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Jan/Feb 2013

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Utah Bar JOURNAL

Volume 26 No. 1
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Cover Art

Light on the mountain, winter scene, by Dan Anderson of Kaysville, Utah. Taken in Big Cottonwood Canyon.

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

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Letter to the Editor

Editor:

"Season's Greetings," by Learned Ham, justified a full year of bar dues by itself. Funniest thing I've read in any legal publication, ever. And true! Whatever you paid L.H. for the article, it was worth more. More, please!

Cordially,
David Harmer
Legal Counsel, Ally Bank

Letter Submission Guidelines

1. Letters shall be typewritten, double spaced, signed by the author, and shall not exceed 300 words in length.
2. No one person shall have more than one letter to the editor published every six months.
3. All letters submitted for publication shall be addressed to Editor, *Utah Bar Journal*, and shall be delivered to the office of the Utah State Bar at least six weeks prior to publication.
4. Letters shall be published in the order in which they are received for each publication period, except that priority shall be given to the publication of letters that reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published that (a) contains defamatory or obscene material, (b) violates the Rules of Professional Conduct, or (c) otherwise may subject the Utah State Bar, the Board of Bar Commissioners or any employee of the Utah State Bar to civil or criminal liability.
6. No letter shall be published that advocates or opposes a particular candidacy for a political or judicial office or that contains a solicitation or advertisement for a commercial or business purpose.
7. Except as otherwise expressly set forth herein, the acceptance for publication of letters to the Editor shall be made without regard to the identity of the author. Letters accepted for publication shall not be edited or condensed by the Utah State Bar, other than as may be necessary to meet these guidelines.
8. The Editor, or his or her designee, shall promptly notify the author of each letter if and when a letter is rejected.

Interested in writing an article for the Utah Bar Journal?

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

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

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

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

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

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

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

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

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

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Who We Are

by Lori W. Nelson

In my last president's message I discussed the recent survey and what we thought of ourselves. In this message I want to talk about *who we are*. I previously told you about my partner here at Jones Waldo, George Pratt, who spends significant time and money traveling to Haiti to work with Healing Hands for Haiti. I also wanted to tell you about Brent Johnson, General Counsel for the courts/judges, who volunteers for Volunteers of America. Every Monday Brent goes to the Homeless Youth Resource Center from 11:00 a.m. to 1:00 p.m. to cook and serve lunch. It is a one-person operation where he cooks, serves, and then cleans up. There are usually about twenty to thirty kids who show up (the center serves homeless youth between the ages of sixteen and twenty-three). The center provides meals twice a day. The center also provides food that the kids can take with them when they are out on the streets or wherever they go. This is not an overnight shelter, but just a place where the kids can get a respite for a few hours every day.

> *"[T]hank you to every member of the Bar who is providing service in any way.…I am humbled by what I see and what little I do know of the service being provided."*

Brent's volunteerism doesn't stop there. For the past couple of years, Brent has also been mentoring a refugee family from Iraq, helping them with the culture and navigating the system for the things they need. He visits with them a couple of times a month.

Another attorney I want you to know about is Scott Lundberg. In 1999 Scott and his family traveled to Romania. While there they visited an orphanage and witnessed deplorable conditions for the children in orphanages. Knowing he and his wife needed to act, they not only adopted one of the children, a three-year process, they also began Bridge of Love, a nonprofit organization designed to help Romania's orphaned children. Bridge of Love focuses on finding loving homes for Romania's orphans, one child at a time, by moving children out of the orphanage and into Romanian foster homes until adoption. The foundation has hired competent Romanian individuals to staff the program, including social workers, a psychologist, and a teacher. There are approximately forty children right now being aided by Bridge of Love.

The above are dramatic acts of selflessness for the benefit of others. However, I don't want to overlook the many other acts of service that are occurring by members of the Bar every day. I know many of you are serving in your communities by volunteering on planning and zoning committees, boards of adjustment, non-profit organizations, homeowner's associations, school boards, PTAs, religious institutions, and our children's schools and sports teams. The number of hours that are donated by attorneys to improve our communities is unknown and unacknowledged. Let this message be a start to acknowledging how much we, as attorneys and individuals, give back to our communities.

I want to acknowledge another group of individuals whose contributions to Utah are not adequately known. Those are the lawyer/legislators. In the last legislative session there were fifteen lawyer/legislators. In the coming session there will be twenty-two lawyer/legislators serving Utah. While not volunteers in the strictest sense, the contributions these lawyer/legislators make to improve the laws and legal system

in Utah are significant. Also, it bears mentioning that while compensated for their service, that compensation does not reflect what they could have earned had they remained in their "day jobs." Not only do they have to step out of their lives for forty-five days each year during the session, they contribute other substantial time throughout the year for interim meetings and working with their constituents. These individuals sacrifice a great deal to serve Utah's citizens. The work is demanding and difficult and in many ways under-appreciated. What these individuals do to give back to Utah is true service.

As I write this article we are approaching the holiday season. During this time I see a great many programs around the state to which individuals can contribute. One such program is the annual law firm competition to donate to the Utah Food Bank. I also know that law firms, large and small, have their own volunteer and service efforts to participate in Sub for Santa programs, the Adoption Exchange, and other similar programs. One of the beauties of giving service is that it is entirely voluntary and also benefits those giving. Volunteers hold a community together. The above-mentioned service opportunities are not necessarily legal in nature, but they are being provided by attorneys. There are many, many other ways we can provide service that is legal in nature.

As you are aware, the Bar began its coordinated, judicial-district-based pro bono program last year. That program is in the process of matching volunteer attorneys with those in need of legal services. The Bar will soon roll out its Modest Means program, matching participating attorneys who agree to provide services at a reduced rate with those who do not qualify for pro bono but cannot afford an attorney. Again, a selfless act of service even where there is partial compensation.

I know that the Bar asks a lot of you, and asking in a difficult economic climate seems onerous. But as the above shows, you are giving back in so many ways that your service should be acknowledged.

Edward V. Brown wrote in *The Healing Power of Service*, that

> Medical scientists are beginning to discover…that there is healing power in helping others. This new field of specialization, psychoneuroimmunology or PNI for short, researches the power of the mind to influence health and healing. This research has produced some startling results. IgA is an antibody that helps the body defend itself from infection. Harvard psychologist David McClelland measured this antibody in students before and after watching a film on Mother Teresa, the Nobel Prize laureate, for her work helping the homeless. Dr McClelland found that merely watching a film on selfless service strengthened the immune response in the students.

Edward V. Brown, *The Healing Power of Service*, http://www.share-international.org/archives/health-healing/hh_ebservice.html.

Thus, while research shows that social isolation is a major health risk factor, it also shows that people who do volunteer work are much less likely to suffer illness. The close interpersonal relationships and community involvement that occur with volunteer service are tailor-made to enhance the healing process.

As Mr. Brown states, the service we give helps us. And it doesn't matter whether that service is coaching your child's soccer team or

traveling to Romania to provide care for orphans. You are serving, and as a group, I believe Utah lawyers are among the most giving members of society. In fact, I heard a statistic I have not been able to verify but will repeat it here at the risk of being in error: as a group, attorneys provide more service than any other profession. Again, I cannot verify the accuracy of this statement, but it rings true to me. I would love to hear more stories of what Utah lawyers are doing to provide service so we can get the word out. I believe it helps us all to know what we are doing, and I believe it helps the public to know how much we are giving back in unacknowledged and largely unknown service to our communities.

Last, I would like to give a shout out to all the members of the Utah Bar Commission. The hours and hours that they provide in service to Bar members is enormous. As I sit around the table in Bar Commission meetings and think of the combined billable hours being donated to serve members of the Bar, I am staggered. This is another service I would like acknowledged, so this is a thank you to each member of the Commission for all you do to give back.

This is also a thank you to every member of the Bar who is providing service in any way. This thank you is inadequate, but I am humbled by what I see and what little I do know of the service being provided. Utah lawyers are an inspiration and you deserve recognition and thanks for all you do. *THANK YOU.*

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The Purposes of the Utah State Bar and How You Can Help

by James D. Gilson

Groucho Marx joked that he didn't want to belong to any club that would have him as a member. In that vein, it's good to consider why we are members of the Utah State Bar. Many may ask: "What does the Bar do besides administer the bar exam, provide CLE, and collect annual license fees?"

This article is a brief overview of the purposes and functions of the Bar, and an invitation to serve on one of the many committees that the Bar has in place to help our profession and to serve the public.

The Bar's Mission Statement is: "To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law."

> *"[V]olunteering to serve on a Bar committee, or donating other worthwhile professional service, helps…increase job satisfaction as a lawyer.…[and] enables you to help improve our profession instead of just being a critic."*

The 2011 Bar member survey revealed that seventy percent of Utah lawyers feel that their overall job satisfaction has met or exceeded their expectations as compared to the beginning of their career, whereas thirty percent feel that their job satisfaction as an attorney is below their expectations. It's been my experience that volunteering to serve on a Bar committee, or donating other worthwhile professional service, helps, as a side benefit, to increase job satisfaction as a lawyer. Bar service enables you to help improve our profession instead of just being a critic.

The Bar is the Supreme Court's Designated Agent

Article VIII, Section 4, of the Utah Constitution provides that the Utah Supreme Court "by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law." Utah Const. amend VIII, § 4. Fulfilling this Constitutional mandate, the Utah Supreme Court, through the Judicial Council (whose Presiding Officer is the Chief Justice), adopted the Utah Code of Judicial Administration Code, including Article 13 (the Rules of Professional Conduct), and Article 14 (the Rules Governing the Utah State Bar).

The Supreme Court authorized and designated the Utah State Bar (formed in 1931) to administer its rules governing the practice of law in Utah. By delegation from the Supreme Court, and subject to its supervision, three core functions are administered by the Bar: admissions, mandatory continuing legal education (CLE), and lawyer discipline. These core functions are outlined below, along with corresponding and various Bar committees.

Admissions[1]

Utah attorneys know that they have to be a member of the Utah State Bar in order to practice law in this State. Whether you've

JAMES D. GILSON has been a member of the Utah Bar since 1989 and has been a Bar Commissioner for the Third Division since 2008. He practices litigation at Callister Nebeker & McCullough.

been practicing law since 1948 like Glenn Hanni, or you're one of the 445 new attorneys admitted in 2012, you had to meet the character and fitness requirements, pass the bar exam, and take the attorney's oath to become admitted to practice.[2] Ours is an integrated Bar; membership in the Utah State Bar is synonymous with the license to practice law.

Many lawyers volunteer tirelessly and behind the scenes to assist Bar staff with the admissions process. Bar committees involved with admissions include the Admissions Committee (co-chaired by Hon. James Davis and Steven Waterman), the Character and Fitness Committee (co-chaired by Bryon Benevento and Andrew Morse), the Bar Exam Examiner Committee (co-chaired by David Broadbent and Tiffany Brown) and the Test Accommodation Committee (Michele Ballantyne, chair).

There is also an important Bar committee tasked with identifying and stopping those who may engage in the practice of law without a license: the Unauthorized Practice of Law Committee (co-chaired by Jonathan Rupp and Sarah Spencer).

Continuing Legal Education[3]

The Bar is the largest provider of CLE to Utah lawyers. Attendance at the Bar's mid-year convention in February in St. George, the July annual summer convention (to be held July 17-20, 2013 in Snowmass, CO), and the Fall Forum (held in October or November in Salt Lake) enables lawyers to obtain quality CLE to fulfill their required hours, and at a reasonable cost.

Many opportunities exist for lawyers to help plan the CLE that the Bar offers, and to give CLE presentations themselves. Related committees include the CLE Advisory Committee (chaired by Jonathan Hafen), and the Spring and Summer Convention Committees, whose volunteer members change each year.

Since 2009, new lawyers in Utah participate in the New Lawyer Training Program (NLTP) with an assigned experienced mentor attorney. This program takes the place of CLE for first year attorneys. The NLTP is an innovative and successful program that other state bars are following across the country. Service opportunities include being a mentor attorney, participating in the NLTP Committee (co-chair Margaret Plane), or being on the Mentor

Training and Resource Committee (co-chaired by Tracy Gruber and Troy Booher).

Lawyer Discipline[4]

Most licensed professionals in Utah are regulated by the Utah Division of Occupational and Professional Licensing. Not so for lawyers. The Utah Supreme Court's Ethics and Discipline Committee and the Bar's Office of Professional Conduct (OPC) are tasked with administering lawyer discipline proceedings, to ensure compliance with the Rules of Professional Conduct and "protect the public." Utah R. Jud. Admin. Ch. 14, Articles 1, 7. The Ethics and Discipline Committee (Terrie McIntosh, chair) consists of twenty-six members of the Bar and eight public members. Committee members sit in panels on a monthly basis to hear and decide discipline cases brought by OPC counsel.

The Bar's Ethics Advisory Committee (John A. Snow, chair) issues periodic advisory opinions related to the Rules of Professional Conduct under the direction of the Bar Commission. Other Bar committees related to the Rules of Professional Conduct include the Fee Dispute Resolution Committee (William Jeffs, chair), and the Fund for Client Protection Committee (Hon. David R. Hamilton, chair). The Bar has also contracted with Blomquist Hale Consulting, *see* http://www.blomquisthale.com, to provide free counseling as a member benefit for lawyers struggling with emotional, mental, or substance abuse problems. Although it is not a Bar Committee, the "Lawyers Helping Lawyers Committee" (Brook Millard, chair), *see* http://www.lawyershelpinglawyers.org, is a group that renders similar assistance to Utah Bar members through peer mentors and support groups.

Bar Governance[5]

The Bar is governed by a President, President-elect, and a Board of Bar Commissioners. (Of course the real work and day to day Bar operations are done by the Bar's staff, under the experienced direction of Executive Director John Baldwin.) The Bar Commission is comprised of fifteen voting members, including the Bar President and President-elect, thirteen lawyer commissioners who serve three-year terms, plus two non-attorney "public" members, all of whom are volunteers. One Commissioner each is elected from the First, Second, and Fourth Judicial Districts; only one Commissioner is elected from the Fifth through Eighth Judicial Districts, and seven Commissioners are elected from the Third District, since that is where the greatest number of attorneys reside. The Bar Commission meets for a half day every five to six weeks, plus each Commissioner has liaison assignments with the Bar's sections and committees, in addition to work on sub-committees.

Other Bar Service Opportunities

There are many other Bar Committees that provide meaningful opportunities for attorneys to contribute to the profession and to the public. Some of these include the recently created *Pro Bono* Commission (including the *pro bono* committees for each of the eight Utah judicial districts), the Modest Means Program (matching clients of modest means with attorneys willing to work at reduced rates), the Governmental Relations Committee (Paxton Guyman and Scott Sabey, co-chairs), the *Bar Journal* committee (Bill Holyoak, chair), the Budget and Finance Committee (Ray Westergard, chair), the Disaster Legal Response Committee (Ed Rutan and Brooke Ashton, co-chairs), and many more.

Many attorneys enjoy actively participating in one or more of the Bar's many practice group sections, or in the Young Lawyers Division (YLD). YLD is the Bar's largest and most active group. It provides terrific opportunities for service to the profession and the community, regardless of age, through such programs as Wills for Heroes and Tuesday Night Bar.

Time and space preclude mentioning all of the Bar committees and those who donate their time and expertise to keep them running smoothly. The Bar clearly could not function without the thousands of hours donated yearly by its members. Check out the Bar's new website, www.utahbar.org, for more information and other ideas where you might contribute. If any of the many Bar programs is of special interest to you, please considering volunteering to help if you haven't already. Doing so will surely bring you greater satisfaction in our noble profession.

1. Utah Code Jud. Admin., ch 14, art. 1, 7.
2. The oath taken as part of becoming a licensed Utah attorney states as follows: "I do solemnly swear that I will support, obey and defend the Constitution of the United States and the Constitution of Utah; that I will discharge the duties of attorney and counselor at law as an officer of the courts of this State with honesty, fidelity, professionalism, and civility; and that I will faithfully observe the Rules of Professional Conduct and the Standards of Professionalism and Civility promulgated by the Supreme Court of the State of Utah." *Id.*, ch. 13, preamble [1].
3. *Id.*, ch. 14, art. 4.
4. *Id.*, ch. 14, art. 5, 6.
5. *Id.*, ch. 14, art. 2.

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Mandatory eFiling Has Arrived in the Utah State Courts

by Debra J. Moore

> It would be extremely difficult, I think, to find any operation more paper intensive than courts; tens of millions of pieces of paper are handled multiple times by multiple people in Utah's courts annually. This is about to change radically and rapidly as we move to what we are calling "e-everything."

Former Chief Justice Christine M. Durham, 2011 State of the Judiciary Address, *available at* http://www.utcourts.gov/resources/reports/statejudiciary/2011-StateOfTheJudiciary.pdf.

The Utah Courts have mandated that attorneys electronically file all pleadings in civil cases in district court beginning April 1, 2013. Utah Code of Jud. Admin. R. 4-503. This means that the last day any district court statewide will accept filings in paper will be Friday, March 29, 2013. The courts adopted this deadline last summer to allow attorneys time to sign up and learn the system. About twenty-five percent of the roughly 5,500 attorneys who currently have filings in district court file electronically. The remainder can help judges, court staff, their colleagues, and their law practice, by starting to eFile now.

> *"With all counsel of record using the [eFiling] system, each user receives the maximum convenience and cost savings."*

Mandatory eFiling has long been a goal for the courts

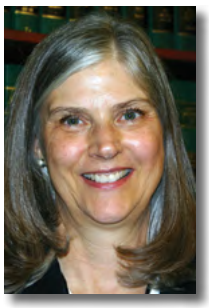
Twenty-one years ago, the Utah Commission on Justice in the Twenty-First Century created goals for the courts' future use of technology, including moving to a paperless system. *See* Utah Judicial Council, Utah Comm'n on Justice in the Twenty-First Century, Final Report, Doing Utah Justice (1990), on file with the Utah State Law Library. Fast forward to 2007, when the Utah Judicial Council approved an eFiling plan for the courts. Voluntary eFiling began in the Second District, Davis County, in 2009, and eFiling went statewide in 2011. After the eFiling system had been in use successfully for over a year, the Judicial Council adopted a rule which makes eFiling mandatory in civil cases in all district courts as of April 1, 2013. *See id*. R. 4-503.

Two case types must be added before the eFiling system is fully ready to receive all filings covered by the rule. eFiling is not yet available for either domestic or probate cases, although it likely will be by the time you read this article. Domestic cases are scheduled to be added to the eFiling system in January 2013, with probate to follow closely.

eFiling benefits the public

The mission of the Utah courts is "to provide the people an open, fair, efficient, and independent system for the advancement of justice under the law." *See* www.utcourts.gov. eFiling advances this mission by opening access to court records at any time and from anywhere. eFiling brings the court

DEBRA J. MOORE is the District Court Administrator for the Utah Administrative Office of the Courts



to the individual rather than requiring the individual to go to court. It increases efficiency by eliminating or reducing the need for court staff to create files and labels, open mail, enter data into the case management system, manually prepare the record on appeal, and physically move files around the courthouse. It reduces the need for costly storage space, postage, paper, envelopes, file folders, labels, and so on.

In order to transition to mandatory eFiling, the courts had to first eliminate paper files in pending cases, which was completed by the end of 2011. Now, to maintain paperless files, court staff scan an average of 15,000 paper filings each day and then destroy the paper. In large part, that labor intensive task will be eliminated with mandatory eFiling.

In addition, mandatory eFiling will help the courts weather a new era of relatively flat state revenues following the "great recession." Because eFiling increases access to justice and makes better use of public resources, the Utah Legislature has been supportive of the courts' move to mandatory eFiling. In a recent audit of court operations, the Legislative Auditor recommended that "[t]he courts should consider mandating e-filing as soon as feasible," noting that "[b]y requiring attorneys to e-file documents, the courts could free up a considerable amount of clerk time." Office of the Legislative Auditor General, A Performance Audit of the Operating Efficiency of the Utah State Court System (September 2011), http://www.le.utah.gov/audit/11_11rpt.pdf.

In fact, mandatory eFiling is expected to enable the courts to eliminate through attrition between eight and sixteen percent of the current district court clerical workforce. The courts intend to redirect the funding for those positions into compensation adjustments for court staff. With mandatory eFiling and other technologies, court staff will have the opportunity to become knowledge workers. Instead of using primarily clerical skills, staff will use more analytical case management and customer service skills than in a paper-based system.

eFiling benefits attorneys

Many Bar members recognize the benefits of eFiling to their law practice, particularly under a mandatory system. With all counsel of record using the system, each user receives the maximum convenience and cost savings. After eFiling became mandatory in the Utah federal district court in 2006, one commentator stated, "[I]t is difficult to imagine any advantage to conventional filing now that electronic filing is possible." Craig Hall, *Electronic Filing in Federal Court: Where are We Now*, 20 Utah Bar J. 32 (Jan./Feb. 2007).

When the proposed mandatory eFiling rule for the Utah Courts was published for comment, most of the comments supported the rule change. One attorney stated, "I am in favor of making e-filing mandatory, the sooner the better." Utah State Courts Rules – Published for Comment, http://www.utcourts.gov/cgi-bin/mt3/mt-comments.cgi?entry_id=2496. Another noted:

> E[lectronic] filing works well in the federal courts and has for some years. It saves time and money for both the courts and lawyers (hence parties). It should be extended to the state courts to the extent practicable. While current options add some costs to lawyers…, that is offset by savings in postage, printing, copying, delivery fees.

Id. The Legislative Auditor also concluded that electronic filing benefits attorneys, noting in his report that attorneys will:

- [n]o longer need[] to make trips to the courthouse or pay postage
- [have t]he ability to submit documents at their own convenience, not just when the courts are open, [and]
- [have] 24/7 online access to all case documents

Office of the Legislative Auditor General, A Performance Audit of the Operating Efficiency of the Utah State Court System, p.19. (September 2011), http://www.le.utah.gov/audit/11_11rpt.pdf.

A cost/benefit analysis by an eFiling service provider in Clark County, Nevada claims that a $10 fee per eFiling is more than offset by the cost of filing and serving the documents in paper on a single opposing party, including delivery cost, whether by U.S. mail, a runner or overnight delivery service. *See* Wiznet, *E-File&Serve Document Access Program, Cost Benefit Analysis*, http://wiznet.wiznet.com/clarknv/pages/pdf/EFS_and_DAP_Pricing.pdf (last viewed Nov. 6, 2012). As discussed further below, eFiling in Utah requires use of a certified eFiling system. Among the private providers who have been certified by the courts, plans are available for less than the $10 fee per filing used in the Clark County analysis.

> *"To supplement the EFSP training, the courts provide written and interactive video training materials online.…Training is also available through the Utah State Bar for Continuing Legal Education credit."*

eFiling can also benefit a law practice by assisting the judge. In eFiling, rather than being scanned by court staff, documents other than orders are submitted in searchable PDF format. More and more, district court judges are managing their cases electronically and the courts are developing a new case management system to make this easier. Judges who work with electronic files prefer the searchable PDF documents that are submitted in eFiling. Searchable PDF files can be read more easily and, as the name implies, can be searched for particular text. The judge can annotate the documents in preparation for a hearing or for interacting with a law clerk. If desired, he or she can copy parts of the document into a draft memorandum decision or order. Judges also appreciate that court staff are not occupied by the time-consuming task of scanning filings.

Attorneys who handle general civil cases are encouraged to begin eFiling now, before the April 1st deadline, not only to begin receiving all of these benefits, but also to prepare adequately for the deadline. To eFile, you will use technology you already have for the most part, but you may need to obtain Adobe Acrobat or other PDF (portable document format) writing software. You will also need to either subscribe to a

certified eFiling Service Provider (EFSP),[1] or build your own interface for certification by the courts.[2] Pricing structures and other features among the EFSPs vary, so you will likely want to do some advance planning, take time to shop around, and perhaps check references. Although the system is easy to learn for anyone with basic computer skills, you will probably also want to make sure that your staff are thoroughly trained and comfortable with the system. It is not too soon to get ready to eFile by April 1st.

Training is available

All of the certified EFSPs offer training to subscribers and serve as your contact for any needed technical assistance. If your concern requires court involvement, the EFSP should contact the courts' information technology department. If your concern relates to a particular case, however, you should contact the eFiling Specialist for the court location where the case is on file. Information on how to contact each of the courts' eFiling specialists is posted online on the courts' website.

To supplement the EFSP training, the courts provide written and interactive video training materials online. The "Basics of eFiling" video can be completed in less than fifteen minutes. By the time you read this article, several "Quick Tips" – single-question videos that can be completed in about three minutes – will also be available online. Training is also available through the Utah State Bar for Continuing Legal Education credit.

Self-represented parties will be able to eFile through OCAP

Currently, attorneys must continue to serve paper pleadings on self-represented parties, who are not included in the mandatory eFiling rule. To further enhance the value of eFiling, however, the courts intend to redesign the Online Court Assistance Program (OCAP) to allow self-represented parties to eFile. OCAP includes domestic cases and other case types in which parties frequently represent themselves. It will not be mandatory for self-represented parties to eFile in OCAP, but the courts anticipate that many will choose the convenience and savings of

Utah State Courts

Notice to Attorneys

As of April 1, 2013, e-filing will be mandatory for attorneys in all civil cases, including domestic relations cases.*

Paper filings will not be accepted after March 29, 2013.

For more information, go to **www.utcourts.gov/efiling** or **www.utahbar.org/efiling**

*E-filing is not yet available for probate cases. The mandatory date to e-file probate cases is July 1, 2013. CJA 4-503.

eFiling. When a self-represented party does eFile, attorneys who represent another party on the case will be able to serve the self-represented party by eFiling.

Attorneys may eFile in criminal cases

Criminal cases are also not yet covered by the mandatory eFiling rule. However, a court-administered system is available to full-time public defenders statewide and is already in widespread use.[3] Part-time public defenders and private defense counsel may also eFile in criminal cases by subscribing to one of the certified EFSPs. On the prosecution side, the Utah Prosecution Council (UPC) has built a version of the Prosecutors Information Management System (PIMS) that allows eFiling of a criminal information. Prosecutors in Davis, Weber, and Cache counties are now eFiling through PIMS and the UPC has created a schedule for the remaining counties around the state. The UPC has advised the courts that it expects to have eFiling available for all county prosecutors, tentatively, by July 2014. City prosecutors will be brought on to eFiling next.

Other Things to Know

1. Accuracy in entering data is critical. With eFiling, attorneys or members of their staff, rather than court staff, enter case data directly into the court docket. Filing in the wrong case, listing the wrong parties, or entering other incorrect data may require the filer to take corrective action.

2. Redaction of personal information is the attorney's responsibility. eFiled documents are entered into the court docket automatically. Court staff do not review documents to determine whether they contain personal information. Personal information not redacted or classified as non-public will be available to the public through XChange, the district courts' online case lookup system. It is important that all counsel be familiar with and follow the court rules on non-public information, which are found at Utah Code of Judicial Administration R 4-202.

3. Continue to include certificates of service with your pleadings. Although eFiling a pleading constitutes valid service, a certificate of service is still required by court rule. The certificate is needed in cases in which not all parties file electronically, and at this time, the rule does not make any exceptions. *See* Utah R. Civ. P. 6.

4. On the judge's request, submit courtesy copies in paper. Courtesy copies should not become part of the court record and therefore should not be eFiled.

5. eFiling accounts may not be shared. When you submit a

pleading electronically, you are affixing an electronic signature. Rule 11(a) of the Utah Rules of Civil Procedure requires that all papers filed with the courts "shall be signed by at least one attorney of record…." *Id.* R 11(a). The courts require that each attorney use a unique account with a unique identifier for that attorney.

6. Use the resources available on the courts' website at http://www.utcourts.gov/efiling. There, you will find frequently asked questions, written and interactive video training materials, contact information for the certified EFSPs, contact information for the eFiling Specialist in each court location, and additional information.

Conclusion

As Chief Justice Durham highlighted in her 2011 State of the Judiciary Address to the Utah Legislature, the courts are moving radically and rapidly to "e-everything." Mandatory eFiling is a critical component of that move and responds to a growing public expectation of doing business with the courts. Converting the seventy-five percent of attorneys who have pleadings on file with the courts to eFiling is a daunting task, but one for which the courts have provided ample lead time. The courts appreciate the efforts of all Utah Bar members to advance the cause of access to the courts and to benefit everyone who participates in the justice system by a more efficient way of doing justice.

1. More EFSPs can be added as long as they meet the courts' certification requirements. For more information about EFSP certification, *see* Utah State Courts, Utah Trial Court System Electronic Filing Guide, http://www.utcourts.gov/eFiling/docs/Electronic_Filing_Guide.pdf.
2. For more information on building your own interface, *see id.*
3. For filings on behalf of a governmental entity, full time court-appointed defense counsel may register to use the court-administered EFSP by contacting the Courts Help Desk at 801-578-3850.

Tenth Circuit Jurisdictional Considerations in Personal Injury Cases

by Kevin J. Simon

Assume for a moment that your client has been served with a significant personal injury complaint and needs your legal expertise and guidance. Alternatively, assume for a moment that your client has been injured, wants to file suit, and likewise needs some direction. If the hypothetical complaint exclusively pleads claims of ordinary and gross negligence (or close relatives thereof), as is often the case, you should consider a couple key issues that may be outcome determinative. First, is the ordinary negligence claim susceptible to an enforceable pre-injury release agreement? If it is, move on to consideration number two. Second, is there diversity of citizenship enabling the defendant to remove to federal court if the plaintiff files in Utah State Court? These two considerations very well may determine whether or not you go to trial, as the United States Court of Appeals for the Tenth Circuit made abundantly clear in *Milne v. USA Cycling*, 575 F.3d 1120 (10th Cir. 2009).

The *Milne* case, filed in the United States District Court for the District of Utah under diversity jurisdiction, involved a bicycle race called the "Tour of Canyonlands" in which multiple racers collided with an on-coming SUV and trailer. One racer died and another was seriously injured. As is often the case with serious injuries, a lawsuit followed and the plaintiffs made claims for ordinary *and* gross negligence. The parties ultimately agreed that a pre-injury release agreement signed by plaintiffs precluded plaintiffs' ordinary negligence claim, but not their gross negligence claim. The parties diverged, however, with respect to whether plaintiffs offered evidence sufficient for a jury to conclude that defendants' actions were grossly negligent. In other words, could the federal district court determine, as a matter of law, that defendants' actions were not grossly negligent? Gross negligence is defined as "'fail[ing] to observe even slight care'" and "'carelessness or recklessness to a degree that shows utter indifference to the consequences that may result.'" *Moon Lake Elec. Ass'n. v. Ultrasystems W. Constructors, Inc.*, 767 P.2d 125, 129 (Utah Ct. App. 1988) (citation and internal quotation marks omitted).

The federal district court in *Milne* found in favor of defendants and granted summary judgment, resulting in a Tenth Circuit appeal. In the intervening time period between the federal district court's summary judgment ruling in June 2007 and the Tenth Circuit's ruling on plaintiffs' appeal in 2009, the Utah Supreme Court issued two opinions reversing state trial court dismissals of gross negligence claims on summary judgment: *Berry v. Greater Park City Co.,* 2007 UT 87, 171 P.3d 442 and *Pearce v. Utah Athletic Foundation,* 2008 UT 13, 179 P.3d 760.

Although a seemingly ominous sign of things to come for the successful defendants in *Milne*, one *non-substantive* difference ultimately protected the *Milne* trial court decision from the intervening Utah Supreme Court opinions. At first blush, one might conclude that the Tenth Circuit's consideration of a "gross negligence" claim would be governed by Utah law, thereby requiring application of *Berry* and *Pearce*, but that would only be partially correct. Yes, "gross negligence" is, of course, defined by Utah law, but federal law dictates the summary judgment standard. While normally this would be inconsequential since Utah closely follows Federal Rule of Civil Procedure 56, it made all the difference in *Milne*.

This is because Utah maintains a "special rule for summary judgment in negligence cases," prohibiting a party from obtaining summary judgment "where the standard of care applicable to that dispute has

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not been 'fixed by law.'" *See Milne*, 575 F.3d at 1126. "Fixed by law," according to the Utah Supreme Court, generally means that "a statute or judicial precedent must articulate 'specific standards'" applicable to the relevant circumstances. *See id*. This "special" Utah rule, which only applies on summary judgment, is considered procedural by the Tenth Circuit and differs "significantly from federal law" where no such rule exists. *See, e.g.*, 10A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 2712 (3d ed. 1998).[1] In fact, the reasons that save plaintiffs from summary judgment under Utah's "special" rule (i.e., no evidence of a "fixed" standard of care with which to compare defendant's acts or omissions) are the very same reasons federal courts sometimes dismiss plaintiffs' claims.

In affirming the federal district court's dismissal of plaintiffs' gross negligence claims, the Tenth Circuit correctly likened *Milne* to the circumstances in another Tenth Circuit appeal, *Foster v. Alliedsignal, Inc.*, 293 F.3d 1187 (10th Cir. 2002). In *Foster*, a retaliatory discharge case brought pursuant to Kansas law, the plaintiff tried to avoid summary judgment by applying Kansas summary judgment standards. *See id*. at 1194. Under Kansas law, a plaintiff must prove retaliatory discharge by "clear and convincing evidence" to prevail *at trial*, but can pretend essentially that a "preponderance of the evidence" standard exists for purposes of opposing summary judgment. *Id*. Just as the Tenth Circuit rejected application of Kansas summary judgment standards in *Foster*, so too did it resist similar attempts to apply Utah's "unique" summary judgment standards in *Milne*.[2] *See id*. at 1195-96; *Milne v. USA Cycling*, 575 F.3d 1120, 1195-96 (10th Cir. 2009).

While certainly not encouraging forum shopping unrestrained by credible domicile arguments, the Tenth Circuit's *Milne* opinion should cause litigants to pause and consider what jurisdiction best suits their clients. When, like in *Milne*, a valid pre-injury release exists precluding ordinary negligence claims and all that remains is a gross negligence claim, where you litigate may dramatically change the case's dynamic and outcome. For defendants in this context, federal court may be the difference between continued litigation with an uncertain outcome and a definitive, sustainable pre-trial victory. For plaintiffs in this context, federal court may be the difference between staying above water long enough to reach trial or settlement and completely wasted efforts.

1. In diversity-of-citizenship actions, questions relating to the availability of summary judgment, such as whether there is a disputed issue of fact that is sufficient to defeat the motion, are procedural and therefore governed by Rule 56, rather than by state law.
2. *See, e.g., Briggs v. Washington Metro. Area Transit Auth.*, 481 F.3d 839, 841 (D.C. Cir. 2007) (affirming grant of summary judgment for defendants on a negligence claim where plaintiff, who under state law had the burden to provide expert testimony on the standard of care, failed to "offer creditable evidence sufficient to establish a controlling standard of care"); *Keller v. Albright*, 1 F. Supp. 2d 1279, 1281-82 (D. Utah 1997) (granting defendant's motion for summary judgment on plaintiff's legal malpractice claim asserted under Utah law because the plaintiff failed to provide expert testimony regarding the standard of care, and the case did not involve circumstances "within the common knowledge and experience of lay jurors").

Rehabilitation Act and ADA Discrimination Claims – Two Birds You Can't Always Kill With One Stone

by Chris Glauser

Most employment lawyers are very familiar with the Americans with Disabilities Act (ADA), which prohibits discrimination by employers based on an employee's disability. However, if a defendant/employer receives federal assistance, a plaintiff can also bring a discrimination claim under the less familiar Rehabilitation Act. *See* 29 U.S.C. § 794(a) (1994) ("No otherwise qualified individual with a disability…shall, solely by reason of her or his disability, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance…."). Like the ADA, the Rehabilitation Act prohibits employers from discriminating based on an employee's disability. *See id*. In most cases, an ADA claim and a Rehabilitation Act claim will rise and fall together, as both apply similar standards to determine whether discrimination has occurred. In fact, the Rehabilitation Act expressly incorporates portions of the ADA, providing that:

> The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

Id. § 794(d).

Because the Rehabilitation Act expressly incorporates Title I of the ADA, courts generally apply the standards and case law arising out of ADA claims in determining whether a defendant has violated the Rehabilitation Act. This includes determining whether an individual has a qualifying disability, determining whether the conduct at issue constitutes discrimination, and applying the familiar *McDonnell Douglas* burden-shifting analysis to discrimination claims. *See Cummings v. Norton*, 393 F.3d 1186, 1190 n.2 (10th Cir. 2005) ("'Because the language of disability used in the ADA mirrors that in the Rehabilitation Act, we look to cases construing the Rehabilitation Act for guidance when faced with an ADA challenge….'" (quoting *Kimber v. Thiokol Corp*., 196 F.3d 1092, 1102 (10th Cir. 1999))). Accordingly, many practitioners do not clearly distinguish between Rehabilitation Act and ADA claims in crafting their prosecution or defense strategies. However, some courts, including the Tenth Circuit, have recognized differences between the two Acts that make it possible for a Rehabilitation Act claim to succeed where an ADA claim would fail. It is important for employment law practitioners to be aware of these differences and to know which courts apply them.

The key point of disagreement among the courts is whether the Rehabilitation Act's reference to the ADA incorporates all aspects of the ADA, including the procedural requirements and definitions, or only the standards for liability. Courts generally agree that ADA statutory requirements and case law for determining whether an employer discriminated against an employee also apply to Rehabilitation Act claims. But the ADA also includes definitions, procedural prerequisites, and standing requirements that are often dispositive of an ADA claim. For example, the ADA defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees…." 42 U.S.C. § 12111(5)(A) (1994).

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Because the ADA applies only to "employers," a defendant with fewer than fifteen employees is not subject to the ADA and any ADA claim against such an employer is subject to summary dismissal. However, some courts, including the Tenth Circuit, have held that while the Rehabilitation Act incorporates the ADA's substantive liability requirements, it does not incorporate all of the ADA's definitions. In these jurisdictions, a claim under the Rehabilitation Act may succeed where a similar claim would be dismissed under the ADA.

In *Schrader v. Fred A. Ray, M.D., P.C.*, 296 F.3d 968 (10th Cir. 2002), the Tenth Circuit addressed this issue and held that the Rehabilitation Act "does not incorporate the ADA definition of an 'employer,' and thus even employers with fewer than fifteen employees are subject to the Rehabilitation Act's requirements so long as they are recipients of federal assistance." *Id.* at 969. The court noted that, although the Rehabilitation Act incorporates the ADA's standards for liability, it does not include any requirement for the number of employees, and it does not use the term "employer." *Id.* at 971. Instead, it applies to any "program or activity" receiving federal funds. *Id.* Therefore, the court found that the Rehabilitation Act's incorporation of the ADA "addresses only the substantive standards for determining what conduct violates the Rehabilitation Act, not the definition of who is covered under the Rehabilitation Act." *Id.* at 972. Under this holding, a plaintiff in the Tenth Circuit may bring a Rehabilitation Act claim regardless of the number of individuals the defendant employs.

Another situation where the scope of the Rehabilitation Act's incorporation of the ADA can be determinative is where a discrimination claim is brought by an independent contractor rather than by an employee. It is well established that independent contractors cannot bring discrimination claims under the ADA. *See* 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual with a disability…in regard to job application procedures, the hiring, advancement, or *discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment*" (emphasis added)); *see also Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632, 642 (7th Cir. 2004) (finding that independent contractors do not have standing to sue under the

ADA); *Lerohl v. Friends of Minn. Sinfonia*, 322 F.3d 486, 489 (8th Cir. 2003) (affirming the district court's determination that the ADA did not apply to terminated independent contractors). This is because the ADA's "definition of a 'qualified individual with a disability' clearly foresees an employment relationship." *Johnson v. City of Saline*, 151 F.3d 564, 567-68 (6th Cir. 1998); *see also* 42 U.S.C. § 12111(8) (defining "qualified individual" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires"). But some courts have held that the Rehabilitation Act does not incorporate the ADA's requirement that the plaintiff be an employee, and therefore allowed discrimination claims by independent contractors under that Act. *See Flemming v. Yuma Reg'l Med. Ctr.*, 587 F.3d 938, 939 (9th Cir. 2009) (holding that the Rehabilitation Act "incorporates the 'standards' of Title I of the ADA for proving when discrimination in the workplace is actionable, but not Title I in toto, and therefore the Rehabilitation Act covers discrimination claims by an independent contractor"). As a result, an independent contractor who is precluded from bringing a discrimination claim under the ADA can bring that same claim under the Rehabilitation Act in some jurisdictions, but not in others. While the Tenth Circuit has not directly addressed this issue, its holding in *Schrader* indicates that it may recognize a claim by an independent contractor under the Rehabilitation Act.

In contrast to *Schrader* and *Flemming*, some jurisdictions have held that the Rehabilitation Act incorporates the ADA completely, including its definitions and procedural requirements. *See, e.g., Wojewski v. Rapid City Reg'l Hosp., Inc.*, 450 F.3d 338, 345 (8th Cir. 2006) ("Given the similarity between Title I and the Rehabilitation Act, absent authority to the contrary, we construe both to apply to an employee-employer relationship and decline appellant's invitation to extend coverage of the Rehabilitation Act to independent contractors."). In these jurisdictions, a claim under the Rehabilitation Act is likely precluded on the same procedural or definitional bases that would preclude an ADA claim.

The different approaches to the Rehabilitation Act's incorporation of the ADA have significant implications for attorneys who litigate discrimination claims. Plaintiff's counsel must determine whether the defendant receives federal assistance (and is therefore subject to the Rehabilitation Act), and how the controlling authority applies the Rehabilitation Act's incorporation of the ADA. If the controlling jurisdiction does not incorporate all definitions and other aspects of the ADA, a plaintiff may be able to succeed on a Rehabilitation Act claim where an ADA claim would face significant obstacles. The defense bar should be similarly aware of the application and the scope of any Rehabilitation Act claim brought against their clients. For example, a defense attorney moving to dismiss an ADA claim because the client has fewer than fifteen employees should not rely on that argument alone, but should include additional substantive reasons to dismiss an accompanying Rehabilitation Act claim that might not be subject to the fifteen employee defense. Otherwise the attorney may have to defend against the same discrimination claim under the Rehabilitation Act, regardless of whether the ADA claim is dismissed.

While Rehabilitation Act claims often follow the same path as an accompanying ADA claim, it is crucial that counsel recognize where the two claims diverge and resist the temptation to simply assume that the claims will sink or swim together. This likely means developing additional defenses or claims that might appear to be unnecessary at first glance, but may save your case by ensuring or preventing complete dismissal of both claims if an apparent "slam dunk" defense under the ADA is found not to apply under the Rehabilitation Act.

What would life be if we had no courage to attempt anything new?

– Vincent van Gogh

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Appellate Highlights – October 2012

by Rodney R. Parker and Julianne P. Blanch

EDITOR'S NOTE: *The following appellate cases of interest were recently decided by the Tenth Circuit, Utah Supreme Court, and Utah Court of Appeals. These summaries were compiled to provide a reference to practitioners who want to know in a five-to-ten-minute read what has been happening of significance in our appellate courts.*

Neri-Garcia v. Holder, 696 F.3d 1003 (10th Cir. Oct 3. 2012)

Petitioner sought "review of the Board of Immigration Appeals' (BIA) denial of his applications for restriction on removal under the Immigration and Nationality Act (INA) and for relief under the United Nations Convention Against Torture (the CAT)" based on his past mistreatment in Mexico due to his homosexuality. *Id*. at 1006. First, the court determined that the Petitioner's showing of an "inhospitable attitude, even discrimination" was insufficient under the INA to show a threat to life or freedom as required to prevent removal. *Id*. at 1009. Second, under the CAT, the court determined that twenty-seven-year-old evidence of Petitioner's past torture was insufficient to establish likely torture today, when no evidence was offered in support, and the Board's determination was otherwise supported by substantial evidence. *Id*. 1010-11.

Pioneer Builders Co. of Nevada, Inc. v. K D A Corp., 2012 UT 74 (Nov. 2, 2012)

Owners of unrecorded leases on real property challenged foreclosure by party that financed subsequent purchase of the property, arguing that their interests in the property were superior because the financing party had actual and constructive notice of the unrecorded leases under section 57-3-103 of the Utah Code. In reversing the district court's grant of summary judgment, the court made several important holdings. First, the court held that information that is consistent with a subsequent purchaser of real property's knowledge that the property is encumbered by recorded interests is insufficient to put the purchaser on notice of unrecorded interests. *Id*. ¶37. Second, the court held that omission of a parcel from a deed is not a "clerical error" that can be corrected by affidavit under Utah Code section 57-3-106(9). *Id*. ¶58. Third, the court held that an interest in real property retroactively validated by the after-acquired title statute is inferior to the interest of any third party who records its interest in the time between the defective conveyance and the conveyance that retroactively validated it. *Id*. ¶49.

In re Jardine, 2012 UT 67 (Oct. 2, 2012)

After an attorney's representation of a client had terminated, the attorney's secretary sent the client her files, "but inadvertently included the file and personal information of another client without that client's consent." *Id*. ¶16. The district court determined that the attorney violated Rule 1.6(a) of the Rules of Professional Conduct, which generally prohibits disclosing information relating to the representation of a client without informed consent. The Utah Supreme Court reversed, holding that "[n]othing in rule 1.6 states that an employee's misconduct is imputed to the lawyer" and that "[t]he policies underlying the Rules of Professional

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Conduct are directed toward the behavior *of the lawyer*." *Id.* ¶64. Rule 5.3, which governs a lawyer's responsibilities regarding nonlawyer assistants, was not before the court.

In re Honorable Keith L. Stoney, 2012 UT 64 (Sept. 28, 2012)

The Judicial Conduct Commission recommended a reprimand against a Judge for issuing an excessive fine – a $10,000 warrant for driving with an expired registration and no insurance. The Utah Supreme Court disagreed, determining that the Commission's finding that there was improper intent was not supported by the evidence because the Judge's testimony that the warrant was the result of a miscommunication or clerical error was uncontested and the Commission did not make a credibility finding. Additionally, the Court noted that although "[e]xcessive errors might 'demonstrate the bad faith necessary to support a charge of willful misconduct or the type of disregard and indifference necessary to support a charge of prejudicial conduct,'" it determined that any mistake in issuing the warrant did not violate the Judicial Code of conduct because there was no history of excessive bail orders, and thus the conduct did "not rise to the level of a violation." *Id.* ¶10 (footnote citation omitted).

Conley v. Dep't of Health, Div. of Medicaid & Health Fin., 2012 UT App 274, 287 P.3d 452 (Sept. 27, 2012)

The Utah Court of Appeals determined that the Division of Medicaid and Health Financing abused its discretion in not providing speech augmentative communication devices (SACDs) to non-pregnant individuals age twenty-one and older under the Utah Medicaid Program and that this policy of excluding such individuals violated the Federal Medicaid Act. Although the court recognized the state's broad discretion "in determining which categories of medical services it will opt into under its Medicaid plan," ¶52, it concluded that it was unreasonable and arbitrary for the State to opt into categories that included SACDs for medically needy individuals "but then to limit coverage of certain services within those categories by the age of the recipient." *Id.* ¶54.

Volunteer Court Visitors in Guardianship Cases

by Karolina Abuzyarova and Michaelle Wells Jones

In any given year there are about 1,500 new adult guardianship and conservatorship petitions filed. Last year seven of them were denied. At any given time, there are about 12,000 active cases; that is, there has been no order ending a fiduciary's appointment.

The demographics that populate these cases are projected to grow:

- The Rehabilitation Research and Training Center on Disability Demographics and Statistics of Cornell University reports that, in 2010, 3.7% of Utahns had a cognitive disability. *See* http://www.disabilitystatistics.org/ (last visited Nov. 30, 2012). With approximately 2.75 million people in the 2010 census, that is almost 102,000 people.

- Utah's State Plan for Alzheimer's Disease and Related Dementias estimates that the number of Utahns with Alzheimer's disease, about 32,000 in 2010, will increase by about one-quarter by 2020, and that by 2025, the number will have increased by 56% to about 50,000. Utah's State Plan for Alzheimer's Disease and Related Dementias: Action Plan 2012-2017 (2011), http://www.alz.org/national/documents/utah_stateplan_2012.pdf. Utah has the highest per capita increase of Alzheimer's disease cases in the country. *Id*.

- Aging alone does not foretell the need for a guardianship. Nevertheless, our older friends, relatives and colleagues are more likely to face functional and cognitive limitations and require a guardianship. The Governor's Office of Planning and Budget estimates that the number of Utahns age sixty-five and older, about 250,000 in the 2010 census, will increase by about one-third by 2020, and that by 2030, the number will more than double to about 523,000. Governor's Office of Planning and Budget, Preliminary 2012 Baseline Projections, http://governor.utah.gov/dea/projections.html (last visited Nov. 30, 2012).

Not all adults with diminished capacity will need a guardianship, but many will. A guardian for an incapacitated adult has a serious responsibility. In fact, a "guardian has the same powers, rights, and duties respecting the ward that a parent has respecting the parent's unemancipated minor child…." Utah Code Ann. § 75-5-312(2) (Michie 1993). It is an equally serious responsibility to vest someone with that power. Will the district court be ready to protect those in need?

For several years the Utah Judicial Council has been pursuing a course to improve how the district court makes guardianship appointment decisions and monitors appointments once made. The Council continues to work from the research and recommendations of the Conference of Chief Justices and the Conference of State Court Administrators and that of an ad hoc committee appointed for this purpose. *See* Resolution 14 of the Conference of Chief Justices and the Conference of State Court Administrators (2010), http://ccj.ncsc.dni.us/ElderResols/resol14TaskForce.html (last visited Nov. 30, 2012); Report of the Ad hoc Committee on Probate Law and Procedures (2009), http://www.utcourts.gov/committees/

KAROLINA ABUZYAROVA joined the courts in 2011 as a Program Coordinator to build a new guardianship monitoring program. She develops community partnerships, training curriculum and materials, volunteer recruitment strategies, and public relations. Karolina holds a Master's Degree in Political Science and Public Administration from the University of Utah.

MICHAELLE WELLS JONES is the Volunteer Coordinator with the Court Visitor Program. She supervises and supports volunteers through case assignment, by answering questions about cases, acting as liaison with the court staff, and engaging in regular communication with volunteers. Michaelle holds a Master of Social Work and a Master of Divinity.

adhocprobate/Guardian.Conservator.Report.pdf.

One of the ad hoc committee's many recommendations was to develop a cadre of volunteer court visitors for assignment by the court, and, working with a three-year grant from the State Justice Institute, the Judicial Council has established a pilot program in the Third, Fourth, and Seventh Judicial Districts called the Volunteer Court Visitor Program. The concept of a court visitor is not new; the authority of the court to assign a visitor has been part of the Utah Code since 1975. *See* Utah Code Ann. § 75-5-303 (history). The authority, however, has been used only sporadically due to lack of qualified people willing to serve.

Nationally, volunteer court visitor programs date back to 1990 through the efforts of AARP, again working with funding from the State Justice Institute. *See* Ellen M. Klem, *Volunteer Guardianship Monitoring Programs: A Win-Win Solution*, ABA Commission on Law and Aging (2007), http://apps.americanbar.org/aging/publications/docs/Volunteer_Gdhip_rpt.pdf. Administration of the fledgling Utah program is modeled after these and the very successful Utah CASA volunteer program, in which volunteers serve as friend, investigator and advocate for a child in juvenile court proceedings. The volunteer court visitors, however, are not advocates. They are observers; they report their observations to the court.

Utah's Volunteer Court Visitor Program has three objectives: preparing the file for the hearing, investigating whether to excuse the respondent from the hearing, and monitoring the guardianship after the appointment is made. The first objective is largely a ministerial function and one that clerks perform in some districts. The visitor's role is to confirm that all statutory and procedural requirements are met, including whether it is proposed that the respondent be excused from the hearing, whether the respondent has a lawyer, whether an interpreter is needed, whether all of the necessary documents have been filed, and whether all of the interested persons have been served with a copy of the petition and notice of the hearing.

The second objective is to conduct the investigation required by statute if it is proposed that the respondent be excused from attending the hearing, yet there is not clear and convincing evidence from a physician that the respondent has fourth stage Alzheimer's disease, extended comatosis, or an intellectual disability and an intelligence quotient score under twenty to twenty-five.

And the Fittest Lawyer in Utah is…

MEN'S DIVISION

1st: Jack Nelson (center)
2nd: David Garbett (left)
3rd: Ryan Atkinson (right)

WOMEN'S DIVISION

1st: Meghan Sheridan (center)
2nd: Elise Reinert (left)
3rd: Artemis Vamianakis (right)

MASTER'S DIVISION

1st: Josh Petterman (center)
2nd: Chad Shattuck (left)
3rd: Robert Eder (right)

The 1st Annual Fittest Lawyer in Utah Competition was held Saturday, October 27. The event, co-sponsored by the Anne Stirba Cancer Foundation and Salt Lake City CrossFit, raised $1,000 for the Huntsman Cancer Institute. Everyone enjoyed the successful event. The tradition will continue with the 2nd Annual Fittest Lawyer in Utah Competition tentatively scheduled for Saturday April 27th.

SALT LAKE CITY CROSSFIT

ANNE STIRBA CANCER FOUNDATION

See Utah Code Ann. § 75-5-303(5) (Michie 1993). The visitor usually has sufficient lead time before the hearings to make inquiries, file a report and serve it on the interested persons. Most of the volunteer assignments to date have been for this purpose.

The final objective is what we hope will become the centerpiece of the program – monitoring the appointments once made. Too frequently the court loses contact with the guardian, and the court has neither the time nor the experience to reestablish contact. Usually this is the result of the guardian moving and not notifying the court. The visitor's objective is to find the guardian by researching the records and data bases of entities that might have a record of the guardian's and the protected person's whereabouts more current than the court's records. The visitor might also research social media sites or contact interested persons from the original guardianship petition.

Further, the courts do not have the time to audit the annual reports of guardians. The visitors can identify those cases in which annual reports are required but not filed, prepare letters directing the guardian to file the report, or, as needed, prepare an order to show cause why the guardian should not be held in contempt. A $5,000 penalty shows how seriously the Utah Legislature views the failure to file required reports. *See id.* § 75-5-312(2)(e)(v). The district court should do so as well.

The visitors can also thoroughly review the reports that are filed, looking for indications that the protected person is at risk of harm. This includes warning signs about the protected person's health and well being:

- Is the protected person's residence and level of supervision appropriate for the nature of the incapacity?
- Are any physical and mental health problems being addressed?
- Are there signs of neglect or abuse, including self-abuse?
- Is the guardian acting within the scope of her or his authority or infringing on the rights retained by the protected person?

It also includes warning signs about the protected person's property:

- Is the protected person's property being properly managed?
- Are there signs of financial exploitation?
- Are the protected person's bills paid on time?
- Is the protected person's income being collected and used for the protected persons benefit?
- Are financial assets safely invested?
- Are real property and personal property safe?

Ultimately it may take in-person interviews and court hearings to reach a sound conclusion about whether there are problems, but the process can start with a volunteer court visitor reviewing the court records for warning signs. Just because there is a hint of a problem does not mean that there is a problem. It will be up to the court, not the visitor, to determine whether to conduct any further investigation.

If the court decides to conduct a further investigation, it might schedule a hearing and make inquiries personally, or the court might assign a visitor to make inquiries of the guardian, the protected person, and others. In this latter circumstance the visitor will conduct supervised interviews of those involved, make personal observations, and report the results of the investigation to the court.

As the volunteers gain more experience, we anticipate that they may instruct guardians on the role and demands of a fiduciary and instruct and mentor new volunteer visitors.

Our volunteers have a variety of backgrounds. We have retired and employed lawyers, social work students, auditors, law enforcement officers, and advocates for the elderly and persons with disabilities. The volunteers self-select the roles they want to fill, and the program

coordinators respect those choices. A person experienced at auditing records might be the proverbial "fish out of water" if asked to interview someone.

We have twenty-five volunteers who have completed the training, background check, and other requirements. Most volunteers are from our urban pilot district, the Third District Court, and three are in our rural pilot district, the Seventh District Court. We are just getting started in the Fourth District Court.

The Administrative Office of the Courts started building the Volunteer Court Visitor Program with a grant from the State Justice Institute in mid-2011. The Judicial Council appointed a steering committee to develop policies and procedures. *See* http://www.utcourts.gov/committees/visitor/ (last visited Nov. 30, 2012).The steering committee learned from similar court visitor programs in Idaho, Arizona, Texas, Washington, and other states, and from the Utah CASA program. The Commission on Law and Aging of the American Bar Association provided significant support by developing sample program manuals and forms. *See* Commission on Law and Aging of the American Bar Association, http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/court_volunteer_guardianshipmonitoring.html (last visited Nov. 30, 2012).

A main pillar of the Volunteer Court Visitor Program has been collaborative community partnerships in volunteer training and recruitment, including the College of Social Work at the University of Utah, Center on Aging at the University of Utah, Department of Sociology, Social Work and Anthropology of the Utah State University, Division of Aging and Adult Services, including Area Agencies on Aging, Long-term Care Ombudsman, Adult Protective Services, and Office of Public Guardian, Utah Volunteers Centers Association, Active Re-entry Centers for Independent Living, Jewish Family Service, AARP, National Alliance on Mental Illness, Division of Services for People with Disabilities, and the Utah State Bar. Volunteer programs work best when they are community based, and our program emphasizes the need for community involvement.

Information on how to volunteer as a court visitor is available on the court's website, http://www.utcourts.gov/visitor/. From there, the training agenda, resource manuals and report forms are just a couple of clicks away. To request a volunteer court visitor in one of the pilot districts, complete a request form from the website and file it with the court clerk.

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Jeremy Stewart
Matt Thue

Predicting the Future for Your Clients

by Joshua S. Baron

I love to watch football. I love watching football so much that I often get suckered into watching pre-game analysis on ESPN. I say suckered because it sometimes seems like these football "experts" can predict the outcome of games about as well as my mother who hates football and never watches it.

There is growing evidence that experts are almost as bad as the rest of us at predicting the future even when predicting things that relate to their expertise. And lawyers are not immune to the thinking errors that lead other experts to err. When lawyers commit thinking errors the consequences can be dire for their clients. That is why it is essential that lawyers start to recognize the errors that they are prone to commit and take action to avoid them.

> *"Nothing will ever take the place of a trained legal mind. But a trained legal mind needs accurate, relevant information to make good decisions."*

The Problem of Prediction

Political predictions are about as accurate as a "dart-throwing chimp" according to Phillip Tetlock a professor of psychology at UC Berkley. *See* Philip E. Tetlock, *Expert Political Judgment: How Good Is It? How Can We Know*? 41 (2005). Professor Tetlock asked hundreds of political pundits to predict future events in the world. He then compared their answers with someone choosing at random (a chimp throwing darts) and simple rules like "the world stays the same." He found that the expert humans did only slightly better than the chimpanzee and were often significantly outperformed by simple rules. Disturbingly, the experts overrated their confidence considerably. They were overly confident even when they were spectacularly wrong.

One reason for the experts' errors is that the world is complex. We don't know as much about the present as we think we do and we know much less about the future. But you won't make much money as a political pundit if you say that no one knows what the outcome will be of an election that is three years away. So you write your column and defend it on cable news shows. And no one ever checks to see how often you are right. If you are wrong and anyone notices, you say that something happened that no one could have predicted or that you were mostly right but just missed a small detail. Or, if you are really good, you make predictions that aren't really predictions at all like, "Political Party X will win the election if they can persuade people that they are better at governing. Party Y will win if people remember the past failings of Party X."

Another reason that experts fail when predicting the future is that they, like everyone else, reliably commit certain thinking errors that predictably skew their predictions. For example, everyone underestimates the cost of construction; whether they are remodeling their kitchen or building the Sydney Opera House.[1] These thinking errors are chronicled by Daniel Kahneman in his book *Thinking, Fast and Slow*. Kahneman shows that our minds use shortcuts that lead to predictable errors in certain situations. *See* Daniel Kahneman, *Thinking, Fast and Slow* 7 (2011). These errors

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are so ingrained that they are extremely difficult to spot at the time we are making decisions and even more difficult to correct. *See id*. at 218.

One of the significant thinking errors is the one that causes people to underestimate the cost of construction projects. Kahneman calls it the "planning fallacy." *See id*. at 255. The planning fallacy occurs when people frame a problem too specifically and ignore the broader context into which the problem falls. For example, when people plan construction projects they ask questions like, "What materials do we need?" and "How long will each construction task take us?" These questions lead to overly optimistic predictions. Better questions would be, "How long do similar projects take to complete and how much do they cost on average?" The second type of question yields much more accurate predictions. And the second type of question takes an "outside view." It looks at the specific project in the context of similar projects. But even people who know about the planning fallacy have a difficult time taking an outside view. *See* Daniel Kahneman, *A Short Course in Thinking About Thinking*, Edge, The Third Culture (July 20-22, 2007), http://edge.org/3rd_culture/kahneman07/kahneman07_index.html.

Lawyers are vulnerable to many of the same thinking errors that construction planners and political pundits face. Lawyers and judges, for example, commit the thinking error called "anchoring." Anchoring occurs when an irrelevant number skews a person's judgment in favor of the irrelevant number. At a judicial conference, researchers presented federal trial judges with a hypothetical personal injury case in which the defendant's liability was clear. *See* Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 793 (2001). The plaintiff had experienced significant injuries including the loss of the use of his legs. The judges were asked to decide an appropriate amount in damages. However, half of the judges were asked to first rule on a motion to dismiss for failing to meet the $75,000 amount in controversy minimum for federal jurisdiction. *See id*. at 803. Though almost all of the judges recognized that the motion was frivolous, they were significantly influenced by it and awarded 29% less in damages to the plaintiff. *See id*. at 791. That thinking error cost the hypothetical plaintiffs an average of $367,000. *See id*.

Minimizing Thinking Errors

Thinking errors are by their nature difficult to address. They are so ingrained in our minds that we generally don't recognize when we are committing them. However, setting up procedures for dealing with common problems can help minimize the effect of some cognitive errors. The planning fallacy is a common one and it comes up frequently in law practice, so I will use the rest of this article to outline a process for combating it. As a note of caution, not all cognitive errors have such easy solutions.

The planning fallacy arises from asking the wrong questions consequently framing the problem incorrectly. When faced with a settlement offer, for example, a lawyer is tempted to ask, "Given what I know about this case and what I know about my own abilities at trial, do I think that I can get a more favorable result for my client at trial?" This question is a dangerous one for many reasons.

For one, lawyers consistently overrate their own abilities. Sixty-five percent of lawyers attending the ABA's annual meeting believed that they were "better than average at predicting the settlement value of a case." Debra Cassens Weiss, *'Cognitive Traps' Ensnare Judges Taking Instant Survey*, ABA J. (Aug. 8, 2008, 9:29 AM), http://www.abajournal.com/news/article/cognitive_traps_ensnare_judges_taking_instant_survey/. They were even more confident of their ability to predict whether a case would be overturned on appeal. Seventy-six percent said they were "better than average at predicting when a trial court judgment would be reversed." *Id*. It is highly unlikely that 65% or 76% of these lawyers is better than average at these tasks.

If lawyers exhibit some of the other thinking errors suffered by other experts, like overconfidence in their predictions and overestimating how much they know about the problem, evaluating a settlement offer is even more perilous. Luckily, there is a limited antidote to the planning fallacy.

When evaluating a settlement offer, lawyers will be more likely to minimize the negative effects of the planning fallacy if they ask all of these questions:

1. What type of case is this one most similar to? In other words, to what class of cases does mine belong?

2. What does a typical result in that class look like? Or what is the average settlement for this type of case?

3. Compared to that set of cases, how does my case compare? Is it much stronger? Weaker? Or about average?

Let us take a hypothetical case as an example and ask the three questions listed above. Suppose you are a personal injury attorney. Your client has been injured in a car accident and suffered severe injuries. Before you call the insurance adjuster, you ask yourself the three questions and do some research:

1. What class of cases does this one belong to? This case is a spinal injury case with $6,000 in medical expenses. You find a database of trial outcomes and settlements for similar cases.

2. What is the average settlement for this type of case? An average trial verdict for this type of case is $12,000 and the highest verdict with similar medical expenses that was upheld on appeal was $20,000.

3. Compared to that set of cases, how does my case compare? Your case is stronger because the policy limits are $500,000, the at-fault driver was drunk at the time of the accident, and the injured driver is particularly sympathetic.

When you call the insurance adjuster, you know that you will reject anything less than $12,000. But you also know that trying for anything over $20,000 is probably unrealistic. You have a ballpark within which to evaluate settlement offers from the insurance adjuster. You will be unlikely to place so much focus on one fact, like the sympathetic injured driver, to the degree that you dramatically exaggerate the settlement value of the case.

Many personal injury and insurance defense lawyers might respond that they go through some version of that analysis. If they do, they are in good shape. They are probably avoiding most of the pitfalls that the planning fallacy presents. The problem arises for lawyers in areas of practice for which comparative information is not available. My practice, for example, focuses primarily on criminal defense. For some of my clients, the consequences for an inaccurate prediction of the future could involve life in prison or, in rare cases, the death penalty.

And yet, I am almost incapable of undertaking the analysis that the lawyer for a car accident can so easily make. There are no consolidated data for criminal trial outcomes or sentencing statistics organized by county and judge. That is not to say that the data would determine the advice I would give every client in every case. Of course clients who claim their complete innocence will be influenced less by the sentencing outcomes of other cases.

But suppose you have a client who is accused of felony aggravated assault and needs to decide whether to accept a plea bargain to a misdemeanor with thirty days jail and eighteen months probation. You think that the prosecution will have difficulty getting its witnesses to come to trial. You also think that you have a sixty percent chance of winning the case, but you know that you are so close to the case that you might be overestimating certain factors. Wouldn't it be helpful to know what the judge's average sentence is for felony aggravated assault cases? Wouldn't it be helpful to know what percentage of felony assault trials in your

county resulted in acquittal? If you knew that the average sentence was nine months in jail would that influence your decision? What if the average sentence were forty-five days in jail?

Criminal lawyers try to share information about sentences and judges' dispositions. But that information is anecdotal. Without reliable information about comparable cases, it is possible that criminal lawyers are exposing themselves to needless inaccuracy in their predictions.

I have less information about areas of law where I don't practice, but I have a sense that Utah lawyers are often missing information that would enhance their ability to advise their clients. When it comes to criminal law it would be relatively easy to compile the data to help lawyers better advise their clients. Hopefully that can be done for criminal lawyers and for other practice areas as well.

Our minds are amazing organs. They do many things extraordinarily well. However, they suffer from some small blind spots. Lawyers would do well to be aware of those blind spots and do everything they can to limit them so that they can better advise their clients. A major blind spot that is frequently involved when evaluating settlement offers is the planning fallacy. One way to minimize the planning fallacy is to compare settlement offers to outcomes in similar cases. It is impossible to compare settlement offers without data on the outcomes of similar cases. So, members of the bar should do all they can to gather such data and use it when evaluating offers and predicting outcomes.

Nothing will ever take the place of a trained legal mind. But a trained legal mind needs accurate, relevant information to make good decisions.

1. *See* Roger Buehler, Dale Griffin, & Michael Ross, *Exploring the "Planning Fallacy": Why People Underestimate Their Task Completion Times*, 67 J. Personality Soc. Psychol. 366, 366 (1994). The Sydney Opera House was predicted to cost $7 million to construct and to be finished by 1963. It was finished in 1973 at a cost of $102 million. So, it was ten years late and cost fourteen times more to complete than originally estimated.

Justice Sutherland Endures: Sutherland's Legacy and the Affordable Care Act

by Lindsay K. Nash, Bradley D. Masters, and Nathanael J. Mitchell

Introduction

The United States Supreme Court recently upheld the Affordable Care Act in *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012). The decision is the most important case decided this term. As such, we take particular pride in the influence Utah's most famous jurist, United States Supreme Court Justice George Sutherland, had on the decision. Justice Sutherland served in the Court from 1922 until 1938; however, his jurisprudence lays foundation for many sections of the decision. At such a juncture in constitutional history, it seems appropriate to honor Justice Sutherland, whose reputation of "even-handed" jurisprudence remains alive and well today.

In this article, we discuss how Justice Sutherland's work is used in sections of Chief Justice Roberts's opinion of the court, Justice Ginsburg's concurrence, and the joint dissent.

The Opinion of the Court

Chief Justice Roberts wrote the opinion of the court, which readily reflects the legacy of Justice Sutherland. Roberts upholds the constitutionality of the Patient Protection and Affordable Care Act's most critical component, the individual mandate, which requires all individuals to obtain health insurance coverage. *NFIB*, 132 S.Ct. at 2577. The Chief Justice's legal analysis surprised and confused some observers. Few expected him to find that the individual mandate was a valid exercise of the taxing power, while at the same time unconstitutional under the Commerce Clause. Erwin Chemerinsky, *A Surprise?*, SCOTUSblog (June 29, 2012, 9:27 AM), http://www.scotusblog.com/2012/06/a-surprise/. Despite observers' responses to the decision, however, perhaps Justice Sutherland would not have been so surprised. For the Court's opinion, at least in its reference to Congress's taxing and spending powers, embraces Justice Sutherland's jurisprudence.

After determining that the individual mandate was an improper exercise of congressional authority under the Commerce Clause, Chief Justice Roberts faced the task of determining whether it was possible to construe the mandate as a lawfully enacted tax. Roberts turned to two cases to resolve this question: *United States v. La Franca*, 282 U.S. 568 (1931), and *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996). *See NFIB*, 132 S.Ct. at 2596.

First, the *La Franca* decision, authored by Sutherland, supplies Roberts with adequate authority to declare the mandate a tax, despite the fact that Congress labeled it a "penalty." In *La Franca*, the government sued a liquor merchant in federal court for failure to pay certain exactions, which were required of anyone selling alcohol. *La Franca*, 282 U.S. at 570. Upon failing to pay these taxes, the merchant incurred additional exactions. *Id.* Here, the Court questioned whether these additional fines should be considered penalties or taxes. *Id.* at 572.

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Justice Sutherland resolved the dispute: "A 'tax' is an enforced contribution to provide for the support of government; a 'penalty,' as the word is here used, is an exaction imposed by statute as punishment for an unlawful act.…No mere exercise of lexicography can alter the essential nature of an act or a thing." *Id*. Sutherland reasoned that the Court must look beyond any categorization or label that Congress attaches to an exaction. Instead, the Court must independently ask whether the government imposed the exaction because the party engaged in an unlawful act. *Id*. Justice Sutherland's distinction in *La Franca* has resolved tax-penalty questions in past decisions and continues to do so today. For example, years after *La Franca*, Justice Souter relied heavily upon Justice Sutherland's tax-penalty distinction. *Reorganized CF & I*, 518 U.S. at 224 (addressing a question nearly identical to the one raised in *La Franca*).

Similarly, Chief Justice Roberts relies on both *La Franca* and *Reorganized* to utilize Justice Sutherland's distinction between taxes and penalties. In doing so, the Chief Justice concludes that the individual mandate constitutes a tax, despite Congress's characterization of the provision. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2596–98 (2012). He reasons that "[w]hile the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS." *Id*. at 2597–98. Thus, it is lawful to not buy insurance, provided that the uninsured pay an exaction to the IRS. Because such behavior is lawful, the individual mandate may be considered a tax, regardless of any "exercise of lexicography" or label applied by Congress.

However, the reliance on *La Franca* raises an interesting question: Would Justice Sutherland have joined the opinion of the Court in this particular case?

The answer is complicated by the fact that Chief Justice Roberts appears to use "tax" and "penalty" interchangeably. On one hand, Congress *intended* to label the mandate a "penalty," which in turn spared the provision the application of the Anti-Injunction Act. *Id*. at 2582–84. On the other hand, despite Congress's intent to label the minimum coverage provision a penalty, the Court concluded that the minimum coverage provision imposed a tax for the purposes of analyzing its constitutionality. *Id*.

Justice Sutherland rejected a similar two-pronged approach in *La Franca*, explaining that "[t]he two words are not interchangeable one for the other ….and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *United States v. La Franca*, 282 U.S. 568, 572 (1931). Therefore, while Justice Sutherland may have agreed with the Chief Justice on whether the individual mandate was a tax, he likely would have concluded, like the dissent, that failing to apply the Anti-Injunction Act "carries verbal wizardry too far, deep into the forbidden land of the sophists." *NFIB*,132 S.Ct. at 2656 (Scalia, J. dissenting).

Nonetheless, whether Justice Sutherland would have joined in the opinion of the Court or not, Chief Justice Roberts relies on Sutherland as he navigates a fine constitutional line in the "Case of the Century." Bradley Joondeph, *A Marbury for Our Time*, SCOTUSblog (June 29, 2012, 2:36 PM), http://www.scotusblog.com/2012/06/a-marbury-for-our-time/.

Ultimately, Chief Justice Roberts, drawing on Justice Sutherland's jurisprudence, upheld the minimum coverage provision under the taxing and spending power. At least four justices, however,

argued for the opposite conclusion, upholding the provision as a valid reach of Congress's commerce power. Impressively, even in the concurring opinion, the legacy of Sutherland endures. Though it is perhaps most notable that after nearly eighty years, Justice Sutherland's influence still impacts the Court's opinion.

Concurring Opinion

Justice Ginsburg's opinion is a biting critique of the majority's approach to the Commerce Clause. Yet, the contrast between the majority and the concurrence breathes new life into an old argument that dominated the Court during Justice Sutherland's tenure. In the 1920s and 1930s, the Court hotly debated the extent to which the federal government could rely on the spending or commerce powers when enacting social and economic legislation. Citing many of Justice Sutherland's cases, the concurrence revives the jurisprudence of Utah's most famous jurist.

During his years on the bench, Justice Sutherland insisted upon limitations to the commerce power. In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court struck down a federal law that imposed significant economic regulations on the coal mining industry. *Id.* at 278. Justice Sutherland, writing for the majority, expressed concern that a far-reaching interpretation of the clause that "extend[ed] to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, and the mechanic." *Id.* at 299. In this case, long before the *NFIB* decision, Justice Sutherland wrote, "[t]he federal regulatory power ceases when interstate commercial intercourse ends; and, correlatively, the power does not attach until interstate commercial intercourse begins." *Id.* at 309.

A year later, the Sutherland Court considered the constitutionality of the Social Security Act. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 573 (1937). The Court upheld the act under the Taxing and Spending Clause. *Id.* at 590. In a separate opinion, Justice Sutherland expressed concern that the administrative provision unconstitutionally required state governments to surrender their ability to administer state unemployment programs. *Id.* at 610–11 (Sutherland, J., concurring in part and dissenting in part). Despite the social pressure caused by unemployment, Justice Sutherland emphasized that "'nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power.'" *Id.* at 615 (quoting *Carter Coal Co.*, 298 U.S. at 291).

In other cases cited by Justice Ginsburg, Justice Sutherland's concerns about constitutional power resulted in a dissenting vote. In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court upheld the National Labor Relations Act of 1935 under the Commerce Clause, even though the act regulated the intrastate relationships between employees and employers. *Id.* at 32. A majority of the Court adopted an expansive view of the Commerce Clause, describing it as "the power to enact all appropriate legislation for its protection or advancement; to adopt measures to promote its growth and insure its safety; to foster, protect, control, and

retrain." *Id*. at 36–37 (citation and internal quotation marks omitted). In *NFIB*, Ginsburg may have agreed with this reading. But in *Jones & Laughlin Steel*, Justice Sutherland joined the dissent, which decried the application of federal regulatory authority over small and large businesses engaged in local manufacturing. *Id*. at 78 (McReynolds, J., dissenting).

The *NFIB* concurrence encapsulates the tension between *Carter Coal Co.* and *Jones & Laughlin Steel*. Justice Ginsburg accuses the majority of adopting a rigid and retrogressive reading of the Commerce Clause. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2609 (2012) (Ginsburg, J., concurring). Alluding to the cases described above, she argues that the majority engaged in an artificial line-drawing exercise. *Id*.; *see also Carter Coal Co*., 298 U.S. at 299, 308 (drawing a distinction between manufacture and commerce); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935) (distinguishing between indirect and direct effects). Similarly, Justice Ginsburg accuses the majority of adopting a formulistic definition of "regulate," and suggests that the majority and the dissenting opinions "bear a disquieting resemblance to those long-overruled decisions" in which the Court "regularly struck down economic regulation enacted by the people's representatives in both the State and Federal Government." *NFIB*, 132 S.Ct. at 2628 (Ginsburg, J., concurring).

Is Justice Ginsburg's parallel to the heady days of laissez faire economics fair to the majority? Certainly, commentators quickly drew parallels to an earlier era. David Bernstein, *Is This 1936?*, SCOTUSblog, (June 29, 2012, 9:27 AM), http://www.scotusblog.com/2012/06/is-this-1936/. In point of fact, Chief Justice Roberts struck the same balance embraced by Justice Sutherland decades earlier in *Carter Coal Co.* and *Steward Machine* by permitting Congress to enact a tax under the Spending Clause, but refusing to allow substantial social legislation under the Commerce Clause. As a whole, the majority opinion resonates with concerns about the preservation of state police power that were very much alive for Justice Sutherland. *See Carter Coal Co*., 298 U.S. at 301.

It is worth noting, however, that despite her critique of Chief Justice Roberts's Sutherland-esque opinion, Justice Ginsburg would also likely agree with some of Justice Sutherland's principles. John C. Eastman & Harry V. Jaffa, *Understanding Justice Sutherland As He Understood Himself*, 63 U. Chi. L. Rev. 1347, 1350–57 (1996) (noting that contemporary jurists, both liberal and conservative, are indebted to Justice Sutherland). After all, in *Steward*, Justice Sutherland filed a separate opinion upholding the Social Security Act, a law of comparable significance to the Act here. *See Steward Machine Co*., 301 U.S. at 609 (Sutherland, J., concurring).

In fact, Justice Ginsburg inadvertently cites a decision that suggests that Justice Sutherland recognized that federal authority could be exercised to address social ills in certain situations. *See Helvering v. Davis*, 301 U.S. 619, 634 (1937). Breaking with the conservatives, Justice Sutherland in *Davis* voted with the majority to uphold a federal law requiring payroll deductions and providing old age benefits to retired employees. *Id*. at 640. In other words, the concurring justices in the *NFIB* decision evoke the jurisprudence of Justice Sutherland as a weapon to attack the majority's approach to the Commerce Clause and as justification for upholding the minimum coverage provision on other grounds. Both sides rely on Sutherland's work.

Near the end of her opinion, Justice Ginsburg asks a question that could have been asked of Justice Sutherland himself: "Why should the Chief Justice strive so mightily to hem in Congress'

capacity [under the Commerce Clause] to meet the new problems arising constantly in our ever-developing modern economy?" *NFIB*, 132 S.Ct. at 2629 (Ginsburg, J., concurring). Yet, despite the differences in their approach to the Commerce Clause, or perhaps because of them, it is clear that both echo the concerns and judicial principles of Justice Sutherland.

Dissenting Opinion

Sutherland's jurisprudence forms a linchpin in the joint dissent as well. The dissenting opinion lambasts Congress for stepping outside its constitutional boundaries. In the process, the dissenting justices evoke principles often raised by Sutherland, namely, the need to limit the Commerce Clause, maintain our federal system of government, and eliminate judicial overreaching.

While Justice Sutherland's jurisprudence resonates throughout the entire dissent, it is within the discussion of severability that the dissenting justices draw most heavily on Justice Sutherland's jurisprudence. After arguing that Congress lacks the authority under the taxing and spending powers to enact the individual mandate, the dissent establishes the logical corollary argument that because the invalid provisions of the Act "are central to its design and operation," such provisions cannot be severed without eviscerating the Act as a whole. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2643 (2012) (Scalia, J. dissenting). This conclusion, and its development in the dissent's argument, relies almost exclusively on Sutherland-court precedent and as such, seems to salute Justice Sutherland and his principles.

In its severability section, the dissent relies primarily on three cases. Two were decided by the Sutherland court. Another, decided in 1987, relies heavily on Sutherland precedent. Though each case was monumental in its own way, each shows that the constitutional fundamentals of severability have remained constant since Justice Sutherland's tenure.

For the dissenting justices, the crux of the Act is its intertwined, inextricable, and interrelated provisions. The dissent criticizes the other justices of "judicial usurpation" on the grounds that the Court allows the Act to stand despite dramatic changes caused by the removal of the Medicaid Expansion. *NFIB*, 132 S.Ct. at 2668.

At the outset, the dissent states the boundaries a court must follow when determining the constitutionality of legislation. Quoting *Railroad Retirement Board v. Alton*, 295 U.S. 300 (1935), an opinion joined by Justice Sutherland, the dissent insists that the Court cannot "'rewrit[e] a statute and giv[e] it an effect altogether different from that sought by the measure [of the Act] viewed as a whole.'" *NFIB*, 132 S.Ct. at 2668 (quoting Alton, 295 U.S. at 362). In short, the dissent affirms principles of Sutherland's vintage, and emphasizes that severance by the Court could actually "be a more extreme exercise of the judicial power than striking the whole statute and allowing Congress to address the conditions that pertained when the statute was considered at the outset." *Id*.

The dissent supports its approach with a 1987 decision, *Alaska Airlines Inc. v. Brock*, 480 U.S. 678 (1987), which in turn relied heavily upon Sutherland precedent. NFIB, 132 S.Ct. at 2668; Brock, 480 U.S. at 684. The dissent creates a two-prong test from this case, with both prongs coming directly from Sutherland cases. The first prong requires that the severed and "now truncated statute…operate in the manner Congress intended. If not, the remaining provisions must be invalidated." *NFIB*, 132 S.Ct. at 2668 (citing *Brock*, 480 U.S. at 685). The second prong requires the Court to "determine if Congress would have enacted [the provisions] standing alone and without the unconstitutional

portion. If Congress would not, those provisions, too, must be invalidated." *Id.* (citing *Brock*, 480 U.S. at 685).

Consistent with the principles espoused by the Sutherland court, the dissent argues that because the individual mandate and the Medicaid expansion are an integral and essential part of the Act – because they are the mechanism that offsets insurance regulations and taxes, which in turn offsets all additional federal spending increases – the Act cannot survive absent those provisions. *Id.* at 2669.

Concluding its severability analysis, the dissenting justices rely on *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929), authored by Sutherland, who states that provisions cannot be severed if they serve merely "to facilitate or contribute to the consummation of [the invalid provisions'] purpose." *Id.* at 245. Justice Sutherland's statement directly supports the dissent's final position – that certain portions of the Act cannot be held nonseverable merely because parties lack the standing to challenge them. The dissent selected an appropriate conclusion by quoting *Williams*. Not only does the quote substantiate the dissent's particular point, but it also brings home the dissent's entire severability argument.

In short, the dissenting justices, just like the Chief Justice and concurring justices, relied upon Justice Sutherland in critical parts of their opinion. For the dissent, the majority's position on the severability provision constituted judicial fiat. Ironically, despite the vigor of their position, all three opinions evoked concerns articulated by Justice Sutherland.

Conclusion

Stretching to nearly two hundred pages, the *NFIB* decision involves complicated judgments about the reach of federal power, the direction and condition of our nation's healthcare system, and the severability of extensive congressional enactments. The decision will inevitably provoke commentary and analysis in the months and years to come. Yet, Utah lawyers, whatever their thoughts on the outcome of the case itself, can be proud that the jurisprudence of the only Supreme Court Justice from Utah is alive and well on today's Court.

Using Other Peoples' Money to Finance Litigation

by Keith A. Call

Last week I drove my wife's minivan (yes, minivan) across town to visit her elderly parents with our kids. After a nice visit, I got back in the minivan and noticed that my sweetheart left me with NO GAS! The DTE (distance to empty) indicator said we were down to our last seven miles. We drove straight to the Maverick, whereupon I realized I had forgotten my wallet and only had four quarters in the ash tray. Four quarters was not even enough to get any gas to the end of the gas pump hose.

I had only one option: return to my in-laws' house, hat in hand, and ask for a loan. It surely was not a big deal, except it gave me flashbacks to twenty-four years ago. My wife's parents were extremely generous to us, freely lending (well, giving) us a car, food, and cash. Though I now recognize their generosity really was free, in my young zeal I felt I was somehow compromising my independence. I thought their "loans" came with "strings." For example, if they were paying for the car and the gas, it seemed we couldn't refuse their requests for weekend visits, even if we thought we had "better" things to do.

> *"[S]pecific terms of a proposed loan arrangement can make a big difference on whether or not the loan is ethical."*

Like today's gas prices, litigation is expensive. Experts are expensive. Depositions are expensive, especially if travel is involved. And let's not even start on e-discovery. Since most of our in-laws are not likely to fund these costs, can a lawyer ethically borrow from other third parties to finance them? Do such loans come with strings that could compromise the lawyer's independent professional judgment? This issue is especially important for lawyers who take cases on a contingent fee basis.

What Is Allowed and What Is Not

Several rules are potentially implicated, most notably Rule of Professional Conduct 5.4(a): "A lawyer shall not share legal fees with a nonlawyer" (except for four exceptions that do not apply here).

The Bar's Ethics Advisory Opinion Committee has weighed in on this issue at least twice. Utah Bar Ethics Advisory Op. Comm., Op. 97-11 (1997); Utah Bar Ethics Advisory Op. Comm., Op. No. 02-01 (2002). In Opinion No. 97-11, the Committee opined that a lawyer *cannot* ethically finance the costs of a contingent fee case in which a non-recourse promissory note is secured by the attorney's interest in the contingent fee. The Committee reasoned that the lawyer's judgment could be impaired, for example, when drawing up a budget for proposed expenses or when recommending that a settlement offer be accepted or rejected.

In Opinion No. 02-01, the Committee *approved* a financing arrangement in which the lawyer was obligated to repay the loan *regardless* of the outcome of the case and the client was obligated to reimburse the lawyer for the cost of the loan. The Committee recognized that the third-party lender had no interest in the lawyer's contingent fee award because the lawyer was on the hook for repayment regardless of the outcome. Similarly, the client's obligation to repay litigation costs (including loan costs) was not contingent. The Committee found this arrangement to be mutually beneficial to both the lawyer and the client without compromising the lawyer's independent professional judgment.

From these two opinions, we learn that the specific terms of a proposed loan arrangement can make a big difference in whether

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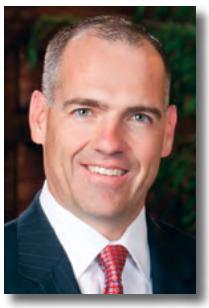


or not the loan is ethical. If you are contemplating a third-party loan to finance a case, take the time to read Opinions 97-11 and 02-01 carefully. The guiding principal is found in the purpose of Rule 5.4, which is "to protect the lawyer's professional independence of judgment." Utah R. Prof'l Conduct 5.4, cmt. 1.

Other Warnings

Keeping your independent judgment is not the only concern. *See, e.g., New York City Bar Ass'n, Comm. on Prof'l Ethics*, Formal Op. 2011-2 (2011). A common criticism of third-party litigation financing is its excessive cost. A lawyer must give her client candid advice. Utah R. Prof'l Conduct 2.1. Advise your clients to consider the costs of the loan, as well as possible alternatives.

Do not let any self-interest you may have cloud your advice. Referral fees from litigation financing companies can be dangerous. Accepting such a fee would be unethical if it prevents you from rendering candid and independent advice.

Third party financing arrangements can also jeopardize client confidentiality and the attorney-client privilege. This risk arises from provisions in loan agreements that require the lawyer to disclose or report on the merits or progress of the case. The safest course is to avoid any requirement for the disclosure of client confidences.

You should also be wary of financing agreements that require the lawyer to inform the lender prior to making or responding to settlement offers or taking other similar steps. Such notice provisions raise the specter that the lender will try to exercise its influence to direct the course of the lawsuit, a role that is reserved for the client, as guided by the lawyer's independent and candid advice.

Conclusion

Like higher gas prices, litigation financing appears to be a growing trend. Used properly, it can have a valuable role in providing access to the courts for clients and financial flexibility for lawyers. Be careful, however, because discerning between a myriad of ethical and unethical financing practices is difficult.

Opening Statements: Winning in the Beginning by Winning the Beginning

by Dominic J. Gianna and Lisa A. Marcy

Reviewed by Andrea Garland

First, my bias: I doubted opening statements as a topic could sustain a whole book, despite Dominic J. Gianna and Lisa A. Marcy having written W*inning in the Beginning By Winning the Beginning*. The advice in the book ranged from very useful to repetitive, to perhaps-useful-on-some-topic-but-not-opening-statements. Opening statements do not quite sustain an entire book, or at least not this one.

There is important information in the book about jurors and how to win them over at a trial's start. The book talks about how the different generations' experiences shape their views on certain presentation styles and evidence types. There is helpful advice on movement (e.g., only gesture above the waistline). There is excellent advice on story-telling in opening. Authors Gianna and Marcy set forth how to show a live event, how to get a jury to see the trial through a client's eyes, and how to choose a plot, a theme, and hooks. They give good examples of using hooks, using simple words, and using sensory language. They advise on using counter-factual thinking to anticipate and counter an opponent, and they provide clear examples. They advise how to handle bad facts (sandwich them between good facts so they're less memorable or consequential). The book covers anticipation, mnemonics, and "The Rule of Three" to keep jurors engaged. The book sets forth how to create persuasive opening statements.

> *"The advice in the book ranged from very useful to repetitive, to perhaps-useful-on-some-topic-but-not-opening-statements."*

There is also superfluous material. For example, most lawyers opening a book on opening statements have some idea that opening statements are important and do not need pages of convincing before they take opening statements seriously. Moreover, the last thirty pages in the body of the book are appellate briefs. Obtaining a directed verdict right after opening statement is commendable. Including in a book on opening statements, *Universal Savings Bank v. Bankers Standard Insurance*' "Appellant's Opening Brief," and the "Brief of Respondent," including statements of facts, all citations, and Rules of Construction of Insurance Policies, is not commendable. Chapters 9 and 10 should have been combined: chapter 9 covers the importance of various objectives of opening statements while chapter 10 discusses how to meet those objectives. A list of tasks for opening statements follows a prior, better-written paragraph with a succinct list of tasks for opening statements. Some of the book's observations such as "It's good to get jurors to trust you," restate the obvious and the phrase "today's alphabet soup jurors" is not clever enough to say more than once but the book says it at least twice.

ANDREA GARLAND is a trial attorney at Salt Lake Legal Defender Association.

In light of superfluous material, some omissions disappoint. The book tells us several times that Cicero was a moving orator, apparently told vivid stories "six of which have survived antiquity," but never includes one quote or paraphrase from Cicero. The Appendix gives several good opening statements, two of which (the prosecution's opening statements against Timothy McVeigh and Zacarias Moussaoui) convinced me those lawyers had plenty of silk with which to construct their silk purse opening statements. At the same time, the Appendix discussed Thomas Messereau's apparently excellent opening statement in his defense of Michael Jackson, but provided few quotes from the statement itself.

While there is much useful information, some is conveyed in a perplexing style. The authors use an anecdote purportedly from a researcher (in which a seventeen-year-old tried to purchase a Honda) to illustrate the necessity of treating Generation X jurors with respect; they recycle the same anecdote with the same wording to explain Generation Y. It's an odd fit anyway, both generations now way too old to be grouped with the teenager. Also, we're supposed to use exclamation points to convey extreme emotion, as in "Oh, the humanity!" when we see a burning blimp, not "Tailoring your themes to the jury also means helping the jurors come to the conclusion that your trial story is a winner because your message not only conforms with their attitudes and beliefs, but also fits, simply, into their heads!" Taking out the exclamation points or re-writing the sentences with exciting, relevant information would make for easier reading. A significant edit might have improved an okay book.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the December 7, 2012 Commission Meeting held at the Law & Justice Center in Salt Lake City.

1. The Commission approved the Lawyer Advertising Rule Proposal as discussed with small revisions.

2. The Commission approved moving forward with HVAC bid process as discussed. Richard Dibblee, Tom Seiler, and Steve Burt will draft HVAC bid instructions and distribute to pre-selected companies.

3. The Commission discussed the activities of the Modest Means Committee and will continue to work on the program.

4. The Commission will schedule a Judicial Council presentation on judges' involvement in Modest Means referrals.

5. The Commission agreed to continue work on Pro Bono Commission Program.

6. The Commission will navigate, test and provide feedback on Bar's new website.

7. The Commission calendared weekly Governmental Relations conference calls during legislative session for Tuesdays at 4 p.m. as listed on the Agenda Calendar.

8. The Commission calendared the Lawyer Legislator Breakfast on February 22nd.

9. The Commission will schedule late January or early February visits to law firms, solo section, and specialty/local bars to promote 2013 Summer Convention in Snowmass. Commissioners will be provided with a list of talking points.

10. By December 14th, the Commission will review possible names for Bar's representative to the Utah Commission on Criminal and Juvenile Justice. A vote via e-mail will be held on the following Monday.

11. The Commission approved the October 26, 2012 Commission Minutes via Consent Agenda.

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

Food and Clothing Drive Participants and Volunteers

We would like to thank all participants and volunteers for their assistance and support in this year's Food and Clothing Drive. 2.5 tons of food, clothing, and toiletries were donated and delivered for immediate distribution. An additional approximate amount of $7,035 in cash donations was also donated, some to specific shelters and organizations that we have supported and part of which was utilized to purchase meals for 150 families to prepare a holiday feast. These meals were distributed on December 20, 2012.

The Florence J. Gillmor Foundation, founded in 1987, whose board is comprised of members of the Utah Bar Association, through James B. Lee, Esq., also contributed $40,000 to the Utah Food Bank, along with Jim's personal donation to the Utah Food Bank. We wish to recognize this Foundation for its continued support of our Food and Clothing Drive and the Utah Food Bank, along with Mr. Lee's generous donation.

We would also like to give a special thanks to H. Dickson Burton, Esq. for his and his firm's substantial support of our efforts this year. Thanks also goes to all of the individual contacts that we made this year. We look forward to working with you again next year.

Thank you all for your kindness and generosity.

Notice of Bar Commission Election

Second and Third Divisions

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

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

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

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

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

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

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

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

2013 Spring Convention Awards

The Board of Bar Commissioners is seeking applications for two Bar awards to be given at the 2013 Spring Convention. These awards honor publicly those whose professionalism, public service, and public dedication have significantly enhanced the administration of justice, the delivery of legal services, and the improvement of the profession. Award applications must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, January 21, 2013. You may also fax a nomination to (801) 531-0660 or email to adminasst@utahbar.org.

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

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

Pro Bono Honor Roll

Alig, Michelle – Tuesday Night Bar

Anderson, Mike – Tort Case

Anderson-West, Michele – Consumer Case

Armstrong, McKenzie – FJC Tuesday Night Clinic

Averett, Steven – TLC Document Prep Clinic

Barrus, Craig – TLC Document Prep Clinic

Bell, Scott – Consumer Case

Benson, Jonny – Immigration Clinic

Black, Mike – Domestic Case

Blakesley, James – Consumer Case

Brinkerhoff, Kraig – Domestic Cases

Buhler, Steven – Domestic Cases

Carr, Ken – Street Law Clinic

Carroll, Nathan – Bankruptcy Case

Chandler, Josh – Tuesday Night Bar

Christine Poleshik – Tuesday Night Bar

Clayton, Brent – Domestic Case

Congelliere, Robert – TLC Pro Bono Bankruptcy Case

Conyers, Kate – Tuesday Night Bar

Curtis, Les – FJC Tuesday Night Clinic

Curtis, Robert – Domestic Case

Denny, Blakely – Tuesday Night Bar

Donosso, Yvette – Tuesday Night Bar

Farley, KT – Rainbow Law Clinic

Gilbert, Graham – Street Law Clinic

Gittins, Jeff – Street Law Clinic

Hadley, Greg – FJC Tuesday Night Clinic

Hanseen, Tawni – Tuesday Night Bar

Harstad, Kass – Street Law Clinic

Hawkes, Danielle – Street Law Clinic

Herrera, Kim – Immigration Clinic

Hoskins, Kyle – Layton Family Law Clinic

Hyde, Ashton – Tuesday Night Bar

Isaacson, Tara – Tuesday Night Bar

Jefferson, Matthew – Domestic Cases, Expungement Case

Knauer, Louise – Family Law Clinic

Lee, Jackie – TLC Document Prep Clinic

Lee, James – TLC Document Prep Clinic

Lillywhite, Andrew – Tuesday Night Bar

Lisonbee, Elizabeth – Layton Family Law Clinic

Lund, Niel – Bankruptcy Case

Marx, Shane – Rainbow Law Clinic

Molen, Lane – Tuesday Night Bar

Montague, Amanda – Tuesday Night Bar

Montoya, Sara – Tuesday Night Bar

Morales, Christopher – TLC Pro Bono Divorce/Custody Case, TLC Document Prep Clinic

Morrow, Carolyn – Domestic Case

Mount, Linda – TLC Document Prep Clinic

Otto, Rachel – Street Law Clinic

Pettey, Bryce – Tuesday Night Bar

Preston, DeRae – FJC Tuesday Night Clinic

Ralphs, Stewart – Rainbow Law Clinic

Robinson, Mark – TLC Pro Bono Collections Case, Consumer Case

Rogers, Stephen – TLC Pro Bono Bankruptcy Case

Roman, Francisco – Immigration Clinic

Schank, Roy – Bankruptcy Case

Scholnick, Lauren – Street Law Clinic

Smith, Linda F. – Family Law Clinic

Speirs, Saul – Tuesday Night Bar

Stolz, Martin – Domestic Case, Consumer Case

Telfer, Diane – Domestic Case

Thomas, Michael – Tuesday Night Bar

Thorne, Jonathan – Street Law Clinic

Walkenhorst, Steven – Tuesday Night Bar

Whiting, Melisa – FJC Tuesday Night Clinic

Wilkins, Brinton – Tuesday Night Bar

Williams, Tasha – Street Law Clinic

Yauney, Russell – Family Law Clinic

Zidow, John – Tuesday Night Bar

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in the October and November of 2013. 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.

Notice of Verified Petition for Reinstatement by Daniel D. Heaton

Pursuant to Rule 14-525(d), Rules of Lawyer Discipline and Disability, the Utah State Bar's Office of Professional Conduct hereby publishes notice of Respondent's Verified Petition for Reinstatement ("Petition") filed by Daniel D. Heaton in *In the Matter of the Discipline of Daniel D. Heaton*, Fourth Judicial District Court, Civil No. 030404763. 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.

2012 Utah Bar Journal *Cover of the Year*

The winner of the *Utah Bar Journal* Cover of the Year award for 2012 is second-time contributor, Justin Bond, of Layton, Utah. His photo, "Old Truck and Star Trails West of Fayette, Utah" appeared on the cover of the Sep/Oct 2012 issue.

Congratulations to Justin, and thanks to all ninety contributors over the past twenty-four plus years who have provided photographs for the covers. Two out of six of the cover photos in 2012 were submitted by first-time contributors.

The *Bar Journal* editors encourage members of the Utah State Bar or Paralegal Division, who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal*, to submit their photographs for consideration. For details and instructions, please see page 4 of this issue.

MCLE Reminder

Odd Year MCLE Reporting Cycle
July 1, 2011 – June 30, 2013

Due to the change in MCLE reporting deadlines, please remember that your MCLE hours must be completed by June 30th and your report must be filed by July 31st. If you have always filed in the odd CLE year, you will have a compliance cycle that began July 1, 2011 and will end June 30, 2013.

Active Status Lawyers complying in 2013 are required to complete a minimum of twenty-four hours of Utah approved CLE, which shall include a minimum of three hours of accredited ethics. **One of the ethics hours shall be in the area of professionalism and civility.** (A minimum of twelve hours must be live in-person CLE.) For more information and to obtain a Certificate of Compliance, please visit our website at www.utahbar.org/mcle. If you have any questions, please contact: Sydnie Kuhre, MCLE Director, sydnie.kuhre@utahbar.org, (801) 297-7035 or Ryan Rapier, MCLE Assistant, ryan.rapier@utahbar.org, (801) 297-7034.

Call for Nominations for the 2013 Pro Bono Publico Awards

The deadline for nominations is March 15, 2013.

The following Pro Bono Publico awards will be presented at the Law Day Celebration on May 1, 2013:

- **Young Lawyer of the Year**
- **Law Firm of the Year**
- **Law Student or Law School Group of the Year**

To download a nomination form and for additional information please go to:
www.utahbar.org/probono/pro_bono_awards.html

If you have questions please contact the Access to Justice Coordinator, Michelle Harvey at:
probono@utahbar.org or 801-297-7027

The Utah State House of Representatives

Patrice Arent (D) – District 36 (Elected to House: 2010. Prior service in Utah House & Senate: 1/1997–12/2006)

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

Committee Assignments: Appropriations – Business, Economic Development & Labor. Standing – Education; Judiciary; Ethics; Legislative Information Technology Steering.

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

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

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

Committee Assignments: Appropriations – Higher Education. Standing – Vice-Chair of Rules Committee; Business/Labor; Law Enforcement.

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

F. LaVar Christensen (R) – District 32 (Elected to House: 2002)

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

Committee Assignments: Appropriations – Public Education. Standing – Judiciary; Vice Chair, Health & Human Services.

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

Spencer Cox (R) – District 58 (Elected to House: 2012)

Education: A.A., Snow College; B.A., Utah State University; J.D., Washington and Lee University School of Law

Committee Assignments: Appropriations – Higher Education. Standing – Business & Labor; Political Subdivisions.

Practice Areas: General Counsel (Telecommunications Firm); Formerly with Fabian & Clendenin, P.C.

Brian Greene (R) – District 57 (Elected to House: 2012)

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

Committee Assignments: Appropriations – Natural Resources, Agriculture & Environmental Quality. Standing – Health & Human Services; Judiciary.

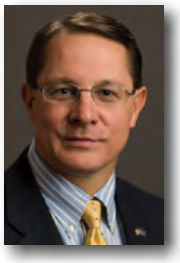
Practice Areas: Administrative Law, Government Affairs & Public Policy, and Commercial Real Estate Transactions.

Craig Hall (R) – District 33 (Elected to House: 2012)

Education: B.A., Utah State University; J.D., Baylor University

Committee Assignments: Appropriations – Executive Offices & Criminal Justice. Standing – Judiciary; Political Subdivisions.

Practice Areas: Litigation and Intellectual Property.



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

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

Committee Assignments: Appropriations – Natural Resources, Agriculture & Environmental Quality. Standing – Vice Chair, Rules; Natural Resources, Agriculture & Environment; Vice-Chair, Government Operations.

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

Mike Kennedy (R) – District 27 (Elected to House: 2008)

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

Committee Assignments: Appropriations – Public Education. Standing – Health & Human Services; Political Subdivisions.

Practice Areas: "Of Counsel," Bennett Tueller Johnson & Deere

Brian King (D) – District 28 (Elected to House: 2008)

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

Committee Assignments: Appropriations – Executive Offices & Criminal Justice. Standing – Ethics; Rules; Judiciary; Revenue & Taxation.

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

Daniel McCay (R) – District 41 (Appointed to House: 2012, Re-Elected 2012)

Education: Bachelors and Masters, Utah State University; J.D., Willamette University

Committee Assignments: Appropriations – Social Services. Standing – Education; Transportation.

Practice Areas: Real Estate Transactions, Land Use, and Civil Litigation.

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

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

Committee Assignments: Appropriations – Higher Education. Standing – Judiciary; Revenue & Taxation.

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

Mike McKell (R) – District 66 (Elected to House: 2012)

Education: B.A., Southern Utah University; J.D., University of Idaho

Committee Assignments: Appropriations – Natural Resources, Agriculture & Environmental Quality. Standing – Natural Resources, Agriculture & Environment; Public Utilities & Technology..

Practice Areas: Personal Injury, Insurance Disputes, and Real Estate.

Merrill Nelson (R) – District 68 (Elected to House: 2012)

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

Committee Assignments: Appropriations – Executive Offices & Criminal Justice; Retirement. Standing – Retirement & Independent Entities; Natural Resources, Agriculture & Environment; Economic Development & Workforce Services.

Practice Areas: Kirton McConkie – Appellate and Constitution, Risk Management, Child Protection, Adoption, Health Care, Education.

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

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

Committee Assignments: Appropriations – Public Education; Retirement. Standing – Retirement & Independent Entities; Education; Government Operations.

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

Lowry Snow (R) – District 74 (Appointed to House: 2012; Re-Elected 2012)

Education: B.S., Brigham Young University; J.D., Gonzaga University School of Law

Committee Assignments: Appropriations – Business, Economic Development & Labor. Standing – Education; Judiciary.

Practice Areas: Snow Jensen & Reece – Real Estate, Civil Litigation, Business and Land Use Planning.

Keven J. Stratton (R) – District 48 (Appointed to House: 2012, Re-Elected 2012)

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

Committee Assignments: Appropriations – Executive Offices & Criminal Justice. Standing – Education; Law Enforcement & Criminal Justice.

Practice Areas: Stratton Law Group PLLC – Business, Real Estate, and Estate Planning.

Earl Tanner (R) – District 43 (Elected to House: 2012)

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

Committee Assignments: Appropriations – Social Services. Standing – Transportation; Revenue & Taxation.

Practice Areas: Tanner & Tanner, P.C.: Trusts and Estates, Real Estate, Tax, Corporate, and Litigation.

The Utah State Senate

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

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

Committee Assignments: Appropriations – Executive (Co-Chair), Public Education; Infrastructure & General Government. Standing – Government Operations & Political Subdivisions; Judiciary, Law Enforcement & Criminal Justice; Ethics.

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

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

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

Committee Assignments: Appropriations – Public Education; Executive Offices & Criminal Justice. Standing – Education; Judiciary, Law Enforcement & Criminal Justice; Rules.

Practice Area: Eagle Mountain Properties of Utah, LLC.

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

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

Committee Assignments: Appropriations – Public Education; Higher Education. Standing – Education; Judiciary, Law Enforcement & Criminal Justice.

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

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

Committee Assignments: Appropriations – Natural Resources, Agriculture & Environmental Quality; Higher Education. Standing – Business & Labor; Revenue & Taxation; Rules Chairman.

Practice Areas: Corporate, Estate Planning, and Tax.

Todd Weiler (R) – District 23 (Appointed to Senate: 2012; Re-Elected: 2012)

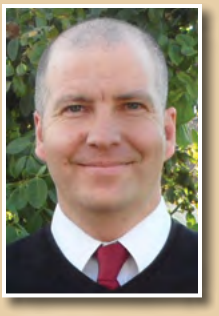
Education: Business Degree, Brigham Young University; J.D., J. Reuben Clark Law School, Brigham Young University

Committee Assignments: Appropriations – Social Services. Standing – Business & Labor; Judiciary, Law Enforcement & Criminal Justice; Retirement & Independent Entities; Rules.

Practice Areas: Civil Litigation and Business Law.

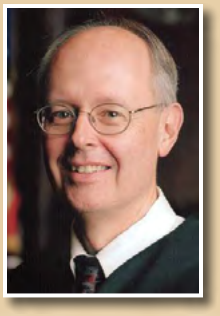
Fall Forum Award Recipients

Congratulations to the following members of the legal community who were honored with awards at the 2012 Fall Forum:



Will Morrison
Pro Bono Award

Samuel Alba
Distinguished Service Award

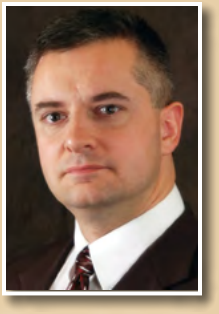


Judge David O. Nuffer
Distinguished Service Award

Judge David R. Hamilton
Distinguished Service Award

Steven T. Waterman
Distinguished Service Award

David E. Leta
Outstanding Mentor



Thomas R. Vaughn
Outstanding Mentor

Mary Kay Griffin
Community Member of the Year

Paul M. Durham
Professionalism Award

Brian R. Florence
Lifetime Service Award

Justice Christine M. Durham
Lifetime Service Award

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.

RESIGNATION WITH DISCIPLINE PENDING

On October 10, 2012, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning C. Andrew Wariner for violation of Rule 1.4(a) (Communication), 1.4(b) (Communication), 1.15(a) (Safekeeping Property), 1.15(d) (Safekeeping Property), 1.15(e) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Wariner left the law firm with whom he was practicing and gave his client the option of continuing the representation or staying on with the firm. The client elected to have Mr. Wariner continue to represent him. Mr. Wariner took the client's case and file with him. A few weeks after leaving the firm, the client agreed to a settlement. Mr. Wariner received the settlement funds and disbursed a portion of the funds to the client and to himself and placed the remainder in a trust account. Mr. Wariner later took the remaining funds from the trust account and put them into his operating account for his own use.

Because of work done on the case prior to leaving the firm, the firm claimed an interest in the settlement funds. Several medical providers claimed interests in the settlement funds. The client understood that the outstanding medical bills would be paid out of the settlement. Although the client received some money from the settlement, the client never received an accounting and was still owed some of the funds. The firm and the client asked on multiple occasions for a full accounting of the disbursement of settlement funds. Mr. Wariner did not provide an explanation regarding the disbursement of settlement funds.

The client attempted to contact Mr. Wariner several times but Mr. Wariner did not respond. Mr. Wariner's ex-partner also wrote to Mr. Wariner asking for the balance of funds owed on the client's matter. The partner contacted Mr. Wariner stating that the firm had received notice from medical providers that had not been paid for medical services provided to the client. The partner sent Mr. Wariner two e-mails asking for the funds owed to the firm and requesting that Mr. Wariner pay the medical providers. Finally, after the firm filed suit on behalf of a medical provider, Mr. Wariner paid the lien, however the client never received a full accounting of the settlement funds.

SUSPENSION

On August 10, 2010, the Honorable Denise P. Lindberg entered Findings of Fact, Conclusions of Law, and Order suspending Nathan N. Jardine from the practice of law for three years for violating Rules 1.1, 1.2a, 1.3, 1.4a, 1.4b, 1.5a, 1.6a, 1.15a, 1.15c, 1.15d, 1.16d, 8.4d, and 8.4a of the Rules of Professional Conduct. Mr. Jardine appealed his suspension. On March 9, 2012, the Utah Supreme Court issued an Order reducing Mr. Jardine's three year suspension to an 18 month suspension. On October 2, 2012, the Utah Supreme Court issued a full Opinion in the matter. The Supreme Court modified the District Court's Order by finding that for purpose of his discipline sanction Mr. Jardine violated only Rules 1.2, 1.3, 1.4, 1.5, and 1.15 of the Rules of Professional Conduct.

SUSPENSION

On October 23, 2012, the Honorable Vernice Trease entered Findings of Fact, Conclusions of Law, and Stipulated Order of Suspension suspending Daniel V. Irvin from the practice of law for six months for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.8(h)(2) (Conflict of Interest: Current Clients: Specific Rules), 1.15(c) (Safekeeping Property), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary there are three matters:
In the first matter, the OPC sent Mr. Irvin a Notice of Informal Complaint ("NOIC"). Mr. Irvin did not submit a response to the NOIC. Mr. Irvin did not provide any relevant facts and documents until the day of the Screening Panel Hearing.

In the second matter, Mr. Irvin was hired to represent a client in two criminal cases. Mr. Irvin was paid for his services. In one case, Mr. Irvin did not appear at any of the scheduled court dates and filed two Motions to Recall Warrant. In the other case, Mr. Irvin did not appear at any of the scheduled court dates, nor did he file any pleadings with the court. During his representation, Mr. Irvin moved his office, but did not notify his client of his new telephone number or address. Mr. Irvin collected an unreasonable fee for the amount of work performed and Mr. Irvin spent the fee before it was earned. Mr. Irvin and his client signed a Release of Liability wherein Mr. Irvin agreed to pay his client to settle the Bar complaint. The OPC sent Mr. Irvin an NOIC. Mr. Irvin did not submit a timely response to the NOIC. Mr. Irvin did not provide any relevant facts and documents until the day of the Screening Panel Hearing.

In the third matter, Mr. Irvin was hired to assist in obtaining custody of the client's grandchildren. There were a number of continuances from the original hearing date. At a subsequent hearing the court ordered the matter to mediation. Mr. Irvin did not provide the client with billing statements nor did Mr. Irvin explain to the client what work had been performed on the case. Mr. Irvin charged the client an additional fee that was not reflected in her billing statement. After Mr. Irvin withdrew from the case, a member of his firm contacted the client for the purpose of asking the client if the client would meet with Mr. Irvin to resolve the Bar complaint. The OPC sent a NOIC to Mr. Irvin. Mr. Irvin did not submit a timely response to the NOIC.

RECIPROCAL DISCIPLINE

On October 26, 2012, the Honorable Vernice Trease, Third Judicial District Court, entered an Order of Discipline: Public Reprimand against Philip M. Kleinsmith for violating the following Rules: 1.1 (Competence), 1.3 (Diligence), 1.4 (Communication), 1.5 (Fees), 1.16 (Declining or Terminating Representation), 5.3 (Responsibilities Regarding Nonlawyer

Assistants), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

Mr. Kleinsmith is a member of the Utah State Bar and is also licensed to practice law in Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, Wisconsin, and Wyoming. The Supreme Court of Arizona issued a Final Judgment and Order reprimanding Mr. Kleinsmith for his conduct in violation of the Arizona Rules of Professional Conduct. An Order was entered in Utah based upon the discipline order in Virginia.

In summary there are several matters:
In two separate cases in Arizona, Mr. Kleinsmith filed complaints that were ultimately dismissed for lack of service. In nine separate cases in Arizona, Mr. Kleinsmith certified the cases for arbitration despite the amount in question exceeding the threshold for the amount allowed for arbitration. When asked to explain the Arizona matters Mr. Kleinsmith stated, "The AZ collection matters we had handled before we were employed by the client were almost always subject of mediation by amount. I did not consider this or direct the paralegal accordingly and, therefore, she continued to elect mediation. I now review every Summons and Complaint to verify whether arbitration applies for the AZ county involved."

In a Florida matter, Mr. Kleinsmith included an incorrect address and property description in the notice of sale and certificate of title and failed to name the condominium association as defendant. Mr. Kleinsmith indicated that he was in the process of correcting his errors when the client substituted new counsel.

In a Wisconsin matter, a case was dismissed with prejudice and costs after Mr. Kleinsmith failed to appear for two hearings. Respondent explained his failure to appear by offering: "I did not appear at two hearings because the client was negotiating a settlement." As a result of his failure to appear, the matter was dismissed with prejudice. Mr. Kleinsmith had the dismissal changed to a dismissal without prejudice, but billed the client to file the corrective motion after his failures to appear. The Judge required the client to pay the Defendant for the dismissal without prejudice.

In a Texas matter, Mr. Kleinsmith filed a Motion to Withdraw as Counsel and mailed a copy of the motion to the client simultaneously. No prior notification of the withdrawal was given to the client. Mr. Kleinsmith believed this was sufficient notice because his understanding was that the motion could only be ruled upon if he set it for hearing.

Grappling With Social Media as a Legal Practitioner

by Jaelynn Jenkins

Social media outlets allow individuals to create custom online identities, foster relationships, and participate in online communities of users sharing similar interests. For the rising generation, online communication is crucial to connecting with the world.

All social networking sites allow users to create personal profiles, veritable treasure troves of personal information. It is no wonder that the abundance of personal information available through these sites has caught the attention of the legal community. Legal practitioners are discovering that the use of social media sites as sources of information is giving rise to some novel legal issues.

The type and amount of information which can be gleaned from social networking sites – photos, videos, personal statements – can be useful in all kinds of cases including criminal, personal injury, employment, and family law. The viable use of such information in a legal setting has not, however, been seamless. Social networking sites, and the information found through them, raise issues surrounding attorney conduct, discovery methods, and the admission of evidence.

Applying the Standing Rules

A legal practitioner should keep in mind that information gathered from social networking sites is no different from any other relevant information historically gathered for legal action merely because it is gathered from a new source – social media. Practitioners should look to existing rules and frameworks as guides to the appropriate use of information found through social media.

Content taken from social media sites easily fits into the existing definition of electronically stored information which includes "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations," Fed. R. Civ. P. 34(a)(1)(A), which means it is discoverable under Rule 26(b) of both the Federal and Utah Rules of Civil Procedure.

The Rules of Civil Procedure also serve to temper and guide the discovery of information found on social networking sites. A broad discovery request for access to the opposing party's entire Facebook profile or Twitter feed may be inappropriate as beyond the scope, for example, where the relevant events took place in 2012 but the party's profile extends as far back as 2006. Legal practitioners seeking information from social media sites should tailor their requests accordingly. Additionally, any discovery requests should be sent directly to the opposing party and not the hosting social media site. Discovery requests regarding personal profiles sent to sites such as Facebook have proved to be less than productive and are quite possibly overreaching and a waste of time.

Legal practitioners will find that existing discovery rules and procedures are more than adequate to address any information that may be available and obtained through social media sites.

Once information has been successfully collected from social media sites, parties must then consider how such information holds up under the rules of evidence. Information gleaned from social networking sites may face challenges regarding relevance, authentication, and hearsay. All of these issues, however, may easily be addressed by the standing rules of evidence. Consider, for example, Rule 901of the Utah Rules of Evidence used for authenticating or identifying evidence.

Legal practitioners may wish to note two different schools of thought regarding the authenticity of and therefore the admissibility of evidence obtained via social media sites. On one hand, information posted on such sites is generated by the individual and intended for an audience selected by the poster, leading to the belief that the poster has no reason or motivation to fabricate the information. On the other hand, social media users may carefully choose what they post in order to orchestrate their own image.

JAELYNN JENKINS currently clerks in the Fourth District Court.

Harvesting Social Media

A vast and various amount of information can be gleaned from social media sites: profiles, postings, messages, photographs, and videos. Postings, specifically, include status updates, wall comments, tweets, retweets, comments, etc.

A practitioner, however, should not stop at the obvious – consider a person's friends or "tweeps" who could be possible witnesses. Some social media sites incorporate "mood indicators," a feature that indicates the user's mood at a certain time. Timelines can be established by tracking a user's post and status updates like virtual footprints and later used to refute the user's testimony of events. Social media can also assist in investigating the credibility of opponents and expert witnesses.

When gathering information from social media sites, first collect information from publicly accessible pages. Be sure to preserve any findings by taking screen shots and printing your findings at the time you find them as entries can be altered or deleted.

Consider strategically timing social media discovery requests. A practitioner may choose to make such a request after the opposing party's deposition is taken, creating an opportunity to use information found through social media for impeachment purposes. Another option is petitioning a court for a "freeze" order, thereby preserving information.

From a defensive stance, legal practitioners may contemplate raising privacy defenses. Privacy defenses, however, may be difficult to sustain where a social media user intentionally publishes information to hundreds of "friends." One of the most ironic aspects of social media is the universal expectation of privacy among users who simultaneously post highly personal data. The very action of posting is in essence the act of publishing – akin to pinning a message on a bulletin board in a public well traveled hallway.

Nevertheless, a practitioner who wishes to make privacy arguments should examine the privacy settings on the relevant account. Did the user in question publish to the entire network or only to "friends?" Evaluate the type of communication; was it a private message or a status update? Potentially the most successful arguments can be made in regards to the least public of social media interactions or "user-to-user messages."

Recognizing the virtual crop of personal information available through social networking sites, legal practitioners need to inform themselves of different types of social media, the likely information available, and how to collect that information.

Use of Social Media by Attorneys

Social media has a role in a legal practice outside of its potential as evidence. It can be used as a marketing tool and a means of communication between members of the legal community. Practitioners should keep the rules of ethics in mind when using social media. Such rules will dictate the way attorneys and judges communicate and interact with society from a both a personal and professional standpoint. To that end, communication through social networking sites is no different from communicating via traditional means.

If a legal practitioner would be prohibited from using a specific means of communication in real life, he or she cannot utilize similar means virtually via social media. For example, attempting to "hook" an opposing party by creating a false Facebook profile is just as unethical as an attorney developing a relationship in real life with the opposing party.

Practical Application

Not only do legal practitioners need to be prepared to seek out relevant information from social media sites, but they also need to protect themselves and their clients from harm that may arise from using social media.

Any restraints placed on in-person attorney communications apply to online communications. Legal practitioners should also avoid posting about clients or the status of a pending case.

Upon retaining a client, make sure to investigate the client's social media habits and discuss the impact of social media postings. Clients should understand the impact postings can have on their case especially if postings can be interpreted or actually are conflicting with testimony. Be sure to highlight the effectiveness, or lack thereof, of privacy settings on social media sites and the potential for the opposing party to access the client's page through a mutual friend.

Both judges and attorneys should be aware that jurors may potentially post regarding trial – an action that can result in mistrials and overturned verdicts. Jurors could potentially try to friend parties or lookup definitions or additional information during deliberations. Legal practitioners need to seriously consider the use of social media jury instructions guiding and reminding jurors of appropriate social media behavior throughout the process.

Social media can be a great asset, but may foster a multitude of problems for the uneducated legal practitioner. All levels of legal professionals should take care to learn the ins and outs of social media in order to utilize it and protect themselves, clients, and the legal process.

Balance: How to Turn the "Act" Into "Action"

by Trina Kenyon

Tick, tick, tick is all my ears can hear. Tock, tock, tock is all my brain can digest. "Come on, let's go!" I bellow out to my kids in a panicked voice. I look at my watch, then my car, then my watch again. It's 7:00 a.m. and lunches for the day still have not been made and my kids haven't made it to the car yet. I think to myself, "I can still make it." After all, according to my super sleuth synchronized watch, I've got three minutes and forty-seven seconds before we have to be out of the door. I then further proceed to think, "I just need to slap a few sandwiches together and by then my kids will hopefully be loaded into the car with their seat belts on."

Needless to say, sandwiches end up not getting made and my children do not make it to the car in time as I was hoping. Instead, we run out of the door fifteen minutes later than planned, shoes are on, but not tied, and as a final morning shocker, my oldest son tells me he left his backpack inside the house.

By now, my heart rate has increased, my mind is working on double overtime and I'm mindlessly muttering things to myself such as: "If I just had five more minutes this morning!" and "I wish there were two of me!" "Calgon…take me away!!"

After all the hustle and bustle of the morning, I finally get my kids to school and then start my forty-five minute commute to work for the day. I then take a deep breath and think, "What just happened? My morning was supposed to be magical. Instead it became monstrous!"

A musical group by the name of O.A.R. sings a song titled, "Shattered." The first words of that song read:

"In a way, I need a change
from this burnt out scene.
Another time, another town,
another everything."

Those words pierce my ears because I have felt them many times before. I have felt burnt out and just wanted to start over with something. For example, I wish I could have started my morning over. Or, I wish I could have started a certain conversation over. I wish this and I wish that. The list could go on and on. I know many of you have felt the same way.

So, what do we do? How do we have better mornings? How do we create less clutter and chaos for ourselves? How do we bring balance into our lives? Balance can be better achieved using three simple concepts:

1. Slow Down.

It's no surprise that technology drives this world. We can visit our favorite online retailer, have a conversation with a family member via video chat, and watch the newest movie with our mobile phone. We have made ourselves accessible twenty-four hours a day, seven days a week. Being on the go so much makes it harder to slow down. However, slowing down is vital to achieving balance.

Choose one day of the week, the same day each week, wherein you sit down by yourself with a pen and paper and write. You can write whatever you choose. I like to sit down every Sunday night and reflect on the prior week. I think about the things that went well and not so well; the things that made me smile and the things that provided conflict for me.

Then, I put all of those thoughts on paper. Once I'm done writing about the prior week I had, I review and read what I wrote. This is where the easy part comes in. Using my pen, I cross out the things from the prior week that wasted my time. For example, if I went to the grocery store without a list and

TRINA KENYON works for Marlon L. Bates at Scalley, Reading, Bates, Hansen & Rasmussen, PC.

ended up spending an extra hour there, I cross that out on my list. Or, if I waited until the last hour to finish a project that I knew I should have started on days before, I would cross that out on my list. Finally, I would make a new list of goals for the upcoming week. For this list, I would focus putting things on it that helped me from the week before and vice versa.

2. Evaluate.

This can be as broad or specific as you wish. This, after all, is your life. Evaluate your life as a whole or evaluate a certain situation. I find it helpful to evaluate my career as a paralegal every three months. I look back at the previous three months and decide if I am more or less productive. Why or why not? Am I completing work at an acceptable pace for myself? For the attorney I work for? Am I contributing to the greater whole of my team or am I focusing too much on my individual needs? Am I proposing solutions to any problems or am I the one creating the problem?

You are able to gain a lot of insight about a situation just by asking yourself a few simple questions. It is best to do this when you are alone because you will be more honest with your answers. The great thing about evaluating something is that you can do it as many times as you need to. If you have a tough question to answer or dilemma to solve, you could choose to evaluate the pros of that question or dilemma one night and then evaluate the cons the next night. If you don't have a lot of time to evaluate your question or dilemma, you could choose to evaluate one side of your issue for thirty minutes and then the other side of the issue for the following thirty minutes. This equals a total time period of one hour – simple and easy. It is always good to break up a whole into its parts to find the answers you are seeking.

3. Act.

Now that you have slowed down a little bit and taken some time to evaluate an issue or situation in your life, it is time to act. You have done the work. You have done the homework. You are ready. Everything you have written down and pondered upon, can now be put into plan.

Go back to my story of my chaotic morning. Remember how I was fighting the clock to get my kids ready and out of the door for school and lunches still hadn't been made? Well, I sat down one Sunday night, thought about that morning and made a list of things that went well and not so well about that morning.

I asked myself what I could have done differently to make that morning run smoother. One of my solutions was to wake up fifteen minutes earlier. That simple decision put time on my side. I had extra time to solve any potential problems. Best of all, I had time to enjoy the morning and spend a little bit more time with my kids. Who doesn't love the gift of time?

Another solution I thought of was to make lunches the night before. Then, instead of thinking about what we each wanted for lunch, having to pull everything out and then having to put everything away in the morning, all we had to do was open the fridge and grab our lunch. Bing! Just like that, problem solved. The kids are happier. I am happier. I would even go as far to say I am feeling euphoric. Making those two small changes leaves me feeling in control and balanced. Balance from my morning now feeds off onto the rest of my day. One good action inspired another.

It's easy to get caught up in life. Because of this, we often end up creating a majority of the problems for ourselves that we complain about. Remember that it is easy to create a solution for each challenging thing in our lives. Use the three concepts I just discussed. Hopefully, before you know it, you'll be running like a well-oiled machine.

Seeking Nominations for Paralegal of the Year

The Paralegal of the Year Award, presented by the Paralegal Division of the Utah State Bar and the Utah Paralegal Association, is the top award to recognize individuals who have shown excellence as a paralegal. This award recognizes this achievement. We invite you to submit nominations of those individuals who have met this standard. Please consider taking the time to recognize an outstanding paralegal. Nominating a paralegal is the perfect way to ensure that their hard work is recognized not only by their organization but by the legal community. This will be their opportunity to shine. Nomination forms and additional information will be coming and posted at http://www.utahbar.org/sections/paralegals/.

The deadline for nominations is April 2013. Reminders will also come via E-bulletin as well as announcements at the Utah State Bar Mid-Year Meeting in March in St. George. The award will be presented at the Paralegal Day luncheon held in May 2013.

CLE Calendar

Seminar Location: Utah Law & Justice Center, unless otherwise indicated.

01/16/2013 | 9:00 am – 3:45 pm — **6 hrs. CLE (including 5 hrs. Ethics & 1 hr. Prof/Civility)**

Ethics School: What They Don't Teach You in Law School. $225 before January 4th, $250 after.

01/30/2013 | 4:30 pm – 7:45 pm — **3 hrs. CLE**

Primer: Real Property in Utah. Agenda TBA. $75 for active under three, $95 for others.

01/31/2013 | 9:00 am – 12:00 pm (registration at 8:30 am) — **CLE TBA**

Cutting Edge Trial Techniques by Masters – Presented by the Rocky Mountain Innocence Center and the Utah State Bar. Schedule includes: Host and Interactive Moderator Roger Dodd, with speakers: Joshua Karton – "Appearing, Live, In this Courtroom! – One Hour of Intensive Investigation into Courtroom Communication;" David Rudolf – "Cross Examining Experts: The Reconstruction of a Scene;" Bob Spohrer – "Closing Argument: The Last Chance." Breakfast and beverages will be provided. Cost TBA.

02/13/2013 | 10:00 am – 11:15 am — **1 hr. self study credit**

WEBCAST: Lincoln on Professionalism. Using an engaging documentary-style format, Abraham Lincoln's exemplary qualities of legal and personal professionalism come to life. There will be a live chat room discussion with a moderator for attendees to expore the current context for Lincoln's model of professionalism. $79.

02/15/2013 — **CLE TBA**

Annual I.P. Summit. Grand America Hotel. Agenda and pricing TBA.

02/15/2013 | 8:00 am – 4:15 pm — **8 hrs. CLE (including 1 hr. Ethics/Professionalism)**

3rd Annual Excellence in ADR Advocacy: Making Deals Work. Part 1: *Improving Negotiations Inside and Outside Mediation*. Part 2: *Buyer's Remorse, Negotiating with Executives, and Using Apps and Technology in Mediation*. Lunch Presentation: Hon. David Nuffer –*Ethics and Professionalism in Mediation*. Co-Sponsored by Hobbs Mediation and the Utah State Bar. Cost for both sessions and lunch: $210 early registration (before 02/07/13), $250 after. Cost for session 1 OR 2 and lunch: $125 early registration, $150 after.

02/27/2013 | 10:00 am – 1:20 pm — **3 hrs. self study credit**

WEBCAST: The Art of Advocacy – What Can Lawyers Learn from Actors. Session 1: Acting Like a Human Being: Demeanor and Skills in Storytelling (opening & closing). Session II: Actor/Playwrite Meets Lawyer: Inflection, Orchestration and Meter (closing argument). Session III: Directing the Trial: Skills in Questioning and Controlling Focus (direct & cross). The program includes a live chat room where attendees can discuss these communication issues with the presenters. $159.

03/27/2013 | 10:00 am – 1:20 pm — **3 hrs. self study credit**

WEBCAST: Impeach Justice Douglas! Anecdote, humor and painful remembrances are used to explore some of the most explosive issues of William O. Douglas' thirty-six year tenure on the U.S. Supreme Court. Douglas addresses the issues about which he was most passionate as he reflects on *Brown v. Board of Education*, the "McCarthy Era" and the Vietnam War. $159.

Classified Ads

RATES & DEADLINES

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

Classified Advertising Policy: It shall be the policy of the Utah State Bar that no advertisement should indicate any preference, limitation, specification, or discrimination based on color, handicap, religion, sex, national origin, or age. The publisher may, at its discretion, reject ads deemed inappropriate for publication, and reserves the right to request an ad be revised prior to publication. For display advertising rates and information, please call (801) 910-0085.

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

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

POSITIONS AVAILABLE

LAW OPPORTUNITIES IN EUROPE: VISITING PROFESSORSHIPS – Pro bono teaching assignments East Europe and former Soviet Republics. Requires 20+ years' experience. www.cils.org/sl. LLM IN TRANSNATIONAL COMMERCIAL PRACTICE – Two-week sessions in Salzburg, Budapest, and Warsaw. www.legaledu.net. Center for International Legal Studies, US Tel 1-970-460-1232. US Fax 1-509-356-0077, Email office@cils.org.

OFFICE SPACE / SHARING

Practice on Exchange Place in an historic building close to the courts! Executive offices from as low as $350 per month within established firm including all office amenities. Also individual offices suites from 800 to 3300 sq ft. starting as low as $1000 per month, perfect for the 1 to 5 person law firm. Great parking for tenants and clients. Contact Richard at (801) 534-0909 or richard@tjblawyers.com.

Ogden Office Space Available – conveniently located on Wall Avenue near freeway exit and courthouse. Three large furnished offices with use of large conference room, break room, kitchen, and private restrooms located on second floor of business building. Additional small conference room on main floor. Security system and plenty of outside parking. Please call Jeannine Timothy at 801-269-1950.

Approximately 2,000 sf main floor office in single building. Downtown location (343 South 400 East), access to TRAX, freeway entrance/exit. Plenty of parking, wheelchair compliant, two bathrooms, kitchen, copyroom, reception area, five offices (use as conference room). Purchase of copy machine, fax machine, phone system negotiable. 3-year lease. 801-328-8888 for details.

Layton office space for rent at 44 N. Main Street. One or two offices available with receptionist, secretarial services, copier, fax, telephone, and conference room. Potential for cases from retiring attorneys. Contact Don Redd 801-546-1265.

Executive office share to suit any need! Just off 1-15 in Bountiful, located in The Square at 2600. Convenient and free parking. Offices between 120 and 350 square feet. Shared conference room and reception area, fax/copier/scanner, Internet, break room. Storage available. Prices starting at $200 per office per month. Month-to-month available. $100 off per month and free internet with 2 year lease. If you are interested please contact (801) 397-2223. VIRTUAL SPACE ALSO AVAILABLE FOR $100/ month (unlimited conference room use to meet clients and you can use this address as your business address). Owner flexible.

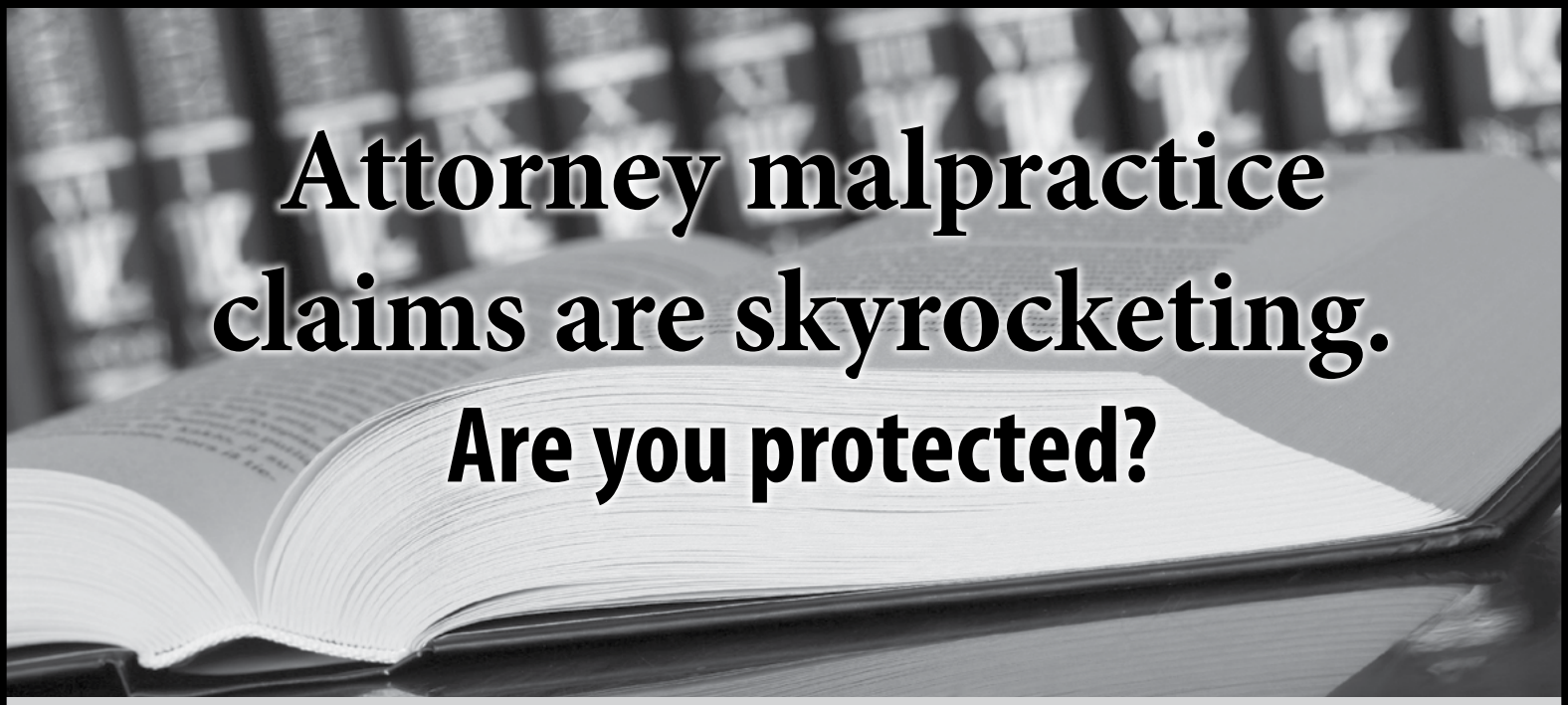
SERVICES

CHILD SEXUAL ABUSE – SPECIALIZED SERVICES. Court Testimony: interviewer bias, ineffective questioning procedures, leading or missing statement evidence, effects of poor standards. Consulting: assess for false, fabricated, misleading information/ allegations; assist in relevant motions; determine reliability/validity, relevance of charges; evaluate state's expert for admissibility. Meets all Rimmasch/Daubert standards. B.M. Giffen, Psy.D. Evidence Specialist (801) 485-4011.

CALIFORNIA PROBATE? Has someone asked you to do a probate in California? Keep your case and let me help you. Walter C. Bornemeier, North Salt Lake. (801) 292-6400 or (888) 348-3232. Licensed in Utah and California – over 35 years experience.

Looking for alternative care but can't stand the thought of a nursing home? We provide close personal attention, honoring freedom of individual choice in a ranch setting for stroke, heart recovery, cancer, or dementia residents. Pets allowed. Reasonable rates. Private pay. Relax and let us help! Jordana Bryan, CNA, 208-308-2600.

Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics: Consultant and expert witness. Charles M. Bennett, 505 E. 200 S., Suite 200, Salt Lake City, UT 84102-0022; (801) 521-6677. Fellow, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.



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[1] *"Profile of Legal Malpractice Claims: 2008–2011," American Bar Association, September 2012.*

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