Volume 18 No. 4
Jul/Aug 2005

Utah Bar JOURNAL

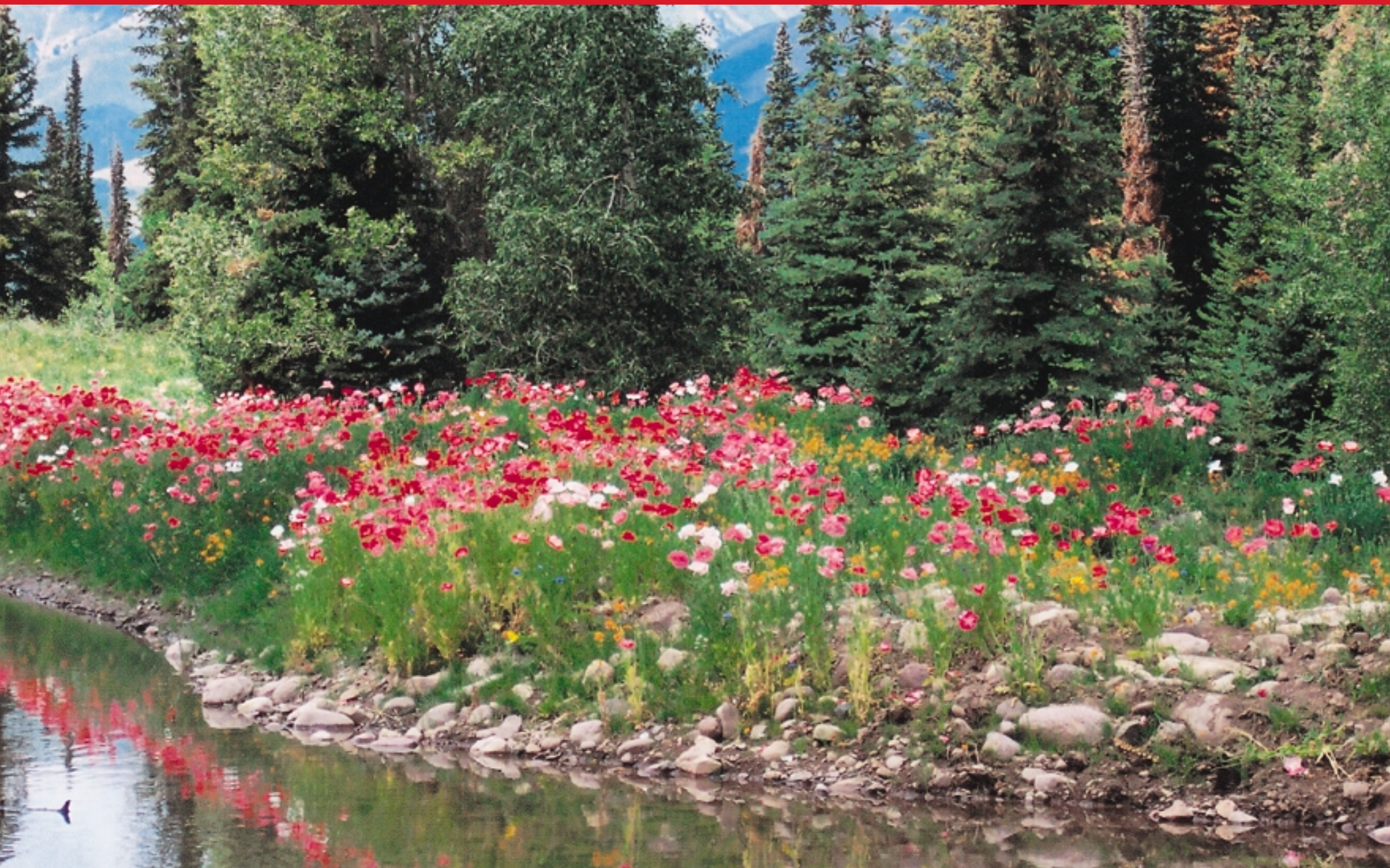


Table of Contents

"Making Law" and "Finding Facts" – Unavoidable Duties of an Independent Judiciary by John J. Flynn	6
Get Ready for the Bankruptcy Amendments of 2005 by Joel Marker	12
Bankruptcy Litigation: Some Practical Pointers by J. Robert Nelson	18
A Guide to The Foreign Corrupt Practices Act by Robert A. Youngberg	22
Practice Pointer: Avoiding Fee Disputes and the Bar Complaints That Sometimes Accompany Them by Kate A. Toomey	28
Federal Appeals: The Scoop on Electronic Submission and Filing by Douglas E. Cressler	30
Views from the Bench: Learning Professionalism and Civility – Thoughts for New Members of the Bar by Judge Derek P. Pullan	32
Standards of Professionalism & Civility: Standard 8 by Linda Jones	38
State Bar News	40
Paralegal Division	54
CLE Calendar	55
Classified Ads	56

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

MISSION OF THE BAR: *To represent lawyers in the State of Utah and to serve the public and the legal profession by promoting justice, professional excellence, civility, ethics, respect for and understanding of, the law.*

COVER: Thousand Peaks Ranch on the Weber River, east of Oakley, Utah. Photo by Marva Match of Cannon & Match, Salt Lake City.

The *Utah Bar Journal* is published bi-monthly by the Utah State Bar. One copy of each issue is furnished to members as part of their Bar dues. Subscription price to others, $30; single copies, $5. For information on advertising rates and space reservations visit www.utahbarjournal.com or call Laniece Roberts at (801) 538-0526. For classified advertising rates and information please call Christine Critchley at (801) 297-7022.

Utah Bar JOURNAL

Volume 18 No. 4
Jul/Aug 2005

Letters 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 which reflect contrasting or opposing viewpoints on the same subject.
5. No letter shall be published which (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 which advocates or opposes a particular candidacy for a political or judicial office or which 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.

Cover Art

Members of the Utah State Bar or members of the Legal Assistants Division of the Bar who are interested in having photographs they have taken of Utah scenes published on the cover of the *Utah Bar Journal* should send their print, transparency, or slide, along with a description of where the photograph was taken to Randall L. Romrell, Esq., Regence BlueCross BlueShield of Utah, 2890 East Cottonwood Parkway, Mail Stop 70, Salt Lake City, Utah 84121. Include a pre-addressed, stamped envelope for return of the photo and write your name and address on the back of the photo.

Interested in writing an article for the *Bar Journal?*

The Editor of the *Utah Bar Journal* wants to hear about the topics and issues readers think should be covered in the magazine.

If you have an article idea or would be interested in writing on a particular topic, contact the Editor at 532-1234 or write *Utah Bar Journal*, 645 South 200 East, Salt Lake City, Utah 84111.

Submission of Articles for the Utah Bar Journal

The *Utah Bar Journal* encourages Bar members to submit articles for publication. The following are a few guidelines for preparing your submission.

1. Length: The editorial staff prefers articles having no more than 3,000 words. If you cannot reduce your article to that length, consider dividing it into a "Part 1" and "Part 2" for publication in successive issues.
2. Format: Submit a hard copy and an electronic copy in Microsoft Word or WordPerfect format.
3. Endnotes: Articles may have endnotes, but the editorial staff discourages their use. The *Bar Journal* is not a Law Review, and the staff seeks articles of practical interest to attorneys and members of the bench. Subjects requiring substantial notes to convey their content may be more suitable for another publication.
4. Content: Articles should address the *Bar Journal* audience, which is composed primarily of licensed Bar members. The broader the appeal of your article, the better. Nevertheless, the editorial staff sometimes considers articles on narrower topics. If you are in doubt about the suitability of your article for publication, the editorial staff invites you to submit it for evaluation.
5. Editing: Any article submitted to the *Bar Journal* may be edited for citation style, length, grammar, and punctuation. Content is the author's responsibility–the editorial staff merely determines whether the article should be published.
6. Citation Format: All citations should follow *The Bluebook* format.
7. Authors: Submit a sentence identifying your place of employment. Photographs are encouraged and will be used depending on available space.

The Utah Bar Journal

Published by The Utah State Bar
645 South 200 East • Salt Lake City, Utah 84111 • Telephone (801) 531-9077 • www.utahbar.org

Working together to take you where you want to go.

No matter where your practice takes you, the LexisNexis® Bar Association Member Benefit Program is always behind you to help smooth out the ride.

Go Beyond Cases & Codes

Manage Your Practice

Grow Your Practice

The changing demands of your practice take you in new directions every day.

Whether you're conducting legal research, managing your front and back office, or even identifying best client prospects, the LexisNexis® Total Research System has the expansive tools and content to help you quickly and confidently switch gears.

And with the **LexisNexis® Bar Association Member Benefit Program**, you can take advantage of a wide range of exclusive LexisNexis benefits through your sponsoring Bar or Association. These member benefits were created with the unique needs of small law firms and solo practitioners in mind.

To learn more about exclusive LexisNexis Bar Association Member Benefit Program offerings, call for details at 866.836.8116 and mention code 203592.

LexisNexis®
Bar Association
Member Benefit Program

A MEMBER BENEFIT OF

UTAH STATE BAR ORGANIZED 1931

AL7859

"Making Law" and "Finding Facts" – Unavoidable Duties of an Independent Judiciary

by John J. Flynn

The role of judges and the duties they are called upon to perform are not well understood by the public generally and many politicians in particular. Recent physical and political attacks on particular judges and the judiciary in general and the politicization of the nomination and appointment processes for judges require a campaign to educate the public about the role of the judiciary in our society.

Bar associations and individual members of the bar have been noticeably silent in coming to the defense of judges and an independent judiciary by explaining to the public the crucial role of an independent judiciary in our system of government. The silence of the Bar has been disquieting, particularly in the face of physical attacks on judges, the undue politicization of the process for appointing judges, the growing trend of contested elections for judges at the state level, and by simplistic political attacks on the judiciary for doing the job judges are asked to do in a society governed by "the rule of law."

Political hacks have sought to use tragic cases like the Terri Shiavo case in Florida to attack judges by calling them "activists." They threaten to "do something" about those judges who ignore Congress's unconstitutional and cynical intrusion into the Shiavo case. In that case, state judges were charged by law with determining whether the law of Florida grants guardianship powers to a husband to make decisions for his comatose wife and to determine what were the wishes of Ms. Shiavo should she ever end up in a persistent vegetative state. State judges interpreted the law and found the facts after open hearings in court. Those factual findings and legal conclusions were affirmed repeatedly by both state and federal appellate courts – political opportunists in Congress to the contrary notwithstanding.

Additional attacks have been launched against the United States Supreme Court in general and Justice Kennedy in particular over the Court's decision in *Roper v. Simmons,* holding the Bill of Rights' prohibition upon "cruel and unusual punishment" barred the execution of juvenile offenders below the age of 18. Justice Kennedy, after surveying the growing trend of states abolishing capital punishment for juvenile offenders under 18, took note of a similar trend internationally and the fact that the United States is the only country in the world that continues to sanction the juvenile death penalty. Some powerful members of Congress cited the Court's use of international law as grounds for removing judges from the bench, and one Leader of the House even went so far as to claim that a Justice's use of the Internet to do research was grounds for removing that Justice from office.

While such absurd claims can easily be dismissed as the bizarre ranting of the ignorant, or cynical attempts by political fanatics to gain control of the courts, the fact that they resonate with many citizens confused about judges allegedly "making law" requires a response from those most familiar with the job of judges who can speak to the issue intelligently – namely, lawyers.

In a growing number of states, contested elections for judgeships have become the norm. Candidates are forced to raise campaign funds from special interests seeking the election of judges who will make law they agree with rather than objectively consider opposing arguments in disputed cases while seeking a reasoned result in accord with the law. The corrupting influence of raising campaign funds, which has undermined public trust in the legislative and executive branches at all levels of government, is now undermining public trust in the judicial branch of government in many states. Public trust in the independence and objectivity of the judiciary can only be further compromised by the popular

JOHN J. FLYNN is the Hugh B. Brown Professor, Emeritus at the S.J. Quinney College of Law, University of Utah. After teaching for 42 years, he retired in June of this year.

election of judges requiring the political prostitution of judicial candidates to raise campaign funds to run for the office, or to defend against a well-financed campaign to defeat an incumbent.

Another and related problem is the undue politicization of the process for nominating and confirming judges at the federal level. The President and many members of the Senate seek the appointment of judges because of their rigid political views rather than seek out experienced and reflective candidates capable of re-thinking their own assumptions and objectively weighing conflicting evidence and arguments about the relevance and meaning of the law. Misleading statements about seeking to appoint judges who will only "apply the law" and not "make law" have become rallying calls for those who seek the appointment of judges who will "make law" that they agree with – not judges who will openly resolve ambiguity in accord with reflectively held values always open to reconsideration. Intellectual arrogance or shallowness, rather than intellectual humility, appears to be the leading qualification of candidates proclaiming they will not "make law" but will only apply the "given law." Such candidates either believe that they have all the "truth" needed to do the job, or do not appreciate the complexities of the job.

Any experienced lawyer or judge knows that only a relatively small category of legal disputes become court cases that require judges to resolve fact disputes or "make law." They are cases where there are disputes about the facts or disputes about the relevance, meaning or applicability of the law to the facts. Such cases are often appealed to higher courts, where judges cannot avoid "making law" because it is the relevance or meaning of the law, and the way the law interacts with the facts, that create ambiguities that can only be resolved by an independent judiciary. Resolving ambiguities about the meaning of a law or its applicability to the facts in dispute is an inherent part of the job of a judge because the words used in a law do not anticipate the dispute before the court; the words used in the law are ambiguous in the circumstances of the case; or, the consequences of deciding a case one way or another do not seem to comport with the policy behind the literal words used in the law.

Many politicians demand that candidates for nomination or confirmation to a judgeship promise to "apply the law and not make law," or that they not make "political decisions." Such simple-minded demands are impossible to fulfill because litigated disputes often raise questions about: 1. what is relevant to a particular dispute; 2. what the relevant law means in the circumstances of a particular dispute; or, 3. how that law ought to interact with the facts in light of the consequences of the decision. Nor is

it always clear: A. which "facts" are relevant to a dispute in light of the relevant law; B. what the relevant facts mean in light of the meaning of the relevant law; or, C. how the facts ought to interact with the law in light of the consequences of the decision. In all of these circumstances, it is necessary that the judge "make law" and/or "find facts" in order to resolve the dispute.

For example, a choice must be made between conflicting rules, social and moral policies, and practical consequences in a case where a law appears to vest in a spouse guardianship over a comatose patient and there is a dispute over whether the patient has any hope of recovery. What rights do the parents of the patient have under the laws enacted by the state, and is there any hope that the patient might recover from what appears to be a persistent vegetative state? We entrust an independent judiciary, untainted by fear of political retribution or corruption, with the power to make such difficult decisions based on evidence heard in open court and the arguments of advocates representing opposing parties to the dispute. The choices that a judge makes in such cases are constrained by statutes, prior decisions, reviewing courts and the public imposing an obligation to be objective and rational in making a decision. The public can inspect the reasoning of those charged with making such decisions because of the court's obligations to hear cases in open court and to write coherent opinions explaining the rationale of the decision. If the decision is rational, coherent and persuasive, the decision will stand. If it is not, the decision will be reversed by a higher court or the legislative branch, or will be eroded over time by subsequent decisions calling its assumptions or reasoning into question.

Judicial decision-making is not like a vending or slot machine where one puts fixed facts into a machine, pulls a lever and out comes the "right answer." Most of the words in the law like "negligence," "privacy," "due process," "speech," "interstate commerce" and "equal protection" are ambiguous and have no counterpart in physical reality. The words of law symbolize relational concepts which represent policies or values behind the words used – normative propositions with evolving meanings in light of changing factual circumstances; evolving understandings of reality; reflections upon the history of society and its laws; meandering precedent dealing with the legal concept in somewhat similar circumstances; and changes in philosophy, morality and technology – indeed, evolutions in every field of human knowledge.

The words used in our laws are not rigid boxes with fixed meanings to be mechanically applied to a dispute no matter the moral context or practical consequences of doing so. Legal words are flexible concepts and tools for the analysis of disputes that arise in countless different circumstances. While relatively fixed when at rest, legal concepts become flexible and dynamic when called upon in a controversy questioning their relevance, meaning or applicability to the facts of a particular dispute. Courts deal with ambiguity, not certainty. It is the fundamental reason legal disputes arise and why society needs an independent judiciary free of political intimidation and financial corruption to resolve those disputes.

Controversial social issues reaching the courts often raise ambiguity about the relevance, meaning or applicability of the words of the "law" because those who wrote those words did not foresee the controversy before the court; evolving social or technological

changes call into question prior understandings of the words used in the "law" in light of new facts; unforeseen consequences become apparent in circumstances not anticipated by the law giver; or one "law" is found to be in conflict with another "law" and the conflict must be resolved to settle the dispute. In all these circumstances a choice must be made and we entrust to an independent judiciary the responsibility of making the choice under the general guidelines set forth in legislation, the Constitution and prior precedent. We do not entrust this unavoidable duty to political hacks in Congress, to legislators concerned primarily with expanding their power by ensuring campaign funds keep flowing, or to special interests financing the election campaigns of judges.

Where does a judge turn in making these kinds of decisions? Justice Cardozo answered this question in his book *The Nature of the Judicial Process* by saying: "If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief from life itself. . . . [Restrictions on the judge] are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession and by the duty of adherence to the pervading spirit of the law. . . . [W]ithin the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom."

In recognition of the unavoidable duty of judges to "make law" in some cases, courts must rely upon the other branches of government to implement their decisions, which depends on the consent of the people to abide by the decisions of an independent judiciary. The only independent powers of the judiciary are to resolve the disputes brought to them and to explain their decisions. That is why courts publish their opinions: so society can decide whether the decision is rational, persuasive and the product of a due concern for the conflicting policies and consequences involved. If the decision does not meet these standards, it will not stand against the onslaught of future disputes challenging its assumptions or changes in the law made by the other branches of government. If the decision is found persuasive and well reasoned, it will stand the test of time and become part of the "pervading spirit of the law" until some future challenge calls its relevance, meaning or application into question.

To carry out this necessary and unavoidable responsibility of judges, we need well-schooled, thoughtful and self-reflective candidates for judicial office of unimpeachable personal integrity who appreciate the heavy burden of "making law" and "finding facts." Those who view judging as a form of vending machine "applying the law" to the facts should not be nominated or confirmed as judges. They do not appreciate all the responsibilities of the job and lack an appreciation for its complexities.

Nor should rigid ideologues, whether of the right or the left, be nominated or confirmed for the bench. They lack the ability to see and cope with ambiguity and the capacity to re-examine their fixed assumptions. That is why such candidates can claim they will only "apply the law" and not "make law" – the law is fixed for them because their ideology dictates what law is relevant, what it means and how it should be applied, persuasive arguments to

the contrary notwithstanding.

It is essential that nominees for the courts be experienced, well educated, and have a capacity for humility and self-reflection about their most basic beliefs. They must be open to new ways of understanding our changing, complex and diverse society, and the ambiguity which arises when applying existing legal concepts in light of past precedent to new disputes constantly arising in our society.

Those nominating and confirming candidates for the bench must have a spirit of moderation in carrying out their functions because, as Judge Learned Hand noted in his classic article *The Contribution of An Independent Judiciary to Civilization:* "[A] society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish." Hand defined the spirit of moderation as "the temper which does not press partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens – real and not the fallacious product of propaganda – which recognizes their common fate and their common aspirations – in a word which has faith in the sacredness of the individual." Too often in recent years the nomination and confirmation process for judges, and too many of the candidates nominated, have not reflected this spirit of moderation. Instead, pressing "partisan advantage to its bitter end" appears to have become an end in itself, jeopardizing both our society and the independence of the judiciary.

Judges and those who nominate and confirm them must understand that judges "make law" for another reason as well. In a society like ours, committed to the "rule of law," an independent judiciary is essential to the maintenance of the rule of law. Judges are not rubber stamps for the actions of the other branches of government. Nor can judges bow down to the political winds of the day if we are to have rights and responsibilities defined by objectively determined legal standards. An independent judiciary, as Judge Hand pointed out, "is an inescapable corollary of enacted law...." One cannot have a "rule of law" without an independent judiciary with the power to "make law" by saying when those laws are applicable to a dispute, what those laws mean in the context of a dispute, and how they should be applied in the circumstances of a particular dispute.

Paradoxically, an independent judiciary with no power other than the power to find "facts" and "make law" is essential to "the rule of law" itself. It is time for the Bar and individual attorneys to stand up and defend the independence of the judiciary and seek to raise the level of political discussion about the nomination and confirmation of judges above the sorry state in which it is now conducted. Members of the Bar must take the lead in explaining to the public why personal and vitriolic political attacks on judges, the undue politicization of judicial appointments and the popular election of judges imperil an independent judiciary and the ideal of the rule of law. Far more is at stake than the short-term gain of one political party or the other, or the venting of personal disappointment with a particular judicial decision. Ultimately, the rule of law itself is at stake.

If you don't recognize us as Mabey Murray, you might remember us as LeBoeuf Lamb.

Same Expertise – Same Sophistication – Same Lawyers – Same Results – Different Name

Mabey Murray LC

With 23 years of experience in corporate reorganization and bankruptcy, energy and utility, environmental and land development law, commercial litigation, business transactions, and insurance regulation, our team is the same, and we're ready to serve you.

Lawyers

Jennifer A. Brown
Gordon W. Campbell
David M. Connors
Joseph M.R. Covey
Mark W. Dykes
Jeramy R. Green
Jared L. Inouye
Lon A. Jenkins
Ralph R. Mabey
Patrick S. Malone
Adelaide Maudsley
Steven J. McCardell
Colin W. McMullin
Kevin R. Murray
Bret F. Randall
Ronald L. Rencher
James K. Tracy
Stephen M. Tumblin

Same Location. Same Phone.

Even though our name has changed, our office location and phone number haven't.

1000 Kearns Building
136 South Main Street
Salt Lake City, UT 84101
(801) 320-6700 | Phone
(801) 359-8256 | Fax
www.mabeymurray.com

Get Ready for the Bankruptcy Amendments of 2005

by Joel Marker

On April 20, 2005, President Bush signed S.256, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "Act"). While critics have noted that the Act is long on attacking perceived abuses of the bankruptcy laws by consumer debtors and short on protecting individuals from their creditors,[1] the Act is now law and members of the bar need to determine how the changes will affect their clients and practices. The following survey of changes imposed by the Act is not complete and readers are encouraged to educate themselves on the Act's provisions prior to its implementation. Two internet resources are helpful in digesting the changes brought by the Act. First, the law firm of Davis Polk & Wardwell has a blackline version of the entire Bankruptcy Code marked to show the amendments from current law at http://dpw.com/practice/code.blackline.pdf. Second, the American Bankruptcy Institute offers a wealth of summaries and articles explaining the Act at http://www.abiworld.net/bankbill.

1. Effective Dates

Generally, the amendments take effect for cases filed on and after October 17, 2005 (180 days after the date of enactment). However, there are numerous exceptions. The Davis Polk & Wardwell blackline sets forth most of the exceptions in a handy table.

2. New Filing Eligibility Requirements

Under new Section 109(h), individuals are ineligible for relief under any chapter of the Bankruptcy Code unless within 180 days of their bankruptcy filing they received an individual or group briefing from a nonprofit budget and credit counseling agency approved by the United States Trustee under standards set forth in new Section 111. Among the standards is a requirement that the agency provide services without regard to the debtor's ability to pay any fee. The required briefing, which may take place by telephone or on the internet, must outline the opportunities for credit counseling and assist in performing a related budget analysis. Exceptions are made for debtors who submit to the court certification describing circumstances requiring immediate bankruptcy filing and stating that the debtor sought the required briefing at least 5 days prior to the bankruptcy filing without being able to obtain it, in which case the debtor is required to complete the counseling within 30 days after the bankruptcy filing. This requirement will cause problems for debtors who wait until the last minute to seek advice on how to stop a foreclosure or repossession. The debtor is required to file a certificate from the agency describing the services provided and any debt repayment plan developed by the agency.

After filing, debtors in both Chapter 7 and 13 will be required to complete an instructional course concerning personal financial management. Under new Sections 727(a)(11) and 1328(g) debtors are subject to denial of discharge for failure to complete an approved program.

Section 521 has been amended to impose a number of new production requirements on debtors. First, in addition to the credit counseling certificate and debt repayment plan, the debtor must file with his schedules a certificate indicating that the debtor received a written description of the different bankruptcy chapters and the general purpose, benefits and costs of proceeding under each of those chapters and the types of services available from credit counseling agencies as set forth in new Section 342(b)(1). The debtor must also file copies of all payment advices (pay stubs) received within 60 days before the filing, a statement of the amount of monthly net income, itemized to show how the amount is calculated, and a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing.

Further, Section 521(e)(2) requires each debtor to provide a copy of the federal income tax return for the most recent period to the trustee and to any creditor making a timely request at least 7 days prior to the meeting of creditors. Failure to comply requires dismissal of the case unless the debtor demonstrates that the failure to comply is due to circumstances beyond the

JOEL MARKER is a shareholder in the Salt Lake City law firm of McKay, Burton & Thurman P.C., where his practice is focused on bankruptcy law. He has served on the panel of Chapter 7 trustees in the District of Utah since 1997.

control of the debtor.

3. Limitations on Discharge

The Act extends the period between successive discharges and forecloses the "Chapter 20" option under current law. Section 727(a)(8) is amended to subject a Chapter 7 debtor to denial of discharge if the debtor received a Chapter 7 or 11 discharge in a case filed within 8 years of the filing of the current case – an extension from the 6 year period under present law. Section 1328, as amended, limits the availability of a discharge in a Chapter 13 case if the debtor received a discharge in a Chapter 7, 11 or 12 case filed within 4 years of the Chapter 13 case. There is also no discharge in a Chapter 13 case if the debtor received a discharge in a prior Chapter 13 case filed within 2 years of the pending case. The amendment will curtail the "Chapter 20" option described in *In re Young,* 237 F.3d 1168 (10th Cir. 2001), which approved a Chapter 13 plan following conversion from Chapter 7. That practice allows a debtor to shed dischargable debt and use a Chapter 13 plan to pay remaining nondischargable claims. The Act will curtail a debtor's ability to obtain bankruptcy relief for four years following a Chapter 7 filing in which the debtor receives a discharge. Members of the bar will need to come up with creative solutions to serve debtors who experience financial difficulties a year or two after receiving a Chapter 7 discharge. One approach may be to use a subsequent Chapter 13 case to cure an arrearage even though a discharge will not be granted at the end of the plan.

Dischargability of credit card debt has also been restricted. The presumption of nondischargability for fraud in the use of a credit card, set forth in Section 523(a)(2)(C), is expanded. The amount that the debtor must charge for luxury goods to invoke the presumption is reduced from $1,225 to $500 and the amount the debtor must withdraw in cash advances in order to invoke the presumption is reduced from $1,225 to $750. The period of time prior to the bankruptcy filing in which these charges must be made in order for the presumption to apply is increased from 60 to 90 days for luxury goods, and from 60 to 70 days for cash advances.

There is good news in the Act for former spouses and children of debtors. Section 523(a)(15) is amended to remove the balancing provision affirmative defense, with the result that property settlements and hold harmless provisions arising from a divorce or separation are nondischargable, and the former spouse or child need not file a complaint in the bankruptcy court to avoid discharge of the debt under revised Section 523(c)(1). Additionally, an amendment to Section 507(a) elevates domestic support obligations to first priority in distribution, subject to the expenses of a trustee in administering assets that might otherwise be used to pay the support obligations. In Chapter 13 cases, the failure to pay domestic support obligations that accrue postpetition will result in conversion or dismissal under new Section 1307(c)(11).

Finally, the Act all but eliminates the superdischarge in Chapter 13 by expanding the list of debts excepted from a Chapter 13 discharge under Section 1328(a) to include debts incurred through fraud, embezzlement or breach of fiduciary duty, among other types of claims.

4. New Chapter 7 Means Test

Section 707(b) of the Bankruptcy Code has been extensively amended (over 150 lines of new text) to provide for dismissal of a Chapter 7 case, or conversion to Chapter 13 with the debtor's consent, upon the finding of abuse by an individual debtor with primarily consumer debts. General grounds for dismissal on a finding of abuse, including bad faith, will be determined under the totality of the circumstances under new Section 707(b)(3).

The means test, set forth in Section 707(b)(2), creates a presumption of abuse if the debtor's current monthly income (as determined by an average of the previous six months) – less secured debt payments divided by 60, less priority debts divided by 60, less the allowed expenses permitted by the Internal Revenue Service, less certain other allowed expenses – is greater than

$100 per month. Internal Revenue Service National Standards establish allowances for food, clothing, personal care and entertainment, depending on household size. As an example, the National Standard for allowable living expenses for a household of 4 with gross monthly income of $3,000 is $990. IRS Local Standards establish allowances for transportation (on a regional basis) and housing (on a county basis). For Salt Lake County, the current allowable living expenses for housing and utilities for a family of 4 or more is $1,617. The ABI website contains links to the IRS National and Local Standards tables.

The means-test presumption comes into play if the debtor's income is above the applicable state median. The median income applicable for determining standing to bring a motion to dismiss under Section 707(b) is as follows: (a) for a debtor in a household of 1 person, the median state family income for 1 earner; (b) for a debtor in a household for 2, 3 or 4 individuals, the highest median state family income for a family of the same or fewer persons. For families larger than 4 persons, $525 per month is added for each additional person. The Executive Office of the United States trustee has not yet published median income tables, but the Utah medians for 2005 should be approximately the following:

One-Person Household	**$40,831**
Two-Person Household	**$46,279**
Three-Person Household	**$54,452**
Four-Person Household	**$60,342**

Section 707(b)(2)(C) requires debtors to file a statement of their calculation under the means test as part of the schedule of current income and expenditures under Section 521. If the presumption arises, the court is required to notify creditors within 10 days of the filing of the petition. In addition, under Section 704(b) the United States trustee is required to review the debtor's materials and file with the court a statement as to whether the presumption of abuse arises. If the presumption arises, the United States trustee must file either a motion under Section 707(b) or a statement explaining why the motion is not being filed.

5. Changes in Chapter 13 Practice

The Act amends Chapter 13 to expedite the process and to provide greater protections to consumer lenders. The Act will significantly affect local practice by requiring that confirmation hearings take

place between 20 and 45 days after the Section 341 meeting of creditors. Under current practice confirmation hearings are typically held 6 or 7 months after the meeting of creditors. In anticipation of the change the United States Bankruptcy Court for the District of Utah recently announced that confirmation hearings for Chapter 13 cases filed after July 2, 2005 will be held approximately 45 days after the meeting of creditors. Further information on this issue and other changes to local procedure can be found on the court's website at www.utb.uscourts.gov.

In addition to the effect on the means test in Chapter 7 cases, a debtor's income will affect plan length in Chapter 13 cases. Under new Section 1322(d) and revised Section 1325(b), a debtor with income above the state median will be required to contribute all disposable income for a full 5-year term in the absence of earlier full payment of all allowed unsecured claims.

Lenders with claims secured by personal property receive increased protection under the Act. Under new Section 506(a)(2) the secured claim of a creditor in the case of an individual under Chapter 7 or 13 will be determined based upon the replacement retail value of the property as of the filing date without deduction for costs of sale or marketing. Secured creditors will retain their liens until completion of the Chapter 13 plan, and Chapter 13 debtors may not cram down or bifurcate secured claims into secured and unsecured claims with respect to a purchase money security interest in a motor vehicle purchased within 910 days (or within 1 year for other collateral) before the filing.

6. Farewell to *"Lowry"* and Reaffirmation Agreements

In *Lowry Federal Credit Union v. West,* 882 F.2d 1543 (10th Cir. 1989), the Tenth Circuit held that a debtor may retain collateral without either redeeming the collateral or reaffirming the debt if the debtor is current on payments to the creditor. *Lowry* allows a debtor to discharge the underlying debt while the creditor retains its lien on the collateral. If the debtor stumbles financially in the future and fails to make payments the creditor may repossess the collateral but may not sue the debtor for a deficiency.

The Act overrules *Lowry* and new Section 521(a)(6) requires an individual debtor in a Chapter 7 case to surrender personal property collateral or to reaffirm the debt or redeem the property within 45 days after the meeting of creditors. An apparently conflicting provision in Section 521(a)(2)(B) requires the debtor to perform his stated intention within 30 days after the meeting of creditors. Under new Section 362(h), the personal property is no longer property of the bankruptcy estate and the automatic stay terminates if the debtor fails to file timely a statement of intention and to either redeem or reaffirm the debt secured by the personal property or to assume an unexpired lease, such as a vehicle lease, pursuant to Section 365(p).

Section 524 was amended to require reaffirmation agreements to contain significant new disclosures that cover several pages of the Act in new Section 524(k). Existing reaffirmation forms used by banks, credit unions and other lenders will not be sufficient for cases filed on or after October 17, 2005, and attorneys for lenders should ensure that their clients' forms are properly updated.

7. Serial Filer Provisions

Among the changes to the automatic stay, Section 362(c)(3) sets new limits on the applicability of the automatic stay for repeat filers. For a debtor filing a second case within one year of a previously dismissed case (other than a case dismissed under Section 707(b)), the stay terminates in 30 days unless the court, within the 30 days, determines that the second filing is in good faith as to the creditors to be stayed. A case is presumptively not filed in good faith as to all creditors if 1) the current case is the third or more case in the past year; 2) any of the previous cases were dismissed for failure to amend the petition or other documents as ordered by the court, failure to provide adequate protection as ordered by the court, or failure to perform under a confirmed plan; or 3) the debtor's financial or personal affairs are substantially unchanged since the most recent dismissed case or there has

not been any reason to conclude that the current pending case will result in a Chapter 7 discharge or a confirmed Chapter 11 or 13 plan.

The stay in a second case does not apply to any specific creditor who commenced an action in the prior case for relief from stay which either was pending when the prior case was dismissed or the stay was terminated or modified in the earlier case. If the current case is the debtor's third or more case that was dismissed within the past year (other than Section 707(b) dismissals), then the stay does not go into effect. Finally, "in rem" relief from the automatic stay is authorized by new Section 362(d)(4). In cases involving either 1) transfers of real property collateral without the consent of the secured creditor or court approval, or 2) multiple bankruptcy filings involving the same real property, the court may issue an order of relief from the automatic stay, which order, properly recorded, is binding on all owners of the property for 2 years from the date of entry. Where "in rem" relief is effective, new Section 362(b)(20) creates an exception to the automatic stay for lien enforcement activity in later cases.

8. New Duties and Liabilities for Debtor's Counsel

Congress' distrust of the debtor's bar is manifest in the Act. Section 707(b) is amended to add several new duties and liabilities of debtor's counsel. Subparagraph (4)(A) allows the court to award costs and fees to a trustee who successfully pursues a Section 707(b) motion, payable by debtor's counsel, if it finds that the Chapter 7 filing violated Bankruptcy Rule 9011. Subparagraph (4)(B) specifies that if the court finds any violation of Rule 9011 by the debtor's attorney it may award a civil penalty against the attorney, payable to the trustee or the United States Trustee. This provision would apply only in Chapter 7 cases. Subparagraphs (4)(C) and (D) set out a statutory parallel to Rule 11, Fed.R.Civ.P., providing that the signature of a debtor's attorney constitutes a certification that the attorney has "performed a reasonable investigation" and determined that the signed documents are well grounded in fact and law, that any Chapter 7 petition is not an abuse under Section 707(b) and that the "attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." The Act does not define what constitutes a reasonable investigation nor does it define the

appropriate scope of inquiry. Prior to filing, prudent debtor's counsel should review tax returns, pay stubs, vehicle titles, divorce decrees, pleadings in pending lawsuits, real property appraisals (if available) and property tax valuation notices. In appropriate cases, vehicle appraisals and third-party personal property inventories may be advisable.

The Act contains three entirely new sections regulating the debtor's bar. First, attorneys and law firms that represent individuals with primarily consumer debts (whose nonexempt property is valued at less than $150,000) are now labeled as "debt relief agencies" under Section 101(12A). Under new Section 526, debtor's counsel are subject to loss of fees, damages, injunctive remedies and imposition of costs for any failure to meet new disclosure and record-keeping requirements imposed on debt relief agencies in new Sections 527 and 528. Sanctions will be imposed for, among other things, intentional or negligent failure to file any required document, including those specified in Section 521, or intentional or negligent disregard of the material requirements of the Bankruptcy Code or the bankruptcy rules. Among the new provisions are obligations to include specified statements in advertisements, to provide certain written notices to the debtor and, prior to the filing, execute a written contract with the client that explains clearly and conspicuously the services the attorney will provided to such "assisted person" and the fees or charges for such services, and the terms of payment. Section 527(d) requires the attorney to maintain a copy of the notices given to the client for 2 years.

9. Other Provisions

Other substantive amendments include the following:

a. Revised Section 365(d)(4) limits the extension of time during which a debtor must assume or reject an unexpired lease of nonresidential real property. A corresponding amendment to Section 503(b)(7) limits the administrative expense claim of a landlord when a nonresidential real property lease has first been assumed, then rejected.

b. Section 503(b)(9) clarifies the "critical-vendor doctrine"[2] and allows an administrative expense for goods received by the debtor in the ordinary course of business within 20 days before the petition date.

c. Sellers of goods receive increased reclamation rights under revised Section 546(c).

d. The Act provides further protection to creditors from preference claims by strengthening the ordinary course of business defense in Section 547(c)(2) and prohibiting preference claims of less than $5,000 in business cases in new Section 547(c)(9). Further, Section 547(e)(2) is amended to exempt from recovery transfer of a security interest if perfected within 30 days, as compared to 10 days under current law.

e. The trustee may avoid a fraudulent transfer made within 2 years before the petition date under revised Section 548(a)(1), up from 1 year under the current Bankruptcy Code. New Section 548(e) allows a trustee to avoid transfers within 10 years of the bankruptcy to a self settled trust if the trustee can prove actual intent to hinder, delay, or defraud an existing or future creditor.

f. Revisions to Chapter 11 include further grounds for conversion or dismissal under Section 1112(b); a new definition of property of the estate of an individual Chapter 11 debtor in new Section 1115; and new provisions for small businesses in Sections 1116, 1121(e) and 1129(e).

The Act introduces the most far reaching changes to bankruptcy law in over 25 years. Attorneys should take advantage of existing internet resources and attend continuing legal education seminars to learn how the changes will affect their clients and practices.

1. *See, Law Professors' Letter on S.256,* www.abiworld.net/bankbill ("The bill is deeply flawed, and will harm small businesses, the elderly, and families with children.")
2. *See In re Kmart Corp.,* 359 F.3d 866 (7th Cir. 2004)

Bankruptcy Litigation: Some Practical Pointers

by J. Robert Nelson

Introduction

The premise of this article, that litigation frequently spawns bankruptcy, is not a novel insight. The recent spate of mass tort suits involving asbestos and dangerous drugs have pushed numerous companies to respond with Chapter 11 filings. Mass tort situations aside, the substantial costs of litigating even one complex case have driven some defendants to seek bankruptcy protection. The mere possibility of a large adverse judgment leads others to bankruptcy. Even the inability to post an undertaking in connection with appeal of an adverse judgment has resulted in bankruptcy filings. Although the circumstances vary, bankruptcy has become a frequently used response to litigation.

Trial lawyers encounter bankruptcy in a wide variety of settings. Some of the more common include:

- pursuing a motion for relief from automatic stay to permit prosecution of a pre-bankruptcy suit against a debtor;
- submitting a proof of claim against a debtor and handling an objection to the claim;
- opposing a debtor's motion to assume or reject a lease or contract;
- objecting to the dischargeability of a debt of an individual debtor;
- defending a preference or fraudulent conveyance action; and
- defending a tort or contract action by a debtor.

While this list is not exhaustive, it will serve in this article to illustrate a number of features of bankruptcy litigation and provide a backdrop for some practical suggestions for litigators.

Bankruptcy Litigation: The Setting

Those who have encountered it can attest that, from the litigators' stand point, things change after a bankruptcy filing. Probably the most dramatic change relates to state and federal court suits pending against a debtor at the time of bankruptcy. Those suits are frozen by the automatic stay under 11 U.S.C. (the "Bankruptcy Code") §362. That section stays and enjoins, among other things, "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of a case under title 11." Although the bankruptcy court has the discretion to lift the stay for cause (Bankruptcy Code § 362(d)(1)), it is rare that pre-bankruptcy suits are permitted to proceed to trial in a non-bankruptcy court. One reason is that there is no need for pre-bankruptcy suits against a debtor to go forward because the Bankruptcy Code includes its own system for submission and resolution of claims against a debtor. That system is based on an adjudication by the bankruptcy court rather than by a state or other federal court, even if a suit was pending against a debtor at the time of bankruptcy.

Another change initiated by a bankruptcy filing relates to the trial forum. Bankruptcy has its own court system. After a filing, most disputes are adjudicated by bankruptcy judges. When the position of bankruptcy judge was created under the Bankruptcy Reform Act of 1978, bankruptcy judges, who replaced bankruptcy referees under the old system, were given broad power to adjudicate all disputes arising in or related to bankruptcy cases. Unlike federal district judges, however, bankruptcy judges were not appointed under Article III of the Constitution and were not tenured judges. In light of this, the broad grant of jurisdiction to bankruptcy judges was questioned, particularly as it pertained to actions which, while related to a debtor (for example, a contract or tort action *by* a debtor against a third party) were not historically part of what bankruptcy judges handled. In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.,* 458 U.S. 50, 102 S.Ct. 2858 (1982), the Supreme Court held that the broad grant of jurisdiction was unconstitutional. In reaction, Congress, in 1984, amended the Bankruptcy Code to, among other things, grant primary bankruptcy jurisdiction to Article III district courts. Bankruptcy judges were maintained, but their power to act became derivative of the district court in each district. In this and other jurisdictions, bankruptcy cases are not handled by district judges but rather referred automatically to bankruptcy judges. District courts do, however, retain the power to withdraw the reference either as to an entire bankruptcy case or to particular proceedings within a case.

Turning to the six examples mentioned above, five involve matters that were the traditional domain of bankruptcy referees – stay relief, assumption/rejection of contracts and leases, claims adjudication, dischargeability suits and avoidance actions (preferences and fraudulent conveyances). The amended Bankruptcy Code defines those and similar matters as "core proceedings"

J. ROBERT NELSON is of counsel to Van Cott, Bagley, Cornwall & McCarthy, P.C. Before his move to Utah his practice focused on corporate reorganization and bankruptcy from bases in Los Angeles and New York.

under 28 U.S.C. § 157. Trial of "core proceedings" is presided over by bankruptcy judges without intervention by the district court (other than in its role to consider appeals from bankruptcy court decisions).

Although all handled by bankruptcy judges, there are definite procedural differences in the five illustrated "core proceedings." Two of them (dischargeability and avoidance actions) are known as "adversary proceedings" pursuant to Rule 7001 of the Rules of Bankruptcy Procedure ("Bankruptcy Rules"). They are initiated by complaint, and the applicable procedures are governed by adversary Bankruptcy Rules that are similar, in many respects, to the Federal Rules of Civil Procedure.

The other three examples of "core proceedings" include claims litigation, relief from stay actions, and assumption/rejection of leases and contracts. They are known in bankruptcy rubric as "contested matters." They are not initiated by complaint. Claims litigation is triggered by an objection to a duly filed proof of claim. Generally, a proof of claim must be timely filed for a creditor to participate in bankruptcy distributions. In contrast, stay relief and assumption/rejection of contracts or leases are sought by motion. "Contested matters" are presided over by the bankruptcy judge and are governed by some, but not all, of the Bankruptcy Rules that govern "adversary proceedings." However, bankruptcy courts may, if they choose, apply all of the adversary rules to a particular contested matter.

The grant of bankruptcy jurisdiction under 28 U.S.C. § 1334 includes not only "core proceedings" but also actions which "relate to" a debtor. Of the six examples, only tort or contract actions by a debtor fall within the court's "related to" jurisdiction. Traditionally, "related to" actions were not handled by bankruptcy referees. Indeed, it was a "related to" action which resulted in the Supreme Court's decision in *Northern Pipeline.* The 1984 amendments could have addressed the constitutional issue by requiring that a district court adjudicate all "related to" actions. Instead, with respect to "related to" actions, the amendments provides for initial consideration by a bankruptcy judge who, after evidentiary review, issues proposed findings of fact and conclusions of law. Those proposed findings and conclusions then are subject to objection (Bankruptcy Rule 9033(b)) by the parties. Objections then trigger *de novo* consideration by the Article III district court.

A Few Practical Suggestions

Bankruptcy litigation is of course a broad topic. Of necessity, the foregoing paragraphs have touched only on a few of the structural and procedural highlights. Any list of practical suggestions also risks serious under-inclusion. With that caveat, the following are a few considerations for lawyers confronting litigation in a bankruptcy setting.

a. Stay Relief

The automatic stay is not an absolute bar to continued prosecution of pre-bankruptcy suits against a debtor. Some actions are excepted from the stay. For example, suits that involve support and custody issues are stay exceptions. In addition, under Bankruptcy Code § 362(d), the bankruptcy court has the discretion to lift the stay to permit a pre-bankruptcy suit to proceed. Relief in such a situation is far from automatic. The petitioning party bears the burden of establishing cause to lift the stay. Bankruptcy courts are more inclined to allow continued prosecution of pre-bankruptcy actions when (1) the bankruptcy was filed on the eve of a trial, (2) there are multiple defendants with a risk of multiple proceedings and conflicting results, and/or (3) the movant agrees to pursue any judgment exclusively against a debtor's insurer so that the bankruptcy estate is not burdened. There may, however, be a practical reason in such circumstances not to pursue stay relief in the early stages of a reorganization case. At that point, it is difficult to assess whether a debtor's financial position will support a small or a large dividend to creditors, and a claimant may not wish to incur the costs of litigating if it is not evident that the debtor can pay.

b. The Trial Forum

Several Bankruptcy Code provisions make clear that the initial choice of trial forum is not necessarily the final choice. The obvious example of this is a pre-bankruptcy suit against a debtor. Because of the automatic stay, it is rare that such a suit proceeds in the original trial court. Rather, it is handled by a bankruptcy judge in the context of claims litigation. Another example involves a debtor's pre-bankruptcy tort or contract suit. Pursuant to provisions in 28 U.S.C. § 1452(a), non-debtor defendants can, if they wish, remove such actions to the district court in which the bankruptcy case is pending as long as such court has "related to"

jurisdiction under section 1334. There are, however, specific time limits for removal pursuant to Bankruptcy Rule 9027, and the district court may on motion remand a removed case. A final example of this principle relates to, 28 U.S.C. § 1334(c)(2). That section provides for judicial abstention, (1) but only as to "related to" actions, (2) which are based upon a state law claim or cause of action, (3) as to which an action is already pending which can be timely adjudicated in the original state forum (assuming a lifting of the stay).

c. Jury Trials

The pendency of bankruptcy does not necessarily foreclose a jury trial, and this despite the rulings of the Supreme Court (1) in *Katchen v. Landy,* 382 U.S.323, 865.Ct. 467, 15 L.Ed.2d 391 (1966), that most proceedings in bankruptcy "are proceedings in equity" to which no right to trial by jury inheres and (2) in *Langenkamp v. Culp,* 498 U.S. 42,111 S.Ct. 330, 112 L.Ed.2d 343 (1990) that a creditor filing a claim waives the right to a jury trial on a counterclaim asserting bankruptcy avoiding powers. Decisions of the Supreme Court and other courts suggest that the jury trial right is preserved, among other situations, (1) as to a fraudulent conveyance suit by the debtor if the creditor has not filed a claim, (2) as to counterclaims that are not based on avoiding powers and (3) as to "related to" suits by a debtor. Moreover, in those situations in which a jury trial is appropriate (excluding personal injury/wrongful death claims which are handled by the district court) a bankruptcy judge may preside pursuant to 28 U.S.C. § 157(e), but only if specially designated by the district court and with the express consent of all parties to the action.

d. "Related To" Jurisdiction

The grant of "related to" jurisdiction permits debtors to prosecute tort, breach of contract and collection actions in the potentially friendly environment of the bankruptcy court. Defendants not satisfied with that prospect are not, however, without recourse. By demanding and refusing to consent to the bankruptcy court's presiding over a jury, the non-debtor defendant assures that the ultimate decision will rest with the district court rather than the bankruptcy judge. This can occur either (1) if the defendant immediately moves to withdraw the reference so that the case can be tried, in the first instance, before a district judge or (2) if the defendant permits the matter to proceed in the bankruptcy court and then objects to the proposed findings and conclusions, thus triggering de novo consideration by the district court.

e. Objections to Dischargeability

Bankruptcies are filed to deal with and discharge debts. Not all debts are susceptible to discharge, however. Bankruptcy Code § 727 lays out bases for denial of a discharge as to all creditors of a debtor. Section 523, on the other hand, delineates those circumstances in which a discharge can be denied as to specific debts. These sections are relevant to individuals who are debtors and not to corporate debtors.

There are several practical considerations in deciding whether to challenge a discharge. Such challenge makes sense only if there is an expectation that the debtor will accumulate meaningful assets after the bankruptcy so that a debt can be paid. The decision to proceed by complaint under § 523 (nondischargeability of specific debts) or § 727 (denial of discharge of *all* debt) turns, obviously, on the facts of the case. However, an individual creditor should think twice before pursuing a § 727 action because, if successfully pursued, it will leave a debtor exposed to all of its pre-bankruptcy debts, not just the claims of the complaining creditor.

f. Pre-bankruptcy Judgments and Settlements

Pre-bankruptcy judgments carry weight in bankruptcy. As to the issue of claims allowance and quantification, bankruptcy does not give a debtor the right to re-litigate a matter that has proceeded to an adverse judgment before a bankruptcy filing. Unless overturned on appeal, the pre-bankruptcy judgment fixes the claim against a debtor. Similarly, pre-bankruptcy findings have collateral estoppel effect with respect to issues such as fraud which are raised in a post-filing objection to dischargeability of a debt.

The foregoing notwithstanding, bankruptcy can impact matters that have proceeded either to judgment or settlement before the bankruptcy petition. If post-judgment levies have occurred, payments been made or liens arisen within 90 days of a bankruptcy filing, they all may be recoverable as preferences under Bankruptcy Code § 547. Even settlement payments voluntarily made during the 90 day period may be challenged on the same basis.

g. Appeal of Pre-bankruptcy Judgments

In addition to preference considerations, a bankruptcy filing has a bearing on appeals by a chapter 11 debtor. For one thing, bankruptcy avoids a potentially costly undertaking for issuance of a stay. Because bankruptcy invokes an automatic stay, ordinary bonding requirements do not apply to a debtor challenging a pre-bankruptcy judgment. An exception may relate to post-bankruptcy costs of appeal for which an undertaking may be appropriate.

The automatic stay bears on appeals in another way. The stay obviously is not implicated in an appeal by the debtor. However, it may be in connection with any cross-appeal. Caution dictates that stay relief be sought by a non-debtor seeking to pursue a cross-appeal.

Conclusion

It should be evident from the foregoing that, the automatic stay notwithstanding, bankruptcy and litigation are not mutually exclusive. Indeed, a bankruptcy filing opens up numerous conflicts that require judicial resolution. Some of the rules that govern these conflicts are familiar to litigators, and others are quite different. Because of these differences, there is an advantage to involving lawyers familiar with the intricacies of bankruptcy litigation when dealing with disputes after a bankruptcy filing.

Parker & McConkie - now a Practice Group of Prince Yeates

Together, Jim McConkie, Brad Parker, and Jonathon Tichy bring an outstanding track record of litigation experience to Prince Yeates and its business clients. Parker and McConkie have experience in complex business and criminal litigation and a settlement and verdict record in catastrophic injury, brain injury, wrongful death, personal injury, and medical malpractice cases that includes Utah's largest wrongful death verdict (*Allred vs. Chenoweth*) $52 Million and largest medical malpractice verdict (*Williams v. Intermountain Health Care*) of $9.7 Million. In addition, the Parker McConkie group carries a significant referral caseload assisting other Utah attorneys in complex litigation matters, catastrophic injury, medical malpractice and wrongful death claims.

Jim McConkie, Brad Parker and James W. McConkie, III have been admitted as shareholders in the firm of Prince Yeates.

Andrew B. Clawson and Jonathon T. Tichy have joined Prince Yeates as associates.

Prince Yeates was formed in 1971 from the merger of two smaller firms, Mulliner, Prince & Mangum and Ward & Geldhalzer. The firm prides itself on a responsive small firm feel with large firm strengths as it assists clients not only in Utah but in other intermountain states as well. Prince Yeates provides a full range of quality legal services, including litigation, real estate, labor and employment, and corporate/commercial law.

Adam S. Affleck
Wilford A Beesley
Wilford A. Beesley, Jr.
Richard L. Blanck
James A. Boevers
Glenn R. Bronson
J. Randall Call
John S. Chindlund
Andrew Clawson
M. David Eckersley
Thomas J. Erbin
D. Jay Gamble
Jon C. Heaton
William G. Marsden
James W. McConkie, II
James W. McConkie III
Roger J. McConkie
Sally Buck McMinnimee
Kathryn P. O'Connor
Bradley H. Parker
G. Troy Parkinson
Allen Sims
Jonathon T. Tichy
Richard H. Thornton
Michael N. Zundel

PRINCE•YEATES

Sound Thinking. Sound Solutions.

801.524.1000 or www.princeyeates.com

A Guide to The Foreign Corrupt Practices Act

by Robert A. Youngberg

Utah companies do business in foreign markets now more than ever before. Among the 50 states, Utah has the seventh fastest growth rate in export shipments of goods. 2,141 companies exported goods from Utah in 2002, and most (83 percent) were not large companies. In 2003, the value of exported goods shipped from Utah topped $4 billion.[1] Compliance with foreign trade laws is, therefore, increasingly vital to the success of Utah businesses.

One such law is The Foreign Corrupt Practices Act of 1977 (the "Act").[2] Congress enacted it after learning of "questionable payments" by U.S. companies to foreign officials to garner business with foreign governments. The Act does more than prohibit bribery. It goes beyond bribery and prohibits actions that may, on first glance, appear to be acceptable business practices, especially in foreign lands. This article aims to guide its readers to a basic understanding of the Act.

General

The Act has two parts. The first pertains to accounting procedures, the second to bribery. The accounting provisions apply to all U.S. companies that have stock registered with the Securities & Exchange Commission. The bribery provisions apply to all U.S. companies, even those that do not have stock registered with the SEC, and to all U.S. citizens and residents. Penalties for violations include both fines and imprisonment.

Accounting Provisions

The accounting provisions essentially restate recognized accounting principles and procedures. As such, they require two things of a company's accounting system: (1) accurate records, and (2) internal accounting controls. Specifically, the Act requires a company to:

(1) make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect transactions and dispositions of assets;

(2) create a system of internal accounting controls that provide reasonable assurances that transactions are properly authorized; and

(3) record accurately all amounts on the company's books.

There is no limit on materiality. That is, a company must account for all its money and not just sums that would be "material" in the financial accounting sense. For example, even for petty cash payments, a company should keep receipts.

Audits meeting the Act's requirements will test to see that a company follows its accounting procedures for all its assets and transactions. They also will test to ensure that all payments have adequate supporting documentation. In particular, auditors should look for cash payments; payments to anonymous or "numbered" bank accounts; checks written to "bearer" or to "cash"; and misleading or fake documentation serving as cover for fictitious sales, purchases, loans or other transactions.

A prudent company will audit its accounting procedures before starting business in a foreign country or with a foreign customer.

Bribery

The Act's second part relates to bribery. It strictly regulates payments of anything of value to foreign officials. However, the Act permits certain payments known as "facilitating payments," which are payments to obtain or expedite the performance of routine governmental action. One violates the Act by making a payment other than a facilitating payment corruptly to obtain or retain business.

Here is a simple outline of the elements of the bribery offense, using words and phrases from the Act itself:

A U. S. person (company, citizen or resident) may not:

- use interstate commerce
- to offer, promise to pay, pay or authorize payment of anything of value
- to a foreign official, or

a foreign political party or party official, a candidate for

ROBERT A. YOUNGBERG served for 16 years as an attorney in the legal department of a major oil company, including 6 years at its London office, where he provided legal counsel to operating peronnel in Europe and Africa. He curently resides in Park City, Utah.

foreign political office, or

any other person while knowing that such person will offer, promise or give money or something of value to any person or entity mentioned above,

- corruptly
- for the purpose of influencing an official act or decision
- to obtain or retain business, to direct business to any person, or to obtain an improper advantage.

The offense is best understood by carefully considering the words and phrases used:

"Interstate commerce." This element of the offense is easy for a prosecutor to prove. Did company employees go to a foreign country on an airline from the U.S.? Did they phone someone in that country from the U.S., or send a letter or e-mail from the U.S.? Did the company ship goods from the U.S. to a foreign country? Your client's normal methods of doing business will easily satisfy this element of the offense.

"Pay." Notice that one need not actually make a payment to commit the crime. One need only offer or promise a payment, or authorize someone else to make it.

"Anything of value" means just that. Low-interest loans, vacations, sporting goods, and charitable donations are all possible examples. As a practical matter, the Act should not stop your client from paying for a customer's lunch. However, your client should know that Congress considered making an exception for gifts that are a "courtesy, a token of regard or esteem in return for hospitality," but declined to do so. There is no "business courtesies" defense. There is no safe harbor minimum value.

"Foreign official" sounds easy, but the term can be difficult to apply. Under the Act, a foreign official is anyone who acts in an official capacity for a foreign government and who exercises some discretionary authority. Obviously, it includes an officer of a foreign government. It also includes an officer in its armed forces. But it can include more. It can include any person employed by an agency of a foreign government, or by a corporation or other body owned or controlled by a foreign government. Moreover, an accountant, a lawyer, a consultant, a broker, or an investment advisor who acts for a foreign government may be a "foreign official."

"Knowing." A company cannot make payments to others while knowing they will use the payments contrary to the Act. The Act first required proof that a defendant have "reason to know" of

illegal payments. However, amendments in 1988 changed that standard to a more comprehensive one, the "knowing" standard. This standard covers those with actual knowledge of illegal payments. It also covers those who fail to take action in spite of reasonable signs of illegal payments. The required state of mind includes a conscious purpose to avoid learning the truth. A company cannot close its eyes to possible violations of the Act by its foreign agents.

"Corruptly" means a bad motive or intent to wrongfully influence a foreign official to misuse his or her official position. This, too, is not a difficult element to prove. After proving the other elements of the offense, a prosecutor will argue that one can infer bad motive or intent, and the argument will likely succeed.

"Influencing an official act or decision." Here, emphasis is on the word "official." Courts interpret the word broadly. Does the payment relate – in any way – to a foreign official's position and the acts or decisions he or she makes in that position? Proof that a payment influenced any official act or any decision, however low in importance, will satisfy this element of the offense. Not only are payments to induce a foreign official to act or decide covered by the Act, but also payments to refrain from acting or deciding. Also covered are payments to induce a foreign official to use his or her influence to, in turn, influence another foreign official.

"To obtain or retain business, to direct business to any person, or to obtain an improper advantage." These words add a business nexus element to the offense. They require proof that a payment helped or was intended to help a company obtain or retain some business for itself or another person. In this respect, "business" is not limited to foreign government contracts. It includes any commercial activity. Congress amended the Act in 1998 to add the words "improper advantage" to the phrase. They refer to something to which one is not entitled. For example, an operating permit for a factory that fails to meet statutory requirements is an "improper advantage."

Exception: "Facilitating Payments"

At first, the Act did not make a distinction between those duties of foreign officials that are "discretionary" and those that are "ministerial." Amendments in 1988 did, however, make that distinction. They allow your client to make a "facilitating payment" when the purpose is "to expedite or secure performance of a routine governmental action." Payments that qualify for this exception are payments to:

- obtain permits, licenses, or other documents to qualify a

company to do business in the foreign country;

- process governmental papers, such as work orders or visas;
- provide police protection or mail service;
- schedule routine inspections required by contract or related to transporting goods;
- provide telephone service, power and water supply, the loading and unloading of cargo, or protecting perishable products from deterioration; and
- actions "similar" to the above.

These exceptions allow a company to pay to hurry up governmental actions that would only happen later without the payment. The Legislative History gives us an example. Foreign government workers have left pharmaceutical products on an airport runway in a tropical climate. The American company that owns the products wants them removed and properly cared for. Under the "facilitating payments" exception, the company may pay a foreign official to speed up removal of the products from the runway.

The scope of this exception is limited. Payments would be comparatively small. If a company makes such a payment, it should record the payment accurately on its books ("facilitating payment" will do). Above all, remember that "routine governmental action" does not include decisions to award new business or to continue business.

Affirmative Defenses

The 1988 amendments also created two affirmative defenses for defendants charged with violations of the Act. They relate to:

(1) "Reasonable and bona fide" expenditures, such as travel and lodging expenses that are "directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract with the foreign government."

For example, your client may pay travel expenses for foreign officials to tour your client's facilities, either here or abroad. However, your client may not pay for any side trips or other expenses that are unconnected with the primary purpose of the tour. In most cases, the issue here is whether the proposed payments are "directly related."

(2) "Payments to officials that are lawful under the written laws of the official's country."

Here, success will depend on correctly understanding the foreign

laws. When in doubt, get a written opinion from foreign counsel for any proposed payment.

Joint Ventures

If a company has a controlling interest in a joint venture (over 50%), the Act applies fully. With less than a controlling interest, your client should encourage the other members of the joint venture to adopt and follow practices that are consistent with the Act. This requires a well-documented "good faith" effort. To meet this standard, a company will investigate its joint venturers carefully before entering the joint venture. It also will document its opposition to any prohibited payments. Finally, it will insist that the joint venture agreement require adherence to the Act or its principles. Ideally, the agreement would require (1) an internal compliance program, (2) senior management commitment to the program, (3) accounting and cash disbursement controls, (4) clear policy statements on providing food, entertainment and gifts, (5) and audit controls to test whether the joint venture follows its own policies and procedures.

Of course, the smaller a company's interest in the joint venture, the less control it will have over these matters. Nevertheless, a company should make a good faith effort, and should document its efforts well.

Enforcement

The Department of Justice enforces the bribery provisions, while the SEC enforces the accounting provisions. The SEC also is responsible for civil enforcement of the bribery provisions against companies that have stock registered with the SEC.

Penalties

Penalties for violating the accounting provisions are the same penalties that apply to most other violations of the securities laws. These penalties include monetary fines but no criminal penalties.

On the other hand, penalties for violating the bribery provisions include both fines and imprisonment. Fines can be up to $2,000,000 per violation for a company and up to $100,000 for an individual. (A company may not reimburse its employees for fines). Imprisonment can be up to five years per violation. Before 1991, courts gave most individuals suspended sentences for violations of the Act. Under the 1991 Federal Sentencing Guidelines, however, convicted individuals serve some time in prison as well as pay fines.

Compliance Programs

Federal Sentencing Guidelines also require federal courts to consider the existence or absence of effective company compliance programs. Such a program can significantly reduce a company's penalty for violations of the Act, while the absence of such a program can increase the penalty. Therefore, all companies that do business in foreign markets should put into practice a compliance program designed to guard against violations of the Act by its employees.

Conclusion

All companies that do business in foreign markets should become familiar with The Foreign Corrupt Practices Act. Although its requirements are strict and its penalties severe, most companies find that the Act does not prevent them from successfully competing for foreign business, especially with the clarifications that the 1988 amendments provide. In the end, most companies know that successful foreign trade is not dependent on "questionable payments" to foreign officials, but rather on those things that have always mattered most in business relations – the quality of the goods, services, and expertise that companies offer their customers.

1. International Trade Administration and Bureau of the Census, U.S. Department of Commerce, Exporter Data Base, *Utah: Exports, Jobs, and Foreign Investment,* 5 January 2005, available at http://www.ita.doc.gov/td/industry/otea/state_reports/utah.html (last visited 8 March 2005).
2. Foreign Corrupt Practices Act, U.S. Code, vol. 15, sec. 78dd-1, et. seq. (1977).

Parr Waddoups Brown Gee & Loveless

We are pleased to announce Jonathan Schofield, Rodger Burge, Seth King, Justin Matkin, Kara Houck and Michael Hoppe have become Shareholders of the firm.

Jon Schofield practices commercial litigation in areas such as contracts, insurance, employment, real estate, construction and bankruptcy.

Rodger Burge practices commercial litigation and transactions with emphasis on contract and employment disputes as well as corporate law.

Seth King practices in the areas of securities, mergers and acquisitions, commercial finance and corporate law.

Justin Matkin practices commercial litigation with emphasis on eminent domain, real estate, contact disputes and intellectual property.

Kara Houck practices commercial litigation.

Michael Hoppe practices commercial litigation with an emphasis in contract disputes, construction, intellectual property, product liability, workouts, creditors' rights and bankruptcy.

We are also pleased to announce Brian Lloyd, Bryan Allen and Matthew Fleming have joined the firm.

Brian Lloyd is a Shareholder and member of the business transactions group, specializing in advising public and private companies as well as investors on formation, financing, securities regulations, mergers and acquisitions, corporate governance and business matters. Prior to rejoining Parr Waddoups, Mr. Lloyd was a partner with the Salt Lake office of Stoel Rives.

Bryan Allen is a Shareholder and member of the business transactions group, with emphasis on securities, corporate counseling and mergers and acquisitions. Prior to rejoining Parr Waddoups, Mr. Allen was a partner with the Salt Lake office of Stoel Rives.

Matthew Fleming is an Associate and member of the business transactions group, specializing in general corporate law. Prior to joining Parr Waddoups, Mr. Fleming was an associate with the Salt Lake office of Stoel Rives.

185 South State Street, Suite 1300
Salt Lake City, Utah 84111-1537
T: (801) 532-7840
info@pwlaw.com
www.pwlaw.com

Practice Pointer: Avoiding Fee Disputes and the Bar Complaints That Sometimes Accompany Them

by Kate A. Toomey

Disputes between lawyers and clients over fees are not in and of themselves disciplinary matters, and the Office of Professional Conduct ("OPC") typically dismisses or declines to prosecute complaints that solely concern the amount an attorney has charged or collected. Although the Rules of Professional Conduct prohibit lawyers from charging or collecting a "clearly excessive fee,"[1] and offer guidance for evaluating the reasonableness of the fee,[2] they don't dictate the terms of attorney-client contracts, nor do they insulate either party from entering into a bad bargain. The fact that many clients are dismayed by the amount owed at the conclusion of a representation is not, without more, a disciplinary issue.

Nevertheless, the OPC receives a substantial number of informal complaints that include allegations that the attorneys' fees were exorbitant, and attorneys sometimes have to respond to these complaints.[3] Even if the attorney isn't requested to respond, the very existence of a Bar complaint can cause anxiety, and most attorneys would prefer to avoid having one filed even if it goes no further. This article will offer some simple suggestions for avoiding fee disputes.

Effective Communication Is Key

As is so often the case in attorney-client relations, good communication is about as effective as anything for avoiding misunderstanding and disagreements. The duty to communicate is so central to the attorney-client relationship that the rules codify it.[4] Employed skillfully, good communication not only fosters effective representation, but also protects the attorney from complaints.

Start by hammering out an explicit written memorandum that identifies what you'll do and how much you'll charge. Sure, not every representation requires a written fee agreement, but it's a good idea to have one anyway.[5] That way, there will be no misunderstandings about issues such as whether the advance or retainer is the entire amount of the fee, whether the client has to pay even if the outcome isn't satisfactory, or whether the attorney is responsible for out-of-pocket costs. If you charge clients for phone calls and overhead such as copying, a fee agreement or memorandum is a good place to explain this.[6]

Billing can be another effective communication tool if you do it at regular intervals and include enough information.[7] If you send your client a monthly statement identifying the nature of the work you performed, the amount of time you spent on it, and the rate you charged for it, the client is less likely to be surprised by the final bill. The client also has an opportunity to review the statement for honest errors on your part, and to raise questions about services performed. It's certainly easier to correct errors right away and, in the long run, if the amount of the initial bill prompts the client to reconsider whether she can afford your services, that too is better known as soon as possible.

Related to this, it's a good idea to collect on your bill as you perform the work, and to forecast this in your written fee agreement. The Rules of Professional Conduct permit you to withdraw from the representation if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled."[8] Including such a provision in a written fee agreement is an important first step in giving "reasonable warning," thereby insulating you from a Bar complaint filed by a disgruntled client after you've terminated the relationship because the client wouldn't pay the bill.

At the conclusion of the representation, take the time to talk to your client. If the outcome wasn't what the client sought, explain the reason for the result. Answer questions. Discuss your client's concerns about the fee. If this doesn't sufficiently address the concerns, suggest that the client review the fees with another attorney.

Resolving the Dispute You Can't Avoid

One way to provoke a Bar complaint is to sue your client for fees. I'm not saying you shouldn't; the Rules of Professional Conduct certainly don't prohibit it, and sometimes that's the only way to collect money the client owes. But consider a couple of things before you take this step.

Many attorneys adjust the fee. If you can keep the client happy and collect enough to cover your expenses and still make a profit, this is often the wise solution even if it means discounting the

KATE A. TOOMEY is Deputy Counsel of the Utah State Bar's Office of Professional Conduct. The views expressed in this article are not necessarily those of the OPC or the Utah State Bar.

amount you are legitimately owed. It's a good way to cultivate continued goodwill and referrals, and you avoid the mess and expense of adversarial proceedings.

If you can't informally resolve the dispute, another option is to seek arbitration. The Utah State Bar sponsors a fee arbitration program[9] that provides hearings before a panel of volunteer arbitrators who hear the parties, review the records presented, and decide what the fee should be. Both parties must agree to submit the case for arbitration, and not all clients are willing to go this route, but it's still worth considering because it's a quick and inexpensive means of putting the conflict behind you. The comment following the rule encourages it, and your willingness to participate goes a long way toward deflecting a complaint.[10]

You need not employ the procedure provided through the Bar; other services are available. You could even agree in advance of the representation to use arbitration or mediation, provided the client is fully apprised of the advantages and disadvantages and gives informed consent.[11] This is an approach endorsed by the American Bar Association's Standing Committee on Ethics and Professional Responsibility, but it's not unanimously favored in other jurisdictions.

If Your Client Files a Bar Complaint Over the Fees

You may be wondering what will happen if your client files a complaint alleging that your fee is too high. The OPC routinely notifies attorneys if it receives information that, if notarized and attested to, would constitute an informal complaint, and it likewise notifies attorneys of informal complaints received, including complaints about fees. You need not respond unless the OPC requests a response; some attorneys submit a response anyway, just to be helpful.

If a response becomes necessary, and the allegations involve the reasonability of the fee, it's helpful if the attorney's response includes a copy of the fee agreement if there is one, and the relevant billing statements. Submitting these documents is often sufficient to allow the OPC to dispose of an informal complaint without further action, either by declining to prosecute it or dismissing it, frequently with the suggestion that the parties consider fee arbitration. If the matter must be referred to a Screening Panel for a hearing, you will be notified, and the panel will receive copies of what you submitted.

The Reasonability of Your Fee Isn't a Matter For the Ethics Hotline

Sometimes lawyers call the Ethics Hotline to discuss matters involving their fees, but there's not much guidance the OPC can offer beyond the factors provided in the rule for determining the reasonability of a fee.[12] These are sensible considerations, requiring an attorney to honestly appraise their skills, circumstances, and reputation, as well as the customs of the place where they practice. The considerations are necessarily fluid, and there's no bright-line test. But if you consider all these factors as a dynamic whole, you're likely to reach an amount that would be reasonable within the meaning of the rule – in other words, a fee that is not "clearly excessive."

1. Rule 1.5(a) (Fees), R. Pro. Con. The rule also prohibits attorneys from charging or collecting an "illegal fee." *See id.* This article does not address issues relating to an attorney's charging or collecting an illegal fee.
2. Factors to be considered as guides in determining the reasonableness of a fee include the following:

   (a)(1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;

   (a)(2)The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

   (a)(3) The fee customarily charged in the locality for similar legal services;

   (a)(4) The amount involved and the results obtained;

   (a)(5) The time limitations imposed by the client or by the circumstances;

   (a)(6) The nature and length of the professional relationship with the client;

   (a)(7) The experience, reputation and ability of the lawyer or lawyers performing the services; and

   (a)(8) Whether the fee is fixed or contingent.

   Rule 1.5(a) (Fees), R. Pro. Con.
3. Rule 8.1(b) (Bar Admission and Disciplinary Matters) requires attorneys to respond to "a lawful demand for information from an admissions or disciplinary authority." If the other allegations, assuming their truth, would constitute a rule violation, the OPC usually requests an answer from the attorney.
4. *See* Rule 1.4 (Communication), R. Pro. Con.
5. *See* Rule 1.5 (Fees), R. Pro. Con. The basis or rate of the fee need not be in writing unless the reasonably foreseeable total fee exceeds $750; contingent fee agreements *must* be in writing. *See id.*
6. Remember that some things cannot appropriately be billed, such as charging a client for time spent responding to a Bar complaint! *See e.g. In re Lawyers Responsibility Bd. Panel No. 94017,* 546 N.W.2d 744 (Minn. 1996).
7. Attorneys sometimes tell me that monthly billing is too expensive, especially if minimal work has been performed on a case, and that providing detailed bills is similarly too expensive. Bear in mind, though, that a client is entitled, upon request, to a prompt and full accounting of funds they have paid an attorney. *See* Rule 1.15(b) (Safekeeping Property), R. Pro. Con. The only way to be able to promptly and accurately render such an accounting is to contemporaneously keep track of your time and the work performed. It seems to me that this is a significant portion of what's involved in sending monthly bills.
8. Rule 1.16(b)(5) (Declining or Terminating Representation), R. Pro. Con.
9. Call the Utah State Bar at 531-9077 for more information about this program.
10. The Comment provides: "If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the Bar, the lawyer should conscientiously consider submitting to it." Rule 1.5 (Fees), R. Pro. Con.
11. *See* ABA Formal Ethics Op. 02-425 (2002).
12. *See* Rule 1.5(a) (Fees), R. Pro. Con.

Federal Appeals: The Scoop on Electronic Submission and Filing

by Douglas E. Cressler

> *Senior partner: "There was a time when we had to print everything that was to be filed with the court on paper, along with several copies as required by the rules, then physically mail or deliver the whole stack of stuff to the court and send additional paper copies of everything to all the parties in the case."*
>
> *New associate: "Wow. And were the deliveries made on dinosaurs?"*
>
> A near-future law firm conversation.

Since December 1, 2004, the U.S. Court of Appeals for the Tenth Circuit has required that motions, briefs, and petitions filed with that court be submitted electronically, in addition to the usual hardcopy filing. At the same time, the court is developing a new docketing system that will permit true electronic filing, eliminating the need for filing paper documents. This article summarizes the federal appellate court's current electronic submission requirements and previews the changes appellate practitioners can expect when true electronic filing becomes a reality with the circuit court.

The Current Practice

The Tenth Circuit Court of Appeals is currently operating under an Emergency General Order filed October 20, 2004, made effective December 1 of that year. The Order provides generally that in addition to the paper filings required by the Federal Rules of Appellate Procedure and local Tenth Circuit Rules, certain documents must also be transmitted to the court in electronic form. The Order is accessible from the court's website at http://www.ca10.uscourts.gov/ by clicking on "Electronic Submissions."

The Order has been amended twice since its adoption. It currently requires that all motions, petitions, briefs, bills of cost, and Fed. R. App. P. 28(j) letters be submitted to the court in 'digital form.' That term is expressly defined in the Order as follows: "[I]n Portable Document Format (also known as PDF or Acrobat format and sometimes referred to as Native PDF) generated from an original word processing file, so that the text may be searched and copied: PDF images created by scanning documents do not comply."

The required digital format, as opposed to the scanned form of PDF document, allows the court to search and copy text from submitted documents, thus facilitating appellate review. The Order permits the inclusion of scanned attachments to digital submissions, but only when the attachments are not available in digital format.

A routine example illustrates how the Order operates. Tenth Circuit Rule 28.2(A) requires that all pertinent written findings, conclusions, opinions, and orders of the lower tribunal be included with the brief of the appellant. If those documents are only available in paper form, they can be scanned together into one additional PDF document and transmitted along with the digital brief. Therefore, the email transmission to the court would contain two PDF files: one in searchable digital form containing the brief, cover-to-cover, and a second file containing the attachments to the brief in scanned form.

Submission by mailing a CD ROM to the clerk is required when the materials submitted are under seal. All unsealed submissions should be sent via email to esubmission@ca10.uscourts.gov. There is no need for special authorization, sign-on codes, or passwords to submit electronically by email.

Within a short time after submission, the electronic documents are linked by court staff to the PACER (Public Access to Court Electronic Records) docket and can be accessed, for a fee, through that system. Information about PACER registration is available at http://pacer.psc.uscourts.gov/register.html.

Appellate practitioners are advised to read the Order carefully and to also comply with its requirements governing identification and signing, certification, service, and privacy redactions. As noted above, the electronic submission does not replace, but is in

DOUGLAS E. CRESSLER is the Chief Deputy Clerk of the U.S. Court of Appeals for the Tenth Circuit. He can be reached at 303-844-3157. The court encourages questions about appellate procedure.

addition to, the requirement of actual filing in hardcopy with the requisite number of copies, as provided by rule. Practitioners with questions should call the circuit clerk's office at 303-844-3157, or e-mail to esubmission@ca10.uscourts.gov.

The Future – True Electronic Filing

The circuit's electronic submission process is just a warm-up for the advent of electronic filing. As the Order states, electronic submission was adopted by the court "to evaluate the usefulness of documents in electronic form."

The next step in the process will be the implementation of an electronic filing system that completely eliminates the need for the filing and service of paper documents. The acronym used by the federal courts for the new system is CM/ECF, which stands for Case Management/Electronic Case Files.

Whether at the trial court or appellate court level, the general concept is the same. Attorneys register to be part of the system and are then allowed to file and serve pleadings via the internet with no hardcopies ever trading hands. Rather than sending a paper motion or brief to a court clerk who then makes an entry on the docket system, the attorney actually creates the docket entry, attaches the court filing to it, and hits the 'send' button. The document is filed, the docket is updated, and parties are automatically notified electronically that a filing has occurred. The document can be accessed by anyone immediately.

Among the benefits of CM/ECF to attorneys, clients, and courts are:

- 24 hour, 7-day per week access to file, view, or print documents;
- Automatic email notification of case activity;
- Documents can be filed and accessed from anywhere in the world that internet access is available;
- Immediate creation of docket entries;
- Immediate access to updated docket sheets and to the documents themselves;
- Potential elimination of paper files that can be misplaced or lost;
- Savings in copying, courier, and noticing costs;
- The ability to store and search documents electronically.

Many attorneys will already be familiar with electronic filing, either through the state systems or through the federal district court.

Although a CM/ECF system is widely available and is growing in popularity with federal district courts, an electronic filing system for the federal circuit courts of appeal and the bankruptcy appellate panels is still in the development process. The various circuit courts are working with the Administrative Office of the United States Courts to develop a system that will be similar to the systems used in the district courts.

In the Tenth Circuit, the project has the full support of the court. The court has appointed Betsy Shumaker, who also serves as Counsel to the Chief Judge, as the CM/ECF project manager. The court hopes that an electronic filing system will be implemented in the Court of Appeals for the Tenth Circuit sometime during 2006, but the project is not far enough along in development for any hard deadlines to be set.

When a clearer picture emerges on an implementation date, the circuit court will begin a large-scale education and training effort. Anticipated plans include on-line training programs that can be accessed from anywhere and in-person training sessions in each of the six states comprising the Tenth Circuit: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. For the moment, however, the focus is on development of a system well-suited to the needs of this diverse circuit.

Lawyers take for granted that we can transact all forms of business, communicate immediately with clients and colleagues, and access an expanding universe of legal and non-legal information through the convenience of an internet infrastructure that essentially did not exist 20 years ago. Electronic filing is also on its way to becoming just another routine part of practicing law.

Learning Professionalism and Civility – Thoughts for New Members of the Bar

by Judge Derek P. Pullan

Every day, I am grateful for attorneys who have a clear view of the law, and are willing to impart that knowledge to me. In the legal profession, seeing things clearly does not come without sacrifice. I am regularly the beneficiary of your long hours of research, reading, and disciplined thought. Those who venture into the vast legal landscape know that the demands of the journey are real. Thank you for your conscientious work on behalf of your clients and the courts.

FIND OR BE A MENTOR

My first suggestion to new members of the bar is to seek out a mentor. Find an experienced attorney in your firm or elsewhere who is willing to guide you in the early stages of your career. A mentor can help you to avoid common pitfalls and can impart wisdom and experience acquired over decades. To seasoned practitioners – when you see a new member of the bar struggling unnecessarily in the practice – please take time to meet with him or her. Give counsel and direction. The long-term returns on this investment are too great to be measured.

As a new lawyer, I had the opportunity to serve as a law clerk for former Chief Justice Richard C. Howe. During that year, I became the beneficiary of Justice Howe's long experience as an attorney, legislator, and judge. His influence shaped both my analytical skills and my character. He taught me the fundamental importance of correct facts. On his wall hung a small sign that read: "Every man has the right to his own opinion, but no man has the right to be wrong in the facts." He taught me to have respect for the hard-fought compromises that are hammered out in the legislature. Most importantly, he taught me the importance of kindness, patience, and humility. Each new member of the Bar should be the beneficiary of such a mentor.

THE STANDARDS OF PROFESSIONALISM AND CIVILITY SHOULD GUIDE YOUR PRACTICE OF THE LAW

In recent years, we have seen a general decline in the civility of public discourse. In the past, the resort to rancorous speech and demeaning personal attacks evidenced a weakness in the merits of one's case. Today, the client's expectations of you are often shaped by the attorneys portrayed on television. Tainted by these caricatures, the client feels you have not earned your fee unless you represent him zealously, and with malice aforethought. We must not permit our standards of behavior as a profession to be shaped by cultural expectations which increasingly gravitate toward hostility.

Recently, the Utah Supreme Court approved twenty Standards of Professionalism and Civility. In my view, this effort was not undertaken to cure epidemic incivility in the profession, but to countervail unfounded expectations about how lawyers conduct themselves. Consider Standards 1 and 2:

> Lawyers shall advance the legitimate interest of their clients without reflecting any ill-will that clients have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.
>
> Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

Sadly, legal drama portraying such prudent behavior would certainly result in abysmal ratings and be discontinued.

The full text of the Standards is available at www.utcourts.gov under the heading "Attorney Resources." Please take some time to become familiar with them. Review them with clients whose expectations are otherwise.

JUDGE DEREK P. PULLAN was appointed to the Fourth District Court in September 2003 by Governor Michael O. Leavitt. Judge Pullan received his law degree from J. Reuben Clark Law School in 1993, and thereafter served as a law clerk at the Utah Supreme Court for former Chief Justice Richard C. Howe. Judge Pullan worked as a deputy county attorney, and served as the Wasatch County Attorney from 1999-2003.

SOME THOUGHTS ON LEGAL WRITING

Much of my time and your time is spent writing. Allow me to make some suggestions to you about this important form of advocacy.

A Persuasive Memorandum is not Necessarily a Lengthy One

One of the skills of persuasive writing is to describe complex principles in terms that are readily understandable. As you write, eliminate extraneous material.

Rule 7 of the Utah Rules of Civil Procedure permits a party to "file an overlength memorandum upon ex parte application and a showing of good cause."[1] Utah R. Civ. P. 7 (c)(2). Certainly, in some cases, such a request is justified. However, use this tool judiciously. Often, what needs to be said can be said in ten pages of argument. Remember, the Mayflower Compact consisted of less than 200 words.

Avoid Unnecessary Footnotes

As a young law clerk at the Utah Supreme Court – fresh from the halls of academia – I had a penchant for writing footnotes. When lines of research yielded nothing useful, I could not simply leave it alone. The footnote was the only way to memorialize my diligent, but fruitless efforts. Justice Howe reminded me: "Derek, if you decide every legal issue in this case, I won't have any job security." In writing, remember that if a sentence is not important enough to be in the body of the text, perhaps it should not be there at all.

Send Timely and Complete Courtesy Copies

Courtesy copies are very helpful. As a general rule, the clerk is pulling files for oral argument less than a week before the hearing. A courtesy copy reminds the judge that the hearing date is approaching, and places before him or her a copy of your memorandum. Another advantage is that the judge is free to make notes directly on these documents.

Having said that, allow me to make two suggestions. First, courtesy copies are most helpful when they arrive well in advance of the hearing – generally ten days. Copies that are received the day before the hearing will not beat the file to the judge's desk. Second, courtesy copies should contain both your pleadings and those of the opposing party. To avoid confusion, consult with opposing counsel so that one courtesy copy containing all pleadings is filed.

Do Not Use Invective

The Third Standard of Professionalism and Civility provides:

> Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communication with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

Here are some examples from actual pleadings filed in the Fourth District that seem to run afoul of this rule. The names of the authors have been withheld to protect the innocent (or guilty, as the case may be).

> *"Under the law cited above, Defendants are taking the absurd position that Plaintiff agreed to arbitrate… [these] claims. Such a position defies common sense and reason."*

> *"The defendant apparently has taken the rather simple-minded position that…"*

"Rather then address the regulations that existed on February 5, 2003, Plaintiff's memorandum presents an unhelpful and specious analysis of 'today's regulations.' Plaintiff's insistence [on this position] is absurd."

"Defendant brings only one argument in its most recent attempt to delay resolution of this matter."

"The motion was denied. Not content with that, the Defendants have moved for an inerlocutory appeal and are again attempting to delay, hinder, and increase costs through these side maneuvers."

Compliance with the Standards is reason enough to avoid such writing. But equally important is the fact that conclusory statements about the opposing party's arguments are not persuasive. They offer no assistance to the Court in deciding the merits of the case. If opposing counsel's position is "simplistic," "absurd," "simple-minded," "unhelpful" or "specious," sound legal reasoning will eliminate any need to label it so.

Occasionally in oral presentations, counsel may use a term or expression that is overly harsh or critical. Such verbal slips – while ill-advised – are more understandable because they occur in the heat of argument. However, in written pleadings – where the advocate is at greater leisure to select terms, craft phrases, and construct sentences – more care should be taken.

BE RESPECTFUL EVEN WHEN THE COURT RULES AGAINST YOUR CLIENT

For the most part, counsel rarely have difficulty in observing this rule. I would caution newer attorneys to remember that your facial expressions can speak volumes, especially to jurors who watch you intently.

The case of *In re Jesus Ramirez*[1] is a good reminder. In that case, R.C. Barry, Justice of the Peace for Tuolomne County, California,[2] found Ramirez guilty of stealing Sheriff George Werk's mule. He imposed court costs and a fine of $100.00. Finding that Ramirez was indigent, Judge Barry ordered that Sheriff Werk pay the costs and fine instead, and that if Werk could not do so, the mule should be sold and the proceeds paid to the court.

Judge Barry then notes this exchange:

> H.P. Barber the lawyer for George Werk insolently told me there were no law for me to rool so, I told him that I didn't care a damn for his booklaw, that I was the law myself. He continued to jaw back I told him to shut up but he wouldn't I find him $50 and committeed him to gaol for 5 days for contempt of Coort in bringing my roolings and dississions into disreputableness end as a warning to unrooly persons not to contraduct this Coort.

So remember, do not be unrooly. Never say or do anything to bring the roolings and dississions of the Court into disreputableness.

CONSIDER THE PURPOSE OF THE RULES OF PROCEDURE WHEN SEEKING DISCOVERY SANCTIONS

Practicing in accordance with the rules of procedure is critical to the efficient operation of the courts. In addition, the procedural rules afford litigants predictability. However, the ultimate objective of the rules is to "secure the just, speedy, and inexpensive determination of every action." Utah R. Civ. P. 1(a). The rules are liberally construed to achieve this end, and there is always a preference for deciding cases on the merits.

Rule 37 provides a continuum of possible sanctions for failing to comply with discovery orders, including entry of default judgment or an order of dismissal. Yet, the trial court is ultimately permitted to "make such orders in regard to the failure as are

just." Utah R. Civ. P. 37(b)(2). Certainly, there are instances in which severe remedies are appropriate. However, as a general rule, these circumstances are rare. Forfeiture of a party's claims or defenses is a harsh sanction, especially when it is imposed because the attorney – not the client – acted inappropriately.

BE GRACIOUS IN GRANTING ACCOMMODATIONS TO OPPOSING COUNSEL

I have found that as a general rule attorneys are cooperative and courteous to each other. Experienced attorneys recognize that the Bar is small and that they will see opposing counsel again and again. They recognize that no matter how careful you are, no matter how many times you count days, no matter how many calendars you keep – everyone will at some point err, (pronounced [ɛ:r as in "air"]; or for the purists among us [ə:r as in "her"]). As Professor Royal Skousen, my linguistics instructor at Brigham Young University, once said: "To err (ɛ:r) is human; to err (ə:r) divine."

In granting accommodations, the application of Biblical principles is well-advised. In that dark hour – when you desperately need an extension of time or a continuance – let me assure you that you will receive from opposing counsel according to your works, whether they be good or evil. So, resolve now that you will do unto others as you would have done unto you. *See* Luke 6:31 ("And as ye would that men should do to you, do ye also to them likewise.").

Standard 14 addresses this issue:

> Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights.

Of course courtesy in the asking is also required: "Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage." Utah Stand. Prof. & Civ., ¶14.

USE THE TOOL OF SUMMARY JUDGMENT JUDICIOUSLY

Summary judgment is frequently used to resolve all or part of a pending case. Rule 56 appropriately spares a litigant the expense of trial when there is "no genuine issue as to any material fact" and he is entitled to "judgment as a matter of law." Utah R. Civ. P. 56(c). However, a motion for summary judgment should not be filed simply as a matter of course.

The appellate courts have recognized that some issues are particularly fact-sensitive and do not lend themselves to summary judgment. These include:

1. Fraud. *See Theros v. Met Life,* 17 Utah 2d 205 (Utah 1965).
2. Negligence. *See White v. Deseelhorst,* 879 P.2d 1371 (Utah

1994).

3. Reasonableness. *See Darrington v. Wade,* 812 P.2d 452 (Utah Ct. App. 1991).
4. Proximate Cause. *See Harline v. Barker,* 912 P.2d 433 (Utah 1996).
5. Employee Acting Within Scope of Employment. *See Christensen v. Swenson,* 874 P.2d 125 (Utah 1994).
6. Abandonment of Personal Property. *See Gurgel v. Nichol,* 429 P.2d 47 (Utah 1967).
7. Intent of contracting parties. *See Novell v. The Canopy Group,* 92 P.3d 768, ¶20 (Utah Ct. App. 2004).
8. Existence of an implied in fact contract. *See Johnson v. Norton Thiokol,* 818 P.2d 997 (Utah 1991).
9. Breach of the covenant of good faith and fair dealing. *See Republic Group v. Won Door Corp.,* 883 P.2d 285 (Utah Ct. App. 1994).
10. Reasonable time. *See Catmull v. Johnson,* 541 P.2d 793 (Utah 1975).
11. Rejection of goods. *See Colonial Pacific Leasing Corp. v. J.W.C.J.R. Corp.,* 977 P.2d 541 (Utah Ct. App. 1999), citing *SPS Indus., Inc. v. Atlantic Steel Co.,* 186 Ga. App. 94, 366 S.E.2d 410, 414 (Ga. Ct. App. 1988).
12. Existence of a joint venture. *See Rogers v. M.O. Bitner Co.,* 738 P.2d 1029 (Utah 1987).
13. Waiver. *See Chandler v. Blue Cross Blue Shield,* 833 P.2d 356, n. 8 (Utah 1992).

When these issues are presented, increased care should be taken in making the decision to file a motion for summary judgment.

DO NOT UNDERESTIMATE YOUR INFLUENCE FOR GOOD

Facing the demands of practicing law – which are certainly real – it is often easy to forget what we are about. In his essay, "Man the Reformer," Ralph Waldo Emerson wrote that to "clear ourselves" of civil society's collective wrongs, we must ask "whether we have earned our bread today by the hearty contribution of our energies to the common benefit," and that "we must not cease to tend to the correction of… flagrant wrongs, by laying one stone aright every day. Emerson, Ralph Waldo, *Essays and English Traits, Man the Reformer,* Easton Press, Norwalk, Conn. (1993).

People who come to court generally have problems that have spiraled out of their control. Some have at stake their property, livelihood, and fortunes. Some are injured and suffering. Some are dangerous and angry; others wronged and betrayed. Many are addicted, outcast, and despised. Without exception, plaintiffs and defendants are worried and anxious. In this dramatic environment, attorneys perform their work. What great opportunities you have to "lay one stone aright every day." I believe, with Emerson, that these individual acts can and do cumulatively work to the correction of broader injustices.

Finally, never underestimate the power you have to influence individuals for good. Much of the tale of *Dr. Jeckyll and Mr. Hyde,* by Robert Louis Stevenson, is told through the eyes of Mr. Utterson, the lawyer. Stevenson writes of this "lean, long, dusty, dreary" attorney at law:

> He had an approved tolerance for others… and in any extremity, inclined to help rather than to reprove… In his character, it was frequently his fortune to be the last reputable acquaintance and the last good influence in the lives of down-going men.

Stevenson, Robert Louis, *The Strange Case of Dr. Jekyll and Mr. Hyde,* Barnes & Noble, Inc., New York (1992), p. 1.

It is the nature of the profession to afford you this opportunity almost daily – the good fortune to be "last reputable acquaintance and the last good influence in the lives of down-going men (and women)." It is in these critical moments, that attorneys perform their most important service. In so many ways – if you are "in any extremity inclined to help rather than to reprove" – you will be the influence that turns "down-going" lives upward. For this service, and for all else that you do on behalf of your clients and the courts, I extend my sincere gratitude.

1. *In re Jesus Ramirez,* Justice Court of California, Tuolumne County, Case No. 516 (1851), published in McClay, J.B. and Matthews, W.L., *Corpus Juris Humorous,* Barnes & Noble, Inc., New York, (1994), p. 54.
2. In *Corpus Juris Humorous,* McClay gives this background information on the judge: "Richard C. Barry, the notorious and nearly illiterate Justice of the Peace for Tuolomne County, California, during the gold rush era of 1849-1851, regularly meted out his stern brand of 'frontier' justice with scant regard for either 'book-law' or the rules of grammar and spelling." *Id.* at p 188.

traskbritt.com
1.800.900.2001

TRASKBRITT

Intellectual Property Attorneys

Your company's IP issues are varied, complex, even unique. But are your IP attorneys listening? Are they giving you useful answers... or telling you you're asking the wrong questions? At TraskBritt we listen, confirm your business goals and give you the IP answers you need to meet or exceed them.

TraskBritt. A different approach to IP.

INSIGHT FOR INTELLECTUAL PROPERTY®

| Prosecution | Litigation | Counseling |

Utah Standards of Professionalism & Civility

By order dated October 16, 2003, the Utah Supreme Court accepted the report of its Advisory Committee on Professionalism and approved these Standards.

1 Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

2 Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

3 Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motives, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

4 Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

5 Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

6 Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

7 When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

8 When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

9 Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

10 Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

11 Lawyers shall avoid impermissible ex parte communications.

12 Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

13 Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

14 Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their clients' legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

15 Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

16 Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their clients' legitimate rights could be adversely affected.

17 Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

18 During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

19 In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

20 Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

Standard 8

by Linda Jones

Editors' Note: *A member of the Supreme Court's Advisory Committee on Professionalism will discuss one of the new Standards of Professionalism and Civility with each issue of the* Bar Journal. *The opinions expressed are those of the member and not necessarily those of the Advisory Committee.*

Standard 8 of the Utah Standards of Professionalism & Civility states:

> *When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.*

The Standard is straightforward. It contemplates that lawyers, who are directed to prepare court findings, conclusions, and orders, will serve as a scribe for the court, memorializing the court ruling as though neutral to the cause. Lawyers shall be prompt in preparing such orders. Findings, conclusions and orders that are timely prepared allow the court and opposing counsel to consider them while memories are still fresh, and they allow the litigation to proceed without delays.

If a lawyer preparing an order considers it necessary to include facts or legal propositions not stated in the court's ruling, the lawyer should bring the matter to the court's attention at the time of the ruling or reconcile it with opposing counsel in conjunction with preparing the order. The lawyer should not take the opportunity in preparing the order to improve her position, to exaggerate findings or conclusions, or to supplement the order with additional facts or propositions. The lawyer should not include additional matters in counsel-prepared findings and conclusions in the hope that opposing counsel and the court will fail to notice or appreciate their import to the case.

Where counsel-drafted orders conserve the limited resources of the courts and protect a prevailing party's interests in later proceedings and on appeal, the Standard promotes scrupulous observance of court rulings, efficiency in the proper disposition of matters, civility in litigation, and fairness in the proceedings.

LINDA JONES is an appellate attorney at Salt Lake Legal Defender Association.

President-Elect and Bar Commission Election Results

Gus Chin, President-Elect & Third Division Commissioner

Rodney G. Snow, Third Division Commissioner

Stephen Owens, Third Division Commissioner

Lori W. Nelson, Third Division Commissioner

Herm Olsen, First Division Commissioner

Gus Chin was elected President-Elect of the Utah State Bar. He received 1,307 votes to Rusty Vetter's 1,008 votes. Rodney G. Snow and Stephen Owens were elected to the Commission in the Third Division. Rodney received 968 votes and Stephen received 862 votes. With 772 votes in the Third Division, Lori W. Nelson was elected to fill the unexpired term of David R. Bird.

Herm Olsen ran unopposed in the First Division.

Commission Highlights

During its regularly scheduled meeting of April 22, 2005, which was held in Salt Lake City, Utah, the Board of Bar Commissioners received the following reports and took the actions indicated.

1. George Daines reviewed the retreat schedule for June 3rd and 4th and also gave a report on Western States Bar Conference. George noted that it was the "best affair of its kind," an excellent convention with valuable information.
2. Gus Chin suggested that the Bar should reimburse a higher portion of Commissioners' overnight expenses at the Spring and Annual Conventions. Currently the Bar pays for only two nights accommodations (Wednesday and Thursday) which prohibits attendance at later scheduled events. George would like Gus to draft a memo outlining this issue and would like John Baldwin to prepare a memo on reimbursement policies in time for the June meeting.
3. Steve Waterman presented a discussion on Faculty/Student Bar Relationships concept and distributed a new handout. Under section II of the handout, he explained that the "equivalent" of a character and fitness evaluation has been delegated to the deans of the law schools. Under section III, the Bar would have the right to terminate the faculty member's license to practice at any time. A draft rule would first be submitted to the Commission before sending it to the Court for final approval. Steve also reported that the rule would be limited to in-state ABA approved law schools.
4. John Baldwin proposed an increase in the licensing fee for inactive full service members. Currently, inactive members pay $90 and receive the *Bar Journal.* The $90, however, does not cover the cost of the *Bar Journal.* The proposal is to increase the fee to $120 which will cover the *Bar Journal* and give inactive members access to CaseMaker. The motion to increase the inactive full service fee passed unopposed.
5. George Daines reported that he, David Bird and John Baldwin had met with Chief Justice Christine Durham regarding the Consumer Price Index Petition. George concluded the discussion by observing that a fee increase would be unnecessary this year.
6. George reported that the Court had recently undergone a legislative audit and based, in part, on the value of the experience, believed a similar process would be helpful for the Bar as well. The Court would like the Bar to have a performance audit every 4-5 years as directed. George stated that it would not be a financial audit like the Court experienced this year, but more of a management analysis.
7. George reported on the discussion over the concept of mandatory malpractice insurance disclosure and noted that

Justice Durham's reception was a favorable one.

8. George noted that the legislative lawyer CLE concept to give CLE credit for full-time service in the Utah Legislature had been discussed with justice Durham. The motion to support presenting this issue to the MCLE Committee, i.e. to provide MCLE credit to full-time service legislators during the legislative session but lawyer legislators would still be required to complete the required ethics component passed unopposed.
9. George informed Commissioners that D'Arcy Dixon Pignanelli had resigned from the Commission and that the Court will need to appoint a replacement public member.
10. David Hamilton explained the Client Security Fund's recommendations that $23,400 be paid for acts of dishonesty. The Commission voted to approve the claims as set forth without dissent.
11. February Bar Exam Applicants were approved without dissent.
12. Yvette Dias reported on mandatory insurance disclosure. A lengthy discussion followed. The motion to place a malpractice insurance question on the licensing form, a request which asks if the attorney has malpractice insurance (in the minimum amount of $100,000) passed without dissent. The motion for the Committee to meet and draft a report including: (1) the cost of obtaining $100,000 malpractice coverage; (2) the impact on solo practitioners and minorities; (3) review the South Dakota model; (4) the impact on class actions and criminal cases; and (5) the consequences on attorneys who cannot obtain insurance, passed without dissent.
13. Rusty Vetter reported on the research he did regarding other states using Employee Assistance Programs. A lengthy discussion followed. Rusty made a motion to have Katherine and John Baldwin review and edit the RFP form and to solicit responses to the RFP which would be due by the May Commission meeting in order to make a proposal at the June Commission meeting. The motion passed without dissent.
14. David Bird reported on the Judicial Council.
15. John Baldwin reminded everyone of the upcoming Commission election. Ballots will be mailed on May 2nd and counted on June 2nd. Law Day lunch is to be held on May 6th and the Admissions Ceremony at the Salt Palace is to be held on May 24th. Nate Alder informed Commissioners of the Minority Bar Gala event at the Grand America on Saturday, October 12, 2005.

A full text of minutes of this and other meetings of the Bar Commission is available for inspection at the office of the Executive Director.

Utah Minority Bar Association First 50 Event

The Utah Minority Bar Association is proud to announce that it will host a gala dinner and program on October 15, 2005 at the Grand America Hotel in Salt Lake City to honor the first fifty lawyers of color to practice law in the State of Utah (the "First 50"). This will take the place of the annual UMBA scholarship banquet. The First 50 honorees hailed from, and practiced in, many communities throughout Utah. To make this event a proper tribute to the First 50, we ask your assistance in several areas:

1. Mark your calendars and save the date to attend. UMBA has negotiated special rates at the Grand and/or Little America for lodging. The event takes place the same weekend as BYU and U of U homecoming weekend and can be attended in conjunction with homecoming activities.

2. The Utah State Bar and the American Bar Association are helping to sponsor the event. However, many sponsorship opportunities are still available. There are many levels of sponsor donations to fit the budgets of the largest or smallest of law firms, legal agencies/offices, legal departments, bar sections and associations, law schools and alumni groups, individual donors, etc. Ticket prices and donations will not only help fund the First 50 event, but will subsidize future scholarships to minority law students as well as other UMBA programs such as recruiting and mentoring minority lawyers in the state of Utah.

3. Following is the preliminary list of the First 50 honorees. UMBA's research committee has scoured historical records, bar and school records, and interviewed numerous people to compile this list. If anyone was left off the list, it was not intended. Please assist us by providing us the name(s) of anyone you believe we may have omitted and any relevant information, if you have it (e.g., approximate time period of practice, date of law school graduation, or current contact information). Likewise, if you have any stories or information regarding any of the honorees listed, please send it to us in the form of a brief description. We are compiling short biographies on each of the honorees. We also welcome any pictures (we will attempt to return pictures sent to us but would prefer you scan them and send us a copy electronically).

4. For ticket prices, sponsorship opportunities, venue/lodging details, information on any of the First 50 honorees, or if you want us to send you or your business/organization information, please call, fax or e-mail Sean Reyes at sreyes@parsonsbehle.com 801-536-6663 (direct line) 801-536-6111 (fax) or Cheryl Mori at Moric@sec.gov 801-524-3141 (direct line). Your attendance and participation will help us celebrate the contributions of these individuals who were/are pioneers in the legal field, minority communities, and Utah at large.

For further information, please see the website at: <http://www.utahbar.org/news/umba_first_50.htm>

No.	Name	Race	Admitted
1	David H. Oliver*	African Amer.	9/8/31
2	Yoshio Katayama*	Asian	4/16/46
3	Mas Yano*	Asian	1/10/49
4	Jimi Mitsunaga	Asian	11/3/58
5	Robert Mukai*	Asian	11/3/58
6	Raymond Uno	Asian	11/5/59
7	Henry Adams	African Amer.	11/5/59
8	Toshio Harunaga	Asian	11/5/59
9	Kenneth M. Hisatake*	Asian	6/5/61
10	Kent T. Yano	Asian	9/27/68
11	Glenn K. Iwasaki	Asian	4/20/71
12	M. Kent Christopherson	Native Amer.	5/10/73
13	Thomas G. Nelford	Native Amer.	5/10/73
14	Larry J. Echohawk	Native Amer.	10/19/73
15	Stephen I. Oda	Asian	10/19/73
16	Eunice Chen	Asian	10/19/73
17	Steven Lee Payton	African Amer.	4/2/74
18	Melvin H. Martinez	Hispanic	9/29/75
19	Armand R. Ibanez	Hispanic	9/29/75
20	Mary Ellen Sloan	Native Amer.	9/29/75
21	Michael N. Martinez	Hispanic	4/28/76
22	Kevin J. Kurumada	Asian	9/20/76
23	Herbert Yazzie	Native Amer.	9/20/76
24	Frank Nakamura	Asian	9/20/76
25	Antonio R. Durando	Hispanic	10/28/76
26	Howard H. Maetani	Asian	1/21/77
27	Frank A. Roybal	Hispanic	2/7/77
28	Andrew A. Valdez	Hispanic	9/20/77
29	James A. Valdez	Hispanic	9/20/77
30	William A. Thorne, Jr.	Native Amer.	9/20/77
31	Douglas Matsumori	Asian	9/20/77
32	Luke H. Ong	Asian	9/20/77
33	Felipe E. Rivera	Hispanic	4/18/78
34	Gilbert A. Martinez	Hispanic	9/20/78
35	Tyrone Medley	African Amer.	9/20/78
36	Raymond T. Swenson	Asian	10/6/78
37	Conrad T. Ayala	Hispanic	11/6/78
38	Anthony J. Ayala	Hispanic	4/26/79
39	Solomon J. Chacon	Hispanic	4/26/79
40	Paul Gotay	Hispanic	4/26/79
41	Tim Allen	African Amer.	9/26/79
42	Heny K. Chai II*	Asian	9/26/79
43	Denise M. Mercherson	African Amer.	9/26/79
44	Rodwick Ybarra	Hispanic	9/26/79
45	Roger A. Flores	Hispanic	4/30/80
46	Irshad A. Aadil	Asian	6/13/80
47	Robert M. Archuleta	Hispanic	6/23/80
48	Samuel Alba	Hispanic	10/8/80
49	Paul F. Iwasaki	Asian	10/9/80
50	Warren S. Inouye	Asian	10/9/80
51	Frances M. Palacios	Hispanic	10/9/80
52	Malashi Mukerji	Asian	10/9/80
53	Oliver K. Myers	Pac. Islander	10/9/80
54	Jimmy Gurule	Hispanic	12/19/80

*Indicates deceased

Thank You!

We wish to acknowledge the efforts and contributions of all those who made this year's Law Day celebrations a success. We extend a special thank you to:

Military Law Section, Utah State Bar

Office of the Staff Judge Advocate, Hill Air Force Base

"and Justice for all" Law Day 5K Run/Walk
Staci Duke, Development Coordinator, Law Day Run/Walk Committee and its members, and all those who participated.

Law Day Luncheon/Awards
Young Lawyers Division – Candice Anderson Vogel, President
David Bernstein & Michael Young, Co-Chairs

and the following:

Bennett & Deloney

Clyde Snow Sessions & Swenson

Kipp and Christian

Manning, Curtis, Bradshaw & Bednar

Skordas, Caston & Morgan

Strong & Hanni

Van Cott Bagley Cornwall & McCarthy

Mock Trial Competition
Utah Law Related Education project and all volunteer coaches, judges, teachers and students.

Salt Lake County Bar Association
"Art & the Law" project

Thank you for your participation!

Bar Commission
Law Related Education and Law Day Committee

PETERSON REED & WARLAUMONT L.L.C.

is pleased to announce that

Michael A. Stout

formerly of counsel, has joined the firm as a member.

The firm will now be recognized as:

PETERSON REED WARLAUMONT & STOUT

The firm will continue to offer legal services in general and complex civil litigation, construction disputes, credit union representation, criminal law, and personal injury & medical malpractice.

PETERSON REED WARLAUMONT & STOUT

800 Boston Building
9 Exchange Place
Salt Lake City, UT 84111

Office: 801.364.4040
Facsimile: 801.364.4060
www.prw-law.com

KENDALL S. PETERSON
JACK W. REED
JAMES L. WARLAUMONT
MICHAEL A. STOUT
TIMOTHY J. CURTIS

"and Justice for all" Law Day 5K Run/Walk – April 30, 2005

The 23rd annual Law Day 5K Run/Walk was held Saturday, April 30, 2005 in conjunction with the Utah State Bar's Law Day activities. Proceeds from the run support "and Justice for all," the collaborative fundraising campaign which supports free civil legal aid to indigent and disabled Utahns served by the Disability Law Center, Legal Aid Society of Salt Lake and Utah Legal Services.

Instead of the traditional pistol start, Utah Attorney General Mark Shurtleff started the Run with the bang of a gavel. In all, 1,029 participants registered for this year's event – an all time record.

Fastest time by a female in the race was Kathryn Connor, and Jon Bowie was the fastest overall male. Manning Curtis Bradshaw & Bednar swept the speed team competition, winning all three top spots. The law firm of Ray, Quinney and Nebeker won the Recruiter Competition and the traveling "and Justice for all" trophy, with 208 participants. Congratulations to all our winners!

Many local businesses and organizations have generously underwritten the costs of putting on the event – in both cash and in-kind donations – so that Run proceeds will go to the "and Justice for all" campaign. We express our sincere gratitude to all the sponsors of the event and to the S.J. Quinney College of Law at the University of Utah and Dean Scott Matheson, Jr. who graciously allowed us the use of the law school facilities.

Thank You to Our Sponsors!

GOLD GAVEL SPONSORS

Utah State Bar

S.J. Quinney School of Law

SILVER GAVEL SPONSORS

Bank of the West

Great Harvest Bread

Iron Mountain

LexisNexis

PricewaterhouseCoopers

Salt Lake Legal

Southwest Airlines

Workers Compensation Fund of Utah

BRONZE GAVEL SPONSORS

Apple Fitness

Garcia & Love Court Reporting

Runner's Advantage

Temple Square Hospitality Corporation

COPPER GAVEL SPONSORS

AquaVie Day Spa

Brain Garden

Café Rio

Carriage for Hire

Clif Bar

Crystal Light

Children's Museum of Utah

Davis Audio Visual

Hale Center Theatre

Hires Big H

Hoppers Seafood & Grill

Hotel Monaco

Kevin Guzik Massage

Office Max

Ogio International

Old Spaghetti Factory

Orbit Café

Panini Restaurant

Passages Restaurant

Pioneer Theatre Company

Prompt Car Wash

Real Salt Lake

Salt Lake Running Co

Skybox Sports Grille & Arena

The Spa Club

Sports Loft Ski Shop

Starbucks Coffee Co

Target

Trolley Wing Co

Tuscany Restaurant

Utah Arts Festival

Utah Bar Litigation Section

Utah College of Massage

Utah Grizzlies

Utah Opera

Utah Symphony

Weider Nutrition

Westlaw

Bring some muscle to the tussle

Large contingency fee lawsuits require an experienced, trial tested, and well financed team of plaintiff attorneys. Otherwise, the defense will play hardball, hoping to wear your client down and force a lowball settlement.

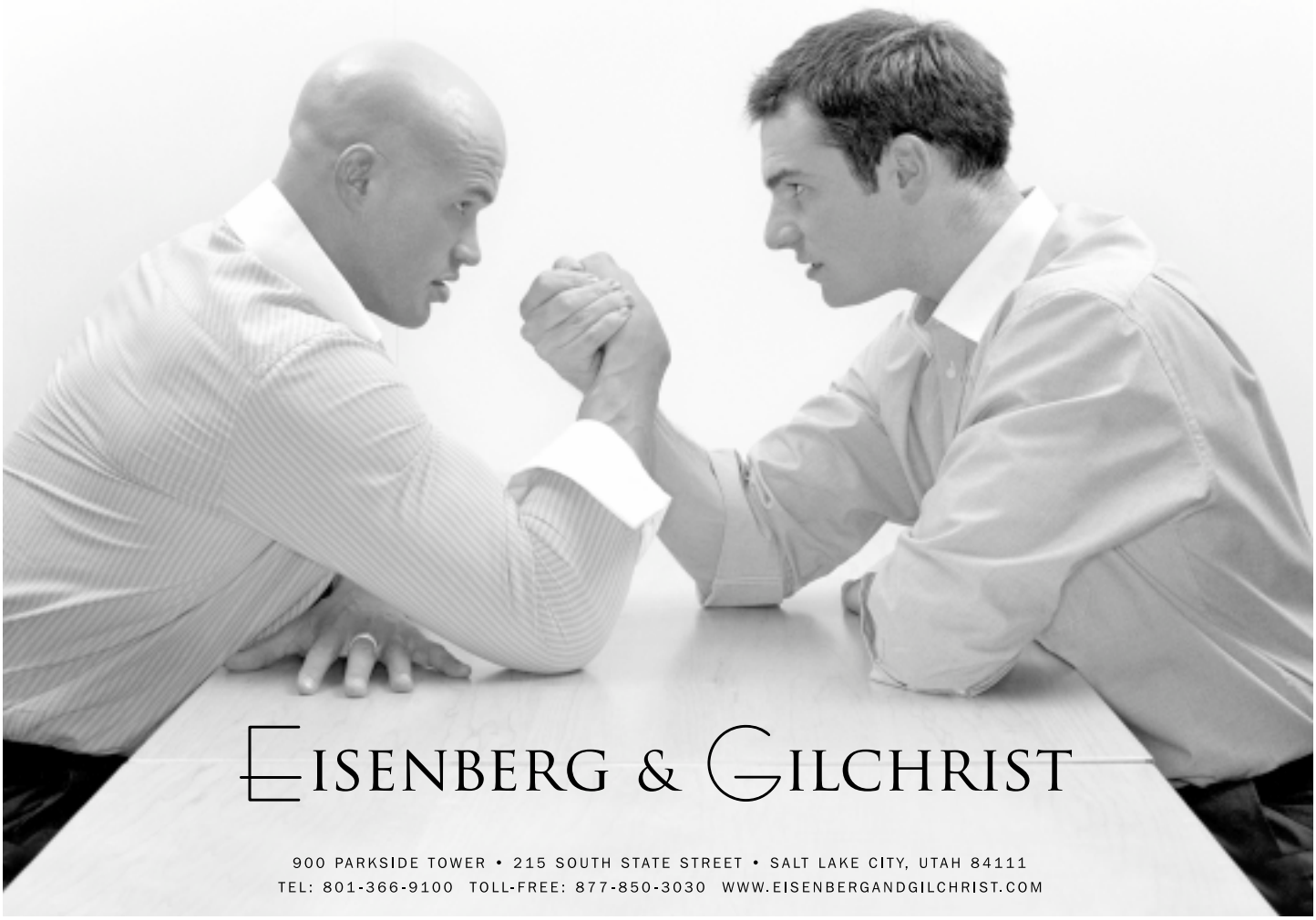
Eisenberg and Gilchrist has the winning track record and the experience that will help you and your client persevere and prevail. We are committed to a true team approach to litigation—the whole firm is involved in every one of our client's cases. Our practice is devoted to one goal—working with referral lawyers and co-counsel throughout Utah to get the most out of high value contingency fee cases. We are an independent Utah firm and are also associated with one of the nation's largest plaintiff litigation firms. When you bring us on board, you'll get small firm service with big firm resources.

Here are some of results we achieved for our clients in the last year, in additions to many other six figure recoveries we also helped lawyers and their clients obtain in 2004.

$4.50 million	trucking accident
$3.75 million	product liability
$3.75 million	insurance bad faith
$3.10 million	trucking accident
$1.50 million	wrongful termination
$1.00 million	wrongful death (adult heirs)
$1.00 million	medical malpractice

We'll work with your firm whether you need the entire case handled from start to finish or whether you are looking to co-counsel with us all the way through trial. Our fee is a portion of your contingency fee, and our contingency agreements are customized to fit your needs and our specific role in helping your client.

Please contact us to discuss how we may be able to work with you to make your next big case a smashing success.



EISENBERG & GILCHRIST

900 PARKSIDE TOWER • 215 SOUTH STATE STREET • SALT LAKE CITY, UTAH 84111
TEL: 801-366-9100 TOLL-FREE: 877-850-3030 WWW.EISENBERGANDGILCHRIST.COM

Pro Bono Honor Roll

Kent Alderman	Walter Merrill
Reha Deal	William Morrison
Michael Deamer	William Ormond
Kevin Fife	Ralph Petty
Richard Gallegos	Kristine Rogers
Richard Grealish	Gregory Simonsen
D. Rand Henderson	Linda Smith
Brent Johns	Mary Woodhead
Alejandro Maynez	Donald Winters
Perry, Malmberg, & Perry	Dorsey & Whitney

Utah Legal Services and the Utah State Bar wish to thank these attorneys for their time and willingness to help those in need. Call Brenda Teig at (801) 924-3376 to volunteer.

2005 Fall Forum Awards

The Board of Bar Commissioners is seeking nominations for the 2005 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 Maud Thurman, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111, no later than Monday, September 19, 2005. The award categories include:

1. Distinguished Community Member Award
2. Pro Bono Lawyer of the Year
3. Professionalism Award

Seeking Nominations for the Peter W. Billings, Sr. Outstanding Dispute Resolution Service Award

In memory of the great contributions of Peter W. Billings, Sr. to alternative dispute resolution in our state, the ADR Section of the Utah State Bar annually awards the Peter W. Billings, Sr. Outstanding Dispute Resolution Service Award to the person or organization that has done the most to promote alternative dispute resolution in the State of Utah. The award is not restricted to an attorney or judge. The ADR Section is currently seeking nominations for this award, which will be presented at the Bar's Annual Fall Forum.

Please submit nominations for this award by September 30, 2005 to Peter W. Billings, Jr., P. O. Box 510210, Salt Lake City, UT 84151.

Mailing of Licensing Forms

The licensing forms for 2005-2006 have been mailed. Fees are due July 1, 2005, however fees received or postmarked on or before July 31, 2005 will be processed without penalty.

It is the responsibility of each attorney to provide the Bar with current address information. This information must be submitted in writing. Failure to notify the Bar of an address change does not relieve an attorney from paying licensing fees, late fees, or possible suspension for non-payment of fees. You may check the Bar's website to see what information is on file. The site is updated weekly and is located at www.utahbar.org.

If you need to update your address please submit the information to Arnold Birrell, Utah State Bar, 645 South 200 East, Salt Lake City, UT 84111-3834. You may also fax the information to (801) 531-9537.

NOTICE: New Rule – Authorization to Practice Law

To be effective immediately, the Utah Supreme Court recently approved a new rule governing the practice of law which addresses, in part, what constitutes the practice of law and what activities a non-lawyer may perform without engaging in the unauthorized practice of law. The new rule, Chapter 13A in the Supreme Court's Rules of Professional Practice, may be accessed on the Court's website at: http://www.utcourts.gov/resources/rules/ucja/ch13a/1.htm or through the Bar's website (www.utahbar.org).

VanCott IS PROUD TO ANNOUNCE THE NEWEST MEMBERS OF OUR TEAM

JOHN P. ASHTON, formerly of Prince Yeates & Geldzahler, brings 32 years of experience to Van Cott's Litigation Group. Mr. Ashton assists clients with civil, federal, and intellectual property litigation matters.

THOMAS R. BARTON, formerly of Prince Yeates & Geldzahler, joins Van Cott's Litigation Group. Mr. Barton assists corporate clients with labor and employment litigation matters.

BART J. JOHNSEN, formerly of Richman and Richman, joins Van Cott's Family Law Group. Mr. Johnsen assists closely held business owners and professionals with divorce, custody, and adoption matters.

ANGELA E. ATKIN, formerly of Jones Waldo, Holbrook & McDonough, joins Van Cott's Tax, Estate & Benefit Planning Group. Ms. Atkin, also a CPA, assists clients with corporate, nonprofit, estate, probate and trust matters.

LISA B. BOHMAN and **DANIEL C. CARR,**
recent graduates of the BYU J. Reuben Clark Law School, have joined the firm as Associates, and will sit for the Utah State Bar exam in July.

ROBERT M. ANDERSON
JOHN P. ASHTON
ANGELA E. ATKIN
THOMAS R. BARTON
THOMAS T. BILLINGS
TIMOTHY W. BLACKBURN
LISA B. BOHMAN+
MARA A. BROWN
J. SCOTT BUEHLER
ROBERT S. CAMPBELL
DANIEL C. CARR+
STEPHEN K. CHRISTIANSEN
THOMAS W. CLAWSON
KIM S COLTON
RAND L. COOK
JOHN W. CRAWFORD
SANDRA L. CROSLAND
CALVIN C. CURTIS
NICOLE M. DEFORGE
WILLIAM G. FOWLER
FREDERICK "BUCK" FROERER
TACY A. HARTMAN
RUTH Q. HAWE
BART J. JOHNSEN
H. MICHAEL KELLER
SCOTT M. LILJA
ROBERT P. LUNT
ROBERT E. MANSFIELD
TIMOTHY S. MCCOY
MATTHEW F. MCNULTY, III.
CASSIE MEDURA
SAM MEZIANI
J. ROBERT NELSON
ARTHUR B. RALPH
DAVID E. SALISBURY
ERIC K. SCHNIBBE
DAVID E. SLOAN
STEPHEN R. SLOAN
DAVID J. SMITH
FRANKLIN N. SMITH
JOHN A. SNOW
JESSICA STENGEL
GERALD H. SUNIVILLE
STEPHEN D. SWINDLE
CLARK K. TAYLOR
MARK A. WAGNER
LOREN E. WEISS
JENNIFER ANDERSON WHITLOCK
GREGORY P. WILLIAMS
M. SCOTT WOODLAND

+Admission to Utah Bar pending

Van Cott, Bagley, Cornwall & McCarthy provides comprehensive legal services for corporate clients and individuals. For information on how we can serve you, contact us at 801.532.3333 or visit our website at ***www.vancott.com***

OGDEN • SALT LAKE CITY • PARK CITY

Discipline Corner

ADMONITION

On April 12, 2005, 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 5.5(a) (Unauthorized Practice of Law) and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was administratively suspended for failure to comply with Mandatory Continuing Legal Education requirements. During the administrative suspension the attorney represented and/or gave legal advice to existing and prospective clients.

PUBLIC REPRIMAND

On April 11, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Larry B. Larsen for violation of Rules 1.3 (Diligence), 1.4(a) and (b) (Communication), 1.16(d) (Declining or Terminating Representation), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Larsen was retained to represent a client in a divorce case. The client moved out of state. Thereafter, Mr. Larsen received discovery requests and did not make reasonable efforts to work with his client to respond to discovery. Mr. Larsen failed to keep his client informed of the case status and failed to explain the proceedings to the extent that his client could participate accordingly. A default judgment was entered in the case because of the client's failure to comply with a prior discovery order. Mr. Larsen was allowed to withdraw, but failed to inform his client that he had withdrawn and the default divorce decree was entered.

RESIGNATION WITH DISCIPLINE PENDING

On April 12, 2005, the Honorable Christine M. Durham, Chief Justice, Utah Supreme Court, entered an Order Accepting Resignation with Discipline Pending concerning Jay W. Taylor.

In summary:

Mr. Taylor presented or caused three checks to be presented to his bank on his attorney trust account at a time when the account

held insufficient funds for the bank to honor the check. Mr. Taylor failed to respond to the Office of Professional Conduct's lawful demands for information. Without a response and/or explanation from Mr. Taylor, the overdrafts presumptively evidence misappropriation of client money. In another matter, Mr. Taylor was hired by a family to initiate guardianship proceedings for one of the parents. Mr. Taylor agreed to provide legal services. There was no written fee agreement. The family also hired Mr. Taylor to probate the estate of the parents. Again Mr. Taylor agreed to provide legal services and there was no written fee agreement. The family made repeated requests for an accounting. After an approximate two and a half year period, Mr. Taylor provided that accounting. However, in a resolution of a civil suit brought by the family against Mr. Taylor, Mr. Taylor acknowledged that he kept money to which he was not entitled.

ADMONITION

On April 28, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.1 (Competence), 1.15(a) and (b) (Safekeeping Property), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney represented a client in a contractual dispute over a house mortgage. The attorney did not structure the transaction in order for the debt to be kept current, there was no Trust Deed Note, and the attorney knew that the amount being paid was not enough to keep the debt current. The attorney did not competently represent the client, thereby causing loss of money to the opposing party, and exposing the client to potential liability. The attorney did not maintain funds the attorney received for the debt in an attorney trust account. The attorney never produced an accounting of the funds despite requests to do so.

PUBLIC REPRIMAND

On April 8, 2005, the Honorable Bruce Lubeck, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Order of Discipline: Public Reprimand against Victor Lawrence for violations of Rules 1.1 (Competence), 1.3 (Diligence), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

Mr. Lawrence was retained to represent a client in a divorce modification matter in which the client had been served with an

Order to Show Cause. Mr. Lawrence miscalendared the date the response was due, and a default was entered against his client. Mr. Lawrence moved to set aside the default within the period set by the rules, but it could have been filed much sooner. Mr. Lawrence did not submit a reply memorandum, and did not promptly file a notice to submit for decision the motion to set aside the default. Although none of these constitute per se violations of the Rules, Mr. Lawrence's failure to respond, his failure to enter an appearance of counsel to more fully protect his client, and the timely-yet-dilatory filing of the motion to set aside all combine to amount to negligent conduct in being less than diligent and competent.

PUBLIC REPRIMAND

On April 28, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Public Reprimand against Edward Brass for violation of Rules 1.1 (Competence), 1.3 (Diligence), 3.2 (Expediting Litigation), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(d) (Misconduct), and 8.4(a) (Misconduct).

In summary:

Mr. Brass was appointed to represent a client in a state post-conviction case. Mr. Brass failed to provide competent legal representation; failed to perform timely and meaningful legal services; failed to respond to discovery requests, missed court deadlines, sought continuances and then missed deadlines, and caused the litigation to stall; failed to respond in a timely manner to the Office of Professional Conduct's Notice of Informal Complaint; and failed to perform meaningful and timely legal services for his client, thereby wasting court resources and causing egregious delays in the case.

ADMONITION

On May 2, 2005, the Chair of the Ethics and Discipline Committee of the Utah Supreme Court entered an Order of Discipline: Admonition against an attorney for violation of Rules 1.1 (Competence), 1.3 (Diligence), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

An attorney was retained to represent a husband and wife in an immigration case. At an immigration hearing, the judge advised the attorney to file required documents. The attorney gave incompetent legal advice to the clients, delaying the filing of the required documents. The attorney also incorrectly advised the

clients concerning immigration fines and prematurely advised the husband that the husband could file for a work permit.

SUSPENSION

On March 29, 2005, the Honorable Robert K. Hilder, Third Judicial District Court, entered a Ruling and Order re: Sanctions, suspending Marsha M. Lang from the practice of law for a period of twelve months commencing May 15, 2005 for violations of Rules 1.3 (Diligence), 1.4(a) and (b) (Communication), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The court's decision was based upon Ms. Lang's misconduct in four separate matters.

Ms. Lang represented a client, during the course of which she failed to forward to opposing counsel income verification provided by her client; failed to promptly and thoroughly investigate or correct any failure to safeguard and forward such documentation in her possession; and failed to diligently represent the client at a contempt hearing. Ms. Lang also failed to advise her client sufficiently to allow him to make informed decisions concerning the representation.

In another matter, Ms. Lang failed to inform a client regarding the case status for a prolonged time, and failed to respond to numerous requests for information or to return telephone calls. Ms. Lang's failure to respond for extended periods hampered the client's ability to make informed decisions to protect the client's interests.

In a third matter, Ms. Lang's conduct during a deposition was prejudicial to the administration of justice.

In the fourth matter, Ms. Lang represented a client but engaged in repeated delay, non-responsiveness, and failed to follow through effectively. Ms. Lang also failed to respond to the client, and to generally communicate the status of the matter; and failed to provide sufficient communication to allow the client to make informed decisions. Ms. Lang also failed to respond to a request from the Office of Professional Conduct, and responded late to a Notice of Informal Complaint.

The court considered various factors in aggravation and mitigation and determined that the aggravation outweighed the mitigation. The court also permitted Ms. Lang to petition the court to reduce the duration of the suspension, provided that she submit her practice to the supervision of an attorney approved by the court.

DISBARMENT

On April 19, 2005, the Honorable Timothy R. Hanson, Third Judicial District Court, entered Findings of Fact, Conclusions of Law, and Judgment of Disbarment, disbarring M. Shane Smith from the practice of law for violations of Rules 1.1 (Competence), 1.2(a) (Scope of Representation), 1.3 (Diligence), 1.4(a) (Communication), 1.5(a) (Fees), 1.15(b) (Safekeeping Property), 1.15(c) (Safekeeping Property), 1.16(d) (Declining or Terminating Representation), 3.2 (Expediting Litigation), 8.1(b) (Bar Admission and Disciplinary Matters), 8.4(c) (Misconduct), 8.4(d) (Misconduct), and 8.4(a) (Misconduct) of the Rules of Professional Conduct.

In summary:

The court's decision was based upon Mr. Smith's misconduct in nine separate matters.

Mr. Smith was retained by an agency in a collections matter. Mr. Smith failed to provide competent representation in that he failed to file a Complaint, failed to keep the agency reasonably informed concerning the case status and failed to respond to its reasonable requests for information. Mr. Smith abandoned the representation, and did not take the steps reasonably necessary to protect the agency. Mr. Smith did not return the unearned portion of the retainer and charged an excessive fee. Mr. Smith failed to respond to the Office of Professional Conduct's Notice of Informal Complaint.

In a second matter, Mr. Smith failed to forward a check, as directed by his client, resulting in his client paying late fees. After the client terminated the representation, Mr. Smith failed to return the file. Mr. Smith failed to respond to the Notice of Informal Complaint.

In a third matter, Mr. Smith was to draft and send a letter informing an entity of his client's intent to file a lawsuit. The letter did not accurately reflect his client's claims and was sent to the wrong entity. The client learned from the entity's employees that Mr. Smith was filing on the client's behalf. Mr. Smith did not file the lawuit in a timely fashion, failed to keep his client reasonably informed about the status of the case, and failed to respond to reasonable requests for information. Mr. Smith did not provide meaningful services and abandoned the representation without taking steps to the extent necessary to protect his client. Mr. Smith failed to respond to the Notice of Informal Complaint.

In a fourth matter, Mr. Smith represented a client in an estate probate matter. Mr. Smith failed to perform meaningful work on behalf of his client, failed to keep his client reasonably informed of the status of the case and failed to respond to reasonable requests for information. Mr. Smith failed to respond to the Notice of Informal Complaint.

In a fifth matter, Mr. Smith failed to complete the matter for which he was hired. He failed to provide competent representation and failed to act with reasonable diligence. He failed to keep his client reasonably informed of the status of the case and failed to comply with reasonable requests for information. The client requested an accounting, but Mr. Smith failed to provide one. Mr. Smith failed to return the file and unearned portion of the retainer. Mr. Smith failed to respond to the Notice of Informal Complaint.

In a sixth matter, Mr. Smith was hired to file a lawsuit against an insurance agency. Mr. Smith's work in the case contained many errors and he failed to provide competent representation. Mr. Smith failed to provide an accounting to the client, and failed to return the client's file and return the unearned portion of the retainer fee. Mr. Smith failed to withdraw from the case even after the client requested that he do so. Mr. Smith failed to respond to the Notice of Informal Complaint.

In a seventh matter, Mr. Smith was retained to represent a client in a medical malpractice lawsuit. Mr. Smith failed to respond to three sets of interrogatories and failed to respond in opposition to motions from the opposing party seeking orders to compel the client's cooperation. The court entered an order to compel, and Mr. Smith still failed to respond on behalf of his client. The action was dismissed with prejudice. Mr. Smith failed to oppose the dismissal. Mr. Smith failed to inform his client of the status of the case and misrepresented to his client that the case was progressing. Mr. Smith did not inform his client of the dismissal until a later date and he told his client that he would file a motion to set aside the dismissal, but failed to do so. Mr. Smith failed to respond to the Notice of Informal Complaint.

In an eighth matter, Mr. Smith abandoned the representation without taking the necessary steps to protect his client. He failed to returned unearned portions of the retainer. The fee agreement Mr. Smith entered into with his client provided that the client could not get the file back until the client paid the bill in full. Mr. Smith failed to appear at the Screening Panel hearing.

In a ninth matter, Mr. Smith was hired to protect his clients' interest in a piece of real property. The clients gave Mr. Smith power of attorney and specific instructions, but he failed to abide by those instructions. Mr. Smith failed to act with reasonable diligence and promptness in representing his clients, failed to keep them reasonably informed concerning the status of the case, and did not comply with their requests for information. Mr. Smith entered into a business transaction with his clients without taking the necessary steps to safeguard their interests. The proceeds amount was significantly less than what Mr. Smith told his clients, and he failed to provide an accounting for the remainder. Mr. Smith failed to respond to the Notice of Informal Complaint.

Farewell Message

by Tally Burke, Paralegal Division Chair

I know that many of you share a story similar to mine. In the Spring of 1996, I was eagerly anticipating the prospect of completing my Associate's Degree in Paralegal Studies from Salt Lake Community College. I was already working in a position at the law firm of Kruse Landa Maycock & Ricks, LLC, then known as Kruse Landa & Maycock, LLC ("KLM&R") as its receptionist. After graduation, I began working for the office manager where I learned how a law office really operates, how I could best be utilized, and how I should perform as a paralegal. Since then, I have continued my employment with KLM&R and was honored to become Mr. James R. Kruse's paralegal. I have now been working for Jim in the corporate and securities area for five years and have been with KLM&R a total of ten years.

It is amazing what I have learned from the attorneys, office manager and staff at my firm. Looking back at my experiences, I realize the skills they were teaching me were vital building blocks to my career. I cannot thank them enough for all they have contributed to my success as a paralegal. I love being a paralegal and look forward to many more years working in this profession.

Many of us who are veterans in the paralegal profession began working at a time when most attorneys were just starting to utilize paralegals. We are very fortunate that in early 1995 a small group of individuals recognized the need for a paralegal section of the Utah State Bar. These same individuals saw that the attributes of professionalism, expertise, and adaptability would be as important to the success of the paralegal section as they are to the individual members of the section and of this profession.

Throughout the Paralegal Division's nine-year history, the leadership of the Division has worked to anticipate the needs of the paralegal profession as the profession experiences dramatic growth. Throughout these years of growth, the purposes set forth by our Division have guided us well in providing opportunities for paralegals while educating the legal community and the public about this profession.

I enjoyed my tenure as Chair of the Paralegal Division during this past year and am now happy to turn the Chair position over to Danielle Price. Danielle is a paralegal with the law firm of Strong & Hanni, working with Stuart Schultz and Peter Christensen, specializing in insurance defense litigation. Danielle has worked as a paralegal for 13 years and has experience in numerous practice areas. She received a paralegal certificate from Westminster College. Danielle is a former President, Education Chair, Parliamentarian, and Newsletter Editor for the Legal Assistants Association of Utah (LAAU). She has served on the Governmental Relations, Bar Journal, and Licensing committees for the Utah State Bar and on the education and committee for the Paralegal Division. She is currently serving as an ex-officio member of the Bar Commission as a representative of the Paralegal Division.

To all of you, I say thank you and congratulations for a job well done in expanding the paralegal profession. It has been a privilege to serve and collaborate with many of you in our mutual quest to succeed as paralegals. I would like to express my deepest appreciation to the hard-working directors of the Division. My term of service as Chair has been enormously rewarding and a great learning experience. To the members of the Division and everyone in the paralegal profession I say: Keep striving to grow! It is an exciting time to be a paralegal!

CLE Calendar

DATES	EVENTS (Seminar location: Law & Justice Center, unless otherwise indicated.)	CLE HRS.
	Utah State Bar 2005 Annual Convention July 13–16, 2005 in Sun Valley, Idaho **Full online Brochure/Registration now available at:** **www.utahbar.org**	
7/20/05	**OPC Ethics School.** 9:00 am–4:30 pm. $150 before July 8th, $175 after July 8th.	6 CLE/NLCLE
08/18/05	**NLCLE: Law Practice Management.** "The Business of Practicing Law" (business formations). "Managing and Destroying Paper" Lincoln Mead, Webmaster, Utah State Bar. "Practical Tips on Law Practice Management" Toby Brown, Communications Director, Utah State Bar. 5:30 pm–8:30 pm. $55 YLD Members; $75 Others.	3 CLE/NLCLE
08/19–20/05	**28th Annual Securities Law Section Workshop:** Jackson Hole, Wyoming, Teton Lodge Resort. Agenda available online. Make your reservations early at 1-800-801-6615. Mention you are with the Utah State Bar Securities Law Section.	7.5

To register for any of these seminars: Call 297-7033, 297-7032 or 297-7036, OR Fax to 531-0660, OR email cle@utahbar.org, OR on-line at www.utahbar.org/cle. Include your name, bar number and seminar title.

REGISTRATION FORM

Pre-registration recommended for all seminars. Cancellations must be received in writing 48 hours prior to seminar for refund, unless otherwise indicated. Door registrations are accepted on a first come, first served basis.

Registration for (Seminar Title(s)):

(1) _____

(2) _____

(3) _____

(4) _____

Name: _____

Bar No.: _____

Phone No.: _____

Total $ _____

Payment: ☐ Check ☐ VISA ☐ MasterCard ☐ AMEX

Card No. _____ Exp. Date _____

Oral Advocacy for the Appellate Practitioner

Sept 16, 2005 • 12:00–2:00 pm
Utah Law & Justice Center
1.5 Hrs. CLE
$35 Appellate Practice & Litigation Section
$50 Others
Law students $10 (pending available seating)

David C. Frederick is a seasoned appellate attorney, having argued before the U.S. Supreme Court 12 times. Currently a partner at Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., in Washington, D.C., Mr. Frederick clerked for Justice Byron R. White. He was an Assistant to the Solicitor General at the United States Department of Justice from 1996 to 2001. He is the author of *Supreme Court & Appellate Advocacy* (West 2003) and *The Art of Oral Advocacy* (West 2003). His full bio is available on the CLE calendar website at www.utahbar.org/cle

Registration being accepted now online or by phone.

Classified Ads

RATES & DEADLINES

Bar Member Rates: 1-50 words – $35.00 / 51-100 words – $45.00. Confidential box is $10.00 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)538-0526.

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: May 1 deadline for 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

Lawyer died, can't read. Bought office building with library. Will sell cheap: Pac 2d 204–1000; Pac 3rd 1-30; ALR 3rd 1–100; ALR 4th 1–90; ALR 5th 1–43; Quick Index ALR 1st–5th. Best offer takes all. 792-6027.

POSITIONS AVAILABLE

Utah Trial Lawyers Association seeks a full-time executive director to provide administrative direction. BS-level education or equivalent experience required. Legal/political and non/profit experience a plus. Excellent communication, writing and editing skills and the ability to work well with people is essential. Responsibilities include: Operational supervision of office personnel, and HR management. Plan and supervise CLE programs, quarterly journal, budget, financial records and reports, membership recruitment, donor development, grassroots programs, public education efforts, meetings, event organization, IT planning & implementation.

Legislative Affairs Coordinator. The Utah Association of Criminal Defense Lawyers seeks part-time help to represent the organization before the Utah State Legislature and in similar official capacities. Coordinator would be expected to serve as needed but must remain available at all times during state legislative session. Applicants must have excellent interpersonal skills and be committed to securing accused persons' rights. Experience in public relations preferred. Compensation limited but likely to increase based upon future funding efforts. Please send resume by July 29, 2005, to Shelly Miller, UACDL, P.O. Box 510846, Salt Lake City, UT 84151-0846.

Construction and development company is seeking to fill an assistant in-house counsel position for its national operations. Areas of responsibility will include real estate, employment, risk management, and general corporate work. Three to five years experience required, with excellent academic credentials. Salary DOE. Please send resume to: Christine Critchley, Utah State Bar, Confidential Box #13, 645 South 200 East, Salt Lake City, UT 84111-3834 or e-mail ccritchley@utahbar.org.

Omni Financial is looking for Attorneys, CPAs, and EAs. National business turnaround firm in Colorado is seeking experienced professionals to manage a caseload of clients at our beautiful Broomfield office. Our clients hire us to mediate IRS, State, bank and other creditor issues. We offer: An outstanding team environment with other like professionals, Team training, Excellent benefits/401k Plan, Salary, Commission & Bonus = $70-80K year one, $80-100K year two. We're constantly looking for outstanding applicants, contact us to set up a confidential interview. Call: Christy Cort at 303-530-7770.

US MAGISTRATE JUDGE – The U.S. District Court seeks qualified applicants for a new magistrate judge position. A Court-appointed Merit Selection Panel will review and recommend qualified candidates to the Court. The finalist will be subject to a FBI background investigation and IRS tax check. The current annual salary is $149,132. The term of office is eight years. For qualifications, duties, and the application form, go to www.utd.uscourts.gov or contact the Clerk of Court at the U.S. Courthouse on 350 South Main Street in Salt Lake City. Applications must be submitted to the Clerk by 5:00 p.m.on August 26, 2005.

Larry H. Miller Management Company has an immediate opening for a full time Legal Secretary for our Corporate Counsel. Duties would include but not limited to keeping corporate books current, do all corporate/dba renewals and filing in Utah, Arizona, Colorado, Idaho, New Mexico and Oregon. Keep all group information current. Knowledge of transaction filing helpful. Please mail or fax a resume to: Attention Brenda Hardy 9350 South 150 East, Suite 1000 Sandy, UT 84070. Fax (801) 563-4291.

Dedicated Legal Secretary with litigation experience needed for busy litigation attorney at downtown law firm. Permanent, full-time position with excellent salary and benefits. Great working environment. Fax resume to 363-3614, attn: Carol.

Large AV rated Salt Lake City firm seeking general corporate/securities lawyer with portable book of business. Send resume to Christine Critchley, Utah State Bar, Confidential Box 2, 645 South 2nd East, Salt Lake City, UT 84111 or ccritchley@utahbar.org.

Clerk of Court, United States Bankruptcy Court, District of Utah (Salary range $117,432-$146,800 DOQ) This is a high level management position which functions under the direction of the Chief Judge of the U.S. Bankruptcy Court. The Clerk is responsible for managing the administrative activities of the clerk's office and overseeing the performance of the statutory duties of the office. Must have 10 years of progressively responsible administrative experience with three of those years in a position of substantial management experience (there are educational substitutions for experience). For the complete announcement and application procedure please visit our website at www.utb.uscourts.gov.

POSITION SOUGHT

Recently sworn-in attorney seeks contractual and overflow work to help build his practice. Please contact John at (801) 502-8777 or e-mail at JHW-law@hotmail.com.

OFFICE SPACE/SHARING

EXECUTIVE OFFICE in Sandy at 9055 South 1300 East. Beautiful, newer office complex with rich alder wood finishes! Shared conference room, T1 internet, and digital phone all included. Spacious window office $500 per month. Call Chris at 572-6969. **OFFICE SHARE WITH ATTORNEYS** in Fort Union area. Brand new, beautiful space! Shared conference room, break room and generous storage. High-speed internet included. Two offices available. Interior office $375 per month. Window office $525 per month. Flexible month-to-month tenancy. Call Gregg at 572-6969.

LOW COST OFFICES AVAILABLE – Downtown, 455 East 400 South – 400 TO 3000 square foot office suites available with several configurations to choose from. $8 to $9 per square foot includes parking, utilities, janitorial. Nice clean builiding, secure access, professional atmosphere. Short term leases available. Liberal move up policy for growing firms. Call John Peters at (801) 323-2395 or E-mail Development_2000@yahoo.com

Two offices available for an office sharing arrangement in the historic Kearns Building (136 South Main). Offices include fax, phones, high speed internet, copier, printer, Westlaw, large conference room, and kitchenette. For more information, contact Kevin or Christine at 531-6088.

One or two exceptionally nice offices available in deluxe small office building in East Sandy in office sharing arrangement with one other attorney. Facilities include receptionist, work station for support staff, fax, copier, high-speed internet and programmable telephone system. Overflow work available. Call (801) 501-0100 or (801)635-9733.

Office Space available for established attorneys. Convenient location in Midvale close to the freeway. 8341 South 700 East. Includes two spacious offices, large conference room, full kitchen & back patio. Private entrance and easy parking adjacent to building. Rent $750.00 per office or $1500.00 for all space available. Please call for details (801) 523-1470.

OFFICE SHARE SPACE: 1, 2, or 3 offices available downtown with receptionist area, conference room, break room, work room with photocopier, fax machine, high speed internet, and kitchenette. Starting at $300/month. Call Jon 599-0913.

STOCK EXCHANGE BUILDING has several available spaces, two office suites containing two to three offices, conference room and file room, as well as two individual offices and two executive suites with full services. Prices range from $400 to $1,600 per month. One-half block from state and federal courts. Contact Richard or Joanne at 534-0909.

Location, Location, Location: Small office building Available Within walking distance of the Court House. Easy access to and from the freeway. Plenty of parking. 777 South 200 East. $1000/month with 5 year lease. Formerly the Executive Tailor Shop for the past 14 years Dorothy we will miss you. Call Ted 580-8040.

Beautifully remodeled historic building in downtown Provo within walking distance to Court has two available spaces for attorneys with own established client base. Large windowed offices with secretarial space. Share office expenses in well-established firm, all amenities included. Contact Gary or Dusty at 801-373-4912.

SERVICES

Forensic Document Examiner, K-D Vacca, Inc. J. Donald Vacca, P.O. Box 6237, Battlement Mesa, CO 80636-6237, (970) 285-6787 Fax (970) 285-6788, E-mail jdvaccaqd@msn.com Specialization: Examination, comparison, identification of hand-writing, indented writing, typewriters, inks, documents, printed materials, photocopiers. Fully equipped laboratroy. Retired from Denver Police Crime Laboratory.

Lump Sums Cash Paid For Seller-Financed Real Estate Notes & Contracts, Divorce Notes, Business Notes, Structured Settlements, Lottery Winnings. Since 1992. www.cascadefunding.com. Cascade Funding, Inc. 1 (800) 476-9644.

I advertise bankruptcy services for attorneys. I have an MBA from UC-Berkeley and have brought attorneys 8,000 bankruptcy cases since 1993. I am seeking a Utah attorney, who is interested in adding bankruptcy to their law practice. Bankruptcy leads to more law business in other areas of law. All advertising is pre-approved by the attorney and complies with state bar rules. From my internet research, the bankruptcy industry in Salt Lake City is booming (500 chapter 13s were filed in Salt Lake City in April 2005). Ken Phillips, kennephill@aol.com, 1-818-263-7274 telephone

Fiduciary Litigation; Will and Trust Contests; Estate Planning Malpractice and Ethics: Consultant and expert witness. Charles M. Bennett, 257 E. 200 South, Suite 800, Salt Lake City, UT 84111; (801) 578-3525. Fellow and Regent, the American College of Trust & Estate Counsel; Adjunct Professor of Law, University of Utah; former Chair, Estate Planning Section, Utah State Bar.

PROBATE MEDIATION AND ARBITRATION: Charles M. Bennett, 257 E. 200 South, Suite 800, Salt Lake City, UT 84111; (801) 578-3525. Graduate: Mediation Course, the American College of Trust & Estate Counsel.

California Probate? Has someone asked you to do a probate in California? Keep your case and let me help you. Walter C. Bornemeier, Farmington. 801-451-8400 (or: 1-888-348-3232). Licensed in Utah & California – 39 years experience.

WE HAVE THOUSANDS OF MEDICAL MALPRACTICE EXPERT WITNESSES. Fast, easy, affordable, flat-rate referrals to board certified, practicing doctors in all specialties. Your satisfaction GUARANTEED. Just need an analysis? Our veteran MD specialists can do that for you, quickly and easily, for a low flat fee. Med-mal EXPERTS, Inc. www.medmalEXPERTS.com 888-521-3601

Language – CTC Chinese Translations & Consulting Mandarin and Cantonese and other Asian languages. We have on staff highly qualified interpreters and translators in all civil and legal work. We interpret and/or translate all documents including: depositions, consultations, conferences, hearings, insurance documents, medical records, patent records, etc. with traditional and simplified Chinese. Tel: (801) 942-0961, Fax: (801) 942-0961. E-mail: eyctrans@hotmail.com

CHILD SEXUAL ABUSE – DEFENSE. Forensic Statement Services provides a complete objective case analysis – Assess relevance of criminal charges – Identify and determine effects of evidence contamination, coersion, bias and prejudice – Evaluate for false allegations – Apply objective Daubert, peer-reviewed research to case evidence and motions to limit/suppress. B.M. Giffen, Psy.D. Evidence Specialist (801) 485-4011. Member: American Psychology-Law Society.