Utah Bar® JOURNAL

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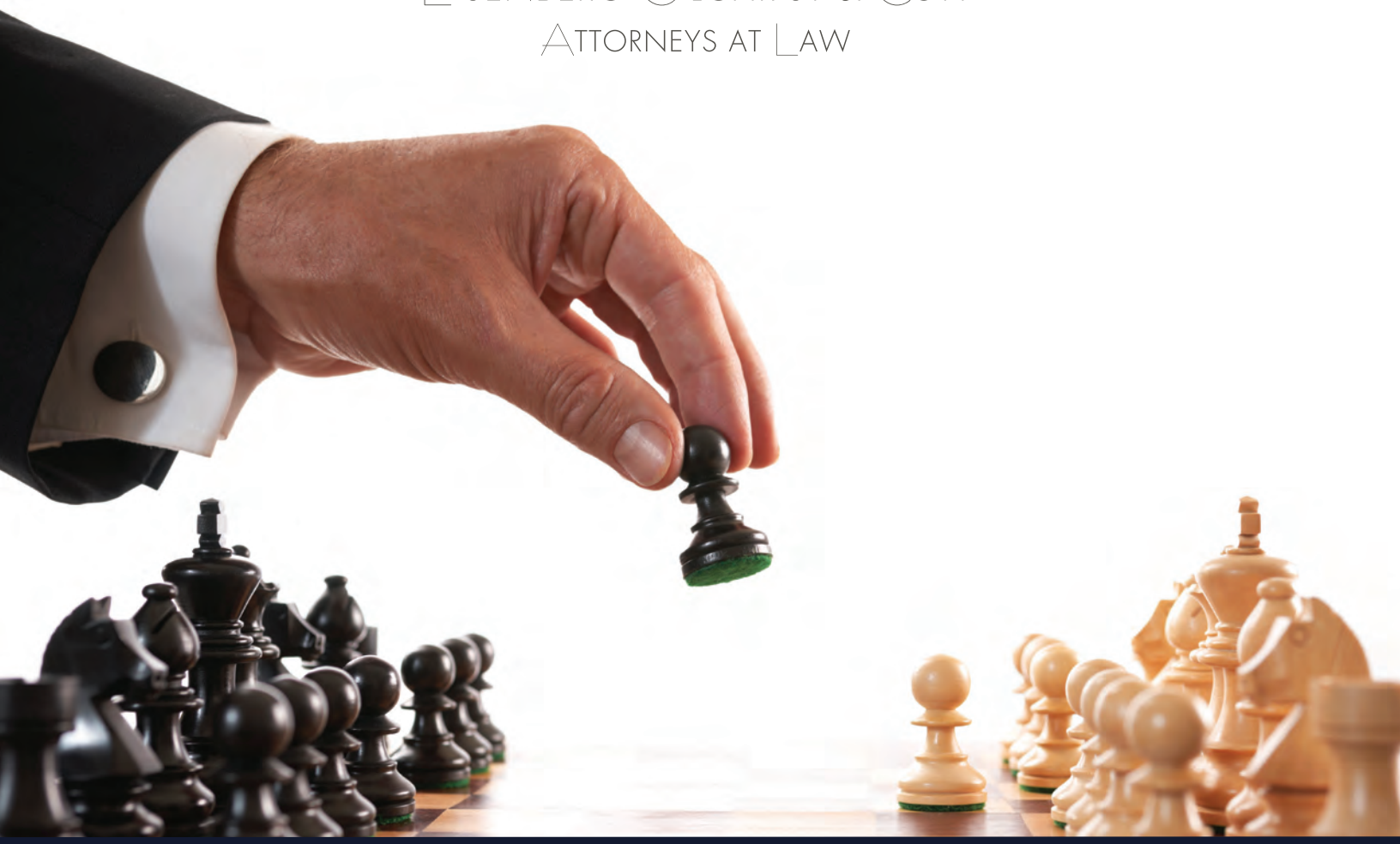

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Cover Art

Gooseneck of the Colorado River near Moab, taken by first-time contributor, Jeff Kramer of Salt Lake City, Utah.

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

Guidelines for Submission of Articles to the Utah Bar Journal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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President-Elect & Bar Commission Candidates

Candidate for President-Elect

Retention of President-Elect: *James D. Gilson has been nominated by the Bar Commission to serve as President-Elect in 2013-2014 and as President in 2014-2015, subject to a confirmation ballot submitted to all lawyers on active status. No other candidates petitioned the Commission to run for the office.*

JAMES D. GILSON

It is a privilege to be part of the legal profession. We have a mutual interest in improving the public's understanding and respect for the role of lawyers in resolving conflicts and helping individuals and businesses. I am committed to helping the Bar's many worthwhile programs to operate effectively and efficiently in these challenging economic times. I will strive, with the help of all Bar members, to fulfill our Bar's Mission Statement of serving "the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law." Please feel free to contact me with any suggestions at jgilson@cnmlaw.com or ph. 801-530-7325. See also my article in the Jan/Feb 2013 *Utah Bar Journal* on "The Purposes of the Utah State Bar and How You Can Help."

Professional Background

Mr. Gilson is a graduate of the University of Utah (Honors BA 1985, JD 1989). He practices law at Callister Nebeker & McCullough where he chairs the firm's litigation section. Previously he was a law clerk to Judge Greene and later for Judge Benson of the U.S. District Court, and was an Assistant U.S. Attorney. He has served as a Bar Commissioner for the Third Division since 2008, and is co-chair of the Bar's New Lawyer Training Program.

Second Division Candidate

Uncontested Election: *According to the Utah State Bar Bylaws, "In the event an insufficient number of nominating petitions are filed to require balloting in a division, the person or persons nominated shall be declared elected." Kenyon Dove is running uncontested in the Second Division and will therefore be declared elected.*

KENYON D. DOVE

I am excited to run for the position of Second Division Bar Commissioner. I enjoy the collegiality I have found among attorneys and judges and appreciate how challenging it is to practice law. We sacrifice so much to help our clients and work hard to provide meaningful and valuable service. While serving previously as the Weber County Bar President, the best part of the position was getting to know the attorneys living and/or practicing in Weber County and trying to help lessen some of the challenges faced in our practices. It is a difficult yet rewarding profession we have chosen.

While serving as bar commissioner, my goals include: (1) better communication and coordination between the local bar associations and the state bar to keep you informed of technology, issues, and opportunities available and help you feel more connected to your State Bar Association; (2) promote better enforcement of the law prohibiting the unauthorized practice of law; (3) supporting quality cutting-edge CLE programming; and (4) most importantly, listening to you to understand and promote what you feel the Utah State Bar can do to help you be more successful.

I look forward to working with you and appreciate your support.

Third Division Candidates

SUSANNE GUSTIN

It would be an honor to serve as a Bar Commissioner in the Third Division. I am a criminal defense attorney with twenty years experience handling both misdemeanor and serious felony offenses. As a trial lawyer, I spend nearly every day in court and am familiar with the day-to-day workings of our judicial system. Based upon this experience, I am aware of the strengths and weaknesses of our courts in ensuring justice for all.

The Utah State Bar, I believe, should play a role in making sure that all persons have access to our judicial system and can afford competent representation. I will continue to promote the Bar's new lawyer mentoring program and Bar programs that promote the integrity of our profession.

I have experience in leadership positions, having served as president of the Utah Association of Criminal Defense Lawyers in 2002. In 2012, I was president of the David K. Watkiss – Sutherland II Inns of Court. If elected, I will listen to your concerns and suggestions about how the Utah State Bar can better serve your needs. I ask for your vote and the privilege to serve as your Bar Commissioner in the Third Division.

BENSON L. HATHAWAY

I'd be grateful for your vote for Bar Commissioner, Third Division.

This past year I was fortunate to co-chair the Bar's Civics Committee which, with the help of over 170 volunteer judges and lawyers, taught 193 junior high and high school classes across the state about the Constitution and separation of powers. I am also presently serving on the Third District's Pro Bono Committee and on the Board of Utah's Chapter of the Federal Bar Association. In the past I have been a mentor and

worked in the Bar's Litigation, Construction, and ADR Sections

I've been a commercial litigator for twenty-nine years, first with a mid-sized firm, then with one partner, and for the past eleven years at a large firm. If I've learned anything it is that an independent, fully staffed and functioning judiciary is essential to our system of government. By the same token, in my view, the Utah State Bar is at its best when it efficiently supports its members of every stripe, with regulatory support, valuable educational opportunities, and a chance to serve the community.

You can count on me working with you and the Bar to continue to bring these benefits to fruition. Thank you.

JOHN R. LUND

Thank you for allowing me to serve as your commissioner for the past three years. It has been quite a lesson. I have learned that although we share the same profession and all must follow the same rules, we are actually quite diverse. We have many different work settings and quite varied expectations of the bar, making it both interesting and challenging to run a bar association. It would be a privilege to continue representing the lawyers of the Third Division. I therefore ask for your vote to renew my commission for a second term.

I practice at Snow, Christensen & Martineau doing civil litigation and trial work and was the firm's president for six years. Currently, in addition to serving on the bar commission and the Utah Judicial Council, I chair the Supreme Court's Advisory Committee on Evidence and also work on the Supreme Court's Advisory Committee on Civil Jury Instructions. I am devoted to the improvement of our profession. If you re-elect me as a bar commissioner for the Third Division I will continue to do my best to help provide Utah lawyers with the services they actually want and truly need from their bar organization. Thank you.

JANISE K. MACANAS

Dear Colleagues:

As a candidate for a Third Division Bar Commission seat, I have the experience and desire to professionally represent members of the Third Division and I am committed to helping our membership reach their highest professional potential. I will work to make Bar services relevant, available, and accessible to all.

I have fifteen years experience as a public sector employee and prosecutor with the Utah Attorney General's Office, where like you, "getting the work done" and efficiency are a priority and necessity. Doing this I realize that the economic environment we practice in has changed dramatically and will continue to do so. The Commission must make it a priority to keep pace with innovation and make it available and affordable to our membership. This includes making benefits, which are skyrocketing in costs, available and accessible to all Bar members.

I am adamant that our Bar dues are not raised, that priorities revolve around service, affordability, and membership support. As your elected Commissioner, I assure you I will be involved and keep you informed of relevant matters that impact your legal practice. I sincerely ask for your vote.

KARTHIK NADESAN

I am running for Bar Commissioner to ensure that the Utah State Bar continues to improve its services while meeting the needs of young solo and small-firm practitioners. For example, I want to have the Bar's free legal research service work well on a smartphone; provide more CLEs tailored to the details of running a small-firm practice; create a brief bank service containing past CLE handouts; and assist the Bar in entering into more discount vendor service agreements.

Although I believe that my goals if elected to the Bar Commission are more important than what I have done in the past, I have always been dedicated to serving the legal community. I served as the President of the Utah State Bar Young Lawyers Division from 2008-09, where I started its Speed Networking program and was involved in the Wills for Heroes program. I was President of the Utah Minority Bar Association from 2006-07, and have been selected as a Rising Star in intellectual property litigation by SuperLawyers since 2008.

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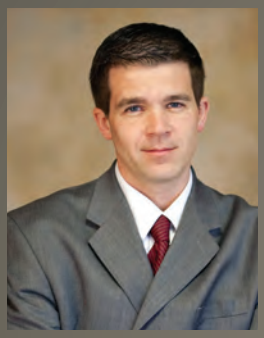

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Balance

by Lori W. Nelson

When I was thinking about what to write, a good friend suggested I write about balance. I took that to mean work/life balance. As I thought about work/life balance, it occurred to me that the way we define the topic changes the discussion. After all, isn't work part of life? To discuss the topic as if work and life are separate and happen in isolation of each other ignores reality. We spend a huge amount of every day devoted to our profession, and it is part of life. I believe a much better way to define the topic is Life Balance.

We all have issues that we deal with every day: jobs, homes, families, health, service, etc. These aspects of our lives are what make us whole. It is how we balance all of these competing interests that determines our happiness.

Malcolm S. McNeil of Carlsmith Ball LLP discussed this topic at the ABA Midyear meeting in 2008. He stated that "lawyers must be aware of their priorities in life and make sure their personal and professional endeavors support those priorities." The point is not that work and life compete, but rather that personal and professional efforts should aim for the same target.

The Young Lawyers Division of the American Bar Association produced a CLE Series called "101 Practice Solutions." One of the topics was "Balancing Life and Work." The suggestions included the following:

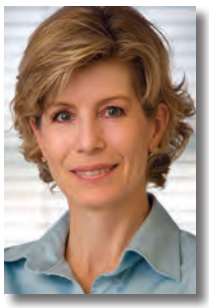
> Define your values – "Life should be a reflection of what you value the most."
>
> Do not procrastinate – "Procrastinating keeps your mind busy and prevents you from relaxing…."
>
> Organize, organize, organize – "Figuring out a way to organize your time, space and habits…can be very calming."

As technology has made it easier to accomplish work related activities when we aren't in the office, we have to ask ourselves if we are managing the balancing act better or worse than before we had access to instant email. Ron Ashkenas, a contributor to *Forbes*, wrote in the October 19, 2012, publication that we are no longer talking about work/life balance but rather work/life blend. (I still object to the notion that work isn't a part of life, but for purposes of discussion, let's just go with that phrase for now.) Ashkenas states that in managing the blend we should "stop feeling guilty about scheduling [work] during vacations and checking our emails at night" and similarly we should stop feeling guilty about "talking with our spouses, friends, and family members during work time."

Cali Williams Yost, the author of the new book *TWEAK IT: Make What Matters to You Happen Every Day*, stated that work/life balance doesn't exist and what we need to think about is work+life fit. She states in an interview with Dan Schawbel at *Forbes*, published January 8, 2013, that:

> It is more important than ever that we bring the best of ourselves, physically, emotionally and creatively to our jobs and lives every day. Small actions and priorities, like a walk with your dog or shopping for healthy food, that are part of your weekly routine make a big difference.

Yost stressed that people need a "simple, weekly practice to deliberately capture the small actions that build the foundation of well-being and order we crave, but that's missing for so many people today." Often thinking and talking about the changes or actions a person can undertake to achieve balance feels like piling more things onto the list of obligations which already exist. It is true for me that trying to figure out and analyze life balance is much more difficult than simply acting.



Here I beg your indulgence as I get a little personal. Thirty years ago I was diagnosed with Crohn's Disease. My son was 1½ at the time and, given the little that was known about the disease and facing major surgery, I became very frightened. It was then that I realized I had to make every day count, and that life is short and unless each day mattered

in some way, it would be wasted. Because of the Crohn's I have had to learn several things: I can't do everything; sometimes I have to stop and regroup; and, I am surrounded by supportive people.

I have been privileged to work in firms that support life balance, firms that understand each individual has different issues and are willing to accommodate those issues. I joined Jones Waldo, in part, because it had the technology to allow me to work from home on those days I simply couldn't get to work (given the advances in medicine, those days are now few and far between). The firm is also very accommodating about my Bar service. Nevertheless, even though I love my house and hate the commute, I find myself going into the office simply because I like being there. Since I first joined a law firm, I found I liked being at work because it fulfilled one of my life goals: associating with competent people doing good in the world.

Fulfillment, for me and my husband (also a lawyer), comes many different ways: our jobs, Bar service, spending as much time as possible with our two grandsons, cooking, and spending time with good friends. We all dedicate hours and hours to our professional lives. This commitment to our profession can and should be fulfilling. It will be if it fulfills at least one of our life goals. I am proud to be part of our profession. The work we do is meaningful and because of it society is much better off. We also dedicate countless hours to community service in pro bono or other volunteer service enhancing the benefits to our community and ourselves.

One of the reasons the Bar continues to have out-of-state CLE conferences is to allow our members access to work-related activities and family related activities at the same location. You have asked for affordable CLE in affordable locations with options that are appealing to families. St. George and Snowmass/Aspen provide those opportunities. It is a chance for us to get together as members of the Bar away from the office and associate in comfortable and (hopefully) stress-free environments. We can fulfill our CLE requirements and still have rewarding family time, or even personal time, in surroundings that are conducive to relaxing and rejuvenating.

Life balance can be achieved. We need to acknowledge that our work, what we do day in and day out is part of life. Admitting that life doesn't just start to happen when we leave for the day can be the first step in finding that balance. I agree with Yost that our lives will feel more balanced if we make what matters to us happen every day.

Bridging the Gap between Trademark Registration and Enforcement

by Trevor C. Lang

In today's ever-changing and expanding marketplace, the underlying value of businesses has changed. The most valuable assets of many of today's leading companies are the goodwill and reputation associated with their name and products. Trade and service marks such as brand names, logos, and slogans designate the origin of goods and services while building goodwill among consumers. *See* Lanham Act § 45, 15 U.S.C. § 1127. Due to their heightened value, marks are often the subject of disputes; yet, despite such value, many owners are discovering that it is increasingly difficult to effectively protect their marks. Accordingly, this article highlights common areas of federal registration that develop into obstacles when protecting a mark by those who are less familiar with trademark law and litigation.

While protection of a mark begins with use in the United States, an often-neglected element of the trademark formula is a properly composed and secured federal registration. Any person can pursue federal registration with the United States Patent and Trademark Office (USPTO). *See* USPTO, Filing the Application and Other Documents, http://www.uspto.gov/faq/trademarks.jsp#_Toc275426693 (last visited Oct. 31, 2012). In fact, the USPTO provides a deceivingly simple application process, including step-by-step guidelines and links to instructional "TM Newsflash" YouTube videos, which come across as campy parodies of the evening news. *See* USPTO, Trademark Basics, http://www.uspto.gov/trademarks/basics/index.jsp (last visited Oct. 30, 2012). As a result, mark owners may often apply for federal registration themselves or turn to their former attorney, who may have limited familiarity with trademark law.

Unlike the application process, the USPTO offers little guidance concerning the relationship between registration and the future protection of a mark – "the owner of a registration is responsible for bringing any legal action to stop a party from using an infringing mark." *Id.* Such a configuration is akin to teaching a teenager how to build a car without any guidance about how to drive it. While the driver will eventually learn to drive, there will likely be a few mishaps along the way. Likewise, the consequences of registering a mark without anticipating conflicts can result in losing a mark, damaging the strength of the mark, or infringing on another's mark.

The USPTO should be commended for their registration system; still, it is precisely because of the convenience of federal registration that many applicants, who may not otherwise be familiar with trademark law, seek federal registration without foreseeing future disputes. Consequently, this article offers applicants direction to bridge the gap between trademark registration and enforcement in the areas of search and evaluation, priority, goods and services description, and how problems are compounded during international registration.

It is uncontroverted that federal registration affords many benefits, including the right to use ® with a mark, Lanham Act § 29, 15 U.S.C. § 1111; prima facie evidence of the validity of the mark, *id.* § 7(b); incontestability after five years of continued use, *id.* § 15; constructive national use and notice of ownership, *id.* § 22; readily available extension of international rights, *id.* § 61; protection from illegal importation, *id.* § 42; and the like. Irrespective of these benefits, an applicant must first determine whether their proposed mark is capable of federal registration, and if so, whether such registration will generate unanticipated obstacles before applying to the USPTO.

In order to attain federal registration, a proposed mark must not be deemed "confusingly similar" to currently registered or

TREVOR CHARLES LANG is an associate at Dumke Law in Salt Lake City. He practices in the areas of intellectual property transactions and litigation, trademark and copyright prosecution, and small business matters.

filed marks. Trademark Manual of Examining Procedure (TMEP) § 1207 (8th ed. 2011). Specifically, a proposed mark will be rejected "when consumers viewing the mark would probably assume that the goods [or services] it represents are associated with the source of a different product identified by a similar mark." *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 408 F.3d 596, 608 (9th Cir. 2005). To determine whether two marks are confusingly similar, courts apply a multi-factor test, which is fact intensive and made on a case-by-case basis. *Id.* at 609. Applicants can usually identify potentially conflicting marks with properly composed searches and practical sense.

Search & Evaluation

To ensure successful registration and future protection of a mark, applicants must adequately search for confusingly similar marks in "commerce." According to the USPTO, "'commerce' means all commerce that the U.S. Congress may lawfully regulate; for example, interstate commerce or commerce between the U.S. and another country." USPTO, All About Trademarks, http://www.uspto.gov/smallbusiness/trademarks/registering.html (last visited Oct. 30, 2012). Yet, applicants are only required to refrain from submitting a confusingly similar mark previously filed with the USPTO by searching the Trademark Electronic Search System (TESS). Lanham Act § 12(a), 15 U.S.C. § 1062(a). Because trademark protection extends to any mark currently used in commerce, applicants must expand the scope of their search efforts beyond TESS if they wish to avoid prospective disputes regarding their mark. Curiously, this aspect is seldom mentioned by the USPTO. It appears the USPTO mentions searching beyond TESS for 32 segmented seconds during a 13:43 "TM Newsflash" video. TM Newsflash 03: Searching, http://www.youtube.com/watch?v=8iUR5p6q8X0 (last visited Oct. 30, 2012). Consequently, given the scope of "in commerce," an applicant may successfully attain federal registration but subsequently lose their mark if it infringes on another since the United States is a "first-to-use" rather than a "first-to-file" jurisdiction. Lanham Act § 7(c), 15 U.S.C. § 1057(c).

Priority

In the United States, trademark rights are established by use rather than by registration. Simply being the first to file an application with the USPTO does not ensure priority over any unregistered marks already in use. *Id.* Under the common law,

if two marks are deemed confusingly similar, use of an unregistered mark provides the user territorial priority over a later-filed federal application – irrespective of the mark's prominence. *Id.* Should a dispute arise, mark owners must establish a priority date through actual documented use of a mark. The mark with the documented first use is most likely to prevail, and federal registration is the best kind of documentation. Hence, applicants must understand the principle of priority rights of similar marks in commerce before seeking federal registration to avoid future disputes.

Search Suggestions

It is imperative to search beyond TESS to ensure use of a strong mark. Federal registration is not required under the Lanham Act, and as a result, most mark owners do not seek registration. *Id.* § 43, 15 U.S.C. § 1125. Preferably, applicants should conduct a thorough TESS search (including live and dead/abandoned marks), examine secretary of state databases, and explore the Internet for marks that may be confusingly similar to a proposed mark. Discovering dead or abandoned marks on the USPTO's TESS is one of the best ways to further direct an investigation. Unfortunately, there is no centralized searchable database for state specific marks, and searching each state can be unduly cumbersome and time consuming. Thus, at a minimum, an applicant should search state registrations where the mark will be primarily used in connection with their goods and services. Finally, it is vital to conduct an exhaustive Internet search using a variety of search engines and mark variations. Mark variations include alternative and misspellings, translations, phonetic spellings, and pseudo-marks. TMEP § 104. Adequately searching for similar marks in commerce is necessary to ensure the future protection of any mark.

Goods & Services

Mark owners may be unable to fully enjoy the benefits of federal registration if the goods and services description is not sufficient in scope. During the application process, the USPTO requires an applicant to identify the goods and services for which the applicant will use the mark. Lanham Act § 30, 15 U.S.C. § 1112. Whether the application is online or in paper, an applicant may either select from the pre-accepted list maintained by the USPTO deemed the Acceptable Identification of Goods and Services Manual (the "List") or elect to create their own goods and services description if filing under the standard Trademark Electronic Application System (TEAS) form. USPTO, ID Manual, http://tess2.uspto.gov/netahtml/tidm.html (last visited Oct. 30, 2012). Each scenario presents unique problems if an applicant is unfamiliar with the consequences of identifying the goods and services description.

Mark owners obtain the right to exclude others from adopting confusingly similar marks, which is determined by the goods and services description and the mark itself. TMEP § 1207.01. For illustration, "Delta" currently enjoys multiple federal registrations by multiple owners. Still, the same mark may coexist since the goods and services descriptions are different, e.g., "air transportation of passengers.…"; "plumbing products, namely, faucets.…"; or "welding torches"; yet, if an applicant attempted to register "Delta" with a goods and services description involving air travel, the proposed mark would be deemed confusingly similar and would not succeed to registration.

If the goods and services identification is too narrow, the mark may restrict the growth of a business while being unable to guard against confusingly similar marks. On the other hand, if the goods and services identification is too broad, the initial application will likely be denied by the USPTO as being too vague to distinguish from other marks. *Id.* § 1402. For instance, an applicant who produces health and wellness rubber bracelets and related jewelry may seek to identify their goods and services with a single and very specific definition, "bracelets and jewelry featuring electronic chips for attracting energy to the body wherein the electronic chips increase in power in the presence of electromagnetic fields, for the purpose of re-balancing the human energy field." It would be proper to advise against a goods and services identification this narrow because even substantially similar yet differing products would not be covered under that registered mark, thereby hindering the owner's ability to expand their product line and enjoin competitors who attempt to adopt confusingly similar marks in related fields.

Conversely, an applicant may attempt to include every definition that contains the word "jewelry," which results in a repetitive and overly broad definition that is not likely capable of registration. Rather, an applicant that is already producing goods should include several definitions that cover current products, e.g., "jewelry," "rubber or silicon wristbands in the nature of a bracelet," "bracelets," "plastic bracelets in the nature of jewelry," and so forth. Thus, ensuring a sufficient goods and services description is essential to allow a business to flourish within the parameters of the mark and to exclude confusingly similar marks.

International Registration

In addition to losing the ability to protect a mark domestically, owners of federally registered marks may lose their international registrations if they do not anticipate future complications when applying to the USPTO. More than ever, trademark owners seek to expand their domestic rights for a variety of reasons. However, domestic rights, whether federal or state, do not provide protection beyond the borders of the United States. *Id.* § 1901.

Historically, if an individual in the United States sought foreign trademark registration, they had to hire counsel within each desired country and comply with their individual and often varied registration procedures, which could be costly and time-consuming. Currently, one of the most convenient ways for owners of federally registered marks to seek foreign registration is under the Madrid System. The Madrid Protocol (the "Protocol") is one of two treaties comprising the Madrid System for international registration of trademarks that allows mark owners to seek foreign registration in any of the member countries by submitting a single International Application. *Id.* § 1900. The International Bureau of the World Intellectual Property Organization (WIPO) administers the Madrid System and coordinates applications, renewals, and other relevant documentation for the 185 member states. WIPO, Member States, http://www.wipo.int/members/en/ (last visited Nov. 14, 2012). While WIPO administers the International Registration, attaining registration is ultimately determined by the foreign trademark office within each country.

Before submitting an International Application, mark owners must balance the need against the cost of international registration. True, use of centralized administration can reduce time and money, but such savings can quickly convert to unpredicted expenses and energy. In addition to WIPO's basic administration fee, each country charges an individual fee for processing, which can vary substantially. WIPO, Individual Fees under the Madrid Protocol, http://www.wipo.int/madrid/en/madridgazette/remarks/ind_taxes.html (last visited Nov. 19, 2012). Moreover, applicants may need to respond to administrative office actions within individual countries that require local counsel, thereby increasing time and expense.

While foreign registration may be desirable for some, international registrations are dependent on the originating (federal) registration for five years after the date of the International Application. Lanham Act § 63, 15 U.S.C. § 1141c. If the original registration is restricted, abandoned, cancelled, or expired, with respect to some or all of the goods and services listed in the International Application, the USPTO must notify WIPO resulting in the cancelation of the International Application or subsequent registrations. *Id.* Thus, a poorly crafted federal application may result in the termination of domestic and international trademark rights.

Summary

The degree of protection afforded to a registered trademark is dependent on how the mark was initially registered. The USPTO's systematic registration guide should continue to be used in conjunction with an understanding of the long-term consequences of trademark infringement and enforcement. Specifically, applicants must understand how to adequately search and evaluate similar marks in commerce, the principle of priority rights, how to sufficiently identify the goods and services description of a mark, and the consequences and intricacies of international registration.

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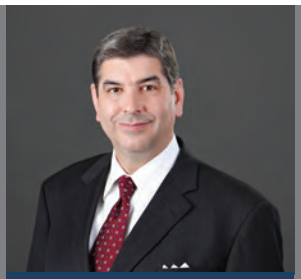

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Be Aware! Service on an Opposing Party in a Foreign Country Requires Particular Procedures and Forms

by Gail Laser

Serving process on opposing parties located in foreign countries arises not only in large commercial contract disputes, but also in smaller cases involving personal injury, tort, divorce, custody, and estate matters. *See generally* Hague Service Convention, art. 1, *concluded* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638; *Charalambous v. Charalambous*, 744 F. Supp. 2d 375 (D. Me. 2010) (applying the Hague Service Convention in a child custody dispute); *Eli Lilly & Co. v. Roussel Corp*., 23 F. Supp. 2d 460 (D.N.J. 2007) (applying the Hague Convention in analyzing whether service of process was appropriate in a tort action); *Collins v. Collins*, 844 N.E.2d 901 (Ohio Ct. App. 2006) (holding that service was improper in a divorce proceeding under the Hague Convention).

Thus, a deep cross-section of the Bar may encounter this prospect. This article describes the particular requirements of service on a defendant located in a foreign country that is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention). At present, sixty-seven nations are signatories to the Hague Service Convention, including the United States and our closest neighbors, Mexico and Canada.[1] Notably, if the requested State is not a party to the Hague Service Convention and there is no other internationally agreed upon means of service, both the Federal and Utah Rules of Civil Procedure require that service be "reasonably calculated to give notice," including by mail with a signed receipt, if not prohibited by the receiving State. *See* Fed. R. Civ. P. 4(f)(2); Utah R. Civ. P. 4(d)(3)(B).

As background, a number of countries consider service of process a governmental function and object to its accomplishment by registered mail without the host government's participation. The Hague Service Convention created procedures and forms to avoid informal service of process methods such as service by mail or agent, in order to safeguard the position of defendants who might otherwise remain ignorant of proceedings being taken against them. Service of process by mail or private process server, as well as other alternative methods, is invalid under the Hague Service Convention. Rather, the Hague Service Convention requires that service occur through a Central Authority, designated by a State "to receive requests for service coming from other contracting States" that will in turn proceed to carry out service. Hague Service Convention, art. 2, *concluded* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638. After the applicable form is completed and sent to the destination Central Authority, the Central Authority then reviews the request, determines its compliance, and "shall itself serve the document or shall arrange to have it served by an appropriate agency." *Id*., arts. 3–5. For signatory nations, "the provisions of the Hague Convention are mandatory" and failure to follow the prescribed methods "voids the attempted service." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988).

This issue was highlighted in Utah by the Utah Court of Appeals in its oft-cited case, *Saysavanh v. Saysavanh*, 2006 UT App 385, 145 P.3d 1166, a divorce/custody matter. There, the wife moved to Mexico following the parties' separation. *Id*. ¶ 2. When the couple's minor child, who lived with the husband, visited the wife in Mexico, the wife refused to return the child to the husband. *Id*. The husband filed an amended petition for

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divorce and a motion for order to show cause, with a subsequent motion for alternative service of that petition pursuant to rule 4 of the Utah Rules of Civil Procedure. *Id.* ¶¶ 3–4; *see also* Utah R. Civ. P. 4(d)(3)(B)(iii) (providing that service can be made "by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served"). The documents were later returned unsigned, without any indication of delivery, after which the court entered a default decree. *Saysavanh*, 2006 UT App 385, ¶ 4. Two years later, the wife asserted that she had just learned of the petition, immediately retained counsel, and moved to set aside the default decree. *Id.* ¶¶ 5–6. The trial court denied that motion, and the wife appealed. *Id.* ¶ 6. The Utah Court of Appeals reversed, stating that service on the wife was never valid because it did not comport with the requirements of the Hague Service Convention. *Id.* ¶ 26.

Saysavanh made plain that failure to abide by the "internationally agreed means" of service is done at a petitioner's peril. *Id.* ¶ 26; *see also* Utah R. Civ. P. 4(d)(3)(A).[2]

> *"When the defendant is not cooperative, using any procedure other than service through the Central Authority is risky."*

How-To – Service Through a Contracting State's "Central Authority"

In order to start the process of international service, a competent judicial officer or authority in the requesting State forwards a request for service conforming to the model forms adopted at the Convention to the Central Authority of the requested State together with copies of the documents to be served. Hague Service Convention, art 3.[3] Use of the model form is mandatory. *Id.*[4] Notably, the treaty provides for service through the use of Central Authorities in each signatory State, but also does not discourage the use of other less formal methods, such as service by mail directly to persons abroad, unless the requested State has expressly made known its opposition to less formal methods. *Id.*, arts. 8, 10, 21. The model form must be completed in either English or French, or one of the official language(s) of the requested State. *Id.*, art. 7. The form need not be notarized. *Id.*, art. 3. Although not required, it is encouraged to include information about the nature of the cause of action, the date of birth of the person to be served, and the relevant provision in the law of the requested State under which service was effected. *See* e.g., Utah R. Civ. P. 4.

Upon receipt of the model form, the requested State's Central Authority examines the request and, if in order, serves the documents or arranges for them to be served. *Id.*, arts. 4, 5. The execution of a request for service under the Hague Service Convention is by a method prescribed by the internal law of the requested State. *Id.*, art. 5(a). However, the Hague Service Convention also allows for the applicant to request a particular method of service as long as it is not incompatible with the law of the requested State. *Id.*, art. 5(b). Ultimately, the requested State's Central Authority effects service by the method it chooses. *Id.*, art. 5(1)–(2). The Hague Service Convention does not specify a time within which a foreign country's Central Authority must effect service, but it is suggested that if there is no acknowledgment of receipt of the request for service within thirty calendar days, the plaintiff should contact the Central Authority to inquire about the status of the request. Hague Conference on Private International Law, *Conclusions and Recommendations of the Special Commission on the Practical Operation of the Hague Apostille, Service, Taking of Evidence and Access to Justice Conventions*, p.6, Rec. 23(a) (Feb. 2–12, 2009), *available at* http://www.hcch.net/upload/wop/jac_concl_e.pdf.

When service is completed, the Central Authority fills out a "Certificate" giving the details of service and returns it to the applicant using another model form attached to the Convention. Hague Service Convention, art. 6. The effect of a Certificate certifying the execution of a request constitutes authoritative confirmation that service has been effected in conformity with the law of the requested State, and creates a rebuttable presumption that service was properly performed. *See United Nat'l Ret. Fund v. Ariela, Inc.*, 643 F. Supp. 2d 328, 336 (S.D.N.Y. 2008). The probative value of the Certificate in the requesting State remains subject to that State's law. A Certificate indicating that no service could be effected is not an obstacle to the granting of judgment in accordance with the law of the requesting State. Hague Service Convention, art. 15(2).

When Service Under the Hague Service Convention is Unnecessary

Despite the requirements documented above, service under the Hague Service Convention is unnecessary in certain instances, specifically, when a foreign party's address is unknown, when the foreign country consents to service, when service is made on an agent of the foreign party within the United States, or when the opposing party waives formal service. Each will be discussed below.

Address Unknown. If a foreign party's address is unknown, the Hague Service Convention does not apply. *Id.*, art. 1 ("This Convention shall not apply where the address of the person to be served with the document is not known.").

It is likely that service would then proceed by publication. *See* Utah R. Civ. P. 4(d)(A)–(C). However, care should be taken that sufficient effort was made to locate the foreign party's address. Courts expect diligent and various efforts to locate the defendant and serve process by "traditional" means, including a demonstration that that publication is likely to reach the defendant. The case of *B.P. Prod. N. Am., Inc. v. Dagra*, 236 F.R.D. 270 (E.D. Va. 2006), gives a sense of the diligence a court may require for a plaintiff to justify service by publication. *Id.* at 271. There, the plaintiff attempted service twice under the Hague Service Convention, hired an investigative services firm in Pakistan where the defendant was believed to be residing, and attempted to serve the defendant through local counsel, all to no avail. *Id.* The court then allowed service in two newspapers widely circulated in Pakistan, in English, since his business dealings in the U.S. made clear the defendant could understand it. *Id.* at 271–73.

Consenting State. Courts have ruled that the Hague Service Convention permits service of process by international mail if the receiving State does not object. *See, e.g., Brockmeyer v. May*, 383 F.3d 798, 803 (9th Cir. 2004) ("We therefore hold that the Convention permits…service of process by international mail, so long as the receiving country does not object."); *Research Sys. Corp. v. IPSOS Publicite*, 276 F.3d 914, 926 (7th Cir.

2002) (noting certified mail is "permitted by Article 10(a) of the Hague Convention, so long as the foreign country does not object"); *Mones v. Commercial Bank of Kuwait, S.A.K.*, 502 F. Supp. 2d 363, 371 (S.D.N.Y. 2007) (finding that because Kuwait objected to service by mail prior to being served, petitioner's service of respondent bank in Kuwait "by mail does not meet the service standards set forth in the Convention, nor of Rule 4(f) of the Federal Rules of Civil Procedure."). Courts have also ruled that the translation requirement of Article 5 applies only to service of documents by the foreign Central Authority, and not direct postal service. *See Greenfield v. Suzuki Motor Co., Ltd.*, 776 F. Supp. 698, 701–03 (E.D.N.Y. 1991) ("Where a country has exercised its Article Five right to require that the document be served by the Central Authority be translated into the official language of the foreign country, courts have generally held that attempted service of an untranslated document is invalid.… However, according to the information offered by the Japanese government with reference to its translation requirement, an exception to the rule requiring translation is the 'voluntary service' of paragraph 2 of Article Five."); *Lemme v. Wine of Japan Imp., Inc.*, 631 F. Supp. 456, 463–64 (E.D.N.Y. 1986).

Notably in Mexico, service on parties must comply with the Hague Service Convention and proceed through its Central Authority – that country does not permit mailings. *See Saysavanh v. Saysavanh*, 2006 UT App 385, ¶ 18, 145 P.3d 1166.

Agent in the United States. The Hague Service Convention requirements also do not apply where the service of process is made upon the agent of a foreign entity located in the United States. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 704-07 (1988) (noting the Hague Service Convention does not apply when process is served on a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation's involuntary agent for service).

Consent by Opposing Party. This may be obvious, but if a consenting party is willing to sign and have notarized an acceptance of service in which he or she waives formal service, this is an expedient way to circumvent the Hague Service Convention requirements.

Conclusion

The lesson is that parties who serve process abroad without considering the Hague Service Convention are asking for trouble. In any case in which process must be served abroad, the safest course is to use the Convention's procedure: serve process through the target country's Central Authority. This can be a slow process; consent to service by mail, by using services such as Federal Express, would be much more efficient if the defendant gives written consent in a formal written waiver of service. When the defendant is not cooperative, using any procedure other than service through the Central Authority is risky.

1. For a complete updated listing of contracting States to the Hague Service Convention, see Status Table, Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, http://www.hcch.net/index_en.php?act=conventions.status&cid=17 (last visited Jan. 31, 2013).
2. Additionally, the court's willingness to permit the Hague Service Convention to be raised as an issue of first instance upon appeal may not be shared by all courts. At least some decisions have refused to consider the Hague Service Convention at all on the basis that it had not been raised in the trial court. *See, e.g., Bakala v. Bakala*, 576 S.E.2d 156, 164 (S.C. 2003) ("[T]he issue of service in compliance with the Hague Service Convention was never raised to the family court. Accordingly, we decline to address it.").
3. Some States require the request and document to be served be translated into the requested State's official language. Hague Service Convention, art. 5. "At least one court has held that a private process service is a competent forwarding authority" and that "most private process servers in the United States feel they are entitled 'to act as applicants on request forms of the Convention,' but some 'instead have the plaintiff's attorney execute the [r]equest forms.'" Charles B. Campbell, *No Sirve: The Invalidity of Service of Process Abroad By Mail or Private Process Server on Parties In Mexico Under the Hague Service Convention*, 19 Minn. J. Intl. L. 107, 114 n.39 (2010) (alteration in original).
4. Model forms can be found at Hague Service Convention – model forms, http://www.hcch.net/index_en.php?act=text.display&tid=47 (last visited Jan. 31, 2013).

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Confessing Sins to Clients

by Keith A. Call

One of the most difficult things a lawyer can be required to do is to admit a mistake to a client. It runs afoul of our foundational makeup. We are trained to think, and some of us actually believe, that we are never wrong and never make mistakes.

Lawyers are not the only ones who suffer from an inflated sense of infallibility. Speaking to a group of CEOs and other business leaders, "wrongologist" Kathryn Schultz correctly points out that "most of us do everything we can to avoid thinking about being wrong." She adds, "This attachment to our own rightness keeps us from preventing mistakes when we absolutely need to and causes us to treat each other terribly." Kathryn Schultz, Video: *On Being Wrong*, (Ted.com 2011), *available at* http://www.ted.com/talks/kathryn_schulz_on_being_wrong.html.

Failing to recognize, admit and address lawyer mistakes can easily compound the initial problem, especially from an ethical perspective. (The liability aspects of confessing mistakes may raise different and competing concerns — including important impacts on malpractice insurance coverage — that are beyond the scope of this article.)

At least two ethical rules come into play. Utah Rule of Professional Conduct 1.4 requires the lawyer to keep the client "reasonably informed about the status of the matter" and to "explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Utah R. Prof'l Conduct 1.4. Rule 1.7 states that a conflict of interest exists if there is a "significant risk that the representation of one or more clients will be materially limited…by a personal interest of the lawyer." *Id*. R. 1.7(a)(2). The language of these rules suggests that lawyers may be ethically bound to report material mistakes to clients, especially if the mistake may impact the client's future decisions about the case or if the lawyer might be inclined to alter strategies due to his or her mistake.

Many lawyers have been sanctioned under these rules for attempting to affirmatively cover up or make misrepresentations about prior mistakes. *See* American Bar Association, Center for Prof'l Responsibility, *Annotated Model Rules of Prof'l Conduct* pp. 52–53 (5th ed. 2003) (citing several cases). In some cases, the lawyers even used their own funds to try to "undo" damage to the client, but were still sanctioned for failing to tell their clients the truth about what happened. *See id*.

But when is the mistake so serious that it must be disclosed to the client? There are no known Utah opinions that address this specific issue. The Ethics Committee of the Colorado Bar Association has addressed this issue directly, concluding that the duty to disclose arises whenever a disinterested lawyer would conclude the mistake "will likely result in prejudice to a client's right or claim." Ethics Committee of the Colorado Bar Ass'n, Formal Op. 113 (2005).

While stating the rule is easy, figuring out when it applies is difficult, especially given the lawyer's personal interests at stake and the normal penchant for insisting on his or her own "rightness." The Colorado opinion gives a few examples. It states that failing to file a claim within a statutory limitations period is one example of a mistake the must be disclosed. On the other end of the spectrum, "missing a non-jurisdictional deadline, a potentially fruitful area of discovery, or a theory of liability or defense may constitute grounds for loss of sleep, but not an ethical duty to disclose to the client." *Id*. The opinion also concludes that lawyers should be given the opportunity to remedy any error before disclosing it to the client. *Id*.

There are many shades along the "prejudice" spectrum. Whether a lawyer must confess his mistakes to his client must often be considered on a case-by-case basis. This can be a gut-wrenchingly difficult process. Because of the personal interests involved, any lawyer who finds himself or herself in this type of situation would be wise to seek the advice of a trusted mentor or colleague.

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What Attorneys Can Learn From Judicial Performance Evaluation

by Joanne C. Slotnick and Anthony W. Schofield

The statute establishing and governing the Utah Judicial Performance Evaluation Commission (JPEC) says nothing about the conduct of attorneys. Yet in gathering data about judges, JPEC has inadvertently collected information about the legal professionals who regularly interact with judges. Most of this information comes from our courtroom observers, trained citizen volunteers who travel the length and breadth of the state, sitting in courtrooms for hours at a time, observing judges as they conduct their calendars. When the observers return home, they use their court notes to create courtroom observation reports. These narrative reports document the observer's courtroom experience, with specific attention to the extent to which judges treat people neutrally and respectfully, allow people to tell their stories, and act as trustworthy decision-making authorities. This constellation of behaviors on which observers focus is called procedural fairness. Research consistently shows that people who are accorded procedural fairness are more satisfied with their court experience and are more likely to comply with court orders.

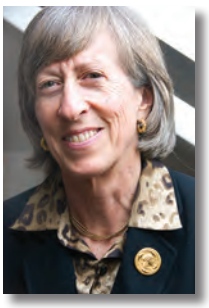
> *"How attorneys conduct themselves, from the moment they walk into the courtroom until the moment they leave, contributes to citizen impressions about how justice is dispensed in our state."*

Over time, the commission has noticed that observers watch more than just the judge. They watch attorneys, too, and sometimes they describe concerning incidents involving attorneys, even if those observations are peripheral to the evaluation of the judge. JPEC hopes that by sharing some of these observer comments, attorneys will remember that as soon as they enter the courtroom, and as long as they remain there, they are "on stage" and in the public eye, influencing public perceptions of our justice system.

One observer made the following comment:

> The judge and his clerks seemed organized and efficient, and the judge seemed familiar with the cases. What bothered me almost to the point of distraction was what was going on with the attorneys gathered there. Maybe about an hour or so into the session, a group of them who were waiting for their cases began not just whispering but actively chatting, laughing, giggling — loudly enough to be overheard three rows back. (I could pick up some of the actual conversation.) There were six of them involved in this, several at once, and this went on continuously for several minutes at a time, I'd guess for a period of more than half an hour, through several cases before the court. They were also playing with, or on their phones (or some other devices) with which they were sharing pictures with each other and laughing.

JOANNE C. SLOTNICK is the Executive Director of the Judicial Performance Evaluation Commission.



ANTHONY W. SCHOFIELD is the Chair of the Judicial Performance Evaluation Commission and a retired judge from the Fourth District Court.

> This seemed way beyond the kind of necessary conversation among attorneys that often has to take place in court, and I found myself having to keep myself from shushing them.

Another observer in another courtroom, experiencing similar behavior, put herself in the shoes of the defendant, wondering how such distractions might impact the defendant's perception of whether justice was being done:

> There were times during the proceedings, though, when others in the courtroom who appeared to be lawyers and/or clerks were standing around at the attorneys' tables and talking at length in audible tones. Their conversations didn't seem to be related to the immediate proceedings. It was distracting and, I thought, even rude to be intruding on the atmosphere of the courtroom. If I'd been a defendant, I would have wondered why that was going on right behind me, and wondered if the judge was focused on my case.

Yet another observer in another court location suggested that such behaviors might demonstrate a lack of respect for the justice system:

> One aspect of the court proceedings that, to me, indicated a possible lack of respect within the court had to do with the level of conversation that went on among the attorneys during proceedings. Some of it seemed to involve court cases, but much of it did not. I think the level of extraneous talk in the courtroom suggested a lack of regard for what should be a focused and serious atmosphere within the judicial system.

The commission does not doubt that attorneys take their jobs seriously and that they respect the arena in which they practice. But perceptions of the public matter.

Without question, conversations between attorneys must be expected in courtrooms. Courtroom observers know that. They are specifically trained to understand that a certain level of interaction between participants and professionals is part of the process, that negotiations happen at all stages of the proceedings, that dockets can unfold in surprising and complicated ways. The behaviors cited here, however, go beyond these expectations.

As professionals whose daily work routinely takes them into and out of court, attorneys can easily forget that a day in court is, for most people, a day they will never forget. What may be ordinary to a trial attorney is likely extraordinary to a citizen whose daily routine does not typically include trips to court or appearances before judges. An observer noted the potential impact of these contrasting perspectives:

> I have noticed the chatting and laughing at the front of the court. I don't know how we expect participants and family to take what is happening seriously if attorneys don't seem to be. Not to mention how rude it is to have such light hearted behavior going on while a family member or friend is being sentenced.

Whether a citizen is appearing before the judge or supporting someone else who has been called to court, the experience is a significant one. All of the professionals who interact in the courtroom, whether or not the judge is present, affect the public's perception of the justice system. How attorneys conduct themselves, from the moment they walk into the courtroom until the moment they leave, contributes to citizen impressions about how justice is dispensed in our state. So, the next time you walk through those courtroom doors, remember that the folks in the gallery are watching the justice system work, and that you are very much a part of what they are seeing.

Appellate Highlights

by Rodney R. Parker and Julianne P. Blanch

EDITOR'S NOTE: *The following appellate cases of interest were recently decided by the 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.*

***In re Guardianship of A.T.I.G.*,**
2012 UT 88 (December 11, 2012)

Preparing for her imminent death, a single mother prepared a testamentary appointment and conservatorship of her minor child in favor of her parents, pursuant to Utah Code Section 75-5-202.5. Utah Code Ann. § 75-5-202.5 (Michie 1993). After the mother's death, the district court signed the grandparents' petition for appointment of guardianship to confirm and accept the appointment. As of that time, the child's father was not named on the birth certificate, had not signed a voluntary declaration of paternity, and had never sought to adjudicate parentage. After the appointment, the father moved to vacate the appointment alleging he did not receive prior notice. He also filed a separate lawsuit to establish paternity. The supreme court upheld the appointment of the grandparents as guardians. The court found that although father had intervener status and thus standing, he had failed to preserve appellate challenges to the district court's denial of his motion to vacate. This case raises issues of failing to preserve issues for appeal, as well as testamentary appointments issues such as notice, definition of "parent," and establishing paternity under the Utah Parentage Act. It also makes clear that, despite the court of appeals having done so, the Utah Supreme Court has never recognized an exception to the preservation rule when the central issue to be decided concerns the best interests of a child.

***Berrett v. Albertsons, Inc.*,**
2012 UT App 371 (December 28, 2012)

The Utah Court of Appeals adopted Section 413 of the Restatement (Second) of Torts, stating that a grocery store should have recognized that an independent contractor's work on an uncovered manhole in its parking lot created a peculiar unreasonable risk, thus creating a duty of care toward patrons. The court rejected Albertsons' argument that adoption of this section runs contrary to the general rule of nonliability on the part of an employer for acts or omissions of its subcontractors. The court explained that the peculiar risk doctrine set forth in Section 413 serves as a limitation to the general rule of nonliability and that it accounts for "special situations" where the employer is in the best position to indentify and minimize risks associated with the subcontractor's activities.

***State v. Rincon*, 2012 UT App 372 (December 28, 2012)**

A worker did not commit identity fraud when the worker made up a random social security number that happened to match another person's social security number. The worker argued that the word "obtain" in Utah's identity fraud statute did not include randomly generating a number in a person's own mind. The court held that the word "obtain" involves a planned action related to an external source, and found that the worker did not "obtain" the random social security number that he had made up.

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***Gardner v. Gardner*,**
2012 UT App 374 (December 28, 2012)

The Utah Court of Appeals addressed for the first time the meaning of the phrase "hold harmless" in a divorce decree. The court held that the phrase is not simply an agreement to indemnify the other party in the event of loss, but rather a promise that the event will not occur. The occurrence of the event thus forms a basis for a finding of contempt. Further, the court held that, although "damage" or "fiscal loss" must result, the claimant need not be able to establish monetary "damages." The wife had agreed to assume and hold the husband harmless from a mortgage, and when the wife's late payments resulted in harm to the husband's credit score, he sought a contempt citation, attorney's fees, and other relief.

***UTA v. Local 382*,**
2012 UT 75, 289 P.3d 582 (November 6, 2012)

A labor union sought review of the district court's order denying the union's motion to compel arbitration of issues relating to UTA's unilateral modification of the union's terms and conditions of employment. The issue became moot after the parties reached a new collective bargaining agreement while the appeal was pending, but both parties argued that the supreme court should decide the issue under a "public interest" exception to the mootness doctrine. The supreme court found that public interest, by itself, cannot establish an exception to mootness and clarified that the exception requires a three-part showing of an issue that (1) affects the public interest; (2) is likely to recur; and (3) because of the brief time that any one litigant is affected, evades review. The supreme court dismissed the case as moot because it did not satisfy these elements, and it could not address the underlying merits in what would amount to an advisory opinion.

***Utah Down Syndrome Found., Inc. v. Utah Down Syndrome Ass'n*, 2012 UT 86 (December 7, 2012)**

A lawyer was found to not have an appeal of right of the denial of his Rule 60(b) motion to vacate the court's disgorgement order, which ordered him to return $30,000 in legal fees, because he was not a party to the underlying suit. The supreme court dismissed the appeal for lack of jurisdiction, noting that the lawyer should have filed either an extraordinary writ or a motion to intervene as a party instead of a Rule 60(b) motion. In a concurring opinion, Justice Lee argued that it is contrary to fundamental principles of due process to deny the lawyer's right to appeal a coercive court order on the ground that he was a non-party.

***Winward v. State of Utah*, 2012 UT 85 (December 7, 2012)**

The Utah Supreme Court vacated a district court's ruling on a prisoner's claim for ineffective assistance of counsel. The prisoner argued that trial counsel was ineffective because counsel failed to explain a plea offer from the State. The district court dismissed the prisoner's ineffective assistance of counsel claim under the Post-Conviction Remedies Act because the prisoner's claim was filed almost ten years after the statute of limitations. After the prisoner briefed the ineffective assistance of counsel issue, the United States Supreme Court issued a ruling in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), holding that the Sixth Amendment right to counsel extends to pretrial plea negotiations and that a deficiency in the pretrial plea negotiation process cannot be redressed by a fair trial. The Utah Supreme Court explained that when a new rule is announced by the United States Supreme Court that provides a petitioner with a newly recognized cause of action, the petitioner may file a motion to vacate the sentence within one year from the date of the decision. Considering that recent decision, the Utah Supreme Court vacated the district court's ruling and held that the prisoner had one year to make a motion to vacate or amend the prisoner's sentence.

***Dorsey v. Dep't of Workforce Servs.*,**
2012 UT App 364 (December 20, 2012)

The Workforce Appeals Board determined that a claimant was ineligible to receive unemployment benefits where the claimant was an employee at a restaurant and received a seasonal job deferral each year during which he would travel to Mexico. The Board reasoned that when the claimant was in Mexico he was not "able and available" for full-time work and imposed an overpayment assessment and a civil penalty for fraud. The Utah Court of Appeals set aside the Board's decision, instead determining that the claimant was available for work because the claimant was willing to travel back to Utah within twenty-four hours if his employer requested his services and the claimant could be contacted to do so. The Utah Court of Appeals noted that while foreign and domestic travel are relevant to the determination of availability, it cannot be grounds for denying eligibility where the claimant is "able to work and is available for work during each and every week for which [he] made a claim for benefits." *See* Utah Code Ann. § 35A-4-403(1)(c) (LexisNexis Supp. 2012).

Stern v. Marshall *Changes the Landscape of Bankruptcy Court Jurisdiction*

by David E. Leta[1]

"There is no liberty if the power of judging be not separated from the legislative and executive powers."

Charles de Montesquieu, The Spirit of Laws 181

INTRODUCTION

The constitutional limit of a bankruptcy court's power is of critical importance to our system of solving financial problems in a just and speedy fashion. At the end of its 2010-2011 term, the Supreme Court of the United States called into question this constitutional power. Since then, courts across the country have been struggling to understand when a bankruptcy court may enter a final judgment, and when it may not do so.

BACKGROUND

Article III of the Constitution secures the independence of the judiciary. The autonomy of the judiciary would be compromised if the other branches of government could assign the "Government's 'judicial Power' on entities outside Article III." *See Stern v. Marshall*, 131 S.Ct. 2594, 2609 (2011). Thus, Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855).

Bankruptcy judges are not Article III judges. They are appointed for 14-year terms and can be removed at any time by circuit judicial councils. *See* 28 U.S.C. § 152(a)(1) (2006). The salaries of bankruptcy court judges are subject to adjustment under the Federal Salary Act. *See id.* § 153(a). Thus, bankruptcy judges have less authority than Article III judges. How much less has proved difficult to answer.

This jurisdictional complexity derives from the English bankruptcy model which bifurcated jurisdiction over bankrupt estates into "summary" and "plenary" proceedings. Administration of a bankrupt's estate was accorded *in rem* jurisdiction. This jurisdiction, also known as a "summary proceeding," was limited to a debtor's property that actually found its way into the hands of the commissioners and the estate's representatives. *See* Ralph Brubaker, *Article III's Bleak House (Part I): The Statutory Limits of Bankruptcy Judges' Core Jurisdiction*, 31 No. 8 Bankr. L. Letter 1 (Aug. 2011). Bankruptcy commissioners, however, could not handle disputes regarding what property belonged to the bankrupt's estate. Such actions were known as "plenary proceedings." Plenary actions had to be brought before a superior court.

Congress adopted the English bankruptcy model in the Bankruptcy Acts of 1800 and 1898. Non-Article III bankruptcy commissioners, designated as "referees," were charged with adjudicating all summary proceedings. *See* Elizabeth Warren & Jay Lawrence Westbrook, *The Law of Debtor and Creditor* 800 (6th ed. 2009) (noting that bankruptcy referees came to be called judges in 1973). In determining the extent of a referee's authority, the Supreme Court routinely invoked the plenary/summary distinction. *See, e.g., Katchen v. Landy*, 382 U.S. 323 (1966); *Schoenthal v. Irving Trust Co.*, 287 U.S. 92 (1932).

When Congress reformed the bankruptcy laws in 1978, it

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expanded the scope of bankruptcy court jurisdiction to include any proceeding "related to" the bankruptcy case. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*., 458 U.S. 50 (1982), this broad grant of authority was declared unconstitutional by the Supreme Court as a violation of Article III of the Constitution. *See id*. at 52–53. The Court, however, recognized that Congress could constitutionally assign some matters to bankruptcy judges, but such matters must involve "public rights." *See id*. at 67–68. Although the Court could not agree on the scope of the public rights exception to Article III, it concluded that the exception did not encompass the state law claim at issue in *Northern Pipeline*. *See id*. at 69–72 ("The distinction between public rights and private rights has not been definitively explained in our precedents. Nor is it necessary to do so in the present cases, for it suffices to observe that a matter of public rights must at a minimum arise 'between the government and others.'" (footnote omitted) (quoting *Ex Parte Bakelite Corp*., 279 U.S. 438, 451 (1929))).

To comply with the Supreme Court's holding, Congress amended the Bankruptcy Code in 1984 and created two broad categories of proceedings: "core" and "noncore." *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 157, 98 Stat. 340 (1984). Proceedings that "arise under" the Bankruptcy Code or "arise in" a bankruptcy case were classified as "core" proceedings. *See id*. § 157(b)(1). Proceedings "related to" the bankruptcy case are classified as "noncore." *See id*. § 157(c)(1). Bankruptcy courts were authorized to issue final determinations in all core proceedings. *See id*. § 157(b)(1). For noncore proceedings, however, bankruptcy courts were only authorized to "submit proposed findings of fact and conclusions of law" to the district court for *de novo* review, *see id*. § 157(c)(1), which then could enter a "final order or judgment." *See id*. This jurisdictional scheme has governed bankruptcy proceedings for the past thirty years, but *Stern v Marshall*, 131 S. Ct. 2594 (2011), has now undermined it.

STERN v. MARSHALL

In *Stern v. Marshall* the Supreme Court held that the Bankruptcy Court lacked constitutional authority to enter a final judgment on a debtor's counterclaim, even though the counterclaim was specifically identified as a "core proceeding" under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2). The implications of this decision remain unclear.[2] The question before the Supreme

Court in *Stern* was straightforward: which court – the California bankruptcy court or the Texas probate court – first entered *final judgment* on the Debtor's counterclaim? The California bankruptcy court first rendered an award to the debtor of $475 million in compensatory and punitive damages. The Texas probate court, however, refused to recognize the judgment and, instead, entered a final judgment for the defendant. Subsequently, on appeal, the California District Court rejected the bankruptcy court's conclusion that it had "core" jurisdiction, vacated the bankruptcy court's judgment, reviewed the case *de novo*, ruled in favor of the debtor and awarded her $90 million in compensatory and punitive damages. Thus, in *Stern v. Marshall*, the Supreme Court had to decide which judgment was the first final judgment entered on the counterclaim and, therefore, entitled to preclusive effect.

The Supreme Court analyzed the case by addressing two issues: (1) whether the bankruptcy court had the statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on the claim; and (2) if so, whether conferring that authority on the bankruptcy court was constitutional. *Stern*, 131 S. Ct. at 2600. In addressing the first issue, the Court concluded that § 157(b)(2)(C) grants the bankruptcy court *statutory authority* to enter a final judgment on a debtor's counterclaim, but on the second question it concluded that this statutory grant of authority was unconstitutional in light of the facts of the case. On this second question, the Court held that Congress could not grant authority to the bankruptcy court over the counterclaim because it was a "private right" entitled to adjudication in an Article III court.

The Court acknowledged a category of claims, referred to as public rights, which Congress could assign to non-Article III courts. The Court defined a public right as a "case[ ] in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority." *Id*. at 2613. The debtor's claim, however, did "not fall within any of the various formulations of the [public rights] concept that appear in this Court's opinions." *Id*. at 2611. The Court reached this conclusion based on seven factors: (1) the claim fell under state common law; *see id*. at 2614, (2) it was not "completely dependent upon" adjudication of a claim created by federal law; *see id*., (3) the defendant did "not truly consent" to resolution of the claim in the bankruptcy court proceedings; *see id*., (4) the asserted authority to decide the claim "is not limited to a particularized area of law"; *see id*. at 2615, (5) there was never any reason to believe that the process of adjudicating the defendant's proof of claim would necessarily resolve the counterclaim; *see id*. at 2617, (6) the trustee was not asserting a right of recovery created by federal bankruptcy law; *see id*. at 2618, and (7) the bankruptcy judge "ha[d] the power to enter 'appropriate orders and judgments' – including final judgments – subject to review only if a party chooses to appeal." *See id*. at 2619. Interestingly, the Court did not seem troubled by the fact that the allowance or disallowance of the counterclaim would have a material impact on the amount of assets in the bankruptcy estate.

The Court insisted that its holding was "a narrow one." *See Stern v. Marshall*, 131 S. Ct. 2594, 2620 (2011). It predicted that its decision would not "meaningfully change[ ] the division of labor" between bankruptcy and district courts. *See id*. So far, that prediction has proved to be wrong.

CONFUSION AFTER *STERN*

Stern v. Marshall sent shock waves through the lower courts. *See, e.g., Meoli v. Huntington Nat. Bank (In re Teleservices Grp., Inc.)*, 456 B.R. 318, 323 (Bankr. W.D. Mich. 2011) (describing *Stern* as a "bombshell" to the bankruptcy system). Released in late June 2011, *Stern* was cited in well over 100 cases before the end of 2011. *See* Frank W. Volk, *First Impressions: Interpreting Stern*, Am. Bankr. Inst. L.J., Dec./Jan. 2011. As of approximately June 23, 2012 — its one year anniversary — *Stern* was cited in over 506 reported decisions, and it continues to be cited in reported decisions at a rate of approximately forty cases per month. As one bankruptcy court put it: "Unfortunately, *Stern*…has become the mantra of every litigant who, for strategic or tactical reasons, would rather litigate somewhere other than the bankruptcy court." *In re Ambac Fin. Grp., Inc*., 457 B.R. 299, 308 (Bankr. S.D.N.Y. 2011). Supreme Court scholar Erwin Chemerinsky noted, "few Supreme Court decisions will have a larger impact on the day-to-day work of judges and lawyers" than *Stern*. Erwin Chemerinsky, *Enormous Confusion*, Nat. L.J., Aug. 29, 2011.

The litany of litigation in the wake of *Stern* has caused "enormous confusion" in courts throughout the country. *See id*. Courts have adopted conflicting interpretations of the case and

its holding.[3] One judge predicted "years of uncertainty" in bankruptcy courts because of *Stern*. *See In re Teleservices Grp. Inc.*, 456 B.R. at 344. The only inevitability at this point is that the case law interpreting *Stern* will continue to multiply and the issues addressed will become more complex. *See* Frank W. Volk, *First Impressions*, Dec./Jan. 2011.

NARROW OR BROAD

There is no uniform interpretation of *Stern*. As one bankruptcy judge observed, "one can find decisions supporting broad, narrow, and middle-of-the-road interpretations." *Liberty Mut. Ins. Co. v. Citron (In re Citron)*, No. 09-8125-jbr, 2011 WL 4711942, *1 n.1 (Bankr. E.D.N.Y. Oct. 6, 2011). Some courts have interpreted *Stern* narrowly based on the language of the decision. *See, e.g., In re Safety Harbor Resort & Spa*, 456 B.R. 703. 719 (Bankr. M.D. Fla. 2011) ("[T]his Court agrees with the *Stern* Court that the decision in *Stern* 'does not change all that much.'" (quoting *Stern*, 131 S.Ct. at 2620); *In re Salander O'Reilly Galleries*, 453 B.R. 106, 115 (Bankr. S.D.N.Y. 2011) (limiting *Stern* to the "unique circumstances of that case"); *Kirschner v. Agoglia (In re Refco Inc.)*, 461 B.R. 181, 191 (Bankr. S.D.N.Y. 2011) (refusing to extend *Stern* to fraudulent conveyances). These courts limit *Stern* to its unique facts — *Stern* only applies to counterclaims like the debtor's that fall under 28 U.S.C. § 157(b)(2)(C). In contrast, other courts have adopted a broad interpretation of *Stern* by focusing more on its underlying rationale than on its unique facts. These courts have extended the holding of *Stern* beyond state law counterclaims by reasoning that *Stern's* "cautionary dicta" does not overcome its "simple logic" that core proceedings outside the public rights exception "must be finally decided by an Article III Court." *Kirschner*, 476 B.R. at 81. According to this "broad view," identifying a proceeding as core under 28 U.S.C. §157 does not determine whether bankruptcy courts have the authority to issue a final judgment. The inquiry is "whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern*, 131 S.Ct. at 2618.

CONSENT

The *Stern* Court did not directly address whether bankruptcy courts can issue final judgments on core proceedings where it lacks constitutional authority *if the parties consent*. The Court avoided the issue by concluding that the defendant did not consent to the adjudication of the counterclaim, *see id*. at 2603–04, even though the defendant had filed a proof of claim in the bankruptcy case. There is no agreement among commentators on this issue.[4] 28 U.S.C. § 157(c)(2) allows a bankruptcy court to enter final judgment on noncore matters with the consent of the parties. But there is no express statutory authority that permits parties to consent to entry of a final judgment by a bankruptcy court in an unconstitutional core proceeding.[5]

CONCLUSION

On a subject this complicated, it is dangerous to designate "take-aways" for fear of over-simplification. A few points are noteworthy, whether you are prosecuting or defending a claim in bankruptcy court. First, does the claim involve a "state law cause of action?" If it does, you probably have a *Stern* issue that will need to be addressed, or at least considered. Second, is the case about property that is now *in the bankruptcy estate*, or is it about property *outside of the bankruptcy estate?* If the latter, you probably have a *Stern* issue. This is a tricky distinction, however, since there are literally thousands of cases that talk about "property of the estate" in very broad terms. Third, is the claim one that involves a traditional bankruptcy court function of administering the debtor's estate and paying claims? If so, then the lawsuit is probably more of a "public rights" issue than a "private rights" action. Finally, have the parties "consented," either expressly or by implication, to entry of a final judgment by the bankruptcy court? If so, then chances are good the bankruptcy court can enter a final judgment.

Courts will continue to grapple with these issues for a long time. Undoubtedly, reasonable minds will differ on what is, and is not, the "right outcome" given a particular set of facts. Hopefully, as more minds are focused on this problem, patterns will emerge that will guide behavior and provide a degree of predictability. Until then, zealous advocacy will rule the day.

1. I am indebted to Mr. Ricky Shelton, a third year law student at the University of Virginia School of Law and a 2012 Summer Associate at Snell & Wilmer L.L.P., for his assistance on this paper.

2. This case received a lot of media attention, but was generally known as the case of Anna Nicole Smith. In 1991, J. Howard Marshall II (J. Howard), a wealthy oilman, met Vickie Lynn Marshall (Vickie), later known publically as Anna Nicole Smith, at a burlesque bar in Houston, Texas.

   J. Howard courted Vickie for the next three years, showering her with lavish gifts. J. Howard and Vickie married on June 27, 1994. He was eighty-nine years old. She was twenty-six.

   Thirteen months later, J. Howard died. A decade-long legal battle over his wealth ensued between his wife Vickie and his son E. Pierce Marshall (Pierce). The litigation outlived both parties – Pierce died in June 2006 and Vickie died in February 2007. The case was carried on by Howard Stern, Executor of Vicki's estate, and Elaine Marshall, Executrix of Pierce's estate. The battle began just prior to J. Howard's death when Vickie brought a claim against Pierce in a Texas probate court alleging that Pierce tortiously interfered with her expectancy of an inter vivos gift from J. Howard. A few months later, Vickie filed for Chapter 11 bankruptcy in California. Soon after, Pierce filed an adversary proceeding in Vickie's bankruptcy case alleging defamation. In response, Vickie filed a counterclaim for tortious interference that was identical to the claim Vickie asserted against Pierce in the Texas probate court. Vickie prevailed on her tortious interference claim in the California bankruptcy court, but lost in Texas.

3. *Compare Meoli v. Huntington Nat. Bank (In re Teleservices Grp., Inc.)*, 456 B.R. 318, 327 (Bankr. W.D. Mich. 2011) (critiquing *Stern* for providing little to no guidance on what core matter may be appropriately determined by the bankruptcy courts), *and In re BearingPoint, Inc*., 453 B.R. 486, 496-98 (Bankr. S.D.N.Y. 2011) (highlighting the difficulties with regard to the consent doctrine and core matters in a post-*Stern* environment), *with In re Safety Harbor Resort & Spa*, 456 B.R. 703, 705 (Bankr. M.D. Fla. 2011) ("The Supreme Court's holding in *Stern* was very narrow."), *and Brook v. Ford Motor Credit Co. (In re Peacock)*, 455 B.R. 810, 812 (Bankr. M.D. Fla. Sept. 2, 2011) ("The narrow holding in *Stern*…does not impact a bankruptcy court's ability to enter a final judgment in any other type of core proceeding authorized under 28 U.S.C. § 157(b)(2).").

4. Commentators disagree about whether the rationale in *Stern* actually rejects the consent doctrine with regard to core proceedings. *Compare* Ralph Brubaker, *Article III's Bleak House (Part I): The Statutory Limits of Bankruptcy Judges' Core Jurisdiction*, 31 No. 8 Bankr. L. Letter 1 (Aug. 2011) (hypothesizing that based on the Supreme Court's reasoning in *Stern* a bankruptcy court's ability to finally adjudicate core proceedings based on the consent of the litigants will be upheld), *with* Adam Lewis ET AL., Stern v. Marshall: *A Jurisdictional Game Changer?*, 7 Pratt's J. Bankr. L. 483,(September 8, 2011) (concluding that the *Stern* opinion casts "significant doubt" on the jurisdiction of bankruptcy courts by consent).

5. The Committee on Rules of Practice and Procedure of the Judicial Conference of the Unites States has published new proposed Federal Rules of Bankruptcy Procedure to address the *Stern* dilemma. These rule amendments are largely based on the "consent" concept. The comment period for the rules ends on February 15, 2013. The proposed rules can be found at http://www.uscourts.gov/rulesandpolicies/rules.aspx.

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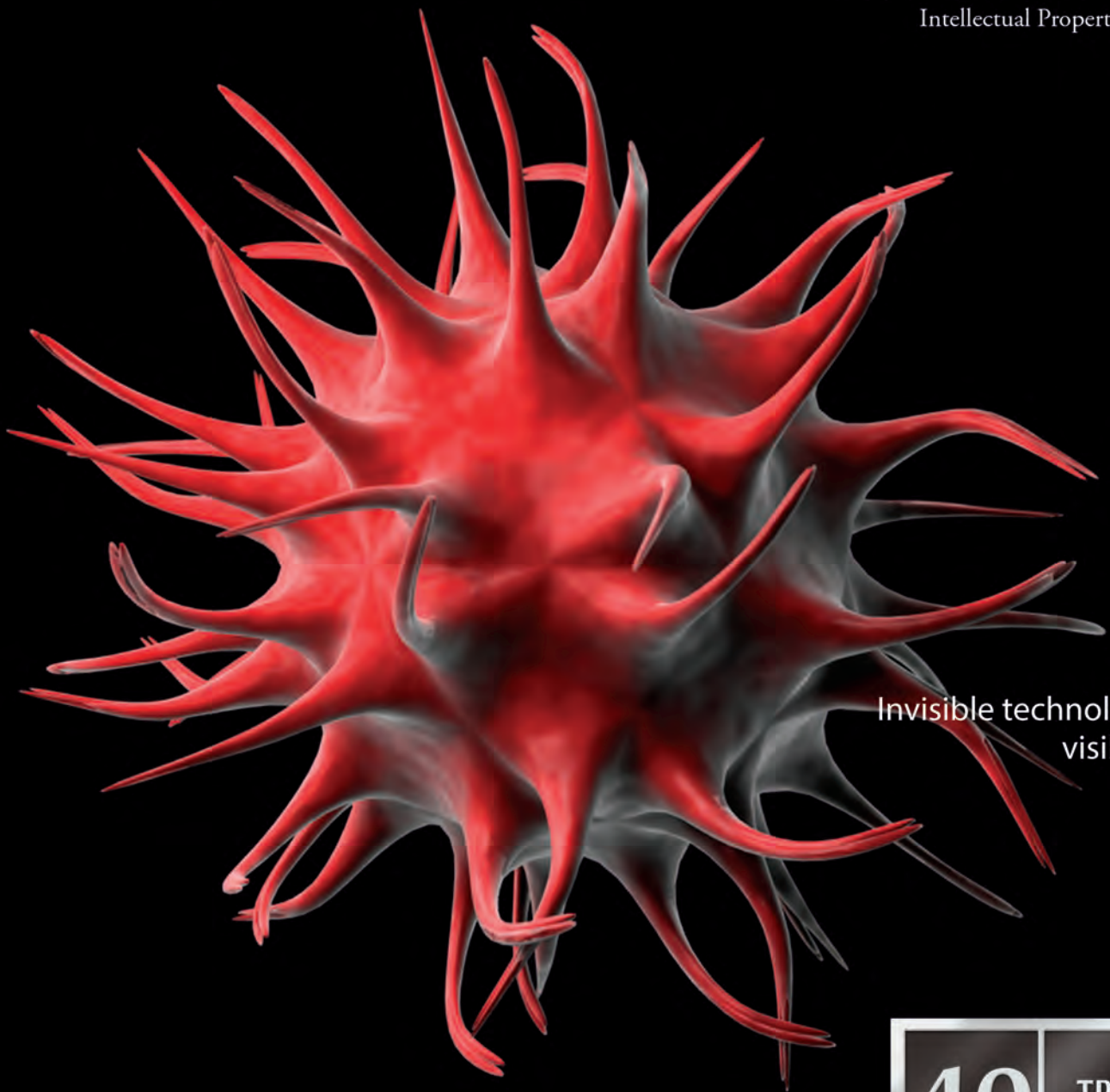

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Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the January 25, 2013 Commission Meeting held at the Law & Justice Center in Salt Lake City.

1. The Commission nominated James Gilson to run for retention election as Bar President-Elect Candidate.

2. The Commission selected Charlotte Miller for the Dorathy Merrill Brothers Award for Advancement of Women in the Legal Profession.

3. The Commission selected Cecilia Romero for the Raymond S. Uno Award for the Advancement of Minorities in the Legal Profession.

4. The Commission reappointed John L. Black, Jody K. Burnett, Catherine F. Labatte, A. Howard Lundgren, Thom R. Roberts, Lauren I. Scholnick, Erik Strindberg, Roland F. Uresk, Kenneth R. Wallentine, and Tracey M. Watson as Utah Legal Services Trustees.

5. The Commission appointed Bart J. Johnsen as a Utah Legal Services Trustee.

6. The Commission adopted the HVAC Committee's recommendations to designate bidder "B" or "C" to Begin Work on the Law and Justice Center's HVAC system with "Alternative #1," to be completed by June 20, 2013.

7. The Commission approved the Client Security Fund Report and Recommendations via the Consent Agenda.

8. The Commission approved Commission Minutes from December 12, 2012 Meeting via the Consent Agenda.

9. Commissioners agreed to follow through with Snowmass presentations at law firms, as assigned.

10. Commissioners agreed to draft Law & Justice Center Building Use Guidelines for Politically-Related Events.

11. Commissioners agreed to contact local bar associations to promote the modest means program.

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

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 at sydnie.kuhre@utahbar.org or (801) 297-7035 or Ryan Rapier, MCLE Assistant at ryan.rapier@utahbar.org or (801) 297-7034.

Bryant J. McConkie

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Pro Bono Honor Roll

Adamson, Jeremy – Tuesday Night Bar

Allebest, Jared – Divorce Case

Allred, Clark – Divorce Case

Amann, Paul – Tuesday Night Bar

Anderson, Douglas – Tuesday Night Bar

Angelides, Nicholas – Senior Cases

Averett, Steven – TLC Document Prep Clinic

Baer, Mark – Tuesday Night Bar

Bagley, John – Bankruptcy Case

Baker, Jim – Senior Center Legal Clinic

Ball, Matt – Tuesday Night Bar

Barrick, Kyle – Senior Center Legal Clinic

Barrus, Craig – TLC Document Prep Clinic

Billings, David – Consumer Case

Birch, Randy – Protective Orders

Black, Michael – Tuesday Night Bar

Blotter, Scott – Bankruptcy Case

Boehme, Alan Joseph – Divorce Case

Bradshaw, Justin – Street Law Clinic

Brinton, Jed – Tuesday Night Bar

Bsharah, Perry – Divorce Case

Buchanan, Donald Clyde – Divorce Case

Chambers, Steven – Rainbow Law Clinic

Christiansen, J. Ed – Divorce Case

Christiansen, Ryan – Divorce Case

Clark, Melanie – Senior Center Legal Clinic

Conley, Elizabeth – Senior Center Legal Clinic

Conyers, Kate – Tuesday Night Bar

Coronado, Cristina – Service Member Attorney Volunteer Case

Crismon, Sue – Medical-Legal Clinic

Cundick, Jr., T. Edward – Bankruptcy Case

Curtis, Les – FJC Tuesday Night Clinic

Curtis, Robert – TLC Pro Bono Divorce Case

Dansie, Daniel – Protective Order

Denny, Blakely – Tuesday Night Bar

DePaulis, Megan – Tuesday Night Bar

Dez, Zal – Family Law Clinic

Dolowitz, David – Protective Order

Donosso, Yvette – Tuesday Night Bar

Emmett, Mark – Bankruptcy Case

Ferguson, Phillip – Probate Case

Fontenot, William – Divorce Case

Freeman, Joshua – Military QDRO Case

Hadley, Greg – FJC Tuesday Night Clinic

Hall, Brent – Family Law Clinic

Handy, Jeffrey – Housing Case

Hansen, Laura – Tuesday Night Bar

Harding, Sheleigh – Family Law Clinic

Harry McCoy II – Senior Center Legal Clinic

Hart, Laurie – Senior Center Legal Clinic

Hinkins, T. Jake – Alimony OSC Case

Jensen, Matthew – Street Law Clinic

Jensen, Michael – Senior Center Legal Clinic

Johansen, Bryan – Tuesday Night Bar

Jones, Casey – Tuesday Night Bar

Jones, Robb – Post Conviction Case

Kessler, Jay – Senior Center Legal Clinic

Latimer, Kelly – Tuesday Night Bar

Lebaron, Shirl – Service Member Attorney Volunteer Case

Lillywhite, Andrew – Tuesday Night Bar

Losee, Mark – Divorce Case

Loughmiller, Kiersty – Service Member Attorney Volunteer Case

Lundberg, Michael – Tuesday Night Bar

Mares, Robert – Family Law Clinic

McDonald, Kathleen – Tuesday Night Bar

McKay, Chad – Divorce Case

Mellen, Richard – Divorce Case

Micken, Christina – Adoption Case

Miller, Nathan – Senior Center Legal Clinic

Morrow, Carolyn – Family Law Clinic, Domestic Case, Housing Case

Naegle, Lorelei – Custody Case

Nalder, Bryan – Tuesday Night Bar;

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

Osmond, Joseph – TLC Pro Bono Divorce Case

Paoletti, C. Jeffery – QDRO Cases, Consumer Cases

Pomeroy, Adam – Post Conviction Case

Roberts, Kathie – Senior Center Legal Clinic

Semmel, Jane – Senior Center Legal Clinic

Timothy, Jeannine – Senior Center Legal Clinic

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in 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 Petition for Reinstatement by Allen F. Thomason

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 Petition for Reinstatement ("Petition") filed by Allen F. Thomason in *In the Matter of the Discipline of Allen F. Thomason*, Fourth Judicial District Court, Civil No. 100401779. Any individuals wishing to oppose or concur with the Petition are requested to do so within thirty days of the date of this publication by filing notice with the District Court.

Notice of Petition for Reinstatement by David VanCampen

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 Petition to Reinstate ("Petition") filed by David VanCampen in *In the Matter of the Discipline of David VanCampen*, Third Judicial District Court, Civil No. 080924407. 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.

2013 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2013 Summer Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org, no later than Thursday, May 30, 2013. The award categories include:

1. Judge of the Year
2. Distinguished Lawyer of the Year
3. Distinguished Section/Committee of the Year

Notice of Legislative Rebate

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

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

Did you know… *Utah Bar Journal* archives are available online at www.utahbarjournal.com.

Notice of Electronic Balloting

Utah State Bar elections have moved from the traditional paper ballots to electronic balloting. Online voting reduces the time and expense associated with printing, mailing, and tallying paper ballots and provides a simplified and secure election process. A link to the online election will be supplied in an email sent to your email address of record. Please check the Bar's website at http://www.utahbar.org/forms/members_directory_search.html to see what email information you have on file. You may update your email address information by using your Utah State Bar login at http://www.myutahbar.org. (If you do not have your login information please contact onlineservices@utahbar.org and our staff will respond to your request.) Online balloting will begin April 1 and conclude April 15, 2013. Upon request, the Bar will provide a traditional paper ballot by contacting Christy Abad at adminasst@utahbar.org.

The purpose of life is to live it... to reach out eagerly and without fear for newer and richer experience.

– Eleanor Roosevelt

UTAH STATE BAR

2013 Summer Convention

SNOWMASS VILLAGE

COLORADO

July 17-20

Try something new! Join us in Snowmass, Colorado.

Come to Snowmass Village for the 2013 Summer Convention, July 17–20.

Something new, something different!

- Hot Air Ballooning
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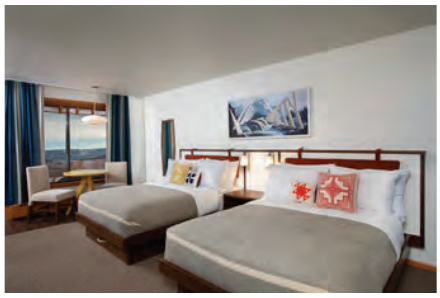
- Jeep Tours
- Backcountry Hiking
- Horseback Riding
- Trap/Skeet Shooting
- Choose between 156 Restaurants

www.snowmassvillage.com

2013 Summer Convention
Snowmass Village Accommodations

WESTIN SNOWMASS
Starting at $159 if booked by April 17
Group rate available until June 17



WILDWOOD SNOWMASS
Starting at $139 if booked by April 17
Group rate available until June 17

VICEROY SNOWMASS
Studio Guestroom – $159
1 Bedroom Guestroom – $189
2 Bedroom Guestroom – $369

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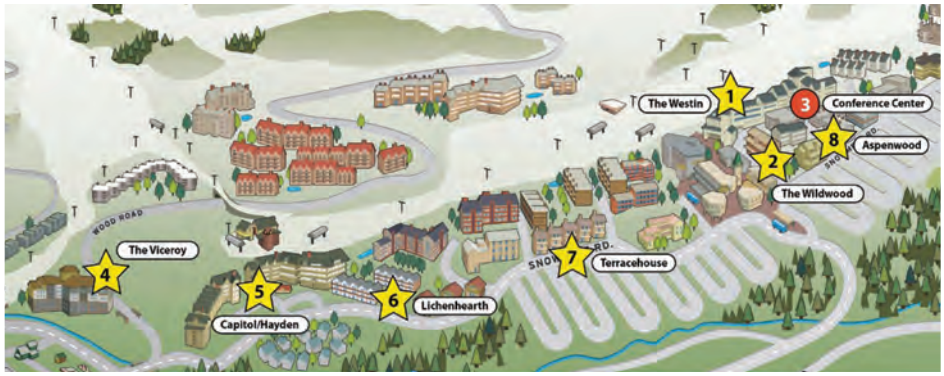
2 Bedroom Premier – $225
3 Bedroom Valley View – $255

LICHENHEARTH CONDOMINIUMS
Studio – $99
1 Bedroom – $109

TERRACEHOUSE CONDOMINIUMS
2 Bedroom – $149

ASPENWOOD CONDOMINIUMS
Studio – $129
Studio with Loft – $149
2 Bedroom – $199



For best selection at these special group rates, book today at:

www.utahbar.org/cle/summerconvention/snowmasslodging

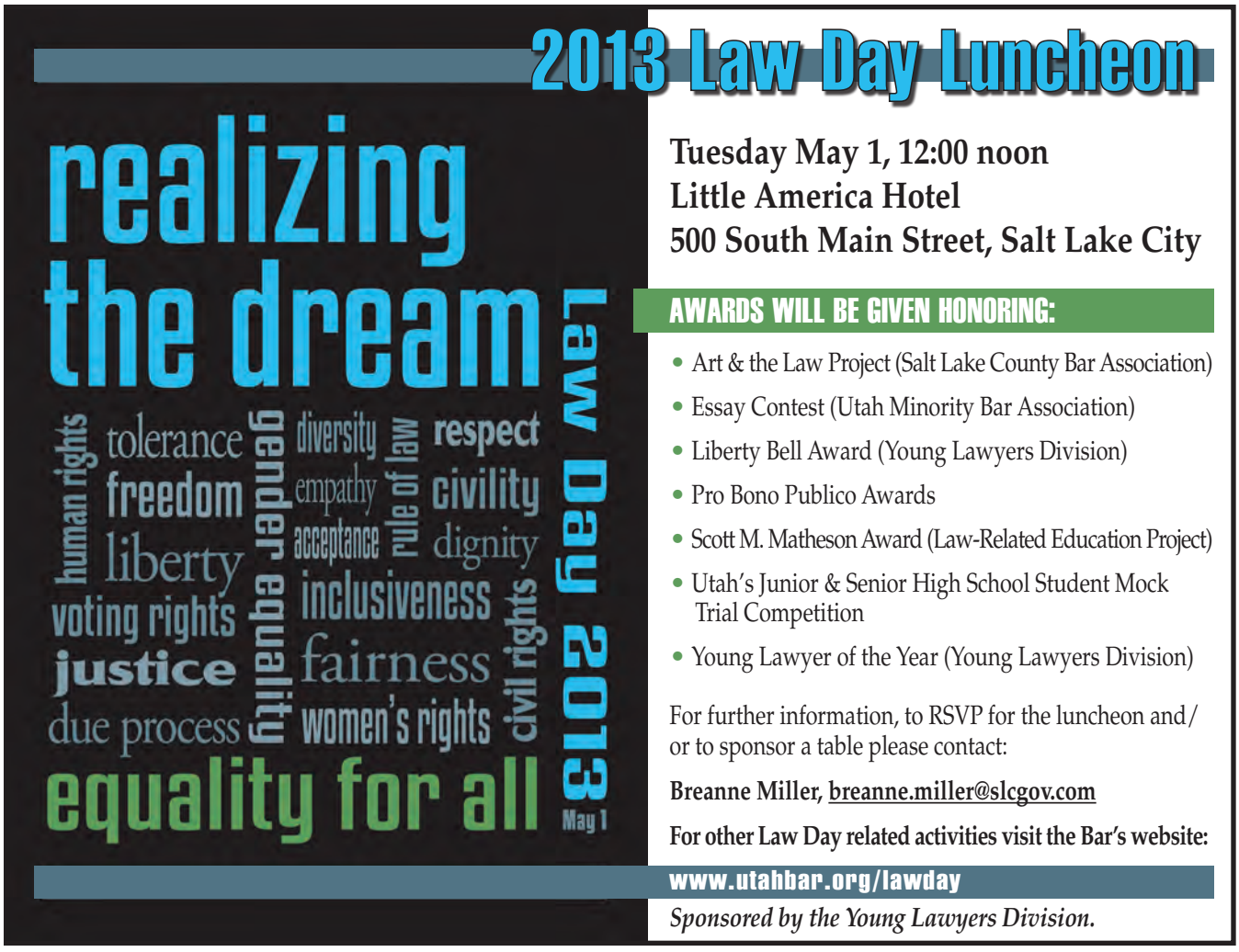
Mandatory Online Licensing

The annual Bar licensing renewal process will begin June 1, 2013 and will be done only online. Sealed cards will be mailed the last week of May to your address of record. *(Update your address information now at* http://www.myutahbar.org.) The cards will include a login and password to access the renewal form and will outline the steps to re-license. Renewing your license online is simple and efficient, taking only about five minutes. With the online system you will be able to verify and update your unique licensure information, join sections and specialty bars, answer a few questions, and pay all fees.

No separate licensing form will be sent in the mail. You will be asked to certify that you are the licensee identified in this renewal system. Upon completion of the renewal process, you will receive an acknowledgment of completion that you can print and use as a receipt for your records. This acknowledgment can be used as proof of licensure, allowing you to continue practicing until you receive your renewal sticker via the U.S. Postal Service. If you do not receive your license in a timely manner, call (801) 531-9077.

Licensing forms and fees are due June 30 and will be late August 1. Unless the licensing form is completed online by September 1, your license will be suspended.

We are increasing the use of technology to improve communications and save time and resources. Utah Supreme Court Rule 14-507 requires lawyers to provide their current email address to the Bar. If you need to update your email address of record, please contact onlineservices@utahbar.org.



Utah State Bar Ethics Advisory Opinion Committee Opinion No. 12-03 – Issued December 13, 2012

ISSUE

May a community association management company profit from legal work performed by the company's in-house attorney?

OPINION

A community association management company's profiting from legal work performed by the company's in-house attorney constitutes the improper sharing of fees with a non-lawyer in violation of Utah Rule of Professional Conduct 5.4(a).[1]

BACKGROUND

An attorney is employed as in-house counsel for a community association management company. Although the company does not profit from the legal work the attorney performs, the company believes that other community association management companies routinely profit from the legal work performed by their respective in-house attorneys. Specifically, these companies collect a fee from their clients for legal services at a rate that is higher than the cost the companies incur in employing their corporate attorneys. The issue addressed in this Opinion stems from this practice.

ANALYSIS

Rule 5.4(a) of the Utah Rules of Professional Conduct, "Professional Independence of a Lawyer," sets out the basic principle that applies to the issue presented. It reads in relevant part: "[a] lawyer or law firm shall not share legal fees with a nonlawyer. . . ."

As its title suggests, the purpose of Rule 5.4 is to protect the professional independence of lawyers and prevent problems that might otherwise occur when non-lawyers, such as corporate employers, assume positions of authority in business arrangements with lawyers. *See* ABA Comm. on Prof'l Ethics & Responsibility, Formal Op. 392 (1995) [hereafter ABA Op.].

These arrangements cause particular concern because non-lawyers are not bound by the ethical mandates regarding independence, conflicts of interest, confidentiality, fees, and other important provisions that govern lawyers' conduct. *See id*. Without these constraints, non-lawyers are free to pursue their own interests, which may be disadvantageous and detrimental to their clients' best interests. *See Emmons, Williams, Mires & Leech v. State Bar*, 86 Cal.Rptr. 367, 372 (1970) ("[F]ee splitting between lawyer and layman . . . poses the possibility of control by the lay person, interested in his own profit, rather than the client's fate. . . .").

For example, in the situation presented to the Committee, some community association management companies have been establishing and charging clients fees for legal services provided by in-house counsel. Although the Committee has not been presented with any evidence suggesting that these fees are excessive, there is nothing to prevent these companies from setting unreasonable rates — something an attorney could not do under Utah Rule of Professional Conduct 1.5. This causes special concern because these companies are, by their nature, highly motivated by profits and concerned with the "bottom line." *See* ABA Op.

Rule 5.4(a) eliminates this and other problems by preventing non-lawyer employers from viewing and using their legal departments as profit centers. This conclusion is significantly bolstered by the opinions of several other ethics committees who have considered this issue. Indeed, there appears to be a consensus that non-lawyer employers may not profit from the legal work performed by their in-house or corporate attorneys. *See, e.g.*, Va. State Bar Standing Comm. on Legal Ethics, Op. 1838 (2007) ("[C]orporate counsel cannot be used to generate profits for an employer, as that would be considered fee splitting with a non-lawyer and a violation of Rule 5.4(a)."); State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 99-12 (1999) ("A lawyer employed by an architectural firm may not provide legal services to the firm's clients, where the firm pays the attorney a salary but charges the clients an hourly rate for the lawyer's services, because of . . . impermissible fee-sharing with non-lawyers."); ABA Comm. on Prof'l Ethics & Responsibility, Formal Op. 392 (1995) ("If a corporate in-house lawyer provides services to third persons for a fee, the lawyer violates Model Rule 5.4(a) if the lawyer turns over to the corporation any portion of the fee beyond the cost to the corporation of the services provided."); Tex. Prof'l Ethics Comm., Op. 490 (1993) ("A lawyer who is a salaried employee of a bank may not under the Texas Disciplinary Rules of Professional Conduct participate in the preparation of loan application documents for bank customers if the bank charges the customers a specific fee for the lawyer's services with respect to the loan application documents."); Ala. State Bar Office of Gen. Counsel, Op. 1992-13 (1992) ("A fee-splitting problem under Rule 5.4 exists only when a non-lawyer agency makes a profit from the rendition of legal services by one of its salaried lawyers."); Ill. State Bar Ass'n, Op. 90-20 (1991) ("In this case, the consumer-client would pay the institution for the preparation of the trust. The institution would then keep a portion of that fee and provide payment to the attorney. This sharing of legal fees violates Rule 5.4(a)."); N.Y. State Bar Ass'n Comm. on Prof'l

Ethics, Op. 618 (1991) ("[T]he evil arises only when a lay agency earns a profit from the rendition of legal services by its salaried employee."); Phila. Bar Ass'n Prof'l Guidance Comm., Op. 88-26 (1988) ("[E]xtraordinary care must be taken to insure that [an employer] does not receive more compensation from the client for legal services than is paid to the lawyer."); Mass. Bar Ass'n Ethics Comm., Op. 84-1 (1984) ("[I]t would be unethical fee-splitting for a non-lawyer employer of an attorney to bill a third party more for that attorney's services than the actual cost of such services to the employer.…"); Dallas Bar Ass'n Legal Ethics Comm., Op. 1982-3 (1982) ("An attorney is considered to be sharing legal fees with a nonlawyer or forming a partnership with a nonlawyer for the practice of law if the employing corporation reaps any benefit, reward or profit from the attorney's provision of legal services to third parties.").

As a closing point, the Committee notes that non-lawyer employers may not circumvent the principles discussed today by arguing that they technically do not profit from the legal services performed by their in-house or corporate attorneys because the funds they receive from those activities would, in total, be less than the costs of running a legal department or hiring corporate counsel. As explained by the ABA,

> [t]he Committee does not believe that this argument changes the analysis. The corporation is still reaping more than reimbursement for its costs of employing its lawyers, and even if the funds were to be pumped back into the legal department, the corporation still would have the same incentive to interfere with the independence of the lawyer to maximize its ability to recoup its losses or free up funds for the corporation's general use.

Id.

CONCLUSION

If an attorney's non-lawyer employer receives any profit from the attorney's provision of legal services to third parties, the attorney is considered to be improperly sharing fees with a non-lawyer in violation of the Utah Rules of Professional Conduct 5.4(a).

1. The Committee notes that this practice may also implicate other provisions of the Utah Rules of Professional Conduct, including 1.5(b), 1.8(f), 5.4(b), 5.5(a), and 7.1.

Utah Bar Foundation

Notice of Utah Bar Foundation Annual Meeting and Open Board of Director Position

The Utah Bar Foundation is a non-profit organization that administers the Utah Supreme Court IOLTA (Interest on Lawyers Trust Accounts) Program. Funds from this program are collected and donated to nonprofit organizations in our State that provide law related education and legal services for the poor and disabled.

The Utah Bar Foundation is governed by a seven-member Board of Directors, all of whom are active members of the Utah State Bar. The Utah Bar Foundation is a separate organization from the Utah State Bar.

In accordance with the by-laws, any active licensed attorney, in good standing with the Utah State Bar may be nominated to serve a three-year term on the board of the Foundation. If you are interested in nominating yourself or someone else, you must fill out a nomination form and obtain the signature of twenty-five licensed attorneys in good standing with the Utah State Bar. To obtain a nomination form, call the Foundation office at (801) 297-7046. If there are more nominations made than openings available, a ballot will be sent to each member of the Utah State Bar for a vote.

Nomination forms must be received in the Foundation office no later than 5pm on Wednesday, May 8, 2013 to be placed on the ballot.

The Utah Bar Foundation will be holding the Annual Meeting of the Foundation on Saturday, July 20, 2013 at 9:00 am in Snowmass Village, Colorado. This meeting will be held in conjunction with the Utah State Bar's Annual Meeting.

For additional information on the Utah Bar Foundation, please visit our website at www.utahbarfoundation.org.

Utah State Bar Request for 2013 – 2014 Committee Assignment

The Utah Bar Commission is soliciting new volunteers to commit time and talent to one or more of sixteen different committees which participate in regulating admissions and discipline and in fostering competency, public service, and high standards of professional conduct. Please consider sharing your time in the service of your profession and the public through meaningful involvement in any area of interest.

Name _____ Bar No. _____

Office Address _____ Telephone_____

Email Address _____ Fax No. _____

Committee Request:

1st Choice _____ 2nd Choice _____

Please list current or prior service on Utah State Bar committees, boards, panels, or other organizations:

_____

_____

_____

Please list any Utah State Bar sections of which you are a member:

_____

_____

_____

Please list pro bono activities, including organizations and approximate *pro bono* hours:

_____

_____

_____

Please list the fields in which you practice law:

_____

_____

_____

Please include a brief statement indicating why you wish to serve on this Utah State Bar committee and what you can contribute. You may also attach a resume or biography.

_____

_____

_____

_____

_____

Instructions to Applicants: Service on Bar committees includes the expectation that members will regularly attend scheduled meetings. Meeting frequency varies by committee, but generally may average one meeting per month. Meeting times also vary, but are usually scheduled at noon or at the end of the workday.

Date_____ Signature _____

Committees

1. **Admissions.** Recommends standards and procedures for admission to the Bar and the administration of the Bar Examination.
2. **Bar Examiner.** Drafts, reviews, and grades questions and model answers for the Bar Examination.
3. **Bar Exam Administration.** Assists in the administration of the Bar Examination. Duties include overseeing computerized exam-taking security issues, and the subcommittee that handles requests from applicants seeking special accommodations on the Bar Examination.
4. **Character & Fitness.** Reviews applicants for the Bar Exam and makes recommendations on their character and fitness for admission.
5. **CLE Advisory.** Reviews the educational programs provided by the Bar for new lawyers to assure variety, quality, and conformance.
6. **Courts and Judges.** Coordinates the formal relationship between the judiciary and the Bar including review of the organization of the court system and recent court reorganization developments.
7. **Disaster Legal Response.** The Utah State Bar Disaster legal Response Committee is responsible for organizing pro bono legal assistance to victims of disaster in Utah.
8. **Ethics Advisory Opinion.** Prepares formal written opinions concerning the ethical issues that face Utah lawyers.
9. **Fall Forum.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
10. **Fee Dispute Resolution.** Holds mediation and arbitration hearings to voluntarily resolve fee disputes between members of the Bar and clients regarding fees.
11. **Fund for Client Protection.** Considers claims made against the Client Security Fund and recommends payouts by the Bar Commission.
12. **Member Resources.** Reviews requests for sponsorship and involvement in various group benefit programs, including health and malpractice insurance and other group benefits.
13. **Pro Bono.** To encourage and enhance the delivery of pro bono legal services.
14. **Spring Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
15. **Summer Convention.** Selects and coordinates CLE topics, panelists and speakers, and organizes appropriate social and sporting events.
16. **Unauthorized Practice of Law.** Reviews and investigates complaints made regarding unauthorized practice of law and takes informal actions as well as recommends formal civil actions.

Detach & Mail by June 28, 2013 to:

Curtis Jensen, President-Elect

645 South 200 East

Salt Lake City, UT 84111-3834

"and Justice for all"

31st Annual Law Day 5K Run & Walk

Presented by Bank of the West

May 18, 2013 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

"RUN FOR THE DREAM: EXERCISE AND EQUALITY FOR ALL"

REGISTRATION INFO: Mail or hand deliver completed registration to address listed on form (registration forms are also available online at www.andjusticeforall.org). **Registration Fee:** before May 1 – $25 (plus $10 for Baby Stroller Division extra t-shirt, if applicable), after May 1 – $35. Day of race registration from 7:00 a.m. to 7:45 a.m. Questions? Call 801-924-3182.

HELP PROVIDE LEGAL AID TO THE DISADVANTAGED: All event proceeds benefit "and Justice for all", a collaboration of Utah's primary providers of free civil legal aid programs for individuals and families struggling with poverty, discrimination, disability and violence in the home.

DATE: Saturday, May 18, 2013 at 8:00 a.m. Check-in and day-of race registration in front of the Law School from 7:00 – 7:45 a.m.

LOCATION: Race begins and ends in front of the S. J. Quinney College of Law at the University of Utah just north of South Campus Drive (400 South) on University Street (about 1350 East).

PARKING: Parking available in the lot next to the Law Library at the University of Utah Law School (about 1400 East), accessible on the north side of South Campus Drive, just east of University Street (a little west of the stadium). Or take TRAX!

USATF CERTIFIED COURSE: The course is a scenic route through the University of Utah campus. A copy of the course map is available on the website at www.andjusticeforall.org.

CHIP TIMING: Timing will be provided by Sports-Am electronic race monitoring. Each runner will be given an electronic chip to measure their exact start and finish time. Results will be posted on www.sports-am.com/raceresults/ following the race.

RACE AWARDS: Prizes will be awarded to the top male and female winners of the race, the top male and female attorney winners of the race, and the top two winning speed teams. Medals will be awarded to the top three winners in every division, and the runner with the winning time in each division will receive two tickets to the **Utah Arts Festival**.

RECRUITER COMPETITION: It's simple, the organization who recruits the most participants for the Run will be awarded possession of the Recruiter Trophy for one year and air transportation for two on **JetBlue Airways** for non-stop travel between Salt Lake City and New York, NY or Long Beach, CA. However, all participating recruiters are awarded a prize because success of the Law Day Run depends upon our recruiters! To become the 2013 "Team Recruiter Champion," recruit the most registrants under your organization's name. Be sure the Recruiting Organization is filled in on the registration form to get competition credit.

SPEED TEAM COMPETITION: Compete as a **Speed Team** by signing up five runners (with a minimum of two female racers) to compete together. All five finishing times will be totaled and the team with the fastest average time will be awarded possession of the Speed Team Trophy for one year. There is no limit to how many teams an organization can have, but a runner can participate on only one team. To register as a team, have all five runners fill in the same Speed Team name on the registration form.

SPEED INDIVIDUAL ATTORNEY COMPETITION: In addition to the overall top male and female race times recognized, the top male and female attorneys with the fastest race times will be recognized. To enter, an individual must fill in their State Bar number in the space provided.

BABY STROLLER DIVISION: To register you and your baby as a team, choose the **Baby Stroller Division**. IMPORTANT: Baby Stroller entrants register **only** in the baby stroller division. Registration for the stroller pusher is the general race registration amount ($25 pre-registration, $35 day of). Simply add on $10 for each baby t-shirt that you want to receive (baby shirts for day-of registrants will be sent out later). Don't forget to fill in a t-shirt size for both adult and baby.

WHEELCHAIR DIVISION: Wheelchair participants register and compete in the **Wheel Chair Division**. An award will be given to the top finisher.

"IN ABSENTIA" RUNNER DIVISION: If you can't attend the day of the race, you can still register in the **"In Absentia" Division** and your t-shirt and participation packet will be sent to you after the race.

CHAISE LOUNGE DIVISION: Register in the **Chaise Lounge Division**. Bring your favorite lounge chair, don your t-shirt, and enjoy a morning snack while cheering on the runners and walkers as they cross the finish line!

REGISTRATION – "and Justice for all" Law Day 5K Run & Walk, Presented by Bank of the West
May 18 2013 • 8:00 a.m. • S. J. Quinney College of Law at the University of Utah

To register by mail, please send this completed form and registration fee to Law Day Run & Walk, c/o Utah State Bar, 645 South 200 East, Salt Lake City, Utah 84111. If you are making a charitable contribution, you will receive a donation receipt directly from "and Justice for all."

First Name: _____ Last Name: _____
Address: _____
City, State, Zip: _____
Birth Date: _____ Phone: _____ E-mail Address: _____

DIVISION SELECTION - MUST SELECT ONE (please mark ONLY ONE division per registrant)

- ❒ Age Division FEMALE _____ (AGE on May 18, 2013 - Must be filled in)
- ❒ Age Division MALE _____ (AGE on May 18, 2013 - Must be filled in)
- ❒ Baby Stroller Division FEMALE
- ❒ Baby Stroller Division MALE
- ❒ Wheelchair Division FEMALE
- ❒ Wheelchair Division MALE
- ❒ Chaise Lounge Spectator
- ❒ In Absentia –"I'll be there in spirit!"

SHIRT SIZE (please check one)

❒ Child XS ❒ Child S ❒ Child M ❒ Child L
❒ Adult S ❒ Adult M ❒ Adult L ❒ Adult XL ❒ Adult XXL

BABY SHIRT SIZE (baby stroller participants only)

❒12m ❒18m ❒ 24m ❒ Child XS

OPTIONAL COMPETITIONS (Registrations MUST be received by May 1, 2013 to be entered in any of these):

Recruiting Organization: _____ (must be filled in for recruiters' competition)
Speed Competition Team: _____ (team name)
Speed Individual Attorney: _____ (Bar number)

Payment	
Pre-Registration (deadline 05/01/13)	$25.00
Baby Stroller (add $10 per baby)	$10.00
Late Registration Fee (after 05/01/13)	$10.00
Charitable Donation to "and Justice for all"	$_____
TOTAL PAYMENT	$_____

Payment Method

❒ Check payable to "Utah State Bar"
❒ Visa ❒ Mastercard ❒ American Express
Name on Card _____
Address _____
No. _____ exp. _____

RACE WAIVER AND RELEASE: I waive and release from all liability the sponsors and organizers of the Run and all volunteers and support people associated with the Run for any injury, accident, illness, or mishap that may result from participation in the Run. I attest that I am sufficiently trained for my level of participation. I also give my permission for the free use of my name and pictures in broadcasts, video, web, newspapers, and event publications. I consent to the charging of my credit card submitted with this entry for the charges selected. I understand that entry fees are non refundable. I agree to return the timing transponder and its attachment device to an appropriate race offical after the race. If I fail to do so, I agree to pay $10.00 to replace the timing transponder.

Signature (or Guardian Signature for minor) _____ Date _____ If Guardian Signature, Print Guardian Name _____

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Nauvoo
The Roof Restaurant

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.

PUBLIC REPRIMAND

On August 10, 2012, the Honorable Judge Pamela A. Heffernan, Fifth Judicial District Court, entered Findings of Fact, Conclusions of Law and Order of Discipline: Public Reprimand against Matthew C. Miller for violation of Rules 1.15(a) (Safekeeping Property), 1.15(c) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Miller was hired to represent a client. The client hired him to file an Order to Show Cause. The client paid Mr. Miller half of the requested fee. Mr. Miller did not deposit the client's money into an IOLTA attorney trust account. Mr. Miller did not maintain the fee in a trust account in a financial institution that agreed to report to the OPC in the event any proper instrument presented against the trust account contained insufficient funds. Later the client sent Mr. Miller a letter asking for the return of the fees. Mr. Miller did not file anything in the client's case. Mr. Miller did not hold the fee separate from his own funds until the fee was earned or refunded to the client.

Aggravating factors:

Multiple offenses; Obstruction of the disciplinary proceedings by intentionally failing to comply with rules or orders of the disciplinary authority; Refusal to acknowledge the wrongful nature of the misconduct involved, either to the client or to the disciplinary authority; and Substantial experience in the practice of law.

Mitigating factors:

Absence of a prior record of discipline.

ADMONITION

On November 27, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.16(d) (Declining or Terminating Representation) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The attorney served as corporate counsel for the complainant. The complainant informed the attorney that the complainant was transferring the representation to another attorney. In the letter which terminated and transferred representation, the complainant asked for all files and records to be transferred to the new corporate counsel. The attorney was also contacted by new counsel and specific documents were requested. In

response, the attorney sent an email indicating that the complainant still owed the attorney money. The attorney failed to provide a copy of the client's file upon request. It was improper for the attorney to demand payment from the company on a note he held in exchange for providing the files.

ADMONITION

On December 3, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rule 1.16(d) (Declining or Terminating Representation) of the Rules of Professional Conduct.

In summary:

An attorney was retained to represent a client in a divorce case. The client paid the attorney by check. Two months later the client cancelled the attorney's services and requested a refund. The client then retained new counsel. Almost eight months later the attorney provided a partial refund and subsequently refunded additional monies to the client.

Mitigating factors:

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

ADMONITION

On December 3, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.4(b) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to represent a client in defending his home in a foreclosure action. No complaint was ever filed on behalf of the client. The attorney failed to keep the client apprised of the status of his case. The attorney failed to explain the reasons for not filing a complaint in order to permit the client to make informed decisions regarding the representation. The attorney failed to take reasonable steps to protect the client's interests when the attorney terminated the representation.

Mitigating factors:

Absence of prior discipline; absence of dishonest or selfish motive; emotional stress; efforts to make restitution and rectify the consequences; inexperience in the practice of law; and remorse.

ADMONITION

On December 3, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.4(b) (Communication), 1.16(d) (Declining or Terminating Representation), 5.1(b) (Responsibilities of Partners, Managers, and Supervisory Lawyers), 5.1(c) (Responsibilities of Partners, Managers, and Supervisory Lawyers), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney was retained to represent a client in defending his home against foreclosure. The attorney's firm filed a Complaint in the client's case. The attorney filed an Ex Parte Motion for Temporary Restraining Order ("TRO") to stop the foreclosure sale of the client's home. A hearing was held where the court denied the TRO. The attorney failed to supervise and manage the other lawyers in the office by failing to ensure that the client received adequate representation at the TRO hearing and by assigning, at the last minute, an attorney who was unfamiliar with the case and did not meet with the client prior to the hearing. Following the hearing, the attorney's firm filed a Voluntary Petition for Bankruptcy on behalf of the client. The attorney did not know that another attorney in the office filed a bankruptcy petition on the client's behalf and otherwise did nothing to ensure that the client's interests were being protected. After not communicating with the client for six months regarding the homeowner defense case, the attorney filed a "Notice to Withdraw as Counsel." The attorney failed to give reasonable notice to the client of the intent to withdraw and when the notice of termination was returned through the mail the attorney and the office failed to make efforts to locate the client's address or try to reach the client through other means. The attorney failed to return the client's file. The attorney's conduct was negligent.

Mitigating factors:
Absence of prior discipline; absence of dishonest or selfish motive; emotional stress; efforts to make restitution and rectify the consequences; inexperience in the practice of law; and remorse.

ADMONITION
On December 3, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.16(d) (Declining or Terminating Representation), 5.1(a) (Responsibilities of Partners, Managers, and Supervisory Lawyers), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
A client retained a law firm to assist her in defending a home foreclosure case. The client made payments to the firm. After a Complaint was drafted, but before the Complaint had been finalized or filed, the client informed the attorney's firm that the client wanted to put the case "on hold" because the client was negotiating a loan modification. Shortly thereafter, the client met with an associate at the law firm and it was agreed that some of the fee paid would be applied to the firm's representation of the client's spouse in an unemployment matter. No work was performed on the unemployment matter and the deadline for the spouse to appeal an adverse ruling was missed. The attorney was unaware that someone at the firm had accepted the employment matter. Employees at the law firm failed to communicate with the client or the spouse regarding the status of the unemployment case. Employees at the law firm failed to properly decline representation with regard to the unemployment matter that led the client to believe the client's interests were being protected. The attorney failed to properly supervise the attorneys in the office regarding their acceptance of the spouse's unemployment case. The attorney did not have clear policies in place about who had authority to accept new clients and make arrangements about fees.

ADMONITION
On December 10, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.4(a) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney's firm was retained by clients to represent them in a lawsuit against their mortgage lender. The attorney failed to adequately communicate with the clients regarding the status of their case. The OPC sent the attorney a Notice of Informal Complaint ("NOIC"). By rule, the attorney was required to respond to the NOIC within twenty days. The attorney did not timely respond.

Mitigating factors:
Absence of dishonest motive and refund to client.

Aggravating factors:
Obstruction of disciplinary proceeding.

ADMONITION

On December 3, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.4(a) (Communication) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
The attorney failed to maintain a reasonable level of communication with the client. The attorney failed to respond to the client's requests for status updates, and failed to adequately consult with the client about the case.

PUBLIC REPRIMAND

On November 16, 2012, the Honorable Judge Vernice Trease, Third Judicial District Court entered an Order of Discipline: Public Reprimand against Maureen L. Cleary for violation of Rules 8.4(b) (Misconduct), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
Ms. Cleary was hired by a law firm in Olympia, Washington. Years later, Ms. Cleary was terminated from the law firm and her access to the firm's computer system was disabled. A few months after she was terminated Ms. Cleary logged into the firm's database from her home computer using her former assistant's login ID. The police conducted an investigation and determined that the IP address used to gain access to the system belonged to Ms. Cleary's computer. The firm did not give authorization for Ms. Cleary to access their computer system for any time after she was terminated. The firm claims it could have incurred a monetary loss. Ms. Cleary was charged with Computer Trespass in the Second Degree, a gross misdemeanor, for accessing the law firm's computer system without authorization. Ms. Cleary entered into a Diversion Agreement with the Thurston County District Court. Pursuant to the Diversion Agreement, Ms. Cleary was required to do fifty hours of community service; attend a court-approved class; and have no contact other than professional with the firm. The duration of the Diversion Agreement was for twelve months and upon completion, the criminal charge would be dismissed. Ms. Cleary completed the terms of the Diversion and the criminal charges were dismissed with prejudice.

PUBLIC REPRIMAND

On December 17, 2012, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Joseph R. Goodman, for violation of Rules 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 3.2 (Expediting Litigation), 8.4(c) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

A client hired Mr. Goodman to represent her in a divorce proceeding and paid him $3,000. Shortly after retaining Mr. Goodman, the client expressed to him her desire to have the divorce resolved as quickly as possible and outlined how property was to be divided. Over the next several months the client provided Mr. Goodman with the proposed terms of the settlement agreement numerous times and made numerous requests for status updates. Mr. Goodman failed to finalize the settlement agreement and failed to respond to many of the client's requests for information. Nine months after the divorce was filed, the court issued an Order to Show Cause ("OSC") ordering the parties to appear and explain why the case should not be dismissed for failure to prosecute. At the OSC hearing, Mr. Goodman represented to the court that a settlement had been reached. The court ordered the paperwork to be submitted within thirty days or the case would be dismissed. Mr. Goodman failed to file any paperwork and the case was dismissed. Mr. Goodman failed to tell the client the case had been dismissed. Unaware that her case had been dismissed, the client continued to provide Mr. Goodman with information related to the stipulation including information regarding Quit Claim Deeds relating to marital property. During the next period of time of approximately a year, Mr. Goodman was essentially non-responsive to the client. The client eventually had to prepare the Quit Claim Deeds herself. Nearly two years after being retained by the client, and one year after the case had been dismissed, Mr. Goodman informed the client that everything was done, but the decree was not yet entered. Although Mr. Goodman told the client that he had to file a motion in addition to the stipulation, he failed to inform her that he had to file a Motion to Set Aside Dismissal. Mr. Goodman failed to inform the client the court denied the motion to set aside the dismissal. The client learned of the status of the case when she finally went to the courthouse to get a copy of the divorce decree. In response to the client's complaint to the Bar, Mr. Goodman contacted both the client, and her husband, to obtain the necessary signatures on the Stipulation and Settlement. Mr. Goodman refilled the client's divorce and Stipulation and Settlement Agreement. A Decree of Divorce and Judgment was entered in the client's case three years after the client retained Mr. Goodman. There was injury to the client and the legal system.

DISBARMENT

On February 4, 2011, the Honorable L.A. Dever, Third District Court, entered an Order of Discipline: Suspension for three years with all but 181 days stayed and probation imposed against Jonathon W. Grimes for violation of Rules 1.2(a) (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct. The details of basis for Judge Dever's Order was reported in the May/June 2011 *Bar Journal*. The OPC appealed the suspension. On December 11, 2012, the Utah Supreme Court issued an Order disbarring Mr. Grimes. Mr. Grimes has filed a Petition for Rehearing.

Legal Requirements for Representing Clients With Disabilities

by Jared M. Allebest

With approximately 220,000 deaf people residing in the State of Utah, it is likely that at some point a deaf person may seek your legal services.

Being the only practicing deaf attorney in Utah that I am aware of, I would like to share some suggestions on how to best represent deaf clients and how to meet your ethical and legal obligations when representing them.

It begins by understanding that the Americans With Disability Act ("ADA") governs you and your firm's representation of anyone with a disability, including deaf and hard of hearing individuals. A person becomes a protected class under the law when there is "a physical or mental impairment that substantially limits [a] major life activity" 42 USC § 12102 such as walking, seeing, hearing, breathing, learning, reading, concentrating, thinking, communicating, and working.

There are five sections to the ADA. Title I covers employment. Title II applies to public entities such as state and local governments. Title III applies to places of public accommodations such as football stadiums, businesses, and restaurants. Title IV covers Telecommunications. And Title V deals with miscellaneous items.

Attorneys working in a small law firm frequently assume that there must be a minimum number of employees in the firm in order to be subject to the ADA. The law, however, is much more inclusive. Although Title I of the ADA contains language covering businesses of a certain size, Title III of the ADA does not limit the law's coverage to an entity of any particular size. As a result, whether you are in private practice as a sole practitioner, or whether you are part of a large, high-profile law firm, both are considered as places of "public accommodation" and therefore both are forbidden from discriminating against people with disabilities, including clients who are deaf or hard of hearing. *See* 42 U.S.C. § 12182. Even if your law firm is a non-profit organization, you are not exempt from the ADA.

The next step to understanding the ADA is to know that one of the major goals of the ADA is to ensure that "effective communication" takes place between an attorney and any client with disabilities. Law firms of any size are deemed to be "Public Accommodations," and as such, they are required to provide "auxiliary aids and services" to qualified individuals with a disability in order to satisfy the law's requirement to provide effective communication. "Auxiliary aids and services" are modifications of existing services, benefits, equipment or devices so as to provide effective communication to individuals with disabilities.

Title III of the ADA requires lawyers to "make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless they can demonstrate that making the modifications would fundamentally alter the nature of the service or facility." 28 C.F.R.§ 36.302.

Under the ADA, auxiliary aids and services may include

qualified interpreters, note-takers, computer-aided

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> transcription services ("CART"), written materials, telephone handset amplifiers, assistive listening devices and systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons ("TDDs"), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments.

See 28 C.F.R. § 36.303(b)(1).

Attorneys sometimes operate under the misconception that the list provided above under Title III of the ADA means that the lawyer can selectively choose the aid or service the attorney will provide. That is not true.

Even though Title III of the ADA provides that "the ultimate decision as to what measures to take rests with the public accommodation" in order to obtain effective communication with their client they "should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication." 28 C.F.R. § 36.301(c).

"[Y]ou cannot simply use someone who claims to know how to interpret for a deaf or hard of hearing person, because having the ability to sign does not mean the individual has the ability to interpret."

Consulting with the client about the specific auxiliary aid and services he needs is essential in meeting the ADA's goal of achieving effective communication, and your goal of providing the best representation possible for your disabled client. Primarily because the "type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place." 28 C.F.R. § 36.303(c)(1)(ii). This requires that you learn from the client the type of aid or service that works for them.

Additionally, in order for effective communication to take place, "auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability." *Id.*

Often times, a deaf or hard of hearing client will request an American Sign Language (ASL) interpreter. Other deaf or hard of hearing individuals may request a Cued Speech interpreter. These are the most common requests that you can expect to receive when representing a client with a hearing loss. Having a qualified interpreter will not only help the client, but will be of invaluable benefit to you as well.

One thing you should know about deaf and hard of hearing individuals is that they do not all have the same communication needs. Some can communicate in English, while others use ASL; still others communicate through Cued Speech – all of which are different from each other. That is why you must learn from the client the type of interpreter they will need. Don't assume that deaf clients need an ASL interpreter. They may in fact need a Cued Speech interpreter, or no interpreter at all. If the client doesn't tell you what his communication needs are, take the initiative and have an open dialogue about the best method to communicate during the initial interview. Periodically check if the accommodations are working for the client.

Proper communication is absolutely essential to effectively represent deaf and hard of hearing clients. Refusing to hire a sign language interpreter may constitute discrimination under the ADA. Discrimination occurs when there is "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities" unless the place of public accommodation "can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii).

Other examples of potential acts of discrimination under the ADA include: instances where the attorney agrees to provide an

interpreter but fails to schedule one, or where an attorney asks a deaf or hard of hearing client to bring a family member to interpret for them.

Under Title III of the ADA, you cannot simply use someone who claims to know how to interpret for a deaf or hard of hearing person, because having the ability to sign does not mean the individual has the ability to interpret. Attorneys are required to provide qualified interpreters to their Deaf clients and patients. A qualified interpreter means an "interpreter who, via a video remote interpreting ("VRI") service through on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators." 28 C.F.R. § 36.104.

Attempting to use a client's family member, friend or neighbor who claims to know ASL leads to a minefield of problems for you and your client. They may be too emotionally or financially involved to provide a fair and accurate interpretation of what your client has said to you. Furthermore, an unqualified interpreter will not have to abide by ethical constraints required of a qualified interpreter. Additionally, using an unqualified interpreter may destroy the privilege of confidential communication. Finally, not using a qualified interpreter may expose you or the unqualified interpreter to liability.

Using a qualified interpreter is the only way to avoid these and other unforeseen problems. Doing so will not disrupt attorney-client privilege. Additionally certified interpreters are bound by a code of ethics that require the interpreter to keep the attorney client communication confidential, and they are required to be neutral in any matter that they are interpreting for.

The best way to find a qualified interpreter is to contact an interpreting agency who can assist you in finding the right interpreter for you and your client. It is important to mention that you will not always need to hire an interpreter for every interaction or communication with a deaf client. Hiring an American Sign Language interpreter applies for both potential clients as well as current clients. If you are unsure as to the need for an interpreter, ask yourself if the information you need to share with your client needs to be done in person, face to face, or whether it can be done via e-mail, fax, or letter. If you need to share information face to face, then you should hire an interpreter.

When you meet with your deaf or hard of hearing client and an interpreter is present, you should look at and speak directly to your deaf client, not the interpreter, even though the deaf client will be watching the interpreter. When your deaf client speaks to you, look at your deaf client even though your client is signing and listening to the interpreter. Remember, the interpreter is only facilitating communication between you and your deaf client. You are not communicating with the interpreter.

If a deaf person is nodding their head during a conversation, it could mean that they are acknowledging that they understand what is being said, or it could mean it is an affirmative agreement or a "yes" response. Please make sure you clarify why they are nodding their head.

Sometimes attorneys find that when they make a simple statement, such as "I don't believe the officer had probable cause to search your car," the interpreter will take additional time in interpreting to elaborate the meaning of certain legal words or phrases to help the client understand what you have said. Often times, legal vocabulary cannot be easily interpreted into ASL.

In some cases, especially in criminal matters, you may have to hire a Certified Deaf Interpreter ("CDI"). The Registry of Interpreters for the Deaf ("RID") is a "national membership organization representing the professionals who facilitate communication between people who are deaf or hard of hearing and people who hear." "About RID: Overview." Registry of Interpreters for the Deaf, Inc. (June 25, 2012), http://www.rid.org/aboutRID/overview/index.cfm.

According to the RID, a "Certified Deaf Interpreter ("CDI") is an individual who is deaf or hard of hearing and has been certified by the Registry of Interpreters for the Deaf as an interpreter." (Professional Standards Committee. "Use Of A Certified Deaf Interpreter." Registry of Interpreters for the Deaf, Inc. (June 20, 2012), http://www.rid.org/UserFiles/File/pdfs/120.pdf.

RID explains that CDIs get

> excellent general communication skills and general interpreter training, [and that] the CDI may also have

> specialized training and/or experience in use of gesture, mime, props, drawings and other tools to enhance communication. The CDI has an extensive knowledge and understanding of deafness, the deaf community, and/or deaf culture which combined with excellent communication skills, can bring added expertise into booth routine and uniquely difficult interpreting situations.

Id.

They are also attuned to the finer nuances of ASL and non-verbal communication that a hearing interpreter might not have.

A common concern that attorneys have is the cost of hiring a sign language interpreter. The cost should not be a significant concern for a number of reasons. First, you will not need an interpreter all of the time when communicating with your client. Second, interpreter rates are typically not excessive. And lastly, it is part of the cost of doing business and providing valuable services to an often under-represented group. In any event, attorneys are forbidden under the ADA from charging the client for the cost of using the auxiliary aid or other services. *See* 28 C.F.R. § 36.301. This includes potential clients as well as current clients. The good news is that although you cannot charge your clients for the interpreter services, the ADA does provide tax incentives to encourage compliance. *See* 26 U.S.C. § 44.

When you are not having a face-to-face meeting with deaf or hard of hearing clients, there are inexpensive and free methods of communication that you can use. In fact, you may use most of them already, such as e-mail, fax, or an Internet-based chat program.

If you or you client want to communicate by phone, there are other devices and methods that are typically free and easy to use. For example, deaf and hard of hearing individuals use video phones to sign to other deaf and hard of hearing individuals. They use a video relay service when talking with hearing individuals, where the deaf person signs to the video relay operator, who will then verbally interpret to you what your deaf client has said. You can use this video relay interpreter service by dialing a toll-free number and giving the interpreter the deaf person's video phone number.

Despite the detailed descriptions provided above, it is not difficult to represent deaf and hard of hearing individuals. Sometimes they will simply read lips and then speak back to you. Sometimes an electronic device or even writing on paper back and forth will do. Sometimes an interpreter will be the most efficient and most effective communications bridge. It all boils down to asking them how you can best facilitate your communications with each another.

The Dollars and Sense of Utilization of Paralegals for the New Decade

by J. Robyn Dotterer

Ten years ago, the Paralegal Division of the Utah State Bar looked at the issue of how to demonstrate to attorneys the value of utilizing paralegals to increase the profits in their firms. So rather that start from scratch, we are re-printing the article to demonstrate that the profitability of using paralegals still exists. So, we will go back to the original article with a few changes and see where the "sense" of utilizing paralegals will take us.

One change that has occurred over the past decade is the general change from the use of the term "legal assistant" to the term "paralegal." The name of our division and the Utah Legal Assistants Association, now Utah Paralegal Association, both reflect that change.

One of the goals of the Paralegal Division is to assist the legal community in understanding the role paralegals can play in all areas of the practice of law. We have addressed those goals several times in the past few years, but it seems that it is time again to discuss that goal.

Back in 2003 I wondered what I could say about the utilization of paralegals that would catch the attention of practicing attorneys. So, I contemplated the definitions of "utilization" and what it really means to the practicing attorney.

The American Heritage Dictionary of the English Language defines utilize as: "To put to use for a certain purpose."

That seems appropriate. Putting paralegals to use for a certain purpose. But what is the purpose? The American Heritage Dictionary defines "purpose" as: "The object toward which one strives or for which something exists; goal; aim."

Even better. The purpose for which a law firm would utilize a paralegal. Now we are getting closer.

What may be the most important definition of proper utilization of a paralegal may well be, "A resource whereby attorneys increase their efficiency, productivity and bottom line." My definition. The purpose of a legal assistant when properly utilized could be, to a law firm, as simple as dollars and cents. Dollars and cents coming into your practice to bolster your bottom line.

> *"If a paralegal is utilized to their full extent, depending, of course, on experience and skill level, an attorney can significantly decrease the amount of hours they are required to put in on a given case."*

The costs involved with utilizing a legal assistant are similar to those associated with associates – and the benefits have a similar upside. In models published in the ABA Section of Law Practice Management book, *Leveraging with Legal Assistants: How to Maximize Team Performance, Improve Quality, and Boost Your Bottom Line*, Chapter 2, "Expanding the Role of the Legal Assistant – Why Do It?," the editors have demonstrated the financial benefit of billable hours generated by a team of attorneys and legal assistants.[1] Many of the examples also

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demonstrate a cost savings to the client. With their permission, I will use some of their examples to demonstrate how you can make this work in your own practice.

Additionally, several years ago Judge David Nuffer presented a CLE seminar entitled "Leveraging with Legal Assistants" and used a number of the ABA's models from Leveraging with Legal Assistants. And then in 2001 a presentation was made at the Bar's Annual Convention in Sun Valley on utilization. It's clear this is not a new topic. But perhaps a reminder might be appropriate.

Paralegals/legal assistants can make you money.

Paralegals do substantive legal work that otherwise would be performed by the lawyer. This is not to be confused with the practice of law; but rather doing those things that do not require the attorney to do them personally. The ABA's definition of the role of a legal assistant/paralegal is:

> A legal assistant or paralegal is a person, qualified by education, training, or work experience, who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work, which work, for the most part, requires sufficient knowledge of legal for a lawyer which is responsible.

When you consider the types of work the paralegal will be doing, you will realize that hours will be freed up that the attorney, who would otherwise be doing the work, will be able to use doing other tasks that only the attorney can perform. For example, the work that would be done by a lawyer would include:

- Accepting a case
- Evaluating the case and charting its course
- Performing legal analysis
- Giving legal advice
- Formal judicial process (i.e., depositions, hearings, trials, etc.)
- Supervising the legal assistants

The work that would be performed by the paralegal would include:

- Obtaining facts from the client
- Communicating information to and from the client
- Interviewing witnesses
- Performing limited legal research to assist the lawyer with the legal analysis
- Obtaining documents (i.e., police reports, medical records, employment records, deeds, photographs, plans, probate records, weather records, etc.)
- Preparing summaries, chronologies, itemization of claims, drafts of pleadings, interrogatories and production requests and responses
- Preparing outlines for lawyer to use in deposing witnesses and in argument
- Indexing deposition transcripts and preparing summaries of the evidence
- Preparing exhibits and lists[2]

The separation of these tasks allows the attorney to handle more cases and offer services to the client at a lower cost.

One of the attractions of utilizing legal assistants/paralegals is the lower cost of legal services to your clients. The ABA's "Leveraging" models demonstrate that clearly.

Example 1 – In our example, assume all the work is performed by the lawyer at a rate of $150.

Interview with Client	2 hr.	$300
Interview Two Witnesses	2 hr.	300
Gather information	2 hr.	300
Review Documents	2 hr.	300
Legal Research and Analysis	4 hr.	450
Draft Pleading	2 hr.	300
Trial Preparation	4 hr.	600
Trial	4 hr.	600
TOTAL	22 hr.	$3,150

The lawyer invests twenty-two hours in the case and bills the client $3,150.

Example 2 – This is the same case with a substantial portion of the work being delegated to a legal assistant/paralegal at $60 an hour.

Interview with Client		
Lawyer	2 hr.	$300
Legal Assistant	2 hr.	120
Interview Two Witnesses		
Legal Assistant	2 hr.	120
Gather information		
Legal Assistant	2 hr.	120
Review Documents		
Legal Assistant	2 hr.	120
Legal Research and Analysis		
Lawyer	1 hr.	150
Legal Assistant	2 hr.	120
Draft Pleading		
Legal Assistant	2 hr.	120
Trial Preparation		
Lawyer	1 hr.	150
Legal Assistant	3 hr.	180
Trial		
Lawyer	4 hr.	600
Legal Assistant	4 hr.	240
TOTAL	27 hr.	$ 2,340

In this example, the lawyer invests eight hours, the paralegal nineteen; billing is $2,340, saving the clients $810.[3]

But perhaps as important, the paralegal is saving the attorney fourteen hours of time on this case that could be used to work on another case – freeing up time for tasks that only the attorney can handle.

That example also demonstrates a significant involvement by the paralegal in the case. If a paralegal is utilized to their full extent, depending, of course, on experience and skill level, an attorney can significantly decrease the amount of hours they are required to put in on a given case. With a limited involvement by the paralegal, the attorney's hours would be considerably higher. More extensive examples of this are outlined in *Leveraging*, but I won't take the time and space to outline them again here. Take my word for it. It will save your client money and the attorney valuable time to utilize a paralegal.

In the arena of insurance defense, which is the area in which I have spent my professional time as a paralegal, it is common for insurance carriers to indicate in their billing guidelines areas of responsibility based on the necessary skill level to accomplish a task from the attorney to the associate to the paralegal and on to the secretarial/clerical skill level. Clients in other practice areas are also becoming aware of the divisions of responsibility that are available in most law firms. The task can be accomplished by the lowest cost denominator, not the highest.

To derive a financial benefit from the use of paralegals, the work must be properly managed and adequately priced. An economic analysis of how paralegals can generate profits for lawyers is necessary to determine how a paralegal can be a financial asset in your firm. The elements to consider in that financial analysis include the following:

- Revenues from legal assistant hours
- Any increase in the lawyer's hourly rate that is justified by shifting a larger portion of the work to a legal assistant with a lower rate
- The increase in the lawyer's billable hours that results from moving nonbillable work from the lawyer to the legal assistant[4]

The ABA model in "Leveraging" also recommends an analysis of the costs vs. the revenues. They recommend determining costs by allocating the same categories of expenses among the partners, associates and paralegals. That allocation would be based on the makeup of the firm and requires making subjective judgments. Costs that can be specifically allocated include:

- Salary – The salary figure of each individual should be specifically allocated.
- Fringe benefits – The fringe benefit expense can be allocated by specific individual or can be broken down by category of time-keeper: partners, associates, and legal assistants.
- Secretarial support – Each individual can be charged with the specific expense of his or her secretary or portion thereof (includes salary and fringe benefits).
- Office space – Each individual can be charged with his or her pro rata share of the office space or it can be broken down by category of timekeeper: partners, associates, and legal assistants.
- Dues, meetings, and CLE – These expenses may be specifically allocated, depending on the firm's control of these items.

Other expense allocations will probably have to be estimated.

For example:

- Supplies
- Library
- Administrative salaries
- Telephone, postage, copying, data processing
- Equipment
- Advertising, marketing and client development[5]

A test to determine if your paralegal is of economic benefit to you is the "Rule of Three." This rather straightforward analysis simply says that the test of profitability is met if the revenues that are generated by the paralegal equal three times the salary. For example:

Hourly Rate X	Billable Hours =	Revenues ÷ 3 =	Salary
$80	1,600	$128,000	$42,666
$80	1,400	$112,000	$37,333[6]

Though by this time the "Rule of Three" may have suffered some erosion due to increasing law firm costs so that the equation may be more of a "Rule of Three and a Half," this model may help you determine how to set the firm's financial goals and costs.

Taking a serious look at the composition of your practice, your client base and your future plans for building and expanding your practice should include an analysis of the utilization of legal assistants in your practice. Look at these dollars and sense issues of how to increase your profitability and efficiency in your practice. Paralegals can be of value, financial and otherwise, if we are utilized properly.

1. Arthur G. Greene & Kathleen Williams-Fortin, *Leveraging with Legal Assistants: How to Maximize Team Performance, Improve Quality, and Boost Your Bottom Line*, Chapter 2 (American Bar Association 1993).
2. *Leveraging with Legal Assistants*, Judge David Nuffer, Utah State Bar CLE, November, 1997
3. *Supra*, note 1, at 9.
4. *Id.* at 11
5. *Id.* at 11–12
6. *Id.* at 13

Paralegal of the Year Award

The Paralegal of the Year Award is presented by the Paralegal Division of the Utah State Bar and the Utah Paralegal Association. It is the top award to recognize individuals who have shown excellence as a paralegal. 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 are available by contacting Danielle Davis at ddavis@strongandhanni.com or on the Paralegal Division website at http://www.utahbar.org/sections/paralegals/Welcome.html

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

Notice to all Paralegals

Renewals will begin on April 1, 2013, through April 30, 2013, online.

Please go to www.myutahbar.org. Click on renew your membership online and follow the directions.

If you do not have your login and password information please email onlineservices@utahbar.org with your name and five-digit bar member ID number if you have it. They will send you back your login information.

The CLE and Attorney Affidavits which are available online on the Paralegal website under FORMS. The CLE, Attorney Affidavits and Committee Volunteer Forms will need to be sent to Carma Harper at charper@strongandhanni.com. You still have until June 30, 2013 to obtain your CLE. Please renew now and have your completed forms sent to charper@strongandhanni.com by June 30, 2013. **PLEASE DO NOT SEND THEM TO THE UTAH STATE BAR.**

CLE Calendar

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

03/13/2013 | 10:00 am – 11:25 am — **1 hr. self study credit (Ethics)**

WEBCAST: Ben Franklin on Ethics. In this engaging and informative program, Ben Franklin (who worked with more lawyers than most modern day practitioners) challenges today's lawyers to expand their own notion of ethics much as he, himself, did during his own life. Topics include Ethics in Documentation, Ethics and Relationships, Ethics and Fees, Ethics and Loyalty and the importance of Humility and Honesty. A live chat room discussion with Ben and a Moderator concludes the program. $59 for Legal Aid attorneys, $79 for Bar members, $99 for others.

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.

04/10/2013 | 10:00 am – 12:50 pm — **2 hrs. online self study credit**

WEBCAST: Maxims, Monarchy, and Sir Thomas More. This drama takes the audience into the last intensely intimate hour with Thomas More just before his execution in 1535 for high treason. Still wrestling with the moral dilemmas that led him to the block, he cracks jokes, makes up songs, takes jabs at his tormentors and eventually finds peace in his fate. The show explores conflicts between private conscience and public loyalty and ethical and moral decisions in legal practice. $119 for Legal Aid attorneys, $139 for Bar members, $169 for others.

04/11/2013 | 8:00 am – 12:00 pm — **4 hrs. CLE credit (including 1 hr. Ethics)**

Social Media Update. Topics include: "Tweets, Posts & Pokes: Social Media Ethical Land Mines for the Unwary Lawyer" with Randy L. Dryer, S.J. Quinney College of Law; "Social Media in the Workplace: What Employers and their Lawyers Need to Know" with Christina M. Jepson, Parsons Behle & Latimer; "Dancing on the Table at Senor Frog's: The Admissibility of Social Media Evidence" with Richard E. Mrazik, Parsons Behle & Latimer; and "Social Media Marketing for Lawyers: What Works and What Doesn't" with Tyson B. Snow, Pia Anderson Dorius Reynard & Moss. $35 for the general session, $70 for two sessions, $90 for three sessions, or $100 for four sessions.

04/18/2013 | 8:00 am – 12:30 pm — **NLTP Requirement**

Mandatory New Lawyer Ethics Program. New Lawyer Ethics Program topics include: Professionalism, Civility & Practicing Law; New Lawyer Training Program; Discipline Processes in Utah; The Top Five Ways to Violate the Rules of Professional Conduct; and A Candid Look at the Profession – Stress and Burnout. $75.

04/19/2013 | 8:15 am – 1:00 pm

Solo Small Firm Section Conference. Topics include: "Too Much to Do and Not Enough Time" with Irwin D. Karp, Esq., productivity consultant with Productive Time in Sacramento, CA; "Negotiation Skills for Lawyers" with Denver Snuffer, Jr., Nelson Snuffer, Dahle & Poulsen, P.C.; and "Professional Civility in the Practice of Law" with former Judge Robert Hilder. $90 for members of Solo, Small Firm, and Rural Practice Section; $125 for all others.

06/272013 | 8:30 am – 11:30 pm — **3 hrs.**

Law Firm Management: How to Start a Successful Law Practice. In his 30+ year legal career, Jinks Dabney started three successful law practices in three different cities and has mentored more than 100 lawyers in creating their own law practices as well. Seminar subjects include: Setting Up an Office, Identifying and Using a Mentor, Hiring Employees, Advertising and Marketing, Trust Accounts, Running your Law Practice like a Business, and How to Make a Good Living and Life in the Practice of Law. This Seminar is essential for all new and experienced lawyers who are looking to establish their own law firms. $109 for new lawyers under 5 years; $129 for lawyers over 5 years, under 10 years; and $149 for lawyers 10 years and over.

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

Utah County's largest law firm, Fillmore Spencer LLC, seeks transactional associate: at least 3 years experience with medium or large U.S. law firm, substantial experience with corporate and LLC formation and governance matters, private placements, acquisitions, licensing and other commercial contracts. Contact William L. Fillmore at wfillmore@fslaw.com.

Clyde Snow & Sessions, an established midsized law firm headquartered in downtown Salt Lake City, is seeking a mid to senior level corporate partner to join our Salt Lake City office. Successful candidates will have experience in mergers and acquisitions, securities law, corporate finance, business restructuring and formation, and contracts, be team oriented with strong written and oral communication skills. Candidates admitted in Utah are preferred. Qualified candidates should submit their resume to Christopher Snow at cbs@clydesnow.com.

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.

Full time paralegal for law firm. Experience preferred in litigation, medical terminology and organizational skills. Salary based upon experience. Send resume to the attn of the office administrator by fax (801) 531-9747 or email cfreeman@pckutah.com.

POSITION SOUGHT

Well-Established Park City Attorney seeks association arrangement with Park City or Salt Lake attorney. Contact Thomas Howard, 435-649-4660, thoward@thomashowardlaw.com.

OFFICE SPACE / SHARING

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.

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.

Two windowed offices available in downtown Ogden law building, walking distance to all courts. $300 and $435, 1/2 off first 6 mos for new attorneys. Four attorneys on site now share costs. Reception, phone, internet, fax, copier available. Call or text Laura Thompson 801-560-7778.

Have the feel of a well-established larger law office by subleasing a new Executive office for as low as $499 a month, close to downtown courts, 5th floor Main Street views & warm associations with seasoned lawyers at Terry Jessop & Bitner. Contact Richard at (801) 534-0909 or richard@tjblawyers.com.

SERVICES

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.

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.

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.

Certificate of Compliance

UTAH STATE BOARD OF CONTINUING LEGAL EDUCATION

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111
Telephone (801) 531-9077 / Fax (801) 531-0660

For July 1 _____ through June 30_____

Name: _____ Utah State Bar Number: _____

Address: _____ Telephone Number: _____

_____ Email: _____

_____

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

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

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

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

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

EXPLANATION OF TYPE OF ACTIVITY

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

1. **Self-Study CLE:** No more than 12 hours of credit may be obtained through qualified audio/video presentations, computer interactive telephonic programs; writing; lecturing and teaching credit. Please visit www.utahmcle.org for a complete explanation of Rule 14-413 (a), (b), (c) and (d).

2. **Live CLE Program:** There is no restriction on the percentage of the credit hour requirement which may be obtained through attendance at a Utah accredited CLE program. **A minimum of 12 hours must be obtained through attendance at live CLE programs during a reporting period.**

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

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

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

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

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

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

Date: _____ Signature: _____

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

Billing Address: _____ Zip Code _____

Card Type: ☐ AMX ☐ MC ☐ VISA

Account # _____ Expiration Date: (e.g. 01/07) _____

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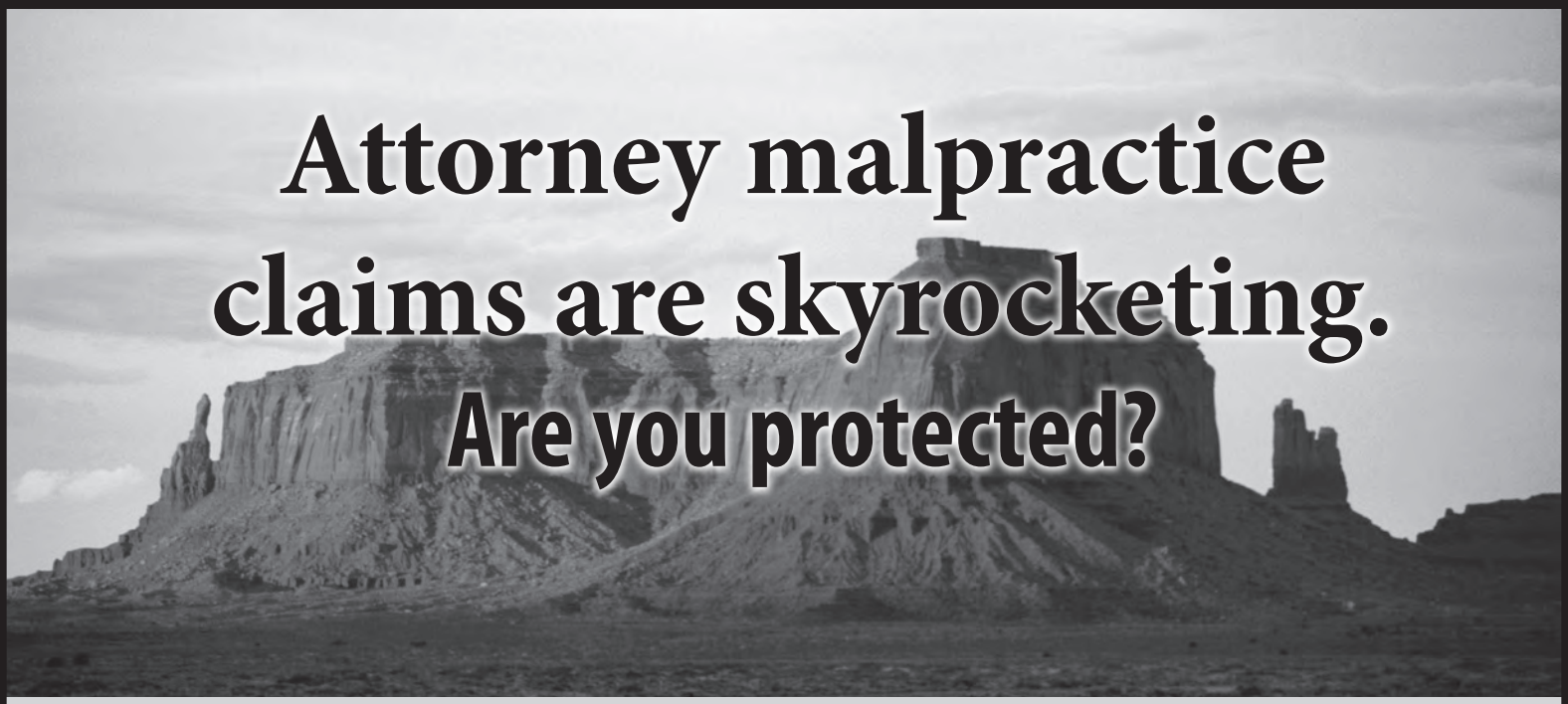
Please Note: Your credit card statement will reflect a charge from "BarAlliance"



Attorney malpractice claims are skyrocketing.

Are you protected?

The number of legal malpractice claims has increased by more than 50% over the last several years, according to a 2012 report from the American Bar Association. What's more, the number of claims with more than $500,000 in total dollars paid increased by 100%.[1]

In this increasingly risky environment, **can your current professional liability coverage give you the *right* protection?**

The **Utah State Bar** endorses the **Malpractice Program from Marsh U.S. Consumer**, a service of Seabury & Smith, Inc., when it comes to protecting Utah State Bar members. The Lawyer Malpractice Program is underwritten by Liberty Insurance Underwriters Inc. (a member company of Liberty Mutual Insurance Group) and administered by Marsh U.S. Consumer, a service of Seabury & Smith, Inc. **Marsh draws on more than 40 years of experience** with lawyers' professional liability insurance.

Marsh U.S. Consumer's Lawyer Malpractice Program can help protect you against negligent acts, errors and omissions. Once you purchase insurance coverage, you have reduced your risk.

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Denise Forsman
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Call **(801) 712-9453**
or visit **www.proliability.com/lawyer**

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

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d/b/a in CA Seabury & Smith Insurance Program Management

Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111