



The Zealous Advocate

President's Message



By
Jonathan Hafen

You Never Get a Second Chance to Make a First Impression

We are fortunate in Utah to have a strong, positive culture among our lawyers. This belief has been reinforced with occasional experiences with out-of-state counsel who seem to believe that advocacy should be judged

by decibel volume and that opposing counsel is never to be trusted. Although our numbers continue to grow, Utah lawyers continue to make sure that a case is just a case, and that litigation should never “get personal” among counsel. One reason for our positive culture is the role of mentoring, both formal and informal, in the lives of all Utah lawyers.

Years ago, a mentor asked me to always remember that “you never get a second chance to make a first impression.” Just as she asked, or perhaps because she asked, I have always remembered that advice. It certainly applies to all of us as lawyers. We have the opportunity to make a good first impression on new clients, on new opposing counsel, and as we appear before judges for the first time. Consciously and unconsciously, we are measured by our preparation, our appearance, our confidence, our integrity, and our demeanor.

Another mentor taught me that we have two things to offer our clients—our knowledge of the law, particularly the process of litigation, and our reputation. Reputations in our legal community are built through

first impressions and subsequent interaction. If we lack integrity, if we refuse to grant extensions, if we are unprepared in court, if we misstate the holdings of cases, if we refuse to look for resolutions to problems, or if we refuse to acknowledge mistakes, word gets around, negative reputations are formed, and our culture is weakened. Thankfully, Utah lawyers largely seem to understand the importance of preserving a culture of excellence and professionalism.

Knowledge of the law and the process of litigation come through experience, which is often the best teacher, though sometimes the harshest. Other educational sources include our mentors and CLE. As mentioned in the last newsletter, our Litigation Section is striving to provide excellent CLE to allow Section members many opportunities to strengthen their legal knowledge.

With recent changes to the discovery rules, all Utah lawyers have something to learn about the new litigation process. There are many traps for the unwary. As a Section, we have provided numerous CLE opportunities to learn about the new rules. For example, we just had an interesting and informative Quarterly Lunch on February 21, 2012, where the Section provided summaries of the changes in the Rules of Civil Procedure and discussed the new practice-specific disclosure rules for family law and personal injury cases. At that lunch, Judge Toomey also provided valuable guidance about

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By
Kent Holmberg

“We are entering a new generation” with electronic filing, the digitization of court files, and the new tiered Utah Rules of Civil Procedure, said Third District Associate Presiding Judge Deno Himonas during a recent interview. Himonas is no stranger to technology. He believes that in 1989 he was the first attorney in Jones Waldo to use a personal computer at his desk. In selecting his first computer he enlisted the assistance of Lawrence Lessig—who according to Wikipedia has gone on to become a Harvard Law School professor and founder of the Sanford Center for Internet and Society. Himonas is the first to admit that he faces challenges with the changing technology but he sees it as inevitable and is “not resistant to it.”

Originally from Price, Utah, Judge Himonas attended law school at the University of Chicago graduating in 1989. Following law school he went to work at Jones Waldo. In May of 2004 he was appointed to the bench by Governor Olene Walker.

Judge Himonas describes his 7 1/2 years on the bench with excitement and respect. He humbly admits that the learning curve is steep and “never stops.”

Current challenges

When asked about the current challenges he faces as the Associate Presiding Judge of the 3rd District he immediately responds with a long list of administrative challenges. The main items he is currently grappling with are as follows (not necessary in order of importance):

- **New Rules of Civil Procedure.** The new *Utah Rules of Civil Procedure* will present challenges and will take time to sort out. The changes are significant and are considered a “pressing matter” for Judge Himonas. For example, in response to the new rules the 3rd District Court rapidly issued a Local Supplemental Rule to expedite

discovery disputes under the new rules: Rule 10-1-306. *Expedited procedures for resolving discovery issues.* Due to the aggressive deadlines dictated by the new Rules, the normal discovery dispute mechanism takes too long; Rule 10-1-306 was promulgated to address this.

- **Digitization of court files.** The Court continues to move to fewer documents and to computer based technologies. There are great challenges—both physical and fiscal—in making this move. Judge Himonas states that electronic filing is gaining momentum and is inevitable. He is a firm believer in e-filing and is clearly excited about the day when e-filing is universal.
- **Court resources.** Given the realities of funding, Court personnel are stretched thin. Judge Himonas recommends that all attorneys and attorney staff realize this reality and work to take this into account in every interaction with the Courts. Simple examples of what the bar can do to help the Courts are not to file duplicate copies of documents as exhibits and not to use staples or tabs which make scanning more difficult. The small things make a big difference.
- **Judicial retirements.** Expected retirements will result in adjustments in administration. This is an exciting time for the 3rd District and presents a different set of challenges.



Judge Deno Himonas

Practice tips.

Judge Himonas does appreciate courtesy briefs at least two days before a motion hearing. He recommends you vet your arguments with other attorneys who are not emotionally involved in the case and anticipate the Court's questions. He is a believer in doing mock arguments and even using mock juries.

Although Judge Himonas will grant a request for an over-length memorandum, he states that a good brief is succinct and its points are supported by solid authority and are well reasoned.

String sites are not necessary unless you need to draw on the law of other jurisdictions.

Final impressions

At the conclusion of the interview of Judge Himonas, the overriding impression is that Judge Himonas is taking his charge as the Associate Presiding Judge seriously. He is identifying the issues that need attention, meeting them squarely, and finding pragmatic solutions. Thank you Judge Deno Himonas.

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Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2012 Summer Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org, no later than Friday, May 18, 2012.

The award categories include:

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



By
Patrick Burt

I first met Jordan Kendell on the opposite side of your typical Utah personal injury case brought under admiralty law. Yes, admiralty law . . . in Utah. Although it may have been daunting to work on the case, and thereby (jokingly) become one of the foremost experts in Utah on

admiralty law, Jordan has never been one to shy away from a challenge. From trying his first criminal case five days after having been sworn in, to becoming the youngest partner, at age 29, at Eisenberg, Gilchrist & Cutt, Jordan has never been intimidated by hard work.

Jordan attributes this confidence and impressive work ethic to his father. Jordan's father graduated Summa Cum Laude from Utah State University in accounting. From there, Jordan's father started as an intern at a bank and worked his way to the position of President of the bank. Following his father's example, Jordan began as an unpaid intern at Eisenberg, Gilchrist & Cutt in 2005 and has worked his way up to becoming a partner in 2011. In those years, Jordan has become a well-established litigator, experienced in all forms of plaintiffs' work.

Ironically, Jordan did not always want to be a litigator, in fact, he did not even want to be an attorney. Growing up, Jordan wanted to be a doctor. Unfortunately, being a self-admitted "germaphobe," his plans quickly turned to law. Jordan attended law

school at Thomas M. Cooley Law School in Lansing, Michigan. During law school, Jordan always envisioned becoming a transactional attorney. Because he was not going to be a litigator, he sought out a litigation internship to say that he had tried it. However, on his first day, he was assigned to work on an insurance bad faith case. From that moment on, he knew he wanted to work as a plaintiffs' attorney and help people who needed the law's protections. To this day, Jordan states that the best part of what he does is helping people. Every year, he receives Christmas cards, letters, and food baskets from former clients, grateful for his help.

Jordan has all the typical accolades. He graduated Magna Cum Laude from law school. He received five Blue Book Awards (awarded for the highest grade in class) during his time in law school. He has been named a Rocky Mountain Rising Star for the last couple years. He has also been named an "Up and Coming Legal Elite" by Utah Business Magazine. He has first or second chaired at least 10 trials (civil and criminal) to resolution. He has recently been asked to serve on the Board of Directors of the Special Olympics of Utah and serves on the executive committee of the Young Lawyers Division



Jordan Kendell

and is a co-chair for the And Justice for All Committee. Despite all this, he says his greatest accomplishment is his family. He and his wife have been married for going on five years, and they are expecting their first child, a boy, in June.

An Evening with the Fourth District Court

Join us on March 8, 2012 from 6:00 – 7:30 p.m. at the courthouse at 125 N. 100 W., Provo. Presiding Judge Samuel D. McVey will provide our keynote address.

Please RSVP to onlineservices@utahbar.org

We hope you will join us.

Customer Service for Lawyers



By
Isaac Paxman

Presiding Judge McVey Emphasizes Customer Service, Gives Cell Number

Judges have been around for centuries. But recently, one here in Utah may have accomplished a first.

Judge Samuel D. McVey, newly installed as Presiding Judge of the Fourth District, is providing local Bar members a piece of information never before available: his cell phone number. Judge McVey says attorneys are welcome to call or text him about virtually any needs or concerns they have with the Court—provided all ethics rules are adhered to, of course, including restrictions on ex parte communications. For example, if you can't reach a judge for an emergency hearing or a problem in a deposition, he says to call or text. As soon as he can, he will do his best to ensure you get you what you need. The same goes if you have suggestions or comments about matters related to the Court: just call or text, and he will respond.

The Friday Afternoon Problem

Judge McVey's willingness to share his cell number stems partly from the widely held notion along the Wasatch Front that you can't get a judge on Friday afternoon. He hopes that by providing his cell number he can help dispel that notion—and ensure that counsel always have access to a judge.

Attorneys' Eyes Only

To avoid misuse, Judge McVey asks that the number not be given to, or used by, anyone other than attorneys. The concern is partly that pro se litigants might not grasp the sensitive issues connected with

ex parte communications. And non-attorneys might be inclined to misuse instant access to a presiding judge.

A Focus on Customer Service

Judge McVey is motivated by a desire to provide what he describes as better “customer service” to some of the Court's primary “customers”: lawyers.

And he wants the cell number to be a meaningful resource. “I want you to call me if there is a problem,” he says, “not just because this is a lonely job, but because I want to ensure timely justice, help your practice, and enhance your standing with clients in the process.”

Get the Number

If you are an attorney and would like to have Judge McVey's cell number, please contact his chambers at 801-429-1067.

“Open Court” Sessions

Judge McVey's “customer service” focus extends beyond providing attorneys his cell number. He is reinstating the Open Court meetings initiated years ago by then-Presiding Judge Raymond Harding, now retired. On the fourth Friday of each quarter, attorneys and staff are welcome to come in for these sessions, which he says “will be totally informal—informal dress if you want. I will just ask what's on your mind, answer questions and hear out your comments and concerns. You can come late and leave early if you want.” The sessions are scheduled to last an hour and a half, but the judge says he's happy to stay past that if needed. “If anyone wants me to get any other judge, commissioner or clerk there, just let me know in advance and I'll ask them,” he adds. Upcoming sessions are slated for April 27, July 27

Judge McVey is motivated by a desire to provide what he describes as better “customer service” to some of the Court's primary “customers”: lawyers.

and October 26, 2012 in Courtroom 302 in the Courthouse at 125 North 100 West in Provo.

Going Paperless

The first four to five months after Judge McVey was named Presiding Judge in July 2011 were largely occupied with the Court's effort to go paperless. He is glad to report that almost every judge in the district is now able to take the bench without hard-copy files and that the Court's archives are now largely available in electronic form through the online access system known as X-Change, thanks, in part, to two part-time employees who, for the past several months, have been dedicated to nothing but scanning. Within the next 18 months, he anticipates that all Fourth District Court filings, from at least as far back as 1990, and through to the present, will be available online. Attorneys and others may still file paper versions of documents if they prefer, but thirty days after filing, the documents will be destroyed by the Court (after scanning).

With more computer terminals slated to be installed in courthouse lobbies, and with attorneys now able

to access Court filings from even their mobile devices, the move away from paper can be seen as one more effort to better serve the public and the Bar.

Judge Pullan also discussed how the concept of proportionality led to the creation of a new three-tier system of pleading and discovery

On the Shoulders of Giants

Judge McVey is quick to acknowledge that his measures would not be possible without the foundation laid by prior presiding judges, particularly the two immediately preceding him: Judge James R. Taylor and Judge Derek P. Pullan. Judge Taylor pushed hard to get another judicial position for the Fourth District. Judge Pullan unclogged judicial calendars through policies designed to move cases along, particularly in the family law arena. This foundation freed Judge McVey to make new headway in other areas.

Paradigm Shift

A guiding star to Judge McVey's efforts is this view: "I want a culture where the Courts serve the public (and you as the people's representatives) and not the other way around." Members of the Bar and their clients are sure to applaud that paradigm—and the measures resulting from it.

"What I Wish the Other Side Understood"

Join us on March 7, 2012 from 8:00 a.m. – 9:00 a.m. at Utah State Bar Building.

Our panelists will be: William B. Bohling, Bohling Mediation, LLC;

Gregory J. Sanders, Kipp & Christian

Jeffrey D. Eisenberg, Esienberg Gilchrist & Cutt

1 Hour CLE

To register, please email RSVP to sections@utahbar.org or fax (801) 531-0660.

Please include your name and bar number on all RSVP's.



By
Ryan Frazier

On December 12, 2011, the Litigation Section sponsored a timely CLE quarterly luncheon focused on how judges may understand and deal with the proportionality requirement embedded in the new Rule of Civil Procedure 26. That rule became effective on November

1, 2011. The CLE presentation was entitled “A Judicial Perspective on the New Proportionality Requirement of Rule 26.” The panel was comprised of two members of the judiciary: Judge Derek P. Pullan and Judge David M. Connors. Each shared important information regarding such topics as the promulgation and implementation of this rule and related rules and provided helpful insights into how the judiciary may use the proportionality requirement to control discovery and to prevent discovery abuses.

Judge Pullan began the discussion with a slide presentation highlighting some of the features of the new rules generally, including the front-loading of information, proportionality, and curbing the costs of expert discovery. Turning his attention to proportionality, Judge Pullan explained that in litigation, one size does not fit all. He noted that the Advisory Committee Note to Utah Rule of Civil Procedure 26(b) states that proportionality “means that the cost of discovery should be proportional to what is at stake in the litigation.” Under Rule 26(b)(3), the burden of showing that discovery is proportional is always on the party seeking the discovery. Judge Pullan explained that under Rule

37(c)(10), a court can allocate discovery costs to the party seeking the discovery to achieve proportionality.

Judge Pullan also discussed how the concept of proportionality led to the creation of a new three-tier system of pleading and discovery. In Tier 1 cases (in which \$50,000 or less is at stake), litigants are limited to three (3) hours of fact depositions, five (5) requests for production, and five (5) requests for admission. This discovery must be completed within 120 days. Notably, interrogatories are not permitted in Tier 1 cases absent a court order or the agreement of the parties. In Tier 2 cases (in which more than \$50,000 but less than \$300,000 is at stake or in

which non-monetary relief is sought), litigants are limited to fifteen (15) hours of depositions, ten (10) interrogatories, ten (10) requests for production, and ten (10) requests for admission. This discovery must be completed within 180 days. Finally, in Tier 3 cases (in which more than \$300,000 is at stake), litigants are limited to thirty (30) hours of depositions, twenty (20) interrogatories, twenty (20) requests for

production, and twenty (20) requests for admission. This discovery must be completed within 210 days. Additional discovery can be sought in an extraordinary case, but such a motion cannot be filed before that party has reached the limits of standard discovery as outlined above. Such a motion must be brought before the close of standard discovery. The discovery sought will be granted only after such discovery is shown to be necessary and proportional,



**Judge Derek P. Pullan, Judge David M. Connors
and Moderator Ryan Frazier**

and the party has reviewed and approved a discovery budget.

Judge Connors discussed the new rule 10-1306, which has been adopted by the Third District Court entitled “Expedited Procedures for Resolving Discovery Issues.” It is a rule designed to “further the just, speedy, and inexpensive determination of civil actions” by expediting the briefing and determination of discovery disputes. It applies to all discovery motions, including a motion for extraordinary discovery (discussed above), a motion

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to compel, or a motion for protective order. The Rule can be found on the Third District Court’s website:

<http://www.utcourts.gov/courts/dist/distsites/3rd/>. The Rule has also been adopted in the Fourth District.

The December 12th Litigation Section Quarterly Luncheon materials can be found in their entirety at: litigation.utahbar.org/clearchives.html.

President’s Message

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new local Rule 10-1-306 governing resolution of all discovery disputes (regardless of whether the case was filed under the old discovery rules or the new discovery rules) in the Third District, the Fourth District, and half of the Second District. She has written a brief article for this newsletter about Rule 10-1-306.

We have many upcoming events in other areas of the law as well. On March 7, we will have a “Rise and Shine” breakfast CLE at the Law and Justice Center on “What I Wish the Other Side Understood.” This CLE will focus on ways to communicate with opposing counsel in litigation and during mediation to get cases resolved. The next day, we will hold our first “Evening with the Fourth District Court,” where we will hear from, among others, Presiding Judge McVey and veteran litigator Dayle Jeffs. We will also have a question-and-answer session with a panel of Fourth District Judges. We look forward to our next Quarterly Lunch with Justice Tom Lee on April 23,

and the Fifth Annual Southern Utah Federal Law Symposium on May 3-5 in St. George.

“Opposing counsel often become colleagues, friends, and referral sources.”

Through these CLE events, we not only have the opportunity to expand our knowledge of the law and the process of litigation, we also have the opportunity to meet and mingle with our judges and fellow lawyers. While most would call this “networking,” I strongly believe that (in addition to networking) such interaction strengthens our legal culture by affirming our commitment to be capable and prepared lawyers who enjoy getting together as colleagues.

After practicing for a few years in another state and then moving to Utah, I had a very favorable first impression of Utah’s lawyers and Judges. That initial impression has never changed. Opposing counsel often become colleagues, friends, and referral sources. Judges continuously offer to support our Section by participating in CLE, helping with Bench Books, and providing guidance for programs and events.

Simply put, Utah is a great place to be a lawyer.

Fifth Annual



Southern Utah Federal Law Symposium

Please join us for the Federal Bar Association's Fifth Annual Southern Utah Federal Law Symposium May 3-5, 2012. This event promises to be our best Symposium yet! The highlight of this year's symposium will be a United States Supreme Court Swearing in Ceremony conducted by Gen. William Suter, the Chief Clerk of the United States Supreme Court.

The event will start on May 3 with an evening reception at Tuacahn Center for the Arts, where we will have the opportunity to chat with General Suter, and with Federal Judges from Utah and Nevada. Following the reception, Tuacahn will provide entertainment, and Fern Bomchill, the FBA's National President, will give her highly regarded presentation "Negotiating Ethics."



On Friday, following breakfast, our participating Federal Judges and other distinguished presenters will provide informative and entertaining CLE in a variety of Federal practice areas. Our lunch speaker will be Gen. Suter, who will give us his "Supreme Court Report." Following his remarks, he will conduct the Supreme Court swearing-in ceremony.

For you golfers, on Saturday, May 5, there will be a scramble golf tournament at the beautiful Coral Canyon Golf Course. You are free to arrange your own foursomes, or we will match people up. Prizes will be awarded.

To review the complete agenda, and to register, go to www.utahbar.org/cle/events and click on the link to the Southern Utah Federal Law Symposium. For any questions regarding registration or to register by phone, call (801) 297-7036.

See you there!



Opinion Watch



By
Heather Sneddon



By
Rick Kaplan

The Utah Supreme Court recently addressed Utah's exemption statute and the requirements for retirement plans

to qualify as exempt, as well as the jurisdictional authority of district courts to issue writs of attachment concerning extraterritorial property. Those decisions are summarized below. We encourage you to visit *Opinion Watch* on the Litigation Section website [here](#) to review and take advantage of additional summaries of important Utah appellate decisions.

• **In re Reinhart, 2011 UT 77 (Dec. 16, 2011)**

In *Reinhart*, on certification from the Tenth Circuit, the Utah Supreme Court undertook an analysis of Utah Code Ann. section 78B-5-505, the Utah exemption statute, and “whether a retirement plan can be ‘described in Section 401(a)’” of the Internal Revenue Code (“IRC”), as required by section 78B-5-505 to be exempt, “when it fails to fulfill that section’s requirements for tax qualification.” *Id.* ¶ 1. The court concluded that a retirement plan is in fact “described in Section 401(a)” —and therefore qualifies for exemption—if the plan “substantially complies with that section.” *Id.*

Reinhart filed a voluntary chapter 7 bankruptcy petition in Utah. With his petition, he submitted schedules claiming that the funds in his Keogh retirement plan were exempt from bankruptcy proceedings pursuant to Utah Code Ann. section 78B-5-505(1)(a)(xiv). *Id.* ¶ 4. The bankruptcy court determined that, although Reinhart’s Keogh plan was not “technically” tax qualified under IRC Section 401(a) due to operational defects, it was “nonetheless, described in Section 401(a)” and therefore exempt under section 78B-5-505. *Id.* ¶¶ 5-6. The trustee appealed the bankruptcy court’s exemption order to the district court and then to the Tenth Circuit, which certified to the Utah Supreme Court

the state law question identified above. *Id.*

In reviewing Utah’s exemption statute, the court noted that such statutes are to be construed liberally “in favor of the debtor to protect him and his family from hardship.” *Id.* ¶ 10. Examining the plain language of section 78-5-505(1)(a)(xiv), and the Utah Legislature’s use of the phrase “described in Section 401(a)” rather than “qualified under”—as is used in other state exemption statutes—the court concluded that the phrase “described in” is more broad. The court likewise determined that the legislature’s use of the phrase “described in” is consistent with the IRC, “which makes it clear that a retirement plan does not necessarily lose its tax exempt status as a result of technical defects in the plan.” *Id.* ¶ 13. Specifically, the court noted the existence of the IRS-created Employee Plans Compliance Resolution System, through which a retirement plan that is otherwise technically deficient is permitted to retain its tax exempt status while the employer cures the operational defects. *Id.*

The court further determined that its interpretation of section 78-5-505(1)(a)(xiv) is consistent with the overarching purpose of the bankruptcy code “to help a debtor obtain a fresh start.” *Id.* ¶ 14. And because the court “believe[s] that the legislature did not intend for a debtor to lose his entire retirement exemption because of technical violations of 401(a),” the court held that “a retirement plan is ‘described in’ section 401(a) if it substantially complies with the requirements of that section. And an unqualified plan is in substantial compliance with the provisions of 401(a) if the defect does not violate the underlying purpose of 401(a),” i.e., the defect is “not the result of an attempt to avoid tax.” *Id.* ¶ 16.

Justice Lee wrote a substantial dissent to the majority’s opinion, which is not discussed herein.

Full opinion available at:

<http://www.utcourts.gov/opinions/supopin/Gladwell121611.pdf>

http://scholar.google.com/scholar_case?q=gladwell+re

[inhart&hl=en&as_sdt=4,45&case=17684616768738508620&scilh=0](http://www.utcourts.gov/opinions/supopin/Aequitas122311.pdf)

• **Aequitas Enterprises, LLC v. Interstate Investment Group, LLC, 2011 UT 82 (Dec. 23, 2011)**

In *Aequitas*, the Utah Supreme Court held that a district court lacks the requisite authority to issue a writ of attachment on extraterritorial property, even in cases where the court has *in personam* jurisdiction over the parties.

Aequitas Enterprises, LLC (“Aequitas”) and Interstate Investment Group, LLC (“Interstate”) entered into a real estate contract for the sale of 388 properties, all located outside the state of Utah. Aequitas paid \$2.6 million in exchange for title to all of the properties, but Interstate claimed, due to circumstances beyond its control, that it could not deliver the titles.

Aequitas subsequently sued Interstate in personam for breach of contract and moved the district court for an extraterritorial prejudgment writ of attachment to secure its place in the chain of title.

Interstate challenged the court’s authority to attach real property located outside the state of Utah. The district court granted Aequitas’ motion to attach the properties and entered an order vesting title to all of the properties in Aequitas. The Supreme Court granted Interstate’s request for interlocutory appeal. *Id.* ¶¶ 1-6. Significantly, however, Interstate did not appeal the district court’s finding of personal jurisdiction. *Id.* ¶¶ 9-10.

The issue before the court, therefore, was “whether the district court had authority to enter an extraterritorial prejudgment writ of attachment in a proceeding in which it had in personam jurisdiction over the parties.” *Id.* ¶ 11. Because the authority to issue writs of attachment is grounded in state law, the court reviewed Utah Rules of Civil Procedure 64 (Writs in general), 64A (Prejudgment writs in general) and 64C (Writ of attachment), but found “no answer to the question of whether an attachment may be issued against extraterritorial property.” *Id.* ¶ 14. The court noted that the parties interpreted that silence differently. *Id.*

Recognizing that general rules of statutory construction apply in interpreting procedural rules, the court reviewed the precise language of the controlling procedural rules concerning prejudgment writs and held that “because [they] omit any reference to authority to issue extraterritorial writs of attachment, we must conclude that the omission was intentional and that no such authority exists.” *Id.* ¶ 17. Specifically, the court quoted Rule 64(d)(1), which instructs “the clerk of the court [to] issue the writ [for seizure of real property] to the sheriff of the county in which the real property is located,” and found that “Utah courts and clerks have no authority to direct sheriffs of other states’ counties to seize property.” *Id.* The court similarly looked to Rule 70, which provides that “[i]f real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law.” *Id.* The court found that Rule 70 “says nothing about real or personal property *not* located in the state.” *Id.*

The court likewise determined that its conclusion was consistent with questions of due process and comity that might arise if the court were to authorize the issuance of extraterritorial writs of attachments, and analyzed cases from other jurisdictions. *Id.* ¶¶ 18-22. Please see the full opinion for this additional analysis.

Full opinion available at:

<http://www.utcourts.gov/opinions/supopin/Aequitas122311.pdf>

http://scholar.google.com/scholar_case?q=aequitas+investment+utah&hl=en&as_sdt=2,45&case=7164608141138781387&scilh=0

New Local Supplemental Rule



By Judge
Kate A. Toomey

The Third District Courts New Local Supplemental Rule

Effective November 17, 2011, the Third District Court adopted a local supplemental rule intended to provide for a rapid and inexpensive means of resolving discovery disputes short of a formal motion, which could take

months to brief, argue, and resolve. The court did this because the new Rules of Civil Procedure, which became effective on November 1, and are intended to simplify, streamline, and reduce the expense of litigation by requiring more comprehensive initial disclosures and comparatively limited discovery, provide deadlines intended to keep cases moving quickly towards resolution. Discovery-related motions, such as motions to compel and motions for protective orders, might not be ripe for decision within these new time frames, and the judges in this district concluded that litigants and their counsel would benefit from a rule that offered a more expeditious manner of quickly resolving disputed issues without requiring counsel to file a motion and the related memoranda provided under Rule 7.

The rule, which was reviewed by the Board of District Court Judges on December 2, 2011, and ratified by the Judicial Council on December 12, is available on the Third District Court's homepage, which you can reach through the courts' website, at <http://www.utcourts.gov/courts/dist/distsites/3rd/>. The rule provides as follows:

Rule 10-1-306. Expedited Procedures for Resolving Discovery Issues. Intent: To further the just, speedy, and inexpensive determination of civil actions. (Utah R. Civ. P. 1).

Applicability: This rule shall apply to the Third District Court.

Statement of the Rule:

- (1) Status and scheduling matters are handled differently by each judge. Contact one of the judicial assistants for the assigned judge for specific questions. In all cases, however, counsel shall:
 - a. Promptly notify the court of any stipulations for extraordinary discovery entered pursuant to Rule 26(c)(6)(A), including notice to the court of any stipulations that extend the presumptive deadlines set forth in Rule 26(c)(5). Stipulations shall be prepared on or substantially comply with the form accompanying this rule; and
 - b. Promptly notify the court of any settlements or stipulations in the case, particularly where such settlements or stipulations may affect a pending motion or trial date.
- (2) The parties shall do the following before filing with the court any discovery motion, including a Motion for Extraordinary Discovery (Utah R. Civ. P. 26(c)(6)(B)), Motion to Compel, or Motion for Protective Order (Utah R. Civ. P. 37):
 - a. Meet and confer regarding the issues, in person or by telephone, and attempt in good faith to resolve or narrow the issues without court involvement.
 - b. File and serve on all parties a "Statement of Discovery Issues", in a form consistent with the requirements of Rule 10. The statement shall not exceed four pages, shall not include exhibits, and shall include a certification stating that the parties have met and conferred regarding the issues and attempted in good faith to resolve or narrow the issues without court involvement. The statement should contain at least the following: (1) the precise relief sought, (2) the basis or reason for the relief sought, (3) a statement regarding proportionality (Utah R. Civ. P. 26(b)(2)), and (4) a statement in compliance with Rule 26(c)(6), if applicable. The party shall also file a separate proposed form of Order

Rule 10-1-306. Expedited Procedures for Resolving Discovery Issues.

consistent with the relief sought.

- c. Within five days following service of the “Statement of Discovery Issues”, any party objecting to the relief sought may file and serve a “Statement in Opposition” in a form consistent with the requirements of Rule 10. The opposition shall not exceed four pages and shall not include exhibits. The opposition should briefly address pertinent issues raised in the statement. The party shall also file a separate proposed form of Order consistent with the relief sought. The parties’ written submissions will be docketed and placed in the court file.
 - d. Upon filing the opposition, or expiration of the time for doing so, either party may, and the party seeking relief shall, file with the court a Request to Submit for Decision. (Utah R. Civ. P. 7(d)).
 - e. The court will promptly set a telephone conference to discuss the matter, and will advise the parties by email or telephone of the date and time for the conference. The court reserves the right to decide the issue(s) without a telephone conference if it determines that a conference is unnecessary, and in its discretion, may require the appearance of counsel and/or the parties in lieu of a telephone conference.
 - f. The court will resolve most if not all discovery issues during or in advance of the phone conference. The court anticipates that no discovery motions will be necessary, but if appropriate, the court will use the telephone conference to set a briefing schedule for a motion addressing all unresolved issues together with a hearing date, if needed. In most circumstances, the court anticipates adopting one or the other of the proposed Orders.
- (3) The parties are reminded that stipulations for extraordinary discovery pursuant to Rule 26(c)(6)(A) are appropriate only “after reaching the

limits of standard discovery imposed by [the] rules . . .” and only if that discovery is proportional.

- (4) Upon the filing of a responsive pleading, all cases subject to Rule 4-510.05 shall be referred to the ADR program, unless the parties have participated in another ADR process, such as arbitration, collaborative law, early neutral evaluation or a settlement conference, or unless excused by the court. At the close of the presumptive case deadline, the parties shall file with the court a certificate confirming that good faith mediation (or other ADR process) has been completed or excused. (Utah R. Civ. P. 16(b)).
- (5) If the discovery deadline passes and a Certificate of Readiness for Trial has not been filed, the court may at its discretion issue an order to show cause why the case should not be dismissed. At that hearing, the court will dismiss the case without prejudice, order deadlines for specific actions to be taken, or set a trial date. If actions are not completed as ordered, the matter may be dismissed without further notice. If parties wish to stay proceedings, they should file an appropriate motion during the pendency of the case deadlines.
- (6) Proposed orders should be prepared and circulated in accordance with the requirements of Rule 7(f)(2) of the Utah Rules of Civil Procedure. Additionally, the order should be electronically filed with the clerk’s office, or a copy of the order in native electronic form (e.g., Word or WordPerfect) should be emailed to the court’s judicial assistant including orders provided pursuant to paragraph 2(b) and (c) above.

The Fourth District has adopted the same rule, on an interim basis, and the Judicial Council has referred it to the Policy and Planning Committee for consideration as a statewide rule.

By
Nicholas Caine

On November 4 and 5, the regional rounds of the 62nd Annual National Moot Court Competition were held at the University of Utah S.J. Quinney College of Law. Both of the College of Law's teams excelled in the competition. The team of Kim Child, Matt Dodd, and Corey Sherwin advanced to the semifinal round. The team of Levi Cazier, Matt Kauffman, and Adam Pace made it to the final round, where they lost to a team from the University of Colorado. By virtue of their second place overall finish, Cazier, Kauffman, and Pace will participate in the final round of the competition in New York City in January. Cazier earned an award for best oralist in the final round.

The teams of Jessica Samowitz/Matt Pernichele and Veronica McDougal/Ben Lawrence ably represented the University of Utah S.J. Quinney College of Law in the recent regional rounds of the ABA Negotiation Competition (covering California, Nevada, Arizona and Utah). The competition was held November 5-6 at Santa Clara University in Santa Clara, California. The team of McDougal and Lawrence placed sixth out of 28 teams. But the College of Law was assigned to the "weaker" side; as a result, although they were the second-best team on that side, they were not in the top 4 that advanced to the final round.

The National Jurist announced that it is recognizing 61 law schools in five different categories that best prepare students for public service. Although the complete lists of schools will not be published until January, the magazine provided an advance list for two of those categories: (1) top schools for government jobs and (2) top schools for prosecutor/public defender jobs. The University of Utah S.J. Quinney College of Law was among only 15 schools nationally that were included in the latter category.

On Saturday, November 19, more than fifty S.J. Quinney College of Law alumni and students came together to provide hours of community service at the James Russell Head Start School in Salt Lake City as part of the Young Alumni Association's annual "Service and Schmoozing" event. The project was co-sponsored by the College of Law's Professional Development Office. Volunteers assembled information packets for parents, helped prepare "wish list tags" for the annual "Operation Chimney Drop" toy and clothing drive, and painted recycling bins.

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."**

Judicial Restraint, Activism and the Rule of Law

Join us on April 23, 2012 from 12:00 a.m. - 1:00 a.m. at Law and Justice Center.

The presenter will be Justice Thomas R. Lee.

We hope you will join us.



By
Seth Oxborrow

As fireworks flared and a ball dropped in NYC, the law school at BYU closed out an eventful year full of exciting events, notable rankings, and further academic success. And despite the crunch and stress that finals bring to each holiday season, BYU found several ways to make the

season brighter and more festive. As the coming year rolls forward, the future promises more of the same for BYU.

The J. Reuben Clark Law School continued its tradition of providing an impressive legal education to its law students throughout 2011, including the last few months. In November, BYU was named 2nd overall in value by the National Jurist, with a 2 year employment average of 96% and an annual tuition of only \$10,280. At the same time, BYU has added several new members to its staff, both in full-time and part-time positions. These and other faculty members have provided students with the opportunity to participate in a variety of unique educational experiences that will provide real-world and long-term benefits. Among these experiences, students were able to participate in writing and submitting an Amicus Brief to the United States Supreme Court in support of the Petitioner in Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC. The case resulted in a unanimous decision in favor of the petitioner, a decision that furthered religious protection from governmental invasion. Of particular interest to the Litigation Section, BYU's annual Linda G. Anderson Trial Advocacy Competition ended November 7. During the competition, students were placed in a trial setting and given practical experiences before actual practitioners including opportunities to question witnesses, raise objections and give opening and closing arguments.

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

Jeffery Stott and Aaron Banks, third-year students, won the competition by a narrow margin over Ivy Rivera and Laura Marquez, both in their second-year.

While considerable attention has been paid to the academic success of BYU students, these future lawyers find ways to enjoy law school outside of the classroom. During the holidays, while final exams could have been focusing students on themselves and their books, many students took time out of their busy schedules to participate in the annual BYU Law School Christmas Service Project to benefit the Ronald McDonald House. Students donated items like aluminum foil and canned goods to needy families lacking basic household items.

Students also channeled the spirit of the holidays by participating in the Career Services Office's annual Ugly Sweater Contest and the new Carols in the Commons event presented by the BYU Law School Choir. Each of these events helped students to remember the festive nature of the holidays and not lose sight of what will always be important, even after finals are over.

Overall, 2011 was a wonderful year at BYU, full of accolades and new experiences. Students were able to participate in a variety of ways and enjoy a vast array of programs and services. Looking forward, 2012 promises to be a year with much of the same, if not better.

Larsen, Rebecca, “Best Value Law Schools”, National Jurist, November 2011, p. 25,

“U.S. Supreme Court Decision -- BYU Law Students Assisted in Amicus Brief”, BYU News and Events, <http://www.law2.byu.edu/news>, posted January 2012,

Carmack, Heidi, “Prosecution Team Wins Linda G. Anderson Trial Advocacy Competition”, BYU News and Events, <http://www.law2.byu.edu/news>, posted November, 2011.

“BYU Law School Christmas Service Project”, BYU News and Events, <http://www.law2.byu.edu/news>, posted November, 2011.

Upcoming Events

Date: March 7, 2012

Time: 8:00 a.m. – 9:00 a.m.

Event: “What I Wish the Other Side Understood”

Panelists: William B. Bohling, Bohling Mediation, LLC;

Gregory J. Sanders, Kipp & Christian

Jeffrey D. Eisenberg, Esienberg Gilchrist & Cutt

Moderator: Patrick Burt, Kipp & Christian

Location: Utah State Bar Building

Cost: \$25 Litigation Section Members and \$35 for all others.

1 Hour CLE

Additional Information: Breakfast will be provided

To Register: Kindly email RSVP to

sections@utahbar.org or fax (801) 531-0660.

Please include your name and bar number on all RSVP's.

Date: March 8, 2012

Time: 6:00 – 7:30 p.m.

Event: An Evening with the Fourth District Court”

Presiding Judge Samuel D. McVey will provide

our keynote address. Then prominent litigator M.

Dayle Jeffs, a bar member for over 50 years, will

give us glimpses into what practice here was like

when he first started—and how things have

changed since then. We'll hear brief remarks

from the clerk's office, and the presentation will

conclude with a panel of distinguished judges

responding to questions collected from practi-

tioners. Light refreshments will follow this free

inaugural event. We hope you will join us.

Location: The courthouse at 125 N. 100 W.,

Provo, Utah 84601

Please RSVP to onlineservices@utahbar.org

Date: April 23, 2012

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

Event: “Judicial Restraint, Activism and the Rule of Law.”

Presenter: Justice Thomas R. Lee

Location: Law and Justice Center

Date: May 3rd – May 5th, 2012

Time: TBA

Event: Fifth Annual Southern Utah Federal Law Symposium

United States Supreme Court Swearing in Ceremony conducted by Gen. William Suter, the Chief of the United States Supreme Court.

The event will start on May 3 with an evening reception at Tuacahn Center for the Arts, where

we will have the opportunity to chat with

General Suter and with Federal Judges from Utah

and Nevada. Following the reception, Tuacahn

will provide entertainment, and Fern Bomchill,

the National President of the Federal Bar

Association, will give her highly regarded presentation “Negotiating Ethics.”

On Friday, following breakfast, our participating

Federal Judges and other distinguished presen-

ters will provide informative and entertaining

CLE in a variety of Federal practice areas. Our

lunch speaker will be Gen. Suter, who will give

us his “Supreme Court Report.” Following his

remarks, he will conduct the Supreme Court

swearing-in ceremony.

For you golfers, on Saturday May 5, there will be

a scramble golf tournament at the beautiful

Coral Canyon Golf Course. You are free to

arrange your own foursomes, or we will match

people up. Prizes will be awarded.

To review the complete agenda, and to register,

go to www.utahbar.org/cle/events and click on

the link to the Southern Utah Federal Law

Symposium. For any questions regarding regis-

tration or to register by phone, call (801) 297-

7036.

Upcoming Events

Date: May 9, 2012

Time: 12:00 pm-1:30 p.m.

Cost: \$15.00

Event: "Body Language": Amy Walker will come and speak on how to read the body language of your clients, opposing counsels, witnesses and judges. She has taught classes around the state and her trainings are in great demand.

Location: The Farmington Court House

Lunch will be provided

1 hour CLE, please RSVP by May 2nd, to catherine@hoskinslegal.com.

Date: August 3, 2012

Time: 12:00-1:30 p.m.

Cost: \$10.00

Event: Changes with Justice Court: Davis County Justice Court Judges will come and speak on practice pointers and changes to Justice Court.

Location: The Farmington Court House

Lunch will be provided

Please RSVP by July 27th, to catherine@hoskinslegal.com.

Date: October 5, 2012

Time: 12:00-1:30 pm.

Cost: \$10.00

Event: Meet and Greet with Weber County Judges - This is a great opportunity to get some pointers and learn something new about the Weber County Judges.

Location: Ogden Court House, Judge DiReda's

Court room

Lunch will be provided

Please RSVP by September 28th to catherine@hoskinslegal.com.

Date: November 2, 2012

Time: 12:00-1:30 pm

Cost: \$10.00

Event: Contempt of Clerk, Joan Commissioner Dillon's Clerk will speak on how to win and influence clerks. For example do speak civilly to them at all times, do not fax over a ream of paper the night before a hearing and then be outraged when the Court did not have time to review it.

Location: The Farmington Court House

Lunch will be provided

Please RSVP to catherine@hoskinslegal.com by October 26th.

2012 Summer Convention Awards

The Board of Bar Commissioners is seeking nominations for the 2012 Summer Convention Awards. These awards have a long history of honoring publicly those whose professionalism, public service and personal dedication have significantly enhanced the administration of justice, the delivery of legal services and the building up of the profession. Your award nominations must be submitted in writing to Christy Abad, Executive Secretary, 645 South 200 East, Suite 310, Salt Lake City, UT 84111 or adminasst@utahbar.org, no later than Friday, May 18, 2012.

The award categories include:

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

Message from the Editor



Editor
Nicole Farrell

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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