2nd Quarter 2012
A Newsletter of the Litigation Section of the Utah State Bar

The Zealous Advocate

President's Message

By Jonathan Hafen

The human mind works in mysterious ways. For example, I have never understood why we remember certain seemingly mundane events from our distant past. When I was in junior high many years ago, we had assemblies every few weeks. The only one I remember featured a skit in which two of my more adventurous classmates dressed as potatoes (yes I went to junior high in Idaho). The really cool classmate was the "Particitater" and the knuckleheaded classmate was the "Spectater." Presumably, the skit's intent was to encourage otherwise apathetic teenagers to become involved in what was happening at the school.

So are you going to be a Particitater or a Spectater?

As trial lawyers, we lead busy lives. We juggle the demands of our practices, devote time to our family and friends, and try to have some time left over for ourselves. In those various roles, we often must decide whether to be "Particitaters" or "Spectaters." In most situations, I believe active participation leads to better outcomes and more emotional fulfillment. Through your Litigation Section membership, you have many opportunities to participate in activities that will strengthen your professional network, improve your ties to the judiciary, and give you leadership experience.

On June 13, 2012 at 8 a.m. at the Law & Justice Center, our Section will hold its annual meeting, at which officers will be appointed and nominations for various leadership positions will be considered. This is a great opportunity to actively participate in a professional association in a meaningful and rewarding way. We are always looking for Section members willing to organize or present a CLE event, to help with our outreach program to the local law schools, to assist with our summaries of important judicial decisions for our newsletter, or to represent our Section on other Bar Committees. For this upcoming year, we have a particular need for Section members with an interest in technology and social networking. We are looking to upgrade our Section's website and to become more active in the new world of Facebook and Twitter. We are also looking for Members interested in helping us market our Section and grow our membership. We know you have something to offer, and we invite you to get involved.

That June meeting will be the last regularly scheduled Section meeting of my tenure as your President. This past year we have focused on improving the quantity and quality of our CLE and providing more services to Section members throughout the State. Thanks to a very dedicated Executive Committee and many others, I believe we have reached our goals this year. Our Quarterly Lunches continue to sell out.
Continued on page 12

Judicial Profile

Judge John J. Walton

By
Bryan Pattison

From Cache Valley to Dixie

Judge John J. Walton grew up in Logan, Utah, and graduated from Logan High School. He stayed close to home and attended Utah State University, where he graduated in 1990. From there, he attended the J. Reuben Clark Law School at Brigham Young University, graduating with his juris doctorate in 1993. After law school, Judge Walton spent one year as a judicial clerk at the United States District Court for the District of Utah, where he spent time clerking for both Judge Aldon J. Anderson and Judge Dee Benson.

Having grown up in Logan, the thought of practicing law in the big city did not appeal to him. But instead of returning home, this product of Cache Valley looked south. He had spent time in St. George while briefly attending Dixie College, and decided that the winter months in Utah's Dixie were a bit more forgiving than the long frozen winters in Logan. When his clerkship ended, Judge Walton headed south and has never looked back.

From Trial Lawyer to Trial Judge

Judge Walton began his career as an associate at the St. George office of Jones Waldo Holbrook & McDonough, where he later became a shareholder. At Jones Waldo, Judge Walton maintained a general civil practice, handling everything from civil litigation to domestic work. Though he maintained a general civil practice, his primary focus was governmental work in representing several local municipalities as well as the local school district.

After having achieved the rank of shareholder in one of Utah's top tier firms, many would be satisfied and settled in for a long and comfortable career in private practice. But from the time he entered law school, Judge Walton had always been interested in being a prosecutor and spending more time in the courtroom trying cases rather than litigating them. After seven years at Jones Waldo, Judge Walton was presented with the opportunity to move to the Washington County Attorney's Office. He jumped at the opportunity and, in 2000, went to work as a Deputy County Attorney prosecuting criminal cases.

After five years as a prosecutor in the Washington County Attorney's Office, Judge Walton decided to throw his name in for an open seat on the Fifth District Court. At the time, he did not consider himself the favorite for the position. There are, however, few candidates for the bench that can bring solid credentials and experience in both civil and criminal law. In November 2005, Governor John M. Huntsman, Jr., nominated Judge Walton to serve on the Fifth District Court.

Judge Walton was initially assigned to sit in Iron County and for his first four years on the bench he commuted from St. George to Cedar City in order to hear and handle cases. When the new Fifth District Courthouse in St. George was completed, his Iron County caseload was trimmed back to approximately 30% of his cases, and he is now able to handle the majority of his caseload in Washington County.

Advice to Young Lawyers

Judge Walton offers the following advice to young lawyers. First, find a good mentor. The practice of law is difficult to learn on your own. Find someone who is professional, experienced, and willing to spend the time to teach you how to do things the right way. Judge Walton knows from experience. During his early years at Jones Waldo, Judge Walton found a mentor in Bill Ronnow, who was not only willing to spend time teaching the nuts and bolts of practice, but also how to be a true professional in interactions with the court and opposing counsel.

Continued on page 3

Continued from page 2

This brings up the second piece of advice Judge Walton has for young lawyers: avoid the "bulldog mentality" of litigation. This type of attitude, Judge Walton advises, does nothing to help the court, but instead only gets in the way of the court's business. Judge Walton advises that the best advocates are "courteous," "don't treat the other side like the enemy," "wait their turn to speak," and when their time comes, present their case and argument in a professional tone and manner.

Judicial Philosophy

Judge Walton likes to be proactive in helping lawyers resolve their cases and, in turn, to resolve their clients' conflicts. To that end, when he first has the opportunity to put his hands on a case, typically when it comes before him for a hearing, he likes to bring attorneys back in chambers to informally discuss with them his initial thoughts, how he sees the case playing out, and ideas about how to get the case resolved. He believes that sharing his views of the case early on is effective in moving the parties forward to an acceptable resolution before the case is taken out of their hands and put into his. In this regard, he also encourages use of mediation and alternative dispute resolution procedures. However, he is quick to point out that if the litigants cannot resolve their issues, he is more than happy to do it for them.

Judge Walton advises that the best advocates are "courteous," and "don't treat the other side like the enemy."

Additionally, Judge Walton is not a fan of discovery disputes. He expects attorneys to work diligently and in good faith with each other to resolve their discovery disputes before putting those disputes on his desk in the form of a motion to compel. His hope is that the new rules of civil procedure will force attorneys to spend more time identifying and getting to the flashpoint of the controversy than bogged down in costly discovery battles over documents and information that are likely not determinative of the underlying issues.

In His "Spare" Time . . .

As the father of five children—ages ranging from 19 to 10—Judge Walton spends most of his spare time involved in sports and family activities. As we concluded our interview, I also learned that Judge Walton has a passion for American history. And as we briefly discussed Alexander Hamilton, it became clear to me that all must stand warned: Don't go before Judge Walton arguing about what the Framers meant unless you really want to know; he's likely to engage you in that debate. Finally, although his legal career may have taken him out of Cache Valley to Utah's Dixie, Judge Walton made clear that he will always remain a True Blue Aggie.

By
Heather Thuet

Manual Labor Molds Young Lawyer of the Year

Growing up, Dr. Ken White firmly believed that free time created a dangerous environment for his intensely curious and defiant teenage son. The only antidote he knew was physical labor. As an agriculture professor at Utah State University, Dr. White had no shortage of work to be done. Gabriel was soon given a shovel and kept busy digging hundreds of post holes and excavating yard after yard of irrigation ditch. He was dragged out of bed at 5:30 every morning to feed and care for a herd of fifty goats kept on the property. When these jobs were not enough, he was hired out to friends, neighbors and casual acquaintances to haul hay and paint fences in the summer and shovel snow through the long winter months. This program kept him relatively free of trouble, but it also left him firmly convinced that he needed a career that required more mind than muscle.

Gabriel White

Studying political science and economics at Utah State University, Gabriel put himself through school working double duty at a truss factory and a call center. In both class and work, he discovered that he had a great love for reading and arguing with anyone about pretty much anything. This led his mother to suggest that law school might be the best way to pay bills on a more long term basis. It was at Utah State that Gabriel met and fell in love with Wendy Carr, who would later become his wife.

Law school was tough, and his three years there went by in a long, exhausted blur. Gabriel could not have made it through without the support of family and friends. The occasional bright spot of hope provided by his professors and legal mentors helped remind him of the importance of legal education. One of the brightest points was the privilege of clerking for the great William Evans, then Division Chief at the Education Division at the Utah Attorney General's office. Bill was a true mentor, making time to talk through concepts and always willing to provide critical advice. His kind and patient demeanor provided a model of professionalism that Gabriel still aspires to emulate.

Since graduating from the S. J. Quinney College of Law in 2007, Gabriel has found a home at the law firm of Christensen & Jensen. He practices primarily in the areas of plaintiffs' personal injury, commercial litigation and construction law.

Christensen & Jensen has always supported and encouraged pro bono work. Since joining the firm, Gabriel has founded and carried out several projects that serve both the bar and the community. In conjunction with the Young Lawyers Division, Gabriel founded and runs Wednesday Night Bar, a pro bono legal services clinic serving Utah's Spanish-speaking community. The clinic is held twice a month at the Sorenson Multicultural Center. He is also responsible for bringing the Practice in a Flash program to Utah. Practice in a Flash provides much needed resources and advice to young lawyers hanging out a shingle for the first time. In recognition of his work with the Utah Bar and the community, Gabriel has recently been named Young Lawyer of the Year by the Young Lawyers Division. Gabriel was presented with the award at the Law Day Luncheon May 1, 2012 at the Little America Hotel.

By
Keith Call

Justice Tom Lee Packs The House, Uses "A" Word

Justice Thomas R. Lee addressed a sold-out crowd at the Litigation Section's Quarterly Luncheon on April 23, 2012. Justice Lee delivered his views on "Judicial Restraint, Activism and the Rule of Law," criticizing those whom he believes unfairly criticize judges for judicial "activism."

Justice Lee explained three common uses of the phrase "judicial activism," and then offered his rebuttal to "A" word advocates. First, some people use the phrase to describe judicial decisions that overrule laws passed by a duly elected body. Citing both Democrat and Republican sources, Justice Lee referred to criticism that an "unelected group of people [Supreme Court Justices] would somehow overturn a duly constituted and passed law." Justice Lee argued it is not "judicial activism" to overturn legislative enactments that exceed constitutional or legislative authority. "That is the court's job. To do otherwise would be 'abdication.'"

Justice Thomas R. Lee

Second, "judicial activism" is sometimes used to refer to court decisions that overrule prior case law. But, Justice Lee argued, no one believes stare decisis is ironclad. *Brown v. Board of Education* is a good example of that. Of course, *Brown v. Board of Education* overturned the 1896 case of *Plessy v. Ferguson*, which had allowed state-sponsored segregation based on race. The *Brown* decision is widely regarded today as a good judicial decision, even though it might have been considered "activist" when it was decided because it expressly overruled a prior case.

Third, the phrase "judicial activism" has been loosely used by some to express dismay over a judicial outcome with which they disagree. This is a purely "emotive conjugation" of the phrase with no real substance. It is simply an emotional means of expressing disagreement with the result.

At the other end of the spectrum, Justice Lee also addressed criticism of "judicial restraint." He described "judicial restraint" as "non-activism," or the principle that courts should prefer narrow grounds for their decisions, including constitutional avoidance. Justice Lee argued that there are times when courts should proactively decide cases and issues that need to be addressed for the sake of clarity in the law.

Justice Lee pointed to his opinion in *Carter v. Lehi City*, 2012 UT 2, to make his case for curbing improper use of the phrases "judicial activism" and "judicial restraint." In *Carter*, the Utah Supreme Court struck down a decision of a duly elected legislative body (the Lehi City Council), overruled prior case law setting forth factors for determining the legality of citizen initiatives, and based its conclusions on broader grounds than were necessary. Justice Lee defended this decision as neither improper activism nor improper restraint.

In Justice Lee's view, judges engage in improper activism when they base their decisions on personal preference or ideology, rather than the rule of law. He urged all of us to drastically limit our use of the "A" word to these types of situations. Less use of the "A" word might reduce criticism of some judicial decisions, but when properly used the phrase "judicial activist" would become, as Justice Lee put it, "drastically more insulting."

Continued on page 12

Opinion Watch

By
Heather Sneddon

By
Rick Kaplan

McArthur v. State Farm Mutual Automobile Insurance Company, 2012 UT 22, __ P.3d __ (April 3, 2012)

After McArthur was injured in an automobile accident, he settled with the driver's liability carrier for $90,000 of the driver's $100,000 policy limit and demanded $100,000 in Uninsured Motorist's ("UIM") coverage under his own State Farm policy to cover the balance of the $200,000 in damages he claimed to sustain. State Farm declined on the ground that exhaustion of the tortfeasor's policy limits was a precondition for UIM coverage under State Farm's policy. McArthur then sued in federal court, lost on summary judgment on the ground of failure to exhaust policy limits, and appealed.

On certification of the issues from the Tenth Circuit, the unanimous Utah Supreme Court (per Justice Lee) rejected McArthur's arguments that the exhaustion requirement was void as against public policy and, if not void, should be enforced only upon a showing of prejudice by his insurer. Essentially, the Court found nothing in the Utah statutes governing insurance to support the public policy argument and explained that conditions precedent, unlike contractual covenants, are enforceable without regard to doctrinal limitations such as prejudice or material breach. *Compare State Farm Mutual Automobile Insurance Company v. Green*, 2003 UT 48, 89 P.3d 97.

Apart from the obvious significance of the case to practitioners of personal injury law, the opinion is of broad interest and importance because of the thorough examination it undertakes of the proper role of the courts in adjudicating public policy arguments. The Court drew a sharp contrast between common law cases, where courts regularly weigh and decide between policy considerations, essentially "wielding policymaking authority"; and cases (like this one) where the comprehensive nature of a legislative scheme limits the judicial role to one "of interpreting and implementing the policies enacted into law by the legislature." 2012 UT 22, ¶ 12.

Click here for a link to the case.

Hooban v. Unicity International, Inc., 2012 UT 19, __ P.3d __ (March 27, 2012) and Bushnell v. Barker, 2012 UT 20, __ P.3d __ (March 27, 2012).

Hooban and Bushnell are companion cases in which the Supreme Court clarified application of the reciprocal attorney fees statute, Utah Code section 78B-5-826. That statute authorizes a fee award to "either party that prevails in a civil action based upon any promissory note, written contract, or other writing . . . when the provisions of the . . . writing allow at least one party to recover attorney fees."

Hooban sued Unicity for compensation and damages on a distribution agreement containing a provision for the award of attorney fees to the prevailing party. Unicity obtained summary judgment on the ground that Hooban was not a party to the distribution agreement and therefore lacked standing to sue for its enforcement. Unicity then moved for fees and the district court denied the motion on essentially the same rationale—Hooban was not a party to the contract on which Unicity's motion was based. The district court explained further that the statute "only applies to the parties to the contract in question 'and not any party to the litigation.'" *Id.* (quoting *Anglin v. Contracting Fabrication Machining, Inc.*, 2001 UT App 341, ¶ 10, 37 P.3d 267). That was so, according to the district court, because the "'intent of the statute is to allow the party in the contract in

Continued on page 7

Continued from page 6

a weaker position to have reciprocal rights to seek attorney's fees, establishing a 'level playing field between all parties.'"

The Court of Appeals reversed and the Supreme Court unanimously affirmed. In an opinion by Justice Lee, the Court reasoned that Hooban's suit was based on the distribution agreement and that, if he had prevailed, he would have been entitled to a fee award. That was enough to make him a "party that prevails in a civil action based upon a written . . . contract" for purposes of section 78B-5-826. 2012 UT 19, ¶ 15. Further, Justice Lee explained that the district court's analysis of the statutory "purpose" and "intent" was inappropriate because the text of the statute was plain. *Id.* ¶¶ 16-17. Indeed, although unnecessary to its decision, the Court expressly "h[e]ld that the statute applies even in the face of a bilateral fee clause." *Id.* ¶ 15.

Bushnell v. Barker was also a case which, at least generally speaking, involved claims on a contract containing a provision for awarding attorney fees to the prevailing party. Bushnell was a client of Barker's accounting firm, the firm's standard agreement contained the provision at issue, and the parties were suing for fees, on the one hand, and damages for negligence, on the other. Bushnell had also brought a third-party claim against Barker, alleging that Barker should be held liable in his individual capacity for the liabilities of the accounting firm because he was the firm's "alter ego."

Barker had prevailed in district court on the alter ego claim and had sought an award of attorney fees. Both the district court and the Court of Appeals rejected the claim, and the Supreme Court affirmed. The Court's rationale was neither Bushnell nor Barker had relied on the contract in litigating the third-party alter-ego claim, and that had Bushnell prevailed on that claim he would not have been entitled to an award of fees based on the contract. Accordingly, Barker wasn't either.

Since contractual fee award provisions may trap the unwary, both transactional lawyers who draft these provisions and litigators who handle commercial cases would do well to read both *Hooban* and *Bushnell* carefully for themselves.
Click here for a link to the *Hooban* case.

Click here for a link to the *Bushnell* case.

LITIGATION SECTION
OF THE UTAH STATE BAR

Annual Meeting of Litigation Section

Please join us for our Annual Meeting of the Litigation Section of the Utah State Bar.
June 13, 2012 at 8:00 a.m.
Law & Justice Center
Officers will be appointed and nominations for various leadership positions will be considered
We know you have something to offer, and we invite you to get involved.

A View from the Bench

Judge Denise Lindberg

By Judge Denise Lindberg

Moving from advocate to judge means approaching the judicial process from a fundamentally different perspective. So, when the Litigation Section asked me to do a write-up for their newsletter, I thought it would be a good opportunity to poll a few of my newer judicial colleagues about things they have learned since becoming judges that they wished they knew while in practice. Their answers were surprisingly similar. I decided to share a few of the most common tips.

As an initial matter, my newer colleagues—I suspect all of my colleagues, if asked—agreed that it is always helpful to remind the Bar that everything said to a judicial assistant or judge's clerk will invariably get back to the judge. It is, therefore, good practice to assume that any time an attorney is speaking to or interacting with anyone in the judge's chambers, they are essentially talking to the judge. Thus, courtesy and civility to those in chambers are always appreciated and will go a long way toward avoiding any potentially embarrassing moments.

Along those same lines, most of us were told while in practice that our personal reputations are the most valuable commodity we possess and that harm to them is likely irreparable. Since assuming the bench, this invaluable advice has taken on new importance. Judges rely on the integrity and forthrightness of members of the Bar. We rely on your briefing, your articulation of the law, and your representation of the facts. Your honesty and integrity in the judicial process is crucial and very much appreciated by the Court.

Several of my colleagues noted that one of the greatest challenges for the Court involves pro se parties. Nothing makes a judge appreciate the important role counsel plays in the justice system more than an unrepresented party. An unrepresented party comes to the Court thinking that the game is rigged, that the rules are unknown and unknowable, and that all of the other participants are speaking a foreign language. The Court's job is not only to get to the right result, but also to ensure that all parties feel that the process is fair. Lawyers can be an enormous help to the Court by demonstrating fairness to pro se parties. Let them have their say; present your arguments in lay terms. Treat the unrepresented party with fairness and respect, without condescension. Above all, do not attempt to bully pro se parties; nothing will turn the Court against you and your client faster.

"The Court's job is not only to get to the right result, but also to ensure that all parties feel that the process is fair."

My colleagues also consistently mentioned the absolutely crucial role attorneys play in clearly identifying the dispositive issues in a case, drawing the Court's attention to those issues, and assisting the Court in efficiently moving cases along. Oral argument is important. Remember that your judge has read and digested your briefs, likely read the primary cases cited, and sometimes has even done independent legal research on the issue. Focus your efforts in oral argument on the central issues that will help the Court dispose of the case. Do not simply restate your memoranda; focus on the important questions of law and tell the judge why your position is the right one. At the same time, know when your point has been made and don't spend time rehashing it unnecessarily.

In closing, my thanks go to Judges Barlow, Harris, Hruby-Mills, Shaughnessy, and Stone for responding to my inquiries and taking time to share some of what they've learned with the Litigation Section members. I also join them in expressing our collective appreciation for the absolutely invaluable job you all do. Thank you for your efforts on behalf of your clients and the judicial system as a whole. Please know that those efforts are greatly appreciated, even when your judge cannot often say so directly.

"What I Wish the Other Side Understood" CLE

On March 7, 2012, members of the Bar were able to enjoy some breakfast and obtain CLE credits while learning from a combined 107 years of legal experience. At the Litigation Section's quarterly "Rise and Shine" CLE, attendees listened to a panel discussion from three lions of the Bar: Judge William Bohling, Gregory J. Sanders of Kipp and Christian, and Jeffrey Eisenberg of Eisenberg, Gilchrist & Cutt.

The discussion theme was "What I Wish the Other Side Understood." Mr. Sanders explained what plaintiffs do wrong, Mr. Eisenberg explained what defendants do wrong, and Judge Bohling explained what all attorneys do wrong.

Among the great advice given, Judge Bohling exhorted that attorneys take more time looking at their case from 10,000 feet. Attorneys should always enter a mediation having considered their case from start to finish and have a firm grasp not only on issues of liability, but on the true amount of damages at issue.

Mr. Sanders cautioned that attorneys should never bring new, higher settlement numbers or new legal theories to a mediation. By the time of the mediation, the parties have already evaluated the case and come in with a set range of settlement amounts and new numbers or theories start the mediation off in the wrong direction.

Mr. Eisenberg suggested that counsel communicate before a mediation so that they can hit the ground running once mediation begins. Counsel should have exchanged demands, legal theories, and defenses ahead of time to make the mediation move more smoothly.

Differences that Make the Difference: Effective Presentation in the Appellate Courts

Linda Jones of Zimmerman Jones & Booher, Judge Michele Christiansen of the Utah Court of Appeals, Laura Scott of Parsons Behle & Latimer, and Judge Stephen Roth of the Utah Court of Appeals participated in a panel discussion on the topic of appellate practice during the Litigation Section's Quarterly Rise and Shine CLE on May 30, 2012.

The panelists discussed common pitfalls that litigators encounter in bringing appeals, such as preservation of issues, appealing from a final order, timeliness of appeal, marshaling of evidence, and inadequate briefing, and how to avoid those pitfalls. Effective practices to ensure that issues may be decided by the appellate court were also discussed, including ensuring that issues are contained in the record whether the case appealed from was decided at trial or on summary judgment.

The panelists also discussed effective preparation for and presentation at oral argument, with the judges noting that oral argument is primarily to answer any questions the judges have about the case, and that it is rare for a judge in oral argument to not have a tentative conclusion in mind about how the case should be decided. Judge Roth also noted that absent error, there is the strong philosophy that trial judges should be supported in the finality of their decisions.

Linda Jones of Zimmerman Jones & Booher, Judge Michele Christiansen of the Utah Court of Appeals, Laura Scott of Parsons Behle & Latimer, and Judge Stephen Roth of the Utah Court of Appeals.

By Nicholas Caine

Three of our esteemed faculty were honored in the last few months. Our own Dean Hiram Chodosh has been appointed the College's Hugh B. Brown Endowed Chair, one of the College's oldest and most prestigious chairs. Professor Christopher Peterson has been appointed the inaugural John J. Flynn Endowed Professor of Law at the College. The appointment is one of two new Professorships at the College of Law that carry the names of beloved professors and deans who represent the College's most outstanding virtues. Professor Debora Threedy was appointed the other new Professorship as she has been appointed the inaugural Lee E. Teitelbaum Endowed Professor of Law.

On March 13, The Salt Lake Tribune publicized the College of Law's plans for a new building near its existing site on the west side of the U campus. To read the Salt Lake Tribune article, click here.

On Friday, March 30, the University of Utah College of Law hosted a series of three counter-terrorism simulations designed to simulate lifelike, high-intensity situations involving legal and ethical dilemmas. This year, the 22 students enrolled in Professor Guiora's counter-terrorism class participated in a shorter, more focused simulation event that differs dramatically from previous exercises. The three-hour simulation builds on four mini-simulations conducted over the course of the semester that emphasize teamwork, decision making, intelligence gathering/analysis and advocacy/articulation.

On Tuesday, April 10, the Hon. Jon O. Newman, Senior Judge of the United States Court of Appeals for the Second Circuit served as the David T. Lewis Jurist-in-Residence at the College of Law. He presided, alongside the Hon. Dee V. Benson of the United States District Court for the District of Utah and the Hon. Carolyn B. McHugh, Presiding Judge of the Utah Court of Appeals, over the 2012 Traynor Moot Court Competition Finals. Both teams in the finals competed admirably on a very difficult issue. However, in the end the team of Douglas Crapo and Laurie Evans Abbot were deemed the best overall team and Laurie Evans Abbot was selected as the best overall oralist.

Through the Utah Appellate Clinic, Professor Paul Cassell, recently filed a series of briefs in federal courts of appeals, including the First, Fourth, Fifth, Sixth and Eighth Circuits. The briefs involve the issue of how much restitution child pornography victims should receive. Professor Cassell will argue on behalf of the Utah Appellate Clinic, before 16 judges of the United States Court of Appeals for the Fifth Circuit on Thursday, May 3. Three students participating in the clinic or other College of Law programs have assisted Professor Cassell in his endeavors.

"Congratulations to the 2012 graduating class which is the 99th graduating class of the College of Law."

Finally, Congratulations to the 2012 graduating class which is the 99th graduating class of the College of Law. Graduation was held on May 11 from 10:00 a.m. to 12:00 p.m. at Kingsbury Hall. The speaker was Deborah Dugan, a 1984 graduate of the College of Law and current CEO of RED, a brand designed to engage business and consumer power to help eliminate AIDS in Africa.

For more information about the S.J. Quinney College of Law please visit: http://today.law.utah.edu/

By
Brad Masters

This campus note is coming straight from the front lines of BYU Law Finals. No matter how much distance one has put between law school and professional practice, everyone can appreciate the feeling the students around campus have experienced as the first rays of sunlight have pierced the gray cloud that has parked itself over the J. Reuben Clark building the past several weeks. Free at last!

We are proud to announce that 17 graduating third-year students and recent alumni will begin clerkships for federal appellate or district court judges and state supreme court justices across the country. This is the highest single-year total in BYU Law School history and includes eight clerkships on the Third, Fifth, Sixth, Seventh and Ninth Circuit Courts of Appeal as well as five State Supreme Court clerkships in Utah, Arizona, and Delaware. The high-quality work of BYU students has created a reputation for excellence that is reflected in this exciting number of clerkship offers.

"The high-quality work of BYU students has created a reputation for excellence that is reflected in this exciting number of clerkship offers."

The high caliber students that BYU has produced are in many respects a reflection on the incredible scholarship opportunities that we are offered. In early March, we were privileged to have Justice Goodwin Liu of the California Supreme Court spend two days at the law school, teaching the first-year constitutional law course and delivering a heartfelt speech on Martin Luther King, Jr., and the Good Samaritan. "My message is King's message; have courage, do your duty, and seek justice, which is easier said than done but goals worth striving for," Justice Liu said in closing.

In addition to Justice Liu's visit, the BYU Law Review Symposium in January brought prominent Supreme Court scholars and reporters together to discuss the relationship between the press, the public, and the Supreme Court. In one of the more memorable panel discussions, Supreme Court reporters Lyl Denniston (SCOTUSblog), Adam Liptak (The New York Times), Dahlia Lithwick (Slate), and Tony Mauro (The National Law Journal) spoke candidly about the highs and lows of Supreme Court reporting and their frustration with the Court's practice of not allowing cameras into the highest court in the country. Erwin Chemerinsky, Dean of Irvine School of Law at the University of California and prominent Constitutional Law scholar, delivered the keynote address titled "The Supreme Court's Failure to Communicate."

These unique scholarship opportunities are just part of what makes the J. Reuben Clark Law School special. Our Student Bar Association is led by the newly elected Ryan Fisher, who brings a fresh and inspiring voice to campus. The first-year (now second-year) students have shown a zeal for the law and building an inviting, cohesive learning environment. As great as the 2011-2012 school year has been, the table is set for great things in the year to come.

CLE Luncheon

Continued from page 5

In *Carter*, the Utah Supreme Court struck down a decision of a duly elected legislative body (the Lehi City Council), overruled prior case law setting forth factors for determining the legality of citizen initiatives, and based its conclusions on broader grounds than were necessary. Justice Lee defended this decision as neither improper activism nor improper restraint.

The *Carter* decision may be accessed here.

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President's Message

Continued from page 1

The attendance at our new Rise and Shine CLE series rises at each event. Our judicial receptions continue to attract numerous Judges and practitioners, and our Section's CLE presentations at the larger Bar Conventions have been stellar. As mentioned above, we still have room to grow and improve as a Section. I look forward to seeing what we can do together as fellow members of the Litigation Section.

As a final word, I recommend that you take a look at a recent NPR feature called "Psychology of Fraud: Why Good People Do Bad Things." Here is a link to the written article. Perhaps it is because I do a fair amount of work in the securities fraud area, but I have always been fascinated with that precise question. I have encountered many people who clearly have done something very wrong (civilly and sometimes criminally), yet they often completely refuse to acknowledge their misconduct to the point that I believe they could pass a lie detector test with flying colors. The fundamental "take away" for me from this article is that everyone, and particularly attorneys with our ethical and professional obligations, need to be ever vigilant about how we conduct ourselves. As you will see in the article, that vigilance begins with asking ourselves the right questions about what we are about to do.

"[We] need to be vigilant about how we conduct ourselves."

Thank you for giving me the opportunity to serve. I look forward to seeing you at upcoming Section events.

Upcoming Events

Event: Summer Convention
Date: July 18-21, 2012
Location: Sun Valley, Idaho
See www.utahbar.org for more information

Event: Changes with Justice Court
Davis County Justice Court Judges will speak on practice pointers and changes to Justice Court.
Location: The Farmington Court House
Date: August 3, 2012
Time: 12:00-1:30 p.m.
Cost: $10.00
Lunch will be provided
Please RSVP by July 27th to catherine@hoskinslegal.com.

Event: Golf & CLE—Salt Lake County
Date: August 10, 8:30 a.m.
Location: Stonebridge Golf Club
4415 Links Drive
West Valley City, Utah
More information to come

Event: Golf & CLE—Utah County
Date: September 7, 2012
Location: Hobble Creek Golf
More information to come

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.
Date: October 5, 2012
Time: 12:00-1:30 pm.
Cost: $10.00
Location: Ogden Court House, Judge DiReda's Court room
Lunch will be provided
Please RSVP by September 28th to catherine@hoskinslegal.com.

Event: Golf & CLE—Washington County
Date: October 19, 2012
Time: 8:30 a.m.
Location: The Ledges
1585 Ledges Parkway
St. George, Utah
More information to come

Event: Contempt of Clerk
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.
Date: November 2, 2012
Time: 12:00-1:30 pm
Cost: $10.00
Location: The Farmington Court House
Lunch will be provided
Please RSVP to catherine@hoskinslegal.com by October 26th.

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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