

## PRESIDENT'S MESSAGE

by Gregory G. Skordas  
Salt Lake County Bar President

Several years ago Pat Leith asked me to join the executive committee of the Salt Lake County Bar. At that time, my only exposure to the Salt Lake County Bar was the Bar and Bench Bulletin. Pat asked if I would set up a committee that later became known as "Straight Talk." The group consisted of doctors and lawyers who went to local junior high school health classes and spoke about the medical and legal consequences of substance abuse. Pat was successful at getting me involved in the County Bar because she gave me a project which was both relevant to my practice and of special interest to me. As time passed, I became involved in a number of County Bar projects. I have found many of them to be professionally helpful and personally rewarding.

We all get very busy with our practices, our families, and other activities. Sometimes it is hard to find time for yet another committee or group. I know my involvement with the Salt Lake County Bar has benefited my practice and increased my commitment to the legal profession. I have found that participation in the County Bar provides an opportunity to sharpen legal skills, and develop lasting professional and personal ties within the legal community. I encourage each of you to participate in one of the Salt Lake County Bar programs. To help you become more familiar with the County Bar, the following is a description of the County Bar's mission, the various committees and their leaders.

At the executive committee's annual retreat, we agreed that the three missions



Gregory G. Skordas

of the County Bar are to (1) provide lawyers with an opportunity to socialize; (2) conduct valuable CLE programs; and (3) encourage and support pro bono efforts.

The officers of the Salt Lake County Bar are Ray Etcheverry, Vice President, Scott Hagen, Secretary and John Lund, Treasurer. John Lund, along with Deno Himonas, is also in charge of the golf tournament that raises funds for agencies that provide legal services to the poor. Other pro bono efforts are conducted by Michelle Ballantyne, Matthew Durham and Kristin Clayton, who make up the Pro Bono Programs Committee.

The County Bar's most widely attended programs throughout the year are the CLE lunches. This year, James

Blanch, Jeff Hunt and Julie Blanch have developed a great list of topics and speakers. The other CLE programs provided by the County Bar are the films and discussions held at the midyear and annual meetings of the Utah State Bar. Judges Nehring and Lewis will continue to plan that activity this year.

The socials this year are being planned by James Blanch and Julie Blanch. The fall barbeque was a great opportunity for bar members to visit. You should reserve December 3, 1999 for the annual Christmas Dinner Dance.

Jeff Hunt and Barbara Townsend are developing a website for the County Bar. Perrin Love is responsible for updating the County Bar legal pamphlets. The Bar and Bench Bulletin is prepared by Carolyn McHugh, Mark Gaylord and Todd Shaughnessey.

The Arts and the Law project is a school program that encourages students to create an artistic expression interpreting the theme for Law Day. Steve Marsden, Deno Himonas, Judge Lewis and Judge Nehring will be heading up that program this year.

We are fortunate to have the benefit of so many talented individuals. With their efforts and yours, the coming year promises to be a good one. The executive committee members of the County Bar are interested in your ideas and how the County Bar can remain relevant to your needs as lawyers. Please take the opportunity to attend at least one County Bar event this year.

# A View From the Bench: Practice Pointers from Judge Kimball

By Carolyn McHugh

**O**n November 24, 1999, Dale A. Kimball<sup>1</sup> will celebrate his second anniversary as a federal district judge. Before the memory of private practice becomes too dim, the *Bar & Bench* interviewed Judge Kimball regarding his impressions from the bench. Although Judge Kimball hopes that he will never forget the practical realities of being an advocate, he was willing to share some of the insights he has gleaned during his first two years as a trial judge.

*Bar & Bench:* It has been almost two years since you left private practice, how has your perspective about the judicial process changed?

Judge Kimball: I have more faith in juries now than I did when I came on the bench. If the facts are against you, the jury will see through that. It is also more important than I used to believe that citizens have an opportunity to observe that the system works. They come in as jurors, often unwillingly, and see that the judge, the lawyers, and the court personnel are all trying, in good faith, to resolve conflicts. Once they see how seriously these people treat the process, the jurors respond in kind. It is often inconvenient for them to serve, but most often they report that they are glad they did serve and that it was an important responsibility.

I would also caution that juries are not as stupid and uninformed as most lawyers seem to believe. You should not over-try your case. Juries do not like to see the same exhibits repeatedly. Do not be condescending.

*Bar & Bench:* How would you describe the judicial decision making process? Is it different than you expected?

Judge Kimball: I am not intimately familiar with how my colleagues make

decisions, so I can only answer for myself. I try to make decisions the way I had hoped decisions were made when I was in practice. I assumed most judges read the briefs, the leading cases, and the important exhibits and I do that. I then try to make the best decision that I can make within a reasonable time. I do not believe the decision will be improved by delay. If the issues are overanalyzed you gain very little in the quality of the decision and your memory of the facts may fade. Therefore, I try to make relatively quick decisions so that the parties can either forget about it or appeal.

*Bar & Bench:* How important is oral argument? In some jurisdictions, most motions are now decided on the paper.

Judge Kimball: In practice, I was beginning to wonder how beneficial oral argument really was. As a judge, I think it can be very helpful. It is important for the lawyers and the litigants to know that they can state views and can respond directly to the concerns of the judge. Luckily, in this district, we are still able to allow oral argument in almost all cases when it is requested. I do not always have oral argument on motions to amend or to clarify judgments. On most other motions, I like to have oral argument.

*Bar & Bench:* What approaches to oral argument do you find most effective?

Judge Kimball: Well, I don't want it to be endless. Lawyers should aim for brevity and clarity. Be ready to launch right into your argument. Do not dawdle and wander into your argument. Be ready to tell me about the leading cases, but do not cite a hundred cases that are not controlling. Also, do not overstate the holding of the cases or the language of the statute or contract. I will read the language and so will my clerk. It does not help your positions to overstate. Fi-



Judge Dale A. Kimball

nally, lawyers should know their case.

*Bar & Bench:* Do you have any suggestions for effective briefing?

Judge Kimball: Organization, brevity and clarity. Most briefs are too long. Again, highlight your best cases. The least effective briefs are those that throw up everything to see what will stick. An endless recitation of the facts is unnecessary. The facts should be tailored so that those that are relevant to the pending motion are highlighted.

Strident comments about opposing counsel are diversionary and not helpful. I do try to be tolerant of those things. Judge Winder always tried to remember what it is like "out there." I hope to always remember that as well. Sometimes things become heated in an adversary setting. One of the perceptions that has changed since I have been on the bench is that I have a greater appreciation for the skills of some of my former adversaries than I did then. Overall, however, your brief will be more effective if you edit out those things.

*Bar & Bench:* What techniques do you find most effective in trial?

Judge Kimball: Knowledge of the case is important and, of course, brevity and clarity. Neither the judge nor the jury wants to hear the same document read over and over again. We get it the first time. Also, do not fumble around for your exhibits in the middle of trial. Know what you are going to use with the witness and bring it up to the podium with you.

*Bar & Bench:* Do you make any efforts to push the parties toward settlement?

Judge Kimball. No. I consider it to be my function to rule on motions and evidence and to conduct trials. I do not believe part of my function is to coerce settlement. Plenty of cases settle without my help.

*Bar & Bench:* What is the most difficult problem you have faced as a judge?

Judge Kimball: Dealing with *pro se* parties. No matter what we do as judges, someone is unhappy. If we try to impose even some small part of the rules of civil procedure, we are criticized that the system is rigged in favor of the lawyer-represented clients and that a *pro se* party cannot get a fair trial. For the same behavior, we are criticized by the lawyers for not making the *pro se* parties comply with the rules and follow the same procedures required of everyone else. It is a no win situation for the judges.

*Bar & Bench:* Often lawyers behave badly during out of court discovery but become model citizens whenever the judge is present. Even when this behavior is documented, it seems as if the judges do not care. Is this an accurate perception?

Judge Kimball: I care, but unless it bears directly on the dispositive issues in the case, it is very difficult to do anything about it. The system relies on lawyers acting professionally outside the sight and

sound of the judiciary. Like most of the other judges, I do not handle the discovery issues in my cases. I have found that the magistrates are better able to deal with these issues and do so effectively.

*Bar & Bench:* Some of your former law partners, including myself, were quite amused to learn that you were the chair of the court's technology committee. While in practice, you were famous for not knowing how to use a dictaphone—let alone a computer. Have you been converted?

Judge Kimball: You should note that I was given that assignment before I actually arrived over here. I would not have volunteered. I will say that I am not as afraid of the future as I used to be. I have seen CD ROM documents used quite effectively and I have used the high tech courtroom on the fourth floor so that a prisoner could testify by telephone. So, I guess I am convinced that these things can be useful—if someone else sets them up and operates them.

<sup>1</sup>Dale A. Kimball graduated *magna cum laude* from Brigham Young University in 1964 with a major in Political Science and a minor in English. This combination of degrees, according to Judge Kimball, gave him a choice between further education or starvation. Wisely, Judge Kimball chose the former, graduating *Order of the Coif* and second in his class, from the University of Utah College of Law in 1967. He began his law practice with Van Cott, Bagley, Cornwall & McCarthy, where he was made a partner in 1972. From 1974 until 1976, Judge Kimball taught at the J. Reuben Clark Law School at BYU. In 1975, he became one of the founding members of the law firm now known as Parr Waddoups Brown Gee & Loveless. Until 1980, he continued to teach part time at BYU. Judge Kimball grew up on a dairy farm in Draper, Utah which was sold to the Catholic Diocese by the Kimball family in 1996 and is now the site of the new Catholic Education Complex.

## Christmas Dinner Dance



You are cordially invited  
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of the  
**Salt Lake County Bar Association**  
at  
**The Country Club**  
on  
**Friday, December third**  
nineteen hundred and ninety-nine

cocktails 6:30 p.m.  
dinner 7:30 p.m.  
dancing 9:00 p.m.  
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Limited seating, please **RSVP**  
no later than **November 24**

# Justice Tongue

**D**ear Justice Tongue,  
I see that things are changing on the Utah Supreme Court. The word on the street has it that Justices Zimmerman and Stewart were finally driven from the bench by that god-awful painting that loomed over their shoulders like some ominous half beast, half radar image from the Weather Channel. According to the newspaper accounts, Governor Leavitt is looking to appoint "someone with a traditional view of the law and who believe that their role is to interpret the law and not to make it." What the heck does that mean? If you ask me, I don't care whether the judge takes the law and runs it through her Vegemetic as long as she rules in a way that improves my chances of getting paid. But since I sent in one of those applications for the job - putting up with that painting is a small sacrifice for what looks like part time work - I figured I ought to get some advice on topics like judicial activism and constitutional interpretation so I can wow the Gov.

Sincerely,  
Bill O'Wright

Dear Bill,

Based on what I can glean from your letter on the subject of your qualifications to hold judicial office, you have better prospects for a seat on the Federal bench. Still, I feel duty-bound to take up your inquiry in the same spirit of solemnity I bring to all of my responses to my faithful correspondents.

When Governor Leavitt announces his preference for judges who interpret the law and don't make the law he is merely telling us that he is opposed to judicial activists, that unprincipled gang of judges consumed by a passion to usurp the public will. They are the judges Orrin Hatch professes to know something about and who he has made the "Willie Hortons" of his presidential campaign.

To the extent that politicians claim

allegiance to a theory of constitutional interpretation, most believe in the primacy of constitutional text. They adhere to the notion that most constitutional provisions and most statutes have a "plain meaning". If judges could only resist the temptation to permit extraneous political, moral and economic predilections to distract their attention from the text, cases could be decided in a value-free and neutral manner.

This is, mind you, a theory of constitutional interpretation which will not stand the test of close scrutiny. It does not take the first year law student long to discover that the interpretation of the most unambiguous constitutional or statutory provisions is as much an act of creation as discovery. The commitment to honor "plain meaning" is strong, however, and it is dutifully honored by our appellate bench. No one who has occupied the appellate bench in my lifetime, a span that reaches back into the mists of Anglo-Saxon jurisprudence, can equal Justice Stewart in devotion to deciding cases based on textual analysis. One might think, then, that Justice Stewart would be a choice role model for those seeking to meet the Governor's ideal of judicial restraint. One would be wrong.

On issues ranging from the propriety of opening public meetings with prayer,<sup>1</sup> the authority of the legislature to participate in the disciplining of judges,<sup>2</sup> to the proper scope and application of the Open Courts clause of the Utah Constitution Justice Stewart has wielded the sword of "plain language" against the forces of popular sentiment and legislative power. By almost every measure, he has earned the distinction of being the Court's most "activist" member.

By contrast, Justice Zimmerman was much less reluctant to draw on extratextual sources like history and tradition in writing opinions which, to the extent that one can generalize about these things, are more narrowly focused and pragmatic than those of Justice Stewart.

Even though some of my acquaintances who consider themselves experts on the matter would replace my characterization of Justice Zimmerman's decisions as pragmatic with the term "shamelessly expedient," none would brand him an activist.

Both justices found in the dispute over a collapsed roof, a vehicle to compose a coda on their respective judicial careers. *Craftsman Builder's Supply, Inc. v. Butler Manufacturing Co.*, 364 Utah Adv. Rep 22, (Utah 1999). The failed roof provided the parties to the lawsuit to invite the Court to revisit Article I Section 11 of the Utah Constitution, commonly known as the Open Courts provision.<sup>3</sup> Highlighting the urgency of each to make a proper valedictory was the fact that Justice Russon authored a workmanlike and altogether satisfying lead opinion which, on most occasions would have been the end of matters. This time it was not. Needless to say, it is unusual that dramatic, line-in-the-sand duels over important constitutional issues are played out in concurring opinions. It happened here.

Justice Zimmerman took the occasion to urge that the Court overrule the centerpiece of its Open Courts jurisprudence, *Berry v. Beech Aircraft, Corp.*, 717 P.2d 670 (Utah 1985). *Berry* held that the Open Courts provision had substantive effect and that the court would nullify legislative attempts to strip persons of vested claims unless the statute created an equivalent alternative remedy or unless the legislature could show that the measure reasonably extinguished the claim in aid of addressing some clear social or economic evil. Justice Stewart, who authored *Berry*, offered rhetorical balm to the legislature by observing that it retained "great latitude in defining, changing, and modernizing the law," but his message was clear, thenceforth the meaty thumbs of judges would be poised over the scales balancing the allocation of power among the branches of government. Just

*Continued on page 5*

# Lawyer vs. Entrepreneur at Mayoral Debate

By Julianne P. Blanch

Salt Lake City mayoral candidates Ross “Rocky” Anderson and Stuart Reid conducted a debate sponsored by the Salt Lake County Bar on October 12 at the Marriott Hotel. No fistfights occurred (which was a disappointment to me, at least), but the nearly one hundred lawyers who attended were treated to a lively discussion that focused mostly on each candidate’s plan to revitalize downtown Salt Lake City and surrounding areas.

Each candidate spoke about how his background makes him the right man to lead this revitalization. Stuart Reid referred to his service in the military and his decision to live in an ethnically diverse neighborhood as life experiences that have broadened his outlook. He served as a city councilman prior to assuming his current position as the Director of Economic and Community Development for Salt Lake City. Rocky Anderson pointed out that in his career as a lawyer, he has demonstrated a willingness to take hard cases and to be an aggressive advocate. During the TRAX construction on Main Street, he visited regularly with several Main Street business owners and learned first-hand about their struggles to stay afloat.

Stuart Reid’s plan for rejuvenating the Salt Lake City area involves pushing through the Gateway Development Project. He contended this will not draw business away from the heart of downtown Salt Lake City, but rather will increase business. He feels that shoppers and residents in the Project will take extended shopping excursions on Main Street and nearby streets. He also spoke in detail about the envisioned mega-mall by Salt Lake Airport, describing it as a “value-based” shopping mecca (I take that to mean outlet stores) that will be so large, it will draw customers from surrounding states who will spend several hundred dollars per visit. He emphasized that the mall should generate hundreds of jobs for Utahns and contribute millions of dollars to the local economy.

Rocky Anderson opposes what he sees as Stuart Reid’s determination to abandon downtown Salt Lake City. He discussed the need to focus on assisting existing Main Street businesses and to encourage new tenants to occupy unused space in the central downtown area. He pointed out that taking advantage of existing infrastructure, instead of subsidizing what he views to be expensive, risky business developments on the outskirts of downtown, is the most cost-effective and ethical way to keep the economy strong. He lamented the drain

national variety chain stores have on locally-owned businesses and vowed to make rebirth of downtown Salt Lake City a priority.

The debate ended as any decent debate should, with the candidates taking jabs at each other about which reprehensible entities are funding the other’s campaign. The Salt Lake County Bar Executive Committee appreciates the candidates’ willingness to address the Salt Lake County Bar.

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## Justice Tongue *Cont. from page 4*

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as Justice Zimmerman had drawn on legislative intent and a Gestalt theory of constitutional interpretation that downplayed textual analysis to find a way to justify the presence of legislators on the Judicial Conduct Committee and thereby mollify a hostile legislature eager to put the judiciary in its place in *In Re Young*<sup>4</sup>, he again took a stand for preserving legislative power in his *Craftsman* concurrence. This time, though, he took his stance grounded in textual interpretation.

Justice Stewart rose to the bait, and to the occasion. He took Justice Zimmerman’s reading of the text with smash-mouth, sumo-style combat that went down to the last comma. Then, just to show that his repertoire included historical analysis, he traced the development of the Open Courts clause from the Magna Carta to the Magna smelter. Along the way, he attacks Justice Zimmerman practicing judicial activism by replacing the plain language of the Open Courts clause with his personal predilections. It is odd indeed that a judge who would rescue the legislative branch from an assault on its power launched by the judiciary would be labeled a judicial activist,

but this might provide a clue to the lesson to be learned here: that it may not be easy for the Governor to tell which of the Supreme Court candidates hold the “traditional views” he reveres because it’s not clear to anyone what those traditional views are or where they might lead.

Yours Truly,  
Justice Tongue

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<sup>1</sup>*Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916 (Utah 1993).

<sup>2</sup>*In Re Young*, 961 P.2d 918 (Utah 1998), rev’d on rehearing, *In re Young*, 361 Utah Adv. Rep. 26 (Utah 1999).

<sup>3</sup>Article I, Section 11 states:

All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

<sup>4</sup>Take that leather-bound collection of Bar&Bench Bulletins off your shelf and re-read (don’t tell me that you ignored it at the time) Tongue, J.’s observations of *In Re Young* in the January 1999 edition.

# A Case for Country Music

By Kitty LeFevre

I love country music. I'm not ashamed to admit it, even in the face of the astonished lawyer-colleagues I encounter who find out this apparently controversial piece of information. People don't size me up to be a country music fan. I think it must have something to do with being an attorney. This is ironic, because it is precisely the fact that I am an attorney that I have become a lover of country music.

In the Salt Lake City legal community, we have many attorneys that are jazz aficionados, symphony and opera patrons, classic rock listeners, and yes—a vibrant minority of Deadheads. Being a relatively young attorney, I'm not sure what my colleagues expect to see when they peruse my CD collection. After the initial shock of reviewing my music library, however, it is apparent that none of them expect to see what is actually there—George Strait, Patty Loveless, Dwight Yoakam, Willie Nelson, Trisha Yearwood, just to name a few.

Those who don't know me instantly assume that I must have been raised in some rural community, and based on this assumption, my otherwise unexplainable musical preference begins to make sense. That's not exactly my story. In reality, I believe that law school, and the subsequent practice of law, left me with no other option but to love country music. In fact, I was driven to it.

During the first year of law school, I attended class and worked through mind-altering, abstract hypotheticals such as who would you kill on the lifeboat to eat for survival, and should you prosecute the remaining survivors for murder? After spending an hour in class theorizing, debating and coming to no conclusion on such dreary facts, I would want to go home and relax a bit by turning on some soothing tunes. Unfortunately, the "alternative" music of my college days was more intangible and confusing than my first-year constitutional law class. MTV forced me to think ever harder—i.e., what

was Jeremy speaking in class, and why does that matter to Pearl Jam? Who needed such unanswerable questions after a long day of struggling to take notes, avoiding being called on, and eye-rolling at classmate commentary? Not me. Country music fit squarely into my law school rest and relaxation picture. Once I indulged, there was no turning back.

I find that there is little to no thinking involved in listening to country music. This is not meant to be an elitist statement, but rather the greatest compliment. The beauty of country music is its simplicity. The lyrics are as concrete as a truck, a dog, an ex-wife or an ex-boyfriend. Additionally, beer figures prominently in country music songs, and just the mental image of such a beverage was enough in law school to get me through several more pages of textbook. While lawyers sometimes take a beating in country music, the "law" makes an appearance every now and then, and one can make a simple scholastic exercise out of recalling the elements of battery after listening to the melodic drama of a bar-room brawl.

The practice of law has only made country music better fare in my mind,

and in my CD collection. Don't get me wrong—I enjoy the practice and am proud of my profession. However, after a long day of dealing with clients, arguing with opposing counsel, and pondering whether (when considering the three-day mailing rule) the Utah Rules of Judicial Administration provide for the exclusion of weekend and holidays in determining when my reply brief is due, there is no better guilty pleasure than being at home listening to Garth Brooks sing of the "American Honkeytonk Bar Association." I suppose that this much-celebrated bar association is fictional, and even if it were not, I doubt my law firm would cover my dues. Regardless, the thought of such an organization provides me an escape from the rigors of the daily legal grind.

My mission is not to convert the Utah State Bar to the products of Nashville. Rather, I would like to live in a legal world where I do not feel compelled to rationalize my choice in music to all the unsuspecting attorneys who display their surprise when faced with my admission. And maybe—just maybe—now that I've come out of the closet, more Utah lawyers will admit that they are a little bit country, in addition to being a little bit rock and roll.

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# “Fall Barbeque of 1999” Goes Off Without a Hitch

By James T. Blanch

Unlike last year, when foul weather and howling winds drove the Salt Lake County Bar Fall Barbeque indoors, conditions for this year’s event—dubbed the “Fall Barbeque of 1999”—were ideal. The event was held outdoors at the Cottonwood Club on September 24, on what turned out to be a perfect fall evening for the Salt Lake County lawyers and judges in attendance.

The highlight of the evening was unquestionably the live music of Rosewood—a country/western band featuring, among

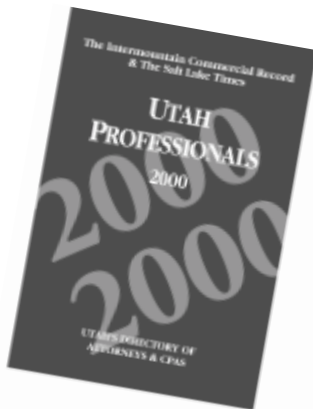
other luminaries, Judge Dennis Frederick and former Attorney General Paul Van Dam. The band played throughout the event while partygoers enjoyed a fine dinner and danced late into the evening.

Many of the perennial participants were in attendance, from law firms such as Parr Waddoups Brown Gee & Lovelless; Ray, Quinney & Nebeker; Parsons Behle & Latimer; Snow, Christensen & Martineau; Snell & Wilmer; and others. Like last year, however, we were again pleased to observe that there were many solo practitioners and recent law-school

graduates in attendance. All of these factors collectively led Salt Lake County Bar Association President Gregory Skordas, his voice trembling with emotion, to pronounce the Fall Barbeque of 1999 a “smashing success.”

Be sure to mark your calendars now for the Salt Lake County Bar’s “Holiday Party of 1999,” which will be held at The Country Club on December 3. This year’s holiday party will feature live music by B. Murphy, a former member of The Platters. We hope to see you there!

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# Event Calendar

- Nov 19 Ethics Presentation: Office of Professional Responsibility.
- Dec 3 Salt Lake County Bar Holiday Party
- Jan. 21 Year end review of significant cases decided by the Utah Supreme Court and the Utah Court of Appeals: Chief Justice Richard C. Howe and Judge Gregory Orme.
- Feb. 24 Constitutional, legal, and social policy issues raised by polygamy prosecutions.
- March 29 Legislative year in review: Representative Patrice Arent and Speaker of the House, Martin R. Stephens.
- April 20 Topic to be Announced
- May 20 Salt Lake County Bar Spring Party
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