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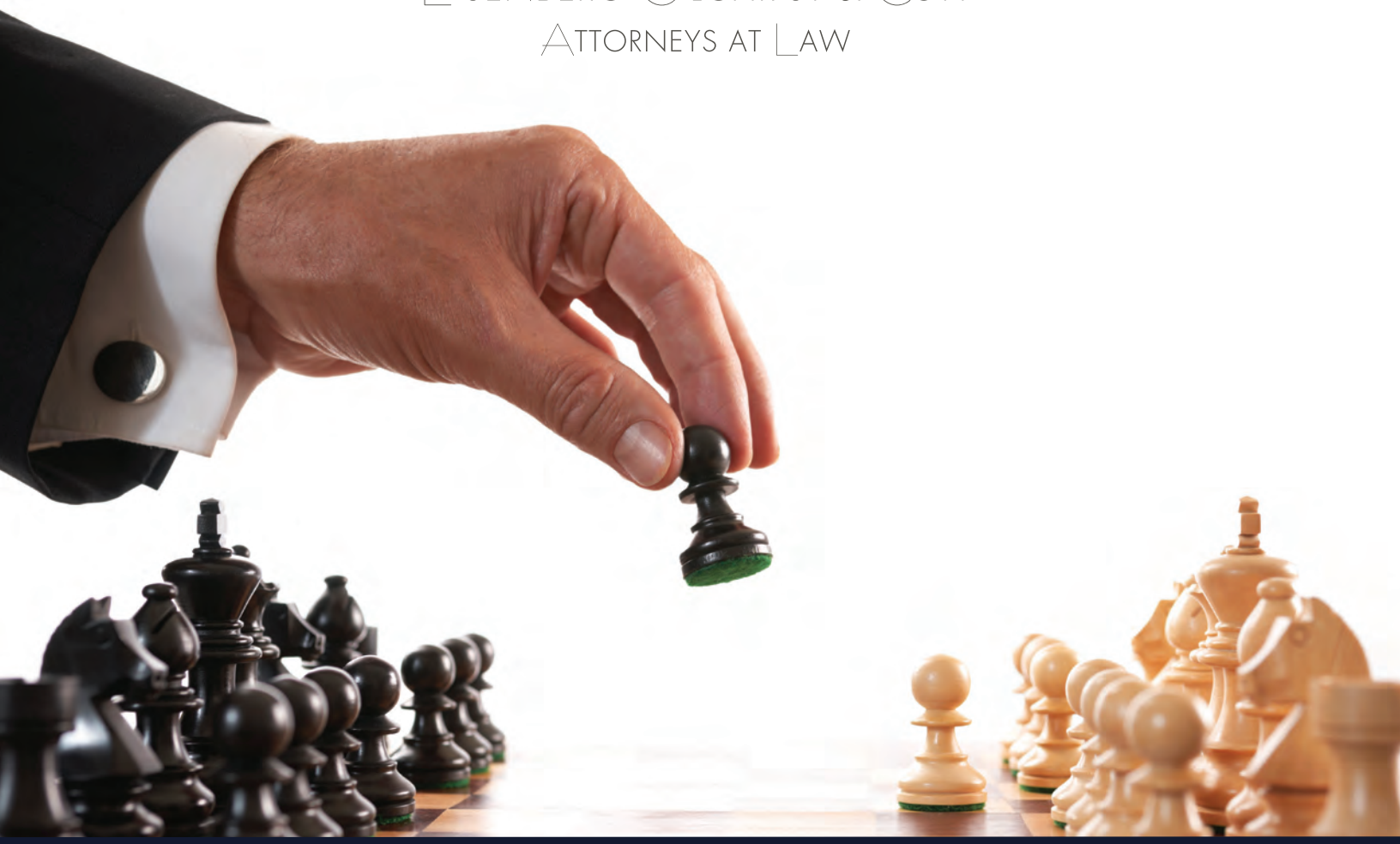

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Cover Art

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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.

Letter to the Editor

Letter Submission Guidelines

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

Dear Editor:

When I recently renewed my Utah State Bar license for a $430 annual fee, I decided to compare costs. A physician/surgeon licensed in Utah pays a two-year renewal fee of $183 plus $78 for a controlled substance license. That comes to $261 ($130.50 per year), about 30% of the annual cost to renew a bar license. A certified public accountant pays a two-year renewal fee of $63 ($31.50 per year), about 7% of the annual cost to renew a bar license.

One significant difference is that after a physician or CPA obtains a mandatory license, he or she has the choice whether to join a professional association. That choice is available to most professions, but is not offered to attorneys. Association membership is rolled into the licensing and regulation functions, and bar licensees must pay for all of it.

This combining of functions is bad policy. Licensing and regulation costs should be mandatory; association costs should be optional. I recognize that a change is extremely unlikely, but I also believe it is worthwhile to increase recognition of the way the State Bar historically has combined these functions that should be separate.

Sincerely,

Thad LeVar

The State of the Utah State Bar

by Curtis M Jensen

I am often asked by friends and colleagues about the general state of the Utah State Bar. They and others want to know how the Bar is doing, what's going on with the practice of law from our perspective as volunteer leaders and what has changed from year to year. Often the comments are just in passing, sandwiched in between a "How are you doing?" on the elevator and a "see you later" on parting. But there always seems to be some sincere desire to actually learn something more about the organization to which we all pay licensing fees, from which we receive regular copies of the *Utah Bar Journal*, and where we hope we don't run afoul of the disciplinary process thanks to a disgruntled client.

So, I thought I would start my new year as Bar President with a message that tries to answer a few of these questions, hopefully giving the members of the Utah State Bar a little better perspective of our organization.

Origin and Responsibilities

Regulation of the profession and the practice of law in Utah is one of the powers granted to the Utah Supreme Court by the Utah Constitution. The Court authorized the organization of the Bar as a 501(c)(3) non-profit corporation and delegated to the Bar the administration, management, and regulation of the profession and the practice under rules which the Court approves. Some of these rules permit the Bar to engage in programs to deliver legal services to the public and others permit the Bar to provide group benefits to lawyers. The Bar is governed and managed by a board of directors called the Bar Commission. It is made up of eleven lawyers elected to represent five geographic divisions within the state, two public members appointed by the Supreme Court, a president and president-elect, and ten ex-officio members, including the deans of the two in-state law schools, the past-president of the Bar, and representatives of other Bar groups.

The mission of the Bar is to lead Utah lawyers in serving the public and the legal profession by promoting justice, professional excellence, civility, ethics, and respect for and understanding of the law.

Demographics

The Bar was originally organized in 1931 with 606 members. Membership grew to 2,000 in 1973, 5,560 in 1983, and 8,073 in 2003. Currently, there are over 11,100 lawyers licensed by the Bar. Bar membership has therefore increased by more than five-and-a-half times during the past forty years. Bar membership growth tracks much higher than Utah's population growth during this same period; specifically, Utah's population has grown by only two-and-a-half times during this period from 1,168,950 in 1973 to its present figure of 2,855,287. This also means there is roughly one lawyer to every 257 citizens of the state, which is identical to the national ratio of lawyers to citizens. In the Unites States, there are 1,225,450 lawyers in the 315,464,000 population.

Two years ago, the Utah State Bar commissioned Dan Jones & Associates to conduct a survey of all lawyers within the state. The survey yielded an overwhelming return rate of 53%. Survey results yielded the following median averages: Utah lawyers are forty-two years of age, have been practicing law for fourteen years, work as solo practitioners or in law firms of less than ten lawyers, earn under $100,000 annually and bill $200 per hour for their services. Seventy-six percent of Utah's lawyers are male and 24% are female. The average lawyer works between forty and fifty-nine hours per week.

Professional Conduct

There are currently six lawyers working in the Bar's Office of Professional Conduct. The office opened 916 new cases in 2012 as a result of complaints primarily from the public. Sixty-six percent of all cases were summarily dismissed by the OPC due to an insufficient factual basis for the complaints or the actions complained of were not ethical violations. It is noteworthy that only 5% of the cases investigated by OPC last year actually resulted in any type of discipline.

The OPC operates under rules of procedure established by the Utah Supreme Court. It reports on its activities annually to the Utah

Supreme Court. The OPC is funded through Bar licensing fees and managed by Billy Walker, who is the Senior Counsel. Billy is supervised by John Baldwin, who is the Bar's Executive Director. While complaints are vetted and investigated by the lawyers and staff in the office, almost all public discipline must be authorized by screening panels made up of outside lawyers and members of the public who are all appointed by the Court.

Of the complaints received by the OPC, 71% come from clients, 6% come from opposing parties, and 4% come from opposing counsel. Fifty-six percent of all complaints received by OPC deal with lawyers who are alleged to have misused client trust funds. The majority of the remaining complaints involve clients who are dissatisfied with the nature and frequency of the communications they received from their lawyers during the pendency of legal matters.

The OPC operates and conducts its investigations entirely independent of the Bar staff and Bar Commissioners. This practice enables the OPC to maintain a fair, impartial and thorough investigation of all complaints.

Group Benefits

The Commission regularly looks for opportunities to provide lawyers with appropriate group benefits so that they can receive discounts for things like car rentals, liability insurance, office supplies, and even credit cards. The Bar also provides lawyers with access to free legal research services through Casemaker and gives lawyers and their families free professional mental health and abuse counseling services through Blomquist Hale. Lawyers may also receive peer-to-peer counseling through a separate Lawyers Helping Lawyers Committee. More importantly, the Bar is currently negotiating with an online group benefits provider to expand the scope and ease of access to even more group benefits.

New Programs

From time to time, the Commission feels it is necessary and important to do even more to serve the public and the profession. For example, the mandatory mentoring of all new lawyers was started three years ago. The purpose of the New Lawyer Training Program was to ease the transition of law students into the practice of law, teach them the nuts and bolts of case management and client relationships, and promote professionalism amongst a growing profession. Our program just received the prestigious E. Smyth Gambrell Award from the American Bar Association in recognition of our efforts to foster greater professionalism in the practice. More recently, the Bar has created a comprehensive Pro Bono Program to assist low income citizens and encourage services by volunteer lawyers. The Bar also recently launched its Modest Means Lawyer Referral

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7:50–8:00 am	Welcome & Introduction: David S. Dolowitz
8:00–8:15 am	**Tax Update:** David S. Dolowitz
8:15–9:50 am	Wally Kisthardt, Professor and Director of Social Work at Park University and Mary Kay Kisthardt, Professor at the University of Missouri, Kansas City – ***Utilizing Mental Health Professionals in a Family Law Practice***
9:50–10:00 am	Break
10:00–11:15 am	Judge's Panel Discussion – ***What Do You Want Presented to You***
11:15 am–12:00 pm	Karin Hobbs – ***Difficult Personalities, Buyer's Remorse and the Winner Effect***
12:00–1:00 pm	Lunch
1:00–2:00 pm	***HIPAA – What Family Lawyers Need to Know***
2:00–3:00 pm	Billy Walker, Senior Counsel, Office of Professional Conduct – ***Complaints Regarding Family Lawyers and How to Avoid Them***
3:00–3:15 pm	Break
3:15–4:15 pm	Calvin Curtis – ***Elder Law – Impact on Family Law Practice***
4:00–5:00 pm	**Hot Tips** (Utah Fellows) Neil B. Crist, Bert L. Dart, David S. Dolowitz, Sharon A. Donovan, Jennifer L. Falk, Brian R. Florence, Frederick N. Green, Larry E. Jones, Kent M. Kasting, Louise T. Knauer, A. Howard Lundgren, Ellen M. Maycock, Sally B. McMinimee, Don R. Peterson, Dena C. Sarandos, Clark W. Sessions, John D. Sheaffer, Jr., and Brent D. Young

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Service, where lawyers who agree to take cases at specific discounts may receive referrals from clients whose incomes preclude them from receiving pro bono legal services but make them eligible for discounted legal services. An added benefit of this program is its ability to provide underemployed lawyers with paying clients.

The Current Financial State of the Bar

The Bar is financially healthy and living within its means. The Commission devotes considerable time and energy to assure that its accounting systems reflect accurate and timely financial reporting. Monthly financial reports and adopted policies and procedures are scrutinized by a separate Budget and Finance Committee consisting of CPAs and lawyers with financial backgrounds. Along with the Budget and Finance Committee and outside auditors, the Commission has established comprehensive guidelines for the management of funds and has updated reporting technology. We have also set aside specific reserves for particular future contingencies and have restricted them from general access.

Licensing fees provide 62% of annual net revenue. Other programs and activities, including building room rental and small income-producing activities provide the remaining 38%. The largest portion of the Bar's budget is used for core regulatory functions, including the admissions process, discipline, and general Bar administration. Expenses also include support for committees, the operation and maintenance of the Utah Law and Justice Center, and programs like the New Lawyer Training, Pro Bono, and Modest Means Programs. Our three conventions are paid for entirely from registration, vendor, and sponsor fees so they require no general Bar funds.

The Commission is constantly exploring ways to provide necessary services at appropriate funding levels to satisfy our mission and better serve the membership. We realize that we are fiduciaries of the funds we receive and are committed to careful decision-making and full disclosure of all of our activities. The current budget and most current audit may be found at www.utahbar.org.

During the coming year, I invite you to contact your local Bar commissioner and share your thoughts. The Commission needs your input. We are interested in what you feel the Bar should be doing within our grant of authority from the Court, and we want to know what issues you are facing in your practice. Please look for the Commission's bi-monthly e-bulletins and take advantage of the many services and opportunities the Bar provides. I am honored to serve you, look forward to a productive year, and welcome any and all direct feedback.

Mr. Jensen would like to thank Executive Director, John Baldwin, for his assistance with this article.

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New Considerations in Personal Injury Litigation

by Michael W. Young

Members of the Utah Bar are no doubt well aware of the recent changes in the Utah Rules of Civil Procedure. Seasoned practitioners and young associates alike have begun to work under the new procedural regime, and adjustments in prior practices and mores are demanded. Some changes are straightforward and easy to apply; they require minor revisions to format and case management. Other changes, however, require more critical reflection.

Among the more notable changes in the civil rules is the addition of Rule 26.2: disclosures in personal injury actions. This rule lays out additional disclosure requirements for plaintiffs filing personal injury actions. *See, generally,* Utah R. Civ. P. 26.2 credits (adopted effective December 22, 2011, and amended effective April 1, 2013). These additional disclosure requirements are particularly considerable when applied within the general disclosure framework outlined in Rule 26. Specifically, Rule 26(d)(4) precludes a party from using an "undisclosed witness, document or material at any hearing or trial." *Id.* R. 26(d)(4).

> *"[Rule 26.2] serves to expedite the litigation process by forcing both parties…to exchange critical information at the outset of the case."*

Accordingly, failure to abide by the disclosure requirements of Rule 26.2 may dramatically impair a plaintiff's pursuit of relief. Compounding this new dynamic are long-standing ethical considerations applicable to all attorneys. In particular, an attorney's ethical obligations of competence and diligence should be carefully understood vis-à-vis Rule 26.2.

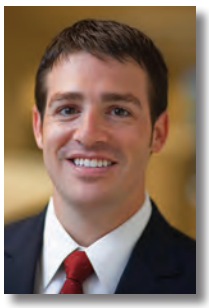
Ultimately, Rule 26.2 and its attendant obligations have further shifted the resource burden to the attorney evaluating a prospective case. In most cases, significant time and resources should be spent before an attorney files a complaint or even enters into a payment agreement. Because personal injury matters are often taken by attorneys under a contingent fee arrangement, this shift in burden is significant and may press attorneys and firms with less resources into entering into fee-sharing agreements with larger firms. While doing so may often best serve the client's interests, such arrangements come with their own legal and ethical considerations that should also be critically reviewed.

Rule 26.2's Requirements and Practical Implications

Pointedly, Rule 26.2 no longer allows an attorney to offload the gathering of information critical to the underlying case to the discovery phase of litigation. The rule's disclosure requirements are not complicated and are intended to advance the litigation at issue by providing the defendant(s) "key fact elements that are typically requested in initial interrogatories in personal injury actions." *Id.* R. 26.2 advisory committee note. Accordingly, a plaintiff is now required to disclose upfront a significant amount of sensitive information.

While much of the required information can easily be obtained at an initial intake meeting or consultation, securing some information is more challenging. For example, gathering

MICHAEL W. YOUNG is an associate attorney at Parsons Behle & Latimer.



required medical information and documents can often be time consuming and expensive. Additionally, working with third parties to obtain wage loss and disability information can also be painstakingly slow and difficult. Perhaps most importantly, the disclosure of medical and wage documentation to opposing counsel prior to reviewing that information yourself immediately puts a client's interests in jeopardy. Beyond the need to protect information that should not be disclosed in the underlying matter for reasons of relevance and privilege, plaintiff's counsel must take every care to preserve the plaintiff's ability to shape the case narrative. Providing opposing counsel with a list of healthcare providers without first reviewing what relevant records those providers actually have fails to protect basic client interests.

Prior to the implementation of Rule 26.2, an attorney lacking the resources necessary to gather this information could still file a complaint with the hope of entering into settlement negotiations or discussions. In the least, an attorney could file a complaint and simply review medical and wage documentation "later." Such is no longer the case. Notwithstanding what might be considered an initial disadvantage to the personal injury lawyer, Rule 26.2 provides a personal injury client with two distinct advantages.

First, as noted above, the rule serves to expedite the litigation process by forcing both parties (defendants have enhanced disclosure obligations too) to exchange critical information at the outset of the case. Such a dynamic should move the litigation along more quickly, providing the plaintiff his or her prospective relief sooner. Second, Rule 26.2 compels personal injury attorneys to engage with the facts of the case sooner. Such an investment in time and resources is consistent with ethical obligations already imposed on practitioners but which have often been overlooked or discarded.

An Attorney's Obligation To Represent a Client in a Competent and Diligent Manner

Rule 1.1 of the Rules of Professional Conduct requires a lawyer to provide his or her client with competent representation. Utah R. Prof'l Conduct 1.1 (2013). This rule indicates that competence requires "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* The relevant factors considered in determining whether an attorney has the requisite knowledge and skill in a particular matter include the attorney's "general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give" to the underlying matter, and whether it is feasible for the attorney to refer, associate, or consult with an attorney of competence in the particular field at issue. *Id.* cmt. 1.

The rule of professional practice regarding competence indicates that the proficiency of a general practitioner is typically sufficient for competent handling of a potential matter but also notes that expertise in a particular field may be required in some circumstances. *Id.* For the attorney considering representation in a personal injury matter, this nuance is important. Certainly not all cases are created equal. Some personal injury matters might simply require the careful application of tort law principles familiar to most general practitioners. However, personal injury matters dealing with medical malpractice, mass torts, or complex regulatory regimes, e.g., transportation and trucking, will often demand a higher level of expertise. An attorney without the requisite skill to *competently* pursue such a matter should carefully consider accepting such a case given the requirement of Rule 1.1.

As noted above, Rule 26.2 of the Utah Rules of Civil Procedure renders dubious the proposition of filing a complaint with the hope of entering into a quick settlement. Indeed, such an approach threatens to violate the ethical obligations an attorney has to a prospective client. Rule 1.16 of the Rules of Professional Conduct dictates when an attorney *shall not* represent a client. Notably, "[a] lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and *to completion*." *Id.* R. 1.16 cmt. 1 (emphasis added). Willingness to see the matter through to trial is an inherent obligation assumed by an attorney representing any client. Accordingly, acceptance of a personal injury matter with an eye toward quick settlement would appear to be a violation of the spirit of the rule, if not its letter.

The ethical obligation of diligence is also implicated by Rule 26.2. "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." *Id.* R. 1.3 cmt. 1. A lawyer's requirement to represent his or her client with "diligence" touches upon all aspects of representation. *See, e.g., Camco Constr., Inc. v. Utah Baseball Acad., Inc.*, 2010 UT 63, ¶ 21, 243 P.3d 1269 (concluding that an attorney's failure to exercise reasonable diligence in identifying key legal case law and theories early in the matter precluded the same from receiving the sought relief); *Brown v. Glover*, 2000 UT 89, ¶ 30, 16 P.3d 540 (stating that an attorney's professional responsibility to act with reasonable diligence and promptness imbues a responsibility on an attorney to "use the available discovery procedures to diligently represent her client" (citing Rule 1.3)). Indeed, failure by an attorney to exercise diligence in representing his or her client can lead to sanctions, such as suspension of one's license. *See, e.g., Utah State Bar v. Jardine*, 2012 UT 67, ¶¶ 78, 83, 289 P.3d 516.

By entering into an agreement to represent a personal injury client, an attorney is obligated to do so with diligence. Again, "a lawyer should carry through *to conclusion* all matters undertaken for a client." Utah R. Prof'l Conduct 1.3 cmt. 4 (emphasis added). Presupposing the settlement of a case is a mistake. Moreover, assuming that one can later obtain the necessary expertise to represent his or her client competently and diligently is an equally dangerous proposition. Utah Rule of Civil Procedure 26.2 affords the practitioner very little time to understand and evaluate legal concepts otherwise unfamiliar or new, yet critical to the issues implicated by the underlying matter. In the end, the attorney considering representation in a personal injury matter must be self-aware. Does the attorney have the time, knowledge, resources, and expertise to pursue the matter to trial? If not, an alternate approach is required.

Fee Splitting as a Work-Around

Attorneys approached with a potential personal injury action should be acutely aware of the procedural and ethical obligations that accompany such a matter as described above. Whether the lawyer works in a larger firm, a smaller firm, or as a solo practitioner, a determination to refer the matter to another attorney with the requisite expertise is often made. The propriety of the arrangement between the originating attorney and the referral attorney is of utmost consideration. As Judge Kate A. Toomey advised as then-Assistant Counsel with the Office of Professional Conduct, there are serious considerations to be made when entering an arrangement with another lawyer to divide fees. Kate A. Toomey, *Practice Pointers: Fee Splitting and Referral Fees Under the Rules of Professional Conduct*, 7 Utah Bar Journal 17 (1999). Judge Toomey explained, "Attorneys should be aware that referral or forwarding fees, 'which by their nature involve an economic benefit for little or no actual services performed beyond the referral' *are not permitted* in Utah." *Id.* (emphasis added) (quoting *Phillips v. Joyce*, 523 N.E.2d 933, 939 n.5 (Ill. App. Ct. 1988)). In light of Judge Toomey's conclusion, a practitioner is forced to ask what arrangements, if any, are permitted in Utah. Again, the Rules of Professional Conduct provide guidance.

Rule 1.5 of the Rules of Professional Conduct prohibits an attorney from charging or collecting an "unreasonable fee or an unreasonable amount for expenses." Utah R. Prof'l Conduct 1.5(a) (2013). The rule also expressly describes the kind of fee-splitting arrangements that are permitted in Utah. Specifically, a division of fees between lawyers who are not in the same firm is permitted *only* if: (1) "the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation"; (2) "the client agrees to the arrangement" and such agreement is reduced to writing; and (3) "the total fee is reasonable." *Id.* R. 1.5(e); *see also* Ethics Advisory Opinion Committee (EAOC) 121, *May a Lawyer Pay Another Lawyer a Fee for Referring a Case?* (Dec. 16, 1994).

The proportionality requirement of Rule 1.5 is intended to

preclude an attorney from collecting fees for merely referring a matter to another attorney. As one court observed, "[a]n attorney is not entitled to a division of fees for 'services performed and responsibility assumed' when that attorney does nothing but refer a fee-generating client to another attorney without any other actual participation in or handling of the case." *Fitzgibbon v. Carey*, 688 P.2d 1367, 1374 (Or. Ct. App. 1984) (citation omitted). In other words, the proportionality requirement requires the actual participation in the matter by the referring attorney. *King v. Housel*, 556 N.E.2d 501, 504 (Ohio 1990) (citing *Palmer v. Breyfogle* 535 P.2d 955, 966–67 (Kan. 1975)); *see also* Toomey, *Practice Pointers: Fee Splitting and Referral Fees Under the Rules of Professional Conduct*, at 19.

Under a joint responsibility arrangement, both attorneys assume responsibility for the pursuit of the matter, regardless of the proportion of work performed by each. However, even under this arrangement, "[t]he lawyer receiving a referral fee under a joint-responsibility arrangement cannot simply 'hand off' the client to the receiving lawyer." EAOC 121. The joint-responsibility arrangement requires each lawyer to assume "responsibility for the representation as a whole." Utah R. Prof'l Conduct 1.5 cmt. 7. In other words, each lawyer is responsible and liable for the other lawyer's actions in the matter, including ethical violations by either attorney.

Whether a proportionality or a joint-responsibility arrangement is made, it is clear that a referring attorney must be engaged in the litigation. This should be seen as an advantage and opportunity for the practitioner lacking the resources or experience to pursue complex personal injury matters. For the seasoned practitioner with little or no interest in the substantive litigation, fee arrangements can be made that merely require minimal feedback and engagement, proportional to the work done by the referring attorney. For the young or inexperienced attorney seeking to foray into personal injury law, but lacking resources or expertise, an arrangement can be made that will not only provide the resources necessary to pursue the matter but will also allow that attorney to gain crucial experience and expertise in the specific legal area.

Are You a Super Lawyer?

by Keith A. Call

When I was in seventh grade, our class had an election for "Class Favorites." By vote of all seventh-graders, one boy would be chosen as the most popular boy in the class and would have the "honor" of dancing with the most popular girl for one dance at an evening sock hop. Like many other seventh-grade boys, I secretly wanted to win the title of "Class Favorite" in the worst way. (I didn't.)

I'm forty-something now, but I still receive similar ballots every few months. Like me, many of you have probably had the opportunity to cast your vote for the most Super, Elite, Best, Superb, or AV lawyer. And also just like me, you all secretly hope you win.

> *"[M]embers of the Bar should reject the temptation and practice of 'gaming' lawyer rating services."*

A few of our lawyer colleagues around town have told me they absolutely refuse to participate in such services, calling them things like "pseudo-popularity contests." On the other end of the spectrum, who among us has not received some sort of a hint, nod, or wink suggesting, "I'd sure like your vote" or "You certainly don't have to vote for me, but I wanted to let you know I'm voting for you"? It can make you feel compromised.

Lawyer rating services claim to provide a public service by allowing other lawyers and the public to identify lawyers who are particularly skilled in their field. Yet, we all recognize what a financial boon these services are for their sponsors and what a game they can become if lawyers try to manipulate them.

A lot has been written about whether a lawyer may ethically advertise himself or herself as Super, Best, Elite, or whatever. Perhaps the biggest battle was fought in New Jersey between 2006–2009. In July 2006, the New Jersey Committee on Attorney Advertising ruled that advertisements describing attorneys as "Super Lawyers," "Best Lawyers in America," or "similar comparative titles" violate Rule of Professional Conduct 7.1. *See* Committee on Attorney Advertising, Op. 38, 185 N.J.L.J. 306 (July 24, 2006).

Utah's Rule 7.1 states,

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Utah R. Prof'l Conduct 7.1 (2013).

The New Jersey Committee's opinion created an uproar. A Special Master appointed by the New Jersey Supreme Court later released a 304-page discussion of the matter, and the New Jersey Supreme Court eventually vacated the Committee's opinion and amended its version of Rule 7.1 to require certain disclaimers to any such rating rodomontade. *See In re Opinion 39*, 961 A.2d 722 (N.J. 2008).

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Utah courts and advisory opinion-makers have yet to provide specific instructions on the ethics of advertising your Superstatus. It is clear, however, that you cannot pay for positive inclusion in lawyer recommendation services. *See* Utah R. Prof'l Conduct 7.2(b) ("A lawyer shall not give anything of value to a person for recommending the lawyer's services;…." (with certain exceptions)).

What is more troubling to me, however, is the potential for vote trading or soliciting among lawyers. Such practices are arguably covered by Utah Rule of Professional Conduct 8.4: "It is professional misconduct for a lawyer to:… (c) [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation.…" *Id.* R. 8.4(c). It is a dishonest misrepresentation to vote for someone if you are merely trading votes and do not believe the person you are voting for meets the established criteria. It is fraudulent to cast a "merit-based" vote if you have no basis to assess the lawyer's abilities on the merits. And it is deceptive to the public to engage in non-merit vote trading that skews rating results.

Some lawyer rating services make at least some effort to discourage vote solicitation or trading. For example, an email I received several months ago from Super Lawyers said, "A word about 'campaigning' *i.e.*, soliciting votes for *Super Lawyers*: Don't do it. It's against the rules (and could result in your disqualification), it doesn't work, we can detect it, and it doesn't reflect well on you or your firm."

Even without a specific prohibition in the rules, individual members of the Bar should reject the temptation and practice of "gaming" lawyer rating services. If a lawyer chooses to participate, then he or she should cast a vote for those lawyers he or she honestly believes best meet the voting criteria. And I certainly agree with the statement that vote solicitation or trading "doesn't reflect well on you or your firm." Even a seventh-grader knows you don't campaign for "Class Favorite."

The Rights of a Member's Creditor Under the Utah Revised Uniform Limited Liability Company Act (Effective 1/1/14)

by Langdon T. Owen, Jr.

This article will analyze some key provisions of the Utah Revised Uniform Limited Liability Company Act (the "Revised LLC Act" or, simply, the "Act"). It will focus only on the rights of a creditor of a member and a few closely associated topics.

The Revised LLC Act is scheduled to become effective January 1, 2014, as part of the Unincorporated Business Entity Act. It may be effective for organizations formed earlier if the operating agreement is amended to elect the new law and will become generally effective January 1, 2016, to all LLCs whenever formed.

A key feature of limited liability companies (and partnerships) is that a judgment creditor of a member obtains a charging order on the member's interest in distributions and, in a multi-member company, does not generally obtain the member's full interest and thus has no vote or other rights. This continues under the Act, with some modification. The major purpose of the charging order is to protect the rights in the business of the company of the other members from interference in management, and from seizures of the debtor's share of company assets. The secondary (but important) effect of the charging order regime is that it provides some protection for the debtor member, too. In order to understand charging orders, it is important to first understand the rights associated with a member's interest which may be affected.

TRANSFERABLE INTEREST

A member's interest under the Act is in two parts: first, a transferable interest, *see* Utah Code Ann. § 48-3a-102(29) LexisNexis Supp. 2013) (defining transferable interest), to receive distributions in accordance with the operating agreement, which interest in distributions is originally associated with a person's membership interest but continues whether or not the person continues as a member or owns the interest; and, second, all other rights and duties, *see id.* § 48-3a-502(7). A transfer of the transferable interest is generally permissible but is not effective where a transferee has notice that the transfer is in violation of a restriction on transfer contained in the operating agreement. *Id.* § 48-3a-502(1)(a), (6). A transferable interest may be, but need not be, evidenced by a certificate, and if certificated, is transferable by transfer of the certificate. *Id.* § 48-3a-502(4). It is a good practice to publish the existence of restrictions on transfer in the Articles and on any certificate relating to a member's interest.

If a transferee becomes a full member with respect to the transferred interest, the transferee becomes liable for the member's obligations known to the transferee to make any required contributions and any liability of the transferring member for the return of wrongful distributions received by the transferor member, *id.* § 48-3a-502(8); a transferee of only the transferable interest would not be so liable.

Transferees including disassociated members who are treated as transferees upon disassociation, *id.* § 48-3a-603(c), receive (or if a disassociated member, retain) distributions relating to the interest affected. *Id.* § 48-3a-502(2). A distribution means a transfer "on account of a transferable interest or in the person's capacity as a member." *Id.* § 48-3a-102(4). For all purposes, not just for applying the solvency tests for determining an illegal distribution, a distribution, by definition, does not include reasonable compensation or benefits for services. *Id.* § 48-3a-102(4)(b). This elimination of compensation from the definition of distribution solves the issue under the Uniform Act of whether for purposes of determining the rights of a transferee, a distribution includes

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such compensatory payments. The comments to Section 503 of the Uniform Act noted that there is a special definition of distribution for purposes of applying the solvency test that does not apply generally or to determine a distribution payable to creditors under a charging order, and noted that there is authority under case law for holding that compensation is such a distribution. Revised Uniform Limited Liability Company Act (2006), National Conference of Commissioners on Uniform State Laws (the "Uniform Act"), cmt. Section 503(b)(2).

However, other issues with respect to compensatory payments remain. The Revised Act provides that "[a] member is not entitled to remuneration for services performed for a member-managed… company, except for reasonable compensation for services rendered in winding up." Utah Code Ann. § 48-3a-407(8). Thus, the exclusion of compensation from the definition of "distribution" does not much help a member of a member-managed company since the member will not be entitled to remuneration except in a winding up of the company's affairs. That two different sets of words are used, "compensation" and "benefits" in Section 48-3a-102(4) and "remuneration" in Section 48-3a-407(8), should not make a difference because the concept is the same. The compensation of a member of a member-managed company, at least if made pursuant to an operating agreement, likely would be in a "person's capacity as a member" and thus would appear to be on account of a transferable interest under Section 48-3a-102(29). Such a case could include a professional service company where all members are expected to provide service to clients and are paid out of collections from such generated accounts receivable. Presumably, unpaid compensatory amounts would transfer with the transferable interest either to an assignee or to a creditor under a charging order. With respect to creditors holding a charging order, this would mean that no separate compensation garnishment would be required for a member-managed company and the limits on wage garnishments presumably would not apply.

This issue may be even more difficult if the member's compensation from a member-managed company is payable pursuant to a separate agreement. If all members have similar agreements, for example, the agreements may be for matters in the capacity of a member; in other circumstances, perhaps not. A number of facts and circumstances would be relevant to whether

an amount payable to a member with management authority is in a "person's capacity as a member," such as the type of job performed given the nature of the company's business. Factory workers paid hourly and who hold minor interests in the companies for which they work may be treated differently from hedge fund managers who hold significant interests in the company for which they work and whose pay is only or largely from such interests.

A similar issue apparently does not arise for managers of a manager-managed company; even if all members are managers and all managers receive compensation on similar terms so that the compensation may be in the person's capacity as a member, and if the compensation is not unreasonably high for the services actually to be performed or actually performed, the payment would not be a distribution under Section 48-3a-102(4)(b). For a manager-managed company, a wage garnishment would be necessary to reach reasonable compensation.

OBTAINING A CHARGING ORDER

To obtain a charging order, a judgment creditor applies to a court which may enter such an order against the transferable interest of a member or transferee judgment debtor. The comments to Uniform Act Section 503(a) state that as a matter of civil procedure and due process, the application for the order must be served on both the company and the judgment debtor. Uniform Act, cmt. Section 503(a). The order, when granted, is a lien on the transferable interest. The company is then served with the order and from then on pays to the holder of the order any distributions that would otherwise be paid to the judgment debtor. Utah Code Ann. § 48-3a-503(1) (LexisNexis Supp. 2013).

The court may also appoint a receiver of the distributions and make other orders necessary to "effectuate the collection of distributions." *Id.* § 48-3a-503(2). A key benefit to obtaining a receiver is that expanded access to information becomes available; unlike other transferees, a receiver will have the "power to make all inquiries the judgment debtor might have made." *Id.* § 48-3a-503(2)(a). Beyond a receivership, the scope of such other necessary orders is not specified beyond that they must only be made "[t]o the extent necessary … to give effect to the charging order." *Id.* § 48-3a-503(2)(b). The comments to the Uniform Act Section 503(b)(2) make clear, by way of example, that a court should not grant an order directing more distributions and less investment in operations, but may determine if an amount is in fact a distribution subject to the charging order. Uniform Act, cmt. Section 503(b)(2). Can information to help decide if distributions will not be adequate to pay the judgment in a reasonable time (a prerequisite to foreclosure) be obtained on such an order, at least without a receiver? Even if not available under this section, the information might be available pursuant to the rules of procedure or other law. *See* Utah Code Ann. § 48-3a-107 (providing that the principles of law and equity supplement the Act unless displaced by particular provisions).

The charging order remedy is the exclusive remedy of a judgment creditor against a member or against a transferee. *Id.* § 48-3-503(8). Thus, if a transferee of a transferable interest (which eventually may include a creditor foreclosing a charging order lien) suffers a judgment, the stream of distributions is not seized or garnished in the usual way but would need to be made subject to a further charging order. The exclusive remedy provision does not apply to security interests under Article 9 of the Uniform Commercial Code. Uniform Act, cmt. Section 503(g). That comment further states that if remedies under Article 9 and under a judgment are both pursued, the charging order constraints apply to the judgment remedies but not the Article 9 remedies. The comment also states that this exclusive remedy provision does not prevent what is called reverse piercing, where a company may be held liable for the obligation of a member under certain circumstances. *Id.*

At this point, on obtaining the charging order, the creditor holding the charging order is not yet a transferee and the charged member is not yet disassociated as a member. One significant effect of this situation is that the debtor is likely to be taxed on the distributions received by the creditor under the charging order prior to foreclosure. *See* Rev. Rul. 77-137, 1977-1 C.B. 178 (using a dominion and control test), I.R.S. Gen. Couns. Mem. 36960 (Dec. 20, 1976); *Lucas v. Earl*, 281 U.S. 111 (1930) (enunciating assignment of income principle of tax law). This tax result will likely shift on foreclosure when it becomes likely (but not certain) that the creditor will then be taxed on income whether or not distributed by a multi-member company. For a single-member company, the creditor may well be so taxed. Such a possibility of taxation may cause a creditor to think twice about foreclosing. However, in the single-member foreclosure situation, as we will see, the purchaser will often have substantial control over the distributions which can ameliorate the tax burden by providing the funds to cover the tax.

FORECLOSURE

The creditor holding the order may then request the court to foreclose the lien of the charging order. The creditor must show, however, that distributions will not pay the judgment

within a reasonable time. On the sale, if the charged interest is not the interest of the only member, the purchaser at the sale receives only the transferable interest in distributions and becomes a mere transferee (but there is a special rule, discussed below in the single-member problem section). *See* Utah Code Ann. § 48-3a-503(3) (LexisNexis Supp. 2013).

To stop the foreclosure, the charged member, the company, or any other member may pay the judgment in full before the foreclosure. *Id.* § 48-3a-503(4), (5). It appears from these provisions, which use the phrase "before foreclosure under Subsection (3)," *id.*, that the legislature meant the court order of foreclosure rather than the later foreclosure sale. Thus, the payment would need to be made before the court orders the foreclosure. If the charged member pays, the charged member may obtain an extinguishment of the order by filing a satisfaction with the court. *Id.* § 48-3a-503(4). If the company or another member pays, the company or member succeeds to the judgment, including the charging order and the right to foreclose. *Id.* § 48-30a-503(5). If the judgment debtor pays the judgment after it has been acquired by another member but before the court orders foreclosure, the member can still extinguish the charging order. Unlike the purchase of a judgment at a discount, this mechanism does not require the creditor's consent, but the full amount must be paid. There is no redemption process after the foreclosure order.

If the company uses this pay-off mechanism, there is no specific restriction on which assets may be used, and there is no particular approval process specifically for the use of the mechanism. On the other hand, as noted in the comments to Uniform Act Section 503(e), whether such action by the company is in the ordinary course or not for purposes of the Section 407 restrictions and consent rights will depend on the circumstances. *See id.* § 48-3a-407(2)(d), (3)(c)(ii). However, these matters may be affected by the operating agreement. The benefit of having the company itself use this mechanism is that it benefits all members pro rata.

SINGLE-MEMBER PROBLEM

If a company has but one member at the time a charging order is entered (later developments resulting in a single remaining member would not be taken into account), then if and when the lien of the order is foreclosed and the transferable interest is

sold, the "court shall confirm the sale," the purchaser "obtains the member's entire interest, not only the member's transferable interest," and the purchaser becomes a member. The right held by the purchaser would include any voting rights of the interest. *See* Utah Code Ann. § 48-3a-503(6)(a)–(c) (LexisNexis Supp. 2013). The charged former member becomes disassociated. The purchaser of a sole member's interest under a foreclosed charging order lien becoming a member appears to be mandatory and automatic. This result affects a third person and thus cannot be changed by the operating agreement. *See id.* § 48-3a-112(3)(n).

The purchaser of a sole member's interest automatically becoming a member solves difficult issues which would have arisen concerning control of dissolution and winding up if there were no members but only transferees. Because there is a member (the purchaser), any personal representative of the last member or any other transferees will be prevented from being able to vote (by distributive share) for someone else to control the wind up. *See id.* § 48-3a-703(3), (4). As a member the purchaser could, if the purchaser desires, act as a member to, for example, amend the operating agreement, cause dissolution, or control winding up.

On the other hand, when the purchaser becomes a member, the purchaser would potentially become subject to certain of the member's duties or obligations, and thus may not desire to foreclose. *Id.* § 48-3a-502(8). The various duties of a member that may apply to such a purchaser under the Act may include becoming liable for unpaid capital contributions, the return of unlawfully received distributions, etc., where known to the purchaser. *Id.* The purchaser may also acquire member duties under the operating agreement, *see id.* § 48-3a-113(2), at least until the operating agreement is modified by the purchaser, if it is not restricted from doing so, *see id.* § 48-3a-114. If the purchaser takes control of wind up as a member, it will be deemed a sole manager, *id.* § 48-3a-703(3), (4)(a), and presumably will be subject to the fiduciary duties of a manager and to the indemnity, liability limitations, and other protections of a manager. The fiduciary duties generally are relatively low, absent provisions of the operating agreement increasing the duty. *See id.* §§ 48-3a-409, -112(4).

The creditor–new member's duties may be made even lower than provided in the operating agreement if the purchaser cannot be stopped from amending the operating agreement to reduce the duties and the remedies for their breach to the barest minimum allowed by the Act. This single member provision is a Utah variation and is not part of the Uniform Act. Where a purchaser of the charged interest of a remaining sole member desires to liquidate the business or change it substantially, this provision could leave others with an interest in the business as transferees at the mercy of the purchaser. Such transferees could be the heirs or beneficiaries of prior members now deceased, or creditors earlier foreclosing charging orders on other now former members who have been disassociated by other members. Does it make sense to privilege this one transferee, the foreclosure sale purchaser of the last member, when there are other transferees involved without equivalent rights to protect themselves, such as votes, information rights, and other member rights, where the other transferees desire to keep the business operating and its distributions flowing, or just desire to prevent being abused by the new member?

Operating Agreement Changes

An operating agreement generally can only be amended by members (not transferees or disassociated members), because it is defined to be an agreement among members, including a single member, Utah Code Ann. § 48-3a-102(13) (LexisNexis Supp. 2013). The agreement may, however, define what third person approvals must be obtained or what conditions need to be satisfied before it may be amended. *Id.* § 48-3a-114(1)(d); *see also id.* § 48-3-407(2)(f), (3)(f)(iii) (stating that all members' consent is necessary to amend the operating agreement, unless the agreement provides otherwise, and such provisions are allowed under Section 48-3a-112). In the case of a multi-member company, obtaining the transferable rights of a member by a purchaser under Section 48-3a-503(3) does not make the purchaser a member able to agree with other members. However, in the sole member situation, where there are no members other than the purchaser, the purchaser may amend the operating agreement, and the amendment might be to the detriment of other transferees such as heirs of deceased former members, or creditors holding transferee interests from a time before the company had only one remaining member.

For example, restrictions in the operating agreement that the purchaser may desire to change could include provisions to prevent dissolution or to restrict distributions in order to maintain the business for, or protect the interests of, other transferees. An amendment by the new sole member may even, under an express provision of the Act, change the rights of these other transferees or disassociated members. *See id.* § 48-3a-114(2). This is only restricted by court orders under Section 48-3a-503(2)(b) made to "give effect to the charging order." Can such a court order so limited protect the interests of other transferees in the company or only the interests of the purchaser or new member?

The lead-in language to Section 48-3a-503(2) also requires the court action to be "[t]o the extent necessary to effectuate the collection of distributions," so the provisions of Section 48-3a-503 appear to be wholly in the opposite direction and of no use to other transferees.

What can be done to protect other transferees or disassociated members? The Act provides that an operating agreement may specify that its amendment requires the approval of a person that is not a party to it or the satisfaction of a condition. *Id.* § 48-3a-114(1). Presumably, this class of persons "not a party" would include any persons who are not actual members, such as transferees and disassociated members because an operating agreement is among members. *Id.* § 48-3a-102(16) (defining "operating agreement"). Although originally intended to benefit creditors by preventing changes in the agreement of which the creditor does not approve, e.g., allowing an otherwise prohibited bankruptcy filing, this consent provision also may be useful to prevent a charging order purchaser in foreclosure that obtains the rights and vote of a sole member, from unilaterally changing the operating agreement. For example, fiduciary duties may be imposed on a sole member where there are other transferee interests and the heirs of a deceased member or others who are transferees without votes may be given a right of consent to any amendment to the operating agreement in order to prevent the elimination of these duties.

Any such consent right regarding amendments to the operating agreement should be backed up with information rights under the agreement. The statutory information provisions for members with consent rights, *see id.* § 48-3a-410(2)(d), would not apply to a third person with such a consent right (the actual word used in Section 48-3-114(1) is "approval") as to amending the operating agreement; thus, without a provision in the operating agreement, a person with such a consent or approval right may not be aware of important relevant information.

Disassociation

Transfers of transferable interests do not alone cause disassociation as a member, but several things can cause disassociation. The disassociation may be rightful or wrongful (potentially giving rise to damages), but any member can disassociate at any time. *Id.* §§ 48-3a-601(1), (2) & -602(1). In addition, some other events will cause disassociation, such as, among others: (i) events

stated in the operating agreement; (ii) expulsion under the operating agreement; (iii) expulsion by unanimous consent of other members when it is unlawful to carry on activities with the person, when the person's entire transferable interest is transferred (including, e.g., on foreclosure, but not before, of a charging order) or when a corporation, a partnership, or a limited liability company member is dissolved (corporations losing their charter get a ninety-day period to cure, *see id.* § 48-3a-602(5)(c), but, strangely, partnerships or limited liability companies administratively dissolved do not receive such grace); (iv) expulsion by court order; (v) death of the member; or (vi) distribution of the entire transferable interest by a trust or estate that is a member. Also, if the company is member-managed, disassociation of a member occurs on a member's bankruptcy or other insolvency process, e.g., receiver, assignment for creditors, etc., or on appointment of a guardian or other incapacity finding by a court. *Id.* § 48-3a-602(2)–(16).

In cases where a member is dissolved (including administratively), it is not clear what happens to the member's votes and other rights if the other members do not unanimously consent to disassociate the member. Can the votes be exercised at all? Can they be exercised by a single person on behalf of the dissolved organization? If there is no such single person with clear authority, are votes simply not counted? Can the votes be exercised by each member of the dissolved organization in some proportion? It may be good to deal with this in the operating agreement.

The foregoing shows that a number of things can reduce a multi-member company to a single member, thus providing a potential charging order purchaser with voting and other member rights, or even can reduce a company to no members, thus potentially triggering dissolution within ninety days. Preventing a multi-member company from becoming a single member company over time may be a planning goal desired by members in order to protect against other transferees being subjected to the control of a third party purchaser under the charging order of the last remaining member.

Dissolution or other Protection of Purchaser

In a multi-member company, typically a transferee, including a foreclosure sale purchaser under a charging order, cannot trigger dissolution, judicially or otherwise, earlier than the ninety days after there are no more members. The member's right to seek a court-ordered dissolution under the "not reasonably practical" to carry on operations standard of Section 48-3a-701(4)(b) or on the "oppressive" standard of Section 48-3a-701(5) would not seem to apply because the transferee is not a member. Could some relief be available through a court order to "give effect to the charging order" under Section 48-3a-503(2)(b) in the event of oppression? Perhaps, but if so the scope of relief is not clear and the relief might in appropriate cases include dissolution. On the other hand, it is possible that such a court order does not continue and cannot be entered after the charging order is foreclosed and the transferable interest is purchased at the foreclosure sale because at that time, there would be no more charging order and no more lien, but only a transferable interest held by the purchaser.

SOME PLANNING OPTIONS

In some cases, members may want to limit or eliminate some events which would otherwise cause disassociation in order to keep the company from becoming a single member company or one without any members. As long as at least one member, even without distribution rights, remains, the powers of a member (including the right to vote, to expel and disassociate another member, etc.) would not pass to the purchaser of a foreclosed charged transferable interest. The negative consequences discussed above arising from there being a single member or no members, such as a premature dissolution killing the operating

business and allowing creditor access to company assets or permitting oppressive conduct by a new sole member could be avoided. For example, a member's personal representative could become a member in the event of the death or disability of the original member, or an organizational dissolution of a member the organization may be allowed to remain a member for a time (voting and control of membership actions would need to be dealt with). Members may also want to define if and when disassociation occurs in the event of a charging order foreclosure. *See* Utah Code Ann. § 48-3a-602(2) (LexisNexis Supp. 2013). For example, should a member suffering a charging order foreclosure remain a voting member (but without the distribution rights held by the creditor) for some time (if not the last remaining member at foreclosure), or should such a member be disassociated immediately? Absent unanimous consent of the other members, such a person remains a voting member indefinitely. *Id.* § 48-3a-602(5). This provision may prove helpful.

The decision to try to maintain members (indefinitely or for a period of time perhaps with decreasing voting power over time) or to disassociate them quickly may be quite different for a family company or one with a tight insider group, as opposed to a joint venture among unrelated corporations. In the situation of closely aligned members, among other possibilities, it may be important to maintain at least one voting member beyond any charging order purchaser, to have provisions in the operating agreement preventing dissolution, and to require a third person to consent to any amendment to those operating agreement provisions after full disclosure of all relevant information.

These matters may be dealt with in the operating agreement. *Id.* § 48-3a-112(1)–(3). The agreement may not vary the requirement to wind up under Section 48-3a-703(1), (2)(a), (5) on dissolution. *Id.* § 48-3a-112(3)(j). However, dissolution is not the equivalent of winding up. The Act does not require that dissolution must occur in accordance with the fallback provisions, except only for a court-ordered dissolution, which cannot be varied. *Id.* § 48-3a-112(3)(i). Thus, the members have flexibility to establish if and when dissolution leading to wind up occurs. Preventing or postponing disassociation may serve this purpose. Similarly, providing that transferees must consent to dissolve where there is a single remaining member could be useful.

Members may want to specify a third party approval or the satisfaction of a condition in order to amend some or all of the operating agreement, for example, those which impose duties on a sole member. The fiduciary duties of a sole member and the remedies for breach of duty (including damages) could be specified. The duty to provide information beyond the minimum provided by the Act could be required. Specificity about all such duties will be important if dissolution is not desired and a new sole member (the charging order foreclosure purchaser) now controls the destiny of other transferees with an interest in the company. It may even be possible for the agreement (not amendable without the consent of other transferees) to allow the other transferees to actually become members in such a situation.

There are other ideas to consider in drafting an operating agreement as well. Indemnities for a sole member might be limited by the agreement. In some cases the foreclosed member could be given a right to redeem the interest if the charging order is purchased by the company or another member through the pay-off process. Such a redemption right could not apply to a third-party purchaser, though.

Another area with which members may want to deal in their operating agreements is whether a member should be allowed to transfer to a secured creditor which has realized on the interest or some other person not quite all of its transferable interest, e.g., all but 1%, retaining the small interest with a contractual duty to use its governance rights for the benefit of the creditor or other person (and potentially to the detriment of other members) yet avoid the ability of the other members to disassociate that member on the basis that the member transferred all its interest under Section 48-3a-602(4)(b). The comments to Uniform Act Section 602(4)(B) expressly state that this ploy may be used to maintain governance rights (including derivate actions), absent contrary provisions in the operating agreement. Uniform Act, cmt. Section 602(4)(B).

Even in the case of a proceeding by a member leading toward dissolution, *see* Utah Code Ann. § 48-3a-701(5) (LexisNexis Supp. 2013), which under Section 48-3a-112(3) cannot be varied, the Act provides the members the opportunity to buy out the complaining member pursuant to Section 48-3a-702. The valuation and process of Section 48-3a-702 for such a buy-out is not listed in the provisions which may not be varied by agreement. Thus, a buy-sell arrangement under the operating agreement might arguably be substituted as terms agreed to by the parties. *See id.* § 48-3a-702. Also, if notice of the existence of buy-sell provisions and restrictions on transfer is properly available to third persons taking an interest, perhaps they could be effective to require creditor transferees to sell out as well as members. *See id.* § 48-3a-502(6). Again, these provisions appear to allow some planning flexibility.

All these possibilities for planning under an operating agreement will affect the ability of a member's creditors holding charging orders (or those holding security interests, or other transferees) to force dissolution and winding up or otherwise control operations. This goal may be particularly important in a company held by family members or close business associates. These planning possibilities do not seem to violate Section 48-3a-112(3)(n), which provides "except as otherwise provided in Section 48-3a-113 and Subsection 48-3a-114(2)" the agreement may not "restrict the rights under this chapter [i.e., the Act] of a person other than a member or manager" because there are no rights under the Act for creditors or purchasers of foreclosed charged interests to force a dissolution. The provisions of Sections 48-3a-113 and 114, referred to in Section 48-3a-112(3)(n), state that the company is bound by the operating agreement, persons who become members are bound by it (which would include purchasers of a sole member's interest under a charging order), and the obligations of a company and its members to a transferee or disassociated member are governed by the operating agreement. Except for a court order to give effect to a charging order, *see id.* § 48-3a-503(2)(b), an amendment to the operating agreement made after the person became a transferee or disassociated member "is effective with regard to any debt, obligation, or other liability" of the company or its members to that person in the capacity of transferee or disassociated member. *Id.* § 48-39-114(2)(a).

Thus, not only are planning opportunities not prevented by Sections 48-3-112(3)(n), -113, and -114, but later changes in distribution policy, buy-sell arrangements, etc., may well be possible over the objection of a transferee (creditor or not) or of a disassociated member. Naturally, if such an action were to constitute a transfer made with intent to hinder, delay, or defraud a creditor under the fraudulent transfer statute, it may be set aside. *See* Utah Code Ann. § 25-6-1, et seq. (LexisNexis 2007 & Supp. 2013). A court could restrict matters overtly discriminatory against the holder of a charging order under Section 48-3a-503(2)(b) at least until the holder forecloses and becomes a transferee. This leaves considerable room for planning through an operating agreement to protect legitimate interests.

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Twin Crises in the Law

Presented by the Utah State Bar & Utah Law Review OnLaw

Scheduled Presenters

Robert W. Adler is the Interim Dean and the James I. Farr Chair and Distinguished Professor of Law at the University of Utah, S.J. Quinney College of Law.

Judge Wiliam B. Bohling has served as a mediator since his retirement from the bench in 2004. His mediations focus on high-conflict, complex, and multiparty commercial, tort and employment cases.

Keith A. Call is a shareholder at Snow, Christensen & Martineau where he defends lawyers and other professionals in malpractice cases and handles complex intellectual property and commercial litigation matters.

Mary Jane Ciccarello has been the Director of the Utah State Courts Self-Help Center since 2007. She is also the Co-Director of the Borchard Foundation Center on Law and Aging.

Abby M. Dizon-Maughan is an associate at Arnold & Wadsworth where her practice centers on criminal defense.

Justice Christine M. Durham has been on the Utah Supreme Court since 1982, and served as Chief Justice and Chair of the Utah Judicial Council from 2002 to 2012.

Megan Green is a career counselor in the Professional Development Office at the S.J. Quinney College of Law.

Beth A. Hansen is the Director of Career Services at the Brigham Young University Law School.

Judge Royal I. Hansen was appointed to the Third District Court in July 2003 by Gov. Michael O. Leavitt. He is the founding judge of the South Valley Felony Drug Court.

James R. Holbrook is a Clinical Professor of Law at the University of Utah's S.J. Quinney College of Law where he teaches negotiation, mediation, and arbitration.

Jonathan R. Hornok is a 3L at the S.J. Quinney College of Law where he is the executive editor of Utah Law Review OnLaw.

Curtis M Jensen is one of the founding partners of Snow Jensen & Reece, P.C. where he represents clients in all aspects of real estate, construction, banking, business, and litigation. Mr. Jensen is currently serving as President of the Utah State Bar.

Linda M. Jones is an appellate specialist and a founding member of Zimmerman Jones Booher LLC. She also teaches appellate advocacy at the S.J. Quinney College of Law.

Jacque M. Ramos is the founder of J. Ramos Law Firm where she maintains a general civil litigation practice.

Brett G. Scharffs is Associate Dean of Academic Affairs, Francis R. Kirkham Professor of Law, and Associate Director of the International Center for Law and Religion Studies at the J. Reuben Clark Law School.

Sen. Stephen H. Urquhart owns his own law practice in St. George. He has worked for 14 years in the Utah Legislature to improve access to justice.

Former Chief Justice **Michael D. Zimmerman** is a partner in Zimmerman Jones Booher LLC, an appellate boutique. He served on the Utah Supreme Court from 1984–2000 and as Chief Justice from 1994–1998.

Schedule of Events

9:00–9:15	Introduction & Welcome: **Curtis M Jensen** & **Jonathan R. Hornok**
9:15–10:00	Keynote: former **Chief Justice Michael D. Zimmerman**
10:00–10:15	Break
10:15–11:15	Underserved Clients panel, moderated by **Judge Royal I. Hansen** with **Mary Jane Ciccarello** and **Keith A. Call**
11:15–12:15	Underemployed Lawyers panel, moderated by **Megan Green** with **Beth A. Hansen, Abby M. Dizon-Maughan,** and **Jacque M. Ramos**
12:15–1:15	Small group breakout session with large group report & discussion over lunch
1:15–2:15	Professionalism & Economics: Benefit or Burden panel, moderated by **Judge William B. Bohling** with **Judge Royal I. Hansen, James R. Holbrook, Linda M. Jones**, and **Sen. Stephen H. Urquhart**
2:15–2:30	Break
2:30–4:00	Paths Going Forward panel, moderated by former **Chief Justice Michael D. Zimmerman**, with **Justice Christine M. Durham, Curtis M Jensen, Robert W. Adler,** and **Brett G. Scharffs**
4:00–4:30	Closing Remarks, including next steps, by **Curtis M Jensen** and **Jonathan R. Hornok**

September 27, 2013
9:00 am–4:30 pm

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Addressing Twin Crises in the Law: Underserved Clients and Underemployed Lawyers

by James R. Holbrook & Jonathan R. Hornok

The legal profession faces two unprecedented crises: underserved middle-class clients and underemployed lawyers:

- Many poor, modest-means, and middle-class parties cannot afford to hire a lawyer.
- Many recent law school graduates cannot find full-time employment as lawyers.

The World Justice Project's *Rule of Law Index* for 2012-2013, lists the United States as 19th out of 29 high income countries in having "access to civil justice." World Justice Project, *Rule of Law Index 2012-2013*, at 27, 150. In 2010, Attorney General Eric Holder appointed Harvard Law Professor Larry Tribe to serve as a senior counselor in charge of a new Access to Justice Initiative. Tribe was asked to "suggest ways to improve legal services for the poor, find alternatives to court-intensive litigation, and strengthen the fairness and independence of our courts." Charlie Savage, *For an Obama Mentor, a Nebulous Niche*, N.Y. Times, April 7, 2010, at A21. Tribe said, "The truth is that as a nation, we face nothing short of a justice crisis. It is a crisis both acute and chronic, affecting not only the poor but the middle class. The situation we face is unconscionable." Laurence H. Tribe, Senior Counselor for Access to Justice, Speaks at the National Institute of Justice (June 14, 2010).

> *"Pro se litigants do not know or understand the law, precedents, case evaluation, civil procedure, legal research, rules of evidence, courtroom conduct, or methods of dispute resolution such as negotiation and mediation."*

Former Chief Justice Michael Zimmerman highlighted the growing number of *pro se* litigants in his State of the Judiciary address in 1998, noting that "[t]he presence of large numbers of *pro se* litigants is fundamentally inconsistent with [the current structure of Utah's court] system. Their lack of understanding of procedure and the law raises the prospect of the *pro se* litigant losing not on the merits of their case, but on technical grounds." Chief Justice Michael Zimmerman, State of the Judiciary Address (Jan. 19, 1998), *available at* http://www.utcourts.gov/resources/reports/statejudiciary/state98.htm. In 2004, then Chief Justice Christine Durham expressed similar concerns with the lack of access to justice in Utah courts in her

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State of the Judiciary address. Chief Justice Christine Durham, State of the Judiciary Address (Jan. 19, 2004), *available at* http://www.utcourts.gov/resources/reports/statejudiciary/state04.htm. When asked about this issue, Justice Durham recently said,

> It is unacceptable in a nation that claims to be founded on the rule of law that huge numbers of American citizens lack access to their justice system because they cannot afford legal services. Civil legal problems have devastating implications for people's lives, and all of us lose when justice is unavailable for some.

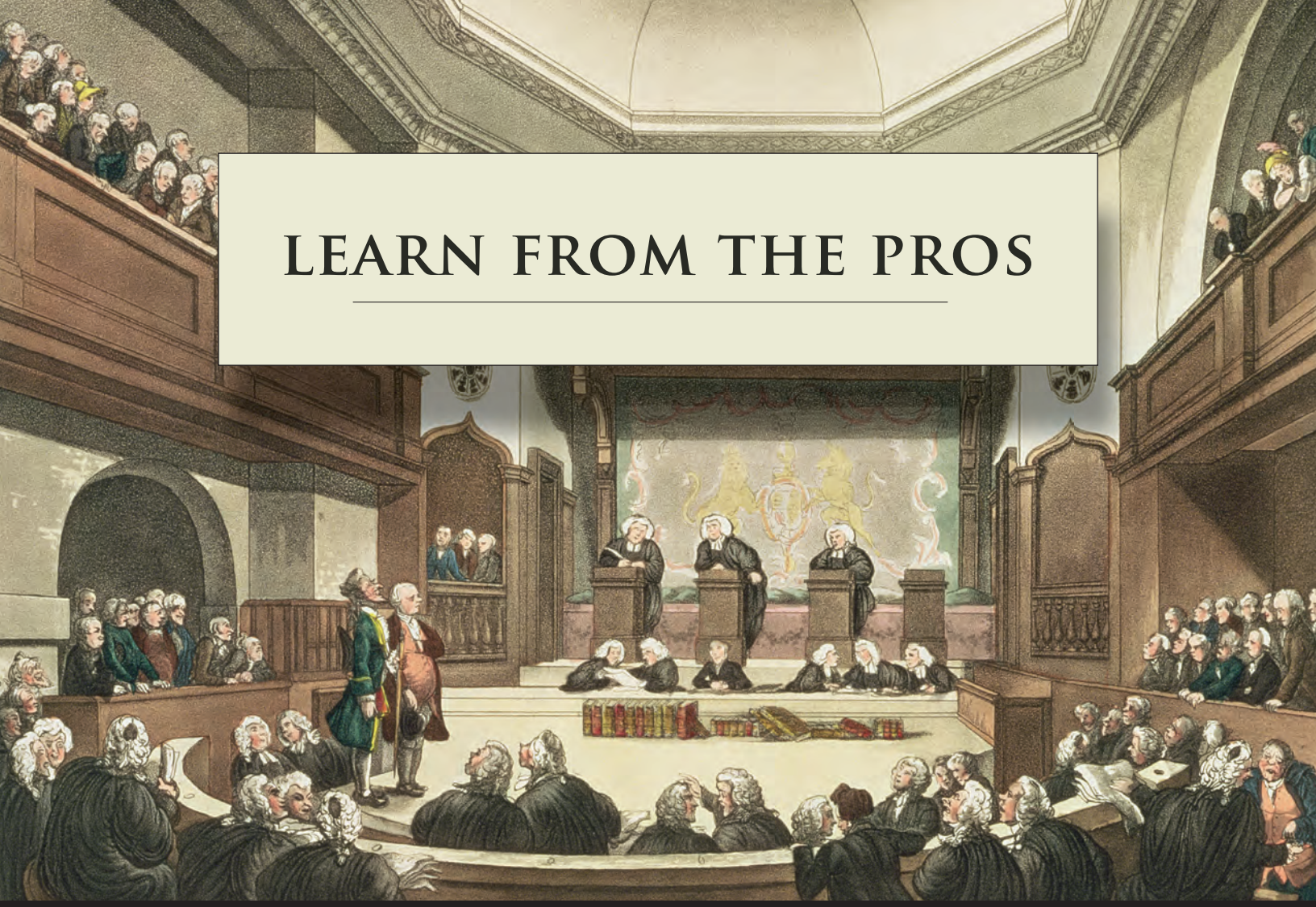
Email from Justice Christine Durham, Utah Supreme Court, to Jonathan Hornok (July 25, 2013) (on file with author).

Pro se litigants do not know or understand the law, precedent, case evaluation, civil procedure, legal research, rules of evidence, courtroom conduct, or methods of dispute resolution such as negotiation and mediation. The ABA announced in July 2010 the results of a national survey of 1,200 state court judges, who said that the number of *pro se* litigants is increasing, particularly since the Great Recession; they do a poor job of representing themselves, they burden judges and clog court dockets; and they often lose in court. Terry Carter, *Judges Say Litigants Are Increasingly Going Pro Se – at Their Own Peril*, ABA Journal (July. 12, 2010), http://www.abajournal.com/news/article/judges_say_litigants_increasingly_going_pro_se--at_their_own_.

In a recent survey of the law school graduating class of 2012 conducted for the National Association for Law Placement, the nine-month post-graduation employment rate for law school graduates was 84.7% (lower than any class since 1994), but only 58% of employed graduates found jobs that were full-time, long-term, and require bar passage. Judy Collins & James Leipold, NALP Member Preview of Class of 2012 Employment and Salary Data 3, 10 (June 18, 2013) (unpublished presentation). This means that less than half of 2012 law school graduates actually entered traditional, full-time law practice.

In February 2013, members of the ABA's Task Force on the Future of Legal Education called for changes in how law students are educated and how the profession is regulated. Ethan Bronner, *A Call for Drastic Changes in Educating New Laywers*, N.Y. Times, February 10, 2013, at A11. One controversial proposal is to shorten legal education to two years so law students can graduate with less debt and enter the profession more quickly. John J. Farmer Jr., Dean of Rutgers School of Law in Newark, proposed that law graduates should be required to have a year of practical experience modeled after medical school residency. John J. Farmer Jr., *To Practice Law, Apprentice First*, N.Y. Times, February 17, 2013, at A17. Whether or not these specific proposals are adopted, it is clear that both legal education and the practice of law must respond to the twin crises.

AUTHOR'S NOTE: *On Friday, September 27, 2013, the Utah State Bar and Utah Law Review OnLaw – the new Utah-focused academic journal at the S.J. Quinney College of Law – will sponsor a CLE discussing these twin crises. Presenters include former Utah Supreme Court Chief Justices Michael Zimmerman and Christine Durham as well as distinguished members of the bench, the Bar, and the academy.*



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Appellate Highlights

by Rodney R. Parker and Julianne P. Blanch

EDITOR'S NOTE: *The following appellate cases of interest were recently decided by the United States Tenth Circuit Court of Appeals, Utah Supreme Court, and Utah Court of Appeals.*

Createrra, Inc. v. Sundial, LC,
2013 UT App 141, 304 P.3d 104 (June 6, 2013)

In this case, the court held that, although well-settled Utah law provides that arbitration agreements must be in writing, the parties could orally modify a notice procedure to allow for email notice. The parties went through a series of arbitrations. The arbitrator delivered each written decision by email only. The arbitrator stated in his first decision that the parties had agreed to service of the arbitration decision via email. Createrra did not object to this statement. Ninety-one days after the arbitrator emailed his final decision to the parties, Createrra moved to vacate all of the decisions. Sundial filed a motion to dismiss because the motion to vacate was untimely under Utah Code Section 78B-11-124(2), which gives a party ninety days after receiving notice to file a motion to vacate an arbitration award. In affirming the trial court's denial of Createrra's motion to vacate, the court also noted that the Arbitration Act only requires notice to be provided "in ordinary course," which is a practical, not technical, concept.

Habnel v. Duchesne Land, LC,
2013 UT App 150 (June 20, 2013)

As an apparent matter of first impression, the Utah Court of Appeals addressed whether a contractual provision allowing for the recovery of attorney's fees in enforcing the terms of a contract applied when a party simply defended against the claims of another but raised no counterclaims or affirmative defenses. In this case, the buyer of a lot and option to build a home sued the seller. A jury ruled against the buyer. The seller then sought attorney fees under the contractual attorney fee provision, which the trial court granted. On appeal, the buyer argued this was error because the seller raised no counterclaims or affirmative defenses and was therefore not enforcing the terms of the contract as required to recover attorney fees. Relying on cases from outside Utah, the court ruled that "[b]y defending against [b]uyers' claims for breach of contract, [s]ellers were enforcing their interpretation of the terms of" the contract and were entitled to fees. *Id.* ¶21

***Harris v. ShopKo Stores, Inc.*, 2013 UT 34 (June 14, 2013)**

In this case, the court reversed the court of appeals' bright line test for apportioning damages between those attributable to the defendant's negligence and those attributable to the plaintiff's pre-existing conditions. The bright-line test held that if the plaintiff's pre-existing condition was asymptomatic on the date of the accident, then the jury was not permitted to allocate a portion of the damages to that condition. The court held that this test was inconsistent with the core principle of tort law that holds defendants liable only for those injuries proximately caused by their negligence. Accordingly, the court held that a defendant may allocate damages to any pre-existing condition as long as evidence at trial provides the jury a sufficient non-arbitrary basis to do so. The court remanded with instructions to order a new trial, finding the defendant's evidence at trial was insufficient to support apportionment because it did not address the extent to which plaintiff's pre-existing condition may have contributed to her injury and pain.

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***Holladay v. Storey*, 2013 UT App 158 (June 20, 2013)**

In this case, the court of appeals upheld the trial court's decision to set a retroactive effective date for the expulsion of an LLC member based on breach of fiduciary duty, holding that the trial court had discretion to backdate the expulsion to the date when the misconduct began. The court also noted numerous problems with issue preservation and briefing on appeal. It declined to consider several issues because they either had not been preserved or because the briefs on appeal did not point the court to the place in the record where preservation occurred. Other issues were reached only because the court "exercised our discretion to independently review the record" to ascertain whether the issues had been preserved. *Id.* ¶11 n.4. The court also declined to consider arguments in reply briefs that were not limited to replying to opposing briefs, and sharply criticized the parties for filing "unnecessarily complicated" briefs that lacked concision and "detract[ed] from" the parties arguments. *Id.* ¶1 n.1.

***Munis v. Holder*, 2013 WL 3306406, _F.3d_ (July 2, 2013)**

In this immigration case, the Tenth Circuit held for the first time that "the hardship determination underlying [a] denial of a waiver of inadmissibility under 8 U.S.C. § 1182(h)(1)(B) is an unreviewable discretionary decision." *Id.* *2. The petitioner, a native of Rwanda and a citizen of Tanzania, "conceded the charge of removability but sought discretionary relief from removal." *Id.* *1. However, due to crimes of moral turpitude, the petitioner could not be admitted into the United States. Accordingly, the petitioner sought a waiver of inadmissibility based on extreme hardship to his wife if he were removed. The immigration judge denied petitioner's request for relief, and the Board of Immigration Appeals dismissed his appeal. The court noted that "[t]he agency's discretionary denial of a waiver of inadmissibility or adjustment of status is unreviewable in the absence of a legal or constitutional question," *Id.* *1. and held that "the hardship determination required for a waiver of inadmissibility under § 1182(h)(1)(B) is an unreviewable discretionary decision." *Id.* *2.

***Murray v. Utah Labor Comm'n*, 2013 UT 38 (June 28, 2013)**

In a departure from prior case law, the supreme court clarified the standard of review applicable in reviewing agency decisions. Specifically, the supreme court determined that the court of appeals erred in applying an abuse of discretion standard when reviewing a labor commission decision, instead of the traditional mixed question of law and fact standard. In doing so, the court noted its "conflicting precedent on [Utah Administrative Procedures Act (UAPA)] standards of review," *id.* ¶15, and sought to clarify its interpretation of UAPA. It concluded that "the plain language of [UAPA] clearly sets forth the type of agency actions for which [courts] may grant relief, but [that] it does not expressly mandate the standards of review [courts] must employ when reviewing those actions." *Id.* ¶18. The court concluded that "that the Legislature intended…traditional standards of review to apply" *id.* ¶21, where no standard is expressed or implied in the statute. Accordingly, the court

determined that "[g]oing forward, the appropriate standard of review of final agency actions will depend on the type of action in question." *Id.* ¶22.

Reynolds v. Bickel, 2013 UT 32 (June 4, 2013)

In this accounting malpractice suit, a business owner sued an accountant who had underestimated the owner's personal tax liability for the sale of three of his limited liability companies. The owner sued as a third party beneficiary of the accountant's services because he was not personally the client – one of his companies was. In order to establish liability under Section 58-26-a-602(b), the owner had to show that the accountant "identified in writing" to the client that the professional services performed on behalf of the client were intended to be relied upon by the owner. The court reasoned that this identification-in-writing requirement was analogous to the statute of frauds, which allows one or more writings to be considered together if there is a nexus between them. Accordingly, the court reversed summary judgment against the owner and held that a series of emails between the owner and accountant which discussed the owner's personal tax liability were enough to satisfy Section 602(b) when taken together in context.

State v. Watkins, 2013 UT 28 (May 10, 2013)

The Utah Supreme Court held in this case that aggravated sexual abuse of a child requires proof that the defendant occupied a position of authority and exercised undue influence over a child. In this case, the defendant moved into a home with his niece, her husband, and her three children. Defendant entered the bedroom where the children slept, kissed a child's head, and pinched her buttocks. The child told her father about the incident and the defendant was convicted of aggravated sexual abuse of a child under Utah Code Section 76-5-404.1(4)(h). That statute provides a non-exhaustive list of people who are in traditional position of authority. The issue on appeal was whether separate proof of undue influence was required where the defendant fell within one of the enumerated categories – in this case an adult cohabitant of a parent. The court held that the state must provide evidence that the defendant both occupied a position of authority and exercised undue influence over the child. Because the state did not provide evidence for both elements of the aggravated sexual abuse of a child statute, it vacated the defendant's conviction and remanded the case to the trial court.

Disproportionate Justice, the Juvenile Court System of Utah

by Michael N. Martinez

In the summer of 2012, I read a *Salt Lake Tribune* article titled "More minority kids ordered to courts; whites get a pass." The story sounded familiar; minority kids are more prone to be arrested and shuttled to a courtroom than their non-minority counterparts, who are diverted into non-penal programs. I remembered similar news articles from at least a decade past, or did I?

Aha, on November 14, 1999, the *Salt Lake Tribune* published an Opinion piece titled "Race Bias in Juvenile Justice." The opening sentence stated, "Utah judges come down harder on minority youths than white kids, according to a new study." The article cited a University of Utah study that found that "minority juvenile offenders receive more severe punishments from judges." The problem was evident, but, as the newspaper opined, a solution could not be determined without "accurate research to define the dimensions of the problem."

> *"Do minority youth commit more crime, or are they just easier to catch? And, when caught, are they incarcerated, rather than diverted to less punishment-oriented programs because they are poor and misunderstand the juvenile system?"*

One year later, on September 4, 2000, the *Deseret News* ran an article titled, "Is jailing more likely for minority youths?" The lead paragraph states, "A quick glance at most adult prison populations shows ethnic minorities are incarcerated at a higher per capita rate than whites. But, a University of Utah report indicates disproportionate numbers of minors are also being jailed, specifically in Utah's juvenile justice system." Brady Snyder, *Is jailing more likely for minority youths?*, Deseret News, *available at* http://www.deseretnews.com/article/780661/Is-jailing-more-likely-for-minority-youths.html?pg=all.

The *Deseret News* article reported that the Utah Task Force on Racial and Ethnic Fairness was releasing a University of Utah-commissioned study that reported juvenile crimes by race and ethnicity. The study found that, in Utah, black juveniles were 41.08 times more likely to be arrested than their white counterparts, Hispanic juveniles were 8.93 times more likely, Pacific Islanders 10.69, and American Indians 9.3. In fact, 21.8% of juveniles arrested were classified as minorities.

In the article, the police denied bias. One officer opined that with fewer minority youths in the community, "the more they stand out and the easier they are to catch." A shooting fish in a barrel theory of law enforcement? But, disproportionate arrests were not the only problem. The University study author added that minority juveniles were also "disproportionately sent to the Division of Youth Corrections after arrest." Of all juveniles arrested, 29.4% of those sent to the Division of Youth Corrections or incarcerated were minorities. So, it appeared there was a systemic bias. Both police and juvenile judges were treating minority juveniles differently than they treated the general juvenile population.

MICHAEL N. MARTINEZ has been a solo practitioner for over 25 years, with representation limited to Spanish speaking clients and non-profit companies. He has served on numerous community boards and Bar committees.

The University report theorized that poverty and lack of understanding of the judicial process were "possible reasons minorities might commit more crime or receive harsher punishments." Which was it? Do minority youth commit more crime, or are they just easier to catch? And, when caught, are they incarcerated, rather than diverted to less punishment-oriented programs because they are poor and misunderstand the juvenile system? I was baffled, and, apparently, so was the study's author. The University professor surmised that more study was necessary, "The unanswered question is: Are more minorities arrested because they commit more crime?" Was this a DNA theory of crime?

When the 2000 study was released, Utah's total Hispanic or Latino population was 9% of the total population, and by far the largest minority population in the state. Hispanic juveniles would have only been a fraction of that percentage. Fast forward a decade. In 2010, minority minors comprised nearly one-fourth of Utah youths. In 2010, Hispanic juveniles were 40.1% of the Hispanic population. While the Hispanic adult population increased 24.1% in one decade, the "under 18" increase was 43.1%. From 2000 through 2010, the Hispanic population increased 77.8%. Salt Lake County is where 49.4% of all minorities reside. In Salt Lake County, minority juveniles are 33.9% of the juvenile population. Pamela Perlich & John Downen, *Census 2010 – A First Look at Utah Results*, Utah Economic and Business Review, Vol. 71, No. 2 (2011), *available at* http://www.bebr.utah.edu.

With the humongous increase in the minority/Hispanic juvenile population in Utah/Salt Lake County between 2000 and 2010, surely, I thought, there would be more effort put into determining the cause of disproportionate juvenile arrests and incarceration. I was wrong. But, now, the Utah Board of Juvenile Justice is so concerned with the disproportionate representation that it started a committee called the Disproportionate Minority Contact Advisory Committee. That committee ran numbers and found that in 2010, minority juveniles were 33.66% of all arrested juveniles. In Salt Lake County, minority juveniles arrested were 39.84% of the total juvenile arrests and Hispanic juveniles were 28.54% of the total juvenile arrests. Minority youth are arrested at a rate that is 68% higher than non-minority youths. Clearly, the policeman had been right in 2000. The more of us there are, the easier we are to find, arrest, and incarcerate. The fish in a barrel and DNA theories are now, apparently, accepted

methods of law enforcement.

The lead sentence in the 2012 *Salt Lake Tribune* story states, "Young Utahns arrested for minor infractions are more likely to have to appear in juvenile court if they are Latino, black or American Indian." Janelle Stecklein, *More minority kids ordered to Utah courts, whites get a pass*, Salt Lake Tribune, Sept. 8, 2012, *available at* http://www.sltrib.com/sltrib/news/54694930-78/diversion-juvenile-utah-court.html.csp. The latest article reported, "[S]tate leaders have intensified their efforts to understand what is causing the disparity and have recruited researchers at the University of Utah to help." *Id*. The story states that, "Utah leaders began studying diversion trends in earnest" in 2003. *Id*. 2003? You mean the pre-2003 studies were just show pieces of intelligentsia?

According to the *Salt Lake Tribune* article, the Utah Board of Juvenile Justice's Disproportionate Minority Contact Advisory Committee is concerned about the overrepresentation of minority youth in detention centers and courtrooms because, "minority youths who did meet the criteria were diverted at a rate significantly lower than whites." *Id*. Youths previously diverted were 25% more likely to be diverted a second time, unless they were minority. Why does this happen? The University study author said, "[W]e can't isolate anything that is specific. [We] can't nail down any one cause." *Id*. Given this inconclusive study, Utah's Juvenile Court Administrator says the study is "informative" and a "little daunting." Armed with this inconclusiveness, the 2011 Disproportionate Minority Contact Compliance Plan's mission statement is to: "Reduce the disproportionate representation of minority youth at decision points within the juvenile justice system, from arrest through transfer and waiver to the adult system." I guess this means that…well I don't know what this means, and apparently neither does the Administrator of the Juvenile Court system, because minority youth are still disproportionately represented in the juvenile system, from arrest to incarceration.

Sheldon Spotted Elk, a member of the Disproportionate Minority Contact Advisory Committee, is quoted in the latest article as making this observation, "Not having minority representation on the police force or on the bench, I think, makes a difference." *Id*. Just like that, without a decade of study funds, Mr. Spotted Elk makes an astute observation that has escaped the criminal justice system. Hire people who have an understanding of the community that is overrepresented. Maybe even some people who are, pardon me, minorities. Of the thirty juvenile court judges in Utah, only three are minorities. And, that is three more than are employed in upper management of the juvenile system. And, there are few minority police officers in Utah. I suspect this is because we are caricatured as looking better in "pin stripe" than blues.

In conclusion, it is clear to me that the juvenile system promotes stereotypes that some juveniles are, due to DNA, more prone to commit crimes and be more violent. These youths are easy to spot, arrest and incarcerate; so they are. Study after study after study documents the problem. Each time the management of the juvenile justice system merely wrings its systemic hands. And, apparently, the juvenile justice overseers, the Utah Commission on Criminal and Juvenile Justice and the Utah Judicial Council, don't mind the disparity in arrests and incarcerations, because they do little to nothing about it.

I write this article because in ten years, minority juveniles will likely comprise nearly 50% of all juveniles in Salt Lake County. Unfortunately, they will probably comprise 90% of the arrests and incarcerations, given the systemic, fish in a barrel, and DNA theories of juvenile justice. And, a la Sonny Bono, "The beat goes on."

A Comprehensive Look at the Newly Proposed Amendments to the Federal Rules of Civil Procedure

by Philip J. Favro

You have heard this one before. Changes are in the works for the rules governing the discovery process that will emphasize proportionality, cooperation, and greater judicial involvement in case management. As conceived, the proposed changes are designed to make discovery more efficient and cost effective, thereby allowing matters to be litigated on the merits instead of in costly satellite litigation.

At first blush, this preamble may seem like a repeat of the 2011 amendments to the Utah Rules of Civil Procedure. Instead, it describes the latest package of proposed amendments to the Federal Rules of Civil Procedure (Federal Rules or Rules). Approved for public comment in June 2013 by the Standing Committee on Rules of Practice and Procedure, the draft amendments are generally designed to streamline the federal discovery process, encourage cooperative advocacy among litigants, and eliminate gamesmanship. The Civil Rules Advisory Committee (Committee), which drafted the amendments, has also tried to tackle the continuing problems associated with the preservation of electronically stored information (ESI). As a result of its efforts, the Committee has produced a package of amendments that affect most aspects of federal discovery practice.

In this article, I provide a comprehensive overview of the newly proposed amendments. This includes the changes that are designed to usher in a new era of cooperation, proportionality and active judicial case management in discovery. I also review the Committee's re-write of Federal Rule 37(e) and its attempt to create a uniform national standard for discovery sanctions stemming from failures to preserve evidence. I conclude by describing the timeline for moving the amendment package forward.

COOPERATION, PROPORTIONALITY AND CASE MANAGEMENT

The overall thrust of the Committee's proposed amendments is to facilitate the tripartite aims of Federal Rule 1 in the discovery process. To carry out Rule 1's lofty yet important mandate of securing "the just, speedy, and inexpensive determination" of litigation (Fed. R. Civ. P. 1), the Committee has proposed several modifications to advance the notions of cooperation and proportionality. Other changes focus on improving "early and effective judicial case management." Judicial Conference of the United States, Report of the Advisory Committee on Civil Rules 4 (May 8, 2013) (Report). The draft amendments that advance these three concepts are each considered in turn.

COOPERATION – RULE 1

To better emphasize the need for cooperative advocacy in discovery, the Committee has recommended that Rule 1 be amended to specify that clients share the responsibility with the court for achieving the rule's objectives. The proposed revisions to the rule (in italics with deletions in strikethrough) read in pertinent part as follows:

> [These rules] should be construed, ~~and~~ administered, *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding.

Report, at 17.

Even though this concept was already set forth in the Advisory Committee Notes to Rule 1, *see* Fed. R. Civ. P. 1 advisory committee's notes 1993 amendments, the Committee felt that an express

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reference in the rule itself would prompt litigants and their lawyers to engage in more cooperative conduct. Report, at 16–17. Perhaps more importantly, this mandate should also enable judges "to elicit better cooperation when the lawyers and parties fall short." *Id*. Indeed, such a reference, when coupled with the "stop and think" certification requirement from Federal Rule 26(g), should give jurists more than enough procedural basis to remind counsel and clients of their duty to conduct discovery in a cooperative and cost effective manner. *See Bottoms v. Liberty Life Assurance Co. of Boston*, No. 11-cv-01606-PAB-CBS, 2011 WL 6181423, at *4–6 (D. Colo. Dec. 13, 2011).

PROPORTIONALITY – RULES 26, 30, 31, 33, 34, 36

The logical corollary to cooperation in discovery is proportionality. Proportionality limitations, which require that the benefits of discovery be commensurate with its burdens, have been extant in the Federal Rules since 1983. Nevertheless, they have been invoked too infrequently over the past 30 years to address the problems of over-discovery and gamesmanship that permeate the discovery process. *See* Philip J. Favro and Derek P. Pullan, *New Utah Rule 26: A Blueprint for Proportionality Under the Federal Rules of Civil Procedure*, 2012 Mich. St. L. Rev. 933, 966 (2012). In an effort to spotlight this "highly valued" yet "missing in action" doctrine, Report, at 4, the Committee has proposed numerous changes to the current rules regime. The most significant changes are found in Rules 26(b)(1) and 34(b).

Rule 26(b)(1) – Tightening the Scope of Permissible Discovery

The Committee has proposed that the permissible scope of discovery under Rule 26(b)(1) be modified to spotlight the limitations that proportionality imposes on discovery. Those limitations are presently found in Rule 26(b)(2)(C) and are not readily apparent to many lawyers or judges. Similar to newly amended Utah Rule of Civil Procedure 26, the proposed modification (in italics) would address this problem by making clear that discovery must satisfy proportionality standards:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case considering the amount in controversy, the importance of the*

> *issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.*

Report, at 19–20. By moving the proportionality rule directly into the scope of discovery, counsel and the courts should gain a better understanding of the restraints that this concept places on discovery.

The Committee has additionally proposed that Rule 26(b)(1) be modified to enforce the notion that discovery is confined to those matters that are relevant to the claims or defenses at issue in a particular case. Even though discovery has been limited in this regard for many years, the Committee felt that this limitation was being "swallow[ed]" by the "reasonably calculated" provision in Rule 26(b)(1). Report, at 11 (quoting Fed. R. Civ. P. 26(b)(1)). That provision currently provides for the discovery of relevant evidence that is inadmissible so long as it is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Despite the narrow purpose of this provision, the Committee found that many judges and lawyers unwittingly extrapolated the "reasonably calculated" wording to broaden discovery beyond the benchmark of relevance. Report, at 11 (quoting Fed. R. Civ. P. 26(b)(1)). To disabuse courts and counsel of this practice, the "reasonably calculated" phrase has been removed and replaced with the following sentence: "Information within this scope of discovery need not be admissible in evidence to be discoverable." *Id*.

Similarly, the Committee has recommended eliminating the provision in Rule 26(b)(1) that presently allows the court – on a showing of good cause – to order "discovery of any matter relevant to the subject matter." Report, at 22 (citing Fed. R. Civ. P. 26(b)(1)). In its proposed "Committee Note," the Committee justified this suggested change by reiterating its mantra about the proper scope of discovery: "Proportional discovery relevant to any party's claim or defense suffices." Report, at 22.

Rule 34(b) – Eliminating Gamesmanship with Document Productions

The three key modifications the Committee has proposed for Rule 34 are designed to eliminate some of the gamesmanship associated with written discovery responses. The first such change is a requirement in Rule 34(b)(2)(B) that any objection made in response to a document request must be stated with specificity. *Id*. at 15. This recommended change is supposed to do away with the assertion of general objections. While such "boilerplate" objections have almost universally been rejected in federal discovery practice, they rather remarkably still appear in Rule 34 responses. *See, e.g., Mancia v. Mayflower Textile Servs. Co*., 253 F.R.D. 354, 358 (D. Md. 2008). By including an explicit requirement for specific objections and coupling it with the threat of sanctions for non-compliance under Rule 26(g), the Committee may finally eradicate this practice from discovery.

The second change is calculated to address another longstanding discovery dodge: making a party's response "subject to" a particular set of objections. Report, at 15. Whether such objections are specific or general, the Committee concluded that such a conditional response leaves the party who requested the materials unsure as to whether anything was withheld and if so, on what grounds. To remedy this practice, the Committee added the following provision to Rule 34(b)(2)(C): "An objection must state whether any responsive materials are being withheld on the basis of that objection." *Id*. at 33. If enforced, such a requirement could make Rule 34 responses more straightforward and less evasive.

The third change is intended to clarify the uncertainty surrounding the responding party's timeframe for producing documents. As it now stands, Rule 34 does not expressly mandate when the responding party must complete its production of documents. *Id*. at 16. That omission has led to delayed and open-ended productions, which can lengthen the discovery process and increase litigation expenses. To correct this oversight, the Committee proposed that the responding party complete its production "no later than the time for inspection stated in the request or [at] a later reasonable time stated in the response." *Id*. at 26. For so-called "rolling productions," the responding party "should specify the beginning and end dates of the production." *Id*. at 27. Such a provision should ultimately provide greater clarity and increased understanding surrounding productions of ESI.

Other Changes – Cost Shifting in Rule 26(c), Reductions in Discovery under Rules 30, 31, 33, 36

There were several additional changes the Committee recommended that are grounded in the concept of proportionality. While space does not allow for a detailed review of all of these changes, practitioners should take note of the new cost-shifting provision in Rule 26(c). That change would expressly enable courts to allocate the expenses of discovery among the parties. *Id*. at 12,

20–21, 23.

The Committee has also suggested reductions in the number of depositions, interrogatories, and requests for admission. Under the draft amendments, the number of depositions is reduced from ten to five. Oral deposition time has also been cut from seven hours to six. As for written discovery, the number of interrogatories would decrease from 25 to 15 and a numerical limit of 25 has been introduced for requests for admission. That limit of 25, however, does not apply to requests that seek to ascertain the genuineness of a particular document. *Id.* at 12–15.

CASE MANAGEMENT – RULES 4, 16, 26, 34

To better ensure that its objectives regarding cooperation and proportionality are achieved, the Committee has introduced several rules changes that would increase the level of judicial involvement in case management. Most of these changes are designed to improve the effectiveness of the Rule 26(f) discovery conference, to encourage courts to provide input on key discovery issues at the outset of a case, and to expedite the commencement of discovery.

Rules 26 and 34 – Improving the Effectiveness of the Rule 26(f) Discovery Conference

One way that the Committee felt that it could enable greater judicial involvement in case management was to have the parties conduct a more meaningful Rule 26(f) discovery conference. Such a step is significant since courts generally believe that a successful conference is the lynchpin for conducting discovery in a proportional manner. *See, e.g.*, 7th Circuit Electronic Discovery Committee Principles Relating to the Discovery of Electronically Stored Information 2.05-2.06 (Aug. 1, 2010).

To enhance the usefulness of the conference, the Committee recommended that Rule 26(f) be amended to specifically require the parties to discuss any pertinent issues surrounding the preservation of ESI. This provision is calculated to get the parties thinking proactively about preservation problems that could arise later in discovery. It is also designed to work in conjunction with the proposed amendments to Rule 16(b)(3) and Rule 37(e). Changes to the former would expressly empower the court to issue a scheduling order addressing ESI preservation issues. Under the latter, the extent to which preservation issues

were addressed at a discovery conference or in a scheduling order could very well affect any subsequent motion for sanctions for failure to preserve relevant ESI. *See* Report, at 21–23.

Another amendment to Rule 26(f) would require the parties to discuss the need for a "claw-back" order under Federal Rule of Evidence 502. *Id*. at 7, 18–19. Though underused, Rule 502(d) orders generally reduce the expense and hassle of litigating issues surrounding the inadvertent disclosure of ESI protected by the lawyer–client privilege. To ensure this overlooked provision receives attention from litigants, the Committee has drafted a corresponding amendment to Rule 16(b)(3) that would enable the court to weigh in on Rule 502 related issues in a scheduling order. *Id*.

The final step the Committee has proposed for increasing the effectiveness of the Rule 26(f) conference is to amend Rule 26(d) and Rule 34(b)(2) to enable parties to serve Rule 34 document requests prior to that conference. These "early" requests, which are not deemed served until the conference, are "designed to facilitate focused discussion during the Rule 26(f) conference." *Id*. at 23. This, the Committee hopes, will enable the parties to subsequently prepare Rule 34 requests that are more targeted and proportional to the issues in play. *Id*. at 9.

Rule 16 – Greater Judicial Input on Key Discovery Issues

As mentioned above, the Committee has suggested adding provisions to Rule 16(b)(3) that track those in Rule 26(f) so as to provide the opportunity for greater judicial input on certain eDiscovery issues at the outset of a case. In addition to these changes, Rule 16(b)(3) would also allow a court to require that the parties caucus with the court before filing a discovery-related motion. The purpose of this provision is to encourage judges to informally resolve discovery disputes before the parties incur the expense of fully engaging in motion practice. According to the Committee, various courts have used similar arrangements under their local rules that have "prove[n] highly effective in reducing cost and delay." *Id*. at 8, 18–19, 23.

Rules 4 and 16 – Expediting the Commencement of Discovery

The Committee has also recommended that the time for the commencement of discovery be shortened after the filing of the complaint so as to expedite the eventual disposition of a given case. In particular, Rule 4(m) would be revised to shorten time to serve the summons and complaint from 120 days to 60 days. In addition, Rule 16(b)(2) would reduce by 30 days the time when a court must issue a scheduling order. *Id*. at 4–5.

PRESERVATION AND SANCTIONS UNDER A REVISED FEDERAL RULE 37(e)

The Committee has separately considered issues regarding the over-preservation of evidence and the appropriate standard of culpability required to impose sanctions for any failures to preserve relevant information. Even though the current iteration of Rule 37(e) is supposed to provide guidance on these issues, amendments were deemed necessary given the inherent limitations with the rule.

As it now stands, Rule 37(e) is designed to protect litigants from court sanctions when the programmed operation of their computer systems automatically destroys ESI. Fed. R. Civ. P. 37(e). Nevertheless, the rule has largely proved ineffective as a national standard because it does not apply to pre-litigation information destruction activities. As a result, courts often used their inherent authority to bypass the rule's protections and punish clients that negligently, though not nefariously, destroyed documents before a lawsuit was filed. Moreover, the rule applied only to ESI and did not address issues surrounding the preservation of paper documents or other forms of evidence. All of which has caused confusion among parties over what needs to be maintained for litigation, resulting in the over-preservation of information. *See* Report, at 35.

The amendments to Rule 37(e) are designed to address these issues by "provid[ing] a uniform standard in federal court for sanctions for failure to preserve." *Id*. at 46. They do so by removing the possibility that courts could impose sanctions under Rule 37(b)(2)(A) for either negligent or grossly negligent conduct in connection with preservation obligations. *Id*. Instead, the proposal would shield pre-litigation destruction of information from sanctions except where "the party's actions":

(i) caused substantial prejudice in the litigation and were willful or in bad faith; or

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation.

Id. at 43 (emphasis omitted).

In making a determination on this issue, courts could not just rely on their inherent powers. Instead, they would employ a multifaceted analysis to examine the nature and motives underlying the

party's information retention decisions. Such factors include:

> (A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;
>
> (B) the reasonableness of the party's efforts to preserve the information;
>
> (C) whether the party received a request to preserve information, whether the request was clear and reasonable, and whether the person who made it and the party consulted in good faith about the scope of preservation;
>
> (D) the proportionality of the preservation efforts to any anticipated or ongoing litigation; and
>
> (E) whether the party timely sought the court's guidance on any unresolved disputes about preserving discoverable information.

Id. at 43–44.

By ensuring that the analysis includes a broad range of considerations, the proposed rule appears to delineate a balanced approach to preservation questions. Such an approach may very well benefit companies, which could justify a reasonable document retention strategy on best corporate practices for defensible deletion. The Committee contemplates as much, observing that "a party that adopts reasonable and proportionate preservation measures should not be subject to sanctions." *Id*. at 35.

While the draft amendments to Rule 37(e) provide some key protections to organizational litigants, the proposed rule also addresses some of the lingering concerns from the plaintiffs' bar. For example, the rule specifically empowers the court to order "additional discovery" or other "curative measures" when a litigant has destroyed information that it should have retained for litigation. *Id*. at 41–42 (emphasis omitted). Under these provisions, an aggrieved party can ferret out the circumstances surrounding the destruction of that data. If the party uncovers evidence suggesting the destruction was sufficiently grievous, it could ultimately justify the imposition of sanctions under either of the above tests.

THE TIMELINE FOR ACTION ON THE PROPOSED AMENDMENTS

Whether you favor or disagree with the proposed amendments, now is the time to share your opinion with the Committee. Public comment on the amendments is open through February 15, 2014. Comments may be provided in writing. Alternatively, oral testimony may be offered at one of the Committee's three public meetings.

The public comment period is important to the Committee and often results in revisions to draft amendments. For example, before the 2006 amendments to the Rules became effective, the Committee revised Rule 37(e) based on feedback received during the public comment period. *See* Philip J. Favro, *Sea Change or Status Quo: Has the Rule 37(e) Safe Harbor Advanced Best Practices for Information Management?*, 11 Minn. J.L. Sci. & Tech. 317, 329 (2010). This latest round of amendments may prove no different as the Committee is seeking feedback on five issues relating to its proposal to amend Rule 37(e). *See* Report, at 50–51.

Once the public comment period has closed, the amendments will go back to the Committee for reflection and possible revision. After winding their way through approval channels in the Federal Judicial Conference, the amendments will eventually be sent to the U.S. Supreme Court. Assuming the Supreme Court approves the amendments and Congress has no objections, the earliest date the amendments could take effect would be December 1, 2015.

Regardless of how things turn out, it is impressive to observe the comprehensive and thoughtful approach that the Committee has taken with respect to the amendment package. Just as the Utah Supreme Court's Advisory Committee on the Rules of Civil Procedure did when it prepared the 2011 amendments, the Committee appears to have developed workable solutions to longstanding problems with the discovery process. I generally support the amendment package and hope that the proposed modifications affect federal discovery practice for the better.

Keep Calm and Argue the Facts: A Pragmatic Approach to the Doctrine of Chances

by Dain Smoland

Last year the Utah Supreme Court handed down *State v. Verde*, 2012 UT 60, 296 P.3d 673, which explicitly embraced a shadowy and oft-maligned exception to the character evidence prohibition known as the Doctrine of Chances. The Doctrine of Chances (DOC) has been around since at least 1915, and I suspect it has been confusing attorneys and judges since that time.

As explained in *Verde*, the DOC may allow evidence of other events and circumstances outside the charges in question, based on "the objective improbability of the same rare misfortune befalling one individual over and over." *Id.* ¶ 47 (citation and internal quotation marks omitted). Specifically, the defendant in *Verde* was charged with sexual assault, and the court remanded the case back to the trial court to consider whether evidence of *other* uncharged sexual assault allegations from other complaining witnesses could be admissible under the DOC to disprove fabrication on the part of the current complaining witness. *Id.* ¶ 62. The remanded case is still pending retrial as of this writing.

> *"[T]he general character evidence prohibition may have Constitutional dimensions…but there is not any clear constitutional mandate for it."*

In other words, being accused of three similar sexual assaults at three different times by three different witnesses may be an "improbably rare misfortune" which is unlikely to befall an innocent individual, making it more likely that the current witness is not fabricating his story. That's the logic of the DOC.

Many defense attorneys are dismayed by the implications of *Verde*. Understandably so. At first blush, the DOC threatens to completely swallow the enshrined prohibition against character and other bad acts evidence offered by the prosecution to show propensity. The obvious complaint against it goes: "Can't the prosecution now offer evidence of *any* prior crimes or accusations and call it DOC evidence instead of character evidence?"

That's a valid question. I think the answer is definitively *no*, which I will explain later, but, perhaps more importantly, I think defense attorneys would be better served by preparing to distinguish DOC evidence or argue for its exclusion under Rule 403 rather than pushing back against the doctrine itself, as tempting as it may be. There are four reasons.

The Doctrine of Chances Is Probably Here to Stay for a While

While an idea's longevity is certainly no reason to accept it on principle, it is a good reason to doubt that the idea can easily be put to rest. As mentioned above, the DOC has been around for 100 years, and, though there has been disagreement during that time, *see* Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. Rich. L. Rev. 419, 444 (2006) (listing multiple evidence scholars that believe the DOC is not a

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valid exception to the character evidence prohibition), several of the major authorities in the evidence world have considered and accepted it, e.g., Imwinkelried and Wigmore. *See id*. at 434–57; 2 John H. Wigmore, *Evidence in Trials at Common Law* § 302 (James H. Chadbourn rev. 1979). Many state and federal courts are also on board, *see State v. Verde*, 2012 UT 60, ¶ 53 n.27 296 P.3d 673 (noting other jurisdictions that have adopted the DOC), including, most importantly, our own. Like it or not, the DOC has some momentum, and there is Newton's law of motion working in its favor now. Further, as explained in the section below, there might be an important practical reason why the doctrine persists.

The Doctrine of Chances May be Good for Defendants as a Whole, if It Preserves the General Character Evidence Prohibition

It is worth remembering that the general character evidence prohibition may have Constitutional dimensions, *see* Imwinkelried at 434, but there is not any clear constitutional mandate for it. Evidently, it can be modified at will by the legislature, which is not famous for its friendliness to criminal defendants. The 2008 modification allowing evidence of other bad acts in cases of child molestation is a good example. *See* Utah Rule of Evidence 404(c). The legislature decided that evidence of past child molestation is simply too important and probative to be restricted by the character prohibition. There is no reason the exception couldn't be widened, or the general character evidence prohibition done away with entirely. Some scholars have argued for such a step. *See, e.g.*, Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 Iowa L. Rev. 777, 803–04 (1981) ("The first step in a rational approach to the admissibility of specific acts evidence would be to abolish the purported distinction between character and noncharacter or propensity and nonpropensity evidence, and to state simply and directly that the admissibility of specific acts evidence depends on a careful balancing of probative value against the concerns with prejudice, time consumption, and distraction of the fact-finder.").

In fact, as Imwinkelried argues the DOC might be the release valve that keeps the whole character evidence prohibition from imploding. *See* Imwinkelried at 460. His argument is long and detailed, and I certainly would not do it justice here, but as a very brief suggestion, consider a famous DOC case in America, *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973). The defendant was charged with murder of her eight-month-old foster child, who died of asphyxiation. *Id*. at 128–30. The testifying physician explained that he thought homicide was the likely cause of death but that the asphyxiation might be explainable by some previously unidentified disease. *Id*. That testimony probably left room for reasonable doubt, were it not for other supporting evidence that the judge allowed in under the DOC. Namely, over the preceding twenty-five years, at least twenty of the small children that passed through the defendant's care had suffered episodes of unexplained asphyxiation. *Id*. at 130. Seven of those children had died. *Id*. Unsurprisingly, the defendant was convicted of homicide. *See id*. at 128.

Now consider if such a case happened today, in Utah, and imagine the public attention it would receive. Consider what would happen if the evidence of those other dead children was not allowed at trial, because of the general character evidence prohibition, and the defendant was then acquitted. Consider the public outrage, the "Miscarriage of Justice" headlines, the television pundits and letters to the editor. As Imwinkelried put it, most laypersons would consider the exclusion of such obviously relevant evidence "an affront to common sense." Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. Rich. L. Rev. 419, 421 (2006). And it likely would not be long until the legislators started looking at the whole character prohibition sideways, thinking, "[D]o we really need this thing?"

With the general character prohibition gone, judges would be left doing Rule 403 balancing for every case with prior bad acts evidence, and doing it *without* the scale automatically tipped away from bad character evidence. It would be very time consuming and probably result in the admission of more such prior bad acts evidence. I would argue that the general character evidence prohibition serves defendants better, even with the shadow of the DOC over it.

Doctrine of Chances Evidence *Is* Distinguishable from Character Evidence

To explain the distinction, I will present two cases. The first is the "original" DOC case of *Rex v. Smith*, 11 Cr. App. R. 229, 84 L.J.K.B. 2153 (1915). In that case, the defendant's new wife

died in the bathtub, leaving the defendant a substantial inheritance (the Bathtub Case). *See* Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, at 434 (citing *Rex*). The defendant claimed it was an accidental drowning, but you can likely guess the evidence allowed in under the DOC: two of the defendant's previous wives had also died in his (startlingly accident-prone) bathtub. *See id*.

The second case is a hypothetical, and, I hope, typical character evidence case: the defendant is charged with bank robbery (the Bank Robbery Case). Defendant claims mistaken identity, but has a shaky alibi. The prosecution wants to offer evidence that the same defendant was convicted of robbing two other banks in the previous five years.

The distinguishing question, then, is whether the facts of each case present an "improbably rare misfortune" – a statistical anomaly that tends to rule out the possibility of innocent bad luck. *See State v. Verde*, 2012 UT 60, ¶ 47, 296 P.3d 673.

So, in the Bathtub Case, the underlying, uncontested facts of the case – that three of the defendant's wives drowned in his bathtub – present a statistical anomaly that tends to rule out the possibility of innocent bad luck. In the Bank Robbery Case, the underlying, uncontested facts of the case – that the defendant has been convicted of two prior bank robberies and now a third bank has been robbed – do not present a statistical anomaly tending to rule out the possibility of innocent bad luck. The fact that another bank robbery *happened* is not at all unusual; after all, banks get robbed all the time.

That, I think, is an easy, short-hand way to distinguish the two archetypal cases, but maybe it begs the question. How do you define an "improbably rare misfortune"? Let's say the prosecution in the Bank Robbery Case is especially clever, and they say, "Ok, we don't want to offer the prior bank robbery convictions, we just want to point out to the jury that the defendant has been *accused* of three different bank robberies. What are the chances that an innocent man gets accused of three separate bank robberies? It's an improbably rare misfortune."

Framed that way, the situation is more akin to the actual *Verde* case, which deals with uncharged accusations, and *Verde* itself provides the answer: it sets out four foundational requirements that must be met for DOC evidence involving uncharged misconduct: (1) materiality, (2) similarity, (3) independence between the accusers, and (4) unusual frequency. *Id*. ¶¶ 57–61. Here, the prosecution's theory is easily shot down for lacking independence among the accusers. As the court points out, "[T]he existence of collusion among various accusers would render ineffective the comparison with chance repetition." *Id*. ¶ 60.

It is hard to imagine a situation where accusations *made by law enforcement agents* would be sufficiently independent to represent an "improbably rare misfortune." After all, if someone is under suspicion (or has been convicted) of past bank robberies, they will be top on the list of suspects for the next unsolved bank robbery.[1] Modern law enforcement, with its instantaneous background checks and inter-agency databases, involves collusion by its very nature. That fact alone should help assuage the fear that the DOC would be relevant in most criminal cases.

Borderline DOC Evidence Can be Excluded under Rule 403

Certainly the archetypal DOC case still *looks* like a propensity argument – that is, it still seems to rely on assumptions about repeated (bad) behavior over time, which the character evidence prohibition ostensibly prohibits. In the Bathtub Case, the fact of the previous drownings only seems relevant if the jury uses it to assume that the defendant tends to murder his wives by drowning them and that he did the same thing in the present case, i.e., propensity. Likely this is another reason why the DOC is so troubling to practitioners.

Imwinkelried argues that pure DOC cases do not rely on character propensity because the chain of inferences stops short of character judgment. *See* Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. Rich. L. Rev. 419, 448–57 (2006). In the Bathtub Case, for example, the statistical improbability of the multiple drowning may help a jury determine only that one or more of the drownings "was not accidental." *Verde* explicitly adopts Imwinkelried's reasoning, where the court says that propensity inferences "do not pollute" the DOC reasoning. *State v. Verde*, 2012 UT 60, ¶ 50, 296 P.3d 673 (explaining that the DOC inferences may help a jury reach "a conclusion that one or some of the occurrences were not accidents or false accusations").

Certainly the DOC at least *invites* (if not begs for) a character propensity judgment (as do many types of admissible 404(b) exceptions, such as Modus Operandi). So, regardless of how convinced you are by the logical distinction above,[2] the most effective way to use the DOC's obvious association with character propensity is under a Rule 403 balancing argument. After all, the DOC's arbitrary stopping point – the "conclusion that one or

some of the occurrences were not accidents or false accusations" – significantly limits its relevance. And that stopping point is very likely to be lost on the jury, who will almost certainly take the obvious next step to character judgment and propensity, regardless of any limiting instructions.

Therefore, defense attorneys can argue that proffered DOC evidence has to be *especially* probative of a contested fact for the limited permissible relevance not to be substantially outweighed by the obvious risk of unfair character judgments. *Verde* invites such an argument, in fact, having remanded the case to the trial court to consider not just the DOC itself, but "the weighing called for under rules 404(b) and 403." *See id.* ¶ 62.

Conclusion

Of course, the distinction between DOC evidence and character evidence would not always be as easy as in my examples. Close cases will be difficult, but the four factors outlined in *Verde* significantly restricts the doctrine's general applicability under Rule 404(b), and the logic which distinguishes it from impermissible character evidence limits it even still – making it susceptible to Rule 403 exclusion in all but the most unusual cases. My point is that the DOC need not be the exception that swallows the rule, but just another fact-specific and somewhat nebulous exception in an area of law already thick with them. And arguing these exceptions might well be the price we pay for the general character prohibition's continued existence.

1. Evidence scholar Paul Rothstein makes a similar point in an argument against the DOC. *See* Paul Rothstein, *Intellectual Coherence in an Evidence Code*, 28 Loy. L.A. L. Rev.1259, 1263 (1995) ("In the movie Casablanca, the police, having heard a crime had been committed, respond with the classic expression, 'Round up the usual suspects.' As in real life, a person who has been charged before commonly is charged again any time a vaguely similar crime is reported. Thus, contrary to the doctrine of chances, it is not so unlikely that an innocent person would be repeatedly charged falsely."). Obviously, Rothstein's version of the DOC did not include the foundational requirements adopted in *Verde*.
2. Personally, I am not quite convinced. But, as I noted above, I think the DOC is persistent and that there is a pragmatic reason for its existence, so, practically speaking, it is a moot point.

Commission Highlights

The Utah State Bar Board of Commissioners received the following reports and took the actions indicated during the July 17, 2013 Commission Meeting held at the Westin Conference Center, Snowmass, Colorado.

1. The Commission adopted a policy describing the process to be followed in the event it chooses to appoint a successor to fill a vacant Commission position.

2. The Commission approved moving forward to negotiate a contract for web-based member benefits.

3. The Commission approved the appointment of the following Committee Chairs: Admissions: Steven T. Waterman and Hon. James Z. Davis; Bar Examiner: David K. Broadbent and Tiffany M. Brown; Bar Examination Administration: Joan M. Andrews; Bar Journal: William D. Holyoak; Budget & Finance: Ray Westergard; Character & Fitness: Bryon Benevento and Andrew Morse; CLE Advisory: Jonathan O. Hafen; Disaster Legal Response: Andrea Valenti Arthur and Brooke Ashton; Ethics Advisory Opinion: John A. Snow; Fee Dispute Resolution: William M. Jeffs; Fund for Client Protection: David R. Hamilton; Governmental Relations: John Bogart and Paxton R. Guymon; Member Resource: Robert L. Jeffs; Mentor Training and Resource: Tracy Gruber and Troy Booher; Unauthorized Practice of Law: Sarah Spencer and Jonathan Rupp; 2013 Fall Forum: Cathleen C. Gilbert and Denver C. Snuffer; 2014 Spring Convention: Aaron Randall and Richard M. Matheson.

4. The Commission appointed the following ex officio members for the 2013-2014 year: the Immediate Past Bar President; the Bar's Representatives the ABA House of Delegates; Utah's ABA Members' Representative to the ABA House of Delegates; the Utah Minority Bar Association Representative; the Women Lawyers of Utah Representative; the Paralegal Division Representative; the J. Reuben Clark Law School Dean; the S.J. Quinney College of Law Dean; and the Young Lawyers Division Representative.

5. The Commission approved Curtis Jensen, Jim Gilson, John Lund, Rob Rice, and Lori Nelson as members of the Executive Committee.

6. The Commission by resolution approved the members of the Executive Committee to serve as signators on the Bar's checking accounts.

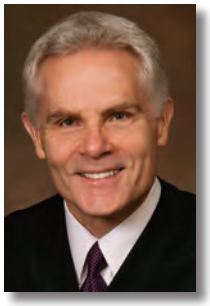
7. The Minutes of the June 14, 2013 Commission Meeting were approved by consent.

8. The July 2, 1013 Report and Recommendations of the Client Security Fund were approved by consent.

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

2013 Summer Convention Awards

The Utah State Bar presented the following awards at its Summer Convention in Snowmass Village, Colorado:



JUDGE OF THE YEAR
Michael D. Lyon

LAWYER OF THE YEAR
Peter Stirba

SECTION OF THE YEAR
Solo, Small Firm, and Rural Section
Cathleen Gilbert, Chair

COMMITTEE OF THE YEAR
Budget and Finance Committee
Ray O. Westergard, Chair

KIRTON | McCONKIE

Look what's going on at Kirton McConkie.

We're moving our Utah County office.

Our Utah County office is growing and has moved to the Thanksgiving Park complex in Lehi, just off I-15. The new space is substantially larger with over 20,000 square feet to accommodate 10 attorneys from the previous Utah County office, 7 attorneys relocating from our Salt Lake City office and new attorneys over the next few years.

The move reflects our commitment to Utah County and its continued growth, as well as to an increasing level of service for our existing clients in areas such as business, intellectual property, tax and estate planning, technology, international and litigation.

UTAH COUNTY ATTORNEYS

Attorneys at this office are Eugene Bramhall, Anthony Schofield, David Glazier, Kenneth Burraston, David Shaw, Joel Wright, Matthew Wride, Peter Schofield, Geoff Germane and Joseph Osmond. Joining them from the Salt Lake City office are David Hildebrandt, David Wahlquist, Richard Armstrong, Jason Beutler, Adam Wahlquist, Katie Laird and Randall Kent.

Thanksgiving Park Four
2600 W. Executive Parkway
Suite 400
Lehi
801.426.2100 *tel*

Kirton McConkie Building
50 East South Temple
Salt Lake City
801.328.3600 *tel*

1800 World Trade Center
60 East South Temple
Salt Lake City
801.328.3600 *tel*

ATTORNEYS AT LAW

Kirton McConkie is a full-service law firm representing business, technology, real estate, intellectual property, litigation, immigration, international, healthcare, construction, employment, tax, estate planning and family law clients.

www.kmclaw.com

Pro Bono Honor Roll

Alig, Michelle – Tuesday Night Bar
Allsop, Kenneth – Domestic Case
Amann, Paul – Tuesday Night Bar
Angelides, Nicholas – Senior Cases
Babcock, Robert – Consumer Case
Baeder, Steve – Family Law Clinic
Baker, Jim – Senior Center Legal Clinic
Ban, Joel – VA Clinic
Barrick, Kyle – Senior Center Legal Clinic
Belnap, Allison – Tuesday Night Bar
Bennett, Gracelyn – Bankrupty Hotline
Benson, Jonathan – Immigration Case
Benson, Jonny – Immigration Clinic
Beringer, Maria Nicolle – Bankrupty Hotline
Bertelsen, Sharon – Senior Center Legal Clinic
Blotter, Scott – Bankruptcy Case
Bogart, Jennifer – Street Law Clinic
Cadwell, Sara – Domestic Case
Clark, Melanie – Senior Center Legal Clinic
Combe, Steven – Tuesday Night Bar
Conley, Elizabeth – Senior Center Legal Clinic
Conyers, Kate – VA Clinic
Coombs, Brett – Street Law Clinic
Corporon, Mary – Domestic Case
Couser, Jessica – Family Law Clinic
Dietz, Tadd – Street Law Clinic
Donovan, Sharon – Domestic Case
Farley, Kt – Street Law Clinic
Ferguson, Phillip – Senior Center Legal Clinic
Fox, J. Tayler – Expungement Case
Gartside, Chloe – Domestic Case, Tuesday Night Bar
Gittins, Jeff – Street Law Clinic
Green, John C. – Domestic Case
Ha, Jennifer – Bankruptcy Case
Hall, Brent – Family Law Clinic
Harding, Sheleigh – Family Law Clinic
Hart, Laurie – Senior Center Legal Clinic
Harvey, Michelle – Debtor's Clinic
Hashimoto, Michael – Tuesday Night Bar
Hawkes, Danielle – Street Law Clinic
Hendrix, Rori – Domestic Case
Holje, Mike – Tuesday Night Bar
Hollingsworth, April – Street Law Clinic
Huntington, Barry – Domestic Case
Hyde, Ashton – Tuesday Night Bar
Jensen, Michael – Senior Center Legal Clinic
Johnson, Gregory – Domestic Case
Johnson-Gutierrez, Heather – Tuesday Night Bar
Keeling, Pamela – Domestic Case
Kesselring, Christian – Street Law Clinic, Rainbow Law
Kessler, Jay – Senior Center Legal Clinic
Lambert, Alyssa – Domestic Case
Larson, Kelli – Domestic Case, Family Law Clinic
LeBaron, Shirl Don – Domestic Case
Lee, Terrell – Senior Center Legal Clinic
Lillywhite, Andrew – Tuesday Night Bar
Lund, Niel – Domestic Case
Ly, Vinh – Immigration Case
Marx, Shane – Rainbow Law
Maughan, Joyce – Senior Center Legal Clinic
McCoy II, Harry – Senior Center Legal Clinic
Meadows, William – Domestic Case
Miller, Nathan – Senior Center Legal Clinic
Miya, Stephanie – Medical Legal Clinic
Montoya, Sara – Tuesday Night Bar
Morrow, Carolyn – Domestic Case, Family Law Clinic
Motschiedler, Susan – Tuesday Night Bar
Murphy, Carol – American Indian Clinic
O'Neil, Shauna – Bankruptcy Hotline
Ovard, Kyler – VA Clinic
Pack, Heather – Domestic Case
Palacios, Frances – Domestic Case
Parker, Kristie – Senior Center Legal Clinic
Pearson, Rachel – Domestic Case
Perschon, Charles – Domestic Case
Peterson, Jessica – Tuesday Night Bar
Pettey, Bryce – Tuesday Night Bar
Ralphs, Stewart – Family Law Clinic
Roberts, Kathie – Senior Center Legal Clinic
Ryon, Rebecca – Tuesday Night Bar
Saunders, Robert – Park City Clinic
Schofield, Tom – Tuesday Night Bar
Scholnick, Lauren – Street Law Clinic
Schulte, Liz – Tuesday Night Bar
Semmel, Jane – Senior Center Legal Clinic
Silverzweig, Mary – Bankrupty Hotline
Smith, Tiffany – Tuesday Night Bar
Snow, Lowry – Domestic Case
Soderberg, Gregory – Domestic Case
Sorensen, Rick – Domestic Case
Squires, Nicole – Tuesday Night Bar
Stephens, Jeff – Tuesday Night Bar
Stevens, Adam – Tuesday Night Bar
Stevens, Jeffrey – Domestic Case
Stormont, Charles – Tuesday Night Bar
Strand, Katy – VA Clinic
Strand, Peter – VA Clinic
Thomas, Benjamin – Domestic Case
Thorne, Matt – Tuesday Night Bar
Thorpe, Scott – Senior Center Legal Clinic
Timothy, Jeannine – Senior Center Legal Clinic
Tolboe, Christopher – Domestic Case
Trueblood, D. Randall – Domestic Case
Trujillo, Scott – Protective Orders
Walkenhorst, Steve – Tuesday Night Bar
Wicks, Robyn – VA Clinic
Williams, Camille – Domestic Case
Williams, Scott – Domestic Case
Williams, Timothy – Senior Center Legal Clinic
Wilson, Analise – Tuesday Night Bar
Winzeler, Zack – Tuesday Night Bar
Wolfley, Nathan – Domestic Case
Yauney, Russell – Domestic Case, Family Law Clinic
Zidow, John – Tuesday Night Bar

The Utah State Bar and Utah Legal Services wish to thank these volunteers for accepting a pro bono case or helping at a clinic in the months of June-July 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/2013ProBonoVolunteer to fill out a volunteer survey.

2013 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2013 Fall Forum Awards. These awards have a long history of honoring publicly those whose professionalism, public service, and personal dedication have significantly enhanced the administration of justice, the delivery of legal services, and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org by Friday, September 13, 2013. The award categories include:

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

View a list of past award recipients at: http://www.utahbar.org/bar-operations/history-of-utah-state-bar-award-recipients/

Supreme Court Seeks Attorneys to Serve On MCLE Advisory Board

The Utah Supreme Court is seeking applicants to fill anticipated vacancies on the Utah Mandatory Continuing Legal Education Advisory Board. The purposes and objectives of the Board include oversight of the MCLE program, accreditation of CLE courses or activities, and handling of compliance issues. Appointments are for a three-year term. No lawyer may serve more than two consecutive terms as a member of the Board. Interested attorneys should submit a resume and letter indicating interest and qualifications to:

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

Applications must be received no later than October 15, 2013.

Supreme Court Seeks Attorneys to Serve on Diversion Committee

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

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

Applications must be received no later than October 30, 2013.

Bar Members Working and Playing Hard in Snowmass

Photos and member survey comments; the Board of Commissioners will review all comments made in determining future convention plans.

After a cooling mist, Bar members gathered at Snowmass's 8,000 foot elevation, forgetting their cares and the 100+ temperatures throughout Utah.

A member said, "These meetings are one of the few opportunities where attorneys and judges that might not normally interact have a chance to mingle and socialize. In my view this is very important for camaraderie and esprit de corps. Every year I run into people that I have not seen for years, and I meet new people from both large and small firms."

The kids enjoyed face painting and getting to know new and old friends. A member said, "The CLE is important, but more important are the relationships developed and strengthened between attorneys and their families."

In the morning, for those not staying at the Westin, the aerial "skittles" made for a short and inspiring commute.

Regarding the content, two sessions inspired much comment: Law, Justice, and the Holocaust: How the Courts Failed Germany by Dr. William F. Meinecke: A member said, "Wow, what a powerful message. Very good, important topic. Relevant. Scalia's follow up was also quite impactful." And of Justice Scalia's keynote address, a member said, "Offensive and thought provoking. Probably worth seven hours of CLE because of the thoughts and discussion that flowed from that presentation."

On a lighter note, Judge Kate Toomey and Dr. Stephen Nash kept a full house focused on the question of who owns the past and what came out of the Snowmastodon dig.

A member said, "Dr. Nash from Denver's Natural History Museum was awesome. That was so cool. My daughter was quite excited by it. The sold-out nature of the CLE is indicative of the family orientation of our annual meetings. I like bringing family members to a few CLEs of interest." In the photo, Dr. Nash is showing a branch excavated from the Zeigler Reservoir site (pictured in upper left above gondolas) with beetle galleries preserved, one of the smaller species found.

Families rode the gondolas to a high-elevation party. A member said, "The Family Picnic activities were terrific. Someone at the Utah Bar put a lot of thought making the kids happy, which gave the attorneys and their spouses time to socialize. The little bikes, face painting, rock climbing, bounce houses and plenty of green space were a huge success. Job well done."

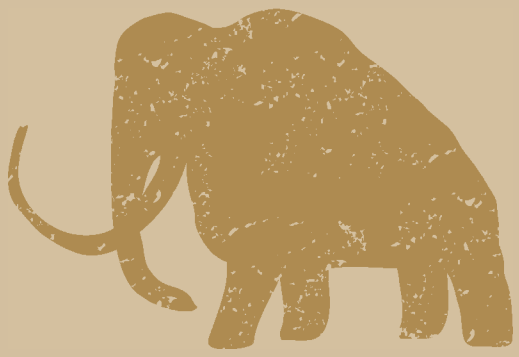
Regarding the recreation activities, a member said, "I think we need three years there to really appreciate the place. There is so, so, so much to do there! I barely spent enough time in Aspen or discovering the mountainside. My wife and kids kept telling me of great stuff I needed to do. I missed Maroon Bells. I did not schedule the rafting. We did not go fishing."

Member Roger Kraft did discover the mountain, and hiked from Base Camp to Summit, and captured the stunning view. He also saw these wildflowers hiking the Rim Trail.

Member Tony Kaye seems to not have missed any great stuff. Among his many adventures, he went riding with his daughter Sarah, and rafting "The Numbers" section of the Arkansas River (over Independence Summit from Snowmass) with his family, Sarah and William having rejected the more placid Browns Canyon (pictured below).

New President Curtis Jensen addressed the convention after being sworn in. Also sworn in as commissioners were Kenyon Dove and Susanne Gustin, and, as president-elect, James D. Gilson. "This Board of commissioners devotes countless hours working for justice, and I am fortunate to be associated with such an energetic and dedicated group," said Jensen.

Member E. Gregg Tobler won the low-carbon-footprint award by taking the California Zephyr to Snowmass. He says, "It was an experience, mostly positive. It was nice not to have to drive. The train was on-time both ways."



Thank You
to everyone who attended!

Utah's New Lawyer Training Program Wins ABA Professionalism Award

Former Utah State Bar Presidents Nate Alder and Lori Nelson, along with current Bar President Curtis Jensen, NLTP Director Elizabeth Wright, and Utah State Bar Executive Director John Baldwin were on hand to accept the E. Smythe Gambrell Professionism Award at the ABA Annual Convention.

The American Bar Association awarded the Utah State Bar New Lawyer Training Program the E. Smythe Gambrell Professionalism Award at the American Bar Association Annual Convention in San Francisco on August 9, 2013.

The E. Smythe Gambrell Professionalism Awards are bestowed annually by the ABA Standing Committee on Professionalism. The Awards honor excellence and innovation in professionalism programs by law schools, bar associations, professionalism commissions, and other law-related organizations.

The Gambrell Awards were established in 1991 and are named for E. Smythe Gambrell, ABA and American Bar Foundation president from 1955 to 1956. Gambrell founded the Legal Aid Society in Atlanta, where he practiced law from 1922 until his death in 1986.

In 2009, the Utah State Bar implemented a mandatory mentoring program for new admittees to the bar. The goal of the Utah State Bar's New Lawyer Training Program ("NLTP") is to train new lawyers during their first year of practice in professionalism, ethics, and civility. The NLTP assists new lawyers in acquiring the practical skills and judgment necessary to practice in a highly competent manner. The NLTP is also a means for all Utah attorneys to learn the importance of organizational mentoring, including the building of developmental networks and long-term mentoring relationships.

New Lawyer NLTP participants work with a Utah Supreme Court Approved mentor during their first year of practice. The mentor and new lawyer are required to meet at least once a month for twelve months to discuss the new lawyer's legal work, professional development, and adjustment to the practice of law. They are also required to discuss the Rules of Professional Conduct as a means of more effectively teaching and fostering professionalism, ethics, and civility.

The Gambrell Award judges were particularly impressed by the Utah State Bar's commitment to a program that exposes every new lawyer to the benefits of qualified mentoring, ensures systematic inclusion of a full array of essential professional development themes in the mentoring experience, provides that all program mentors are experienced and in good standing, and conscientiously monitors program effectiveness and user satisfaction.

The judges also noted Utah's NLTP's popularity among new lawyers and the program's positive and progressive regional impact, observing that Western states like Nevada, New Mexico, and Oregon have modeled their mentoring programs on Utah's.

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/office-of-professional-conduct-ethics-hotline/. Information about the formal Ethics Advisory Opinion process can be found at www.utahbar.org/opc/bar-committee-ethics-advisory-opinions/eaoc-rules-of-governance/.

PUBLIC REPRIMAND

On July 11, 2013, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Derek J. Barclay for violation of Rules 3.3(a) (Candor Toward the Tribunal) and 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Barclay is an employee of a law firm. In the course of a litigation matter, Mr. Barclay was instructed to obtain an affidavit from an employee of a client. The affidavit was to be included in a reply memorandum that was due shortly. Mr. Barclay prepared and sent a draft of the affidavit. On the afternoon of the due date of the affidavit, Mr. Barclay still had not received a signed copy of the affidavit. After trying to reach the affiant at her office and on her cell phone, Mr. Barclay talked to the owner of the firm, who stated that the affiant would sign the affidavit. By 5:00 pm that day, Mr. Barclay had not heard from the affiant. Mr. Barclay signed the affiant's name to the affidavit, and had the signature notarized by a notary at the firm. He then filed the affidavit with the court. The next day, the affiant called Mr. Barclay and indicated that her supervisor had some concern about statements in the affidavit, and she would not be able to sign it until her supervisor spoke to someone at the firm. Two weeks later, the client learned that the affidavit had been filed with the court. She sent several emails to the firm, asking them to strike the affidavit and inform the court what had happened. Mr. Barclay did not attempt to strike the affidavit or inform the court at that time. Mr. Barclay later admitted to the court that he had forged the affiant's signature. Mr. Barclay's mental state was negligent. There was injury to the client in that she had to retain legal counsel to address the situation and there was injury to the legal system and the profession because it undermines the integrity of the courts when an officer of the court submits a forged affidavit

upon which he knows the court will rely.

Mitigating factors:
No prior record of discipline; no selfish motive; and remorse.

PUBLIC REPRIMAND

On June 5, 2013, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Raymond N. Malouf for violation of Rules 1.1 (Competence), 3.1 (Meritorious Claims), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:
A man was living in a home owned by his parents. The man's girlfriend's mother alleged that she loaned him money. Mr. Malouf, on behalf of the girlfriend's mother, filed a lawsuit against the man and his parents in an effort to collect the money that had been loaned to the man. Mr. Malouf filed a Notice of Lis Pendens against the home owned by the man's parents. At no point did the man ever have a legal interest in the home. The court concluded that the claims were not warranted by existing law, and were without merit and not asserted in good faith, and that the lien on the property was illegal and invalid. Mr. Malouf's behavior was generally negligent. There was injury to the parents in that they spent time and money dealing with the lawsuit. They also had a cloud on the title that kept them from doing anything with the property. There was harm to the system because of the time spent on litigating issues without merit.

ADMONITION

On June 1, 2013, 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 4.2(a) (Communication with Persons Represented by Counsel) of the Rules of Professional Conduct.

In summary:
An attorney representing a client in a dispute sent opposing counsel a letter indicating the representation. Opposing counsel, who was a Utah attorney, responded to the email the

same day. Even though the opposing counsel was licensed in Utah, the attorney sent an email indicating that the attorney had discovered that opposing counsel was not a licensed Utah attorney and that the attorney intended to delete opposing counsel's previous email without reading it and delete any future emails the attorney received without reading them. According to opposing counsel's notarized statement, opposing counsel responded to the Utah attorney's email the same day and provided the Utah attorney the opposing counsel's Utah Bar number. Even so, the attorney directly contacted opposing counsel's client regarding the possibility of settling the dispute. The attorney admitted that the attorney contacted the client when the attorney knew that the client was represented by counsel. The Utah attorney's mental state was negligent. There was little or no injury caused by the Rule violation.

ADMONITION

On May 20, 2013, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 3.1 (Diligence) of the Rules of Professional Conduct.

In summary:

The attorney represented five defendants in a civil case. On the first day of trial, the attorney informed the court that the attorney had a separate matter set before another judge. The attorney left the courtroom to go deal with that matter. The attorney indicated that an attorney representing one of the other defendants would cover for the attorney in the trial. The other attorney was not co-counsel with the attorney. The attorney returned to the courtroom about an hour later, but then left again late in the afternoon and did not return that day. The attorney never asked the court for permission to leave the trial. The next day, the attorney was late for the trial, because the attorney had been in another courtroom on another matter. Between the first and second day of the trial, the attorney missed over three hours of court time. Later, the trial court entered an Order finding that the attorney developed a course of misconduct during the trial. The trial court found the attorney in contempt of court for the attorney's actions. The sanction was 30-days in jail, which was suspended on the condition that the attorney pay a fine. The attorney's mental state was negligent. There was little or no injury given that the defendants' interests were aligned and the attorney's clients had no defenses that were distinct from the other defendants.

Mitigating factors:

Absence of dishonesty or selfish motive; good faith effort to make restitution and rectify the consequences of the attorney's conduct; imposition of other penalties and sanctions; and remorse.

RESIGNATION WITH DISCIPLINE PENDING

On July 10, 2013, the Utah Supreme Court entered an Order Accepting Resignation with Discipline Pending concerning James B. Belshe for violation of Rule 8.4(c) (Misconduct) of the Rules of Professional Conduct.

In summary:

While working for a law firm, Mr. Belshe submitted reimbursement requests for travel expenses purportedly related to meetings with clients. However, Mr. Belshe did not meet with clients and was actually billing the clients for personal travel. While working for another law firm, Mr. Belshe caused a settlement check to be paid directly to the client, rather than the firm, and then directed the client to pay an expert fee to a consulting company that was owned by Mr. Belshe. Mr. Belshe improperly received funds to which he was not entitled and which belonged to the firm.

Paralegal Division 2013-2014 Leadership

Allen, Heather	Director At Large	YLD, Community Service Co-Chair
Andersen, Sharon	Director At Large	Parliamentarian, Membership Co-Chair
Burke-Ellison, Tally	Director At Large	Bar Journal, Utilization Committee Co-Chair
Eriksson, Julie	Director At Large	Finance Officer, Utilization Committee Co-Chair, Heather Finch Scholarship Committee Co-Chair
Harper, Carma	Director At Large	Membership Co-Chair, Modest Means Committee, Pro-Bono Commission
Hazlett, Krystal	Director At Large	Marketing and Publications Chair, Long Range Planning, Community Service Committee Co-Chair
Jeffs, Cheryl	Director At Large	CLE Committee Co-Chair
Wanberg, Geneve	Director At Large	CLE Committee Co-Chair
McCall, Karen	Region II	Secretary, Membership Committee
Jimenez, Kari	Region IV	Job Bank, Professional Standards Chair
Davis, Danielle	Chair	Bar Commission, Paralegal of the Year Committee Chair, Bylaw Revisions Committee

CLE Calendar

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

RESCHEDULED 9/13/13 | 8:30 am – 4:15 pm — **7.5 hrs.**

Annual Securities Law Workshop. Featured speaker: Salt Lake County Mayor Ben McAdams. Cost: $150 for Securities Law Section members, $225 for others.

09/13/13 | 8:30 am – 12:00 pm — **Approx. 3 hrs.**

Litigation Section – Cache County CLE & Golf. 550 East 100 North, Smithfield. CLE only: for Litigation Section members and Cache Co. Bar members $30, $90 for others. CLE & Golf: $40 for Litigation Section members and Cache Co. Bar members, $145 for others.

09/17/13 | 8:30 am – 1:30 pm — **4 hrs.**

Fall Corporate Counsel Section Seminar. Legal Writing with Marilynn Bush LeLeiko. Cost $20 for current Corporate Counsel Section members, $120 for others.

09/18/13 | 9:00 am – 3:45 pm — **6 hrs. Ethics (including 1 hr. Prof/Civ)**

OPC Ethics School. $225 before 09/06/13, $250 after.

09/20/13 | 8:30 am – 5:00 pm

iSymposium (fka Utah Cyber Symposium). Adobe Offices, Lehi, UT. $50 for students, $75 for non-bar member attendees (does not include CLE credit), $150 for Cyberlaw Section members (includes CLE credit), $170 for other bar members.

09/25/13 | 8:30 am – 2:30 pm — **5 hrs. self study**

21st Annual Estate and Charitable Gift Planning Institute Webcast. $20.

09/27/13 | 9:00 am – 4:30 pm — **7 hrs. (including 1 hr. Prof/Civ)**

Twin Crises in the Law. 1) Underserved middle class clients; and 2) under-employed lawyers. $25 if you sign up with Pro Bono and Modest Means, $210 otherwise.

10/02/13 | 5:30 pm – 8:00 pm — **2 hrs.**

Evening with the Justice Court Judges. Reception: 5:30–6:00. Seminar: 6:00–8:00. Cost: $70, Active under 3: $50.

10/04/13 — **Approx. 6 hrs. (incl. 1 hr. Ethics)**

Annual ADR Academy. $190 for section members, $220 for others.

10/04/13 | 8:00 am – 12:00 pm — **3 hrs.**

Salt Lake County CLE & Golf – The Ridge Golf Club. 5055 Westridge Boulevard, West Valley City, UT. Evidentiary Boot Camp – The Nuts and Bolts of Evidence in the Courtroom. Presenters include: Hon. Dee V. Benson, U.S. Federal District Court; John R. Lund, Snow Christensen & Martineau; and Hon. Terry L. Christiansen, Third District Court. Cost for Litigation Section members: $40 for CLE only, $45 for CLE & Golf. Cost for others: $90 for CLE only, $135 for CLE & Golf.

10/17/13 | 8:30 am – 12:30 pm

New Lawyer Required Ethics Course. All new lawyers who took the two-day bar exam are required to attend this course. No admittance to this course after 9:00 am. $75.

10/25/13

Construction Law Bi-Annual Meeting

11/14/13 | 5:00 pm – 8:00 pm AND 11/15/13 | 8:00 am – 5:00 pm

2013 Fall Forum – Little America Hotel, 500 South Main Street, Salt Lake City.
Early registration (by November 1): $235 for attorneys, $160 for active under 3-years attorneys and non-lawyer assistants. After November 1: $260 for attorneys, $185 for active under 3-years attorneys and non-lawyer assistants. See the brochure in the center of this *Bar Journal* for the full agenda and registration.

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.

FOR SALE

RETIRING – Well established 40 year practice, same location, phone number, fax. 8,500-plus client base. Excellent Davis County location and office equipment. Literally a turn-key operation. Traditionally 55% criminal, 25% domestic, balance: PI; civil litigation; business; estate; and real estate. Will assist in transition. Submit inquires to: Lawoffice1972@gmail.com.

POSITIONS AVAILABLE

Strong & Hanni Law Firm is seeking attorneys to expand our existing Business Transactions and Estate Planning practice areas in our Salt Lake and Sandy offices. We seek attorneys with an established client base in the following areas: Corporate Finance, Business Bankruptcies and Estate Planning. Strong & Hanni has a progressive compensation model and we are seeking attorneys that are excited to be rewarded for their entrepreneurial achievements. Send inquiries to: rmangone@strongandhanni.com.

OPPORTUNITIES IN EUROPE: LLM in Transnational Commercial Practice – www.legaledu.net. Visiting Professorships in Eastern Europe – www.seniorlawyers.net. Center for International Legal Studies / Salzburg, Austria / US Tel 970-460-1232 / US Fax 509-356-0077 / Email office@cils.org.

In-House Corporate Counsel. IM Flash Technologies, LLC, a world-leading semiconductor manufacturing company based in Lehi, Utah seeks a three to five-year experienced attorney to join our small in-house legal team, reporting to Senior Counsel. This role is wide-ranging with considerable responsibility (vendor contracts, research, internal consultation i.e. environmental, risk management, antitrust, and more) and will require a motivated, self-reliant individual with a proven ability to work as part of a team. The position offers a very desirable combination of competitive salary, excellent benefits, and a fast-paced work environment in this dynamic, growing company in the high-tech industry.

The City of St. George is seeking a Civil Attorney, salary $60,345–67,888. Benefits package includes health care coverage at date of hire. Acts as counsel and advisor to the City of St. George and its departments in civil, criminal, business, and regulatory issues. Requires: Juris Doctor Degree and two years as a practicing attorney. Job Description available at www.sgcity.org/hr. To apply: submit a completed City of St. George Employment Application on-line at www.sgcity.org; via fax to 435-627-4679; by email to jobs@sgcity.org; or in person to Human Resources, City of St. George, 175 E. 200 N. Position is open until filled. Refer questions to Vickie at 435-627-4673. Pre-employment drug screening and criminal record check is required. EOE. We make reasonable efforts to provide reasonable accommodation to disabled candidates.

Kipp and Christian, P.C., a law firm in Salt Lake City downtown is seeking an Attorney with 3-5 years experience. The candidate should have a high level of knowledge in litigation skills, including proficiency in legal research, conducting depositions, trial preparation, drafting motions, legal briefs and other legal documents. Excellent verbal and writing skills are a must. Experience in insurance defense litigation is preferable. Please send resume by e-mail only to: gbernardo@kippandchristian.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.

NEWLY BUILT-OUT, 250 SQ. FT. LARGE EXECUTIVE DOWNTOWN OFFICE with full services & warm associations with seasoned lawyers is now only $850 a month. Next to the courts with 5th floor Main Street & mountain views. Contact Richard at (801) 534-0909 or richard@tjblawyers.com.

SERVICES

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.

Attorney To Attorney Services: Estate and business planning attorney with 15 years of experience is available for attorney-to-attorney work. Increase the services you can offer your clients without having to hire more employees. Reasonable rates and very fast turnaround. Email Pattie Christensen at pchristensen@utahestateplanners.com for more information

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.

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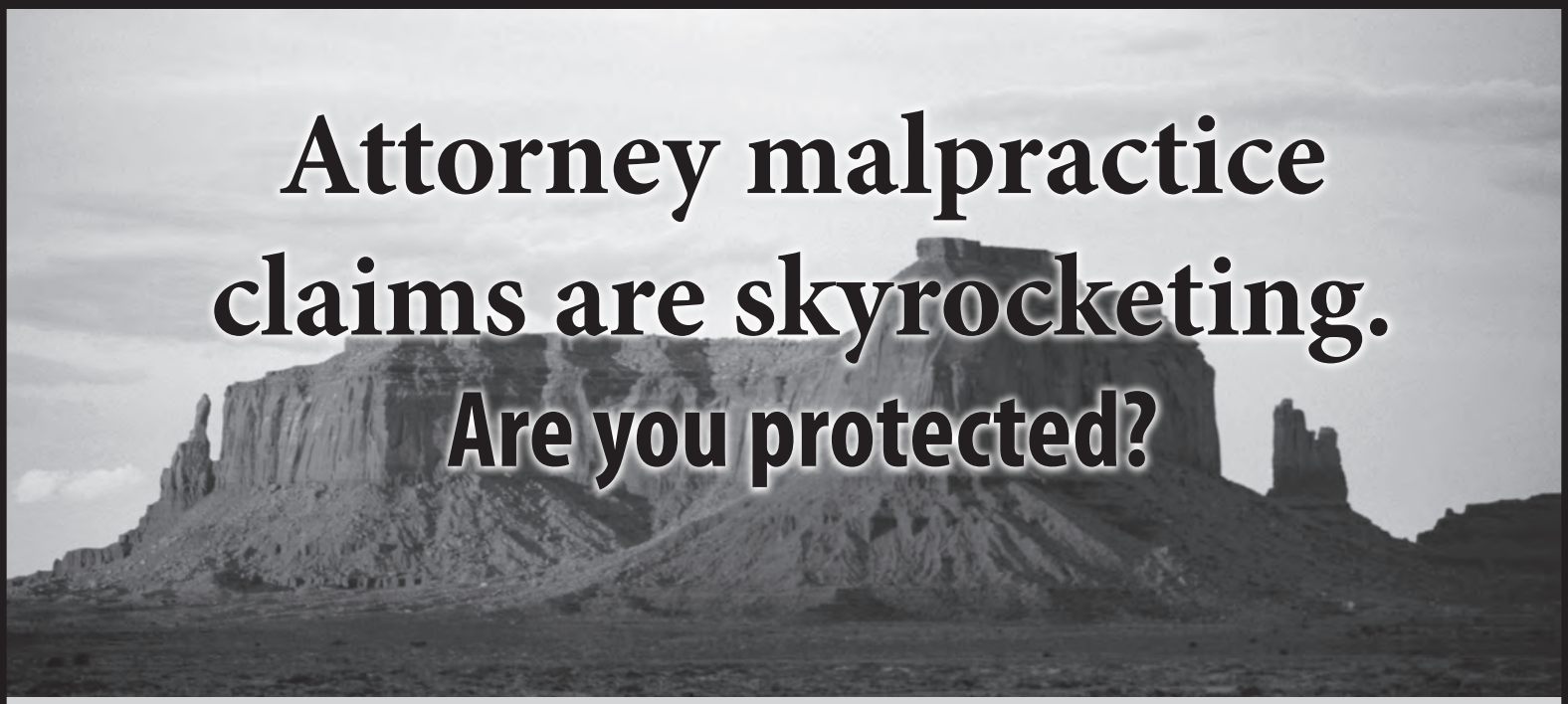

Attorney malpractice claims are skyrocketing.

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.

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

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