4th Quarter 2011

A Newsletter of the Litigation Section of the Utah State Bar

The Zealous Advocate

President's Message

by Jonathan Hafen

By Jonathan Hafen

Litigation Section Membership: Investing in Your Future

Reporting on a survey he conducted, Dr. Arthur C. Brooks found that members of professional associations generally make more money (as much as 52% more on average) and are happier with their careers than those who do not join such associations.1 At just under 2,000 members, the Utah State Bar's Litigation Section is one of Utah's largest professional associations. While membership in the Utah State Bar is mandatory, joining the Litigation Section is voluntary. We are very glad you have chosen to be part of our organization.

Dr. Brooks also found that professionals look for the following from their association membership: "career networks and advantages, ideas and education, portable fringe benefits, community, and opportunities to serve." We believe we have done well in all of those areas. However, to become a better association for you, we are implementing a number of new programs for Section members this year and expanding successful existing programs. Our goal is simple—we want you to consider your annual Section dues one of the best investments you make.

The newsletter you are reading right now is the first edition of "The Zealous Advocate," a new publication we hope will meaningfully enhance your practice with "ideas and education" and "career advantages." The Zealous Advocate will come out quarterly. As you can see, it contains "Opinion Watch," which summarizes key recent rulings in Utah. Simply reviewing this part of the Newsletter will keep you up to date on where the law is headed in Utah. We will also provide judicial profiles, which will contain background information on Judges as well as practice pointers. In this edition, the Newsletter profiles Judge Hansen. Over time, we will build a library of these judicial profiles, which will be available on our website. Along with our Section's Bench Books, which you can access at litigation.utahbar.org/benchbooks.html, these judicial profiles will give our Section Members the inside track on how to best represent clients before our Judges. We will also present practitioner profiles, through which you will get to know some of our Section members and hopefully pick up some ideas from their practices that will help you in yours. We also intend to use our newsletter to better promote our upcoming events, so that you will be able to take advantage of the high quality programs your Section provides throughout the year.

Worthwhile and interesting CLE programs have long been a strength of the Litigation Section and are part of the "ideas and education" Dr. Brooks references. Our CLE events also present fantastic networking opportunities.

Our Section presents the "Litigation Track" at our three major Bar conventions—Mid-year, the Annual Meeting, and Fall Forum. Hundreds of our Section members also attend our highly successful series of quarterly CLE luncheons, which include an hour of high quality CLE, often involving Judges, and a free lunch. Because lunches are not always the best time for CLE for all of our members, we tried an experiment this summer with a "Rise and Shine" CLE, where we served breakfast along with a presentation on "5 Top Tips from 5 Top Practitioners." Based on attendance and feedback, we now will put on those

Rise and Shine CLEs once a quarter, with the next one coming soon.

We have other great CLE programs on the horizon. On December 12, we will host a quarterly luncheon oat noon at the Bar Offices on "A judicial Perspective on the Proportionality Requirement of Rule 26." Panelists include Judge Derek Pullan of the Fourth District, Judge Deno Himonas of the Third District, and Judge David Connors of the Second District. In April 2012, we will put on a full day Trial Skills Academy, where Utah Judges and leading practitioners will provide training on all aspects of trial. This presentation is intended to be valuable for both the brand new and the experienced litigator. On May 3-5, 2012, our Section is co-sponsoring with the Federal Bar Association the annual Southern Utah Federal Law Symposium. This year's keynote speaker will be General William Suter, Clerk of the United States Supreme Court. I have heard him speak in the past. He is very entertaining and very informative. Following his keynote speech, we will have a U.S. Supreme Court swearing in ceremony, which is something you will not want to miss.

We will also continue our popular "Golf and CLE" series, with events throughout the State—Cache County, Utah County, and Washington County, and plan to add an event in Salt Lake County. In prior years we occasionally have had an evening reception where Section members meet and mingle with Third District Judges. In 2012, we will repeat that event in the Third District and add receptions in both the Second and Fourth Districts. Watch for more information on these opportunities.

Far more than simply an opportunity to pick up some CLE credits, all of these events are intended to provide you with opportunities to connect with fellow Section members and with our Judiciary. We have a wonderful sense of community among the litigators and Judges in Utah. It is a great place to practice law—a large enough market that we have a wide variety of cases, but small enough that you get to know those litigators who practice in your areas (of the law and of the State). As we continue to build that sense of community as the number of Utah lawyers inevitably grows, we hope to maintain a sense of pride in how we practice law here. This includes excellence in preparation, professionalism, and presentation.

I welcome any ideas you may have on how to improve our Section or any feedback on our programming and this newsletter. If you are looking for service opportunities, we offer those as well. Feel free to email me at jhafen@parrbrown.com.

We hope that as a result of your participation in our association, you make more money and you enjoy your practice more than you would without us. That certainly would be an investment well made.

"Our goal is simple—we want you to consider your annual Section dues one of the best investments you make."

[1]Arthur C. Brooks, Ph.D., "Engaging the Next Generation of Association Members," The Maxwell School of Citizenship and Public Affairs, Syracuse University.

Jonathan Hafen is an attorney at the firm of Parr Brown Gee and Loveless.

By
Keith Call

Judge Royal I. Hansen, Public Servant

It is obvious Judge Royal Hansen, Presiding Judge of the Third District Court, thrives on public service. Serving others is a hallmark of his private and public legal career and life.

The Road to the Bench

Judge Hansen graduated from East High School in Salt Lake City, where he excelled in whatever sport was in season, including football, basketball and track. He earned his B.A. and J.D. degrees from the University of Utah, completing his law degree in 1975. After law school, he clerked for Judge Frank Q. Nebeker, a Utah native, on the District of Columbia Court of Appeals.

Judge Hansen joined the Salt Lake firm of Moyle & Draper in 1976, where he spent the next 27 years. His practice there was mostly civil litigation, including insurance defense, products liability, and plaintiff's personal injury. One of his most memorable cases came early in his career as one of several lawyers who represented the families of 91 miners who tragically burned or suffocated in the Sunshine silver mine fire near Kellogg, Idaho, in 1972. Judge Hansen's genuine compassion for the families he served in that case is still evident today.

Governor Michael Leavitt appointed Judge Hansen to the bench in 2003. He began as a the lone judge in the Sandy department of the Third District Court, moved to West Jordan when the new courthouse opened there, and landed in the Salt Lake City department in 2009. He became the Presiding Judge of all Third District Court operations in 2011. Most, but not all, of his judicial experience has been with criminal cases.

Judge Royal Hansen

Protégé and Mentor

Judge Hansen is quick to acknowledge many of the mentors who have shaped his career and life. He is particularly fond of Brent Wilcox, who took Judge Hansen under his wing when he joined Moyle & Draper. In the mine accident case, Judge Hansen found he was often outnumbered in depositions and at hearings, sometimes being the lone plaintiffs' attorney amidst a dozen defense and Justice Department attorneys. Brent taught Judge Hansen that hard work, diligence, and careful attention to detail are great equalizers in the law. Brent also taught by example how to treat opposing counsel well, especially in rigorous adversarial situations. Judge Hansen took note that Brent's professionalism and respect for others was usually met with professionalism and respect in return.

Mentoring has always been an important part of Judge Hansen's legal service, even from the bench. As Presiding Judge, he has assumed an important role in new judge training and mentoring, a job he takes very seriously. He notes the retirement in 2011 of four seasoned judges with over 70 collective years of judicial experience. His commitment to mentoring younger judges will serve all of us well.

Judge Hansen calls on all senior lawyers to act as mentors. "The new lawyer profile," he says, "is a lawyer with a laptop at Starbucks." For the good of these lawyers and for the profession, Judge Hansen bluntly states, "Senior lawyers have the responsibility to mentor."

Judicial and Legal Philosophy

"Most people who appear in court will only be there once in their entire life, and their experience in court is something they will remember and talk about for the rest of their lives." Judge Hansen therefore believes it is imperative for a judge to be an excellent listener, to treat all parties in civil and criminal cases with complete dignity and respect, and to make sure every person is afforded

a genuine "day in court." He reminds us of the obvious—that it is critical for a judge to "do justice, follow the law, and work hard to figure out what the law is."

He is also quick to point out that better lawyers make him a better judge. The most effective lawyers he has seen work with character and candor. When Judge Hansen took Justice Ronald Nehring's seat on the bench, Justice Nehring told Judge Hansen, in essence, "Your reputation as an attorney is your most important asset." Judge Hansen elaborates, "Every time you appear in court or file pleadings, you are either adding to or subtracting from that reputation. Your reputation is more important than writing skills, oral skills, negotiation abilities, rainmaking, or any other skill." He admires the lawyer who is candid about weaknesses in facts or law.

"Judge Hansen advises all lawyers, especially young lawyers, to be engaged in public service."

Commitment to the Public

Judge Hansen advises all lawyers, especially young lawyers, to be engaged in public service. Some of his most rewarding memories of private practice arose from occasional phone calls from Federal Court Judges appointing him to serve as counsel on post-conviction proceedings and from other pro bono opportunities. These opportunities allowed him to know first-hand that the legal "profession" is about more than just money. "Lawyers have unique skills, and therefore a unique ability to impact the community. No lawyer should abdicate to others his responsibility to give service." There are many ways to get involved through pro bono service, Bar committees, neighborhood and school associations, boards, political office, and so forth.

Some of Judge Hansen's most cherished personal relationships have come through such service. He has served on more Bar committees than you would want to read about in this article! He is the founding judge of the South Valley Felony Drug Court, an experience that gave him new perspectives on life and people. And he clearly views his current judicial position as far more than just a job. For him, it is a way to contribute to the community, state and nation, and to do his part to make the world a better place.

Keith Call is an attorney at the firm of Snow, Christensen & Martineau.

By Joseph M. Stultz

The Utah Supreme Court has approved a number of substantial amendments to the Utah Rules of Civil Procedure. These amendments are effective for cases filed on or after November 1, 2011. Joe Stultz, a member of the Litigation Section Executive Committee, sat down with James Blanch, who served on the Supreme Court Advisory Committee on the Utah Rules of Civil Procedure while the new rules were being considered and passed, to get his thoughts on the amendments. James has practiced law for 18 years in the litigation department of Parsons Behle & Latimer and has served on the advisory committee for 9 years. A useful link to the materials explaining the new rules can be found here.

Q: What was the main impetus behind the 2011 amendments to the Utah Rules of Civil Procedure?

A: About two years ago, one of the judges on the Supreme Court Advisory Committee on the Utah Rules of Civil Procedure (a committee composed of lawyers, judges, and court administrative personnel), observed that there were many small cases where the costs of litigation often made it economically unfeasible to bring a case and that discovery was a primary driver for the excessive costs. The problem was that the amount of money it takes to bring a case to trial essentially precluded a lot of people with legitimate disputes from having access to the judicial system. The Committee's sense was that the Utah State Legislature was also concerned about these access-to-justice issues and that it was wise to look at potentially making changes to the Utah Rules of Civil Procedure to ensure that people with small dollar value cases can bring those cases to trial without having the costs of seeking justice overwhelm the value of the matter in controversy.

James Blanch

Q: Can you give me a hypothetical example of the cases you are talking about?

A: I think that a lot of people who have practiced in litigation for a long time have had multiple experiences where you have a client that comes to your office and has a legitimate dispute. It might be a dispute over a real estate commission or a small contract of about $35,000 to $40,000. You look at the case and you tell the client she has a good claim and that she would probably prevail at trial, but that it would cost $50,000 or $60,000 or more to get justice, largely because of the costs of discovery. The hope of the Committee is that the new rules will allow the person with the $35,000 claim to get justice in the court system without the litigation process costing more than the potential recovery.

Q: What do you think is the single biggest amendment that will reduce the costs of litigating the $35,000 claim?

A: I think that the change to Rule 26 of the Utah Rules of Civil Procedure that establishes three tiers for standard discovery based on the amount of damages in controversy will have the biggest impact. Someone who pleads damages of $50,000 or less, or even $50,000 to $300,000, will trigger significant limitations to discovery under the standard discovery provisions, including the amount of time permitted for discovery. Even claims in excess of $300,000 will involve presumptive limitations on the time and amount of discovery relative to what is available now.

Q: Are there any other states using this sort of a system?

A: There have been different states that have experimented with concepts similar to some of the changes our amendments incorporate. There have been states that have tried to have dual-track systems on a pilot basis that were voluntary, and the experience of some of the states that went down that road was that people would opt out of the program and they never really got a good sense of whether or not the ideas they had incorporated would work. No state thus far has taken the comprehensive approach to address these access-to-justice problems that Utah has. Frankly, although the principle of proportionality as a limitation on discovery is not new, the overall approach in the 2011 amendments is new; we're on the cutting edge. If it works as the Committee hopes, I anticipate it will be a blueprint that other states will follow in the future.

Q: How will the amendments change the way that you approach cases?

A: I think that a lot of the work in cases will now be front-loaded on both the plaintiff and defense side. It is going to be necessary to go out and gather as much information as you reasonably can at the outset of a case, such as figuring out who your witnesses are going to be, interviewing them to find out what their testimony is going to be, and determining what documents are going to be relevant. Concerning the documents, it is incumbent under the new rules to assemble your relevant documents at the outset and get copies ready to furnish to the other side. I think for a plaintiff it will be advisable to get all of that information together before you even file your complaint, so that you're not caught unable to comply with your disclosure obligation a few weeks later. For defendants, when they get a complaint they will need to jump on their investigation right away. It will be more than merely an investigation that is sufficient to allow you to put an answer together. It will be the same kind of investigation I just described with respect to a plaintiff where you pull together information about witnesses and the expected testimony, documents, and trial exhibits and really assemble your case as much as possible up front. So there will be some early costs associated with preparing a case that previously would have been pushed later into the discovery processes, but the hope is that, now that we have very limited standard discovery, the parties will have exchanged the bulk of the information that they'll be using at trial in the automatic disclosure process. Then discovery will be available to fill in the gaps, and perhaps uncover relevant information the other side might have. Starting cases will involve a bigger effort on the front end than it did before.

"Starting cases will involve a bigger effort on the front end than it did before."

Q: What do you think are the biggest potential traps for the unwary?

A: There are many deadlines that kick in automatically under the new rules. The new rules no longer provide for Rule 26(f) discovery and scheduling conferences. Instead there are built-in deadlines that trigger automatically that attorneys will need to understand and follow. One example is that the parties will need to identify their experts with respect to issues on which they bear the burden of proof, and provide a fair amount of information about those experts and their opinions, within seven days after the close of standard discovery. After this initial expert identification is made, the other side has seven days to elect either a deposition or an expert report, but not both. If no election is made, both the deposition and report are forfeited. So parties will want to take care to elect a deposition or report within that seven-day window. Another potential trap for the unwary is that the rules provide that parties can either stipulate or move for additional, what is called extraordinary, discovery in excess of the standard discovery, but that the stipulation or motion must be between the time the parties have completed standard discovery and the expiration of the time period for standard discovery. So there is this little window of time within which people should make those stipulations or motions for extraordinary discovery.

Q: What is your favorite thing about the new rules?

A: My favorite thing about the new rules is the idea of a first tier case, a case that's $50,000 or less, that requires some discovery, but is not worth the kind of discovery warranted for a bigger case. I like the idea of being able to file a $25,000 to $45,000 claim for a client and have confidence that if I approach the case in an intelligent way and I pull the information together up front, there is going to be limited discovery and there will be a trial quickly. The parties may not know everything there is to know about the case, but that is okay, because it is a case involving less than $50,000, and they will know more than they would know in a small claims court where there is no discovery. The criminal law system functions without allowing the parties exhaustive pretrial discovery, and there is no reason the civil system can't do so as well, particularly in smaller cases. I think the idea of allowing parties to receive justice in an effective, economically efficient way, even when their claims are modest, is the most exciting thing about the new rules.

Q: What do you see as the biggest challenges for Judges with the new Rules?

A: I think that there will be some motion practice, at least at first, where the judges and the lawyers will need to understand what the meaning of this new term "proportionality" is. I think it is reasonable to anticipate that judges will see a flurry of motions after these new rules take effect where people have exhausted standard discovery, wish to pursue additional, or extraordinary discovery, and have to demonstrate that the additional discovery they are seeking is proportional. The rules themselves and the accompanying advisory committee notes provide significant detail about what proportionality means, but the judges will need to speak to this new proportionality principle, and I suspect that this may be a challenge for the bench as well as for lawyers.

Q: Do you see the courts also moving towards streamlining motion practice on discovery disputes?

A: I have heard that some of the judges are considering developing procedures to streamline consideration of discovery disputes. This will be important considering that the time frames built into the rules for standard discovery are relatively short, and the rules provide that discovery motions do not toll these deadlines. Other judges I have appeared before in other jurisdictions have developed procedures where a party with a discovery dispute can submit a short letter to the court describing the dispute, and the other party will submit a short responsive letter. The judge will then get the parties on the phone and resolve it quickly. I understand that some of the judges in Utah are thinking about a similar approach to help resolve these discovery disputes quickly, and I think some new procedures like this could be useful in speeding along the resolution of discovery disputes so the parties can meet the deadlines under the new rules.

Q: What should attorneys be telling their regular clients about the new rules?

A: I think attorneys who do work for clients where they file similar types of claims routinely, such as attorneys who represent banks, perhaps, should give their clients a lesson about what these new rules are going to require up front. For example, there will be more work required of a standard foreclosure action or collection action than was required in the past. I also think lawyers should let their clients know that they should bring to the lawyers' attention smaller claims that they may have ignored in the past because of the high cost of litigation. Again, under the new rules, it will be more economical to bring a $35,000-$40,000 case, and it might make more sense to bring it to court now rather than letting it go.

Q: Is there anything else that you would like to add about the new rules?

A: Well, I hope lawyers and judges approach these new rules with a sense of optimism and not fear. I think that there is a tremendous upside if the Rules work the way that they are intended. I think there is always fear when something new happens, that people worry it will make their lives difficult or that things are not going to work well. But there is great potential for these rules to accomplish a lot of good. The advisory committee is always open to new ideas expressed by judges and lawyers and others concerning ways to improve the rules, so if there are some unintended consequences as a result of these amendments that we can fix through subsequent amendments, the advisory committee is very interested in hearing about that. Through that process I think that there is a tremendous potential for Utah to be on the cutting edge of ensuring access to justice for people from one end of the litigation spectrum to the other.

"I hope lawyers and judges approach these new rules with a sense of optimism and not fear."

Joseph Stultz is an attorney at the firm of Parsons Behle & Latimer.

Opinion Watch

By
Heather Sneddon

By
Rick Kaplan

As a service to our members, the Litigation Section has recently formed *Opinion Watch* to flag recent opinions of the Utah Supreme Court and Court of Appeals that will likely be of interest to litigators, and summarize their key points soon after they are issued.

Of particular note, the Utah appellate courts have recently handed down decisions concerning plain error on appeal, condemnation proceedings and Utah Code Ann. § 78B-6-501, guarantees, claim preclusion, judgment liens held by lawyers, intervention and standing to join, Rules 54(b) and 60(b), the securitization of mortgages and Utah Code Ann. § 57-1-35, the finality of minute entries for purposes of appeal, the expansion of Rule 15(b) beyond its explicit reference to issues actually tried, and the interpretation of the Utah Procurement Code. We invite you to visit *Opinion Watch* on the Litigation Section website here to review and take advantage of these summaries.

By way of example, Opinion Watch highlights two of the Utah Supreme Court's recent opinions, which are summarized below (and also available on the Litigation Section website):

Pyper v. Bond, 2011 UT 45, July 29, 2011

Pyper involved a law firm that filed a lien on its former client's house after the client failed to pay his bill in the amount of $10,577 and the firm secured a money judgment. At the time the lien was filed the house had an estimated value of about $125,000. The lender foreclosed and the only bidder at auction was the client's former attorney, who bought the house for $329. The former client petitioned to set aside the sheriff's sale on the grounds that the price was inadequate and that he had been treated unfairly because he had attempted during the redemption period to pay the overdue bill and the attorney had failed to respond to numerous phone calls and messages. The district court made findings that the client had in fact made multiple calls; that he told an employee of the firm that he wanted to redeem his property; that he asked for a judgment lien payoff amount; that he had been told an attorney would return his call; and that no one ever did.

All five Justices agreed on the controlling standard of proof—when, as here, the price is grossly inadequate, the sale may be set aside on a showing of "slight circumstances of unfairness." Three justices held that that standard, which reflects application of a "sliding scale" to the pertinent factors, was met on this record. They found that the former client "may have reasonably believed that he could resolve the dispute with the law firm and reacquire his property through negotiation, and that it was therefore unnecessary for him to utilize the redemption process." *Id.* ¶ 26. Two justices dissented from that portion of the majority's opinion on the grounds that when the lawyer failed to respond, the former client should have realized it was essential for him to participate in the redemption process himself.

One aspect of the majority's analysis bears special mention for litigators and for all lawyers with judgment liens, because it addresses what appears to be a fundamental, underlying concern. The Court pointed out that even "slight circumstances of unfairness in the conduct of the party benefited by the sale [may suffice] to raise the *presumption of fraud*." *Id.* ¶ 20 (emphasis in original). And the Court instructed that "unless the presumption is rebutted, a court may justifiably find [on facts such as these] a compelling circumstance that justifies setting aside a sheriff's sale." *Id.*

Full opinion available at:

http://www.utcourts.gov/opinions/supopin/Pyper5072911.pdf

http://scholar.google.com/scholar_case?q=pyper+bond&hl=en&as_sdt=4,45&as_ylo=2011&as_yhi=2011&case=15229837351191944648&scilh=0

Utah Dep't of Transp. v. Admiral Beverage Corp., 2011 UT 62, October 18, 2011

In *Admiral* Beverage, the Utah Supreme Court overruled a prior decision concerning the admissibility of fair market value evidence in takings cases, and held that Admiral

had the right to recover from UDOT the decrease in the fair market value of its remaining property (i.e., severance damages) resulting from the state's condemnation.

UDOT condemned real property owned by Admiral as part of the reconstruction of I-15. Because it was entitled to compensation from the state for the taking of its property, Admiral sought to introduce evidence in the district court of all factors affecting the market value of its remaining property. UDOT sought to exclude all evidence of severance damages caused by the loss of visibility from the freeway into the non-condemned portion of Admiral's property. *Id.* ¶ 6. Siding with UDOT, the district court excluded all evidence of severance damages based upon the loss of view from Admiral's remaining property. *Id.* The Court of Appeals affirmed on interlocutory appeal, holding that because Admiral's property did not directly abut I-15, but instead abutted 500 West, the abutment rule limited Admiral's compensable right of view to 500 West. The appellate court specifically noted that the Supreme Court's decision in *Ivers v. Utah Department of Transportation*, 2007 UT 19, 154 P.3d 802, had not eliminated the abutment rule. *Id.* ¶ 7. Admiral petitioned for a writ of certiorari, which the Supreme Court granted. *Id.* ¶ 8.

Revisiting its decision in Ivers, the Court explained that the plaintiff in that case sought severance damages resulting from the loss of visibility of its restaurant from the highway and the loss of view from the property when a portion of it was condemned as part of UDOT's widening and elevation of U.S. Highway 89. The trial court precluded the plaintiff from presenting evidence of damages resulting from the loss of visibility and view, and the Court of Appeals affirmed. On certiorari review, the Supreme Court affirmed, holding that the plaintiff "was not entitled to damages for loss of visibility because 'landowners do not have a protected interest in the visibility of their property.'" *Id.* ¶ 11.

In this case, Admiral urged the Supreme Court to overrule the foregoing part of *Ivers* that prevents a landowner from recovering damages for loss of visibility. *Id.* ¶ 13. Upon reviewing *Ivers*, the Court concluded that the requirements for overturning *Ivers* on that ground were satisfied. Analyzing the Utah Constitution, applicable statutes and Utah's eminent domain case law, the Court held that Ivers was wrongly decided: "Indeed, until *Ivers*, we had never held that a landowner who has had a portion of his property physically taken may recover severance compensation only for damages to 'recognized property rights.' To the contrary, our measure of severance damages has *always* been the diminution in market value of the remainder property. See *infra* ¶ 30 n.4. And in assessing fair market value in the context of severance damages we have always allowed evidence of all factors that affect market value. See *id.* Against this long line of precedent, Ivers is revealed for what it is—an aberration that was wrongly decided." *Id.* ¶ 17. The Court further concluded that more good than harm would result from overruling Ivers. *Id.* ¶ 18.

Accordingly, the Supreme Court in *Admiral Beverage* held that when a landowner suffers the physical taking of a portion of his land, "he is entitled to severance damages amounting to the full loss of market value in his remaining property caused by the taking." *Id.* ¶ 19. When the landowner suffers damages *not* connected to a physical taking, however, the Court affirmed its prior rule that the landowner may recover only for "damage to protectable property rights." *Id.*

For the Court's analysis of the Utah Constitution, statutes and relevant case law, please see the full opinion by clicking below.

Full opinion available at:

http://www.utcourts.gov/opinions/supopin/AdmiralBev101811.pdf

http://scholar.google.com/scholar_case?q=%22admiral+beverage%22&hl=en&as_sdt=2,45&as_ylo=2011&case=14497098915797197484&scilh=0

Contributing to Opinion Watch are Richard Kaplan and Heather Sneddon, as well as other lawyers at Anderson & Karrenberg.

By Nicholas Caine

The College of Law continues to grow as it welcomed the new 1L class as well as many transfer students. The new 2014 class consists of 114 students and with the transfer students brings the total enrollment of the law school to 398 students.

The Student Litigation Society, a student organization, was founded this year. The purpose of the Society is to organize, network, and educate students interested in litigation. The Society will help students connect to helpful resources and practicing litigation attorneys through the Utah State Bar Litigation Section. However, the main purpose of the society is to organize and operate an annual trial advocacy competition at the College of Law that will provide students an opportunity to practice their skills and get feedback from practicing attorneys and judges.

Professor Michael Teter joined the faculty as an associate professor of law. Prior to joining, he was a visiting professor of politics at Pomona College and a teaching fellow in the Federal Legislation & Administrative Clinic at Georgetown Law. Professor Teter received his B.A. in Politics from Pomona College and his J.D. from Yale Law School. After law school, Professor Teter worked as a union-side labor lawyer in Los Angeles before joining the presidential campaign of John Kerry in 2003. He worked in Iowa, Washington State, and California, before serving as the Kerry-Edwards Wisconsin State Field Director. He also directed the re-election campaign of Senator Herb Kohl before going to work as a litigation associate at Perkins Coie in Seattle, Washington.

On October 2, 2011, our own Dean Hiram Chodosh received the 2011 Gandhi Peace Award, which is given annually by the Gandhi Alliance for Peace. Gandhi Alliance board member Allan Smart praised Dean Chodosh for his long-standing commitment and service to the cause of world peace, especially in his leadership of the College of Law's two-year efforts providing legal assistance to the government of Iraq in 2008 to 2010, for his role in helping to create and promote court-annexed mediation in India beginning in 1995 and continuing as a Senior Fulbright Fellow in India in 2003, plus the ongoing collaboration of the College of Law with Indian law schools and Indian lawyer-mediators in New Delhi, Ahmedabad, Chennai and elsewhere in that country. He also recognized Dean Chodosh as one of America's leading legal scholars. Dean Chodosh developed a comparative approach to the study of the rule of law, conflict resolution, and international human rights.

The College of Law hosted the Autism Law Summit On October 20-21. One hundred participants from 31 different states gathered at the College of Law for the 6th Annual Autism Law Summit. Sponsored by Autism Speaks, the nation's largest autism science and advocacy organization, this year's summit was co-sponsored by the Utah Autism Coalition and the University of Utah S.J. Quinney College of Law.

For more information and news about the College of Law please visit: http://today.law.utah.edu

"The Student Litigation Society, a student organization, was founded this year."

Nicholas Caine is the University of Utah student representative on the Litigation Section Executive Committee.

By
Seth Oxborrow

When the Class of 2014 entered the J. Reuben Clark Law Building on BYU Campus for the first time in mid-August, few of them understood that they were part of the changing face of BYU LAW. They couldn't know that classroom debates were being increasingly informed by internationally renowned scholars and leaders. At first glance, the only things they would notice were the sounds of construction and the smell of fresh paint. Likely, most of these only knew that BYU is a top-tier law school offered in a faith-centered environment. Still, BYU LAW refuses to sit back and rest on its international reputation. Instead, it continues to raise the bar for legal training, producing better and better graduates, a list of graduates that will include the Class of 2014 in three short years.

BYU continues to draw an international audience of scholars and leaders to inform its students, most recently in conjunction with the 18th Annual International Law and Religion Symposium that took place over several days in early October. Seventy delegates from 37 countries attended a packed conference focusing on "Religious Freedom in Pluralistic Age: Trends, Challenges and Practices." Translation of these proceedings was offered in 10 languages. Among the notable speakers was Justice Zakeria Mohammed Yacoob of South Africa's Constitutional Court, who gave a keynote address.

Students have responded to BYU's emphasis on international and scholarly thinking in kind. In the last year, 52 students from the law school went abroad to participate in externships, while more than 200 participated in externships across the country. While these numbers are among the best in the nation, BYU also contributes to the legal field in other ways. Professor Tom Lee, now Justice Lee, was recently appointed to the Utah State Supreme Court. And while BYU professors regularly publish articles in legal journals and attend events all over the world, they are joined in that prestige by the students. One BYU student even published a paper he co-authored in the Harvard Latino Law Review dealing with the equal access to the courts for linguistic minorities. With these experiences, BYU continues to produce students that are uniquely prepared for the changing legal climate and capable of dealing with unique and challenging legal concepts.

Beyond the theoretical, students at BYU continue to participate in competitions to gain practical experience in legal concepts. The Rex E. Lee Moot Court Competition is perhaps the most well-known of the law school's on-campus competitions and regularly pits 40 to 50 of the most talented advocates the school has to offer against each other. The final round took place on October 28, 2011, with participants continuing on to the National Moot Court Competition in 2012. A second competition focusing on negotiation also took place on campus, providing students with experience in yet another facet of what a lawyer can encounter in practice. The law school's trial advocacy competition also took place during the first part of November.

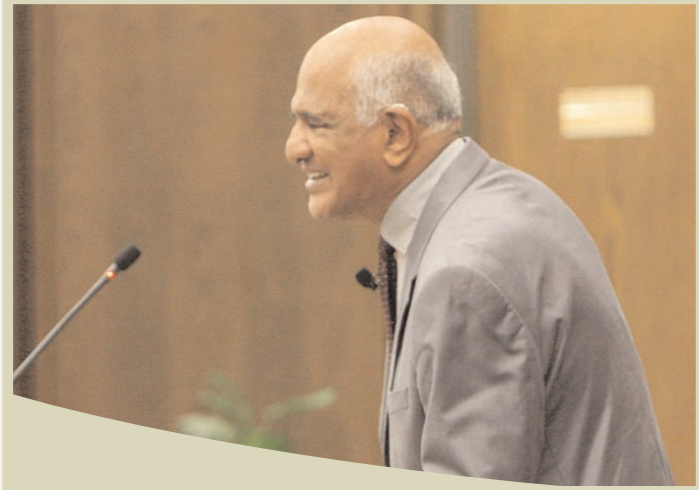
"Over the past year, the law school has been improving its facilities in order to provide students with a better learning environment."

Not all of the improvements at BYU have been intellectual in nature, though. Over the past year, the law school has been improving its facilities in order to provide students with a better learning environment. These physical improvements include a new Trial Court Room, completed just before the school year began. The room provides both cutting-edge technology and physical amenities that can be found in courtrooms throughout the country. Now, students can learn the theory of the law and practice their trial court skills in a practical and realistic setting better than ever before.

While so much is changing as part of BYU's push to provide the best possible education to its students, perhaps

the most important part of BYU's improvement is demonstrated by the incoming class itself. The students come from a variety of backgrounds, religions, and fields of study. Some of them hail from Sweden, Brazil, Ukraine, China, and Jordan, as well as Arizona State, Boise State, Cal State, William and Mary, Florida International University, Longwood University, Southern Virginia University, and a number of Universities of California. Significantly, of the class of 150, more than 100 speak a foreign language and forty percent are women.

All of these efforts are part of the J. Reuben Clark Law School's effort to provide valuable and cutting-edge education to tomorrow's lawyers. These efforts have increased BYU's presence and acclaim on a national and an international stage. Students are leaving BYU LAW well-prepared for legal practice, many with experiences only dreamed of at other law schools. Obviously, the law school has asked both students and faculty to rise up; something that those involved are doing and doing well.



Mohammed Yacoob

Seth Oxborrow is the Brigham Young University student representative on the Litigation Section Executive Committee.

Utah State Bar Litigation Section : A Judicial Perspective on Proportional Discovery Under the New Rule 26

Presenters: Hon. Derek P. Pullan, Fourth District Court
Hon. Deno Himonas, Third District Court
Hon. David M. Connors, Second District Court

Date: December 12, 2011

Time: 12:00-1:00 p.m.

Location: Utah State Bar – 645 South 200 East

Notes: Cost is free for Litigation section members and $20 for all others. Lunch will be provided. 1 Hour CLE.

To Register: Kindly e-mail RSVP to sections@utahbar.org or Fax (801) 531-0660 by December 9, 2011. Please include your name and bar numbers on all RSVP's.

Practitioner Profile

Peggy Hunt

By
Nicole Farell

Peggy Hunt still remembers her first day of clerking for Judge Clark at the United States Bankruptcy Court for the District of Utah. An office clerk wheeled a cart into her office stacked with volumes and volumes of files. She wondered if those were the files for entire month. Then, to her amazement and horror, she learned that they were the files for just the next day's proceedings. Not knowing even basic concepts of bankruptcy, she recalls staying up until four in the morning trying to figure out basic bankruptcy concepts such as requesting relief from the automatic stay.

She has come a long way since that day. Now, more than twenty years later, she is a partner at Dorsey and Whitney LLP, where her practice focuses primarily on bankruptcy law and litigation. Peggy represents debtors, Chapter 11 trustees, creditors, and equity holders in complex bankruptcy cases. She also has significant experience representing trustees and receivers appointed in and creditors of Ponzi schemes. Peggy also was recently was appointed to serve on the Panel of Chapter 7 Trustees for the District of Utah and in that role serves as a trustee and counsel in both large and small Chapter 7 cases.

Peggy Hunt

Prior to practicing at Dorsey, Peggy practiced at the law firms of Ray Quinney & Nebeker and LeBouef Lamb Greene and MacRae. She has also served as a judicial law clerk, not only for Judge Clark, but also for Justice Robert J. Callahan of the Connecticut Supreme Court and for judges appointed to Bankruptcy Appellate Panel of the Tenth Circuit.

Peggy grew up in Connecticut. Her father died in a car accident when she was 8 years old, so her mother raised her and her brother and sister as a single parent. Peggy says that when she now looks back on those years—especially since becoming a mom herself—she marvels at all that her mom accomplished on her own with sole responsibility for three young kids. Peggy recalls her mom telling her that in the '70s, she went to the bank and tried to get a credit card but was told that she was not eligible for one because she didn't have a husband. Peggy's mom went back to school when Peggy and her siblings were still young, earning an MBA and then working as a manager for Xerox Corporation in New York City. Peggy says her mom has always been her example, hero, and first mentor.

Peggy graduated from the University of Pittsburgh School of Law in 1988 after receiving her bachelor's degree in economics and political science from Washington and Jefferson College. She made her way to Utah from Connecticut because she loved to ski and thought Utah would be a great place to ski (and do a little clerking) for a year. She hasn't lived anywhere else but Utah since her decision to clerk for Judge Clark.

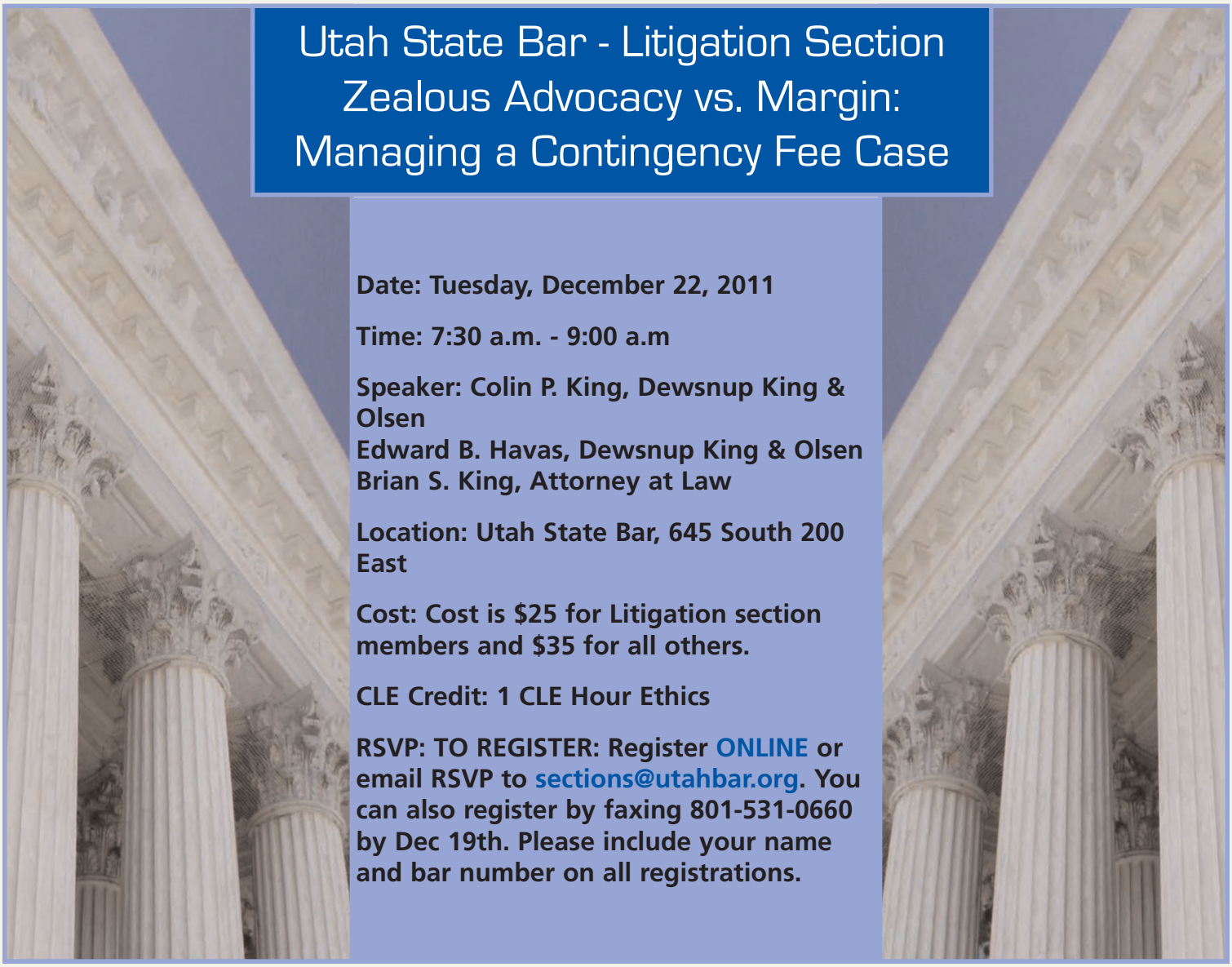
Peggy has consistently been listed in the Best Lawyers of America and named to Utah's Legal Elite in Utah Business Magazine. In addition, Peggy believes in public service and has been involved in many community activities over the years. She was named Pro Bono Attorney of the Year by the Utah State Bar in 1996. And although her community and civic activities are too numerous to mention, the highlights include being a co-founder of the recently created Women's Giving Circle for the Community Foundation of Utah, which raises funds for Utah non-profits whose missions are the advancement of women and girls in our community. She also serves on the Associates Board for the Utah Museum of Natural History and has served on the board and as a past president of The Sharing Place, Inc., a small non-profit

that provides grieving assistance for children who have lost a parent, caretaker, or loved one.

In her spare time, Peggy enjoys spending time with her husband and two daughters, Leigh, 17, and Libby, 12. Every weekday afternoon, except for days she is in court, Peggy can be found on the phone with her two daughters getting the lowdown on what happened during their day at school, while the topics are still fresh on their minds. She enjoys cycling and still loves to ski.

After more than 20 years of practicing law, Peggy says the best advice she could give younger lawyers is to not take yourself too seriously, be able to admit when you don't know something, and also to learn to live with the fact that in this profession, you'll never be able to achieve complete perfection. She says: "Now that I'm more experienced, I know that it's not going to be the end of the world if I don't win every case. It helps to recognize that you can just go in there and do the best you can."

Nicole Farrell is an attorney at the firm of Parsons Behle & Latimer.



Q-Lunch Recap: Best and Worst Discovery practices

By
Alec McGinn

October's quarterly luncheon CLE focused on best and worst discovery practices. The panel, which consisted of Third District Judge Todd Shaughnessy, and Erik Christiansen and Katherine Venti, shareholders at Parsons Behle & Latimer, put on an insightful CLE outlining some recent changes in law on discovery, as well as upcoming changes contemplated by the proposed amendments to the Utah Rules of Civil Procedure. The litigation section is appreciative of the panel's thoughtful and educational presentation.

The panel discussed a number of important changes in the law regarding termination sanctions in response to discovery abuses. In particular, the panel discussed the recent case *Markyl Lee v. Max International, LLC*, 638 F.3d 1318 (10th Cir. 2011), decided in May of this year. *Markyl* refines the standard in *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992), that governs when termination can be imposed as a discovery sanction. Under *Ehrenhaus*, a district court was required to examine and apply five factors before imposing termination as a discovery sanction: "(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for non-compliance; and (5) the efficacy of lesser sanctions."

"Simply passing along requests for production to the client and asking for responsive documents is not a best discovery practice."

In *Markyl*, the Tenth Circuit clarified how the *Ehrenhaus* factors are applied. The Court noted that "[t]he *Ehrenhaus* factors are simply a non-exclusive list of sometimes helpful 'criteria' or guide posts the district court may wish to 'consider' in the exercise of what must always remain a discretionary function." The Court also observed that "[t]he dispositive question on appeal thus isn't whether the district court's order could or did touch every *Ehrenhaus* base. Instead, it is and always remains whether we can independently discern an abuse of discretion in the district court's sanctions order based on the record before us. The *Ehrenhaus* factors may sometimes help illuminate that question, just as they sometimes may assist a district court in exercising its discretion. But a district court's failure to mention or afford them extended discussion does not guarantee an automatic reversal."

The panel also discussed the importance of effective litigation hold letters, and ensuring that clients are preserving relevant documents. Simply passing along requests for production to the client and asking for responsive documents is not a best discovery practice. Lawyers should be actively involved in identifying relevant people, documents, computers, and databases that may contain responsive documents, and ensuring that this information is retained. The panel referenced *Philips Electronics North America Corp. v. BC Technical*, 773 F. Supp. 2d 1149 (D. Utah 2010) as a cautionary case on the dangers of failure to control the discovery process with clients, spoliation, and the severity of spoliation sanctions. In *Philips* , after a series of discovery motions and an order from the Court directing that counsel draft and distribute a preservation of evidence letter to his own clients, it was discovered that electronic data on five laptop computers was deleted in violation of court orders. The answer and counterclaims were stricken, default was entered, and the matter was referred to the U.S. Attorney's Office. A malpractice suit by the sanctioned party against its attorneys then followed. The panel further advised that, in acting as local counsel, attorneys should still be involved in the process of ensuring that discovery obligations, including preservation of evidence, are being met.

The panel also discussed recent Utah law set forth in *Daynight, LLC v. Mobilight, Inc.*, 2011 UT App 28 (Utah Ct. App. 2011). In *Daynight*, the Utah Court of Appeals affirmed entry of default judgment for spoliation of evidence. Of particular note, the Utah Court of Appeals outlined a broad view of a district court's power to enter default judgment, observing that trial courts have broad discretion in selecting and imposing sanctions for discovery violations. The Court also observed that Utah Rule of Civil Procedure 37(g) does not require a finding of willfulness, bad faith, fault or persistent dilatory tactics, or violation of court orders before a court may sanction a

Q-Lunch Recap: Best and Worst Discovery practices

party.

Finally, the panel discussed the proposed amendments to the Utah Rules of Civil Procedure and the concept of proportionality. Under the new rules, proportionality will become the controlling factor for all discovery. Proportionality will take into account whether the proposed discovery is likely to lead to discovery of admissible evidence, and whether it is proportional to the amount at issue. The panel also noted the importance of early disclosure under the new rules. A plaintiff must disclose all documents, and a witness list with a summary of testimony, within 14 days after service of the first answer. The defendant must make a similar disclosure within 28 days after the plaintiff's first disclosure or after the defendant's appearance, whichever is later. If a party fails to identify a witness or document, the party risks having that witness or document excluded. As a result, early and proactive identification of documents and potential witnesses may become increasingly important under the new rules.

The October 7th Litigation Section luncheon materials "Best and Worst Discovery Practices" can be found in their entirety here: litigation.utahbar.org/cle-archives.html.

Alec McGinn is an attorney at the firm of Kunzler Needham Massey & Thorpe.

The next quarterly luncheon will be on December 12, 2011 at noon. It will be held at the Bar offices. As always lunch will be provided with the CLE.

The CLE is going to be called "A Judicial Perspective on the New Proportionality Requirement of Rule 26."

The presenters will be a panel of 3 judges: Judge Derek P. Pullan (4th District), Judge Deno Himonas (3rd District), and Judge David M. Connors (2nd District)

Litigation Section's quarterly luncheon CLE

Erik Christiansen, Katherine Venti, and Judge Todd Shaughnessy

Message from the Editor

Editor
Nicole Farell

Do you have ideas, questions or comments about this newsletter? We want to hear from you, our members. Please send your questions or comments to editor Nicole Farrell at nfarrell@parsonsbehle.com.

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Jenifer Tomchak
Seth Oxborrow, ex officio member (BYU)
Nicholas Caine, ex officio member (U of U)

Upcoming Events

Litigation Section Calendar of Events

December 12, 2011 Noon	Quarterly Luncheon: "A Judicial Perspective on the New Proportionality Requirement of Rule 26." Panelists include Judge Derek Pullan (Fourth District), Judge Deno Himonas (Third District), and Judge David Connors (Second District).
December 22, 2011 7:30 am - 9:00 am	Rise and Shine Breakfast: "Managing Contingent Fee Cases"
March 8, 2012	First Annual "Evening with the Fourth District"
March 16-17, 2012	Spring Convention
May 3-5, 2012	Southern Utah Federal Law Symposium in St. George, Utah
July 18-21, 2012	Annual Convention in Sun Valley