation and in-house corporate in Cache County; civil litigation insurance defense, medical malpractice and products liability with the law firm Richards, Brandt, Miller & Nelson as well as in-house corporate for a mortgage servicing company in Salt Lake County and in-house corporate for a housing company in Washington County. She obtained her Real Estate license in 2005 and is currently the City Recorder for Ivins City. She received her Certified Municipal Clerks (CMC) designation from the University of Utah and is currently working on her Master Municipal Clerk (MMC) designation. Kari is the Southern Region Director for the Utah

Paralegal Association (UPA) formerly known as LAAU. At the end of 2006, having experienced enough cold and snow, Kari and her spouse Wilson, who is originally from Ecuador, South America, and two children Garrett & Mariah, moved from Sandy, UT to sunny St. George, UT. Kari enjoys road and mountain biking, hiking, camping, and traveling.

Director at Large – Trina Kinyon: Trina received her Associate's Degree from Mountain West College in 2002 in Paralegal Studies. While there, she received the Highest Academic Achievement award in her graduating class. She received her Bachelor's Degree from Columbia College in 2007 in Criminal Justice. She became a Certified Paralegal with NALA in August, 2008. She became a member of the Utah State Bar – Paralegal Division in 2009. She has been employed with Scalley Reading Bates Hansen & Rasmussen for three years. She is the senior paralegal to Marlon Bates. Marlon's practice focuses on Bankruptcy/Creditor's rights and Foreclosure. She has been working in the legal field since 2002. Trina was born in Provo, Utah and has lived in the State of Utah her entire life. She has two sons, ages four and six. She currently resides in Eagle Mountain and loves the area. She enjoys Utah and most of the activities this state offers; primarily camping and riding four wheelers. She enjoys volunteering and believes in making a difference in the lives of others. She has worked with Wills for Heroes for over one year now and has enjoyed every second of it. She believes in being honest and

honorable and above all integrity of her work and herself.

Director at Large – Geneve Wanberg: is a litigation paralegal at Ballard Spahr LLP. She has been a litigation paralegal for seven years and prior to that was a corporate paralegal for five years. She has served on the Education Committee for the past few years. She has also co-chaired the committee for the Paralegal Day Luncheon for 2011. Geneve enjoys education, from learning to teaching, and working with the education committee to create education situations that teach, assist, and inspire her fellow paralegals in Utah. In her office, she is known as the paralegal pastry chef and loves to cook. Geneve has ten grandchildren with another on the way. Her husband is a greenhouse manager for a high profile group of gardens in downtown SLC.

Director at Large – Jessica Zimmer: has been a paralegal at Ray Quinney & Nebeker for nearly seven years. She graduated from the University of Utah with a Bachelor of Arts degree in Philosophy and a Bachelor of Arts degree in Political Science. She received her Paralegal Associates degree from Salt Lake Community College. She enjoys intellectual property and criminal law, as well as commercial litigation. She lives in Salt Lake with her husband, dogs, and beautiful baby girl.

I look forward to working with the Board to achieve the goals of the Division and the Mission of the Utah State Bar.

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DATES	EVENTS (Seminar location: Utah Law & Justice Center, unless otherwise indicated.)	CLE HRS.
09/07/12	Utah County Golf & CLE. Hobbie Creek Golf Course. 8:00 am – 12:00 pm. Topics TBA. CLE only: \$40 for Litigation Section members, \$90 for others. CLE & Golf: \$45 for Litigation Section members, \$95 for others.	3 hrs.
09/07/12	NLTP Mentor Training & Orientation. 12:00 – 2:00 pm. Davis County Courthouse, 800 West State Street, Farmington, UT. Speakers: Commissioner Catherine Conklin and Laura Rasmussen of Farr, Kaufman, Sullivan, Jensen, Medsker, Olds & Nichols, LLC. Event is free and lunch will be served.	2 hrs. (includes 1 hr. Ethics & 1 hr. Prof.)
09/19/12	20th Annual Estate & Charitable Gift Planning Institute. 8:00 am – 2:00 pm. “Estate and Charitable Planning in a New Era: Navigating the Winding Road.” Presented by Ann B. Burns and Lawrence P. Katzenstein. This event is free (lunch is provided). Registration is limited, so register early.	5 hrs. self-study incl. 1 hr. Ethics
09/28/12	Estate & Distribution Planning for Retirement Benefits. An intensive, all-day workshop. Presented by: Natalie B. Choate with special guest speaker Mark Newcomb “TIRA.” \$195 for current Elder and Estate Planning Section members, \$235 for others.	7.5 hrs.
10/12/12	11th Annual ADR Academy – The Art & Science of Stakeholder Collaboration and Building Consensus. 8:00 am – 12:00 pm. Speaker: Steven D’Esposito, President, RESOLVE.	3 hrs.
10/18/12	New Lawyer Required Ethics Program. 8:30 am – 12:30 pm. \$75. Topics include: <ul style="list-style-type: none"> • Introduction to the Bar and to Practice • Professionalism, Civility, & Practicing Law • Ethics, Rules, Discipline, & Processes in Utah • Top 10 Reasons Lawyers Receive a Bar Complaint • Pro Bono Service • New Lawyer Training Program • Consumer Assistance & The Discipline Process • Profession-Stress and Burnout 	Satisfies New Lawyers Ethics & Prof./Civ. for first compliance period
10/19/12	Litigation St. George Golf & CLE. The Ledges in St. George. 8:00 am – 12:00 pm, with golf to follow. Topics TBA. CLE only: \$40 for Litigation Section members, \$90 for others. CLE & Golf: \$60 for Litigation Section members, \$135 for others.	3 hrs.
11/8– 11/9/12	 2012 Fall Forum. Little America Hotel. 	up to 8 hrs.*
12/20/12	Benson & Mangrum on Utah Evidence.	6 hrs.*

*CLE hours are approximate and subject to change.

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